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FAT 275 of 2017
with
I.A No. CAN 7 of 2023
Smt. Krishna Sarkar
Vs.
Sri Chandan Sarkar

Mr. Prantick Ghosh
Mr. Siddhartha Sarkar
Mr. Prasad Bhattacharyya
... For the Appellant/Wife

Mr. Amitabh Ghosh
Ms. Nabamita Chatterjee
... For the Respondent/Husband

Soumen Sen. J. (Oral): The appeal is arising out of a judgment and decree dated 20th April, 2017 passed by the learned Additional District & Sessions Judge, Fast Track no. 5 at Barasat, North 24 Parganas in Matrimonial Suit No. 42 of 2011.

Learned Trial Judge decreed the suit in favour of the plaintiff/husband.

The plaintiff filed the suit for divorce on the ground of cruelty and desertion.

Briefly stated, the plaintiff married one Krishna Sarkar, the appellant herein, on 14th December 2003 and within the wedlock a female child was born on 7th August, 2007. The plaintiff alleged that during the aforesaid period the appellant would frequently leave the matrimonial home expressing her discontent to stay with her

in-laws. She refused to adjust to the new environment and would make frequent visit to her paternal home ignoring the plaintiff and his family members. She also refused to participate in social functions. Notwithstanding such indifference attitude of the appellant the plaintiff/husband tried his best to give company to the appellant and adjusted himself in order to lead a happy and peaceful matrimonial life. The husband requested the appellant to accept the matrimonial home as her own home and adjust with the family members of the plaintiff. The plaintiff has categorically stated that all the family members of the plaintiff were simple and nice to the appellant. In spite of the aforesaid, the appellant was insisting the plaintiff to purchase a flat nearer to the residence of his father-in-law.

The plaintiff-husband alleged that on several occasions the appellant would insist her husband to make arrangement for a separate mess nearer to the house of her father at Dumdum and not to keep any relation with his old ailing parents. The plaintiff could not agree to such inhuman proposal and tried to convince the appellant to leave together happily. The respondent is the only son of his parents and it is both inhuman and impossible to keep his old

ailing parents in an abandoned condition. Since the plaintiff-husband did not agree to such demand he was assaulted by the appellant by broomstick and she hurled abusive and vulgar languages towards plaintiff and his old ailing parents ignoring the social status and prestige of the plaintiff. Without the knowledge of the plaintiff the appellant used to leave for place of her own and would not disclose her whereabouts. On several occasions the petitioner-husband had declined to share bed with the plaintiff-husband. The appellant had no liking or affection towards the petitioner even during his illness the respondent did not feel it necessary to take care of the husband. It is alleged that the appellant had no love or affection towards the petitioner.

The plaintiff alleged that the appellant did not maintain any relation with his father-in-law and mother-in-law and would threat the elderly couples to implicate them in false cases. Even she would not permit the parents of the plaintiff to enter the first floor of the residence of the plaintiff (that is the portion where the plaintiff and the respondent used to reside together and she was extremely rude to her in-laws and the family members of the plaintiff. The plaintiff alleged that in or about 15th June, 2008 and on

19th June, 2008 the defendant/wife humiliated the plaintiff and her in-laws and hurled abusive language and ultimately her elder brother and sister-in-law came from Dumdum to pacify the respondent and on that very day she left the matrimonial home with the child.

The plaintiff further alleged that since the plaintiff was not willing to separate himself from his ailing parents the appellant left the house on her own volition on 15th July, 2008 finally with the child. The plaintiff was always ready and willing to lead happy matrimonial life and for that reason the plaintiff filed an application on 25th September, 2008 under Section 9 of the Hindi Marriage Act being MAT Suit No. 1437 of 2008, which was renumbered as MAT Suit No. 8 of 2009, for restitution of conjugal right before the Additional District Judge, 1st Court, Barasat.

In order to expedite the matter and in furtherance of his readiness and willingness to restore the matrimonial relationship and to bring the child back the plaintiff filed an application before the District Magistrate, North 24 Parganas. On the basis of the said application the Zila Shasak Janaavijog Nirasan Kendra convened a meeting presided over by the District Magistrate in which both the parties appeared and the appellant consented to stay with her

husband. Soon thereafter, on 1st December, 2008 the appellant received a summon in connection with the petition under Section 9 of the Hindu Marriage Act.

During the pendency of the aforesaid proceeding, the wife filed an application on 13th January, 2009 under Section 24 of the Hindu Marriage Act praying for alimony pendente lite in which an order was passed on 5th February, 2010 allowing the said application. Simultaneously with the filing of the aforesaid application and during the pendency of the application for restitution, the appellant/wife filed a complaint case being No. 50 of 2009 before the learned C.J.M, Barasat under Sections 12,18,20 and 22 of the Protection of Women from Domestic Violence Act, 2005 on 13th January, 2009. The petition filed for restitution of conjugal rights was dismissed for default on 25th March, 2010 and thereafter the husband filed a matrimonial suit on 15th October, 2010 being Matrimonial Suit No. 42 of 2011 for divorce on the ground of cruelty and desertion.

