

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

THE HON'BLE JUSTICE HARISH TANDON
&
THE HON'BLE JUSTICE MADHURESH PRASAD

FA 79 of 2021
Smt. Susmita Pal
Vs.
Sri Dipak Pal

Appearance:

For the Appellant : **Ms. Manali Biswas, Adv.**

Judgment On : **21.12.2023**

Harish Tandon, J.:

The application for dissolution of marriage under Section 13 of the Hindu Marriage Act alleging cruelty and/or desertion at the instance of the wife/appellant is rejected by the Court below on the finding that the wife/appellant has miserably failed to prove the act of cruelty perpetrated upon her by the husband/respondent nor could prove the act of desertion without any reasonable cause.

The wife/appellant has assailed the said judgment and decree and the learned advocate appearing for the wife/appellant has restricted the argument solely on the ground of cruelty and irretrievable breakdown of marriage.

At the very outset, we record that the pleading of the wife/appellant is scanty and does not vividly include the incidents of cruelty except by generalising the cruelty in physical and mental form. The parties to the proceeding are married according to Hindu rituals and rites on 04.06.2002. Since after the marriage they started residing together as husband and wife and the marriage was duly consummated which would be evident from the fact that the girl was born of the said wedlock. It is pleaded in the application by the wife that the husband/respondent is a business man but used to inflict torture both physical and mental upon her. She, however, remained silent and tolerated such torture and ultimately she was compelled to leave the matrimonial house on 10.06.2011 along with her daughter and took shelter in her father's house.

On the basis of the aforesaid pleading, the matrimonial suit no. 308 of 2013 was filed before the District Judge, Murshidabad at Behrampore and upon service of summon the husband appeared and contested the said proceeding by filing the written statement. The husband has denied the allegation of any physical and mental torture upon the wife/appellant and stated that she is a quarrelsome lady raising demand to buy clothes in short intervals and to provide a hefty amount which was not possible for husband/respondent because the income is not in commensurate with such demand. It is further disclosed in the defence that subsequently the

business could not yield profit and the husband/respondent was compelled to close down the said business. It is further stated that the only child was admitted in the school to pursue her studies and all the expenditure was borne by the husband/respondent. The husband/respondent denied the allegation that the wife was compelled to leave on 10.04.2011 from the matrimonial house but she remained in the matrimonial house till the early part of the month of May, 2013 and later on left the matrimonial house without any reason and rhyme. It is a specific stand of the husband/respondent that he tried to trace the whereabouts of the wife/appellant and the child in the nearby locality and ultimately found that she is living in her parental house. The pleading goes further that the husband/respondent tried to bring reconciliation as he went to parental house of the wife/appellant but she refused to come back.

On the basis of the aforesaid pleadings, the parties went in trial and the wife deposed as a first witness wherein she reiterated the statement made in the said application and denied the statement of the husband taken in defence. The wife/appellant also cited her mother as second witness to corroborate the cruelty as alleged. The daughter of the parties also deposed as a third witness of the plaintiff/appellant. On the other hand, the husband adduced evidence as first witness and also brought a neighbour as second witness in support of his contention that there was no occasion to perpetrate mental or physical cruelty upon the wife/appellant.

As indicated above, the Trial court rejected the said application as the wife/appellant failed to prove the allegation of cruelty and desertion.

At the very outset, we hasten to add that neither the pleading nor evidence of the wife discloses the incident or the series of incidents causing mental and physical cruelty as all the witnesses proceeded on the premise that the wife/appellant was subjected to mental and physical cruelty without disclosing any instances nor by producing any documentary evidence in support of the physical cruelty.

It is no gainsaying that the cruelty is not defined under the Hindu Marriage Act nor precise or definite meaning can be assigned to the same more particularly, in relation to a matrimonial offence. The obvious reason being that the concept of cruelty has varied from and largely depend upon the social and economical aspects. It is more a social aspect which defers from a man to man as the cruelty which may be perceived in one case cannot be the cruelty in other. It, therefore, depends upon the conduct of the parties and the manner and demeanour of parties during the matrimonial life and the acceptance and the reaction which they gave to an incident. Any attempt to construe cruelty in a blanket manner is not a safe course for the Court more particularly, when the persons for whom the Act is promulgated have manners, customs and mode of life quite different from those whose cases were dealt with and the decision have been rendered.

Section 13 (1a) of the Act does not distinguish the physical cruelty from mental cruelty and the legislative intent can be reasonably inferred from the language used therein that both the forms of cruelty may entitle the petitioner therein to seek dissolution of marriage on being proved before the Court. The catena of judgments rendered by the different High Courts as well as the Supreme Court have enunciated the concept of cruelty to be

such that it would percolate a sense in the mind of the petitioner regarding likelihood of a danger to his/her life and impossibility to live with security.

In ***Naveen Kohli vs. Neelu Kohli***, reported in **(2006) 4 SCC 558** the Apex Court have succinctly narrated the concept of cruelty as a course or a conduct of one which is adversarily affecting the other and further held that in a case relating to a mental cruelty under Section 13 (1) (1a) of the Act it may be defined as a conduct inflicted upon the other causing such mental pain and suffering which would make it impossible for such party to live with other.

