IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-
The Hon'ble Justice Harish Tandon
And
The Hon'ble Justice Madhuresh Prasad

F.A. 9 of 2016

Gopal Ranjan Bahdopadhyay
@ Gopal Ranjan Banerjee
Vs.
Smt. Manidipa Banerjee (Talukdar)
with
COT 99 of 2022

Smt. Manidipa Banerjee (Talukdar)
Vs.
Gopal Ranjan Bahdopadhyay
@ Gopal Ranjan Banerjee

For the Appellant (F.A. 9 of 2016)
For the Respondent (COT 99 of 2022) : Mr. Kallol Basu
Mr. Bratin Kumar Dey

For the Respondent (F.A. 9 of 2016)
For the Appellant (COT 99 of 2022) : Mr. Sohini Chakraborty

Heard on : November 23, 2023

Judgment on : December 21, 2023

Madhuresh Prasad, J.:

1. The petitioner/ appellant is aggrieved by the judgment and decree dated 29th July, 2015 passed by the learned Additional District Judge, 6th Court, Alipore, South 24 Parganas in Matrimonial Suit No. 117 of 2009. The Court has declined the petitioner's prayer for dissolution of marriage with the respondent, and instead granted a decree of judicial separation with effect from the date of decree, prepared under the seal of the Court on 24.09.2015. The Court has

also directed for payment of alimony at the rate of Rs. 3000/- to the respondent and Rs. 4000/- towards maintenance of the minor daughter, both amounts by 7th of each month.

2. Before examining the correctness and legality of the impugned judgment, we, notice the relevant facts, which are not in dispute. The marriage was solemnized on 21.05.1998 and consummated. The respondent was appointed as a teacher in Pakdaha Balipur F P School in the month of December 1999. A daughter was born out of wedlock on 5th May, 2000. The petitioner, on 24.04.2009 brought an application under Section 13 of the Hindu Marriage Act ('HMA' for brevity) praying for a decree of divorce by dissolving the marriage of the petitioner and the respondent, cost of the suit, and any other relief/ reliefs as per law. The same was numbered as Mat Suit No. 117 of 2009.

3. The petitioner asserted that within few days after the marriage, the respondent started to misbehave with the petitioner and his parents and frequently left her matrimonial home without any consent or permission. He has also alleged use of filthy language and assault upon the petitioner's parents in his absence, and neglect to look after the day to day affairs of the matrimonial home. Though petitioner made efforts to adjust and requested the respondent to mend her ways, she did not accede to such request. The respondent created pressure upon the petitioner to live with her at Barrackpore at her paternal house. Efforts to reconcile the issue with intervention of the relatives and parents of the respondent have yielded no result.

4. On 21.05.2003, it is alleged that the respondent deserted the petitioner and left her matrimonial home. She took all her belongings and the minor child, never to return to the matrimonial home. The efforts by the petitioner to bring her back to the matrimonial home to resume conjugal life only resulted in bitterness. Having waited considerably and left with no chance of reconciliation between the parties he filed the suit.

5. The case of the respondent on the other hand is that there was paucity of accommodation at the petitioner's parent's house. For convenience of attending her duties, on account of her recent appointment as a teacher; and subsequently to facilitate better care of the minor daughter born in May 2000, she continued her service while staying with her minor daughter at her father's house. Otherwise there was no-one to look after the minor daughter. These were the compelling circumstances due to which it was mutually decided for her staying at her father's residence. When the minor daughter attained the age of 2 – 3 years, the respondent had returned to her husband's house at Behala, but again due to difficulties in attending to her duties at the school, she at the instance of the petitioner used to stay at her mother's house. She would come with her minor daughter to stay at the matrimonial home at Behala on holidays like puja vacation, summer vacation and other festivals. She has stated about celebration of her daughter's birthday on 5th May, 2007 at Behala and that she performed all the spiritual ceremonies with the petitioner at his house at Behala after

the demise of the petitioner's father. She has denied the allegations of the petitioner of abandoning her conjugal life or of using any filthy language or assault either to the petitioner or his parents. She, however, has stated that the petitioner's sister was persistent in her efforts to break the marriage of the petitioner and the respondent. It is the case of the respondent that she was residing at Barrackpore or her parent's house based on a mutual decision of the petitioner and the respondent, to facilitate continuance of her service duties without in any way compromising on the care of the minor daughter. She has also stated that soon after her marriage with the petitioner she realized that the petitioner's mother was a mental patient.

