

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

Hon'ble Justice Nishita Mhatre,
And
Hon'ble Justice R. K. Bag.

F.A.155 of 2005

Smt. Mira Mondal (nee Biswas)

V.

Shri Jyotirmoy Mondal

For the Appellant : **Mr. Kausik Chanda,**
Ms. Sumitra Das,
Ms. Washima Ansar,

Heard on : **02.03.2015**

Judgment on : **20.03.2015**

R. K. Bag, J.

The bonhomie of marriage between the appellant/wife and the respondent/husband gradually developed into acrimonious relationship and ultimately culminated into separation after 22 years due to arrogance, misunderstanding, lack of feelings for each other and continuous ill-treatment meted out to each other. The respondent/husband instituted the Mat Suit No.51 of 1997 against the appellant/wife for dissolution of the

marriage by a decree of divorce. The divorce was granted by Learned Additional District Judge, 8th Court, Alipore on 7th September, 2004, which has been challenged by the appellant/wife by preferring this appeal.

2. The respondent/husband was a student of M.A. of Rabindra Bharati University and the appellant/wife was a student of B.Sc., 2nd year of Rammohan College at the time of solemnisation of marriage on 11th March, 1973. The appellant/wife started living in the matrimonial home at Subhas Pally, Bongaon along with her husband, parents-in-law and four brothers of the husband. The father-in-law of the appellant/wife was a lower division clerk and there was financial hardship in the family. The appellant/wife joined the service in the main branch of Bank of India in the month of July, 1978 and the respondent/husband also joined as an employee of Syndicate Bank in the month of December, 1978. Both of them shifted to the rented accommodation at 6/24, Viveknagar, Kasba. Two daughters were born from the said wedlock. Thereafter both of them shifted to their own accommodation at 84, Gouranga Sarani, Kolkata-700078.

3. It is alleged by the respondent/husband that the appellant/wife was very harsh, cruel, ill-tempered and was in the habit of insulting the husband as the husband has come from lower strata of the society. The respondent/husband is a prolific writer, who used to contribute literary article, novel and short stories in the newspaper and Bengali periodical. The elder brother of the appellant/wife who was a resident of USA, constructed one house at Salt Lake City under the supervision of the husband of elder sister of the appellant. The appellant/wife persuaded the husband to reside in the said house at Salt Lake City, but the respondent/husband was not willing to reside in the house of his brother-in-law at Salt Lake City. Owing to this difference of opinion between the wife and the husband, the appellant/wife started misbehaving and giving ill-treatment to the respondent/husband. It is alleged that the appellant/wife started staying outside the residence for 2-3 days at a stretch without giving any intimation to the respondent/husband. It is further alleged that the appellant/wife did not look after the children properly and did not provide food and did not take care of the husband when the

respondent/husband was ill. It is also alleged that the appellant/wife used to make false allegation before the neighbours to the effect that she was subjected to mental cruelty by the respondent/husband. The further allegation of the respondent/husband is that he had to attend the police station on 19 occasions on the basis of false allegation made by the appellant/wife against him. Ultimately the appellant/wife deserted the husband on 21st March, 1995 along with her two minor daughters. The respondent/husband started the matrimonial proceeding before the Trial Court on 16th July, 1997 praying for dissolution of the marriage by decree of divorce on the ground of desertion and cruelty.

4. The appellant/wife contested the matrimonial proceeding before the trial court by filing written statement and adducing evidence in support of her pleadings. The appellant/wife was residing in the house of her elder brother at Salt Lake City since 12th January, 1999 along with her minor daughters. It is alleged that the respondent/husband used to drink with his friend in the residence and very often he used to come back late at night in an inebriated condition and the appellant used to protest

against this type of conduct of the husband. The husband constructed the house at 84, Gouranga Sarani, Garfa and the wife contributed Rs.86,000/- in constructing the said house. It is alleged that the respondent/husband did not contribute anything to the family and he used to misbehave with the appellant/wife. It is further alleged that on one occasion the respondent/husband poured hot water on the wife and on another occasion the respondent/husband had thrown hot pieces of meat on the face of the appellant and thereby she sustained burn injury. The specific case made out by the appellant/wife is that she left the matrimonial home on 21st March, 1995 along with her two minor daughters and domestic aid, as she could not bear the physical and mental torture inflicted on her by the respondent/husband. Initially the appellant/wife lived in the rented accommodation within a distance of one kilometer from the matrimonial home, but ultimately she shifted to the house of her elder brother at Salt Lake City. The appellant/wife specifically stated in evidence that she would like to examine her mother-in-law, brother-in-law and the then maid servant in support of her allegation of physical

and mental torture by her husband, but no one was examined by the appellant/wife before the trial court except herself. The appellant/wife is still willing to reside with the respondent/husband provided she can maintain her own dignity.

