

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
Appellate Side

Present :

The Hon'ble Justice Arindam Sinha

FAT 638 of 2015

Smt. Mukul Ray

Vs.

Sri Samar Bijoy Roy

For appellant/wife : Mr. Kushal Paul, Adv.

For respondent/husband : Mr. Partha Sarathi Bhattacharya, sr. Adv.
Mr. Raju Bhattacharya, Adv.
Mr. Arunava Maity, Adv.
Mr. T.J. Mondal, Adv.

Heard on : 5th April, 2019, 12th March, 2020 and 11th February, 2021.

Judgment on : 18th February, 2021.

Arindam Sinha, J.: In view of difference of opinion in the Division Bench there was assignment of the appeal to this Bench for third view. Mr. Paul, learned advocate appeared on behalf of appellant/wife while Mr. Bhattacharya, learned senior advocate appeared on behalf of respondent/husband. Upon hearing them it transpired, trial Court did not find in favour of respondent/husband as had proved existence of grounds under clauses (ia) and (ib) in sub-section(1) of section 13, Hindu Marriage Act, 1955. However, decree for divorce was granted on finding of irretrievable break down of marriage. Hence, appeal by the wife.

Judgment of Supreme Court in **Satish Sitole vs. Smt. Ganga** reported in **(2008) 7 SCC 734** as well as **AIR 2008 SC 3093** were considered by trial Court and

both learned Judges in the Division Bench. Learned presiding Judge said, on consideration of judgments of Supreme Court in **Vishnu Dutt Sharma versus Manju Sharma** reported in **(2009) 6 SCC 379** and **Darshan Gupta versus Radhika Gupta** reported in **(2013) 9 SCC 1**, irretrievable breakdown is not a good ground to grant divorce in a contested action. So, the legal premise for granting divorce by trial Judge, was incorrect. Learned presiding Judge went on to say, on considering **Satish Sitole** (supra), continuance of a marriage on irretrievable breakdown would amount to cruelty. On facts, learned presiding Judge found there is evidence to suggest that since year 2001, respondent husband had been requesting appellant wife to be physically proximate with him, but she repeatedly denied him amounting to sufficient mental torture, entitling the husband to obtain divorce. Judgment of learned presiding Judge was that trial Judge had come to correct conclusion for granting divorce but attributed wrong legal reasons in support of it.

Learned second Judge agreed with interpretation of learned presiding Judge that Supreme Court in **Satish Sitole** (supra) had said, continuance of marriage irretrievably broken down could itself amount to cruelty. Said learned Judge found, apart from a bald statement, the husband failed to prove that the wife refused to co-habit with him. Said learned Judge went on to find, the wife was all along ready and willing to stay with the husband and continue with the marital tie. She is eager to be united with her husband.

Mr. Paul, drew attention to cross-examination of the husband. He relied on the following:

“Only for four times we have cohabited. I have accepted this aspect of life. It is not a fact that we are in the habit of regular cohabitation or that I have full satisfaction in cohabitation of my life.”

.....

“Yes it is a fact that w.e.f. 30.08.2000 till 08.10.2000 I and my wife went on a tour programme with the help of Loknath Travel Agency at Delhi, Agra, Rajasthan and Gujarat.”

.....

“It is not a fact that I with full satisfaction with my conjugal life with my wife in a regular manner.”

He then drew attention to paragraph 11 in Evidence on Affidavit of the husband, reproduced below: -

“That due to obnoxious attitude of the O. P. my life became miserable and I became isolated from my friends and relatives and staying in separate place, separate mess in the same house.”

Meaningful reading of above evidence and the pleading would cause conclusion or inference that his client was always ready and willing to cohabit with her husband. Mr. Paul submitted there should be view taken concurrent with that of learned second Judge.

Mr. Bhattacharya, relied on judgment of Supreme Court in **Manish Goel vs. Rohini Goel** reported in **(2010) 4 SCC 393**. He submitted, said Court had granted decree of divorce to put quietus to all litigations between the parties and to save them from further agony, as also evident from several earlier decisions referred therein. He

submitted, there should be view taken concurring with that of learned presiding Judge.

View to be taken must be upon appreciation on a question of fact, whether regular co-habitation or co-habitation had been denied by appellant/wife to respondent/husband. That is the only question because there is no supplementary question, arising from judgment of the Division Bench, regarding cruelty attending upon denial.

Paragraph 3 from the plaint is reproduced below:-

“3. That since the date of marriage O.P. resides in the house of the petitioner as husband and wife. Since the date of marriage till today as per desire of the petitioner and usual force and eggerness O.P. involved in sexual-inter-course for only four days, though not upto the satisfaction.”

Above was also asserted by respondent husband by affidavit in chief. This assertion could not be shaken in cross-examination, other than obtaining admission, relied upon by Mr. Paul, of having gone on a trip.

Appellant wife affirmed her Evidence on Affidavit on 1st April, 2015. In it she said, inter alia, as follows:-

“I am the defendant of this suit. Plaintiff is my husband. Since my marriage till filing of this suit and till the date of receiving the summons at the above suit I and the plaintiff both lived together as husband and wife with regular co-habitation with full satisfaction of the couple. Our matrimonial life was full of joy, jubilant and full and events of the perfect couple. I always behave properly with plaintiff which a normal wife under all circumstances to

her husband. I did never make anything that have caused any mental pain, agony or cruelty in the mind of the plaintiff or any member of the family.”

It is noticed that the assertion of regular co-habitation was general, in as much as no specific mention was made of the trip taken together in year 2000 to Delhi, Agra, Rajasthan and Gujarat. As such there is preponderance of probability that there was no further co-habitation, as alleged by husband.

Above inference, however, should not be taken to be result of deliberate omission by appellant, resulting in denial of marriage right of respondent. This because appellant's letter dated 29th July, 2001, written to respondent, was exhibited by respondent, through appellant in cross-examination. Relevant deposition in this regard, of the cross-examination, is reproduced below:-

“This letter dated 29.07.2001 do not belong to me. It does not have my signature even. He might have used someone for preparation of this letter.

(Cross-examination is deferred on the prayer of plaintiff)

.....to be continued

Dictated & Corrected

by me

Additional District Judge

1st Court, Raiganj, Uttar Dinajpur

22.05.2015

Additional District Judge

1st Court, Raiganj, Uttar Dinajpur

22.05.2015

(Cross-examination of OPW-1 Mukul Roy resumed on 01.07.2015)

The letter marked x for identification belongs to me and I admit this letter dated 29.07.2001 (volunteers) it is marked Ext.C.”

The letter is written in Bengali. By the last paragraph appellant says to respondent that whenever there is quarrel he says; why are you still there when I have no connection or adjustment with you? She answers the question by posing one. She asks him; do you know why?

This Bench is convinced appellant loves respondent. There cannot be a finding that she caused him cruelty by not co-habiting with him. It is respondent who does not have answer to her question. **Manish Goel** (supra) was exercise of power by Supreme Court under article 142 in the Constitution of India. Even otherwise it is inapplicable on the finding of fact.

There must be and is concurrence with view taken by learned second Judge. The appeal is allowed on direction already made in regard thereto.

(Arindam Sinha, J.)