In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side

The Hon'ble Justice Sabyasachi Bhattacharyya
And
The Hon'ble Justice Uday Kumar

F.A. No. 53 of 2020

[redacted]

Vs.

[redacted]

For the appellant	:	Mr. Om PrakashDubey, Mr.Sailesh Kumar Gupta, Mr.Samrat Shil
For the respondent	:	Mr.Abhra Mukherjee, Mr.Sauradeep Dutta, Mr.Arpayan Mukherjee, Mr. S. K. Mondal, Mr.Himadree Ghosh
Hearing concluded on	:	25.11.2024
Judgment on	:	19.12.2024

Sabyasachi Bhattacharyya, J.:-

1. The plaintiff/appellant-husband instituted a suit for divorce on the ground of cruelty against the respondent-wife. The said suit was dismissed on contest, against which the present appeal has been preferred.

2. Although the impugned judgment is quite lengthy, a perusal of the pleadings and evidence-on-record indicate that the conspectus of the *lis* is brief.

3. The first plinth of the husband's ground of cruelty is an undated undertaking signed by the respondent-wife, which was marked as Exhibit-1 in the suit. Much reliance is placed on the said document by learned counsel for the appellant-husband to argue that the same should be construed as an admission on the part of the respondent-wife regarding her cruelty.

4. However, the said document is unreliable to prove the husband's case of cruelty for several reasons, as discussed below.

5. The appellant-husband pleads in Paragraph No.14 of the plaint that due to the cruel activities of the respondent-wife towards the appellant, his widow mother and grandmother, the appellant got frightened and informed the local club and other well-wishers, after which the respondent gave an undertaking in writing that she would be restrained from doing such "inhuman and cruel activities". In his examination-in-chief dated September 21, 2011, the appellant-husband tendered the document (Exhibit-1), that is the purported undertaking, and proved the same.

6. However, the same was rightly disbelieved by the learned Trial Judge at least due to four cogent reasons:

i) The respondent-wife, in Paragraph No.8 of her affidavit-in-chief, categorically stated that she had lodged a diary in the local police station in respect of her signature being taken by force on some blank papers, which, according to the respondent, were subsequently converted into the said purported undertaking. The respondent-wife gives out that the diary was lodged

contemporaneously on February 20, 2008, bearing G.D. No.1021 of 2008. Notably, not a single counter-suggestion is made in that regard to the wife, who deposed as D.W.1, in her cross-examination, either in respect of the lodging of the diary or in respect of her signature being obtained forcibly on blank papers. Thus, the said statement of the wife has to be accepted by application of the doctrine of non-traverse.

ii) Secondly, the undertaking was given by the wife allegedly in the presence of the adjacent club members, but does not contain any other signature than that of the respondent-wife herself. Prudence demands that if there was a conciliation between the parties leading to the wife giving such undertaking, something in the form of minutes ought to have been recorded and/or at least other witnesses should have signed the document, which is conspicuously absent in the present case.

iii) Again, the purported undertaking states that the respondent-wife shall not claim any right regarding the son of the parties and the said son would stay with the appellant-husband. However, it is an admitted position that the son continued to remain all along with the respondent-wife and never went to the appellant-husband. So, there is nothing to show that the parties ever acted on the purported undertaking.

iv) In either his pleadings or evidence, the appellant-husband does not give any specific date of the incident in the backdrop of which the respondent-wife signed the document-in-question. Going by

the uncontroverted statement of the wife in her examination-in-chief that the diary was lodged contemporaneously with the forcible signing of blank papers on February 20, 2008, such document was apparently executed during pendency of the suit, since the divorce suit was instituted on June 16, 2007. As such, there is a strong presumption that the said document was created to manufacture a piece of evidence to support the husband's case of cruelty.

7. Thus, no reliance can be placed on the purported undertaking of the wife to elevate it to the status of an admission by the respondent-wife of her alleged cruel acts against the husband.

8. Moreover, the appellant-husband admitted in his cross-examination dated August 1, 2013 that although the respondent-wife used to assault him physically, he had not lodged any complaint on the said issue at any police station, although he tries to cover up such non-disclosure by attributing the same to shame. Be that as it may, fact remains that there is no document whatsoever to show that the husband ever complained to any authority in respect of such physical assault. None came forward from the household of the appellant-husband to corroborate his case of cruelty. P.W.2, a neighbour and a local club member living near the matrimonial home of the parties, was the only other witness apart from the husband to support the plaint case. Such absence of corroborative evidence by eye-witnesses is itself an indicator of the falsity of the plaint case in respect of cruelty.

9. Another important factor cannot be given a go-bye. By way of cruelty, the appellant-husband cited in his affidavit-in-chief (Paragraph No.11)that the respondent-wife used to compel her mother-in-law to do all the household work including the washing of cloths of the respondent, despite knowing that her mother-in-law was suffering from various problems. It is also alleged that the respondent-wife did not perform any duties towards the appellant-husband or his other family members and never did any household work. However, the appellant-husband, in his cross-examination dated August 1, 2013, categorically contradicts such allegation and admits that his mother used to perform her household job in her separate unit, she being in separate mess with the appellant and the respondent and that household work used to be done by his wife; so long he used to stay at home he used to help his wife to do the household job. The appellant, as P.W.1, goes so far as to admit in his cross-examination that after his departure for office, the respondent-wife used to perform their household jobs.

