

A.F.R.

Neutral Citation No. - 2024:AHC-LKO:40090-DB

Reserved

Court No. - 2

Case :- FIRST APPEAL No. - 31 of 2021

Appellant :- Dr. Bijoy Kundu

Respondent :- Smt. Piu Kundu

Counsel for Appellant :- Rohit Tripathi, Syed Zulfiqar Husain Naqv

Counsel for Respondent :- Saurabh Misra, Ajeet Kumar Singh, Ved Prakash Verma

Connected with

Case :- FIRST APPEAL No. - 33 of 2021

Appellant :- Dr. Bijoy Kundu

Respondent :- Smt. Piu Kundu

Counsel for Appellant :- Rohit Tripathi, Shishir Srivastava, Syed Zulfiqar Husain Naqv

Counsel for Respondent :- Saurabh Misra, Devansh Vikram Singh

Hon'ble Rajan Roy, J.

Hon'ble Om Prakash Shukla, J.

(Per Om Prakash Shukla, J.)

- (1)** Heard Mr. Rohit Tripathi, learned counsel for appellant and Mr. D.P. Singh Somvanshi, learned counsel for the respondent.
- (2)** These appeals under Section 19 (1) of the Family Court Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 have been filed by the appellant/husband, assailing the judgment and decree dated 15.02.2021 passed by the Principal Judge/District Judge, Family Court, Lucknow, whereby Regular Suit No. 886 of 2012 filed by the appellant/husband under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage was dismissed and Regular Suit No. 29 of 2013 filed by the respondent/wife under Section 9 of the Hindu Marriage

Act, 1955 for restitution of conjugal right was decreed in favour of the respondent/wife.

- (3) Since the above-captioned appeals arise out of a common factual matrix and judgment, hence they are being decided by a common order.

FACTS

- (4) Shorn of unnecessary details, the facts, in brief, which give rise to the appeals herein are as follows :-

In both these appeals, the appellant is the husband and the respondent is the wife. Appellant got married with respondent on 27th November, 1986. Two sons were born out of the wedlock of the parties. According to the appellant, after conceiving both sons, his wife (respondent herein) was not interested in him at all and started misbehaving with him in front of servants and other members of the family. It has been alleged by the appellant that on one day, his wife (respondent herein) locked him in toilet; his wife used to connect/co-relate him with a lady residing next door; she abused his parents in front of his children; after 2003, she stopped even giving food to him; though he took her to U.S.A. for 18 months/Europe for 4 months; in the year 2008, he arranged for a visit to Kerala with his entire family but the respondent strictly refused for it; since 2003, only course of communication between them was either through sons or SMS or handwritten notes, which even

spilled over at the time of offering tea/lunch etc.; and since 2003, respondent is living separately with the appellant under the same roof. According to the version of the appellant, in compelling circumstances, he instituted a suit, bearing Regular Suit No. 886 of 2012 (hereinafter referred to as '**First Suit**'), under Section 13 of the Hindu Marriage Act, 1955 for declaring his marriage with the respondent as null and void.

- (5)** After filing the aforesaid suit on 28.04.2012, the respondent-wife had lodged four cases against the appellant/husband, namely, (a) case under provisions of the Domestic Violence Act; (b) case for Maintenance under Section 125 Cr.P.C.; (c) Criminal Case under Sections 498A/323/504/506/406 I.P.C.; and (d) under provisions of Dowry Prohibition Act, for which Police Complaint was lodged in November, 2012. Subsequently, the defendant/respondent/wife had also instituted a suit, bearing Regular Suit No. 29 of 213 (hereinafter referred to as the '**Second Suit**'), under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. Both suits were clubbed together and heard analogously by the Family Court.
- (6)** The respondent/defendant/wife had filed his written statement in the aforesaid suits and denied the allegations made by the appellant/plaintiff/husband. She set up her own version of the case in as much as she has stated that she conceived two male children, namely, Vishwendu Kundu and Diyendu Kundu and

after their birth, she had to take care of her children as well as had to fulfill her own duties and responsibilities; she never ignored her own duties and responsibilities towards her husband/appellant; she never locked the plaintiff/appellant; all the decisions with respect to the children were taken by the plaintiff/appellant; appellant himself wanted the children to study in convent school, therefore, he got them admitted at St. Francis College, Lucknow; he also wanted the children to become Engineers and she only used to help the children in doing daily chores; the relation between the plaintiff/appellant and defendant/wife continued as usual, they cohabited as and when the plaintiff/appellant wanted; and the defendant as a wife took care of the plaintiff in all possible ways.

