

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.1019 of 2017

Abhinesh Kumar Nirala son of Dhanik Lal Yadav, resident of Village-
Budhma Lakhraj, O.P. Bharrahi, P.S. and District- Madhepura.

... .. Appellant/s

Versus

1. Jyoti Devi @ Rina Devi and Anr wife of Abhinesh Kumar 'Nirala', resident of Village- Budhma Lakhraj, O.P. Bharrahi, P.S. and District- Madhepura.
2. Mukhesh Yadav, son of Late Ashok Yadav, resident of Village- Kamaljari, O.P. Patarghat, P.S. Saur Bazar and District- Saharsa.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Bidhanesh Misra, Advocate

For the Respondent/s : None

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 01-03-2024

The present appeal has been directed against the impugned judgment and decree dated 19.08.2017 passed by the learned Principal Judge, Family Court, Madhepura in Matrimonial Suit No.52/2012, whereby and whereunder matrimonial case filed by the appellant for dissolution of marriage with the respondent no.1 has been dismissed.

2. Briefly stated the fact of the appellant's case is that he is said to have married with respondent no.1 Jyoti Kumari as per Hindu Customs Rites in July, 2002 and during course of happy marriage life one child was born out of their wedlock of both appellant and wife/respondent no.1 she was aged about eight years as on the date of filing of matrimonial case No.52/2012.



3. It is claimed by the appellant that the behaviour of respondent no.1 changed and worsened towards the appellant and it is averred that the appellant went to the house of wife/respondent no.1 and brought her back to the matrimonial home. It is reliably learnt that wife/respondent no.1 is said to have illicit relation with one person (Mukesh Kumar) respondent no.2. It is further claimed that wife/respondent no.1 is said to harassed the appellant in different ways. Wife/respondent no.1 threatened to falsely implicate the appellant by committing suicide or by consuming poison or pouring K.oil. In the light aforesaid facts and circumstances of the case, the appellant filed Informatory Petition Case No.772/2007 in the court of C.J.M. It is claimed by the appellant that matrimonial ties between the both parties have not been established since the said occurrence. It is further claimed by the appellant that the appellant's father after being superannuated, he constructed a new house where all the family members of the appellant shifted but the wife/respondent no.1 did not reciprocate and continue to reside at old house and the appellant began to reside with respondent no.1 after tolerating non co-operative attitude because of his love and attachment towards his daughter.

4. It is alleged that ransom call of rupees one lac was being demanded on phone for eliminating whole family, if demands were not met. It was believed that occurrence of kidnapping and



murder would be committed at the behest of respondent no.1. The appellant has suggested and advised wife/respondent no.1 to live with parents-in-law leaving the old house, but the wife/respondent no.1 was never ready to join together there, where the appellant's family resides.

5. Wife/respondent no.1 filed a show cause in which the respondent no.1 admitted the factum of marriage as well as birth of female child she denied the allegation made by the appellant in the plaint. She has stated that the appellant deliberately left old house where all-in-laws lived there and she has specifically denied that she has any illicit relation with respondent no.2 as at the time of marriage of wife/respondent no.1, respondent no.2 was of six years old, on the basis of matriculation certificate. She has specifically stated that she used to serve her in-laws and her husband and she continued resides at her in-laws house to serve her parents-in-laws and the husband.

6. Learned counsel appearing on behalf of the appellant submits that the wife/respondent no.1 is residing at old Dih, and she is adamant not to reside with her husband and in-laws at the newly constructed house and there was no marital relation between wife/respondent no.1 and the appellant. Both parties are residing separately and there was no reason to continue with their marital relation. Learned counsel for the appellant further submits that she



has extra marital affairs with one Mukesh Kumar/respondent no.2 and she has committed the act of cruelty as her behaviour changed and the appellant is not in a position to resume matrimonial relation. In this way, the judgment and decree passed by the concerned court is neither tenable nor sustainable in the light of aforesaid facts and circumstances of the case. Learned counsel for the appellant relied upon decision of ***Samar Ghosh vs. Jaya Ghosh*** reported in (2007) 4 SCC 511 in which “the concept of mental cruelty has been deeply explained by the Apex Court through various precedents. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of others for a long time may lead to mental cruelty. The appellant is entitled to dissolve marriage on the ground of adultery, cruelty and desertion.

8. Learned counsel for the respondents did not appear before the court.

9. From the side of the appellant three witnesses were examined. PW-1 is father of the appellant (Dhanilal Yadav), PW-2 is Dinesh Yadav and PW-3 is Abhinash Kumar Nirala. No documentary evidence has been filed on behalf of the appellant himself. Respondent has produced five witnesses namely DW-1 Umesh Mukhiya, DW-2 Raj Kishore Yadav, DW-3 Birendra Yadav, DW-4 Vikil Yadav and DW-5 Jyoti Devi.