10. The next component of the case which is to be considered is that the only corroborative evidence adduced in support of the plaint case is by P.W.2, a neighbour living near the matrimonial home of the parties and a member of the adjacent club. In his cross-examination, P.W.2 consistently repeats that there were quarrels between the spouses, that is, the appellant and the respondent. The term “quarrel”, by its very definition, involves two parties. As such, fault cannot be attributed solely to one of the parties for an altercation or quarrel. Thus, the consistent case of P.W.2 in his cross-examination that the spouses

quarrelled between themselves is not sufficient to attribute any cruelty to the respondent-wife. In fact, P.W.2 further admits in his cross-examination that both the parties sometimes came to their club making allegations against each other, which makes it all the more clear that the exact role of either of the spouses in such altercations cannot be fixed. Thus, the only so-called corroborative evidence of the plaint case is no evidence of cruelty at all but might at best indicate towards the natural wear and tear of married life.

11. We would be failing in our duty if we do not consider the argument of the appellant-husband that the learned Trial Judge, by way of reason in the impugned judgment, rather sermonized. The learned Trial Judge says that the wife intends to reconcile in spite of so much difference and difficulties between the couple and that there is an issue of the couple who is a grown-up. According to the learned Trial Judge, in such view of the matter, the parties must sacrifice their own differences for the sake of their only son to get united again, on which ground the suit should be dismissed, giving another opportunity to the parties to reconcile their differences.

12. Such sermonizing, of course, needs to be deprecated, since it is only the parties to the dispute who are the best judges of whether they can live together in view of the skirmishes between themselves.

13. Another error committed by the learned Trial Judge was in arriving at the finding that the plaintiff failed to prove his case “beyond reasonable shadow of doubt”. It is common knowledge that the standard of proof in civil matters, including matrimonial suits, is preponderance of

probability and the case of the parties need not be proved to the hilt, beyond reasonable doubt, as in a criminal case.

14. However, even giving a go-bye to such observation, the conclusion of the learned Trial Judge is otherwise justified since it is evidence from the discussion of the evidence above that the plaintiff/appellant failed to prove his case of cruelty against the respondent-wife.

15. As such, we categorically differ with the advice given gratis by the learned Trial Judge that the parties must sacrifice their own differences for the sake of their only son to get united again and that the suit must be dismissed to give an opportunity to them to do so.

16. The marriage between the parties was solemnized as long back in the year 1994 and they have been living separately since the year 2005. Although the appellant could not establish by proper evidence that he has been living in separate residences, it is clear from the evidence of both parties that there has been no conjugal relationship between them at least since 2005, that is, for long 19 years.

17. The son of the parties cannot any longer be a unifying factor, given that the very fabric of the matrimonial relationship has gone beyond repair. In any event, the son himself was born on August 25, 1995 and is now 29 years of age. He has been with his mother all along and never been with the appellant at any point of time. Hence, the "issue of the parties" cannot be a justified reason for them to prolong their agony of trying to seal irreparable breaches.

18. The appellant cites *Vikas Kanaujia v. Sarita*, reported at *(2024) 7 SCR 933* to contend that the divorce ought to have been granted on the

ground of irretrievable breakdown. However it is well-settled, as summed up succinctly in Paragraph No.8 of the said judgment by the Hon'ble Supreme Court, that although irretrievable breakdown of marriage can be a facet of cruelty, fault cannot be attributable to one party alone and hence no divorce decree can be granted under the current Indian Law on such ground. The Supreme Court itself cited previous judgments and granted the decree of divorce on the ground of irretrievable breakdown but categorically invoking Article 142 of the Constitution of India for such purpose to do complete justice between the parties.

19. Article 142, however, is available neither to the Trial Court nor to this Court and, as such, cannot be a basis for granting a divorce decree in the present case.

20. As such, in view of the above discussions, although we find from the records that the marriage has irretrievably broken down between the parties, the conundrum cannot be helped by this court as the appellant-husband is not entitled in law to a divorce, since the conduct of the respondent has not been proved to come within the ambit of 'cruelty' as envisaged in law.

21. Accordingly, F.A. No. 53 of 2020 is dismissed on contest without any order as to costs, thereby affirming the judgment and decree dated July 31, 2019 passed by the learned Additional District Judge, Eighth Court at Alipore, District: South 24 Parganas in Matrimonial Suit No.44 of 2007 dismissing the appellant's divorce suit.

22. It is, however, made clear that it will be open to the parties to prefer a challenge against the present judgment and decree before the Hon'ble Supreme Court in a bid to seek invocation of Article 142 of the Constitution of India to get a divorce decree, if the parties are otherwise entitled to the same in law.

23. A formal decree may be drawn up accordingly.

(Sabyasachi Bhattacharyya, J.)

I agree.

(Uday Kumar, J.)