

**06.07.2023**

Court : 04  
Item : 72  
Matter : FA  
Status : DISMISSED  
Bench ID : 266048  
Transcriber : NANDY

**FA 194 of 2015**  
with  
**CAN 1 (8670) of 2015**

**Bidyut Kumar Saha**  
**Vs.**  
**Chumki Saha**

**Mr. Anit Kumar Rakshit, Advocate**

.....for the Appellant

**Mr. Prasanta Banerjee, Advocate**

.....for the Respondent

1. This appeal has arisen from a judgment and order passed by the learned Additional District Judge, Second Court, Hooghly Sadar dated April 30, 2015 in MAT 102 of 2005 by which an application under Section 13(ia)(iv) of the Hindu Marriage Act, 1955 filed by the appellant was dismissed.
2. The aforesaid suit was filed by the husband seeking a decree for dissolution of marriage between the appellant and the respondent. Admittedly, the marriage was solemnized on 25.05.1991 and the same was duly consummated as the parties have a female child born from the said wedlock. It is alleged in the said application that the respondent used to frequently visit her parents' house without any permission from the appellant and forced the daughter to live with her therein. It is further alleged that the respondent insisted the appellant to live as domesticated son-in-law in her parents' house and further threatened him to take recourse to various provisions of the Indian Penal Code as her father is a lawyer's clerk. It is alleged that because of such behaviour and threat, a cruelty is perpetrated upon the appellant. It is further alleged

that on and from 19.04.2002, the respondent has deserted the appellant and started living in her parents' house and despite the request to return to the matrimonial home, she showed reluctance in this regard. It is further averred in the said application that a matrimonial suit being MAT 531 of 2004 was filed by the appellant against the respondent seeking dissolution of marriage both on the grounds of desertion and cruelty. Subsequently, the said suit was dismissed for non-prosecution. Even thereafter, the respondent showed no inclination to return to the matrimonial house and the present suit is filed on March 5, 2005.

3. The respondent took a defence in the written-statement that the earlier matrimonial suit was, in fact, withdrawn by the appellant on 21.01.2005 and within a span of one and half months, the present suit is filed and, therefore, the instant suit is not maintainable. She denied all the allegations of the appellant and, in fact, indicated that she always intended to live with the appellant along with her daughter at the matrimonial house and she is all along living with the appellant and the said suit is filed with a wrong intent.
4. The evidence of the appellant could not indicate any cruelty perpetrated upon him nor the act of desertion by the respondent. The appellant admitted that he had paid nothing towards the education of the daughter and the maintenance is paid on the basis of an order passed by the Court. It transpires from the said cross-examination that the appellant has forgiven her matrimonial offence so

that she may return to the matrimonial house.

5. The wife who deposed in the matter, categorically asserted that she was compelled to leave the house as the treatment of the appellant was not normal as expected by the wife and, in fact, she was put to starvation at times. She further deposed that even when the daughter was sick, the appellant did not take any attempt to get her treated and the reason for her living in the parental house is to save the future of the daughter as it was not possible to live together.
6. The Trial Court dismissed the said application as the appellant has not been able to prove the element of cruelty as pleaded in the said application nor could sustain the allegation of desertion by the wife. The Trial Court further found that the earlier suit was filed on the selfsame cause of action which was subsequently dismissed for non-prosecution and, therefore, the instant suit is not maintainable in view of Order 23 Rule 4 of the Code of Civil Procedure. In order to sustain a decree of dissolution of marriage on the ground of cruelty, it has to be proved with convincing material that it is impossible to live together as husband and wife under the same roof. Mere one incident or other which is normal wear and tear of the conjugal life cannot be regarded as cruelty.
7. Furthermore, the first suit was instituted on the selfsame allegation of cruelty and having withdrawn without any leave to file afresh on the selfsame relief, it condones all the acts which would further be evident from the cross-examination of

the appellant. He has categorically stated in the evidence that he condoned all the acts of the respondent in order to restore the matrimonial life and, therefore, he cannot bank upon such part of the alleged cruelty in a subsequent proceeding.

8. Furthermore, the moment the suit is withdrawn without any leave having obtained, the subsequent suit on the selfsame cause of action is barred. So far as the desertion is concerned, the explanation has been offered by the respondent which compelled her to live in her parents' house because of the act of the husband. Mere living apart cannot be construed as desertion. There must be an act of desertion without any plausible reason, in other words, the wife without any reasonable cause has disassociated herself from the husband and the parties are living separately.
9. We do not find any element of desertion having proved in the instant case, nor do we find that the ground of cruelty has been established by cogent evidence.
10. The appeal being **FA 194 of 2015** is thus **dismissed**. No order as to costs.
11. The connected application being CAN 1 (8670) of 2015 also stands **dismissed**.

**(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**

