Neutral Citation No. - 2025:AHC-LKO:1303-DB

Court No. - 10

Case :- FIRST APPEAL No. - 37 of 2021
Appellant :- [redacted]
Respondent :- Smt. [redacted]
Counsel for Appellant :- Ashok Sinha, Sumit Pandey

Hon'ble Vivek Chaudhary,J.
Hon'ble Om Prakash Shukla,J.

1. The service of this Appeal was complete as per office report dated 19.01.2022, however the sole-respondent/ Wife did not appear in person or through her counsel. Since the matter was a matrimonial dispute, this Court had sought the assistance of the Chief Metropolitan Magistrate, Kolkata (West Bengal) for the presence of the Respondent and thereafter the present Appeal was adjourned on several occasion from time to time.

2. Subsequently, the present Appeal was directed to be heard *ex parte* vide an order dated 28.07.2023. However, again, as an abundant caution, this Court had directed that the ex parte order should also be communicated to the sole-respondent through Chief Metropolitan Magistrate, Kolkata (West Bengal) and the registry of this Court was directed to take necessary steps in that regard and list the matter immediately thereafter.

3. Office has reported sufficiency of service of notice on sole respondent vide report dated 21.10.2024, but even after the said service, none appears on behalf of the sole-respondent before this Court to oppose

the appeal, hence the appeal is being heard *ex parte* as it has been pending since the year 2021.

4. Heard Mr. Ashok Sinha, learned Counsel representing the Appellant-Husband and perused the impugned Judgment as well as the Trial Court's record.

5. By means of the present First Appeal filed under Section 28 of The Hindu Marriage Act, 1955 read along with Section 19(1) of The Family Courts Act, 1984, the Appellant-Husband has preferred the present Appeal against the Ex-parte Judgment and Decree dated 12.02.2021 passed by learned Additional Principal Judge-10, Family Court, Lucknow (hereinafter to be referred as '**Family Court**') in Matrimonial Suit No.1204 of 2020 (CNR No. UPLKO 200 2192 2020): [redacted] Versus Smt. [redacted], whereby the learned Family Court has dismissed the said suit filed by the appellant/husband for grant of decree of divorce under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the 'Act, 1955').

6. Briefly stating, the facts of the present Appeal lies in a narrow compass, wherein the appellant/Husband had filed a divorce petition before the learned Additional Principal Judge-10, Family Court, Lucknow alleging therein that marriage of the appellant and respondent was solemnized on 14.12.2015 according to Hindu Rites and Rituals. Prior to their marriage, they got to know each other through a website i.e. ***www.shaadi.com*** and at the time of their marriage, the respondent-wife was working in [redacted] company and at present she is living in Kolkata

along-with their only child, namely, Master [redacted]. It has also been alleged in the said matrimonial suit that the parents of respondent-wife were against the said marriage as they did not want to marry their daughter with the appellant-husband, as the wife belonged to a Bengali family, whereas the appellant-husband was a non-Bengali.

7. After their marriage, the couple started living in Delhi where the respondent-wife lived happily with the appellant-husband, however, later on the respondent-wife changed her behavior drastically towards the appellant-husband. The respondent-wife started going outside with her friends without informing the appellant-husband and also started consuming alcohol. The respondent-wife also started throwing tantrums, committed nuisance and became abusive. The respondent-wife also used to attend various phone calls of different persons, without disclosing anything about them to the Appellant/Husband. The respondent-wife and her father started forcing the appellant-husband to live and work in Kolkata. Since the appellant-husband was alone son of his parents, therefore, he did not agree to live and work in Kolkata. On 28.11.2016, the respondent-wife along-with the son, Master [redacted] went to Kolkata. The appellant-husband tried to bring her back, however, she denied to return to him.

8. Thus, the appellant-husband preferred a divorce petition before the learned Additional Principal Judge-10, Family Court, Lucknow, however, the respondent-wife did not put in appearance and as such, the respondent/wife was proceeded Ex-parte.

9. Based on the averments in the matrimonial suit seeking divorce, filed by the appellant/Husband, the learned Family Court had framed the following issues:

"(a) क्या प्रत्यर्थिनी याची की पत्नी है ?

(b) क्या प्रत्यर्थिनी ने याची के साथ क्रूरतापूर्ण व्यवहार किया ?

(c) क्या याची द्वारा वाद संस्थित किए जाने के ठीक पहले दो वर्ष की कालावधि तक प्रत्यर्थिनी ने याची को अभित्यक्त रखा है ?

