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Court : Delhi

Decided On : Aug-29-2016

Judge : Pradeep Nandrajog &Amp; The Honourable Ms. Justice Pratibha Rani

Appeal No. : MAT.APP.(F.C.)No. 49 of 2014

Appellant : Anil Kumar Sharma

Respondent : Manju Sharma

Judgement :

Pratibha Rani, J.

1. The appellant/husband Anil Kumar Sharma is aggrieved by the order dated February 04, 2014 whereby his petition seeking dissolution of marriage on the ground of cruelty and desertion has been dismissed by the learned Judge, Family Court, Rohini.

2. The marriage between the appellant/husband and the respondent/wife was solemnized on April 26, 1999 as per Hindu rites and ceremonies at Delhi. The marriage was consummated. The parties were blessed with a daughter on February 25, 2000 who was nine years old at the time of filing the divorce petition.

3. The act of cruelty alleged against the respondent/wife are as under:

(i) Her stubborn and non-cooperative nature.

(ii) Humiliation to the appellant/husband and his parents due to her disrespectful conduct.

(iii) Frequent visits to her parental house and using filthy language against the appellant/husband and his family whenever they requested her to stay at the matrimonial home.

(iv) Long stay by respondent/wife at her parental home from August, 1999 till October 19, 1999 and thereafter, agreeing to return to the matrimonial home after repeated requests.

(v) Undue influence exercised by the father of the respondent/wife in the matrimonial affairs and the threats being extended by him using his influence being a retired police official from Delhi Police.

(vi) On August 15, 1999 father of the respondent/wife threatened the appellant/husband to transfer the property of his father in the name of respondent/wife or he would get him implicated in a false case. This led the appellant/husband to file a complaint at PS Dabri.

(vii) The respondent/wife shifted all her articles to her parental home on March 20, 2004 through Aggrawal Transport Service.

(viii) The respondent/wife finally left the matrimonial home on February 22, 2006 and deserted her husband. The parties have not cohabited thereafter.

4. In the written statement the respondent/wife denied all the accusations and took the plea that her husband and in-laws were not satisfied with the dowry given and used to taunt her saying that her father being in Delhi Police was accepting bribe and he (appellant/husband) had a right over that money. She denied the incident dated August 15, 1999 i.e. of pressurising the appellant/husband by her father to transfer his father s property in her name. While pleading that she was ill treated by her in-laws she had given an explanation for leaving the matrimonial home and staying at her parental home for a longer duration. As per respondent/wife when she was in family-way, her in-laws wanted to ascertain the sex of the foetus which was resisted by her. She also developed complications during pregnancy and was

sent to her parent s home by her in-laws where she gave birth to a daughter on February 25, 2000. Birth of a female child was to the disliking of her husband and in-laws.

5. It is pleaded in the written statement and not disputed by the appellant/husband that in the year 2004 she purchased a flat in Rohini after availing loan and her husband also stayed with her in that house. Her husband was transferred to Kanpur in the year 2000 and whenever he visited Delhi he used to visit and stay with her also. She also pleaded that on June 12, 2005 i.e. on the eve of marriage of her brother, her husband was gifted with a gold chain and they were together. She has denied having committed any act of cruelty or desertion.

6. Before learned Judge, Family Court, the appellant/husband examined three witnesses whereas the respondent/wife has examined herself.

7. After considering the evidence adduced by the parties, the learned Judge, Family Court dismissed the divorce petition for the following reasons:

(i) The explanation given by the respondent/wife which compelled her to live at her parental home was accepted by the learned Judge, Family Court for the reason that her in-laws wanted the sex determination test to be conducted which was not acceptable to her as she did not want her pregnancy to be terminated.

(ii) She was compelled to go to her parental home for delivery and postnatal care which justified her stay there in her peculiar circumstances.

(iii) In the statement of the appellant/husband recorded under Section 165 of the Indian Evidence Act he has admitted that he remained posted in Kanpur from October, 2000 to March, 2005. When he himself was not in Delhi due to his posting at Kanpur, there was no occasion for the respondent/wife to leave the matrimonial home without the permission and consent of her husband.

(iv) Statement of PW-3 Sh.A.K. Gaur was believed to record a finding that the respondent/wife was residing at her parental home as well her matrimonial home.

(v) Practical difficulties faced by a working woman having a small child have been examined by the learned Judge, Family Court recording that the wife was compelled to look for the alternative to balance her motherly obligations as well the official duties by leaving the child with her parents to attend her job.

