IN THE HIGH COURT AT CALCUTTA

CIVIL APPELLATE JURISDICTION

APPELLATE SIDE

Present:

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

FAT 181 of 2018
CAN 10 of 2023
With
FAT 182 of 2018

Vs.

Appearance:

For the Appellant : **Mr. Sabyasachi Chatterjee, Adv.**
Mr. Dyutiman Banerjee, Adv.
Mr. Sandipan Das, Adv.
Mr. Subhrajit Saha, Adv.
Ms. Anindita Chatterjee, Adv.
Mr. Badrul Karim, Adv.
Mr. Kiron Sk., Adv.
Mr. Sanajit Roy, Adv.
Mr. Saumava Ganguly, Adv.

For the Respondent : **Mr. Swagata Dutta, Adv.**

Judgment On : **22.03.2024**

Harish Tandon, J.:

The aforesaid two appeals are at the behest of the wife/appellant challenging the judgment and decree of the Trial Court in a proceeding for the dissolution of marriage having granted and the application for

restitution of conjugal rights having dismissed under the Hindu Marriage Act, 1955.

Prior to the application for restitution of conjugal right the husband/respondent filed an application under Section 13 (1) (a) of the Hindu Marriage Act alleging that the wife has perpetrated cruelty upon him and, therefore, the marriage between them to be dissolved. The facts pleaded in the application for dissolution of marriage by the respondent herein have been succinctly narrated by the learned Judge in the Trial Court which we feel to adumbrate in our own way in the following:

(i) The marriage between the parties were solemnised on 7th March, 2011 as per the Hindu ritual and rights at Chunnabhati, District- Howrah. The marriage was duly consummated as the parties herein resided together in the house of the brother of the respondent at Premises No. 401, Hossainpur, P.S.- Tiljala, Kolkata- 700107 but no issue is born from the said wedlock.

(ii) The appellant wife since after the solemnisation of the marriage were treating the respondent/husband with great hardness and perpetuated cruelty by abusing in the corset and using insulting languages and sometimes beats him.

(iii) The mother of the respondent husband was hospitalised prior to the marriage for the treatment of fracture of her right hand on 25.2.2011 but the appellant/wife did not tolerate the same and used filthy languages.

(iv) The appellant/respondent suffers from a mental illness or incomplete development of mind and is highly aggressive or seriously irresponsible in her conduct and needed a medical treatment.

(v) On 8.7.2011 due to the torture of the appellant/wife, the respondent/husband fell down from the staircase and suffered deep cut injury and was hospitalised at Rubi General Hospital on 8.7.2011.

(vi) A general diary was lodged with the concerned police station on 30th August, 2011 when the respondent/husband took his mother to hospital for her medical check up and subjected to abusive languages from the appellant/wife who also beat his mother and, thereafter, left the matrimonial home.

(vii) Even on 27th September, 2011, 5th November, 2011 the Respondent/husband was beaten by the appellant/wife and hurled the abusive languages which continued day by day subsequently.

(viii) On 7th November, 2011 the respondent/husband was insulted by the appellant/wife with the filthy languages for which a general diary was lodged with the concerned police station.

(ix) Subsequently on 13.11.2011, the respondent/husband was further abused with filthy languages and beaten by weapons and the respondent/husband and his mother lodged a general diary with the police station.

(x) The appellant/wife tried to burn the mother of the respondent/husband on 13.12.11 for which the general diary was lodged with the concerned police station. The respondent/husband left the house on 01.06.12 intimating the police station and is residing separately from the appellant/wife since then.

The wife in the written statement denied all such allegations and made a counter allegation that the appellant/wife was always treated with the cruelty in the hands of the mother of petitioner who used to call her as "Baja". It is further stated that in order to eradicate such sense she was taken to the Rubi General Hospital and after the check up it was found that the appellant/respondent is capable of procreating the child but the respondent/husband did not undergo with the medical examination with regard to his capacity to give birth to a child. The wife took further stand that despite the same she wanted to live with the husband who has disassociated his company voluntarily without any reasons and rhymes.

The pleadings in the application for restitution of conjugal rights and the defence taken by the respondent/husband are replete of the pleadings filed in the application for dissolution of marriage and, therefore, it would be a sheer repetition of the facts in dealing with the same in the instant judgment.

The evidence of the respective parties is critically examined by the learned Judge in the Trial Court as each words or the sentence are being interpreted in pursuit of granting the decree for dissolution of marriage and

rejecting an application for restitution of conjugal rights which shall be dealt with *in extenso* in latter part of this judgment.