(d) क्या याची अनुतोष प्राप्त करने का अधिकारी है?"

10. In support of his case, the appellant has examined himself as P.W.-1.

11. So far as issue No.(a), the learned Family Court had answered that as the appellant-husband had stated that on 14.12.2015 the plaintiff-husband was married to the defendant-wife at K.K. Palace, V.I.P. Road, Lucknow according to Hindu Rites and Rituals, as such, the appellant-husband had proved the issue (a). As far as issue (b) is concerned, the learned Family Court had returned a finding that since the appellant-plaintiff had stated that behavior of wife changed towards him after some time of marriage, however, for a small period, her behavior was good with her husband, as such, it could not be ascertained that how the behavior of wife changed towards the appellant-husband. The learned Family Court had also returned a finding that marriage of the couple was solemnized on 14.12.2015 and the child was born on 23.06.2016 i.e. after a period of six months and nine days but nowhere it has been stated that the child was unhealthy, therefore, if the respondent-wife was consuming alcohol, as alleged by the appellant-husband, then the child would have become unhealthy during the pregnancy. The learned

Family Court had also observed that as per averment of the appellant-husband, the respondent-wife used to work as waiter at Dubai in the house of Chef Sanjeev Kapoor, therefore, there is a possibility of having male friends. Thus, the learned Family Court had opined that all this does not amount to cruelty and, as such, the issue (b) remained unproved.

12. So far as issue No.(c) is concerned, the learned Family Court found that the appellant-husband had stated that the respondent-wife and her father forced him to live and work in Kolkata, however, he refused as he is alone son of his parents. When the respondent-wife left the house of the appellant-husband along-with the child, the appellant-husband asked her to come back and live with him, however, she refused to come back. The learned Family Court had recorded its finding that the respondent-wife is living separately with her husband since 29.11.2016 and the divorce petition was filed on 03.07.2020, thus, the wife is living separately for more than two years,however, the learned Family Court had returned a finding that since there is no averment that the wife could not had gone to Kolkata for work after marriage, thus, working after marriage in Kolkata cannot be termed as 'desertion' and, as such, the the issue (c) also remained unproved.

13. In so far as issue No.(d), the learned Family Court had also recorded its finding that the appellant-husband had proved that the respondent-wife is his legally wedded wife, however, he failed to prove that the

respondent-wife is causing cruelty to him and also deserted him and, as such, the issue (d) also remained unproved.

14. Based on the above findings of learned Family Court has dismissed the suit filed by the appellant for divorce by means of the impugned judgment dated 12.02.2021. It is this judgment dated 12.02.2021, which has been challenged in the present appeal.

15. Learned counsel for the appellant has submitted that the learned Family Court has not appreciated the facts in its correct perspective, in as much as the learned Family Court while returning a finding with regard to aforesaid issues have travelled beyond the pleadings of the appellant-husband and totally ignored his relevant statement. The learned Counsel has further submitted that despite service of notice, the respondent has not chosen to appear before this Court and in fact, admittedly even after the date of filing of the suit till today, she is living separately, that itself shows that the respondent-wife is not interested in the union of marriage with the appellant, and even on this ground alone, the suit filed by the appellant-husband has to be decreed by granting divorce. The learned Counsel has submitted that the Apex Court has consistently in various judgments held that desertion means intentional abandonment of one spouse by the other without the consent of the other and without a reasonable cause. According to him, in the instant case, that could be taken into consideration that the wife deserted the husband. In support of his contentions, learned counsel for the appellant has relied upon the judgments of the Apex Court in **Sukhendu Das Vs.**

Rita Mukherjee, AIR 2017 SC 5092, Dr. Nirmal Singh Panesar Vs. Mrs. Paramjit Kaur Panesar @ Ajinder Kaur Panesar, 2023 (3) ARC 244, Shilpa Shailesh Vs. Varun Sreenivasan, Transfer Petition (Civil) No. 1118 of 2014. He also relied upon the judgment of this Court passed in **Shashi Bala Vs. Rajendrapal Singh, 2020(2)ADJ 745**.

16. Having regard to the submission of the learned Counsel representing the appellant/husband and going through the record available before this Court in this appeal as well as the impugned judgment and decree and the record of the trial Court, the points of determination arise in consideration before us in the present appeal are as under: -

> **I.** Whether the findings of the Family Court regarding the issue with respect to the plea of cruelty as grounds for divorce, is perverse and unsustainable thereby rendering the impugned judgment unsustainable?
>
> **II.** Whether the findings of the Family Court regarding the issue with respect to the plea of desertion as grounds for divorce, is perverse and unsustainable thereby rendering the impugned judgment unsustainable?

