HIGH COURT OF TRIPURA
AGARTALA

F.A.09 of 2017

Sri Budhi Datta Barua,
son of Sri Samiran Barua,
resident of Jamircherra (Dewanpara),
P.S. Manu, District : Dhalai, Tripura

…….Appellant(s)

Versus

1) **Smt. Usha Barua,**
wife of Sri Budhi Datta Barua,
daughter of late Kalu Barua,
resident of Srirampur,
P.S. & P.O. Kanchanpur,
District : North Tripura

2) **Sri Ananta Das,**
son of Sri Satish Chandra Das,
resident of Netaji Nagar,
P.S. Kanchanpur,
District : North Tripura

…….Respondent(s)

For Appellant(s)	:	Mr. K. Nath, Adv.
For Respondent(s)	:	None

HON'BLE MR. JUSTICE S. TALAPATRA
HON'BLE MR. JUSTICE S.G. CHATTOPADHYAY

Judgment and Order

09/12/2020

[S. Talapatra, J]

Heard Mr. K. Nath, learned counsel appearing for the appellant. None appears for the respondents despite service of notice. However, both the respondents had refused to accept the notice and as such, service against them has been deemed by this court.

2. The appellant herein, had filed a petition under Section 13(1)(i) of Hindu Marriage Act, 1955 seeking divorce by dissolving marriage that subsisted between the appellant and the respondent No.1 on the ground of having 'voluntary sexual intercourse' with the other person [the respondent No.2] beyond marriage. The respondent No.2, the other person, who has been held to have the sexual intercourse with the respondent No.1. After recording of the evidence and appreciation thereof, the District Judge, North Tripura, Dharmanagar came to inference that the evidence does not support the ground under Section 13(1)(i) of the said Act. But it has been categorically held that since that the marriage has been irretrievably broken and there is no hope of its reconstruction, in that circumstance, the decree of divorce be granted in favour of the appellant and accordingly, such decree has been passed. The appellant being the person who sought the decree has filed this petition projecting the solitary ground that despite the sexual intercourse with other person having substantially proved, the District Judge has opined differently.

3. Mr. K. Nath, learned counsel appearing for the appellant has submitted that there is no grievance against grant of the decree of divorce but the grievance is for negation of solitary ground of sexual intercourse with the other person beyond the marriage. Mr. Nath, learned counsel has submitted that the wife of the respondent No.2 [the paramour] claimed to have witnessed such sexual intercourse. In her words, seeing both the respondents No.1 and 2 in a compromising position, she raised her alarm. The neighbouring people, some of whom

testified in the trial, came and saw both the respondents No.1 and 2 coming out of the room almost in "undressed condition." Those witnesses from the neighbourhood and from the parental home of the respondent No.1 have stated that they saw several times the respondents No.1 and 2 in the intimate condition. They were, according to them, engaged in an illicit relation.

4. Mr. Nath, learned counsel has thus, submitted that this ground under Section 13(1)(i) of the said Act stands squarely proved and the finding of the District Judge that a case of adultery against the appellant has not been made out against the appellant's wife is therefore liable to be interfered with, but the appellant has stated that he has not challenged the decree of divorce and prayed for its affirmation.

5. We have been taken to the thick of evidence. It is useless to give detailed assessment of the evidence in the case in hand inasmuch as the respondents being aware that an appeal has been filed against the said judgment, they preferred not to appear in order to contest the appeal. Even, they have not filed any appeal against the said judgment dated 06.07.2017 delivered in T.S.(Div.)36 of 2016. As stated earlier, this appeal is structured on the solitary objection against the finding that there is no proof of 'adultery'.

6. The appellant [PW-1] has testified in the trial stating that he came to learn from the wife of the respondent No.2 namely Rina Sabdakar [PW-2] that she caught her husband [the respondent No.2] and the respondent No.1 in a compromising position and when the neighbourers who had gathered at her residence responding to her

alarm, saw the respondents coming out of the room. They found them almost in "undressed condition." The only witness who has been relied by the appellant to prove the sexual intercourse is PW-2. PW-2 in her deposition has stated as follows :

> **"On 05.04.2016 in the evening I was absent from my house and after returning home at about 7:30 PM I found the door of our house is locked from inside. I wanted to know who is inside the house but there was no reply from inside for 2/3 minutes and then through window *I saw my husband and Usha Barua in compromising position upon our bed*. I identified both of them in the light of electric bulb lighting in the room."**

She has further stated that :

> **"I raised alarm and hearing my alarm my sister and some other neighbours rushed to our house and then my husband opened the door and *we found both of them almost in undressed condition*."**

In the cross-examination, she could not be made to resile from the said statement and she had reiterated the same statement in her cross-examination when she was suggested that those statements were false.

