

Item-
10. 20-02-2023

FA 162 of 2015

Jayanta Sarkar
Versus
Rubi Sarkar

sg Ct. 8

Mr. Shehnaz Tareq Mina, Adv.
Mr. Pratick Sardar, Adv.

...for the appellant

Mr. Lakshminath Bhattacharya, Adv.

...for the respondent

The appeal is at the instance of the husband. A suit filed by the husband for divorce on the ground of cruelty and desertion was dismissed by the learned Additional District Judge, 10th Court at Alipore.

Briefly stated; the marriage between the appellant and the respondent was solemnised in the year 1994. They were living together as husband and wife in the matrimonial home till 7th February 6, 1999. On 7th February, 1999 the respondent left the matrimonial home.

The appellant is the husband. He has filed a suit for divorce on the expiry of the period of 2 years from 7th February, 1999 alleging that the respondent has left her matrimonial home without just cause and excuse. It was alleged that, during her stay in the matrimonial home, she insisted for separate accommodation and refused to co-habit from September 1998. She was disrespectful to her in-laws at her matrimonial home and was not attending to the guests and relations of the appellant who used to visit the matrimonial home.

In this proceeding, the appellant has relied upon two

letters in order to demonstrate that the respondent left her matrimonial home on her own volition and that in spite of repeated attempts to establish to reunite and revive the conjugal relationship, the respondent wife did not show any interest and, accordingly, there is clear intention to sever and separate the matrimonial relationship. It was further alleged that the insistence of the wife to sever her relation from his parents and to live separately ignoring his elderly parents and refusal to respond to have a healthy sexual relationship have resulted in cruelty.

The wife contested the proceeding by filing a written statement. In the written statement, she has denied the allegations. It is stated that she was always willing to stay with the husband however, because of the ill-behaviour and the incident happened on 7th February, 1999, she was compelled to leave her matrimonial home. For a short period of time, she was staying in hostel. In fact, she went back to the matrimonial home on 16th December, 2000 but she was not welcomed.

On behalf of the plaintiff, the plaintiff and his mother gave evidence. In the evidence, they have narrated the incident stated in their respective affidavit-in-chief. There are, however, contradictions with regard to conduct of the respondent at her matrimonial home. We find from the deposition of DW-2 that on the fateful day i.e. 7th February, 1999, she helped her mother-in-law to prepare the breakfast, hence it cannot be said that she was rude and without provocation left the matrimonial home. The reason for her leaving the matrimonial home on that date has to be accepted. Even otherwise, we find from the evidence-on-

record mainly Exhibit-3, that is a copy of the letter from the plaintiff to the respondent that the appellant was willing to give a mutual divorce to the respondent which clearly belies the claim of desertion and lack of any intention to revive the matrimonial ties. It appears that the wife has self-respect and demonstrate it when she denied to accept the amount of Rs.1,000/- as maintenance. However, she was willing to accept the money provided it was paid for her 'pocket expenses'. In fact, the evidence would show that on 16th December, 2000, she went to the matrimonial home. At that time, admittedly, the petitioner was not at home. One would have expected her mother-in-law to come forward and accept her with an open arm and make all attempts to pacify her. Instead, we find that the wife of the second brother of the appellant alleged to have handed over few documents that the respondent needed and it was alleged that she requested the respondent to have a dialogue. However, the younger daughter-in-law was never produced as witness. The statement of the mother-in-law to that extent is hearsay. Admittedly, the parties are living separately for over twenty-three and half years. The wife is personally present before us and she said that notwithstanding the differences that she had with her husband, she is willing to revive her matrimonial ties. The husband is not willing to revive the matrimonial relationship for the reasons that he has faced mental torture. Cruelty whether mental and physical has to be proved. It must appear from a course of conduct and gravity of the incident.

The learned Counsel for the appellant has relied upon a decision of *Samar Ghosh versus Jaya Ghosh* reported in

(2007) 4 Supreme Court Cases 511 paragraph 101(xiv) in order to demonstrate that this long period of continuous separation would itself lead to a mental cruelty. If a person by his act and conduct has contributed to create a situation in order to wriggle out of the marriage with a mask of cruelty, the Court should not allow such mask to prevail over the real identity of the issue. The said observation of the Hon'ble Supreme Court, in our respectful reading, cannot be read in isolation. It is true that the parties are living separately for more than 23 years and it shows that the respondent was working in a private company at the time when she deposed before the learned Trial Court. However, still in our society, a divorce carries a kind of stigma to which the respondent is afraid of and we do not wish to part with such apprehension expressed by the respondent when the plaintiff has failed to prove its case. The petitioner relied upon paragraphs 13, 14, 15 and 16 in examination-in-chief by way of affidavit filed by the appellant. It is argued before us that the contents of the said paragraphs were not challenged, as no questions were put with regard to such paragraphs in cross-examination to the witness of the appellant.

The wife has stated in her chief that she was not unwilling to have a child and denied any suggestion to that contrary in cross-examination. There is no evidence-on-record before us, on the basis of which, we can come to a finding that the wife was responsible for not bearing the child or refused to have a happy physical relationship with her husband. As stated earlier, the appellant could not prove the case of desertion. It is not dependent upon any questions being put in cross-

examination to the witness of the appellant as the documentary evidence-on-record read with the other evidence would clearly show that the desertion was not proved. In fact, during the period of two years, the wife came. Her mother-in-law has made contradictory statements with regard to articles alleged to have been taken by the respondent/wife. In the chief at paragraph 16 she has stated that her daughter-in-law arrived at the matrimonial home in or about 3.45 p.m. to collect few documents and during cross-examination, she has stated that still some of her belongings are in their custody which means that she did not collect all the documents. In any event, it was not proved that she deliberately left the matrimonial home and was not willing to come back in spite of efforts being made in this regard. Insofar as the cruelty is concerned, the said paragraphs do not constitute cruelty. If the respondent was adamant to leave the matrimonial home and was disrespectful to her mother-in-law, then she would not have participated with her mother-in-law in the kitchen for preparing breakfast on the fateful day i.e. 7th February, 1999.

Taking into consideration all the factors, we are of the opinion that the appellant has failed to prove desertion of cruelty.

The appeal, accordingly, fails.

However, there shall be no order as to costs.

(Uday Kumar, J.)

(Soumen Sen, J.)