

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.731 of 2017

Sudesh Kumar, Son of Kishori Sah, Resident of Village- Bahuarwa, P.O.-
Sugaha Bhawanipur, Police Station- Kangali, District- West Champaran.

... .. Appellant

Versus

Anjali Devi, Wife of Sudesh Kumar, Daughter of Ramesh Sah, Resident of
Village- Jatiyahi, P.O. and Police Station- Raxaul, District- East Champaran.

... .. Respondent

Appearance :

For the Appellant/s : Mr.Vinod Gautam

F of or the Respondent/s : Mr.

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and
HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH
ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard learned counsel for the appellant.

The present appeal has been preferred against the
judgement dated 14.07.2017, passed by learned Principal Judge,
Family Court, West Champaran at Bettiah, in Matrimonial



(Divorce) Case No. 79 of 2016, whereby the appellant's prayer for dissolution of marriage with the respondent, basically on the ground of adultery coupled with desertion and cruelty, has been dismissed by an *ex parte* order.

The appellant was married with the respondent on 11.07.2013. However, the respondent stayed in the matrimonial house for 15 to 20 days after the marriage. In the meantime, in those 15-20 days, one unknown boy used to come to meet the respondent frequently and on one day, the appellant saw the respondent in objectionable position with the unknown boy and on protest being made by the appellant, the respondent became aggressive and revealed that she was forced to marry with the appellant against her wishes. The respondent subsequently called her father to take her to her parents house and consequently the father of the respondent came to the house of the appellant and took the respondent to his house. Thereafter, several times, the father of the appellant went to the respondent's parents' house to take the respondent back to her matrimonial house. Subsequently, the father of the respondent asked the appellant to transfer two bighas of land in the name of the respondent for the purpose of starting some business, as the respondent was not willing to reside in her matrimonial house. The said offer of the



respondent's father for settlement of the issue was declined by the appellant and his father. The respondent also attempted to kill the appellant by mixing poison in the cough syrup. There was no matrimonial relationship between the parties since last two years, preceding the filing of the application for grant of divorce. Hence, the matrimonial suit was filed with a prayer for dissolution of marriage before the learned Principal Judge, Family Court, West Champaran at Bettiah.

Learned counsel for the appellant submits that the learned Principal Judge, Family Court vide order dated 18.3.2016 issued notice to the respondent and subsequently vide order dated 20.9.2016 notices under registered cover were directed to be issued and thereafter, vide order dated 4.1.2017 the learned court below directed for substituted service to the respondent, whereafter the same was published in daily newspaper "Hindustan" on 16.1.2017 but the respondent did not appear before the learned Court below. As a result, vide order dated 21.3.2017, the matter was posted for ex-parte hearing.

Two witnesses were examined on behalf of the petitioner-appellant. P.W. 1 being the appellant and P.W. 2 being Kishori Sah who deposed that after some period, the respondent developed illicit relationship with another person and on protest



being made, the respondent left the matrimonial house. Efforts were made to resolve the issue but it failed.

The learned Court below, after analyzing the evidence on record, came to the conclusion that basically the evidences were led on the ground of adultery, but adultery has not been proved nor the adulterer was made party nor any evidence of cruelty was brought on record. As a result, the suit was dismissed ex-parte. Hence, the present Miscellaneous Appeal.

It is submitted by learned counsel for the appellant that the matrimonial suit was dismissed without appreciating the evidence in its true perspective. The appellant was admitted to Primary Health Centre, Sikta and Duncan Hospital, Raxaul when he was administered poison and prescriptions of both the hospitals have been brought on record in support of the claim, as contained in Annexure 3 to the memo of appeal, to impress upon upon the Court the plea of cruelty, which the learned Court below has held to be not proved.

Having heard learned counsel for the appellant, it appears that basically the dissolution of marriage has been sought for on the ground of adultery but as per pleading in the plaint, it appears very unreasonable that after the marriage, the respondent stayed for 15-20 days in the matrimonial house but the plaint



does not disclose the identity of the person who visited the respondent in matrimonial house and the date of his visit. The prescriptions with regard to treatment of the appellant as he claimed to have been administered poison through cough syrup, have been brought on record as Annexure 3 to prove the ground of cruelty but nowhere in the plaint it is mentioned that the same was exhibited or filed before the learned Court below. The date of administering poison has also not been given. The medical prescriptions, as contained in Annexure 3, suggests that the appellant was admitted on 17.11.2014 whereas the respondent stayed only for 15-20 days in the matrimonial house after marriage which was solemnized on 11.7.2013 as per the plaint.