Learned Trial Judge decreed the suit on both grounds.

Learned Trial Judge has taken into consideration the fact that the appellant inspite of her assurance in writing to stay with the

husband in the matrimonial home before the Zila Shasak Janaavijog Nirasan Kendra in the office of the District Magistrate on 1st December, 2008 she failed to adduce any evidence to show that she had acted on the basis of such undertaking. Learned Trial Judge has also taken into consideration that the filing of an application for alimony pendente lite during the pendency of the restitution application in spite of an assurance given by the wife on 1st December, 2008 to resume the conjugal tie and filing a criminal case would show that she was not willing to return to her matrimonial home.

Mr. Prantick Ghosh, learned counsel appearing for the appellant/wife, has submitted that the plaintiff has failed to prove desertion and cruelty. It is submitted that burden of proof lies upon the husband to prove both the grounds. It is submitted that the husband did not pursued the application for restitution of conjugal rights and finally the said application was allowed to be dismissed for default purposely so as to use it as a plank for the purpose of filing the subsequent suit alleging desertion and cruelty. The husband has failed to prove that since the filing of the application for restitution of conjugal rights he was ready and willing to take back the wife and resume the

matrimonial tie. It is submitted that the appellant was able to demonstrate sufficient ground to stay separately and was compelled to file an application for maintenance due to penury.

The allegation of cruelty is unfounded and baseless and in any event having regard to the fact that the husband had filed application for restitution of conjugal rights in spite of past alleged acts of cruelty by the wife all such past acts of cruelty on the date of filing of the application stands condoned in view of the decision of the Hon'ble Supreme Court in ***Ravi Kumar Vs. Julmedevi, reported in 2010(4) SCC 476.***

It is further submitted that the learned Trial Judge has completely misconstrued Order 12 Rule 6 of the Code of Civil Procedure as the wife cannot be expected to file an affidavit accepting the allegations of cruelty made against the wife in the application for restitution of conjugal rights.

Mr. Ghosh accordingly submits that the judgment of the trial court is required to be set aside.

Per contra, Mr. Amitabh Ghosh, learned counsel appearing for the respondent/husband, submits that the conduct of the parties are

important to assess whether the husband was subjected to cruelty and any act of desertion had taken place in the instant case. It is submitted that the cruelty is to be inferred from circumstances and even an isolated grave instance may constitute cruelty. It, however, depends upon the facts and circumstances of each case. It is submitted that even the judgment relied upon by Mr. Prantik Ghosh with regard to the restitution of conjugal rights it has been observed that whether the past acts of cruelty was condoned would be basically a question of fact and has to be assessed on a cumulative assessment and reading of the evidence of the parties.

Mr. Ghosh has submitted that the wife has admitted during trial that she had agreed to resume the matrimonial tie, but curiously without adhering to her assurance she initiated multiple proceedings namely, an application for interim maintenance and a complaint under POWFDV Act, 2005 both filed on 13th January, 2009 during the pendency of restitution application. In view of such conduct it is quite clear that the assurance given before the District Magistrate was not genuine and never intended to be complied with or acted upon by the wife. It is submitted that under such facts and

circumstances of the case the application for restitution of conjugal rights could not have succeeded and in any event subsequent events would very clearly show that the appellant did not want to maintain matrimonial tie. It is also submitted that the wife realising that there is no substance in the complaint filed in POWFDV Act, 2005 allowed it to be dismissed and the restoration of the said petition was also dismissed. The appellant did not pursue the matter any further.

Mr. Ghosh submits that from the nature of the complaints filed before the Magistrate under the Domestic Violence Act, it would appear that she did not claim any in the said proceeding. Mr. Ghosh has referred to the sections mentioned in the complaint and submitted that Section 18, 20 and 22 are for protection order, monetary reliefs and compensation order. This would also clearly establish that she gave a false assurance before the District Magistrate during the pendency of the restitution proceeding.

The said proceedings were initiated to harass the husband.

Mr. Ghosh further submits that long deprivation of the husband of a happy conjugal relationship and unwillingness of the wife to resume conjugal rights without any just cause

and excuse beyond the period of two years clearly entitled the respondent/husband to file the suit for divorce on the ground of cruelty and desertion and necessary facts have been proved and established at the trial the evidence of the respondent.

