

26 09.01.2023

Ct-08

ar

FAT 67 of 2015
with
I.A No. CAN 3 of 2022

Sumana Pal
Vs.
Pradip Kumar Pal

Mr. Bhudeb Chatterjee
Mr. Rajendra Banerjee
Ms. SomoshreeSaha
... For the Appellant

Mrs. Sohini Chakrabarty
Mr. S. Gharai
... For the Respondent

The Court: The appeal has arisen out of a judgment and decree passed in a Matrimonial Suit No. 348 of 2008 on 20th December, 2014.

The appellant is the wife. The appellant is aggrieved by the order passed by the learned Additional District & Sessions Judge, 1st Court, Tamluk, Purba Medinipur in a matrimonial suit instituted under Section 13(i-a)(i-b) of the Hindu Marriage Act praying for dissolution of marriage on the ground of desertion and cruelty. The solemnisation of marriage between the parties is not in dispute.

Learned counsel appearing on behalf of the appellant/wife has submitted that the plaintiff has failed to prove desertion. Our attention is drawn to the earlier proceeding instituted by the respondent/husband before the Hon'ble Judge, Family Court, Nagpur being petition no. A384 of 2004 on 8th July, 2004 under Section 13(i-a)(i-b) of the Hindu Marriage Act for grant of divorce.

It is submitted that in paragraph 11 of the said petition the respondent/husband has categorically stated that on 2nd February, 2004 the present appellant had come to Nagpur with a

view to reside with her husband and on 10th March, 2004 she left the said house on her own. Learned counsel has submitted that there was categorical statement in the said petition that the appellant and the respondent were lastly residing as husband and wife in the Nagpur address.

It is submitted that initially a decree was passed in the said proceeding. However, an application was filed under Order 9 Rule 13 of the Code of Civil Procedure being petition no. A354 of 2004. The family court set aside the ex parte decree on the ground of lack of jurisdiction. Thereafter the present suit has been filed on 6th November, 2008 on ground of desertion and cruelty and the original cause of action mentioned in the suit filed before the family court at Nagpur.

It appears from the plaint that the plaintiff in paragraph 22 of the present plaint has stated that the cause of action for the suit arose on 1st June, 2004 when the present plaintiff/husband had filed an application for divorce being petition no. A384 of 2004 before the Family Court at Nagpur and the said cause of action is still continuing.

Mr. Rajendra Banerjee, learned counsel appearing for the appellant, submits that the trial court has failed to take into consideration that the relationship, as husband and wife, continued till 10th June, 2005 and thereafter she was driven out from her matrimonial home and accordingly, reliance on the date placed by the trial court for the purpose of computing the period for desertion is factually incorrect and a mistake apparent on the face of the record.

It is submitted that the trial court has failed to appreciate the evidentiary value of Exhibits 5 to 12 that had referred to, as alleged communication between the husband and the wife, in arriving at a finding that the wife did not show any interest to resume or continue with the matrimonial relationship.

It is further submitted that all the letters were returned unserved with endorsement like 'insufficient address' or 'absent' or 'not found' and in absence of the postal peon being examined with regard to such service the trial court could not have relied upon the said communication to show that the plaintiff was able to make out a case of desertion.

In order to succeed on a plea of desertion the spouse is required to prove the factum of separation and intention to bring cohabitation permanently to an end. Similarly, insofar as deserted spouse is concerned, two elements are required to be proved, namely, i) absence of consent and ii) absence of conduct giving reasonable case to the spouse leaving the matrimonial home to form the intention aforesaid. The appellant has referred to the decision in ***Elokeshi Chakraborty Vs. Sunil Kumar Chakraborty***, reported in ***AIR 1991 Cal 176*** to argue that the conditions for desertion has not been established. In fact, this judgment seems to have been relied upon by the respondent in support of his contention that the case of desertion is proved.

Mr. Banerjee further submits that the trial court has completely misdirected its mind in allowing the plea of cruelty merely on the basis of non-mentioning of the name of the husband in

the recital of the deed of sale dated 23rd September, 2009. It is submitted that although the sale deed stands in the name of the appellant/wife in which she has declared her status as the daughter of the father that by itself would not constitute cruelty as by that time the parties were litigating and the trial court has failed to appreciate the sentiment of the wife.

It is further submitted that a single instance in isolation is not sufficient to allow the dissolution of marriage on the ground of cruelty. The court is required to examine the conduct of the parties along with evidence on record to decide the said issue and cumulative effect of all such materials should have been taken into consideration by the trial court before allowing such plea.

Per contra Mrs. Sohini Chakrabarty, learned counsel appearing for the respondent, has submitted that the desertion has been adequately proved from the evidence both oral and documentary and the trial court has rightly considered that after the appellant had left the matrimonial home on 10th March, 2004 she did not express any intention or desire to resume the matrimonial relationship.

Mrs. Chakrabarty has drawn our attention to Exhibits 5 to 12 to show that in spite of adequate knowledge the wife had conveniently avoided to establish or restore the conjugal relationship between the parties and admittedly such period continued for more than four years, in spite of best efforts being made in this regard by the husband.

It is submitted that all these letters clearly borne out the intention of the plaintiff/husband

for resumption of conjugal life and matrimonial relationship. In fact, in those letters the husband had repeatedly requested the wife to return the child and he also communicated that his father was suffering from paralysis and was seriously ill and wanted to see the child before his death.

