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Calcutta High Court

Case No: R.V.W. No. 173 of 2009 in F.A. No. 227 of 2007 and C.A.N. 9077 of 2009

Sutapa Mondal — APPELLANT

Vs

Swapan Kumar Karmakar. — RESPONDENT

Date of Decision: May 16, 2011

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 47 Rule 1
- Evidence Act, 1872 - Section 3
- Hindu Marriage Act, 1955 - Section 23
- Penal Code, 1860 (IPC) - Section 498A

Citation: (2011) 2 CALLT 635 : (2011) 5 CHN 82 : (2011) 3 DMC 225

Hon'ble Judges: Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench: Division Bench

Advocate: Bidyat Kumar Banerjee, Jiban Ratan Chatterjee and Sulekha Mitra, for the Appellant;Aniruddha Chatterjee and Syed Arefin, for the Respondent

Final Decision: Dismissed

Judgement

Prasenjit Mandal, J.
This application for review is directed against the judgment and decree dated August 7, 2009, passed in F.A. No. 227 of 2007 by which this Bench allowed a First Appeal thereby reversing the judgment and decree passed by the learned Additional District Judge, First Court, Purulia in Matrimonial Suit No. 70 of 2006.

2. The wife/Respondent of the first appeal has preferred this application for review praying for setting aside the decree of divorce passed in the said first appeal by the Division Bench. The wife has sought to rely upon the alleged subsequent event occurred during the pendency of the first appeal in support of her contention that in view of those subsequent events, we should hold that the alleged acts of cruelty had been condoned by the husband. According to the wife, the parties to the proceedings had access to each

other during the pendency of the appeal and they lived together for two days on May 5, 2007 and May 6, 2007 at Deoghar. They had been to Deoghar on May 5, 2007 and then after staying there together on May 5, 2007, May 6, 2007, they returned on May 7, 2007 and thus, there having been resumption of cohabitation between the parties, such fact constituted condonation of the matrimonial offences. It is also contended that the said fact was within the, knowledge of the husband/Appellant/opposite party herein and he has suppressed such fact. The allegation of cruelty and desertion as raised by the husband, according to the wife, stands condoned by cohabitation of the parties at Deoghar in view of the provisions of Section 23 of the Hindu Marriage Act.

3. The applicant has further contended that the learned advocate for the applicant could not point out such development at the time of hearing of the argument of the first appeal due to mistake. The applicant has materials in support of her contention about their staying together at Deoghar. It. is contended on behalf of the applicant that the parties had been to Deoghar as per order of another Division Bench of this Hon''ble Court on a pleasure trip. In view of such development of the situation, the judgment and decree of the Appellate Court needs review. So, the application for review has been preferred.

4. The husband/opposite party herein has filed an affidavit-in-opposition and also a supplementary affidavit denying the material allegations made in the application for review and the supplementary affidavit filed by the applicant.

5. On hearing both the sides and on perusing the record we are of the view that the following points should be taken into consideration for decision in this review:

1. Whether the subsequent development as contended by the applicant as Deoghar episode shall be taken into consideration.

2. Whether the acts of cruelty and desertion as observed in the judgment and decree of the first appeal stand condoned by the alleged subsequent conduct as contended by the applicant, and

3. Whether the application for review should be allowed in view of the contention raised by the applicant in the review application.

6. Upon hearing the learned Counsel for the parties and on going through the materials on record we find that the following facts are not in dispute:

1. That the parties to the application were married according to Hindu customary rights on the 1st day of March, 1993;

2. That their marriage was consummated and one daughter was born to them in the wedlock;

3. That the husband is a clerk of the Office of the Assistant Labour Commissioner, Purulia. The wife/applicant herein is a teacher of physics of a renowned school at Purulia town. Her father was also the Assistant Headmaster of a local school at Purulia;

4. That there was no good relationship between the parties and the wife filed a criminal case u/s 498A of the Indian Penal Code against her husband and that case ended in compromise;

5. That the husband instituted a suit for dissolution of marriage by a decree of divorce on the ground of cruelty and desertion before the learned District Judge, Purulia. That suit was registered as Matrimonial Suit No. 70 of 2006;

6. That the learned Additional District Judge, First Court, Purulia dismissed the suit on contest with exemplary costs and maintenance of the daughter on January 2, 2007;

7. That the husband preferred a first appeal being F.A. No. 227 of 2007 against the judgment and decree passed by the learned Additional District Judge, First Court, Purulia, and;

8. That while disposing of the said first appeal, this Division Bench observed that the husband had been able to prove the mental cruelty and desertion and as such, the Division Bench dissolved the marriage tie between the parties by a decree of divorce dated August 7, 2009.

