

Court No. 1
30.04.2024
(JPD 116)
(S. Banerjee)

Calcutta High Court
In the Circuit Bench at Jalpaiguri
Appellate Side

FAT 11 of 2023

Tanushree Roy
Vs.
Prasenjit Roy @ Hang

CAN 1 of 2023

Mr. Arnab Saha

... for the appellant

1. Affidavit of service filed in court today be kept on record.
2. None appears on behalf of the respondent/husband despite service.
3. We have heard learned advocate for the appellant/wife at length in support of the instant appeal.
4. The present appeal is now taken up for passing appropriate order.
5. In this appeal the order dated 18.05.2023, passed in Matrimonial Suit No. 138 of 2022 by the learned Additional District Judge, 1st Track-I, Alipurduar has been assailed. By the impugned order the learned Trial Court dismissed the appellant/wife's

application for divorce ex parte as filed under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'said Act').

6. On perusal of the copy of the plaint as has been annexed with the stay petition being CAN 1 of 2023, it appears to us that the said suit for divorce has been initiated basically on the ground of cruelty and desertion. It is the case of the petitioner/wife before the learned Trial Court that her marriage was solemnized as per Hindu rites and customs on 04.03.2021 and thereafter she started leading her conjugal life with the respondent/husband at her matrimonial home. It is the further case that while leading such conjugal life, it is found that the respondent/husband was a drunker and he used to come at late night in intoxicated condition and used to assault the present appellant/wife mercilessly and further the other family members of the husband of the present appellant also used to torture her on account of additional demand of dowry. It is the further case of the petitioner/wife that on account of quarrel at the instance of her husband for non-fulfillment of additional demand of dowry, she was driven out from her matrimonial home on 15.09.2021 and thereafter she took shelter at her paternal home at Paschim Barochowki under

PS and district Alipurduar. It is the further plaint case that since then the respondent/husband took no information of the petitioner/wife. It is the further plaint case that on account of such assault, the petitioner/wife was treated by doctor.

7. It appears to this court that before the learned Trial Court the petitioner/wife, being PW-1, has filed her affidavit in chief and her affidavit in chief seems to be the replica of the assertion as made by her in her plaint.

8. It further appears to this court that the learned Trial Court while passing the impugned order has perused the plaint as well as the affidavit in chief as submitted by the PW-1 but came to a finding that the incident of torture and question of desertion could not be proved by citing any supporting evidence.

9. We have meticulously gone through the entire materials as placed before this court. It appears to us that the petitioner/wife before the learned Trial Court on affidavit categorically stated that after solemnization of her marriage, she went to her matrimonial home wherein she was assaulted by her husband physically and she was also mentally and physically harassed and tortured by the inmates of

her matrimonial home on account of demand of dowry. It is the further case that she was thrown out from her matrimonial home on 15.09.2021. Admittedly before the learned Trial Court no materials have been placed by the petitioner/wife to substantiate that she was treated by any doctor for her injury. But in the considered view of this court, those are not very much fatal because before the learned Trial Court so much material is coming to disbelieve the unchallenged testimony of the PW-1 and it is to be kept in mind that degree of proof in a civil suit is distinguishable from that of a criminal trial. In further considered view of this court the learned Trial Court could have applied the theory of proof by preponderance of probability while passing the impugned order.

10. We also take note of the fact that in spite of service of the writ of summons the defendant/husband did not appear and contest the suit. The trial court under such circumstances should have given due regard to the provisions of Order VIII Rule 5 of the Code of Civil Procedure. The said provision clearly postulates that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant,

shall be taken to be admitted except as against a person under disability. The doctrine of non-traverse could have been applied in the instant case for returning a finding in favour of the wife as the allegation of cruelty and desertion has been proved by oral testimony of the wife and in absence of any denial, specific or otherwise, the court could not have held against the wife and dismiss the suit ex parte.

11. In view of the discussion made hereinabove, we are of the considered view that the appellant, who is the petitioner before the learned Trial Court, is successful in proving the grounds of divorce by adducing sufficient evidence.

12. Accordingly, the instant appeal is allowed.

13. Consequently, the impugned order dated 18.05.2023 passed by the learned Additinoal District Judge, Fast Track Court, 1st Court at Alipurduar in Matrimonial Suit No. 138 of 2022, is hereby set aside.

14. Consequently Matrimonial Suit No. 138 of 2022 is hereby decreed.

15. The matrimonial tie by and between the present appellant, Smt. Tanushree Roy and Sri

Prasenjit Roy @ Hang, is hereby dissolved with effect from the date of passing of this judgement.

16. There shall be no order as to costs.

17. Department is directed to draw up the decree as expeditiously as possible.

(Soumen Sen, J.)

(Partha Sarathi Sen, J.)