The wife having failed to act in terms of her undertaking and assurance in the proceeding of restitution of conjugal rights has clearly evinced an intention to withdraw from her matrimonial obligation, that is, not permitting or allowing and facilitating cohabitation between the parties.

The course of conduct of the appellant wife can reasonably cause anguish to the husband and it can endanger his mental health. The conduct of the wife in relation to or in respect of the matrimonial duties and obligation clearly reflect that she was not willing to lead happy conjugal life. On analysis of the conduct and evidence on record it becomes abundantly clear that the situation is such that the husband cannot reasonably be expected or asked to put up with such conduct and continue to live with the appellant. The course of conduct and behavior of the wife can reasonably create a deep anguish, disappointment and frustration to the petitioner-husband. Moreover, there has been a long period of continuous separation from which

it can be fairly concluded that the marriage bond is beyond repair and it becomes a friction though supported by a legal tie [see, ***Samar Ghosh v. Jaya Ghosh*** reported in **2007(4) SCC 511: AIR 2007 SC**].

We have considered the impugned judgment. We have read the evidence carefully.

The respondent has failed to prove that there was any improper demand of her in laws and she had protested against such unexpected demand. Showing respect to the parents of the husband and elderly persons of her in-laws family is a descent expectation that the husband can reasonably expect from his wife. The reasonable insistence of the wife for having a separate matrimonial home with conjugal privacy for herself and her husband per se may not be an act of cruelty but “such right does not extend to whimsical or unreasonable demand or sheer obstinacy” as observed in ***Kakalidas Ghosh v. Dr. Asish Kumar Das***, reported in **AIR 2003 Cal 287**. However, the foundation of the sound marriage is tolerance, adjustment and respects to one another. We are unable to find out any evidence that she was ill treated at her in laws place. She did not file any application for restitution of conjugal rights. If the husband was cunning and had ulterior motive he would

not have filed an application for restitution of conjugal rights. In the application for conjugal rights he had candidly stated that he still loves his wife and his child. His equal concern for the well being of the child and his wife are clearly reflected from the said petition of restitution of conjugal rights and also in his evidence. The husband had never denied its responsibility to maintain the wife and the child and it is precisely for that purpose she filed an application for restitution of conjugal rights. The proceedings initiated by the wife immediately after her assurance shows lack of respect, faith and understanding causing pain and disrepute to the other partner thereby causing humiliation and lowering his reputation in the society.

The wife's demand that her husband leaves his old ailing parents and reside with her parents or at a place nearby to her parents and upon his refusal to abuse the husband is an act of cruelty. In every relationship there must be compassion and empathy. It is the duty of the child to look after his parents in old age. It is applicable for both the husband and the wife. If the wife is having ailing parents the husband cannot insist his wife not to visit her parents' house and stayed with them for sometime to look after their need and comfort. In ***Narendra v. K. Meena***

reported in **2016(167) AIC 217 (SC)** the Apex Court took serious exception of the wife's insistence that the husband separates from his family. The apex Court remarked:

“In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are dependent upon his income. The persistent effort of the respondent wife to constrain the appellant to be separated from the family would be torturous for the husband and in our opinion; the trial court was right when it came to the conclusion that his constitutes an act of ‘cruelty’.”

Although cruelty may not depend upon any particular period or number of incidents of cruel treatment or continuous course of conduct and it depends upon intensity, gravity and stigmatic impact of it when meted out even once as observed in **Vijay Kumar Ramchandra Bhate v. Nella Vijay Kumar Bhate** reported at **2003(6) SCC 334** it clearly excludes “mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life” as held in **Samar Ghosh v. Jaya Ghosh** reported in **2007(4) SCC 511**. Cruelty must be inferred from the whole facts and atmosphere disclosed by the evidence. In **Kaslefsky v. Kaslefsky** reported in **1950(2) All ER 398 at 403** Denning LJ (as he then was) sounded a note of caution in

considering matters cases involving allegation of cruelty in His Lordship's inimitable style:

“if the door of cruelty were opened too wide, we should soon find ourselves granting divorce for incompatibility of temperament. This is an easy path to tread, especially in undefended cases. The temptation must be resisted lest we slip into a state of affairs where the institution of marriage itself is imperiled.”

This piece of prudent warning has been noticed with approval in ***Dastane v. Dastane* ; (1975) 2 SCC 326**, by the Supreme Court of India and has been followed in other cases, namely, ***J.L. Nanda v. Veena Nanda*; (1983) 2 DMC 135 (DB) (Del)**.

We have carefully and cautiously approached the issue as the primary duty of the matrimonial court would be to respect the sanctity of marriage and not to create disruption more particularly when a child is involved. However, in spite of our best efforts the parties could not reconcile their differences. The husband has married in the meantime.