6. From perusal of the pleadings as well as the evidence on record it is apparent that the petitioner has sought a decree of divorce dissolving the marriage on the grounds mentioned in Section 13 (1) (ia) (ib), which provisions reads as follows:

> *"(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-*
>
> *…*
>
> *(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or*
>
> *(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or*
>
> *…"*

7. It is the petitioner's case that the story of the respondent of coming to the matrimonial home on holidays, vacations or festivals is false and uncorroborated. In her cross-examination the respondent

(D.W.1) has stated about staying with her parents from 2003 till 2008. The intention of the respondent not to return was thus apparent. There is no allegation made by the respondent in the W.S. Regarding cruelty or desertion by the petitioner, who has regularly been meeting the expenses for their daughter. In so far as, the issue of desertion is concerned, the same has sufficiently been proved. Based on the pleadings and evidence led by the petitioner in the suit the factum of separation and intention on the part of the respondent to bring co-habitation to a permanent end is apparent.

8. In so far as cruelty is concerned, it is submitted by the learned Counsel for the petitioner that the same can be subtle, brutal by gestures or by words. Alleging mental illness of the petitioner's mother, itself amounts to an act of cruelty. Such cruelty is evident from the W.S. filed by the respondent also wherein she has specifically stated about mental illness of the petitioner's mother. Such false and motivated allegations bereft of any material whatsoever are rightly perceived by a dutiful and caring son, such as the present appellant as being an act of cruelty by the wife.

9. Thus, both the grounds under Section 13(1)(ia) and (ib) have been proved by the petitioner. In his evidence, the petitioner (P.W.1) has supported the above noted allegations made in the petition for divorce. Learned Counsel for the petitioner, in support of his submissions relied upon decision of the Apex Court in the case of **Debananda Tamuli v. Smti Kakumoni Kataky reported in (2022) 5 SCC 459**, he has also relied upon a decision of a Division Bench of

this Court in the case of **Smt. Elokeshi Chakraborty vs Sri Sunil Kumar Chakraborty, reported in AIR 1991 Cal 176**. Having established *animus deserendi*, as also cruelty the petitioner was entitled to a decree of divorce by dissolution of marriage.

10. The respondent (D.W.1) on the other hand, has supported her version in Court. The admitted position that emerges from the pleadings and evidence is that the respondent wife remained at her parent's house at least in between May 2000, i.e. after Gargi (their daughter) was born, until 2003 when it is a common case that she had come back to the matrimonial home only to leave again. She has opposed the petitioner's plea for divorce by dissolution of the marriage. It is her case that her residing with her parents, was only on account of convenience and in the best interest, and for better care of the daughter born out of wedlock, without compromising on her service duties. Such arrangement was with consent of the parties and has continued from 2000 up till 2009. There is no particular instance based on which withdrawing of the consent by the petitioner can be made out so as to justify filing of the suit for divorce by dissolution of marriage on the ground of desertion. The ground of cruelty also has not been established by the petitioner. He has not even examined his parents, let alone any other person to substantiate the allegations in the petition regarding abusive and filthy language and assault upon the petitioner and/or his parents. No grounds either under Section 13 1 (ia), or (ib) have been established in the proceedings in the MAT Suit No. 117 of 2009 for

passing a decree of divorce on dissolution of the marriage. The appeal is thus without any substance and deserves to be dismissed.

