

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.259 of 2016

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Prem Lata Thakur @ Prem Lata Kumari @ Pinki D/o Late Karunakar Thakur
resident of Village- Rampur, P.S.- Nathnagar, District- Bhagalpur.

... .. Respondent-Appellant

Versus

Kumar Achyuta Nand Jha son of Rudra Narayan Jha resident of Nawada
Gopalpur, P.S.- Rajaun, District- Banka at present residing Mohalla
Kailashpuri, P.S. Mojahidpur, District- Bhagalpur.

... .. Petitioner-Respondent-

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Appearance :

For the Appellant/s	:	Dr. Manoj Kumar, Adv.
For the Respondent/s	:	Mr. Ashutosh Jha, Adv.
		Mr. Bijoy Kant Mishra, Adv.
		Mr. Avinav Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 05-09-2024

The present appeal has been directed against the
impugned order dated 19.01.2016 and decree dated 04.02.2016
passed in Matrimonial (Divorce) Case No. 102 of 2007 by the
court of learned Principal Judge, Family Court, Bhagalpur
whereby marriage between the parties has been dissolved by
passing decree of divorce. Further, the concerned court ordered
that appellant is not entitled for permanent alimony/maintenance
and also directed the appellant/wife to hand over baby child to
the respondent/husband.

2. Before delving the factual aspect of the divorce
petition filed by the respondent u/s 13 (1)(ib) of the Hindu



Marriage Act, 1955, summarizing the background of appellant prior to date of marriage including stories and sub-stories of divorce petition which consists of 35 pages and to cut short the matter, the relevant aspects are being projected which are as follows:

The present appellant and respondent solemnized the marriage on 24.06.2005 and sufficient gifts were presented by respondent's sides through relatives. It is averred in divorce petition that the appellant misbehaved at the behest of her mother, brother and maternal uncle. Her conduct was never suitable as she never cooked and cleaned the room. She moved places in search of employment without consent and permission of appellant. She fled away to her mother's house. Allegation was made that she wanted to go to the clinic for termination of pregnancy but at last pregnancy was protected. The respondent has made allegations that in absence of family members of respondent, the appellant's brother, mother and maternal uncle, used to conspire against the family of respondent. Respondent persistently demanded new and costly dresses and edible items and luxurious things beyond the financial capacity of respondent with a view to create noise. On 23/9/2005 appellant fled away to mother's house without respondent's consent. It is alleged that



appellant's maternal uncle Raj Kumar Mishra came on 7/7/2006 and abused and threatened to implicate in false case and appellant would divorce the respondent and perform second marriage and on suspicion, respondent's younger brother filed informatory petition before the learned C.J.M, Bhagalpur on 10/7/2006. Respondent's family members provided all the facilities to appellant according to her need but appellant's mother, brother and maternal uncle always abetted her for committing wrong. Fortunately, she gave birth to a female child at Bhikhanpur on 31/7/2006 at about 7 PM. and medical facilities was being provided to the appellant along with balance diet and child was kept under regular surveillance. Despite being all the facilities rendered in favour of appellant, appellant did not change her nature rather she became ferocious and quarrelsome and used abusive language against all. She did not care for her child since her birth. At the mercy of God, the child was being served by respondent's mother and neighbours. She persistently demanded partition at the instance of her family members, just for illegal gain. On 29/8/2006, appellant quarreled with her husband and mother-in-law, using filthy language and her attitude is quite disrespectful towards the respondent and family members. On the same night at 12:30 AM she took



kerosene oil and poured upon her body and bolted her room from inside. She forgot the matchbox, she came out from the room but she could not succeed in her conspiracy. In morning, 30/8/2006, appellant fled away from the house of respondent containing ornaments, garments, leaving the small child. Respondent's father went to Rampur in the evening on the same day to apprise to appellant's mother and there was threat from the appellant's side to implicate respondent in false case. Respondent's younger brother filed informatory petition before CJM, Bhagalpur on 1/9/2006 stating the aforesaid facts. On 7/9/2006, appellant entered into the house forcibly with the help of her maternal uncle. It was asserted that appellant was making conspiracy silently to do wrong act at the behest of appellant's relatives, maternal uncle, mother and brother. It is averred that on 22/10/2006 that appellant's relatives persuaded appellant and ranting with the respondent. Appellant returned on 24/10/2006 at the instance of police official, respondent's father welcomed and allowed the appellant to leave. On 25/10/2006, appellant made altercation relating to food. She is in the habit of busing respondent and his brother and she never served food to respondent and relatives and appellant, on 3/12/2006 went to Rampur at the instance of her relatives. It is alleged that the