17. Before considering the aforesaid points of desertion, it would be apposite to quote the relevant provisions of Section 13 of the Hindu Marriage Act, 1955, which sets out the grounds for divorce:

> "**13. Divorce.—**(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—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; **or**

(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

(ii) has ceased to be a Hindu by conversion to another religion; **or**

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

Explanation.—In this clause,—

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18. It has to be understood that each of the aforesaid grounds for divorce are mutually exclusive to each other which is evident by use of the disjunctive word ‘or’ to separate each ground from the other and there is no reason to read ‘or’ conjunctively as it will lead to absurdity. Thus, cruelty can by itself be a ground for dissolution of marriage, like desertion by itself also be a ground like any other ground for grant of decree of divorce.

19. This Court in the present petition is concerned with only two grounds mentioned under Section 13(1)(i-a) and under Section 13(1) (i-b) of the Act and in the considered view of this Court, the Appellant in order to further his case on the aforesaid two grounds would be required to plead and prove by leading evidence that; (a) The respondent has

treated the appellant with cruelty; or (b) That the respondent has deserted the appellant for a continuous period of not less than two years immediately preceding the presentation of the suit and extent that the respondent cannot reasonably be expected to live with the appellant.

20. It is well-settled that the expression ‘cruelty’ includes both (i) physical cruelty; and (ii) mental cruelty. It is the onus on the plaintiff/appellant to prove cruel treatment by the defendant/ respondent. Although, the appellant/Husband had stated that behavior of wife changed towards him after some time of marriage, however, no period nor any specific dates has been mentioned as to how and which manner, the behavior of the wife changed and from which period. Further, as a corollary to the said statement, as rightly observed by the learned Family Court, it also meant that the respondent/wife used to have good behavior albeit for a small period, but that by itself does not mean that any cruelty has been inflicted to the Appellant/husband. It has been alleged by the Appellant/ Husband that the respondent/wife had been consuming alcohol. Consuming of Alcohol by itself does not amount to cruelty, if it is not followed by unwarranted & uncivilized behavior. Though, consuming of alcohol in middle-class society is still a taboo and not a part of culture, however there is no pleadings on record to show as to how consuming of alcohol has caused cruelty to the husband/appellant. Infact, the learned Family Court was right in observing that there is no pleadings on records to show that because of consumption of alcohol, the child born out of the wedlock was weak or unhealthy or there was

any problem in the pregnancy of the respondent/wife. No evidence has been brought on records to show that the various calls received by the respondent/wife were that of any of the male friends of the respondent/ wife or that as to how and in what manner they have caused cruelty to the husband/appellant. The averment of the Appellant seems to be cryptic and apparently it seems the learned Family Court has rightly observed that as per averment of the appellant-husband, the respondent-wife used to work as waiter at Dubai in the house of Chef Sanjeev Kapoor, therefore, there is a possibility of having male friends. This Court is in agreement with the findings returned by the learned Family Court that the Appellant/Husband was not able to prove as to what act or instances and on which date and/or period, any cruelty was inflicted on him, so as to make him entitle for a decree of divorce on the ground of cruelty. Thus, point No.1 as framed above is answered in negative accordingly.

21. As far as the second point of determination framed by this Court is concerned, the learned Family Court had recorded its finding that the respondent-wife is living separately with her husband/Appellant since 29.11.2016 and the divorce petition was filed on 03.07.2020, thus, the wife is living separately for more than two years as required under Section 13(1)(ib) of the HMA, 1955. The Hon'ble Apex Court in the case of **Savitri Pandey Vs Prem Chandra Pandey, AIR 2002 SCW 182** has held that "Desertion" for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without

reasonable cause. The Explanation to Section 13 has widened the definition of desertion to also include 'wilful neglect' of the petitioning spouse by the respondent. In other words, it is a total repudiation of the obligations of marriage. It has to be understood that “Desertion” is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalizes the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case.