11. It is by now axiomatic that by merely making averments alleging cruelty in the petition for divorce cannot be taken by the Court to be sufficient for finding existence of such grounds as pleaded. In so far as the element of mental cruelty, the petitioner/ appellant has alleged the same as a consequence of the averments made by the respondent in her response regarding the petitioner/ appellant's mother suffering with mental illness. The issue of mental illness has not been established or proved with any material in the trial. Such allegation, *per se* cannot be viewed to constitute an act of mental cruelty. We take judicial notice of the fact that family members of a large number of people suffering with mental illness are averse to accept the existence of mental illness, nurturing a baseless fear of social stigma. Such misplaced common notions cannot be accepted by the Court to hold that an allegation of mental illness of the petitioner/ appellant's mother *per se* would constitute an act of mental cruelty. Mere failure to prove the allegation of mental illness, cannot be considered as an act of mental cruelty, as has been considered by the Apex Court in the case of **Ramchander vs. Ananta reported in (2015) 11 SCC 539.** In so far as physical cruelty based on allegations of use of abusive language and assault upon the petitioner, and his parents, this Court has already recorded a finding that in absence of any corroborative material the same cannot be accepted.

12. Having given our careful consideration to the facts and evidence as well as the argument/(s) on behalf of the parties, we find the counter allegations regarding misbehavior by either of the parties to the proceedings also have not been alleged or proved with reference to any details as regards the date/(s) or place pertaining to which the allegations have been levelled. The petitioner has not corroborated his assertions with reference to any marital whatsoever regarding cruelty founded on use of filthy/ abusive language by the respondent against his parents, or in respect of the alleged assault. He has not even examined his parents, the alleged victims in support of such allegations.

13. The petitioner's case of desertion also is with effect from 21.05.2003 and not in respect of the period prior thereto. In his cross-examination he has stated that he does not have any document to show that he paid maintenance or inquired about the respondent or their daughter in between 2000 to 2003. It has emerged from his evidence that he had no information even regarding his wife suffering with breast cancer or undergoing any surgery for such condition. There is also no material to show that from 21.05.2003 till filing of the suit on 24.04.2009, the petitioner made any efforts to bring the respondent back to the matrimonial home.

14. In so far as the respondent is concerned, the deposition/ evidence of respondent (D.W.1) is bereft of any material to support her contention that her father gave ornaments, utensils and other articles including lump sum at the time of her marriage. She has

admitted that she did not write any letters to show that she wanted to resume living together with her husband. She has also not supported the alleged mental illness of the petitioner's mother with any document or witness.

15. There is also nothing on record to show that the petitioner at any time prior to filing of the suit in question had objected to the respondent residing with her parents, or made any efforts to bring her back to the matrimonial home. There is nothing on record to show lack of consent or, when in between 21.05.2003 and filing of the Mat Suit in 2009, the consent of the petitioner was withdrawn. The requisite element of *animus deserendi*, on part of the respondent thus has not been established. Reliance placed by the learned Counsel for the petitioner on judgment of the Apex Court in the case of **Debananda Tamuli (Supra)** in our opinion is not sustainable in view of the distinguishable facts. In the said case there was no dispute that parties were staying separately from 01.07.2009. In the instant case, however, it is the respondent's case that she was living at her parent's house based on a mutual decision for the sake of convenience of attending to her service duties without compromising on the child care, with frequent stay at her husband's house during vacations, festivals etc. The Apex Court in the case of **Debananda Tamuli (Supra)** has taken note of the distinguishable factor of that case, wherein the wife has not pleaded and established any reasonable cause for remaining away from her matrimonial home, which is not the circumstance in the instant case. Decision in

the case of **Smt. Elokeshi Chakraborty (Supra)** is thus also inapplicable to the facts and circumstances of the instant case. In the said case apart from the husband, other witnesses had been examined to establish desertion by the respondent's spouse. There was evidence to show that the respondent spouse adamantly refused to go to the petitioner husband's house. The evidence in this regard was not discredited by the respondent/ appellant therein. There were also certain letters exhibited which showed that the respondent/ appellant was not living in her matrimonial home. It is under such circumstances that this Court affirmed the finding of the Trial Judge that the appellant had descerted the respondent and that the period of desertion was more than two years, next preceding the date of filing of the suit. The precedence relied upon by the learned Counsel for the petitioner therefor are not applicable to the facts and circumstances of the present case.

