
(2015) 04 CAL CK 0001
In the Calcutta High Court
Case No : F.A. 42 of 2007

Narayan Chandra Dey

APPELLANT

Vs

Kabita Dey

RESPONDENT

Date of Decision : 01-04-2015

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1A)(ii), 13(IA)(II), 9
Penal Code, 1860 (IPC) — Section 498A

Citation : (2015) 4 CHN 81

Hon'ble Judges : Debi Prosad Dey, J.; Jyotirmay Bhattacharya, J.

Bench : Division Bench

Advocate : Tarakeswar Pal, Tapan Dutta Gupta, Parvej Anam, Bijoy Bag and Sayoni Roy Chowdhury, for the Appellant; Amal Baran Chatterjee and Satadal Chatterjee, Advocates for the Respondent

Final Decision : Allowed

Judgement

Jyotirmay Bhattacharya, J.—This first appeal is directed against the judgment and decree passed by the learned Trial Judge on 8th March, 2006 in Matrimonial Suit No. 109 of 2003 at the instance of the appellant/husband. By the said decree, the husband's suit for divorce was dismissed by the learned Trial Judge.

2. The legality of the said judgment and decree is under challenge before us.

3. Let us now consider as to how far the learned Trial Judge was justified in dismissing the husband's suit for divorce in the facts of the instant case.

4. Admittedly, the marriage between the parties was solemnised on 12th December, 2004 in accordance with the Hindu rites and ceremonies. At the relevant time, the husband/appellant was posted at Muri Railway Station as railway employee. The parties last resided together at Muri railway quarter. Initially, the husband filed a suit for divorce against the wife on the ground of cruelty in the Court of the learned Judicial Commissioner, Ranchi. The said suit was registered as Matrimonial Suit No. 55 of 1996. The wife/respondent

appeared in the said suit and expressed her willingness to stay with the husband. Since the wife expressed her willingness to stay with the husband, the husband withdrew the said suit for divorce unconditionally. Ultimately, the wife did not come back. She filed a complaint against the husband and the other relatives of the husband under Section 498A of the Indian Penal Code before the Court of Bishnupur. Despite such complaint was made by the wife against the husband and his other family members, the husband filed an application under Section 9 of the Hindu Marriage Act, 1955 praying for restitution of the conjugal rights in the Court of the District Judge at Bankura which was subsequently transferred to the Court of the 2nd Additional District Judge, at Bankura. The said suit was registered as Matrimonial Suit No. 77 of 1999. The wife appeared in the said suit and contested the same by filing written statement. The said suit was ultimately decreed on 20th April, 2002 by declaring the husband's entitlement to get a decree for restitution of conjugal rights against the wife as per the provision of Section 9 of the Hindu Marriage Act. The wife did not challenge the said decree in any higher forum. She accepted the said decree. But, she did not come back to the matrimonial home of the parties in compliance of the decree for restitution of conjugal rights till 12th September, 2003. Under such circumstances, the husband filed the present suit for divorce against the wife on three grounds, namely, (I) cruelty, (ii) desertion and (iii) refusal to resume cohabitation with the husband in terms of the decree for restitution of conjugal rights of the parties passed by the learned Trial Judge.

5. The wife contested the said suit by filing written statement denying the allegation made out by the husband in the divorce petition. Both the parties adduced evidence in support of their respective claims.

6. The learned Trial Judge after considering the pleading of the respective parties and the evidence adduced by them, dismissed the said suit on contest by holding interlaid that the husband has failed to prove any of the grounds made out by him in his suit for divorce. The learned Trial Judge held that the incidents of cruelty with which the husband was treated were all incidents which allegedly occurred prior to filing of the suit for restitution of conjugal rights. The learned Trial Judge, thus, held that when the husband filed a suit for restitution of conjugal rights in 2002, he condoned the cruelty, which allegedly he received from his wife before filing of the suit for restitution of conjugal rights.

7. After considering the materials on record, we also do not find any reason to disagree with the learned Trial Judge in this regard as we find that the incidents of cruelty which he allegedly received from his wife had taken place in the year 1995/1996 and despite receiving such cruel treatment from the wife the husband filed an application for restitution of conjugal rights in 2002. Filing of an application for restitution of conjugal rights in 2002 clearly indicates that he condoned all lapses on the part of his wife till the date of filing of the said application.