The learned Judge in the Trial Court has in his usual rhetoric eloquently dealt with the issues and concentrated on marshalling of the law of evidence which in our opinion wrongly shifted to the onus of the wife/appellant in disproving the evidence of the husband. The bare reading of the observations made in the impugned judgment containing the nuances of the law in relation to the meaning assigned to the word 'cruelty' appearing in Section 13 (1) (ia) of the said Act and the critical examination of the depositions of the respective parties, the fallacy in the judgment can be envisioned when the learned Judge held that the husband/respondent miserably failed to prove the incident vividly and succinctly narrated in the plaint on the basis of a general diary lodged without the contents thereof having placed before the Court. In other words, the lodging of the diary which does not reflect the contents thereof was held by the learned Judge to be incomplete and/or defective piece of evidence to corroborate the allegations pleaded in the application for dissolution of marriage yet proceeded to grant the decree for dissolution as the wife/appellant miserably failed to cross-examine the husband/respondent on the statement made in the deposition.

What can be reasonably culled out from the aforesaid notion discerned from the impugned judgment that rule of evidence is inflexible when the deposition made in the examination-in-chief is not cross-examined by the adversary leading to a presumption in law that the correctness

whereof has been impliedly accepted. The disclosure of the events of cruelty as stated in the application for dissolution of marriage followed by the lodging of the complaint before the police authorities was held to have not been proved merely on the basis of copies of the general diary which is merely a entry slips without the content embodied therein to which the learned Judge in the Trial Court held that it would not tantamount to proving of such incident and is regarded as having a little consequences or nothing in this regard. The moment the learned Judge in the Trial Court arrived at the conclusive decision that mere lodging a general diary does not *ipso facto* prove the incident as pleaded in the said application, let us examine whether the latter portion of the judgment leading to grant the decree for divorce can be sustained.

It is no longer *res integra* that the provision contained under Section 13 (1) (ia) of the Act postulates that a marriage solemnised according to Hindu Marriage Act may be dissolved if the party applying for dissolution of marriage was subjected to cruelty by the other party. The cruelty has not been defined in the said Act which was previously a ground for judicial separation. Subsequently, by way of an amendment the cruelty was recognised as an incident for dissolution of marriage yet the legislators consciously omitted to define the word 'cruelty' appearing in the said statute. In absence of any definite meaning assigned to the word 'cruelty'; it admits no ambiguity that the aforesaid word is of wide import and is in varied form. It engulfs within itself not only physical but mental cruelty as well and the decision in this regard rendered by the courts of the country

are uniformed that the cruelty must be of such magnitude that it would cause danger to the life, limb or health both bodily or mentally inculcating a sense in the mind of a person a reasonable apprehension of danger in this regard. The vagaries of life, normal wear and tear or a dissent in the respective views cannot be termed as cruelty. The moment the case is founded upon a mental cruelty it is to be judged on the parameter of the treatment, impact and above all creating an apprehension of danger in the mind of the other on his life, limb or health. We do not intend to dilate on the several judgments rendered in this regard as relied upon by the learned Judge in the Trial Court on the proposition that what would constitute a 'cruelty' and what would not, even the Counsels appearing for the respective parties have not relied upon any judgment rather they banked upon the observations of the learned Judge in the impugned judgment.

The entire judgment is founded on the proposition that if the incidents narrated in the pleading or evidence has not been cross-examined or in other words no question is put thereupon, it would tantamount to an acceptance of such incident to be true and if those incidents are the incidents of cruelty, the dissolution of marriage is inevitable. It is held by the learned Judge that incidents of cruelty with the specific dates having disclosed in the Examination-in-Chief by the respondent-husband, having not cross-examined as no question was put thereupon, it would tantamount to a non travesty in the following:

> ***"In support of his case, the petitioner/husband has examined himself as PW1. He has deposed in consonance with his own case. The allegations, as above,***

have duly been mouthed by him, in his examination-in-chief, in verbatim. He went through a rigorous cross-examination on dated 28.07.2015, 25.01.2016 & 23.02.2016. Curiously, he was not cross-examined over the incidents allegedly took place on different dates, what the petitioner/husband (PW1) has deposed in his examination-in-chief in corroboration of his own case. No suggestion, even in the form of denial was there to the PW1, in this regard. Therefore, in absence of any such denial, even for a single word, this court is afraid to hold that the OP/wife has virtually admitted the allegations as made against her by the petitioner/husband.

