

**IN THE HIGH COURT AT CALCUTTA
(Civil Appellate Jurisdiction)
APPELLATE SIDE**

Present:

The Hon'ble Justice Madhuresh Prasad

And

The Hon'ble Justice Supratim Bhattacharya

F.A. 140 of 2022

Sri. Anath Bandhu Adak

Versus

Smt. Anita Adak (Patra)

For the Appellant : Mr. Chittapriya Ghosh,
Mr. Sandipan Pal,
Ms. Tithi Chakraborty.

For the Respondent: Ms. Piyali Sengupta,
Mr. Victor Chatterjee,
Mr. Barnamoy Basak.

Heard On : 19.09.2024
Judgement Delivered On : 19.12.2024

Supratim Bhattacharya, J.:

1. The matter was listed for delivery of judgment on 18.12.2024 but due to the resolution of the Bar it had to be adjourned and as such judgment is being delivered today.
2. Being aggrieved by and dissatisfied with the judgment dated 25.03.2022 passed by the Ld. Additional District Judge, First Court, Uluberia, Howrah in Matrimonial Suit No. 14 of 2013, the appellant/husband has preferred the present appeal.
3. Through the petition before the Ld Trial Court the appellant/petitioner/husband has prayed for divorce under Section 13(1) of the Hindu Marriage Act, 1955.

4. The appellant/husband herein was the petitioner whereas the respondent/wife herein was the respondent before the Trial Court.
5. Through the said judgment the Ld. Trial Judge has been pleased to dismiss on contest the prayer of the appellant/petitioner/husband praying for divorce.

6. Facts of the instant *lis*

The husband/appellant has prayed for divorce against his wife on the ground of desertion and cruelty. The said marriage has been solemnized on 10.06.2001. It is the contention of the husband that the respondent/wife is not able to reside with him in a joint family. It has also been stated by the petitioner/husband that he had tried his level best to convince his wife that is the respondent to live together in a joint family with the other family members but all his efforts have been in vain. The husband has also stated that from the core of his heart he had tried to have a happy conjugal life with his wife but his wife is a person of desperate nature. It has also been stated that even the brothers of the wife often tortured the petitioner/husband physically and mentally.

It has further been stated that the couple has a child namely Deep Adak who at the time of filing of the suit was aged about ten years. The husband has also stated that the ill-behaviour of the wife has made his life miserable. He has further stated in the petition for divorce that on 03.01.2005 his wife and her brothers physically

assaulted him and driven him out from the petitioner's own house. It has also been stated that the wife has even uttered that she will not divorce him if he wants to do so.

7. On the contrary, the wife has denied all the allegations of torture by herself upon her husband. The wife has specifically denied as regards to the allegation of ill-behaviour and torture on her part and also by her brothers. In contrast to the allegations made by the husband the respondent/wife has stated that she has always discharged her marital obligation towards her husband and her in-laws. It has also been stated by her that she has always been neglected and subjected to torture and humiliation by her husband. She has further stated that she has never inflicted torture upon her husband. It has also been stated by the wife that her husband is a man of uncertain temperament having no sense of decorum and is in the habit of maintaining extra marital relation with other woman so he is trying to get divorce from his wife.

8. Mr. Chittapriya Ghosh Ld. Counsel representing the appellant/husband being assisted by Mr. Sandipan Pal and Ms. Tithi Chakraborty during his exhaustive argument has stressed upon the point that

- i)** The wife that is the respondent has been torturing her husband and being unable to bear the torture the husband

has been compelled to pray for divorce on the ground of cruelty and desertion.

ii) The Id, Counsel has stressed upon the point that even the brothers of the respondent/wife used to torture the appellant/husband and as a consequence of the said torture the husband has sought for divorce.

iii) At the time of arguing the matter on behalf of the husband the Ld. Counsel has raised the issue that the wife has alleged against her husband that she has extra marital affairs with other women and the said allegation has not been proved by the wife. This raising of allegation without any proof leads to cruelty.

Banking upon the aforesaid submission and relying upon the judgment passed by a coordinate bench of this Court in the case between Tapan Kumar Chakraborty and Smt. Jyotsna Chakraborty published in AIR 1997 Cal 134 the Ld. Counsel has prayed for allowing the present appeal thereby granting divorce.

9. Ms. Piyali Sengupta Ld. Counsel representing the respondent /wife being assisted by Mr. Victor Chatterjee and Mr. Barnamoy Basak during her argument has submitted that

i) The allegations brought on behalf of the husband as regards to cruelty and desertion are cropped up story. He

has further submitted that neither the wife nor her brothers have ever disregarded the appellant/husband and least to say that they have applied force upon the husband.

On the contrary it is the husband who has not treated his wife well.

ii) The Ld. Counsel has further submitted that apart from oral evidence the husband has not produced any iota of evidence proving or trying to prove that assault has been committed upon him. Story of assault by the wife and her brothers upon the appellant/husband is false and fabricated.

iii) The Ld. Counsel has further submitted that the appellant/petitioner/husband could not exhibit any document in support of his contentions, on the contrary on behalf of the respondent/wife the signature of the husband on a document said to be compromise has been exhibited. In the said document, the name of one China Adak appears who is the wife of one Kartick Adak.

