

(2021) 11 GAU CK 0023
In the Gauhati High Court
Case No : Mat.App. No. 4 Of 2021

Minati Hazarika

APPELLANT

Vs

Bidyadhar Hazarika

RESPONDENT

Date of Decision : 02-11-2021

Acts Referred:

Hindu Marriage Act, 1955 — Section 13, 13(1)(ib)

Citation : (2021) 11 GAU CK 0023

Hon'ble Judges : Suman Shyam, J; Marli Vankung, J

Bench : Division Bench

Advocate : P J Saikia, H Gupta

Final Decision : Allowed

Judgement

1. Heard Mr. P. J. Saikia, learned counsel appearing for the appellant(wife). Also heard Mr. H. Gupta, learned counsel appearing for the respondent (husband).

2. This appeal is directed against the judgment and order dated 28.09.2018 passed by the learned Additional District & Sessions Judge No.2, Nagaon, Assam, in M.(D) Case No.46/2015, granting a decree of divorce in favour of the respondent based on a petition filed by him on 31.07.2015 under Section 13 of the Hindu Marriage Act, 1955.

3. The case of the respondent, as projected in the plaint, is that the appellant had got married to the respondent on 19.03.1995 as per the Hindu rites whereafter, they had been peacefully living as husband and wife. From their wedlock, four children were born. However, seven years after the marriage, the appellant (wife) started visiting the house of her parents at the instigation of her brother (respondent No.2 in the plaint) and started staying there for weeks without the approval of the respondent. According to the respondent, the brother of the appellant used to very often visit their house and his wife used to go with him to the house of her parents. Despite the objection as regards the frequent visit of the wife to her parents house and his advise not to do so, his wife did not

pay any heed to such advice. On 17.07.2012, when the petitioner/respondent was posted at Delhi as the Body Guard of the Chief Minister, he came to know that the appellant had filed M.R. Case No.199/2012 which ultimately culminated in a settlement reached in the Lok Adalat whereby the respondent had agreed to pay a sum of Rs.4500/- per month to his wife as maintenance. The above conduct of the appellant, according to the respondent, are the instances of cruelty. It has also been alleged in the plaint that the appellant had left her matrimonial home on 27.02.2015 along with one son and a daughter but did not return despite several requests made by the respondent to such effect. Based on such pleadings, the respondent had filed the suit seeking a decree of divorce on the grounds of cruelty and desertion.

4. The appellant (wife) had appeared and contested the suit by filing her written statement. However, she remained absent thereafter as a result of which, the learned court below had passed the ex-parte judgment and decree dated 28.09.2018.

5. By referring to the materials on record Mr. Saikia has argued that there is no pleading in the plaint setting out any of the grounds for divorce within the meaning of Section 13 of the Hindu Marriage Act, 1955 (herein after referred to as "the Act of 1955"). Moreover, submits Mr. Saikia, the learned court below did not discuss the evidence adduced by the respondent nor did it indicate in the impugned judgment as to on what ground, the prayer for dissolution of marriage was allowed. Alleging that there was a communication gap between the appellant and her lawyer as a result of which, she could not adduce evidence before the learned trial court, Mr. Saikia has prayed for setting aside the impugned judgment and order dated 28.09.2018.

6. Mr. Gupta, learned counsel for the respondent, on the other hand, has argued that the foundation of a case under Section 13 of the Act of 1955 has been laid in the pleadings and the respondent had also led evidence during trial. The learned counsel, however, submits that even if the decree is found to be unsustainable in law, the matter be remanded back to the trial court for a fresh decision in the suit.

7. We have considered the rival submissions made at the bar and have also gone through the materials available on record.

8. A perusal of the impugned judgment and order dated 28.09.2018 goes to show that based on the pleadings in the plaint as well as the written statement, the learned court below had framed two issues which are as follows :-

"a) Whether there is any cause of action for filing this suit?

b) Whether the petitioner is entitled to get a decree as prayed for or any other relief/reliefs?"

9. The first issue was decided in favour of the respondent herein by holding that since there was a dispute between the husband and wife the suit was

maintainable.

10. In so far as the 2nd issue is concerned, the learned court below has recorded the following finding which is reproduced herein below :-

"12. After gone through the petition filed by the petitioner as well as his evidence in-chief and evidence in chief of his witness presented before the Court, it is clear that the petitioner and the respondent were married on 19-03-95 in accordance with Hindu rites. It is also proved that after their marriage both were living as husband and wife. It is also proved that the respondent no.1 adopted a very negative role towards him when the petitioner was in Delhi. It is also clear that the petitioner filed a case of restitution against the respondent No.1. It is also proved that there are four children out of their wedlock. It is also proved that the petitioner tried to restore his conjugal life with the respondent no.1. Therefore, issue no.2 is decided in favour of the petitioner. Accordingly, this Court found merit on his petition and passed the following order."

11. Save and except the observations made in paragraph 12 of the judgment, as quoted herein above, we do not find any other discussion by the learned trial court on the merit of the case. The decision and conclusion of the learned court below also does not even remotely indicate as to whether, the petitioner (husband) had succeeded in proving the case of cruelty and/or desertion by his wife and if so, based on what evidence.

12. It is to be noted herein that Section 13(1)(ib) of the Act of 1955 categorically provides that marriage between husband and wife can be dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for continuous period of not less than two years immediately preceding the presentation of the petition. In the instant case, as has been mentioned herein before, the alleged desertion was on 15.02.2015 and the suit was filed on 31.07.2015 i.e. within six months from that date of desertion. Therefore, the petition seeking a decree of divorce on the ground of desertion was clearly not maintainable in the eye of law.

13. In so far as the plea of cruelty is concerned, we have already noted that there is neither any pleading nor any evidence to substantiate such a plea. Even the learned trial court has failed to record any cogent finding as regards cruelty. It may be noted herein that in this case the husband is alleging cruelty against his wife. But no particulars of cruelty or evidence supporting such a plea, is available on record. After going through the impugned judgment dated 28.09.2018, we are of the view that the same is vitiated by non-application of mind. Therefore, the impugned judgment is unsustainable in the eye of law and hence liable to be set aside.

14. Ordinarily, in proceeding of this nature, if the decree of divorce is set aside by the appellate court due to non-application of mind by the trial court, the matter is remanded back to the trial court for a fresh decision in the suit. However, since the suit itself has been held to be not maintainable for a decree

of divorce on the ground of desertion for the reasons mentioned herein above and considering the fact that there is no pleading or evidence lead by the petitioner to make out a case for divorce on the ground of cruelty, remanding the matter back to the trial court for a fresh decision in the suit, in our view, would be a futile exercise.

15. It is unfortunate that while passing the impugned judgment and decree dissolving the marriage between the parties, the learned trial court had failed to properly appreciate the evidence adduced by the parties or to record proper reasons in support of the decision and conclusion arrived at. Be that as it may, for the reasons indicated herein before we hold that the impugned judgment and decree is unsustainable in the eye of law.

The same is accordingly set aside.

It is, however, made clear that this order is without prejudice to the rights and interest of either party to avail appropriate legal remedy, for redressal of their further grievance, if any, as may be permissible under the law.

The appeal stands allowed.

Send back the LCR.