

**In the High Court at Calcutta
Constitutional Appellate Jurisdiction
Appellate Side**

**The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar**

F.A. No. 173 of 2022

**Suman Talukder
Vs.
Namita Paul Talukder**

For the appellant/husband : Ms. Shebatee Datta,
Ms. Poulami Roy

Hearing concluded on : 19.11.2024

Judgment on : 21.11.2024

Sabyasachi Bhattacharyya, J.:-

1. The plaintiff/husband in a divorce suit has preferred the present appeal against the *ex parte* dismissal of his suit.
2. The suit was filed on the ground of cruelty and desertion. The respondent-wife, despite service of summons, did not appear in the suit, nor was she represented at any stage of the present appeal, although notice was duly served. Thus, the present appeal is also taken up for hearing *ex parte*.
3. Learned counsel appearing for the appellant argues that the appellant did not get an opportunity of advancing arguments in connection with the suit. On the very date when the examination of the two witnesses of the plaintiff/appellant was concluded, the learned Trial Judge

reserved judgment and passed the same later on during the same day, that is, on March 28, 2022.

4. That apart, the learned Trial Judge failed to appreciate the corroborative evidence of P.W.1, the plaintiff, and P.W.2, his mother, and the exhibits filed in connection with the suit in refusing to grant the relief of divorce. The learned Trial Judge brushed aside such corroborative evidence by holding that the mental disorder of the respondent-wife was not established, since there was no evidence except for P.W.1 and P.W.2 in their affidavits-in-chief. It is contended that in the absence of any cross-examination and/or written statement, the allegations made in the plaint, as substantiated by such evidence of P.W.1 and P.W.2, ought to have been accepted by application of the doctrine of *non traverse*.
5. Learned counsel takes the court through the evidence of the two witnesses of the plaintiff and contends that there was sufficient material on record to substantiate the plaint case.
6. Upon hearing learned counsel for the appellant, we find that although the P.W.1 and P.W.2 corroborated each other's evidence, it cannot be said that the plaint case was substantiated.
7. Several vital allegations made in the plaint were not established by cogent evidence. For example, the plaintiff-husband alleged that the parties went to the Andaman & Nicobar Islands on a trip, upon return from which the respondent-wife left the husband without explanation. However, no document was produced to show that they had visited the Islands.

- 8.** Again, in his examination-in-chief, the plaintiff/P.W.1 asserted that the respondent-wife, out of anger and scepticism, attempted to cut the vein of her left hand, as a result of which she had to be immediately admitted to the Baptist Christian Hospital at Tezpur, Assam. Not a single scrap of paper regarding admission and treatment of the wife was produced by the plaintiff to substantiate such allegation.
- 9.** Again, the plaintiff/appellant alleged that the respondent-wife made baseless complaints against him in his office. Not only did the husband fail to produce any written complaint, no witness was brought from the office of the employer to substantiate such allegation. Thus, the husband failed to establish the plaint case of cruelty on vital issues.
- 10.** The plaintiff alleges that there was corroborative evidence by P.W.2. However, P.W.2, the mother of the plaintiff/P.W.1, in her evidence used certain expressions which indicate that she was merely repeating the version of her son. Apart from the fact that the affidavit of examination-in-chief of both P.Ws. are almost replicas of each other, merely altering the first person to second person in places and paraphrasing certain portions, in Paragraph No.8 of the examination-in-chief of P.W.2, for example, she states in second person that her son discovered that the respondent is a sceptical-minded lady and always doubts the character and conduct of the son and also that when he tried to calm her down, she insulted the plaintiff in foul and abusive language. If P.W.2 had direct knowledge, she would not have used the second person in describing such event by stating that her son had so discovered. In

such case, P.W.2 would have stated directly that the respondent committed the alleged acts.

