

(2013) 08 OHC CK 0029
In the Orissa High Court
Case No : MATA No. 64 of 2011

Smt. Nibedita Dash and Others

APPELLANT

Vs

Sri Biranchi Narayan Satpathy and Others

RESPONDENT

Date of Decision : 27-08-2013

Acts Referred:

Citation : (2013) 116 CLT 711 : (2014) 1 DMC 99 : (2013) 2 OLR 852

Hon'ble Judges : Sanju Panda, J;B.R. Sarangi, J

Bench : Division Bench

Advocate : Bibekananda Bhuyan, B.N. Das, S.K. Panda, R. Ray, A.K. Rout, B.N. Mishra, C.R. Swain, P. Mohanty, Ms. S. Sahoo and S. Samal and Ors, for the Appellant; K.C. Kanungo, H.V.B.R.K. Dora and Chitra Padhi and Ors., for the Respondent

Judgement

Sanju Panda, J.—Since both the appeals/arise out of a common order, they were heard together & are being disposed of by this common Judgment. Challenge has been made in these appeals by the wife to the Order Dated 15.7.2011 passed by the Learned Judge, Family Court, Cuttack in Civil Proceeding Nos. 251 of 2003 & 204 of 2005.

2. The husband filed Civil Proceeding No. 25-1 of 2003 u/s 12 of the Hindu Marriage Act, 1955 (in short, "the Act") to declare the marriage with wife as void & in the alternative to grant a decree of divorce & permanently restrain her from claiming maintenance from him. The wife filed Civil Proceeding No. 204 of 2005 u/s 9 of the Act for restitution of conjugal rights. The Court below dismissed the application filed by the wife for restitution of conjugal rights on contest without cost & allowed the application filed by the husband on contest without cost & dissolved the marriage by a decree of divorce subject to payment of cost of Rs. 3 lakhs as permanent alimony to the wife within three months from the date of the order.

3. Learned Counsel for the Appellant submits that C.P. No. 251 of 2003 was filed by the husband u/s 12(1)(c) read with Section 13(1)(i-a) of the Act. During

pendency of the proceeding, by way of amendment, the relief claimed in the proceeding was only u/s 12(1)(c) of the Act & his prayer to declare the marriage as void on the plea of fraud, which could not be proved by him during trial. Therefore, the Judgment & decree is liable to be reversed. The Court below illegally granted relief u/s 13(1)(i-a) of the Act specifically when the said relief was deleted from the pleadings of the parties. The finding of the Court below, that there is no chance of reunion without taking into consideration the application filed by the wife for restitution of conjugal rights, is illegal as the Court below neither averred regarding desertion of wife nor proved the said facts. Therefore, the said finding is based on surmises & conjectures & not sustainable in the eye of law. It was further contended that ICC No. 200 of 2006 was filed by the wife after threatening given by her to implicate the husband, his family members & relatives in a false case of torture & demand of dowry & the fraud practiced by the wife suppressing the facts that due to hormonal imbalance, moustache & beard were appeared on her from 1996 & on totality of the said facts, one can conclude that the husband has been subjected to cruelty by the wife & due to such harassment & mental agony practically there can be no reunion & therefore, the order passed by the Court below granting divorce in favour of the husband is liable to be reversed. The application filed by the wife for restitution of conjugal rights should have been passed by the Court below in view of the medical report that she is medically fit to lead a normal conjugal life. In support of his contention, he cited a decision of the Madhya Pradesh High Court in the case of Shrikant Ramsajiwan Tripathi Vs. Saroj, & submits that in absence of any evidence to grant relief u/s 13 of the Act, the Court below has exercised its power illegally in the absence of any evidence on record. Hence, the decree is liable to be set aside. He also cited a decision of the Apex Court in the case of Dr. N.G. Dastane Vs. Mrs. S. Dastane, & the decision of the Punjab & Haryana High Court in the case of Krishan Kumar Vs. Smt. Nidhi Arora wherein it has been held that in absence of positive pleading & evidence, the Court has lack jurisdiction to grant such relief.