In ***G.V.N. Kameswara Rao vs. G. Jabilli*** reported in **AIR 2002 SC 576** the Apex Court held that the mental cruelty faced by the appellant is to be assessed having regard to his status in his life, educational background, environment in which he live. The appellant could have suffered traumatic experience because of the police complaint and the consequent lose of reputation and prestige in the society.” Every incident which is regarded as a normal wear and tear of a conjugal life cannot be construed as a cruelty and, therefore, it is an arduous duty of the Courts in the country to consider the allegation thereof or cruelty in the attending facts and circumstances and perception to a personal notion or the sensitivity of the petitioner should be eschewed (***See Savitri Pandey vs. Prem Chandra Pandey***) reported in **AIR 2002 SC 591**. What is important is the conduct of the other party and the behaviour inflicted upon the petitioner is such which renders the petitioner impossible to live under one roof because of the sense having developed that it would be harmful and injurious to live together.

In the pleading there is no incident of physical cruelty pleaded by the wife/appellant even in the evidence she could not disclose any such incidents except that the husband/respondent did not take care of her and the child even when she was admitted in hospital for treatment of ailment of gallbladder nor even a time when the said child was born. Interestingly, in the cross-examination, the wife/appellant has categorically deposed that the husband/respondent is eager for reconciliation but did not disclose her intention whether any reconciliation is possible. The mother of the wife/appellant simply deposed that whenever the daughter used to come to the parental house she used to say that she is subjected to mental and physical torture but also could not divulge any such incident. The daughter who deposed as the third witness of the wife/appellant stated that the father used to inflict physical torture on her mother and frequently used abusive language. Interestingly, the daughter says that the father used to pay the school fees but was irregular which belied the statement of the wife/appellant that the husband never took care of the educational expenses.

There is nothing which can be seen from the evidence of the daughter nor even an incident is ever disclosed from which it can be reasonably inferred that she was subjected to mental cruelty. On the other hand, the husband/respondent in his evidence has shown his inclination to resume and restore the marital knot and have further deposed that he took care of all expenses while the wife/appellant is admitted in the hospital and the medical expenses of the daughter suffering from dental problem. The husband/respondent has further deposed that the wife voluntarily left the

house in the month of May, 2013 without any reason and rhymes and he is ready to take them back home.

The Trial Court in our opinion has correctly arrived at the conclusion that apart from using the expression “mental and physical torture” there is no iota piece of evidence produced by the parties in support of such contention nor any evidence is adduced which compelled the wife/appellant to leave the matrimonial house on sensing insecurity or the alleged cruelty. Even a case of desertion has not been proved as it was somewhat linked with the allegation of cruelty and, therefore, the moment the case of cruelty falls, the desertion shall face the same consequences. The reason for making such observation is that the wife has categorically stated that she left the matrimonial house but under compulsion because of the alleged torture being inflicted upon her. The law recognises the constructive desertion as an element of desertion under the statute provided such desertion is occasioned for the reasonable cause thereby erasing the concept of voluntary desertion.

However an interesting point is raised by the Counsel for the wife/appellant that financial insecurity can lead to a cruelty having drawn inspiration from the Division Bench Judgment of the Delhi High Court in ***Poonam wadhwa vs. Rajiv Wadhwa (NAT APP FC 197 of 2022 decided on 6th September, 2023)***. Though the Delhi High Court has held that the financial insecurity may be an integral limb of the cruelty but one has to understand in what perspective such observation was made in the said case. The marriage between the parties was arranged upon an understanding that the husband is graduate and working in export house

earning substantial amount of money. Subsequently it was found that he was not working and was totally dependent upon the money provided by his mother and the allegation as to consuming liquor daily and playing gamble was also made. The Wife happened to be a working lady since before the marriage and continued to work even thereafter. Several allegations as to the lack of reasonable care with regard to her medical need was also pleaded therein. It was also disclosed by the wife therein that the father in fact facilitated by arranging money in the hire-purchase basis to buy a four-wheeler tempo so that the husband can earn therefrom which was later on proved to be futile as the said vehicle was ultimately surrendered to be a financial institution. It also came from the evidence that later on the three-wheeler was purchased on loan-cum-hypothecation basis which was also surrendered subsequently as it could not yield any income. The husband in his deposition said that because of lack of experience in the field of transportation he could not utilise those vehicles and in such backdrop it was held that the financial insecurity may be brought within the purview of cruelty.

A decision in a case is what is decided on the basis of the facts involved therein. In the instant case even the daughter in her deposition said that the father used to pay her educational fees though irregularly which means that the father was discharging his obligations and duties towards his child. Furthermore, the wife has not come forward with any kind of allegation that the husband does not have any income rather he has categorically pleaded that the husband has running a business and earning a substantial amount therefrom. However, the husband in a deposition

asserted he was compelled to close down the business yet he was able to meet the expenses of a daughter in pursuing her studies. Apart from the same the wife has not pleaded anywhere nor deposed on a plea of financial instability. The Court shall not permit the Counsel to make out a case which is neither pleaded nor taken in the evidence and, therefore, we do not think that the law enunciated in the above report can be of any assistance to the wife/appellant.

In view of the said discussion made hereinabove, we do not find that it is a fit case for interference with the impugned judgment and decree, the appeal is thus dismissed.

No order as to costs.

Urgent Photostat certified copies of this judgment, if applied for, be made available to the parties subject to compliance with the requisites formalities.

(Harish Tandon, J.)

I agree.

(Madhuresh Prasad, J.)