7. Mr. Banerjee, learned Senior Advocate for the applicant has contended that the parties to the application had been to Deoghar on a pleasure trip on May 5, 2007 and stayed at Satsangha Ashram on May 5, 2007 and May 6, 2007 and they returned on May 7, 2007. According to Mr. Banerjee, the xerox copy of the register of the Satsangha Ashram clearly indicated that the parties stayed there on May 5 and 6, 2007 and the husband signed on the relevant register of the Satsangha Ashram. Mr. Banerjee contends that the parties cohabited on those two days and for that reason, the matrimonial offence of cruelty and desertion, if any, stood condoned in view of the provisions of Section 23 of the Hindu Marriage Act. According to Mr. Banerjee, the husband has no scope of denying such entry in the relevant register; Mr. Banerjee submits that at first, the husband denied that any such pleasure trip was held, but when the wife was able to produce the xerox copy of the relevant register, the husband has denied the said fact by contending that he had been to Deoghar Ashram with his two friends and that they (parties to the application) did not live together. Mr. Banerjee contends that such contention of the husband should not be believed. Mr. Banerjee also contends that the parties had such a pleasure trip as per direction of another Division Bench of this during the pendency of the first appeal. Thus, the application for review has been filed based on such materials appearing as Annexure "P" from Page No. 7 to 11 of the affidavit filed by the applicant in support of her application for review.

8. The husband has totally denied in his affidavit-in-opposition and supplementary affidavit that they had been to Deoghar Ashram on a pleasure trip as per direction of a Division Bench of this Hon''ble Court and that the husband ever stayed with the wife and their daughter at Deoghar for the said two days as claimed by the wife.

9. In order to appreciate the situation properly, it is better to mention the provisions of Order 47 Rule 1 to determine the scope of the application for review of the impugned judgment and so the said provision for review is quoted below from Order 47 Rule 1 of the Civil Procedure Code:

REVIEW

Application for review of judgment. -

(1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed, or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and Appellant, or when, being Respondent, he can present to the Appellate Court the case on which he applies for the review.

[Explanation. - The fact that the decision on a question of law on which the judgment of the Court is based has been reversed or modified by the subsequent decision of a Superior Court in any other case, shall not be a ground for the review of such judgment.]

10. Therefore, in order to succeed, the applicant is required to prove any of the three grounds namely:

(i) Discovery of new and important matter of evidence, which after the exercise of due diligence, was not within the applicant''s knowledge or could not be produced by him at the time when the decree was passed or order was made;

(ii) Mistake or error apparent on the face of the record, and;

(iii) For any other sufficient reason.

11. The so-called Deoghar episode allegedly took place after the passing of the decree by the learned Trial Judge in the suit. So, the present application does not come within the ground No. (i) as stated above.

12. Although the alleged subsequent development has been described as an error apparent on the face of the record, such fact was not mentioned at all at the time of hearing of the first appeal before this Division Bench. After the disposal of the appeal by passing a decree for divorce, the wife has come up for the first time with such allegation in the application for review that that the said pleasure trip was availed of by the parties as per direction of another Division Bench of this Hon"ble Court. But, curiously enough, the record does not indicate any such direction of any Division Bench directing the parties to go to Deoghar. The applicant has contended that the husband did not point out such fact before us at the time of hearing of the appeal. Since, it is the total denial on the part of the husband, mentioning such fact on the part of the husband does not arise at all. It is the admission on the part of the applicant that her lawyer also did not mention such fact at the time of hearing of the appeal before this Bench nor was any application earlier filed far taking note of such event although the appeal was heard two years after the alleged incident. Thus, no case has been made out painting out any error apparent on the face of record in our judgment. Therefore, the application for review does not come under the ground No. (ii).

13. Now, therefore, we are to consider whether the application for review could be allowed for any other sufficient reason, that is, ground No. (iii).