Banking upon the aforesaid submission the Ld. Counsel has submitted that the judgment passed by the Ld. Trial Court is in accordance with law and has been passed correctly.

10. Thus, the moot point for consideration is as to whether the impugned Judgment passed by the Ld. Trial Judge is in accordance with law or not.

11. Considering the submissions of the Ld. Counsels it is evident that the appellant/petitioner has relied upon the fact that the wife has been torturing him and as an effect he is unable to lead a happy conjugal life as a consequence of which he has been compelled to seek divorce against his wife and his wife has deserted him.

12. Upon going through the deposition of the petitioner and respondent before the Trial Court, we find that at best a situation emerges where the petitioner has moved out of the matrimonial home to reside in a rented accommodation. The wife, on the other hand, continues to reside in the matrimonial home. The facts emerging from the pleadings and deposition of the parties, therefore, does not even remotely suggest that the wife without reasonable cause and without consent, or against the wish of the petitioner has deserted the petitioner or willfully neglected the petitioner. In this connection, it would be relevant to reproduce Section 13(1)(ib) and (Explanation) appended thereto which reads as follows:

“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—

...

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

...

[Explanation.—In this sub-section, 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].”

The element of desertion as alleged by the petitioner was required to be established so as to satisfy this statutory provision extracted above. Whether a case of desertion is established or not is to be inferred from the facts brought on record by way of evidence and such facts and evidence must be sufficient for any prudent person to conclude that the intentional abandonment of the petitioner by the respondent was without his consent and without a reasonable cause. It is for the deserted spouse (in this case the petitioner) to establish that the deserting spouse, allegedly the respondent herein had an intention to bring co-habitation to a permanent end. The facts presented at the trial herein, however, present a different picture altogether. It is the petitioner who has moved out of the matrimonial home. Therefore, the question of the respondent (wife) moving out without consent or without reasonable cause, with an intention to bring co-habitation to a permanent end, does not arise. The petitioner has not anywhere alleged in the pleadings or deposed at the trial that he made efforts to move back with the respondent wife in their matrimonial home and continue to live with the respondent wife. In fact, it is

the specific case of the wife that the petitioner was maintaining relation outside marriage with another lady. To facilitate such relationship he moved out, whereas the respondent (wife) maintains her feelings and desire to resume living together with the petitioner. In absence of the necessary elements of “*animus deserendi*” on the part of the deserting spouse (in this case the respondent) having been established with reference to any material whatsoever, we find that the Trial Court has rightly concluded that desertion could not be established. In this context we refer to Paragraph-7 of the judgment passed by the Hon’ble Apex court in the case between ***Debananda Tamuli vs. Kakumoni Katakya*** reported in ***(2022) 5 SCC 459***, wherein the Hon’ble Supreme Court laid down the requisite facts and circumstances for inferring existence of *animus deserendi*.

“7. We have given careful consideration to her submissions. Firstly, we deal with the issue of desertion. The learned counsel appearing for the appellant relied upon the decision of this Court in Lachman Utamchand Kirpalani [Lachman Utamchand Kirpalani v. Meena, (1964) 4 SCR 331 : AIR 1964 SC 40] which has been consistently followed in several decisions of this Court. The law consistently laid down by this Court is that desertion means the intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is a factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus deserendi on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home. The view taken by this Court has been incorporated in the Explanation added to sub-section (1) of Section 13 by Act 68 of 1976. The said Explanation reads thus:

"13. Divorce.—(1)

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Explanation.—In this sub-section, 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."

13. As noticed from the facts noted above such facts and circumstances have not been made out by the petitioner with reference to any material whatsoever.

14. Insofar as the issue of cruelty is concerned, we now proceed to consider the evidence, if any, on record in support of cruelty. At the very outset, we observe from the record that it transpires that the husband has deposed that alleged trouble was not ventilated to any Government forum for redress. He has further deposed that his wife has been residing in his house and he has no data to show that his wife left his society or company. During cross-examination the husband has further deposed that he does not know what is contained in his application for divorce. On behalf of the husband apart from himself none has corroborated the allegations which have been made by the husband. The wife has denied the allegation that her husband was compelled to leave the house and has been compelled to live elsewhere. As regards to the extra marital relationship the wife has asserted the same during her cross-examination and has further submitted that she had

lodged a complaint at the police station ventilating the torture inflicted upon her by her husband but had not proceeded further.

15. The wife in her written statement has stated about the extra marital affair of the plaintiff/husband. The same has been denied by the plaintiff and in fact the submission has been made that such unfounded and uncorroborated allegations, which have not been established by the respondent/wife, *per se* would amount to cruelty. We make a note of such submission only for rejecting the same. It is not a case where the respondent/wife has made any such allegations, by instituting any proceeding against the petitioner; and has not failed to establish the same therein. In the present case while resisting the petitioner's plea for divorce, the respondent in her defence has made such a statement. We further find that the petitioner's signature on a document being a document of compromise dated 07.10.2004 has been marked an exhibit in evidence at the trial. From the said document of compromise it appears that the name of the lady with whom the respondent was alleging some relationship outside the institution of the marriage is prominently figuring in settlement of the dispute between the parties by the compromise. We are conscious of the fact that the document has not been proved but since the

signature of the petitioner has been proved on the said document we have considered this aspect of the matter.