(vi) In the year 2004 when the respondent/wife purchased a flat in Rohini the appellant/husband himself assisted in shifting to the new accommodation. The shifting by the wife to the new flat was not without the consent of her husband. She did not take her goods to her parental home as pleaded by the appellant/husband but shifted to her flat in Rohini with consent of her husband and goods were transported to that flat.

(vii) The appellant/husband has admitted in his statement under Section 165 of the Indian Evidence Act that whenever he came to Delhi from Kanpur he used to come to Rohini flat where his wife and daughter were residing and also stayed there which shows that there was no acrimony between the parties on that issue.

(viii) Referring to different dates given at different stages by the appellant/husband as to when his wife deserted him, the learned Judge, Family Court has noted the different versions given by the appellant/husband in para 41 of the impugned judgment as under:

41. Reverting back to the case in hand, the petitioner has alleged that the respondent has deserted him in February, 2006. At the outset, it may be mentioned that the petitioner had given separate dates of the desertion, as in his petition itself at one point of time, the date of desertion has been mentioned as 22.02.2005, and subsequently, the date of desertion has been given as 22.02.2006. In his cross examination as PW1, firstly he stated that the respondent left the matrimonial home in June, 2010, but he again changed his stand to June, 2000, but denied the version of the respondent that they had last resided as husband and wife till May, 2009. Therefore, the petitioner s stand as to what was the actual date of their separation, was not established, and at the same time, even the respondent was not able to establish that they had last resided as husband and wife till May, 2009, in order to frustrate the petition of the petitioner, on the ground of desertion, as it has been filed in October, 2009. The petitioner

was, therefore, examined by the Court on 03.02.2014 wherein he stated that he last resided as husband and wife with the respondent till February, 2006. Therefore, for all probabilities, this is taken to be the version of the petitioner.

(ix) As per statement made by the appellant/husband under Section 165 of the Indian Evidence Act, on his visit from Kanpur to Delhi the arrangement of his staying with his wife and daughter at Rohini flat continued till February 22, 2006. Thereafter he did not visit that flat to live with his wife nor he asked her to accompany him to the matrimonial home. Thus physical desertion was on the part of the appellant/husband who stopped visiting his wife in the flat at Rohini.

(x) It is not a case of animus deserendi on the part of respondent/wife. The parties were exchanging greetings on occasions like birthdays etc.

8. The learned Judge, Family Court finding it not to be a case of cruelty and desertion being committed by the respondent/wife, declined the prayer of the husband for dissolution of marriage.

9. The learned Judge, Family Court has also noted the contention urged on behalf of the appellant/husband that the marriage of the parties has broken down irretrievably as they were residing separately for more than seven years. As no such ground is available for seeking divorce under Section 13 of Hindu Marriage Act, 1955, this prayer was declined.

10. On behalf of the appellant/husband Mr.Sachin Datta, Senior Advocate has urged before us that due to excessive interference by the parental family of the respondent/wife and her frequent long stay there, amounted to cruelty. Father of the respondent/wife was in Delhi Police and he used to exercise his influence in their matrimonial affairs by compelling the appellant/husband to transfer his father s property in the name of respondent/wife and extended threats which was reported to the police. The respondent/wife had hardly stayed at the matrimonial home before shifting to flat in Rohini in 2004. It resulted in causing mental cruelty to the appellant/husband. Prior to that also she used to stay at her parental house for a couple of months and return to matrimonial home after great persuasions.

11. Learned Senior Advocate for the appellant/husband has submitted that in this case the parties are residing separately for almost ten year and there is hardly any chance of any reconciliation. Learned Senior Counsel for the appellant has drawn the attention of this Court to the transport slip dated March 20, 2004 Ex.PW1/4 submitting that the respondent/wife left the matrimonial home and shifted to Flat No.204, Sector-24, Rohini, Delhi. Thus, she deserted her husband when she started living in the newly acquired house. The marriage has broken down irretrievably and in view of decision of Division Bench of this Court reported as AIR 2013 Del 209 Om Prakash Poddar vs. Rina Kumari the marriage of the parties may be dissolved.