The learned Trial Judge also refused to pass any decree for divorce on the ground

of desertion by holding interlaid that the husband has failed to prove that the wife withdrew herself with an intention to bring the cohabitation to an end permanently. It is rightly held by the learned Trial Judge that unless the factum of separation and animus deserted co-exist, decree for divorce cannot be granted on the ground of desertion.

8. We agree with the learned Trial Judge that the husband has failed to prove that the wife withdrew herself with an intention to bring the cohabitation to an end permanently. This conclusion we draw as we find from the evidence of the respective parties that the parties were in talking terms as the husband made several telephone calls to the wife and the wife unhesitatingly received them before filing of the present suit for divorce.

9. Let us now consider the other ground which was made out by the husband in support of his claim for divorce. He stated that after passing of the decree in a suit for restitution of conjugal rights on 20th April, 2002; the wife did not come to the matrimonial home for resuming cohabitation with the husband till the date of filing the present suit. This part of the evidence of the plaintiff remains uncontroverted.

10. Mr. Chatterjee, learned Senior Advocate, appearing for the respondent/wife has drawn our attention to the evidence in cross-examination of the husband being PW-1 wherein he stated that the parties were referred to Lok Adalat of Bishnupur for reconciliation and in course of such reconciliation before the Lok Adalat the husband expressed his unwillingness to take back his wife as he could not believe his wife any more and submits that when the husband himself refused to take her back, he cannot claim a decree for divorce on the said ground of failure of the wife to resume co-habitation following the decree of restitution of conjugal rights passed by the learned Trial Court.

11. Let us now consider as to how far the relief which the husband claimed in the suit for divorce as per the provision contained in Section 13(1A)(ii) can be denied on the ground that in course of reconciliation, the husband expressed his unwillingness to take back his wife.

12. If we consider husband's pleading and his evidence in this regard we find that the husband stated therein that after passing of the decree for restitution of conjugal rights on 20th April, 2002; the wife did not come back his matrimonial home for resuming the cohabitation till the date of filing of the suit, i.e. 12th September, 2003. Thus, the cause of action for seeking a decree on the ground enumerated in Section 13(1A)(ii) was complete as on the date of filing the said suit inasmuch as there was no resumption of conjugal rights between the parties for a period of more than one year after passing of the decree of restitution of the conjugal rights in a proceeding in which they were parties.

13. It is true that in connection with the said suit they were referred to the Lok Adalat for reconciliation. If in course of such reconciliation, the husband refuses to take her back, decree which he has prayed for in the said suit on the aforesaid

ground cannot be denied as the refusal to take her back in course of reconciliation proceeding is not a pre-suit incident resulting in demolition of the appellant's claim for divorce. On the contrary, had he agreed to take her back and expressed his such desire before the Lok Adalat, the relief which he claimed in the suit could have been refused. As such we do not find any substance in such argument of Mr. Chatterjee.

14. Before parting with, we also like to mention here that even assuming that the wife wrote a letter to the husband expressing her willingness to come back and the husband did not take her back, still then, we hold that the decree for divorce on the ground of Section 13(IA)(II) cannot be refused as ultimately we find that there was no resumption of conjugal right between the parties for a period of more than one year after passing of the decree of restitution of conjugal rights. The conditions for grant of decree for divorce on the ground contained in Section 13(IA)(II) of the Hindu Marriage Act, are satisfied in the instant case.

15. As such, we set aside the judgment and decree of the learned Trial Judge and pass a decree for divorce by dissolving the marriage between the parties which was solemnised on 12th December, 1994 as per the Hindu rites and customs.

16. Having regard to the fact that the husband is a railway employee and the wife has no means to maintain herself and the parties have also a daughter who is studying in graduation level with honours, we direct the husband to pay a consolidated sum of Rs. 7,00,000/- (Rupees seven lacs only) towards the permanent alimony of the wife and the cost of maintenance of the child. Such payment should be made to the wife within three months from the date of passing of the decree.

17. The appeal is, thus, allowed.

Urgent Photostat certified copy of this order, if applied for, be given to the parties as expeditiously as possible.

Jyotirmay Bhattacharya, J.

I agree.