7. PW-3 [Sandhya Sabdakar], mother of PW-2, has also testified that on 05.04.2016 they heard alarm of PW-2 and with few other neighbours she had rushed to the house of PW-2 and found the door of their house locked from inside. On being asked, Rina Sabdakar [her daughter] told them that Ananta Das and Usha Barua were inside. After their arrival, Ananta Das opened the door and they found both Ananta Das and Usha Barua almost in 'an undressed' condition. PW-3 did not change any part of her version during the cross-examination.

8. PW-4, Nantu Chakma has stated that whenever he asked the respondent No.1 why she had been staying leaving the matrimonial home she had stated that she would not live with the appellant.

9. PW-5, Arjun Mog had also corroborated PW-4 that the respondent No.1 did not intend to live with the appellant. This witness has also stated that he saw the respondents No.1 and 2 moving regularly very intimately, even in the night. All those PWs have narrated their version to PW-1 based on which it appears that he had proved the ground of sexual intercourse beyond the marriage.

10. PW-6, Dinesh Das, a neighbour of the appellant, has stated that the respondent No.1 was reluctant to discharge the matrimonial obligation and most of the time, she used to stay in her parental home. When she was asked why she had been behaving like that, she had categorically told them that she would not live with the appellant.

11. Another witness namely Jharna Barua, even though filed the examination-in-chief but did not come forward for cross-examination. PW-8 had filed the examination-in-chief under Order 18 Rule 4, CPC but did not come forward for cross-examination.

12. We have also noticed that the respondent No.1 had filed her examination-in-chief and stated how she was treated with cruelty by the appellant. When she started living separately for saving her from cruelty, she was even not provided with any maintenance and as a result, she had filed one petition under Section 125 of the Cr.P.C.

13. It is apparent that the appellant did not find any hope in the relation and as such, on the said ground as adverted in the petition under Section 13(1)(i) of the Hindu Marriage Act, he had filed the petition [the suit] for dissolution of marriage. The said suit has been decreed by dissolving the marriage between the appellant and the respondent No.1. As stated, the respondent No.1 did not challenge the said judgment. But the appellant has question the said finding on adultery and urged for striking down the finding of the District Judge, North Tripura, Dharmanagar.

14. We are constrained to observe that the ground taken by the appellant in the petition filed under Section 13(1)(i) is not adultery, even, that is akin to adultery. From a bare reading, it would come to the fore that the said ground requires specific instance of sexual intercourse. For purpose of reference, Section 13(1)(i) is reproduced hereunder :

> **13.(1)(i) 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 has, after the solemnization of the marriage, <u>had voluntary sexual intercourse with any person other than his or her spouse</u>."**

15. Sine qua non is the sexual intercourse. Sexual intercourse beyond the marriage is broadly called adultery, but the said provision does not require the proof of living in adultery or in adulterous life. It is the sexual intercourse, even a single sexual intercourse would be adequate to invoke that provision for dissolving a marriage.

On appreciation of the evidence, we find no reason to maintain the finding of the District Judge as we understand that the District Judge has

implied 'adultery' as the sexual intercourse as engrafted in Section 13(1)(i) of the Hindu Marriage Act, 1955. The evidence of PW-2 and the witnesses who arrived immediately or in the wake in the place of occurrence which took place on 05.04.2016 makes us believe that that incidence of sexual intercourse between the respondents No.1 and 2 really took place. Hence, the finding of the District Judge cannot be maintained and is set aside.

We hold that the respondent No.1 had sexual intercourse with the respondent No.2 on 05.04.2009 in the evening around 7:30 p.m. in the house of the respondent No.2

16. Accordingly, we find and hold that the divorce should have been granted on the solitary ground as resorted to by the appellant. However, we maintain the decree of divorce on the said ground. The appeal which has been filed for limited purpose stands allowed.

The decree of divorce stands affirmed.

LCRs be sent down forthwith.

JUDGE **JUDGE**

HIGH COURT OF TRIPURA
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