appellant is said to have illicit relation with one Shri Chandan jee from the past and the said relation persists as she says that she would go to his house and reside forever and she has admitted that she has bond for Chandan jee. Chandan Mishra misguided and persuade her to come to Hazipur. The said person enticed the appellant to engage her either in his business or to any other business. The sole purpose was to earn money while make use of appellant. The appellant along with her relatives went to Nathnagar on 4/12/2006 to lodge false FIR but the O/I refused and the appellant's maternal uncle Raj Kumar Mishra went DIG Office, Bhagalpur on 5/12/2006 and DIG heard both parities and their guardians and came to conclusion that allegation against present respondent/husband and relatives are false and directed the appellant/wife to return to her matrimonial home and other members are suggested not to interfere in their matters. It is further averred that appellant came on 6/12/2006 and she was allowed to live for the sake of prestige and position. She was not respecting elders and love for youngers. Appellant received call from her mother and maternal uncle on 29.03.2007 and, thereafter, she had altercation with family members of respondent and fled away at about 3:30 to 4:00 PM along with golden and silver ornaments, costly clothes and dresses



presented by in-laws at the wedding. On the same date, the respondent's father filed written information to S.P, Bhagalpur. It is alleged that appellant's maternal uncle and relatives made a plan in conspiracy to keep the appellant alone from the matrimonial home and she spent a night at Kahalgaon railway station and she travelled from Kahalgaon to Gaya by Hawra-Gaya Express on the same day and arrived at Gaya at 1:30 PM and stayed with unknown person. On 29/3/2007 at about 10 to 10:30 pm, appellant's relatives came by tempo at respondent's residence in search of appellant and they also threatened to implicate in false case and assaulted respondent's younger brother. The respondent's father sent a petition to DIG, SP and O/I, Mojahidpur police station by registered post. Inquiry was set up and lastly it was found that appellant was at her home Rampur on 2/4/2007 and appellant visited hazipur on 7/4/2007 and resided with Chandan Mishra, her brother-in-law fortnight with the consent of appellant's relatives. She resumed illicit connection with the said Chandan Mishra and was ready to marry with him but her elder sister protested. It is alleged that officials of Mujahidpur P.S. threatened the respondent on telephone on 5/5/2007 and directed him to allow appellant to return her matrimonial home. Respondent claimed that appellant



was said to have conceived and her pregnancy was terminated later on and it is alleged that appellant again abused the respondent and his mother on 21/5/2007 and she assaulted the husband with slap and small child too. It is asserted by respondent in para 41 that after birth of a child on 31/7/2006 there is no cohabitation among appellant and respondent. The appellant has completely broken the marital tie as she became an unreliable wife and she has departed from matrimonial home to her mother's house without respondent's consent and frequent departure from matrimonial home without respondent's consent leading to adulterous and illicit relation but there is no effect on appellant as she is not interested in welfare of respondent and child and she has no interest in conjugal life and happiness, and series of incidents enumerated in the divorce petition has been inflicting mental and physical cruelty upon respondent and family member and she has frequently deserted respondent and child made his life miserable.

3. The written statement has been filed on the behalf of appellant/wife. She admitted the factum of marriage as well as birth of a child and she denied the allegation portion of the respondent's divorce petition and she has stated that respondent's family pressurized for demand of dowry and they



assaulted and uttered filthy language to appellant. She has stated the true fact is that the appellant was at her matrimonial home with her husband, father-in-law, brother-in-law and her baby child till 28/8/2007 and the respondent proposed the appellant to go to mother's home to celebrate Raksha Bandhan and appellant relied upon her husband and in-laws, went to her mother's home with her husband and baby child. It is also asserted that on 30/8/2007, respondent came to Rampur and appellant prepared herself and appellant's husband took the baby child in his lap and appellant went to room for changing saree and she did not find her husband and child at gate and respondent switched on the telephone and said that he is in kailashpuri home with child. Immediately appellant came to kailashpuri with younger brother but respondent's father and relatives did not allow appellant to enter into the house. The father and mother of respondent stated that they will solemnize the marriage of his son soon with another girl with huge amount of dowry.

4. Pursuant to the notice, appellant appeared and Court has taken effort for amicable settlement among the parties but of no avail.