4. Learned Counsel appearing for the Respondent submitted that Learned Judge, Family Court dissolved the marriage by a decree of divorce subject to payment of Rs. 3 lakhs on the ground of admission by the wife that the father of the wife refused to send her to the matrimonial home & the rebuttal evidence of P.W. 2, the brother of the husband, amounts to cruelty & desertion. As the wife has already received Rs. 3 lakhs as permanent alimony on 8.8.2012 as directed by this Court, the Judgment & decree passed by the Court below need not be interfered with as the Judgment is passed as per the provision of Order 12 Rule 6(1) of the CPC read with Section 18 of the Indian Evidence Act on the admission of the wife. The Court has jurisdiction u/s 23(1)(a) of the Act to draw a decree on the basis of material evidence in the end of justice. She further submitted that implicating the entire family members in criminal case by filing ICC Case No. 200 of 2006 amounts to cruelty. As the husband was frustrated & sustained huge financial expenses for his frequent coming to Court from his working place, there

is no chance between the husband & the wife to lead a happy conjugal life. Therefore, the Judgment & decree need not be interfered with. In support of his contention, the decisions of the Apex Court in the case of Praveen Mehata v. Inderjit Mehta, reported in AIR 2000 SC 2582 & the decision of the Delhi High Court in the case of Sangeeta Vs. Hitesh Kumar, & the decision of this Court in the case of Smt. Pratima Biswal Vs. Amulay Kumar Biswal, have been cited.

5. From the rival submissions of the parties & after going through the LCR & pleadings of the parties, it appears that the husband filed Civil Proceeding No. 251 of 2003 on 23.3.2003 u/s 12(1)(c) read with Section 13(1)(i-a) of the Act on the ground that he is a permanent employee of Indian Railways & working as TTI. The wife is a Graduate & her father is also an educated person & working in an organization at Jagatsinghpur. The marriage was solemnized between the parties on 28th February, 2002 as per Hindu rites & customs. It was an arranged marriage. The wife lived one month in matrimonial home & returned to her father's house. The husband left for his service place. Thereafter, the wife went with him to his service place on 1st December, 2002 where she fell ill & was admitted to South Eastern Railway Hospital where it was detected ovarian tumor. The husband found moustache & beard on her face & on being asked, she disclosed regarding her hormonal imbalance. She was under regular treatment from 1996. She also disclosed that she was under treatment of ovarian tumor; Accordingly, he was shocked. He informed the said facts to her father who took her to the native place for better treatment. She was admitted in a nursing home at Cuttack & operated there. After discharging from the nursing home on 14.1.2003, the doctor advised her to take rest. It came to his knowledge that the right ovary had been removed by operation & left ovary had been scratch for removal of cyst as a result of which chance of conception was very remote. The said fact was disclosed to all the family members of the wife. Though the family members of the wife were aware about the said illness of the wife, they did not disclose the said fact before marriage. Had the said fact been brought to his notice & his family members, he would not have given his consent for such marriage. Since it was an arranged marriage & the marriage was held by obtaining fraud & misrepresentation of facts & this fraud gave mental shock & agony, he is entitled to decree of divorce. To resolve the dispute, his family members & well-wishers arranged a meeting in his house on 23.4.2003. The father of the wife was invited to attend the meeting. He also admitted the above facts. It was disclosed before him that since the marriage was held by fraud & misrepresentation of facts & chance of wife to conceive was very remote, the husband was constrained to file an application for mutual divorce. The father of the wife did not agree to such proposal & threatened to implicate the family members in false case. As the matter was not settled amicably, he filed the proceeding u/s 12 of the Act.

6. The wife appeared & filed the written statement and" it was stated therein that she was ill on 6.12.2002. She traversed all other allegations made by the husband. She stated that after marriage, she led a happy conjugal life for more

than 10 months & the marriage was consummated. She also disclosed that she was admitted to a nursing home at Cuttack with prior intimation to the husband & his family members were very much present in the hospital on the date of the operation & took care of her. On 6.12.2002, the ovarian disease was detected. As per the opinion of the doctor, she was medically fit to lead a normal life; rather the husband forced her to remain with her parents & the relief sought by the husband should not be granted on a defamatory & unfounded allegations. Her father never threatened to file a false criminal case. She was ready & willing to join the company of the husband. Similar pleading was made in Civil Proceeding No. 204 of 2005 filed by the wife for restitution of conjugal rights.