- 11.** Very importantly, in her examination-in-chief, the mother of the plaintiff-husband describes her address to be in Paschim Bardhaman. However, as per the plaint allegation and the evidence of both the plaintiff's witnesses, all the relevant events happened during the stay of the parties at Tezpur in Assam. Thus, in the absence of a single sentence in the examination-in-chief of P.W.2 that she ever visited Tezpur, Assam or lived with her son there, the entire evidence of P.W.2 acquires the colour of hearsay and cannot be relied on.
- 12.** Hence, the "corroboration" by P.W.2 of the P.W.1's evidence is rendered illusory and no corroboration at all.
- 13.** There is no evidence of any third-party witness, either any neighbour or helping hand of the couple in Tezpur, Assam or from the office of the employer of the plaintiff-husband to substantiate the plaint case of cruelty.
- 14.** Thus, we do not find any fault with the judgment on merits, at least insofar as cruelty is concerned.
- 15.** However, there are two aspects of the matter which cannot be lost sight of. First, the impugned judgment and the immediately preceding order indicates that March 28, 2022 was the date fixed for *ex parte* hearing of the suit. On the self-same day, both P.W.1 and P.W.2 adduced their evidence. Although it is recorded in the judgment that the learned advocate for the plaintiff/appellant was heard, there is no reflection in the judgment of the arguments advanced on behalf of the plaintiff. The

above circumstances clearly indicate that substantial opportunity was not afforded to the plaintiff to place his case before the court. The same violates the principle of natural justice inasmuch as the plaintiff was denied proper opportunity to present his case on merits.

- 16.** Secondly, it cannot be overlooked that the respondent-wife has been absent throughout the hearing of the suit and the pendency of the appeal before this Court. Such consistent and deliberate abstinence of the respondent-wife despite being served with summons of the suit and notice of the appeal, goes on to indicate utter absence of *animus revertandi* on the part of the respondent-wife. Thus, the learned Trial Judge ought to have considered the ground of desertion on the part of the wife upon adverting to the circumstances of the present case.
- 17.** It transpires from the consistent conduct and lack of interest of the wife that the marriage between the parties has irretrievably broken down. Although irretrievable breakdown is *per se* not a ground for divorce as yet in Indian Law, the jurisprudence in certain other countries such as the United Kingdom incorporate the component of irretrievable breakdown as an aspect of cruelty, affording a ground of divorce in such cases. Keeping in view the evolving needs of society and seen from a pragmatic perspective, probably it is high time that components of irretrievable breakdown of marriage should be read into the grounds of desertion and cruelty in our law as well, to ensure that the parties are not forcibly kept bound to dead marriages and bygone promises which have spent their shelf-lives long ago.

- 18.** The consistent abstinence of the respondent-wife from the company of the appellant-husband without any explanation furnishes the plaintiff-husband with a case at least of desertion, if not cruelty by itself, despite irretrievable breakdown not being a legally recognized ground of divorce under the Indian law.
- 19.** Moreover, in our opinion, since there does not appear to be any scope of reconciliation due to the consistent absence of the wife, the matter ought to be remanded to the Trial Court by giving an opportunity to the plaintiff-husband to furnish further evidence, oral or documentary, to substantiate his case and to amend the plaint to incorporate the factum of consistent absence of the respondent-wife without explanation from the company of the plaintiff-husband, which might furnish a good ground of desertion, if not cruelty.
- 20.** In such view of the matter, F.A. No. 173 of 2022 is allowed, thereby setting aside the impugned judgment and decree dated March 28, 2022 passed by the learned Additional District Judge at Asansol, District: Paschim Bardhaman in Matrimonial Suit No. 227/2019 (CIS-229/2019) and remanding the matter to the learned Trial Judge for granting an opportunity to the plaintiff/appellant to amend the plaint in order to incorporate the developments inbetween in respect of desertion by the wife. The learned Trial Judge shall rehear the suit in the light of the above observations, granting further opportunity to the plaintiff-husband to substantiate the case of desertion as well as the ground of cruelty as taken in the plaint.
- 21.** The trial Court records be sent down immediately to the court below.

- 22.** There will be no order as to costs.
- 23.** No formal decree need be drawn up in view of the nature of the above judgment.
- 24.** Urgent certified server copies, if applied for, be issued to the parties upon compliance of due formalities.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)