5. Learned counsel for the appellant submitted that the judgment and decree passed by the concerned court is without



having any application of mind. The matrimonial dispute is very sensitive matter where the conduct of both parties has been taken into account on the basis of material available on record. In the present matter, the family court has passed the order on the ground of adultery, desertion and cruelty without going through material available on record. Even the fundamental facts are not been proved in the manner known the law and the court gave finding that the appellant/wife has illicit relation with some other person. The court has given very perverse finding that without any cogent evidence, the ground of adultery has been proved. In matrimonial life, several allegations and counter allegations are hurled to score over the conduct of parties and on that score court cannot pass an order without having any cogent material. One another count, from the bare perusal of divorce petition it is clear that on 31.07.2006, appellant gave birth to a child, it cannot be denied that when both parties are residing together by matrimonial bond and out of wedlock of both parties, appellant gave birth to a girl child, in that situation the question of desertion does not arise on 31/7/2006. And when assertion mentioned in the divorce petition that since 31/7/2006, there is no cohabitation between both the parties, even the said date is taken into account, the minimum statutory requirement of



two years has not been lapsed when divorce petition has been filed. But in this case the divorce petition has been filed on 23/7/2007 and statutory period of two years have not lapsed, hence, the ground of desertion cannot be made out and it would be premature petition. The court has not even taken into account the minimum statutory period while giving finding on desertion. The ground of cruelty is totally vague as during cross examination at para 125 appellant has stated that she wants to reside with her husband and child and she does not want divorce. She wants to lead happy conjugal life with her husband and child. In para 126 she has stated that if any wrong thing has been committed by her, she seeks apology for the same. Learned counsel for the appellant further submitted that the concerned court has misdirected itself in not granting maintenance to the appellant and handing over child to respondent, though, appellant is mother and natural guardian. He further submitted that the concerned court has not appreciated the order dated 17.12.2008 passed in C.R. No. 87 of 2008 along with C.R. No. 479 of 2008. The learned court without considering or adding the party Chandan Mishra or Naval Kishor Gupta held that appellant led adulterous life with them is not permissible in the facts and circumstances of the case. Beyond the back of the



aforementioned person finding has been given, while tarnishing his reputation. Learned counsel for the appellant further submitted that learned Single Judge of this Court vide order dated 17.12.2008 dismissed C.R. No. 87 of 2008 along with C.R. No. 479 of 2008 filed by the respondent/husband and directed the respondent to pay Rs. 2,000/- per month by way of maintenance to the appellant/wife and further directed to pay entire arrears and current maintenance as per the impugned order within a period of one month from the date of receipt/production of a copy of the order. By the said order respondent was also directed to hand over the custody of the child to the appellant/wife within a period of 15 days from the date of receipt/production of copy of the order. Learned counsel for the appellant further submitted that at page-22 of impugned order the court has come to the finding that there is continuous desertion of more than 8 years admittedly, how the court has come to the said finding, it is beyond the reach of imagination. When marriage took place in the year 2005 and both parties led matrimonial life and one female child was born in the year 2006 and divorce petition was filed in the year 2007 how the court has calculated desertion of 8 years and it is settled law that no one can go beyond the pleadings. From the bare reading of pleading



there is nothing on record which goes to say that there is a continuous desertion. The appellant/wife is not residing separately for more than 8 years then how the court has come to the said finding that both are living separately for more than 8 years. Learned counsel for the appellant further submitted that conduct of the respondent can easily be assessed when child was merely two years old, the respondent tried to not to hand over the child to the mother/appellant where there is specific provision under Section 6 of the Hindu Minority and Guardianship Act, 1956 that custody of a minor child of up to the age of five years will ordinarily be with the mother/appellant and the respondent has litigated the guardianship of minor child to the High Court and after that matter has been settled and appellant has denied that she left the matrimonial home rather the respondent's side does not allow to join her matrimonial home as the father of respondent is renowned lawyer at Bhagalpur and he has utilized his legal acumen to craft a bulky divorce petition by inserting so many stories and sub-stories for creating legal evidence to suit the divorce petition. The presentation of divorce petition is nothing but the legal acumen of father of the respondent who has created a vague and baseless allegation which cannot be justified in any family of common



prudence.