Mrs. Chakrabarty further submits that all these letters were properly addressed and were sent to last known address of the appellant and her family. The writ of summons of the suit was also delivered and received at the said address. It was never disputed that the wife or her family did not reside at the said premises where all these prepaid letters were sent by registered post. Mrs. Chakrabarty submits that the respondent was unable to rebut the presumption created under Section 27 of the General Causes Act read with Section 114 of the Evidence Act. The wife has intentionally avoided such services, even she did not care to see her ailing father-in-law and not allowed the child to meet her father-in-law before his death on 29th December, 2007.

In so far as the mental cruelty is concerned, it is submitted that the court is required to take a cumulative view of all the evidence, namely, non-presumption of conjugal relationship. Even at the time of death of her father-in-law she did not come to console her husband and allow the child to meet his grandfather. This situation, according to Mrs. Chakrabarty, cannot reasonably be accepted in a matrimonial relationship. The kind of treatment the husband has received from his wife in this case is sufficient to cause a reasonable appreciation in the mind of the husband that it would not be in

his best interest to continue with the relationship. Mrs. Chakrabarty supports the judgment of both the courts.

We have heard the learned counsel appearing for the parties.

On the issue of desertion we are in agreement with the view taken by the trial court in granting the decree in favour of the plaintiff. The learned Trial Judge has taken into consideration that the appellant in her examination-in-chief, by way of an affidavit at paragraph 12, alleged that she was driven out from her matrimonial house on 10th June, 2005. However, she could not adduce any evidence to show that she was compelled to leave her matrimonial home. She could not produce any independent witness to prove such allegation. The appellant could have proved such allegation by producing oral and documentary evidence corroborating her allegation of forcible exit. The appellant could not even produce any letter during the aforesaid period that is to say from 10th March, 2004 till the institution of the suit expressing her desire to resume conjugal relationship. In her written statement she stated that she was driven out from the matrimonial house. If we consider the 10th June, 2005 to be the relevant date for the purpose of computing the qualifying period of desertion then the initial onus is on the respondent to prove that the appellant did not leave the matrimonial house voluntarily. Exhibits 5 to 12 clearly spelt out the intention and the desire of the husband for co-habitation and continuation of the matrimonial relationship. These letters would demonstrate that the husband repeatedly requested her to resume her

matrimonial life.

The learned Trial Judge has also taken into consideration that the appellant did not lodge any complaint to any authority with regard to the mental and physical cruelty nor did she make any communication to the husband alleging such cruelty. Curiously enough her parents and relatives did not come forward to support the case of the respondent.

Although non-mentioning of the name of the husband in the deed while describing her marital status or changing the nomination in her service book in isolation may not be material for the purpose of cruelty. The fact of unwillingness to cohabit cannot be easily disregarded for the purpose of ascertaining the intention of the appellant in resuming or continuing with any matrimonial relationship, which results in mental cruelty.

As rightly observed by the trial court that if she was really interested to resume her conjugal life, she could have filed an application for restoration of conjugal life.

Learned counsel for the appellant has submitted that in the earlier proceeding before the family court the respondent prayed for divorce on the allegation of cruelty and desertion. However, we are unable to accept such submission as on a careful reading of the plaint in earlier proceeding it would show that the said proceeding was initiated on the ground of mental cruelty and was decreed on that ground, but subsequently, the said decree was recalled for want of jurisdiction. A judgment, which is a nullity, cannot be looked into for any purpose. The ground of cruelty was based on the wife's

persistence not to resume happy conjugal life. Moreover, because of the short period that had lapsed between the appellant leaving the respondent and the initiation of the said proceeding the respondent could not have taken the ground for desertion. The cause of action before the family court was that the respondent was harassed, ill-treated and was forcing the respondent to leave his own service and to reside with the appellant at some other place.

In view of the aforesaid, we are of the view that the trial court was justified in decreeing the suit in favour of the respondent. However, even if we dismiss the appeal, we cannot completely ignore the fact that they have a child and both the parents are required to look after the child for proper upbringing and joint parenting.

The respondent/husband has already deposited a sum of Rs.4,00,000/- (Four lakhs) in the designated bank account in terms of our earlier order dated 4th July, 2022.

The respondent/husband shall make a further deposit of Rs.6,00,000/- (Six lakhs) in the designated bank account within eight weeks from date and shall ensure good and quality education of the child.

Out of Rs. 10 lakhs to be received a sum of Rs.7.50 lakhs shall be kept in a suitable fixed deposit account yielding highest returns for a minimum period of 500 days and shall not be encashed prematurely unless there are compelling reasons and shall be kept renewed from time to time for such amount as would remain unutilized on the date of renewal until fully exhausted.

It is needless to mention that the said amount shall be earmarked for meeting the educational, medical and other expenses of the child only.

This order shall not prevent the appellant to pray for enhancement of maintenance for the child in future, if occasion arises. The parties, if required shall nominate the child in their service record for receiving all financial benefits in their absence.

The parties shall jointly decide on the school and higher education of the child.

In view of the above, the appeal being FAT 67 of 2015 is disposed of along with CAN 3 of 2022.

(Uday Kumar ,J.)

(Soumen Sen, J.)