The question of desertion is a question of fact that has to be assessed on the basis of the conduct of the parties. There cannot be any dispute that the wife on 1st December, 2008 appeared before the District Magistrate and assured in writing that she would stay with the husband. There is no contemporaneous

evidence that she in furtherance of her assurance returned to her husband's place with the desire to stay with her husband. Mr. Prantik Ghosh has drawn our attention is a stray sentence in the evidence of the wife where she volunteered to say that she wanted to stay with her matrimonial home during Kali Puja, but she was refused entry. It has to be remembered that Kali Puja for the year 2008 was over by the time matter was taken up by the District Magistrate on 1st December, 2008 and if she had meant it to be of 2009 which she did not clarify but we assume by that time she initiated proceedings before the Magistrate under Domestic Violence Act. She filed an application on 13th January, 2009 for alimony pendente lite and another proceeding under POWFDV Act, 2005 on that date itself. In the POWFDV proceeding she did not claim any right of residence. The attitude and reluctance to join the appellant is quite apparent from her conduct. She could not establish that after December 1, 2008 she went immediately to her matrimonial home for resumption of matrimonial relationship but she was prevented from entering the house. If these two factors are taken into consideration it can well be presumed that the assurance given by the wife on 1st December, 2008 was not genuine. In any event,

the restitution of conjugal rights was bound to fail by reason of the aforesaid proceedings being initiated by the wife. It gives an impression that the wife was merely buying time in order to launch a fresh assault on the husband which she did by initiation of two parallel proceedings on the same date which are in close proximity to the assurance she had given to the District Magistrate on 1st December, 2008. She could not demonstrate any change of circumstances between 1st December, 2008 and 13th January, 2009 that compelled her to file the said application. Both proceedings were filed almost within one and half month from the date of her assurance in writing. The wife could not establish that she left the matrimonial home under compelling circumstances. In fact the husband by his course of conduct has clearly demonstrated that he was ready and willing to resume conjugal ties. In absence of any evidence with regard to her leaving the house under compelling circumstances the case of desertion is proved. On the contrary, it would appear from the evidence on record that the husband initiated a proceeding for restitution of conjugal rights much prior to any other proceeding initiated by the wife in order to lead a happy conjugal life. He expressed his desire to

maintain the daughter as well. The evidence would show that the husband and her parents were willing to stay together. The reason for discontent appears to be the insistence of the wife to leave the old ailing parents of the husband. It has now been judicially recognized that such insistence on the part of the wife would amount to mental cruelty. The wife could not justify the stand and her complaint dated 13th January, 2009. The stand of the wife is prevaricative and self destructive. The plaintiff is a government employee. It is quite clear that such complaint was made motivatedly and to disrepute the husband at his place of work and his parents.

On such consideration we are of the opinion that the learned Trial Judge was justified in decreeing the suit on both the grounds.

In view of the above, the appeal fails and is hereby dismissed.

Although, we dismiss the appeal we cannot ignore the fact that they have a child who is presently studying in Kendriya Vidyalaya at Kashipur. Both the parents are required to look after the child and ensure proper upbringing and joint parenting.

The respondent/husband shall pay alimony at Rs.30,000/- per month from 31st March 2023.

All arrears in terms of our earlier order shall be paid by March 2023. In default, the appellant shall be entitled to pray for attachment of the salary of the respondent/husband.

Over and above, all medical expenses of the child shall be borne by the respondent/father as she is dependent. In this regard the appellant/wife shall furnish all medical bills and prescription of the child to the respondent.

The respondent in addition to the aforesaid shall for the time being create a fixed deposit of Rs.6 lakhs on or before 31st March, 2023 in the name of the child in a bank initially for a period of 600 days yielding highest return. The original fixed deposit receipt shall be made over to the appellant.

The said amount shall be clearly earmarked for education and higher studies. The fixed deposit 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 the entire corpus is fully exhausted.

The parties shall be at liberty to apply for custody of the child if so advised, however, till the custody issue is decided the respondent would have the visitation right. The respondent

shall be permitted to take the custody of the child during second and fourth weekends without compromising her studies and tuition. During such weekends it would be the responsibility of the appellant to ensure that the tuition and other recreational activities of the child are not hampered. The parties are directed to agree to a mutual convenient time and place for handing over and return of the child. The period of custody during annual vacations are also to be mutually decided by the parties in the same manner and we expect that both the parties would behave as responsible parents and ensure that by their conduct the welfare of the child is not affected.

The order of the learned trial Judge is confirmed with the aforesaid direction upon the parties with regard to the visitation right of the respondent-husband.

In view of dismissal of the appeal CAN 7 of 2023 is also dismissed.

There will be no order as to costs.

I agree

(Soumen Sen, J.)

(Uday Kumar, J.)