6. Learned counsel for the respondent submitted that the respondent has suffered physical and mental cruelty by the conduct of appellant and the concerned court has passed impugned order on the basis of material available on record. Learned counsel has relied upon the judgment passed by Hon'ble Supreme Court in the case of *Sivasankaran vs. Santhimeenal* reported in (2022) 15 SCC 742. He further submitted that both parties are residing separately since long and matrimonial acrimony has gone to such an extent that they cannot reside together and the discord has reached to such an extent that relation cannot be repaired and it is better to dissolve rather to carry the said relation as a loaded bearing unit.

7. In support of present matrimonial (divorce) petition, the respondent/husband has adduced nine witnesses in his support and they are PW-1 Kaushlendra Kumar Mishra, PW-2 Abhijeet Priya, PW-3 Sitanshu Kumar Mishra, PW-4 Shiv Narain Choudhary, PW-5 Nageshwar Pd. Sah, PW-6 Arun Kumar Sah, PW-7 Rudra Narain Jha, PW-8 Umesh Chandra Jha and PW-9 Kumar Achyuta Nand Jha/respondent himself. Besides this the respondent relied on some documentary evidence which are as follows:-



Ext. 1- Certified copy of Etlay Petition No. 3066 of 2006 dated 10.07.2006

Ext. 2- Certified copy of Etlay Petition No. 4146 of 2006 dated 01.09.2006.

Ext. 3- Certified copy of order sheet dated 05.06.2009 in Nathnagar P.S. Case No. 157 of 2008.

Ext. 4- Certified copy of FIR of Nathnagar P.S. Case No. 157 of 2008.

Ext. 5- Certified copy of fardbyan written by Premlata Thakur dated 04.07.2008.

Ext. 6- Certified copy of final form report of Nathnagar P.S. Case No. 157 of 2008.

Ext. 7- True xerox copy of Kewala

Ext. 8- copy of order of Hon'ble Court passed in Cr. Rev. No. 87 of 2008 and Cr. Rev. No. 479 of 2008 dated 17.12.2008.

Ext. 9-Xerox copy of pay slip of Premlata Thakur.

Some documents are also marked as X to X/7.

On the other hand, the appellant/wife has also adduced two witnesses, they are DW-1 Kiran Thakur and DW-2 Prem Lata Thakur/appellant herself.

8. On the basis of pleadings of both parties, following issues have been framed:-

(I) Whether the Matrimonial (Divorce) case as framed, is maintainable ?

(II) Whether the petitioner-plaintiff has valid cause of action for filling the suit/case?

(III) Whether the petitioner-plaintiff is entitled for a decree for divorce on the grounds of alleged desertion, adultery and cruelty committed by the respondent/opposite party as claimed for ?



(IV) Whether the respondent/opposite party is legally wedded wife of the petitioner and she is entitled for any permanent alimony/maintenance in this case ?

(V) Who is the legal and natural guardian of minor child and she is entitled for any maintenance etc. in this case ?

(VI) to what other relief or reliefs, if any, the petitioner is entitled to in this case ?

9. In order to prove desertion, relevant Section is 13(1)(1-b) of the Hindu Marriage Act, 1955 which reads as under:-

13. Divorce-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

Explanation- In this subsection, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be



construed accordingly.

10. When we are referring the ground of desertion, we find that there are two kinds of desertion:-

(i) actual desertion and (ii) constructive desertion.

In the case of desertion, it is settled by the Hon'ble Supreme Court through judicial pronouncement and it has been interpreted that (what could be said to be "Desertion" in the divorce proceedings filed under Section 13 of the Hindu Marriage Act, 1955). The expression "Desertion" has come up under the judicial scrutiny of Hon'ble Supreme Court in ***BipinChandra JaiSinghBai Shah vs. Prabhavati*** (AIR 1957 SC 176) which was considered in the case of ***Lachman UtamChand Kirpalani vs. Meena alias Mota*** (AIR 1964 SC 40). In ***BipinChandra JaiSinghBai Shah*** (*supra*) it has been held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. The Hon'ble Supreme Court collating the observations made in the earlier decisions, stated its view as under:-

"Collating the aforesaid observations, the view of this Court may be stated thus: Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four



essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home.”

