

Item-26. 03-04-2023

sg Ct. 8

FA 153 of 2016
CAN 2 of 2017 (old CAN 7525 of 2017)

Gourisankar Debnath
Versus
Aparna Debnath

Mr. Sanjib Bondhopadhyay, Adv.
Mr. Manoj Kumar Mondal, Adv.
...for the appellant

The affidavit of service filed in Court today is taken on record.

In spite of service of notice upon the respondent/wife, the said respondent is not represented.

The appeal is arising out of a judgment and decree dated December 17, 2015 passed by the learned Additional District Judge, 2nd Court, Contai, Purba Medinipur in a Matrimonial Suit No. 28 of 2013. The appeal along with the application for additional evidence are considered together.

The appellant initially filed a suit for restitution of the conjugal rights. After the said suit was withdrawn, the appellant filed an application for divorce on the ground of desertion and mental cruelty.

The learned Counsel appearing on behalf of the appellant submits that the basis of the judgment of the learned Trial Judge is erroneous as it proceeds on the basis that, during the pendency of the application for restitution of conjugal rights, the appellant had filed the suit for divorce and both cannot co-exist.

We find from record that the said observation of the learned Trial Judge is erroneous, as admittedly the application filed for restitution of conjugal rights was withdrawn on 7th August, 2013

and thereafter, the suit for divorce was filed on 12th August, 2013 i.e. few days after the dismissal of the application for restitution of conjugal rights. However, the fact remains that the learned Trial Judge has considered the allegations of desertion and mental cruelty and on the basis of the evidence recorded in answer to Issue No.6, the suit was dismissed on contest. Issue No.6 reads as follows:

“6. Whether there is no chance of reunion in between the petitioner and the respondent”.

The finding of the learned Trial Judge on Issue No.6 is as follows:

“Issue No.6.

In page 4 of his cross examination the P.W.1 has stated that he is ready to take his wife and to lead conjugal life peacefully with the respondent. The respondent has also stated in her cross examination in page 4 that she wants to leave as wife and husband with the petitioner. In such circumstances, I think that there is still a chance of reunion in between the parties.”

In view of the clear evidence of the parties, we feel that the learned Trial Judge could have converted the said proceeding into a proceeding for restitution of conjugal rights and decreed the suit accordingly.

Mr. Sanjib Bondhopadhyay, learned Counsel representing the appellant has submitted that the learned Trial Judge, in deciding the issue of desertion and mental cruelty, has ignored the communication made by the wife to the Commanding Officer in

connection with a compliant lodged by her regarding physical, mental and sexual torture and harassment caused by the appellant towards her and his continuous indifference towards children. Mr. Bondhopadhyay has referred to an affidavit filed by the respondent wherein at paragraph 5 she has stated that she was not willing to stay with her husband even after the matter was dissolved as she had no trust in him that she would meant his wife. This affidavit was notarized on 7th January, 2011, prior to the institution of the present suit and the application for restitution of conjugal rights. Notwithstanding such affidavit, the husband preferred to file an application for restitution of conjugal rights and thereafter, another application for divorce was filed alleging mental cruelty, desertion and adultery may be due to reluctance of the wife to stay with the husband. The husband could not prove adultery. However, it appears that at the trial both of them agreed to restore their conjugal relationship, which would be reflected from their evidence as recorded by the learned Trial Judge in deciding the Issue no.6.

Under such circumstances, the order of the learned Trial Judge is modified and a decree for restitution of conjugal rights is passed in this appeal. For the purpose of Section 13(1A)(ii), the period of one year shall commence from this date.

The department is directed to communicate this order by way of an Administrative Notice to the respondent/wife for information.

The appeal succeeds in part.

The department is also directed to draw up a decree as expeditiously as possible.

A copy of this order shall also be communicated to the Chairman, District Legal Services Authority, North 24-Parganas to Smt. Aparna Debnath, at her address being 36, Marium Mahal, Sadar Bazar, P.O. & P.S. Barrackpur, District North 24 Parganas, Pin. 700 120 through the office of SDLC, Barackpore.

Photostat copy of the application for additional evidence filed on behalf of the appellant shall be treated as original till the original is traced out by the department.

(Uday Kumar, J.)

(Soumen Sen, J.)