10. As per submission and contention of both parties, it is admitted fact that wife/respondent no.1 is legally wedded wife of the appellant and both were blessed with one child Arti Kumari. The court recorded the finding that the appellant is not entitled to get the decree of divorce on the ground of adultery, cruelty and desertion. Being aggrieved with the said finding, the appellant preferred present misc. appeal.

11. In the light of given facts and circumstances of the case, question arises:-

whether the appellant has proved the case on the ground of adultery, cruelty as well as desertion respectively in the light of given evidence and the materials available on record or not?

12. It is necessary to analyze the evidence of PW-3 who is the appellant himself. During examination-in-chief he has supported the factum of petition. His evidence during cross-examination is quite contradictory as he has not taken pain to us about even well-being of his wife and he did not know anything about her. The Statement of respondent no.1 is quite relevant in this connection as she is examined as OPW-5 and she stated that she lived at old house of her husband and her husband lived at new house and other OPWs supported that wife/respondent no.1 lived at appellant's house. The conduct of the appellant indicates that he has not taken any genuine step to bring his matrimonial home to



normalcy when she was residing at his old house. The appellant cannot take benefit of his own fault when wife/respondent no.1 has not denied to accompany her at old matrimonial home. PW-3 has stated that respondent no.1 is said to have established illicit relation with respondent no.2. PWs 2 and 3 are said to have made similar statement. The aforesaid statement of PWs are purely based on hearsay account and the said statements cannot carry the weightage as said facts are based on surmises and conjectures and the same has not been substantiated by any material evidence. In this way, allegations are quite vague and not based on any material evidence.

13. The appellant has failed to produce any documentary evidence that he has filed a case against respondent regarding the allegation of adultery. The statement of PW-1, PW-2 even PW-3 who is appellant himself, has not pointed out any particular circumstance with regard to the specific date, time and place regarding either the allegation of adultery or cruelty or desertion. In this way, the statements of all the witnesses are vague and full of infirmities and the ground of cruelty cannot be taken into account as same is superficial in nature which is found in the petition of the appellant. The statement of witnesses are just like parrot version who have said to have heard that the wife/respondent no.1 is said to have illicit relation with respondent no.2. On the point of desertion, neither appellant nor any witness has made any specific statement



regarding the date and time or from which date, she has left matrimonial house, though, she is residing at a place from where she joined appellant's home. Only bald statement has been made by the petition, though, she is also admitting said fact that she is residing at old matrimonial house and father of the appellant left and constructed a new house.

14. It is pragmatically and prudently understood that the Hindu marriage is sacrament tie between the parties and the matrimonial tie cannot be destroyed at the cosmetic allegation which has no deep rooted connectivity on the basis of material available on record. Unfortunately, the sacred union is subject to various disagreements due to which the matrimonial disputes arise between husband and wife. When there is no alternative remedy, parties choose to dissolve the marriage.

15. In the several judgments of Hon'ble Supreme Court, the ground of cruelty has been discussed in the interpretation of Hon'ble Supreme Court in the case of ***Dr. N.G. Dastane vs Mrs. S.Dastane*** reported in ***AIR 1975 SCC 1534***. The word "Cruelty" has been interpreted that what act constitutes cruelty, which is a ground for dissolution of marriage may be defined as willful and unjustified conduct of such a character as to cause danger to life, limb or health badly or mental or as to give rise to reasonable apprehension such a danger. Under statutory provision of Hindu



Marriage Act under Section 10 (i) (b) of the Act what constitute cruelty must depend upon the term of this statute, which provides:

“10.(1) Either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition to the District Court praying for a decree for judicial separation on the ground that the other party-

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party;”

16. In the case of ***V.Bhagat vs D. Bhagat*** reported in ***1994 AIR 710*** the concept of cruelty has been examined through referring the case of ***Shobha Rani v. Madhukar Reddi*** reported in ***(1988) 1 SCC 105***. The word “Cruelty” has been not defined in the Hindu Marriage Act, it has been used in Section 13 (1)(i-a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to nature of the cruel treatment and then as to impact of such treatment on the mind of spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live



with the other, ultimately, it is a matter of inference to be drawn by taking into account the nature of conduct and its effect on the complaining spouse.

17. The crux of the various decision of the Hon'ble Supreme Court on the interpretation of word "Cruelty" is that it has to be construed and interpreted considering the type of life the parties are accustomed to; or their economic and social conditions and their culture and human values to which they attach importance. Each case has to be decided on its own merit.

