

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.618 of 2013

Subhash Chandra Jha, Son of Sri Prabhu Narayan Jha Resident of Mohalla-
O.T. Para Railway Colony, P.S.- Katihar, District- Katihar.

... .. Appellant/s

Versus

Smt. Archana Daughter of Sri Kapileshwar Mishra Resident of Mohalla-
Manihari Road, Laliyahi, P.S.- Katihar, District- Katihar.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Siddhartha Prasad
For the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard learned counsel for the appellant and learned
counsel for the respondent.

The present Miscellaneous Appeal is directed against the
judgement and decree dated 26.7.2013 passed by the learned
Principal Judge, Family Court, Katihar in Matrimonial Case No.
53 of 2005, whereby the matrimonial suit for decree of divorce
on dissolution of marriage between the appellant and the
respondent, has been dismissed on contest, however, without
costs.

The marriage between the appellant husband and the
respondent wife performed on 6.7.2003 at Katihar according to



Hindu rites and ceremonies, is admitted. The respondent wife was not ready to reside at the husband's place, hence, the appellant husband was compelled to file Matrimonial Case No. 50 of 2005 for restitution of conjugal rights. However, subsequently, the appellant husband withdrew the said matrimonial case on 15.7.2004, as the appellant was given assurance of bidagiri. Thereafter, the respondent wife came to the appellant husband's house but she began threatening the appellant over trivial and petty issues. The respondent wife also used to insult the retired ailing father, old mother and handicapped brother of the appellant husband. The respondent also used to quarrel and abuse the appellant causing great mental pressure and humiliation. Hence, the appellant husband filed Matrimonial Case No. 53 of 2005 for a decree of divorce on dissolution of marriage on the ground of desertion and cruelty.

The respondent wife appeared, on notice, filed written statement and contested on the ground that the matrimonial suit is not maintainable and that the appellant husband has no cause of action. She denied the accusation of cruelty and desertion, admitted the marriage being performed on 6.7.2003 and the second marriage (Gauna) on 7.11.2003. For six months, the respondent wife stayed with the appellant husband (In the railway



quarter of Amrendra Pandey, maternal uncle of the appellant) but the appellant did not behave properly, inflicted torture upon her and same was the behaviour of the maternal uncle of the appellant and his family members. The appellant filed Matrimonial Case No. 50 of 2004 for restitution of conjugal life on 30.6.2004 and himself withdrew the same on 15.7.2004 without any notice to the respondent wife, which was filed in anticipation of filing of criminal case by the respondent wife. The respondent never abused the appellant and the appellant's claim that he was being abused at the house of Sanjay D'Cruz is absolutely false. Initially after the marriage the respondent wife was taken to village Bhura, the native place of the appellant and thereafter to Katihar.

Considering the pleadings of the parties, the learned court below framed five issues, which reads as follows:

- i. Is the suit as framed maintainable ?
- ii. Is the plaintiff (applicant) got any cause of action for the suit ?
- iii. Is the plaintiff subjected to torture physically and mentally ?
- iv. Is the plaintiff entitled for a decree of divorce ?
- v. Is the plaintiff entitled for any other relief or reliefs ?”



During the pendency of the matrimonial case, maintenance pendente-lite under Section 24 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) @ Rs.1000/- per month and litigation cost of Rs.10000/- were awarded to the respondent.

The appellant husband in support of his case, examined five witnesses – P.W. 1 Sanjay Kumar Jha and P.W. 2 Krishna Murari Jha being cousin of the appellant, P.W. 3 Sanjay D’Cruz and P.W. 4 Aloysius D’Cruz are friends of the appellant husband and P.W. 5 Subhash Chandra Jha is the appellant himself.

The respondent wife has also examined four witnesses – R.W. 1 Jamuna Yadav, an acquaintance of the respondent, R.W. 2 Sri Krishna Mishra alias Manoj Mishra being brother of the respondent, R.W. 3 Kapileshwar Mishra being father of the respondent and R.W. 4 Archana Mishra, the respondent herself. Apart from the oral evidence, documentary evidence has been filed mainly with regard to the cases lodged against each other.