11. The Hon'ble Supreme Court in the case of ***Debananda Tamuli vs. Kakumoni Katakya*** reported in (2022) 5 SCC 459 at para 8 held as under:-

8. The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence.

12. The Supreme Court in the case of ***Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi*** reported in AIR 2002 SC 88 has observed as under:-

"The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include 'wilful neglect of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a



wide import which includes wilful neglect of the petitioner by the other party to the marriage, therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, no elements are essential so far as the deserted spouse is concerned: (1) absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

13. From perusal of the record, *prima facie* it is found that the finding of the trial court is perverse, sketchy and without assessing the material available on record. It is settled law that no one can go beyond the pleadings. From the plain reading of divorce petition, it is clear that the marriage took place in the year 2005 and both resided together and one female child took birth on 31.07.2006. In the said circumstance, one cannot assess that minimum statutory period of two years has elapsed when the divorce petition has been filed in the year 2007. How the concerned court has reached to the conclusion that both parties are living separately since 8 years when there is no whisper in the divorce petition. From perusal of the record it is crystal clear



that even foundational facts regarding allegation of adultery has not been proved as the person, against whom allegation of adultery is made, has not been made party to the divorce proceeding. There is dearth of material information for proving the adultery as during cross examination respondent/husband himself has stated that he has not seen appellant with any other. On the other hand, appellant/wife is ready to reside with her husband and child and she does not want divorce whereas respondent/husband has taken plea of divorce at one pretext or another and he has not shown any positive attitude to secure the presence of his wife at her matrimonial home. Even no petition under Section 9 of Hindu Marriage Act has been filed to secure the presence of his wife in matrimonial home. In the divorce petition respondent asserts himself that he has taken several efforts to secure the presence of his wife. The appellant in her written statement asserted that she is ready to join matrimonial home to lead happy conjugal life with her husband and child. On that juncture, the concerned court has not assessed material information on record and reached to the perverse finding where contention of appellant's counsel is quite tenable that the finding of the concerned court put stigma on the appellant. From perusal of the record it is crystal clear that marriage between appellant



and respondent was solemnized in the year 2005 and both parties resided together and during normal leading of conjugal life, one female child took birth on 31.07.2006. There is assertion in the divorce petition by the respondent that after birth of child on 31.07.2006 no co-habitation has taken place between the appellant and respondent but in the divorce petition it has been asserted that appellant has joined matrimonial home on 24.10.2006. On the said score, the contention of respondent is quite contradictory that on the point of desertion, minimum statutory period of two years has not been elapsed and court has also not taken into account the statutory period which is mentioned under Section 13(1)(ib) of the Hindu Marriage Act.

14. The court has framed the issue on the point of adultery and in impugned order the court has reached to the finding that the ground of adultery has been proved. The contention of learned counsel for the appellant that even the person against whom allegation is made, has not been made party to the divorce proceeding, then, on that score the person against whom allegation is made, has been left undefended. During cross-examination respondent himself admitted that he has never seen illicit relation with Chandan Mishra and there is no cogent material to prove that the appellant is said to have



illicit relation with other and even without having foundation, the court has come to the conclusion that ground of adultery has been proved. The court has to be very sensitive while handling divorce petition which is related with end of matrimonial life. There is no material information to prove the ground of adultery and on the said point, contention of learned counsel for the appellant is quite tenable and sustainable in the light of given facts and circumstances of the case. The judgment cited by learned counsel for the respondent is totally different from the facts and circumstances of the present case and hence, same does not apply in the present case.

15. The allegation levelled against the appellant is merely a bald statement without having substance of merit. On said score the court cannot act as a party to stigmatize other party. In matrimonial dispute one party tries to circumvent his/her own fault by making allegation to other party to get advantage of his/her financial position. The court has to weigh quality material to give any finding, so, that neither of the party feels stigmatized. Without going into details of merit of the case, prima facie we find that the court has committed wrong by not assessing material on record and reached to wrong finding.

16. In the light of aforesaid facts and circumstances of



the case, we have decided not to go into the details of the merit of the case rather to remit back the present miscellaneous appeal to pass appropriate order keeping in view the guidelines given by the Hon'ble Supreme Court in the case of *Rajnish vs. Neha and another* reported in *(2021) 2 SCC 324* read with *Aditi alias Mithi vs. Jitesh Sharma* reported in *2023 SCC Online SC 1451* as also in the light of discussion made above. The matter is remitted back to the learned Family Court to decide the matter on the basis of material available on record within a period of six months from the date of receipt/production of a copy of this judgment. Parties are directed to co-operate in disposal of Matrimonial (Divorce) Case No. 102 of 2007.

17. The trial court records be sent back to the learned trial court forthwith.

18. Pending I.A.'s, if any, stands disposed of.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

shahzad/-

AFR/NAFR	AFR
CAV DATE	23.08.2024
Uploading Date	05.09.2024
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