14. In order to decide this third ground, we are to consider the merit of the application for review. The husband has totally denied such Deoghar episode. He has, contended in his affidavit that he is a member of the Satsangha for a long time and he pays contribution to the Satsangha regularly as per rules and for that reason, a family code number is allotted to each family. Whenever any contribution is made, the family code number is to be quoted. The husband had been to Deoghar with his two other friends and stayed at Satsangha Ashram and he paid charges under the family code. For that reason, the receipt indicates the names of three persons i.e. the husband, the wife and the daughter with the family code number. Such contention is supported by the subsequent receipts, copies of which are annexed to the affidavit-in-opposition and the supplementary affidavit. Therefore, the xerox copy of the relevant register does not prove that the parties to the application along with their daughter stayed at Deoghar Ashram.

15. We have stated that the wife is bound to prove such episode of Deoghar. She has simply filed the xerox copy of the Satsangha register, Annexure "P" to the application which shows that Swapan Kumar Karmakar stayed at Satsangha Ashram on May 5, 2007

along with two others and left the Satsangha Ashram on May 6, 2007. While it is the specific case of the wife that they stayed together on May 5 and 6, 2007, the relevant Annexure "P" does not support the contention of the wife. Therefore, we are of the view that this material Annexure "P" is not enough to come to a conclusion that the parties stayed together as husband and wife at Deoghar Ashram along with their daughter. Even if we assume for the sake of argument that another Division Bench directed the parties to go to Deoghar for resolving the dispute which is not recorded in the order-sheet of the appeal, it is not possible to hold that they cohabitated as husband and wife on those two days. We find that only one room was taken and according to the wife, they were accompanied by their grown up school going daughter. Thus, the wife has even prima facie failed to prove that they really went to Deoghar and cohabited as husband and wife. No reasonable individual having regard to Section 3 of the Evidence Act would believe such fact. If the fact was genuine, the wife would definitely mention the matter before the Division Bench reporting compliance of the alleged earlier order and would also mention the incident. Even when the appeal was taken up for hearing, no such incident was reported to this bench. Thus, from the materials on record, we disbelieve the incident alleged in the application for review. Therefore, we are of the view that the application does not come within the third ground of "for any other reason".

16. Mr. Banerjee has referred to the decision of Tapan Kumar Chakraborty Vs. Smt. Jyotsna Chakraborty, and he submits that cruelty, if any, on the part of wife, must be taken to have been condoned by the husband in view of compromise and subsequent conduct as per Section 23 of the Hindu Marriage Act. He has also contended that the Court cannot grant a decree of divorce on the mere ground of irretrievable breakdown of marriage without more. With due respect of Mr. Banerjee, we are of the view that this decision cannot help his client inasmuch as the applicant has failed to prove that her cruelty had been condoned by the husband in any way.

17. In the instant case, the decree of dissolution of marriage tie between the parties has been passed on the ground of proved mental cruelty and desertion by our judgment dated August 7, 2009. Elaborate discussions on these two grounds have been made. This Division Bench has come to a clear finding that there was consistent treatment of cruelty on the part of the wife by describing the husband as a "clerk" of an Office of the Assistant Labour Commissioner, Purulia and by boasting that she is a teacher of physics in the science stream of a renowned school. It has also been established from the evidence that after quarrel between the parties, the wife broke her "Sankha" and "Noya" signifying the disconnection of relationship between the two. It has been observed that such facts have not been denied by the wife of oath. On the basis of the decision of Dr. N.G. Dastane Vs. Mrs. S. Dastane, such conduct amounted to cruelty. This Division Bench has also held that the wife had deserted the husband last three years before the filing of the suit.

18. In view of the above findings, we are of the opinion that the wife/ applicant herein has failed to show any of the grounds in support of her contention that the judgment and decree passed by this Division Bench has been vitiated because of error apparent on the

face of the record.

19. So, this application is devoid of merits. The three points framed for decision in this application for review are, thus, answered against the applicant.

20. Accordingly, the application for review is dismissed.

21. Considering the circumstances, there will be no order as to costs. C.A.N. 9077 of 2009

22. This application has been filed by the applicant praying for placing certain facts on the record and those facts have already been taken into consideration at the time of disposing of the above application for review. As the facts as stated by the Petitioner for placing the same on the record have already been taken care of in the application for review, the same is disposed of with the above observations.

Urgent xerox certified copy of this order, if applied for, be made available to the learned Advocate for the parties on their usual undertakings.

Bhaskar Bhattacharya, J.

I agree.