(7) On the basis of pleadings and documents, the Family Court framed following issues in the First Suit filed by the appellant for dissolution of marriage :-

- “1. Whether as asserted in the plaint defendant behaved with the plaintiff with cruelty and deserted him ?
2. Whether the defendant forbade the plaintiff from conjugal relationship ?
3. Whether the suit is legally tenable ?
4. Whether the plaintiff is entitled for any relief ?”

(8) However, since no issues were framed in the Second Suit filed by the respondent/wife for restitution of conjugal right,

therefore, the Family Court framed following issues for proper adjudication of the Second Suit filed by the respondent/wife :-

- “1. Whether the defendant has withdrawn himself from the society of the plaintiff ?
2. Whether the plaintiff is entitled to restitution of conjugal rights ?
3. Whether the plaintiff is entitled to any other relief ?”

(9) In support of their respective cases, both appellant and respondent got examined themselves as P.W.1 and D.W.1, respectively. Except them, no one was examined to prove their case as set up by either of them. Documentary evidence was also led, details of which are mentioned in the impugned judgment.

(10) The Family Court stated that many a times efforts have been made for an amicable settlement, but on the basis of allegations which have been levelled by both the parties against each other, mediation between the parties was not successful.

(11) The Family Court, after appraising both, oral as well as documentary evidence, decided the issues framed in both the suits.

A. As far as the First Suit filed by the husband/appellant for dissolution of marriage, the issue were decided in the following manner :-

Issue Nos.	Issues	Decision of the Family Court
Issue No.1	Whether as asserted in the plaint defendant behaved with the plaintiff with cruelty and deserted him ?	The said issue was decided in affirmative in part in favour of the plaintiff /appellant by returning a finding that the husband had succeeded in bringing home the charge of cruelty against the defendant/respondent. So far as the issue of desertion, the Family Court had decided it against the appellant/ husband. Thus, issue no.1 has been partly answered in favour of the appellant/plaintiff so far as it relates to the ground of cruelty.
Issue No.2	whether the defendant forbade the plaintiff from conjugal right ?	The said issue was decided by the Family Court in negative and against the plaintiff/appellant.
Issue No.3	whether the suit is legally tenable ?	The said issue was decided in affirmative in favour of the plaintiff/appellant.
Issue No.4	whether the plaintiff is entitled for any relief ?	The said issue was decided by the Family Court in negative against the appellant.

B. As far as the Second Suit filed by the wife/respondent for restitution of conjugal rights, the issues were decided in the following manner:

Issue Nos.	Issues	Decision of the Family Court
Issue No.1	Whether the defendant has withdrawn himself from the society of the plaintiff	The said issue was decided in favour of the respondent and against the appellant.
Issue No.2	Whether the plaintiff is entitled to restitution of conjugal rights,	The said issue was decided by the Family Court in affirmative and in favour of respondent and

		against the Appellant/ Husband.
Issue No.3	whether the plaintiff is entitled to any other relief,	The said issue was decided in favour of the respondent by recording finding that the respondent would be entitled to get costs.

(12) In this backdrop, the Family Court had dismissed the First Suit filed by the appellant and decreed the Second Suit filed by the respondent and passed a decree for restitution of conjugal rights in favour of the respondent vide judgment and decree dated 15.02.2021. It is this judgment and decree dated 15.02.2021, which have been challenged in the above-captioned appeals.

SUBMISSIONS

(13) Assailing the impugned judgment/decreed, learned Counsel for the appellant submitted that cruelty by the respondent/wife towards the appellant having been found to be proved by the Family Court, the only logical corollary of its finding was to order dissolution of marriage even if desertion was not proved but surprisingly the Court below dismissed the suit for divorce and has allowed the suit of respondent/wife for restitution of conjugal rights, which is apparently erroneous and perverse both on facts and law. The finding of the Court below on the issue of cruelty has not been challenged by the respondent, therefore, the appeal is liable to be allowed on this count itself.