In reply to his cross-examination, the petitioner/husband (PW1) has categorically stated that he tried to live with the OP/wife peacefully. This statement came from the PW1 during his cross-examination. What this statement implies? It definitely proposes two things; one- there was something wrong, another-effort was made by the petitioner/husband to make the loss good. Curiously, even after making such a statement in reply to his cross-examination, the PW1 was not suggested as to the fact that the OP/wife had also tried to pacify the situation. In absence of such a suggestion, it can be presumed that, it was the petitioner/husband only who was concerned about the dustup between the couple. Does the petitioner/husband still want to live with his wife? In his cross-examination, the PW1 has steadfastly replied in the negative. The PW1 (petitioner/husband) has denied a suggestion, put to him by the Learned Lawyer for the OP/wife in his cross-examination that he 'still' has love & affection towards the OP/wife. Here, this court wises to emphasize on the word 'still'. This suggestion goes to evoke that the OP/wife has virtually admitted that, previously the petitioner/husband had love & affection with her and the same had been withered, at present, as replied by the petitioner/husband. "

The aforesaid observations does not find support from the earlier observations made in the impugned judgment wherein the learned Judge

has arrived at the conclusion that the incident with the specific dates for which the general diary was lodged has not been proved and, therefore, the entry slip of the general diary without any contents having disclosed is not a reliable piece of evidence. The rule of evidence postulates that the onus initially lies upon the person who initiated the proceedings before the Court to prove the incidents of cruelty in a proceeding for dissolution of marriage. The moment such onus is discharged it shifts upon the other side to dislodge the same. The learned Judge in the Court below was of the view that such incident as explicitly pleaded in the plaint with the specific date having not proved by the husband, the subsequent decision that in absence of any cross-examination or putting a question on such incident it would tantamount to an acceptance thereof does not appear to be correct. The emphasis on the word “still” appearing in the Examination-in-Chief of the respondent/husband appears to be misplaced and cannot lead to a loss of love and affection towards the other nor can be presumed to have a disharmony in the matrimonial relationship which has been withered subsequently. In a common parlance, the word “still” connotes the continuance of such love and affection despite the storm in the relationship and, therefore is not a word of negative concept as perceived by the learned Judge. The word ‘still’ should not be emphasised by the learned Judge in the negative sense more particularly, on the nuances of the cruelty which stands on a higher pedestal than of a normal wear and tear of a matrimonial life. Furthermore, filing an application for restitution of conjugal rights subsequent to the filing of an application for dissolution of marriage does not percolate a negative concept as held by the learned Judge. The learned

Judge held that what prompted her not to file the said application for restitution of conjugal rights before the application for dissolution of marriage and surreptitiously jumped to the conclusion that it would invite an adverse inference. Another incident of a complaint lodged by the appellant/wife with the police station and arrest of the respondent/husband and his mother is projected as an incident of cruelty. The evidence of the respondent/husband and the second witness on his behalf is clear indicative of the fact that there was no arrest as the respondent/husband and the mother was allowed to go home after certain enquiry without any bail being granted in this granted. Even the complaint (Exhibit-DW 1) does not constitute the elements of cruelty but a mere recording of an incident that the husband left the matrimonial home without intimating the appellant/wife who is residing in the matrimonial house. The observation of the learned Judge that in a happy marriage the wife provides the climate and husband the landscape is an archaic notion which has gradually eroded with the advancement of society in all respect. The two persons grown up and raised in a different atmosphere have a reciprocal and/or collective duty to create a congenial atmosphere which cannot be said to be a one way traffic. It is a collective duty of both husband and wife to wither the trivial issues which are normal in a matrimonial life and mutual respect to the decision of each other appears to be the hallmark of the society. Even the Constitution recognises equality in gender and, therefore, the husband to be put on higher degree than that of the wife is unacceptable. The learned Judge appears to be swayed by the emotions and inappropriate appreciation of the facts and, therefore, we could not persuade ourselves to agree with

the findings made in the impugned judgment. The impugned judgment is thus set aside. The application for dissolution of marriage is dismissed. The application for restitution of conjugal right is allowed.

However, there shall be 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.)

Later:

After the Judgment is delivered, the learned Counsel for the respondents prays for stay of operation of this order.

We do not find that there is any case made out for such request.

Accordingly, the prayer for stay of operation of the order is rejected.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)