Adultery, as defined in Black's law Dictionary, means 'a voluntary sexual intercourse between a married person and a person other than the offender's spouse.'

Adultery has not been defined in the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) but as per definition given under Section 497 of the Indian Penal Code, which has been declared ultra vires in the case of Josheph Shine Vs. Union of India, reported in (2019) 3 SCC 39. Cruelty has also not been defined in the Act. However, the daily wear and tear cannot be treated as cruelty. Section 497 of the IPC reads as follows:



“497. Adultery.—Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor.”

It is well settled law as has been held by the Supreme Court in the case of V. Bhagat Vs. D. Bhagat reported in (1994) 1 SCC 337 that merely because there are allegations and counter allegations, a decree of divorce cannot be followed.

The adulterer has not been made party. Order I Rule 9 of the Code of Civil Procedure stipulates that no suit shall be defeated by reason of the mis-joinder or non-joinder of parties. The Court may, in every suit, deal with the matter in controversy so far as regards the rights and interests of the parties actually before it, but this principle will not apply to the non-joinder of necessary party. In the case of adultery, the adulterer is a necessary party.

Rule 16 of the Patna High Court Hindu Marriage Rules, 1956 (hereinafter referred to as the Rules) stipulates that



adulterer is a necessary party when the dissolution of marriage or judicial separation is sought on the ground of adultery. However, on certain grounds the Court may allow the petitioner not to make adulterer as party if he is dead or if he could not know his name instead of due diligence. Rule 16 of the Rules reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”



Adultery may be defined as an act of married person having sexual intercourse with the opposite gender other than the wife or husband of the person. The essential ingredients of the offence of adultery are –

- (i) that there should be an act of sexual intercourse outside the marriage;
- (ii) that such intercourse should be voluntary.

There has been different views of the Court as to the extent to which the circumstantial evidence can be termed as proof of adultery but the general view is that the circumstances should be compelling that the only irresistible conclusion of adultery can be arrived at. Though earlier the view was that the adultery has to be proved beyond reasonable doubt but in the recent judgments, the Supreme Court has diluted such notion since proving the charge beyond reasonable doubt is essential for the criminal charge and not in the civil cases as in the case of Dr. N.G. Dastane Vs. Mrs. S. Dastane, reported in (1975) 2 SCC 326, the Apex Court has held that there is no necessity of the presence of proof beyond reasonable doubt where the dispute or the allegations contained in such dispute involves personal relationship specifically that between the husband and wife.

Though adultery was treated as conduct of grave



immorality since long and it was a ground for judicial separation and not divorce but after 1976 Amendment, it became a ground for divorce. The finding of adultery is necessary to be based on some sort of positive evidence, something more than mere suspicion, as the charge of adultery is of very serious nature.

The conduct of not opposing the entry of an unknown person into the house of the appellant and the wife of the appellant having relationship with that unknown person within 15-20 days of the marriage, appears to be unreasonable.

There is nothing on record to suggest that the appellant made any effort to resolve the issue, nor has he been able to prove any specific instance of adulterous relationship of the petitioner which could have caused mental cruelty to the appellant. In the case of Samar Ghosh Vs. Jaya Ghosh reported in (2007) 4 SCC 511 at paragraph 101, the Supreme Court has enumerated the situations which constitute mental cruelty. Paragraph 101 of the judgment reads as follows:

“101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as



would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.



(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

Testing the case of the appellant on the touchstone of



the parameters laid down in the case of Samar Ghosh (supra), we find that the appellant has miserably failed to prove the charges of adultery or mental cruelty.

In view of the discussions made above, we are not inclined to interfere with the impugned judgment basically on the ground that the appellant has basically claimed divorce on the ground of adultery without making the adulterer as a party or proving the same with any positive evidence.

Accordingly, the present appeal is dismissed.

However, it is made clear that dismissal of the present appeal will not preclude the appellant to file an application under Section 9 of the Hindu Marriage Act for restitution of conjugal life.

(Dinesh Kumar Singh, J)

(Prabhat Kumar Singh, J)

Amrendra/-Anil/

AFR/NAFR	
CAV DATE	
Uploading Date	
Transmission Date	