12. We have appreciated the evidence led by the appellant/husband to prove cruelty and desertion by the respondent/wife.

13. In the decision reported as AIR 2011 SC 114 Gurbax Singh Vs. Harminder Kaur the Apex Court held that the matrimonial life should be assessed as a whole and few isolated instances over a period of time cannot be said to be amounting cruelty. It thus held that:

11. A Hindu marriage solemnized under the Act can only be dissolved on any of the grounds specified therein. We have already pointed out that in the petition for dissolution of marriage, the appellant has merely mentioned Section 13 of the Act and in the body of the petition he highlighted certain instances amounting to cruelty by the respondent-wife. Cruelty has not been defined under the Act. It is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors, in different set of circumstances. Therefore, it is essential for the appellant, who claims relief, to prove that a particular/part of conduct or behaviour resulted in cruelty to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that a particular conduct will, under all circumstances, amount to cruelty, vis-a-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty. It is true FAO 291/96 Page 26 of 35 that even a single act of violence which is of grievous and inexcusable nature satisfies the test of cruelty.

Persistence in inordinate sexual demands or malpractices by either spouse can be cruelty if it injures the other spouse. There is no such complaint by the appellant. In the case on hand, as stated earlier, the appellant has projected few instances in which, according to him, the respondent abused his parents. We have verified all the averments in the petitions, reply statement, written submissions as well as the evidence of both parties. We are satisfied that on the basis of such instances, marriage cannot be dissolved.

12. The married life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty. The illconduct must be precedent for a fairly lengthy period where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, one party finds it extremely difficult to live with the other party no longer may amount to mental cruelty. Making certain statements on the spur of the moment and expressing certain displeasure about the behaviour of elders may not be characterized as cruelty. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day to day life in all families would not be adequate for grant of divorce on the ground of cruelty. Sustained unjustifiable and reprehensible conduct affecting physical and mental health of the other spouse may lead to mental cruelty.

14. It is admitted case of the appellant/husband that after his marriage with the respondent/wife on April 26, 1999 he remained posted out of Delhi for five years i.e. from 2000 to 2005. After the solemnization of marriage in April, 1999 the respondent/wife conceived in August, 1999 i.e. within four months of her marriage. It is not disputed that the respondent/wife was gainfully employed and had developed some complications during her pregnancy. The real problem arose when as per respondent/wife she was asked to subject herself to undergo sex determination test for which she refused. The respondent/wife appears to have left the matrimonial home not to be with her parents but to protect her own child in womb and give birth without sex determination. We hold that as a would be mother, if she felt more protected and secured at her parents home, her act of leaving the matrimonial home at that juncture did not amount to cruelty or desertion by any stretch of imagination.

15. To prove the accusation of humiliation caused to other family members of the appellant/husband, we find that none of the family members has been examined as witness with any specific act attributed to the respondent/wife which can be termed as cruelty for purpose of seeking divorce. While the appellant/husband has appeared as PW-1, he examined his neighbour Sh.Om Prakash as PW-2 and Sh.A.K.Gaur his brother-inlaw as PW-3. None of these two witnesses deposed about any incident which could prove any act of cruelty being committed by the respondent/wife till she stayed at her matrimonial home.

16. Learned Judge, Family Court has rightly appreciated the problems being faced by the respondent/wife during her pregnancy to be the justification behind leaving the matrimonial home frequently before and after birth of their daughter.

17. It is an admitted fact that since 2004 the respondent/wife is living in a separate house alongwith their only child, providing free access to the appellant/husband to visit them. This shows that she had never deserted her husband. May be because of not being able to live with her in-laws she had taken a decision to live separately. Neither she was living with her parents not with her in-laws but in an independent house acquired by her in her own name, alongiwth her daughter. It has been admitted by the appellant/husband that he had been visiting his wife and daughter and staying there with them in that flat. The appellant/husband admits that they have cohabited till 2006. Thus the act of cruelty, if any, prior to that period stood condoned by the appellant/husband. There is no act of cruelty attributed to her after 2006.

18. Then comes the next ground on which the appellant/husband is seeking dissolution of marriage i.e. desertion by the respondent/wife. It has been stated by the appellant/husband before the learned Judge, Family Court that he had been visiting and staying with his wife in the flat purchased by her in Rohini. It is also stated by him that this arrangement continued till February 22, 2006 and thereafter he did not visit that flat. The statement made by the appellant/husband on February 03, 2014 by the learned Judge, Family Court is to the following effect:

I am the petitioner/husband in the instant petition. I am a graduate and have done my PG diploma in Industrial Relations and Personnel Management. I joined my

service in Kanpur in 2000 and worked there till March, 2005. The respondent shifted into a flat purchased by her in Sector-24, Rohini, in April, 2004, where she shifted and took all her articles from the matrimonial home. I had helped her in shifting the said articles to the flat in question. I did not object to the respondent shifting into her own flat in 2004. From April, 2004 till March, 2005, I visited Delhi at least approximately once a month. During the said visits, from 2004 till 2005, I met the respondent and my daughter, who was in her custody, five times, out of which on two occasions, I took them out at Japanese Part etc. I also spent the night at the said flat twice. Out of the said five meetings with the respondent, during the said period, on one occasion we had arguments/quarrel, but remaining four meetings were happy one.