18. In the present case, appellant has self asserted in the petition that his wife/respondent no. 1 is residing at old matrimonial home to which she is not ready to leave and during cross examination he himself has stated that he has not taken pain to ask regarding the well being of his wife and he did not know anything about her. In matrimonial relation reciprocity is essential conduct to take the benefit to which he is seeking. He himself is not taking care of his wife and he is seeking divorce on the ground of cruelty and desertion. No one is allowed to take benefit at his own fault. Even he has not taken legal step for restitution of conjugal rights but he himself has suggested that he has tried to bring his wife/respondent no. 1 to newly constructed house but he has not stated anywhere how he has not joined matrimonial house which is belonging to appellant himself where he resided well after solemnization of



marriage. His self asserted version is quite contradictory in his pleading as he has not taken pain to reconcile his matrimonial relation, though, his wife is residing at his own house.

19. On the factum of cruelty the statement of PW-3 is quite vague. So far as the allegation regarding ransom call, threatening of kidnapping and abduction was made at the behest of wife/respondent no.1 is concerned, the same are quite vague. There is no cogent evidence to support the said bald statement of pleading of the appellant and even no prudent man can draw any inference from said allegation as they are quite based on surmises and conjectures. The allegation of consuming poison and pouring K. oil are without having specific date, time and place. There is no cogent material to substantiate the said allegation. The allegation of visiting respondent no.2 has not been seen by any of the witnesses examined on behalf of the appellant. The allegation of desertion has not been supported by any specific date, time and place and the appellant has not stated that wife/respondent no.1 did not allow him to join at old house of the appellant. Not even a single circumstance has been pointed out with regard to date, time and place as to what constitutes cruelty committed by wife/respondent no.1 against the appellant.

20. So far as the ground of desertion is concerned, there is no any specific circumstance attached to the pleading or any other material available on record indicating that on which particular date



the wife/respondent no.1 has left the matrimonial home. Not even a single specific allegation of behavioral misconduct amounting to cruelty has been made out either in pleading or in evidence with reference to date, place and nature of cruelty. The allegations are made in pleadings which have clearly indicated that the factum of deserting the matrimonial home by the wife of the appellant is not proved as she continues to reside in one of the matrimonial home. The appellant's father, retired police official, constructed new house and this house is genesis of entire allegation and said allegations have been sweetly drafted and crafted to achieve the desired out come that is dissolution of marriage.

21. In the present case, we are assessing the fact of the present case upon touch stone of ground of cruelty. We do not find any solitary circumstance, where it is found that the appellant has proved the case where cruelty is constituted in the light of statutory provision as mentioned above. In daily life numerous incidents have taken place but all cannot be taken into account, which is reasonably wear and tear of married life, which can be ignored.

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

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

22. In 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 13 of Hindu Marriage Act,1955). The expression “Desertion” has come up under judicial scrutiny of Hon’ble Supreme Court in ***Bipinchandra Jaisinghbhai Shah V. 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 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. Hon’ble Supreme Court collating the observations made in the earlier decisions, stated its view as under:-

“Collating the aforesaid observation, 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.”

23. From perusal of the evidence adduced during the course of trial, the appellant has neither proved the factum of desertion as he has only given statement that she was residing at old matrimonial home and not joining the newly constructed house



which is made by his father. It is not claimed that she has left the matrimonial home and so far as the ground of adultery is concerned there is no any tangible material available on record which constitutes adultery in the light of given facts and circumstances of the case and it is not anywhere averred either in pleading that wife is not ready to keep her husband at old matrimonial home. So, appellant cannot take benefit at his own fault that wife/respondent no.1 is not ready to join matrimonial home though she is always present at old matrimonial home.

24. From the evidence of the appellant as well, the allegation is quite vague and same is not specific with regard to time and place and there is no solitary circumstance which constitutes either cruelty, desertion or adultery. From the perusal of record, there is no material to prove that there was animus deserendi on the part of respondent. The facts as stated in *Samar Ghosh* case (*supra*) are entirely different from facts of present case. In this way, the ground as stated by the counsel of appellant in his submission is neither tenable nor sustainable.

25. On all counts keeping in view discussion made in foregoing paragraphs, we find that there is no merit in the present appeal warranting any interference in the impugned judgment. The Family Court has rightly dismissed the matrimonial case of



appellant seeking divorce. The present appeal is dismissed accordingly, affirming the impugned judgment and order of decree.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

Amitkumar/
Vashudha-

AFR/NAFR	AFR
CAV DATE	N/A
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