16. Reliance placed by the Ld Counsel for the appellant on the decision of a coordinate Bench in the case between ***Tapan Kumar Chakraborty vs. Smt. Jyotsna Chakrabort*** reported in ***AIR 1997 CALCUTTA 134*** appears to be misplaced. A bare reading of the Paragraph-21 of the said judgment reveals that expression of an apprehension regarding a relationship outside the institution of marriage would not constitute cruelty in all circumstances. Where the person alleging such fact has some objective basis for making such allegations then he/she would not be held guilty of cruelty. As noticed above, in the instant case, the objective basis was apparent to the Trial Court from the compromise dated 07.10.2004 wherein the name of the person with whom the wife has alleged the petitioner to have a relation is found.

17. Insofar as the issue of cruelty is concerned, we find that no material whatsoever, let alone any convincing material has been brought before the Trial Court in support of the allegations made in the pleadings. It is trite law that cruelty is required to be established both by pleading and proof so as to constitute a ground for dissolution of marriage/ divorce. In the present case as noted above apart from verbal allegations there is not an iota of

material to substantiate the same. It has been repeatedly held by the Courts that cruelty has many facets and may differ from person to person depending on the social context, economic strata of the parties to the marriage and such other factors. Be that as it may whatever may be the bench mark for assessing cruelty there must be some incident of cruelty proved by the party alleging it, which in the present case is totally lacking.

18. The law also in this regard is well-settled by several decisions of the Apex Court. We intend to refer and rely upon a celebrated decision of the Hon'ble Apex Court in ***Samar Ghosh vs. Jaya Ghosh*** reported in ***(2007) 4 SCC 511***. The Apex Court considering the various earlier judgments on the issue of cruelty as a ground for dissolution of marriage, has held that there can be no fixed comprehensive definition of mental cruelty. What is cruelty in one case may not amount to cruelty in another case and the subject of cruelty differ from person to person depending upon the upbringing level of sensitivity, educational, family and cultural background, the financial position, social status, customs, traditions etc. Having observed so the Apex Court has laid down the law that it would be prudent and appropriate to adjudicate a case by evaluating the peculiar facts and circumstances keeping in background the above noted considerations by way of illustration. Some instances of human

behaviour which may be relevant in dealing with the case of mental cruelty have also been enumerated therein in Paragraph-100 of the judgment in the case of **Samar Ghosh** (*supra*).

We find that in the present case the plaintiff has failed to substantiate that the allegations leveled against the respondent falls within any of the illustrations contained in the judgment of the Apex Court in the case of **Samar Ghosh** (*supra*). True it is that the illustration is not exhaustive and it is not required that the case must fall within only one of those circumstances as enumerated in the judgment of the Apex Court, but in the present case the allegation of cruelty is devoid of any substance whatsoever. Apart from an allegation of cruelty, there is no reference to any instance of cruelty corroborated by any material whatsoever.

19. We are therefore of the considered and firm opinion that no case whatsoever has been made out by the plaintiff before the Trial Court to establish cruelty as a ground for dissolution for marriage between the parties.

20. As a last resort the appellant has made a desperate attempt by raising the contention of irretrievable breakdown of marriage. In this connection he has referred to the decision of the Apex court in the case of **Kiran Jyot Maini vs. Anish Pramod Patel** reported in **2024 SCC online SC 1724**. We are not impressed by

this desperate attempt of the plaintiff. Irretrievable breakdown of marriage has not been incorporated in the statute as a ground for dissolution of marriage or divorce. The judgment of the Apex Court relied upon by the petitioner/ appellant is in exercise of jurisdiction by the Apex Court under Article 142 of the Constitution of India. This Court however is exercising appellate jurisdiction and it is needless to say that it cannot by any stretch of imagination be expected to exercise jurisdiction as has been done by the Apex court in the case of ***Kiran Jyot Maini*** (*supra*) being relied upon by the petitioner.

21. From the aforementioned discussion this Court is of the view and opinion that the appellant/petitioner/husband has not been able to prove that he has been tortured both physically and mentally by the respondent/ wife. The husband has not been able to prove that the wife has deserted him. Being unable to prove the same it is not expected that a Court of law only on the basis of verbal allegation will untie/sever the sacred knot of marriage.

22. As such this court is of the view that the judgment passed by the Ld. Trial Judge does not require interference.

23. Thus the instant appeal being **F.A. 140 of 2022 is dismissed without any cost.**

24. Parties shall be entitled to act on the basis of the server copy of the judgment and order placed on the official website of the Court.

25. Urgent certified photo copies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.

I Agree,

(Madhuresh Prasad, J.)

(Supratim Bhattacharya, J.)