5. The trial court dissolved the marriage between the appellant/wife and the respondent/husband by decree of divorce under Section 13 of the Hindu Marriage Act, 1955. Leaned Judge of the court below came to the conclusion that continuous ill-treatment of two minor daughters by the appellant/wife amounted to cruelty to the respondent/husband. The trial court also held that there is irretrievable break down of marriage between the appellant and the respondent and that there is no chance of re-union of the appellant and the respondent as husband and wife and as such the marriage between the parties was dissolved by decree of divorce. The appellant/wife has challenged the said decree of divorce in the instant appeal.
6. None appears on behalf of the respondent/husband in spite of service of notice and as such we would like to dispose of the

appeal after hearing Learned Counsel for the appellant. Mr. Kausik Chanda, Learned Counsel for the appellant/wife contends that the bunch of letters (Exhibit-1 series) written by two minor daughters to the respondent were relied upon by Learned Trial Judge in order to come to the conclusion that the ill-treatment meted out to the minor children by the appellant amounted to cruelty towards the respondent/husband. According to Mr. Chanda, these letters cannot be considered by the court to establish the allegation of cruelty of the appellant/wife towards the respondent/ husband, because the letters were written by two minor daughters aged about 13 years and 8 years respectively when minor daughters were under the influence of the father who happens to be the respondent/husband. It is also contended on behalf of the appellant that the letters were not proved in accordance with law before the trial court and the minor daughters who had written the letters have not been examined as witnesses before the trial court. Mr. Chanda relied on the Division Bench decision of our High Court in the case of "Smti Ananta V. Ramchander" reported in AIR 2009 Cal 167 in support of his

contention that evidence of a child witness indicating cruelty of the mother towards the children cannot have any bearing on the allegation of cruelty of the wife against the husband. On close scrutiny of the letters written by two minor daughters to the respondent when they were merely 13 years old and 8 years old, we find that the appellant being the working mother imposed some restrictions on the teen aged daughters keeping in mind the welfare of the daughters. The allegation levelled against the appellant/wife by two minor daughters in the bunch of letters marked Exhibit-1 series cannot be construed as cruelty of the appellant towards the minor daughters because the liberty given by the respondent/ father who used to meet the daughters occasionally cannot be expected to be given by the appellant/mother in whose custody the minor daughters were residing at the relevant point of time. It is relevant to quote the observation made by the Hon'ble Judges of the Division Bench in Paragraph 23 of the said decision reported in AIR 2009 Cal 167, which is as follows:

“The Learned Trial Court also appears to have been impressed by the evidence of the child when he

objected to the appellant wanting to live with him and his father. The child may have been deprived of care and affection which a non-working mother would have given to her child in normal circumstances. Being a working mother, she may not have enough time to spare for her child resulting in a feeling of not being cared for and even hatred towards her. Any expression of the child emanating from a sense of hatred towards his mother is due to incompatibility which is an attitude problem and could have been solved. Being a child of tender years, he is yet to understand the significance of "Maa". The liking which the child may have for his father may not be comparable with that of the appellant because of his incompatibility but this again by itself would not tilt the balance in favour of the respondent since in a proceeding for divorce, it is the nature of cruelty inflicted on the spouse that is relevant and material and the respondent failed in establishing that the present case is covered by the instances enumerated

in Clauses (i), (ii) and (x) of Paragraph 101 of the decision in Samar Ghosh (Supra).”

7. The letters written by the minor daughters to the respondent have been admitted into evidence, but the minor daughters have not come to the witness box to face the cross-examination and as such the appellant/wife is deprived of the opportunity to elicit information from the minor daughters for pointing out the circumstances under which discipline was imposed on the minor daughters. Even assuming for argument's sake that the minor daughters who were in the custody of the appellant/mother at the relevant point of time were subjected to ill-treatment by the appellant being the working mother, the same can by no stretch of imagination be construed as cruelty of the appellant/wife towards the respondent/ husband. The findings of the trial judge that the respondent/husband was subjected to cruelty by the appellant/wife on the basis of the said letters marked Exhibit-1 series is not sustainable in law.
8. Mr. Chanda has also contended that irretrievable break down of marriage between the parties cannot be a ground for divorce under Section 13 of the Hindu Marriage Act, 1955. In this

regard he has relied on the Division Bench decision of our High Court in the case of “Rajesh Burman V. Mitul Chatterjee (Burman)” reported in 2011(5) CHN (Cal) 753. In the fact situation of the said case the Hon’ble Judges of the Division Bench held that the trial court has no jurisdiction to pass decree of divorce on the ground of irretrievable break down of marriage. However, a decree for judicial separation was granted by the Hon’ble Division Bench in the said case reported in 2011(5) CHN (Cal) 753. There is no disagreement with the proposition of law laid down by the Hon’ble Division Bench of our High Court in the said reported case.