- (14) The appellant cannot be forced to live with the respondent once cruelty meted out by her to the appellant is proved and this by itself disentitled her to relief but the Court below has missed out on this relevant and apparent aspect.
- (15) Appellant's Counsel did not advance any argument nor attempted to demonstrate as to how the finding of the Family Court on the question of desertion was perverse or erroneous in any manner.
- (16) Learned Counsel for the petitioner further submitted that parties are staying separately since March, 2012 i.e. prior to three weeks from the date of filing of divorce petition by the appellant/husband and during that period, no attempt was ever made by the respondent/wife for reconciliation and even when the appellant tried to make the issue settled, it all went in vain, therefore, the marriage having been irretrievably broken down, the appellant is entitled for a decree of Divorce on the ground of Cruelty. In this regard, he has relied upon the decision of the Apex Court in **Inderjeet Singh Grewal Vs. State of Punjab and another** : (2011) 12 SCC 588 and **Sureshtha Devi Vs. Om Prakash** : (1991) 2 SCC 25.
- (17) *Per contra*, the learned Counsel representing the respondent/wife could not putforth any argument much less an acceptable one as to how the suit for divorce could have been

dismissed once a finding favourable to the appellant/plaintiff had been recorded on the issue of cruelty. He submitted that the respondent had made all efforts to respect the sacred relationship between the parties all through out and is still ready to look after the appellant with the assistance of her sons. According to him, mere long period of separation could not tantamount to irretrievable break down of marriage. He lastly submitted that there is no perversity or illegality in the impugned judgment/decreed passed by the Family Court.

ANALYSIS

- (18)** We have carefully perused the pleadings and documents on record and heard the respective learned Counsel representing the parties at length.
- (19)** The point which falls for our determination as to whether, in view of the finding of cruelty by the respondent/wife towards the appellant/husband as returned by the Family Court in the context of issue no.1 framed by it, the appellant/plaintiff is entitled to a decree of divorce and the suit of the respondent under Section 9 of the Hindu Marriage Act, 1955 is liable to be dismissed; whether the Family Court has erred in dismissing the suit of the appellant and allowing the suit of the respondent in spite of the finding in favour of the appellant on the issue of

cruelty in terms of Section 13 (1) (i-a) of the Act, 1955 as amended by U.P. Act No. 13 of 1962.

- (20) The Family Court after considering the pleadings, oral and documentary evidence on record, has categorically recorded a finding that cruelty as a ground for seeking divorce has been proved by the appellant/plaintiff. Relevant extract of the judgment containing his conclusions on the issue is quoted below :-

“Since issue no.1 takes in its fold allegations of cruelty, hence in this regard observations of this Court are a must. Apart from the pleadings of the plaint regarding cruelty perpetrated by the defendant, admission of the defendant herself is relevant in this regard. The plaintiff has filed documents per list C-71/1 to C-71/26 and has also got it substantiated by his oral testimony as rendered at page 1 and 2 of his statement-in-chief. The defendant has been subjected to a lengthier cross-examination and as D.W.-1 she has stated at page-10 of her cross-examination that it is true that she has filed a reply in the case instituted under Domestic Violence Act and whatever she has written in paragraph 4 of it, all they are correct.....Thereby the defendant has stated, that it is the respondent, (plaintiff in the first suit) who is of a promiscuous virtue he has had several long relationships and undesirable association with other woman and the respondent had several times contacted sexually transmitted disease which could be discerned by the fact that the respondent was regularly under the treatment of Dr. S.K. Jain, Sexologist.....That the respondent is illegitimate son of his father Late Dr. B.N. Kundu, who at the age of 50 years deserted his legally wedded wife with whom he had a legitimate son and without valid and legal divorce started to live with another woman named Late Kamla Kundu

inheriting such immoral values from his unmarried parents the respondent is now revealing his genetic traits.