7. In support of their pleadings, the husband examined himself as P.W. 1 & his brother as P.W. 2. The wife examined herself as OPW 1, her father was examined as OPW 2 & her mother as OPW 3. They filed documents & letters which were marked as exhibits. On analyzing the evidence on record, the Court below recorded a finding that the marriage was not in dispute. The Court below held that the husband failed to establish convincingly that wife had growth of moustache & beard on her face & she had ovarian complication prior to her marriage. Therefore, he failed to establish the plea that by false representation & fraud, he had been given in marriage with Respondent-wife. Under such circumstances, the marriage could not be held invalid or void. However, the Court below taking into consideration the fact that the wife was operated on 11.1.2003 & after her discharge from nursing home, when her in-laws sought to bring her back to the matrimonial house, her father refused to send her with a plea that the doctor advised her rest for 6 months. Since the wife did not return to the matrimonial home & she preferred to stay at her father's house, her said act amounts to cruelty to the husband. In view of that & on totality of the evidence on record, one could conclude that the husband was subjected to cruelty by the wife & on such findings, the Court below passed the impugned Judgment & decree.

8. From the above-findings of the Court below, it appears that the Court below passed a decree u/s 13(1)(i-a) of the Act on the ground of desertion without analyzing what amounts to desertion.

9. Law is well settled that in its essence desertion means the intentional permanent forsaking & abandonment of one spouse by the other without that other's consent, & without reasonable cause. It is a total repudiation of the obligations of marriage. The inference of desertion has to be made on a balance of probabilities.

10. In view of the above settled principle of law & the pleadings as well as the evidence led by the parties, in the present case, it does not reveal that the wife is guilty of desertion. She left the matrimonial home with an intention to return back to the matrimonial home after treatment. Her subsequent conduct appears that she is ready & willing to return to the matrimonial home & resume the conjugal rights. However, on a false plea the husband was not willing to bring her

back to the matrimonial home; rather through P.W 2(elder brother of the husband), he pressurized the wife for a divorce. Thereafter on a false plea filed the present proceeding with an allegation that consent of marriage obtained by fraud & misrepresentation & he failed to prove such plea during trial.

Law is also well settled that the burden of proving desertion the "factum" as well as the "animus deserendi" is on the Petitioner; & he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the husband has still to satisfy the Court that the desertion was without cause (See Lachman Utamchand Kirpalani Vs. Meena alias Mota, & Dr. N.G. Dastane Vs. Mrs. S. Dastane, . Hence, the husband has failed to prove the plea of desertion against the wife.

11. So far as cruelty is concerned, in the present case, the Respondent-husband has not brought the wife to the matrimonial home. The Appellant-wife when left the matrimonial home has not disclosed any intention of permanent forsaking or abandonment of the spouse or she has left the matrimonial home without consent; rather she has left the matrimonial home for treatment. As per the doctor's advice, she was overstayed to take rest. The said overstayed of wife in her parents house will not constitute cruelty towards husband. Accordingly, the finding of the Court below is arbitrary & perverse so far as cruelty is concerned.

12. The decisions cited by the husband in the case of Praveen Mehata (supra), Sangeeta (supra) & Smt. Pratima Biswal (supra) are not applicable to the facts & circumstances of the present case. It appears that the criminal case has been filed by the wife in the year 2006 during pendency of the present proceeding. Therefore, the allegation made by the husband that the father of the wife threatened to file criminal case against the family members of the husband is not correct. Accordingly, we set aside the Judgment & decree passed in Civil Proceeding No. 204 of 2005 & reverse the Judgment & decree passed in Civil Proceeding No. 251 of 2003 & dismiss the said civil proceeding filed by the husband to declare the marriage as void on the plea of fraud & directs him to pay maintenance at the rate of Rs. 6000 (rupees six thousand) per month to the wife from the date of the order as she has reasons to stay separate from the Respondent-husband & has no income.

The appeals are accordingly disposed of.

B.R. Sarangi, J.

I agree.