16. It is axiomatic that flash point for igniting a matrimonial dispute and the complexities of a matrimonial dispute vary from case to case and are unique. What may be perceived as an act of cruelty or the circumstances that may be viewed as giving rise to *animus disserendi* by a spouse may vary from case to case. Such variation is based on multiple factors such as socio-economic background of the parties, the size of the family residing at the matrimonial home, the individual temperament of the parties in matrimony, etc. The issue when brought before the Court, however, has to be considered for the purposes of giving effect to the legislative intend in the Act and the

provisions contained therein. In so far as the ground on desertion is concerned, the legislature has provided an explanation in Section 13 itself. The explanation reads as follows:-

> *"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."*

17. From plain reading of the explanation it is apparent that desertion so as to satisfy the statutory intendment for dissolving a Hindu marriage is required to be without reasonable cause and without consent or the wish of the party which has approached the Court for dissolution of marriage. Desertion has been explained by the statute to include willful neglect of the petitioner by the spouse. From the material available by way of evidence in the proceedings before the matrimonial Court, the pleading of desertion in the petition for dissolution of marriage has not been established to be without reasonable cause and without consent or wish of the petitioner. We form such opinion since the petitioner has not denied or disputed the fact that on account of the new employment of the respondent as a teacher and for proper care of the newly born girl child, the respondent was staying at her matrimonial uncle's house up till 2003. Till this period it is not alleged that the respondent was living away from the matrimonial home without consent. It is the petitioner's specific case that the respondent finally disserted the petitioner when she left for matrimonial home along with the

daughter on 21.05.2003. Even thereafter, there is no evidence on record to show when the consent admitted for the period prior thereto was withdrawn, there is also no material to show that the petitioner at any point of time in between 2003 to 2009 made any efforts to bring the respondent back to the matrimonial home. Thus there is no premise for the petitioner to allege request being ignored or rejected by the respondent. Apart from statements in the pleading regarding efforts to reconcile the issue with intervention of relatives and parents of the respondent, the petitioner has not discharged the obligation to establish the same by way of any material whatsoever. It is also not clear as to why the petitioner waited from 2003 to 2009. If the respondent would have deserted the petitioner in 2003, it is quite unnatural conduct that the petitioner would have waited six years or more after desertion, before approaching the Court for dissolution of marriage. We, therefore, have no hesitation in holding that desertion as contemplated under the Act, has also not been established by the petitioner.

18. The appeal is accordingly dismissed, but with no order as to costs.

19. The respondent in the appeal, being the wife of the petitioner/ appellant has preferred a cross-appeal. She is aggrieved by the judgment and decree under appeal in so far as the learned Trial Judge has granted a decree of judicial separation. Argument has not been advanced separately on this cross-appeal. The learned Counsel for the respondent wife/ cross-objector advanced submissions in

opposition to the case of the petitioner, which have been noticed above relying thereupon it has been submitted that the conclusion in so far as the learned Trial Judge has granted a decree of judicial separation is erroneous and unsustainable.

20. We have already recorded a finding after hearing the common arguments in this regard based on the very same material which has been relied upon by the learned Counsel for the parties in F.A. 9 of 2016, that there is no corroborative evidence of any kind in support of the grounds as enumerated under Section 13 (1) (ia) and (ib) based on which the petitioner/ appellant has claimed dissolution of marriage. In view of such conclusion and since the grounds for grant of decree of judicial separation under Section 10 are one and the same as enumerated in Section 13 of the Act, the decree of judicial separation by the Trial Judge cannot co-exist with the finding that the grounds of desertion or cruelty raised by the petitioner/ appellant for grant of decree of divorce has not been established at the Trial. Since the grounds for grant of divorce and judicial separation are one and the same, the conclusion of the Trial Judge regarding existence of grounds for grant of decree of judicial separation is clearly unsustainable since existence of the very same grounds has been found not to exist for the purposes of a decree of divorce by dissolution of marriage.

21. The decree of judicial separation is, therefore, unsustainable and to that limited extent we set aside the judgment and decree dated 29th July 2015 passed by the learned Additional District

Judge, 6th Court, Alipore, South 24 Parganas in Matrimonial Suit No. 117 of 2009.

22. COT 99 of 2022 stands allowed in the aforesaid terms.

(Madhuresh Prasad, J.)

23. I agree.

(Harish Tandon, J.)

A.D.