Apart from it also it has been mentioned herein before that after filing of instant divorce case, the defendant filed several cases in quick succession against the plaintiff including criminal case U/S 498A, 323, 504, 506 IPC with false and absurd allegations which was quashed by the Hon'ble High Court in Criminal Misc. Application No. 5246/2013. Accordingly all the allegations of demand of dowry, cruelty and mis-appropriation of property and breach of trust etc. were found baseless. This fact is further substantiated by the documents filed by the plaintiff namely C-71/39 to C-71/47. Also it has been stated by the plaintiff that the defendant locked him in toilet from inside and this statement of the plaintiff could not have been got controverted even by his cross-examination. All these facts sufficiently indicate that the defendant has behaved with cruelty with the plaintiff and these instances cannot be termed as stray incidents of day to day life."

(21) This finding on the issue of cruelty has not been challenged by the respondent/wife nor even in this appeal in terms of Order XLI Rule 22 of the Code of Civil Procedure. This finding has, therefore, attained finality. It being so one fails to understand as to how the appellant's suit for divorce could have been dismissed. The fact the other ground taken by the appellant/plaintiff which was of desertion referable to Clause (ib) of sub-section (1) of section 13 of the Act, 1955 could not be proved, was immaterial.

(22) Although the findings of the Family Court on the issue of cruelty has not been challenged, we have also gone through the

pleadings and evidence on record including oral and documentary evidence keeping in mind the decision of Hon'ble the Supreme Court in case of **K. Srinivas Vs. K. Sunita** :. 2014 (16) SCC 34, **Mangayakarasi Vs. M. Yuvraj** : 2020 (3) SCC 786 as also in the case of **Ravi Kumar Vs. Julmi Devi** 2010 (4) SCC 476 and the judgments referred in the impugned judgment and we do not find any perversity or illegality in the said findings.

(23) Section 13 of the Act, 1955 reads as under :-

“13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; **or**

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; **or**

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; **or**

(ii) has ceased to be a Hindu by conversion to another religion; **or**

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

*Explanation.—*In this clause,—

(a) the expression “mental disorder” means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression “psychopathic disorder” means a persistent disorder or disability of mind (whether or not including sub—normality of intelligence) which results in abnormally aggressive or seriously irresponsible conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment; or

(iv) * * * * *

(v) has been suffering from venereal disease in a communicable form; or

(vi) has renounced the world by entering any religious order; or

(vii) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of it, had that party been alive;

(viii) ***

(ix) ***

Explanation.—In this sub-section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground—

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of

a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground,—

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner:

Provided that in either case the other wife is alive at the time of the presentation of the petition; or

(ii) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality; or

(iii) that in a suit under section 18 of the Hindu Adoptions and Maintenance Act, 1956 (78 of 1956), or in a proceeding under section 125 of the Code of Criminal Procedure, 1973 (2 of 1974) (or under the corresponding section 488 of the Code of Criminal Procedure, 1898 (5 of 1898), a decree or order, as the case may be, has been passed against the husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards;

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years.

Explanation.—This clause applies whether the marriage was solemnized before or after the commencement of the Marriage Laws (Amendment) Act, 1976 (68 of 1976).

(24) U.P. Amendment to Section 13 (1) (i-a) is as under :-

“(i-a) has persistently or repeatedly treated the petitioner with such cruelty as to cause a

reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party; or”

- (25) It is apparent that Section 13 of the Act, 1955 provides for grant of divorce and enumerates various grounds on which the same may be granted. It enacts that “*any marriage solemnized whether before or after the commencement of this Act*’ may be dissolved on petition presented either by the husband or by the wife or any of the grounds specified therein. Clause (i-a) of sub section (1) of section 13 of the Act, 1955 declares that a decree of divorce may be based by a court on the ground that after solemnization of marriage, the opposite party has treated the petitioner with cruelty subject to the State amendments to Section 13 (1) (i-a) in this regard. There are other grounds also mentioned in the said sub section (i) of section 13 of Hindu Marriage Act and each of these grounds are independent of each other. It has to be understood that each of these grounds are mutually exclusive to each other which is evident by use of the disjunctive ‘or’ to separate each ground from the other and there is no reason to read ‘or’ conjunctively as it will lead to absurdity. Thus, cruelty can by itself be a ground for dissolution of marriage. However, it seems that learned Family Court, after returning a finding that “cruelty” has been inflicted by the respondent-wife on the appellant-husband, refused to grant divorce to the husband presumably on the ground that the

ground of “desertion” could not be proved by the appellant-husband.