The witnesses supported the cases of respective parties with some additional facts which have not been pleaded. Most of the witnesses examined on behalf of the appellant husband are hear say witnesses as they are not family members of the appellant husband.

The learned Court below took attempts for reconciliation of



the issue but the same failed since the appellant husband and the witnesses could not place and prove the exact time and date of cruelty being inflicted, and therefore, no specific case of physical cruelty being placed and most of allegation related to mental cruelty and the evidence were found to be inconsistent and contradictory to each other, the learned Principal Judge, Family Court dismissed the matrimonial suit on contest vide judgement dated 26.7.2013, which is under challenge in the present Miscellaneous Appeal.

Learned counsel for the appellant submits that the impugned judgement and decree is against the weight of evidence. The specific case of the appellant husband is that the respondent wife inflicted torture upon him, his old ailing parents, disabled brother, maternal uncle and family members as well as friends. The respondent wife herself deserted the appellant husband and since 2005 there has been no physical relationship between them, hence, the marriage has irretrievably broken down. Reliance has been placed to the case of Samar Ghosh Vs. Jaya Ghosh, reported in (2007) 4 SCC 511.

Notices were issued to the respondent vide order dated 21.1.2016. Subsequently, the respondent appeared and on joint prayer of the parties, vide order dated 1.5.2019, the appeal was



directed to be listed on 15.5.2019 in chambers in order to make an effort to resolve the issue but on that date, neither the respondent nor her counsel was present, hence the appeal was adjourned for 8.7.2019, but on 8.7.2019 also, none appeared on behalf of the respondent, as a result, it was adjourned for 14.8.2019. However, the appeal was taken up on 22.8.2019 but again none appeared for the respondent. On request of learned counsel for the appellant, learned counsel for the respondent appeared on 23.8.2019 and submitted that the respondent is not responding, hence the appeal be disposed of.

On application of the factual matrix, it gets necessitated that the scope of cruelty be understood within the ambit of Hindu Marriage Act, 1955. Cruelty is not defined under the Act. Cruelty can be physical or mental. The concept of cruelty and its effect vary from individual to individual and it depends upon the social and economic status to which such person belongs. Hence, there is no straight jacket formula with regard to defining cruelty, particularly, mental cruelty. The Hon'ble Supreme Court in the case of A. Jayachandra Vs. Aneel Kaur, reported in AIR 2005 SC 534. Paragraph 10 of the judgement reads as follows:

“10. The expression ‘cruelty’ has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of



marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may



not at the same time be direct evidence. In cases where there is no direct evidence, courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.”

From the pleading of the appellant husband in the plaint as well as the evidence on record, it appears that the only allegation is of abuse and of threatening to get the appellant implicated in criminal cases, though he has also alleged during trial that the respondent wife tried to consume poison but neither there is pleading to that effect nor any evidence has been led in that regard.

It is well settled law that ordinary wear and tear cannot be held to be cruelty. Cruelty in one case may not amount to cruelty in another. It is easy to prove the physical cruelty with direct evidence but it is really difficult to prove the mental cruelty with direct evidence. The appellant husband has examined P.W. 1 and P.W. 2 who are his cousin but there is no pleading that they used to reside with the appellant husband. P.W. 3 and PW. 4 are friends and acquaintances. Hence, it appears that close family members, like, parents and others have deliberately been withheld. In the



case of mental cruelty, the evidence of close family members reflect more light with regard to infliction of cruelty.

Hence, we do not find any infirmity with regard to the finding of the learned Court below that mental cruelty has not been proved. In the case of Samar Ghosh (supra), the Hon'ble Supreme Court, has laid down certain instances of mental cruelty. Paragraph 101 of the judgement reads as follows:

“**101.** No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of “mental cruelty”. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot



amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-



day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a



legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

The above instances clearly suggest that the mental pain, and agony should be such that it becomes impossible for husband or wife to reside with the other side. The case of the appellant does not come within the purview of above mentioned instances of mental cruelty. However, in the case of K. Srinivas Rao Vs. D.A. Deepa, reported in (2013) 5 SCC 226, the above instances of cruelty have been further broadened. Paragraph 16 of the judgment reads as follows:

“16. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.”

