
(2005) 06 CAL CK 0018

In the Calcutta High Court

Case No : F.A. No. 13 of 2005 with COT No. 3556 of 1999

Piyali Halder

APPELLANT

Vs

Rathin Kumar Halder

RESPONDENT

Date of Decision : 17-06-2005

Acts Referred:

Family Courts Act, 1984 — Section 9
Hindu Marriage Act, 1955 — Section 13, 13(1), 5

Citation : (2005) 4 CHN 690

Hon'ble Judges : Sadhan Kumar Gupta, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Pradip Kumar Panja, for the Appellant; Abhijit Basu, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This appeal has been preferred by a wife u/s 19 of the Family Court Act being dissatisfied with the judgment and decree dated 12th April, 1999 passed by the learned Judge, Family Court in Matrimonial Suit No. 149 of 1997 granting a decree for judicial separation in favour of the husband.

2. The husband filed the aforesaid proceedings in the Court of the learned District Judge for annulment of the marriage of the parties on the ground that his consent in such marriage was obtained by suppressing the fact that the wife was suffering from epilepsy.

3. The present appellant filed written statement denying the allegations made in the plaint and ultimately the suit was transferred to the Family Court. After such transfer, the husband came up with an application for amendment thereby praying for an alternative remedy of decree for dissolution of marriage by divorce on the ground, of desertion and cruelty and such amendment was allowed.

4. At the time of hearing of the aforesaid suit three witnesses were examined on behalf of the respondent while an equal number of witnesses also appeared on

behalf of the present appellant. Various documents in support of the plea that the wife was suffering from epilepsy were marked as exhibits.

5. The learned Trial Judge came to the conclusion that the present appellant was suffering from epilepsy before her marriage in 1988. The learned Court, however, found that by filing an application for amendment thereby incorporating the prayer of divorce on the ground of desertion and cruelty and further by giving suggestion to the wife in cross-examination whether she was agreeable to accompany him to his house, the husband had waived the ground of alleged fraud. The learned Trial Judge further held that there was no material to hold that there was any act of fraud on the part of wife or she was involved in any connivance.

6. On the question of desertion, the learned Trial Judge specifically arrived at the conclusion that the suit having been filed on 9th February, 1993 and the wife having stayed separately from 29th August, 1992, the alleged desertion was for a period of less than two years and it did not attract Section 13(1)(b) of Hindu Marriage Act.

7. He further found that the wife refused to go back to her husband's house and to lead conjugal life without any reasonable excuse and according to the learned Trial Judge, such act amounted to cruelty. The learned Trial Judge further held that suppression of material fact before the marriage that the appellant was suffering from epilepsy also amounted to cruelty notwithstanding the fact that the wife was not found to be guilty of fraud for such suppression.

8. Accordingly, the learned Trial Judge concluded that the present appellant treated the respondent with cruelty and taking into consideration the facts and circumstances of the case decided to grant a decree for judicial separation in favour of husband.

9. Being dissatisfied, the wife has preferred the present appeal.

10. The husband has on the other hand filed a separate cross-objection contending that the wife having been found to be guilty of cruelty, there was no reason to grant a decree of judicial separation and as such, the husband was entitled to get a decree for divorce for such cruel treatment; It was further contended that the learned Trial Judge ought to have declared the marriage as a nullity on the ground that the fact of the epilepsy of the wife was suppressed at the time of marriage and as such, the concealment was sufficient for annulling the marriage as one of the conditions of valid marriage was absent on the part of the wife.

11. After hearing the learned Counsel for the parties and after going through the materials on, record we find that the learned Trial Judge has specifically arrived at the conclusion that the husband is not entitled to get a decree for divorce on the ground of desertion as the required time for desertion was not completed at the time of institution of suit. The learned Trial Judge; however, held that

although there was no desertion for the required period yet it has been established that desertion for that short period was without any just cause and according to the learned Judge, such refusal amounted to cruelty. The learned Trial Judge although in one portion of the judgment came to the conclusion that there was no fraud on the part of wife in the matter of procuring consent, nevertheless held that suppression of the disease of epilepsy amounted to cruelty and thus, granted decree for judicial separation on the ground of cruelty.

12. According to Section 13 of the Hindu Marriage Act, act of cruelty can afford a ground of divorce or judicial separation provided such cruelty is committed by one of the spouses after the solemnization of marriage. Therefore, if before marriage, fact of epilepsy was concealed, even if we assume such concealment to be cruelty for the sake of argument, the same having been committed before marriage, cannot enable a party to get a decree for divorce or judicial separation. Similarly, in Section 13, of the Hindu Marriage Act there being specific ground of cruelty apart from desertion for more than two years, the learned Trial Judge, in our view, committed gross error of law in treating desertion for less than, two years as an act of cruelty. When the legislature specifically intended that desertion less than two years would not afford a ground of divorce or judicial separation, the self-same act cannot take the shape of cruelty so as to enable a party to get those very relief. In our view, desertion even without just cause for less than two years cannot at any rate amounts to cruelty within the meaning of Section 13 of the Act and thus the learned Trial Judge acted illegally in granting a decree for judicial separation on the basis of such erroneous finding or cruelty. Moreover, in this case, merely because at the time of hearing, the husband offered to take back wife and the wife said that she would think over the matter after the examination of the son was over such answer of the wife cannot lead to the inference that she deserted the husband. When the husband has filed a suit for annulling the marriage and was proceeding with the suit, no adverse inference can be drawn against the wife for turning down the proposal of the husband to return to the matrimonial home.

13. We, thus, find that the decree for judicial separation granted by the learned Trial Judge was patently illegal as the husband failed to prove cruelty on the part of the wife after solemnization of the marriage.

14. As regards cross-objection filed by the husband we are, of the view that there being no cruelty on the part of wife within the meaning of Section 13 of the Hindu Marriage Act, the husband cannot claim divorce on the ground of cruelty and we find no substance in such a ground taken in cross-objection. As regards the other ground taken in the cross-objection that the marriage should be declared to be nullity is equally devoid of any substance. The legislature has during the pendency of this appeal amended Section 5 of the Hindu Marriage Act by making it clear that epilepsy will not be a disqualification of valid marriage. Such being the position, today we cannot grant a decree for declaration that the marriage was a nullity when during the pendency of the present proceedings

epilepsy has been deleted from the mischief of Section 5 of the Act. Although, Mr. Basu appearing on behalf of the husband strenuously contended before us that at the time of institution of the suit epilepsy being a disqualification, his client's right cannot be taken away by subsequent amendment, we are not at all impressed by such submission. The legislature in its wisdom as a public policy having decided to exclude epilepsy from the list of disqualifications of a valid marriage, such amendment will be applicable even to a pending proceeding and as such, this Court now cannot hold that the marriage should be declared to be a nullity on the ground that the wife was suffering from epilepsy at the time of marriage. Therefore, notwithstanding the finding of the learned Trial Judge that the wife was suffering from epilepsy before marriage, the husband is not entitled to get declaration of nullity as the said disqualification has been removed during the pendency of the proceedings. (See Lakshmi Narayan Guin and Others Vs. Niranjana Modak,)

15. We, thus, find no merit in the cross-objection filed by the husband.

16. On consideration of the entire materials on record, we, thus, set aside the decree of judicial separation passed by the learned Family Court. The appeal is, thus allowed. The cross-objection filed by the respondent is, however, dismissed. In the facts and circumstances, there will be, however, no order as to costs.

Sadhan Kumar Gupta, J.

17. I agree.