- (26)** Interestingly, instead of allowing the suit for divorce, it has decreed the suit of the respondent for restitution of conjugal rights which is apparently incongruous and irreconcilable with finding on the issue of cruelty recorded in the context of the suit for divorce in favour of the appellant/husband and against the wife. This finding itself constituted a valid ground and a reasonable cause within the meaning of Section 9 of the Act, 1955 for the husband not to live with the respondent and for the Family Court to dismiss the suit of the wife under Section 9 of the Act, 1955, but this material aspect has been omitted from consideration.
- (27)** In view of the above discussion, we have no hesitation in determining that once cruelty was proved, the suit for divorce had to be decreed and the suit of the wife had to be dismissed, subject of course to the provision of Section 13A of Act, 1955, but, the Family Court has erred on facts and law in not doing so. The point of determination is answered accordingly.
- (28)** We have not expressed any opinion on the issue of desertion as recorded by the Family Court because the appellant’s Counsel did not press the said ground.

- (29)** At this juncture, it would be apt to mention that this case has travelled from the Family Court to this Court. The suit for divorce was filed in 2012, whereas suit under Section 9 of the Act, 1955 was filed in 2013. The decision of the Family Court is of 15.02.2021. The records reveal that both the appellant and respondent are now living separately for the last more than a decade i.e. since 2012. Even prior to 2012 i.e. from 2003 till three weeks prior to filing of the suit in 2012, though they were living in a house under the same roof, there was no communication between them and they communicated only through SMS/calls. Two sons were borne out of their wedlock prior to 2003, both of whom are well educated. Both sons are living with respondent/wife. Repeated efforts by the Courts for reconciliation or settlement have resulted in failure. At the very initial stage, the Family Court had sent the parties for mediation, which did not succeed. This Court had also sent them for mediation, which also failed. On the last date, this Court had also requested the parties to explore the possibility of them living together, but nothing materialized. This Court had also made an effort by asking the parties to come with some mutual settlement, but in vain, meaning thereby that every single effort of the Court and the mediators, towards the compromise or settlement has led to a blind alley.
- (30)** The husband and wife, who are before us, have been living separately since the last more than a decade. There are bitter

allegations of cruelty from both the sides and multiple litigations have taken place between the two in the last more than a decade. This embittered relationship between the appellant and respondent which has not witnessed any moment of peace for the last more than a decade or more is a martial relationship only on paper. The fact is that this relationship has broke down irretrievably long back.

(31) In the facts and circumstances of this case also, it is not a fit case for grant of alternative relief of judicial separation under Section 13A of the Act, 1955.

(32) Although there are allegations and counter allegations between the parties about their financial status, however, we find that the respondent did not seek permanent alimony under Section 25 of the Act, 1955 presumably because she was seeking restitution of conjugal relationship, though she could have done so as an alternative relief in the suit for divorce but we find that before us also there is no such pleading by parties nor any prayer made nor any evidence on record, therefore, we leave it open to the respondent to initiate separate proceedings in this regard as per law.

(33) Based on the discussions made hereinabove, without interfering with the findings of the Family Court with regard to issue nos.

1 and 2, its findings and conclusions with regard to relief no. 3 in Regular Suit No. 886 of 2012 filed under Section 13 of the Act, 1955 are set aside. Consequently, the judgment and decree dated 15.02.2021 dismissing Regular Suit No. 886 of 2023 for divorce is also set-aside, Regular Suit No. 886 of 2012 is decreed. The marriage between the appellant and respondent is dissolved. Liberty is granted to the respondent to initiate separate proceedings under Section 25 of the Act, 1955 as per law.

(34) The judgment and decree 15.02.2021 allowing the Regular Suit No. 29 of 2013 is set-aside. Regular Suit No. 29 of 2013 filed under Section 9 of the Hindu Marriage Act, 1955 is dismissed.

(35) Both the appeals are **allowed** in the aforesaid terms.

(36) Parties to bear their own costs.

(Om Prakash Shukla, J.)

(Rajan Roy, J.)

Order Date : 27th May, 2024
Subhankar/Ajit