2024 INSC 55

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(s). OF 2024
(Arising out of SLP(C) No. 21139/2021)

PRAKASHCHANDRA JOSHI .... APPELLANT

VERSUS

KUNTAL PRAKASHCHANDRA JOSHI @ KUNTAL VISANJI SHAH ... RESPONDENT

J U D G M E N T

PRASHANT KUMAR MISHRA, J.

Leave granted.

2. The instant appeal is directed against the judgment and order impugned dated 24.06.2021 passed by the High Court of Judicature at Bombay in Family Court Appeal No. 162 of 2019 whereby the High Court, while affirming the order of the Family Court, dismissed the appeal seeking dissolution of marriage by a decree of divorce.

3. The facts in brief are that the marriage between the appellant and respondent was solemnized on 05.01.2004 as per the rituals of Hindu religion after having spent eight years in courtship. They are Indian citizens by birth. However, they acquired citizenship of Canada for financial gain and were living a normal and happy matrimonial life in Canada. A male child was born from the wedlock on 21.05.2010. In the year 2011, the appellant started experiencing medical problems namely, constant back and shoulder pain as well as skin related problems, especially during summer due to rag weed allergy resulting into sleepless nights and miserable days. During the period of recession in Canada, the appellant lost his job and the couple along with the minor child returned to India on 29.01.2011. The respondent after wilfully staying at her matrimonial home, joined her parental house on 20.02.2011. After some time, when the appellant asked the respondent to resume cohabitation, the respondent did not pay any heed and refused to join the company of the appellant. The respondent was interested in returning to Canada for a better future. The appellant, however, expressed his unwillingness to shift to

Canada owing to his health issues. Various attempts were made by the family of the parties to resolve the matrimonial discord between them but to no avail. The respondent left for Canada with her son. Thereafter, the appellant tried to contact the respondent either through e-mail or by other modes requesting her to come and cohabit with him. It was neither responded to nor complied with.

4. The appellant was, therefore, constrained to prefer a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights which remained uncontested on behalf of the respondent though the respondent was duly served. Desperately, the appellant withdrew the petition for restitution of conjugal rights. Since the appellant realized that there would be no hope of any restitution, he filed a divorce petition on the ground of cruelty and desertion.

5. The petition proceeded *ex parte* as, despite due service, the respondent remained unrepresented. After considering the pleadings and evidence, the learned Family Court dismissed the petition of the appellant, *inter alia*, observing that no case had

been made from the alleged cruelty caused to the appellant by the respondent.

6. Being aggrieved with and dissatisfied by the dismissal of the petition by the learned Family Court, the appellant moved a Family Court Appeal before the High Court. The High Court dismissed the appeal by holding that no case has been made out by the appellant for seeking a decree of divorce on the ground of either cruelty or desertion. Hence, this appeal.

7. Considering the facts and circumstances, a short question arises for our consideration as to whether a decree for divorce can be granted for the reason that the marriage has irretrievably broken down.

8. Notice was issued to the sole respondent/wife on 21.01.2022, which was duly served upon the respondent. The respondent once again did not put in appearance either in-person or through an advocate.

9. We have heard Mr. Dhananjay Bhaskar Ray, learned counsel appearing for the appellant at length and have also perused the pleadings.

10. Mr. Dhananjay would submit that the respondent deserted the appellant about 13 years ago and she refused to cohabit with the appellant. Learned counsel would further submit that the appellant and the respondent have been living apart due to matrimonial discord for the last 13 years and as there are no prospects for reconciliation, the marriage has been irretrievably broken down. The learned counsel would argue that the uncontroverted evidence substantially establishes the fact that the appellant had been treated with mental cruelty by his wife who had left his company despite an objection from the appellant. The learned counsel further submitted that the conduct of the respondent itself indicates that she is not willing to live with the appellant. Learned counsel for the appellant, in support of the contentions, placed reliance on the decisions of this Court in the case of "***Sukhendu Das Vs. Rita Mukherjee***[1]***"*** and ***"Samar Ghosh vs. Jaya Ghosh***[2]***".***

11. The record reveals that after appellant's car accident in November, 2009 the couple was blessed with a baby boy on

[1] (2017) 9 SCC 632
[2] (2007) 4 SCC 511

21.05.2010. The appellant lost his job owing to the deep recession in Canada and eventually the family came back to India in January, 2011. The couple last resided together in appellant's mother's house at Mumbai till 19.02.2011. After this date, they lost contact with each other, and the respondent refused to return to the matrimonial home. On being contacted, the respondent refused to resume matrimonial life unless the appellant separates from his family and resides in a separate household. On account of appellant's inability to accede to this demand of the respondent, she never returned to resume the matrimonial life.

