

Form No. J(2)

In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

Present: The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar

F.A. 96 of 2018

Sri Saikat Sarkar
Vs.
Smt. Swati Guha (Sarkar)

For the appellant : Mr. Amales Ray
Ms. Mousumi Bhowal
Mr. Iohan Bhattacharya

Heard on : 19.03.2025

Judgment on : 19.03.2025

Sabyasachi Bhattacharyya, J.:-

1. None appears for the respondent at the time of call.
2. Accordingly, the appeal is taken up for hearing *ex parte*.
3. The plaintiff/husband in a suit for divorce has preferred the instant appeal.
4. By the impugned judgment and decree, the learned trial Judge dismissed the suit for divorce, filed both on the grounds of cruelty and desertion.

5. Insofar as desertion is concerned, the finding of the learned trial Judge was that the suit was premature, since the period of desertion had not yet reached the statutory mandatory period of two years before filing of the suit.
6. Learned senior counsel for the appellant, in his usual fairness, does not seriously harp on the ground of desertion.
7. However, it is contended that the learned trial Judge erred in law and on facts in refusing a decree of divorce on the ground of cruelty.
8. Learned senior counsel points out that the respondent/wife did not adduce any evidence of her own and as such, failed to substantiate the case as made out in her written statement.
9. It is further pointed out that the learned trial Judge proceeded on the premise that the respondent/wife had come to visit the appellant/husband after filing of the suit, in the year 2012, and stayed with him for a period of twenty-five days.
10. However, learned senior counsel places the answer of the appellant as PW-1 to Question-19, put to him in his cross-examination, where he says that the wife came only for about twenty-five days when the husband was sick; however, she had visited the husband 4/5 times within this period but did not stay.
11. It is further pointed out that the wife having deserted the husband for a considerable period, such desertion itself should

be construed to be a refusal to cohabit with the appellant, which is an integral part of matrimonial life.

- 12.** In view of such refusal, the same sufficiently tantamounts to cruelty of such a nature that the spouse cannot be expected to live together for the rest of their lives.
- 13.** Learned counsel for the appellant-husband also hints at the marriage between the parties having broken down irretrievably.
- 14.** Upon a careful consideration of the impugned judgment and the materials on record, we find that there is no element of irretrievable breakdown of marriage, since the wife, in paragraph no.17 of her written statement, stated that she is always ready to continue the matrimonial tie with her husband and to live together as husband and wife at his house Dinhata or the matrimonial house, whatsoever may be, and she has no intention to discontinue the matrimonial life and vehemently opposes the fact that she deserted the husband.
- 15.** There is nothing on record to show that the wife deviated from such stand at any point of time subsequently.
- 16.** The plinth of the submission of the appellant is that his wife, the respondent, has deserted him, thus depriving the husband from conjugal bliss.
- 17.** In fact, the suit was filed, *inter alia*, on the ground that the respondent/wife has permanently deserted the husband in or around the month of May, 2010.

- 18.** However, in his cross-examination, the husband, as PW-1, categorically admits that the respondent/wife came to him and stayed at his house for twenty-five days at a stretch in the year 2012, when the husband was sick.
- 19.** Not only that, it is admitted by the husband in his cross-examination that the wife came on such occasion in response to the invitation by the appellant/husband himself, thereby clearly indicating that the alleged cruelty, if any, was condoned by the husband.
- 20.** That apart, the very fact that admittedly the respondent/wife responded immediately to the invitation of the appellant/husband, that too when he was sick and in need of her, and stayed with him for twenty-five days, is itself sufficient to indicate the animus of the respondent/wife to continue residing with her husband.
- 21.** The appellant/husband further admits in his cross-examination that his wife came and started residing with him after institution of the suit in the year 2012.
- 22.** The contrary stray statement that the wife visited him only for 4/5 times during the period of twenty-five days in 2012 when she stayed with him, in the same breath with his admission that the wife resided with him for the self-same period, cannot enure to the benefit of the husband.

- 23.** The husband admits in his cross-examination further that the marriage between him and his wife was consummated and that the spouses never got themselves medically examined regarding incapacity to bear child.
- 24.** In such backdrop, the plaint case that the matrimonial relationship never reached fruition due to lack of marital intercourse cannot be accepted.
- 25.** Rather, the husband has clearly established in his own evidence that there was consummation between the parties and that there was no medical examination to show that either of the parties was incapable of living a conjugal life.
- 26.** Even the father of the husband/appellant, adducing evidence as PW-2, admitted in his cross-examination that his daughter-in-law lived at their house at Choudhurihat (the matrimonial home) for 15-20 days after her marriage and that she used to live at his Dinhata house periodically for the year 2007-2012.
- 27.** Thus, in view of the suit having been filed in 2011 on the ground that the wife deserted the husband in the year 2010, the admission of both the appellant and his father in their respective cross-examinations that the wife periodically resided at Dinhata, where the husband also resides, from the year 2007 to 2012 continuously, itself demolishes the case that the wife refused to lead conjugal life with the appellant/husband.

- 28.** In view of such categorical admission of the plaintiff's witnesses, there was no further necessity for the respondent/wife to adduce evidence.
- 29.** In fact, there was no scope or occasion for the respondent/wife to adduce negative evidence to prove that she was not guilty of cruelty as alleged by the husband.
- 30.** In order to embellish his case, the husband, in paragraph no.5 and paragraph no.8 of his plaint, also alleged that the relation between the appellant and the respondent was gradually deteriorating and that without any rhyme or reason the respondent started abusing the appellant and his family members.
- 31.** He further alleged that the respondent's character was peculiar and she became suspicious and a maniac.
- 32.** In fact, such allegations, being utterly unsubstantiated in the evidence of the appellant/husband, by themselves could furnish sufficient justification for the wife abstaining from the society of the husband.
- 33.** It is well-settled that one of the spouses cannot take advantage of his or her own wrong to obtain a decree of divorce.
- 34.** In such backdrop, we do not find that there is any infirmity or illegality and/or error of law on the part of the learned trial Judge in refusing to grant a divorce decree to the husband on

the premise that the husband failed to prove any occasion of cruelty by the respondent.

- 35.** Moreover, the learned trial Judge rightly pointed out that no particular date or particulars regarding when conjugal life or marital intercourse was refused by the wife has been mentioned by the husband either in his pleadings or in his evidence.
- 36.** In the absence of any specific or particular averment in that regard, the allegation of cruelty as sought to be made out in the plaint and the evidence of the husband and his father are vague.
- 37.** Thus, since it is trite law that it is not for the appellate court to substitute its own views for that of the learned trial Judge merely because another view is possible on the facts and circumstances of the case, we do not find any reason to find fault with the impugned judgment and decree.
- 38.** By applying the yardstick of preponderance of probabilities, which is applicable in civil cases, we find that the learned trial Judge was perfectly justified in refusing the divorce decree as prayed for by the plaintiff/husband.
- 39.** Accordingly, we do not find any scope of interference with the impugned judgment and decree.
- 40.** Hence, F.A. 96 of 2018 is dismissed, thereby affirming the impugned judgment and decree dated November 29, 2016 passed by the learned Additional District Judge, Fast Track

Court at Cooch Behar, District-Cooch Behar in Matrimonial Suit
No.80 of 2011.

- 41.** A formal decree be drawn up accordingly.
- 42.** There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)

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