From the pleadings of the appellant husband it appears that



the appellant and the respondent lived together only for a brief period. From the evidence of P.W. 5 it appears that the respondent wife stayed with the appellant on two occasions at village Bhura, for a brief period. Moreover, the evidence of P.W. 3 and P.W. 5 reflects that the respondent wife stayed with appellant at the maternal uncle's house of the appellant also.

On the contrary, the respondent wife has examined R.W. 2 Sri Krishna Mishra, brother of the respondent and R.W. 3 Kapileshwar Mishra, the father of the respondent. Hence, at least two family members have deposed to suggest that no mental cruelty was inflicted upon the appellant husband.

So far as the ground of desertion is concerned, neither there is specific pleading nor evidence has been led to the effect that the appellant husband was deserted by the respondent wife for continuous period of not less than two years immediately preceding to the presentation of the matrimonial suit. The marriage was performed on 6.7.2003, while the Matrimonial Case was filed in 2005.

Desertion is also not defined in the Act but two elements which are necessary to constitute desertion, are that, either of the spouse should have left the company of the one without other's consent and without reasonable cause. The Hon'ble Supreme



Court in the case of Savitri Pandey Vs. Prem Chandra Pandey, reported in (2002) 2 SCC 73, illustrated the concept of desertion.

Paragraph 9 of the judgement reads as follows:

"9. Following the decision in Bipinchandra case this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena by holding that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation."

With regard to desertion, no documentary evidence has



been brought on record and it remains confined to the allegations and counter allegations, where the appellant husband stated that the respondent wife deserted him whereas the wife also stated that she has been forced to leave the matrimonial house.

So far as the question of allegation with regard to the adulterous relationship and counter allegations by both the parties is concerned, this Court is not inclined to give any finding on the same since those allegations have been pleaded in the plaint and the written statement, nor the evidence has been led to that effect to prove the same. More over, neither side has made adulterer as a party. Rule 16 of the Patna High Court Hindu Marriage Rules stipulates that the adulterer is a necessary party when the dissolution of marriage or judicial separation is sought on the ground of adultery. However, on certain grounds the Court may allow the petitioner not to make an adulterer as party, if he is dead or if he could not know his name inspite of due diligence. Rule 16 of the Rules reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said



petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

Similar provision has been made under Rule 214(16) of the Civil Court Rules, which reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a



prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

It appears from the impugned judgement as well as from the grounds taken in the Miscellaneous Appeal that half-hearted allegations have been made to the effect that both sides are residing separately since 2005, hence, the marriage between the appellant and the respondent have irretrievably broken down. Section 13 of the Act does not stipulate any ground for dissolution of marriage on the basis of irretrievable breakdown of marriage. However, that can be a material consideration while considering the dissolution of marriage on the ground of desertion and cruelty but that cannot be the main ground for dissolution of marriage. However, the Hon'ble Supreme Court has dissolved the marriage on the basis of irretrievable breakdown of marriage, whereby the principle has elaborately been discussed in the case of Samar Ghosh (supra), D.A. Deepa (supra) and Naveen Kohli (supra). However, in the case of Anil Kumar Jain vs. Maya Jain, reported in (2009) 10 SCC 415, it has



been held that the Supreme Court in exercise of jurisdiction under Article 142 of the Constitution of India can dissolve the marriage on the ground of irretrievable breakdown, but the marriage cannot be dissolved on such ground alone by the High Court or Family Court. Paragraph 28 and 29 read as follows:

“28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13- B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is



not available even to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.”

In view of the discussions made above, we do not find any infirmity in the impugned judgement and decree under appeal.

Accordingly, this Miscellaneous Appeal having no merit is dismissed.

(Dinesh Kumar Singh, J)

(Arvind Srivastava, J)

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