

14 10.4.2023

Ct-08

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FA 147 of 2022
with
I.A No. CAN 1 of 2022

Sri Santanu Kundu
Vs.
Smt. Moumita Barman

Mr. Ayan Banerjee
Mr. Suman Banerjee
... For the Appellant

Mr. Anirban Das
... For the Respondent

The suit filed by the plaintiff/appellant under Section 25(i) of the Special Marriage Act, 1954 was dismissed by the learned Trial Judge. This judgment is under challenge by filing this appeal.

Learned Trial Judge dismissed the suit as the husband was unable to prove that there was willful non-consummation of marriage.

We have heard the learned counsel appearing for the appellant. We have read the plaint.

The petitioner alleged that the marriage was solemnized on 25.5.2019 under the Special Marriage Act at Shantinagar, Anandanagar, Nischinda, P.S. Bally, District-Howrah. After the marriage the petitioner returned to his house and the respondent stayed at her parental home on a plea that after completion of her examination she would come to the house of the petitioner.

It is alleged that the respondent never returned to her matrimonial home, although she told the petitioner that she would be busy with her study for examination.

The suit was filed within few months from

the date of registration of marriage on the ground that due to willful refusal for consummation the petitioner compelled to file the suit with a prayer for nullity of marriage solemnized on 25th May, 2019.

Mr. Ayan Banerjee, learned counsel representing the appellant, submits that in the detailed affidavit-in-chief the appellant has proved non-consummation of marriage. We have, however, unable to accept the said submission. We are of the view that the wife has not been given sufficient chance for consummation of marriage. Moreover, there has to be a finding that such refusal was willful.

In the petition the plaintiff has admitted that the wife was unable to return her matrimonial home due to her study, as she was preparing for her examination. This explanation cannot be discarded. In fact, the learned Trial Judge in deciding the matter has relied upon the decision of a learned Single Judge in ***Bina Tewari vs. Chandra Prakash Munshi, reported in 1996 SCC Online Cal 477: (1996)1 DMC 606*** to arrive at a finding that it is difficult to conclude that the marriage has not been consummated owing to the willful refusal of the respondent to consummate the marriage as envisaged under Section 25(i) of the Special Marriage Act, 1954.

There is no evidence to show that the husband after waiting for reasonable time tried to ascertain from the wife as to why the wife was not being able to return to her matrimonial home. It gives an impression that the marriage was hurriedly done with a clear understanding that the wife would not be able to stay with the petitioner immediately as she was preparing for her

examination. The burden of proof is on the husband. It is for him to discharge the initial onus of non-consummation of marriage, only thereafter the onus may shift upon the wife. The wife, however, did not contest the suit. Today, Mr. Anirban Das, learned counsel appears on behalf of the respondent and filed Vokatnama in this proceeding.

Mr. Banerjee has referred to a decision of the Hon'ble Supreme Court in the case of ***Vidhyadhar Vs. Mankikrao and Anr., reported in AIR 1999 SC 1441*** and has argued that due to non-filing of the written statement and failure of the wife to appear into the witness box, the petitioner was unable to cross-examine the defendant/wife and it is a fit case to apply doctrine of non-traverse and be return a finding in favour of the appellant. There cannot be any doubt that if the statements made in the plaint has remained uncontroverted by reason of non-appearance and non-filing of the written statement, the court shall presume that the statements are correct and proceed to decree the suit by applying the principle of non-traverse. However, there is a rider to the said provision. The court may require the plaintiff to prove a particular fact and may not allow the suit to be decreed merely on the ground of non-traverse. The said doctrine is not of universal application and is hedged with a discretion exercised by the court in an appropriate case. In the instant case, on the basis of the evidence non-consummation of marriage due to willful neglect of the wife is not proved.

Under such circumstances, we are not inclined to interfere with the order passed by

the learned Single Judge.

The appeal is accordingly dismissed along with CAN 1 of 2022.

This order shall not operate as res judicata, in the event any subsequent suit is filed for non-consummation of marriage, if such facts are established.

We dismiss the appeal due to unsatisfactory evidence of non-consummation of marriage.

(Uday Kumar, J.)

(Soumen Sen, J.)