After my return from Kanpur to Delhi in March, 2005, I used to live with the respondent at her flat at times, and some times I used to stay with my parents at the matrimonial home. This arrangement continued till 22.02.2006, and since there (Sic. then) I did not ever go to live with the respondent at her flat. I did not ever ask the respondent to join my company, either in the matrimonial home or any other separate accommodation.

My passport was got prepared by me at the address of the respondent, but I do not remember the date of its issue but probably it is of the year 2005. I am making the statement voluntarily.

19. If it is so then where is the question of animus deserendi by the respondent/wife.

20. A wrong doer cannot take advantage of his own wrong as held by the Apex Court in the decision reported as (2013) 9 SCC 1 Darshan Gupta vs. Radhika Gupta. The relevant observations are extracted hereunder:

.A perusal of the grounds on which divorce can be sought under Section 13(1) of the Hindu Marriage Act, 1955, would reveal, that the same are grounds based on the 'fault' of the party against whom dissolution of marriage is sought. In matrimonial jurisprudence, such provisions are founded on the 'matrimonial offence theory' or the 'fault theory'. Under this jurisprudential principle, it is only on

the ground of an opponent's fault, that a party may approach a Court for seeking annulment of his/her matrimonial alliance. In other words, if either of the parties is guilty of committing a matrimonial offence, the aggrieved party alone is entitled to divorce. The party seeking divorce under the "matrimonial offence theory"/the "fault theory" must be innocent. A party suffering "guilt" or "fault" disentitles himself/herself from consideration. Illustratively, desertion for a specified continuous period, is one of the grounds for annulment of marriage. But the aforesaid ground for annulment is available only, if the desertion is on account of the fault of the opposite party, and not fault of the party which has approached the Court

21. If one fine morning the appellant/husband took the decision not to visit his wife and daughter at the flat where they were staying which in fact became their matrimonial home, then how he can be rewarded with a decree of divorce on the ground of desertion when he himself has deserted his wife.

22. We are unable to find any material on record to establish that either the respondent/wife or her father pressurised the appellant/husband to transfer any property or his implication in false cases. There is only a carbon copy of the criminal complaint Ex.PW1/3 available on record which is having stamp of being received at PS Dabri on August 15, 1999. In the said complaint, the appellant/husband has mentioned that his wife is playing in the hands of her father who is in Delhi Police and that she had left alongwith her father alongwith valuables, jewellery and clothes and she had been trying to involve him in false criminal cases using the influence of her father. While being examined as PW-1 he had narrated the incident to be of August 15, 1999. This Court can take judicial note of the fact that the entire Delhi Police Force and Para-Military Forces remain occupied in preindependence arrangements days before 15th August. It appears that the purpose of lodging the complaint was to report that his wife has left with all valuables. The appellant/husband failed to bring on record what action was taken on his complaint.

23. It is a matter of record that till date the respondent/wife has not made any complaint or initiate any litigation before any authority/Court against her husband

and in-laws either of her own or using the influence of her father who was an officer in Delhi Police.

24. The contention raised on behalf of the appellant to grant decree of divorce as the marriage has broken down irretrievably is not tenable in view of the decision of Supreme Court in (2009) 6 SCC 379 Vishnu Dutt Sharma Vs. Manju Sharma..

25. In Om Prakash Poddar s case (Supra) [authored by one of us (Pratibha Rani, J.)] relied upon by the appellant, the Family Court held that ground of desertion had been proved but instead of granting a decree of divorce passed a decree for judicial separation under Section 10 of Hindu Marriage Act, 1955. The limited question considered was whether the Family Court could grant a decree for judicial separation without specifying any reason for the same. This Court granted a decree of divorce on the ground of desertion.

26. The appeal is dismissed but without any order as to costs.

27. Trial Court Record be sent back alongwith copy of this order.

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