

Smt. Binita Bag Vs. Tapas Bag

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Court : Kolkata

Decided On : Jul-16-2009

Reported in : AIR2009Cal267

Judge : Bhaskar Bhattacharya and; Prasenjit Mandal, JJ.

Acts : Hindu Marriage Act, 1956 - Section 9; ;Code of Civil Procedure (CPC) - Order 6, Rule 17

Appeal No. : F.A. No. 261 of 2008

Appellant : Smt. Binita Bag

Respondent : Tapas Bag

Advocate for Def. : Ashoke Kumar Banerjee and; Shyamal Sanyal, Advs.

Advocate for Pet/Ap. : Debasish Roy and; Ajoy Choubey, Advs.

Judgement :

Bhaskar Bhattacharya, J.

1. This first appeal is at the instance of a wife in a suit for restitution of conjugal rights since converted to a suit for divorce by way of amendment, and is directed against the judgment and decree dated 27th March, 2008, passed by Sri P.K. Bandopadhyaya, the learned Additional District Judge, First Class, Howrah in

Matrimonial Suit No. 124 of 2007 thereby passing a decree for divorce.

2. Being dissatisfied, the wife has come up with the present appeal.

3. The respondent before us filed a suit being Title Suit No. 124 of 2007 before the learned District Judge, Howrah for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1956 which was transferred to the Court of Additional District Judge, First Class, Howrah for disposal.

4. On 14th March, 2007, the date fixed for peremptory hearing of the suit, the respondent filed two applications, one for acceptance of evidence in the form of affidavit-in-chief and the second one, an application under Order 6, Rule 17 of the Code of Civil Procedure for amendment of the application for restitution of conjugal rights in order to convert the said suit to one for divorce. On receiving of such applications, the learned advocate for the appellant filed an application for adjournment and the Court fixed 19th March, 2008 for further hearing of the main proceedings and also for hearing of the application for amendment.

5. On the next date fixed, namely, 19th March, 2008 the learned advocate for the respondent tendered various documents along with affidavit-in-chief and the learned advocate for the appellant cross-examined the respondent in part and prayed for adjournment for four weeks for filing written objection to the application for amendment. The Court, however, fixed the next date on 26th March, 2008.

6. On 26th March, 2008 at 10.30 in the morning, the husband was present but the wife was absent and the Court fixed the matter at 10.45. a.m. At 10.45 a.m., the learned Trial Judge ex parte allowed the application for amendment of the plaint and thereafter, on the same day, heard out the suit itself although, no further evidence was adduced on behalf of the husband in support of his amended plaint and fixed 27th March. 2008 for delivery of judgment. Ultimately, as in Heated earlier, on March 27, 2008 the learned Trial Judge decreed the suit by granting the decree for divorce.

7. Being dissatisfied, the wife has come up with the present first appeal.

8. After hearing Mr. Roy, the learned advocate appealing on behalf of the appellant and Mr. Banerjee, the learned senior advocate appearing on behalf of the respondent, we are unable to approve the judgment and decree impugned in this appeal as the same is against the basic principle of natural justice for the following reasons:

9. As indicated above, during the pendency of the suit for restitution of conjugal rights, an application for amendment of the main proceedings thereby praying for converting the same to one for divorce was filed and was allowed ex parte on 26th March, 2008. The moment such application for amendment was allowed and the proceedings were converted to one for divorce, it was the duty of the learned Trial Judge to give an opportunity to the wife to file additional written statement for the purpose of controverting the allegations made in the amended application for divorce notwithstanding the Fact that on the day the application for amendment was allowed, she was not present. It appears that after the amendment was allowed, no further evidence was even adduced by the husband In support of his amended claim of divorce, and the learned Trial Judge on the basis of the original evidence given at the time of hearing of the proceeding for restitution of conjugal rights, passed the decree for divorce.

10. By going through the judgment impugned in this appeal, we find that no further issue was framed after the proceedings were converted to one for divorce and the learned Trial Judge decided the main issue being issue No. 2 as to whether the wife withdrew herself from the family and society of the husband voluntarily without any just and reasonable excuse, and answered the issue in favour of the husband and consequently, granted the decree for divorce. In the ordering portion of the judgment, the learned Trial Judge, however, in his handwriting inserted that the suit was decreed on the ground of wife's wilful desertion and cruelty, although, no such issue on the question of desertion and cruelty was framed.

11. We, thus, find that the learned Trial Judge without following the principles of natural Justice granted a decree for divorce by not giving any opportunity to the wife-appellant to file additional written statement or to controvert the allegations of cruelty or desertion inserted by way of amendment of the pleading. It is needless

to mention that desertion is a ground of divorce provided such desertion is for a period of two years prior to the presentation of the proceeding. In this case the ground of desertion was incorporated by way of amendment one day prior to the date of delivery of Judgment and there was no issue framed to that effect and even the husband did not adduce any further evidence In support of the amended relief than those originally given in support of the relief of restitution of conjugal rights.

12. We, thus, set aside the judgment and decree impugned and remand, the matter back to the learned Trial Judge for giving an opportunity to the wife to file additional written statement on the added grounds of divorce after conversion and thereafter, should give opportunities to the parties to lead evidence on the question of desertion and cruelty. Let the additional written statement be filed within four weeks from today. The learned Trial Judge is directed to hear out the suit within three months from, the date of receipt of this order.

13. The appeal is, thus, allowed to the extent indicated above. No costs.

Prasenjit Mandal, J.

14. I agree.

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