22. Further, in order to establish desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

23. The law lays down the rule that desertion to amount as a ground for divorce must be for a continuous period of not less that two years

immediately proceeding the presentation of the petition. Admittedly, respondent-wife is living separately from her husband/Appellant since 29.11.2016 and the divorce petition was filed on 03.07.2020. It has come on record that when the respondent-wife left the house of the appellant-husband along-with the child, the appellant-husband asked her to come back and live with him, however, she refused to come back, without any reasonable cause. Her refusal to join the company of her husband also amounts to willful neglect in view of the explanation appended to Section 13 of the HMA, 1955. Further, this Court cannot be oblivious to the fact that the respondent/wife had not been negligent towards the Appellant/husband in the matrimonial affairs, but has also been purposefully not participating in the present proceedings, which sufficiently shows her intention of not returning to her matrimonial home or even contesting the divorce proceedings, which led to the present impugned ex-parte order. This Court also finds force in the argument of the learned counsel for the Appellant that the impugned order was passed ex-parte as the respondent/wife deliberately did not prefer to join the proceedings as per her choice.

24. Further, the conduct of the respondent/wife during the present Appeal proceedings also has to be considered in that perspective, in as much as even after the service of notice of this Appeal, she has chosen to not participate in this proceedings and when directions were passed by this Court to get the ex-parte order served through the learned Chief Judicial Magistrate, Kolkata (West Bengal), the respondent-wife, without putting her appearance personally or through a counsel, has

sent an affidavit dated 08.10.2024 from Kolkata, wherein it has been stated that she does not want to contest this appeal but with the leave of the Hon'ble Court, she may reserve the right to contradict or contest the same later if required. She had also stated that she does not want to stand in the way of a decree of divorce being passed and the marriage of the appellant and the respondent is dissolved. She had also stated that she does not want any alimony or maintenance whatsoever. Thus, from the conduct as well as the facts & circumstances of this case, it is clear that the Respondent/Wife is not interested in living along with the appellant and that according to this Court amounts to “willful neglect” in view of the explanation to Section 13 of the Act, 1955.

25. This Court finds that admittedly, the respondent had been staying away from the appellant for three years before the filing of the divorce petition in the year 2020 and despite receipt of the notice, she was not inclined to appear before the learned Family Court and defend her case. Even, before this Court, the Appeal has been pending since the last more than four years and yet again the Respondent/wife has chosen not to defend or even bother to appear before this Court, which again fortifies that the respondent/wife is not interested to live or continue with the matrimonial life with the appellant and to make the matter more worse, she is not even ready to try and find a solution to the matrimonial disputes with her husband. Keeping, in totality of the facts, this Court has no hesitation in holding that the marriage between the parties has become totally unworkable and emotionally dead. At this

juncture, it would be apt to mention that in **Rakesh Raman vs Kavita :** 2023 SCC OnLine SC 497, the Hon'ble Supreme Court has observed as under :-

> *"(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."***

26. Apparently, it is available from the records of the present case that the marriage was solemnized on 14.12.2015 and parties are living separately since 29.11.2016 and as on today more than eight years have been lapsed. The respondent is not contesting the appeal in spite of service on notice having been issued by this Court. She has not come forward to oppose the pleas of the appellant. This shows her disinclination to live with the appellant inspite of the stand taken by him before the Family Court. When this Court examine the aforesaid facts in light of the law explained in **Rakesh Raman (Supra)**, we find that the long period of continuous separation establishes that the matrimonial bond is beyond repair. The marriage between the parties has become a fiction, though supported by a legal tie. Therefore, we are of the considered opinion that the Respondent/wife has deserted the Appellant/husband without any reasonable cause and he has been willfully neglected and as such a case for grant of divorce on this ground is made out in the peculiar undisputed facts and circumstances of the present case. It is made clear that this Court has considered the

facts and tested on the anvil of granting of divorce on the ground of desertion and has not decided any issue arising due to the existence of matrimonial relations between the parties, which may be agitated by the parties as is permissible in accordance with law. Point No.(2) is decided accordingly.

27. For the reasons aforesaid, the judgment, order and decree dated 12.02.2021 passed by learned Additional Principal Judge-10, Family Court, Lucknow in Matrimonial Suit No.1204 of 2020 (CNR No. UPLKO 200 2192 2020, J.O. Code UP06494); [redacted] Versus Smt. [redacted] is **set aside**. The appeal is **allowed.**

28. We, accordingly, while allowing this Appeal, dissolve the marriage and grant a decree of divorce in favour of the appellant-husband [redacted] and against Smt. [redacted], the respondent-wife herein and the suit is decreed in the above terms.

29. There shall be no order as to cost.

(**Om Prakash Shukla,J.**) (**Vivek Chaudhary,J.**)

Order Date :- 8.1.2025
Saurabh