9. Learned Counsel for the appellant has pointed out from the judgment of the trial court that the instant matrimonial proceeding was started by the respondent/ husband within four months from the date of leaving the matrimonial home by the appellant/wife. It appears from the observation made by Learned Trial Judge that the wife left the matrimonial home on 21.03.1995 and the suit was instituted on 16.07.1995 and as such the ground of desertion laid down in Section 13 (1) (ib) of the Hindu Marriage Act has not been established. On scrutiny

of the materials of the lower court record we find that the instant Mat Suit was instituted by the respondent/husband in the court of Learned District Judge, Alipore on 16.07.1997 and subsequently the said suit was transferred to the Court of Learned Additional District Judge, 8th Court, Alipore for disposal. Admittedly the appellant/wife left the matrimonial home on 21st March, 1995. Accordingly, the Mat Suit was instituted long after two years from the date on which the appellant/wife left the matrimonial home. Learned Judge of the court below was factually incorrect to hold that the instant Mat Suit was instituted on 16.07.1995. The evidence on record clearly goes to establish that there was arrogance, misunderstanding, ill-treatment meted out to each other during acrimonious married life of the appellant and respondent for almost 22 years. The appellant/wife has failed to adduce cogent evidence to establish that there was reasonable cause for leaving the matrimonial home without the consent and against the wish of the respondent/husband on 21st March, 1995. The logical inference of our above observation is that the appellant/wife deserted the respondent/husband for a continuous period of not

less than 2 years immediately preceding the institution of the Mat Suit in the court of Learned District Judge at Alipore. The respondent/husband is, thus, entitled to get a decree for divorce under Section 13 (1) (ib) of the Hindu Marriage Act, 1955.

10. In the instant case it is established from the evidence on record that acrimonious feelings developed between the parties long back due to arrogance, misunderstanding, continuous allegation and counter-allegation made by each other, and lack of feelings for each other. The respondent/husband had to attend the police station on 19 occasions due to false allegation made by the appellant/wife which caused insultation and humiliation of the respondent/husband. The appellant and respondent lived together as husband and wife in spite of ill-treatment meted out to each other and in spite of acrimonious feelings developed between each other during almost 22 years and thereafter on 21st March, 1995 the appellant/wife left the matrimonial home forever. It is alleged that the appellant/wife was forced to leave the matrimonial home due to physical and mental torture inflicted on her by the respondent/husband. On the other hand, the respondent/husband has stated in evidence that the

appellant/wife voluntarily left the matrimonial home along with the minor daughters forever on 21st March, 1995. Be that as it may, both parties are admittedly living separately for almost 20 years i.e. from 21st March, 1995 till the date of argument of the case before this court i.e. on 2nd March, 2015. The respondent/husband did not appear before this court to contest this appeal even after receiving notice of the appeal. We are informed that both parties have attained the age of superannuation and retired from the service of the bank. The daughters have also attained majority and are settled in life long back. There is no sign of giving respect to the emotions, sentiments and feelings of each other. The irresistible conclusion would be that the matrimonial bond between the parties has been ruptured beyond repair and the marital tie does not serve the sanctity of marriage. It is true that the irretrievable break down of marriage by itself would not be a ground for divorce under Section 13 of the Hindu Marriage Act, 1955. It is pertinent to point out the proposition of law laid by the Supreme Court in paragraph 101 (Xiv) of “Samar Ghosh V. Jaya Ghosh” reported in (2007) 4 SCC 511 which is as follows:

“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.”

11. In view of the above proposition of mental cruelty laid down by the apex court, we are of the view that refusal to grant divorce to the respondent/husband after continuous separation of the parties for last almost 20 years would lead to mental cruelty to the respondent/husband in the back ground of acrimonious married life of the couple, particularly when there is no chance of re-union of the parties.
12. The natural corollary of our above findings is that the decree of divorce passed by the trial court should be upheld. Accordingly the judgment and decree passed by Learned Additional District

Judge, 8th Court, Alipore in Mat Suit No.51 of 1997 is affirmed.

The appeal is dismissed but without any cost.

Let a copy of this judgment and order be sent down to the Learned Court below along with lower court records for favour of information.

Urgent certified photostat copy of the judgment and order, if applied for, be given to the parties as expeditiously as possible after compliance with necessary formalities.

(R. K. Bag, J.)

(Nishita Mhatre, J.)