12. It is also to be seen that in the proceedings initiated by the appellant for restitution of conjugal rights under Section 9 of the Hindu Marriage Act, the respondent did not appear despite receiving the summons. Similarly, in the present divorce proceedings also the respondent failed to enter appearance despite service of notice in the Trial Court, High Court and Supreme Court as well. Thus, it is apparent that the respondent does not wish to continue the marital chord and is

not responding to court summons much less the request made by the appellant.

13. On the basis of the above factual matrix the present appears to be a case of irretrievable breakdown of marriage. In the matter of ***"Shilpa Sailesh vs. Varubn Sreenivasan[3]"***, this Court has held that exercise of jurisdiction under Article 142 (1) of the Constitution of India is clearly permissible to do 'complete justice' to a 'cause or matter' and this Court can pass an order or decree which a family court, trial court or High Court can pass and when such power is exercised, the question or issue of lack of subject-matter jurisdiction does not arise.

14. On the issue as to grant of divorce on the ground of irretrievable breakdown of marriage in exercise of jurisdiction under Article 142 (1) of the Constitution of India, this Court in ***Shilpa Sailesh*** (supra) held thus in paras 33 and 42 (iii):

> "33. Having said so, we wish to clearly state that grant of divorce on the ground of irretrievable breakdown of marriage by this Court is not a matter of right, but a discretion which is to be exercised with great care and caution, keeping in mind several factors ensuring that 'complete

[3] (2023) SCC online SC 544

justice' is done to both parties. It is obvious that this Court should be fully convinced and satisfied that the marriage is totally unworkable, emotionally dead and beyond salvation and, therefore, dissolution of marriage is the right solution and the only way forward. That the marriage has irretrievably broken down is to be factually determined and firmly established. For this, several factors are to be considered such as the period of time the parties had cohabited after marriage; when the parties had last cohabited; the nature of allegations made by the parties against each other and their family members; the orders passed in the legal proceedings from time to time, cumulative impact on the personal relationship; whether, and how many attempts were made to settle the disputes by intervention of the court or through mediation, and when the last attempt was made, etc. The period of separation should be sufficiently long, and anything above six years or more will be a relevant factor. But these facts have to be evaluated keeping in view the economic and social status of the parties, including their educational qualifications, whether the parties have any children, their age, educational qualification, and whether the other spouse and children are dependent, in which event how and in what manner the party seeking divorce intends to take care and provide for the spouse or the children. Question of custody and welfare of minor children, provision for fair and adequate alimony for the wife, and economic rights of the children and other pending matters, if any, are relevant considerations. We would not like to codify the factors so as to curtail exercise of jurisdiction under Article 142(1) of the Constitution of India, which is situation specific. Some of the factors mentioned can be taken as illustrative, and worthy of consideration.

> 42 (iii) Whether this Court can grant divorce in exercise of power under Article 142(1) of the Constitution of India when there is complete and irretrievable breakdown of marriage in spite of the other spouses opposing the prayer?
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> This question is also answered in the affirmative, inter alia, holding that this Court, in exercise of power under Article 142(1) of the Constitution of India, has the discretion to dissolve the marriage on the ground of its irretrievable breakdown. This discretionary power is to be exercised to do 'complete justice' to the parties, wherein this Court is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. The Court, as a court of equity, is required to also balance the circumstances and the background in which the party opposing the dissolution is placed."

15. Reverting back to the case in hand, to accord satisfaction as to whether the present is a fit case for exercise of power under Article 142 (1) of the Constitution of India to dissolve the marriage on the ground of irretrievable breakdown, we see that the parties are residing separately since February, 2011 and there have been no contact whatsoever between them during this long period of almost 13 years. The respondent-wife is not even responding to the summons issued by the courts. It seems she is no longer interested in continuing the marital

relations with the appellant. Therefore, we have no hesitation in holding that the present is a case of irretrievable breakdown of marriage as there is no possibility of the couple staying together.

16. For the foregoing reasons, the appeal is allowed and we dissolve the marriage between the parties on the ground of irretrievable breakdown in exercise of powers under Article 142(1) of the Constitution of India. Accordingly, the marriage between the parties solemnized on 05.01.2004 is dissolved by a decree of divorce. A decree to this effect be drawn accordingly.

.....J.
(B.R. GAVAI)

.....J.
(PRASHANT KUMAR MISHRA)

JANUARY 24, 2024
NEW DELHI.