

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

And

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 208 of 2022

CAN 3 of 2021

Manojit Basu

vs.

Shyamasree Basu (nee Ghosh)

Appellant in person	: Manojit Basu
For the Respondent	: Mr. Debasish Roy, Adv. Ms. Sumitra Das, Adv.
Hearing concluded on	: 20 th September, 2023
Judgement on	: 17 th October, 2023

Siddhartha Roy Chowdhury, J.:

1. Challenge in this appeal is to the judgement and order passed by learned Additional District Judge, 1st Court, Sealdah in Matrimonial Suit No. 36 of 2011. By the order impugned, learned Trial Court was pleased to pass a decree dissolving the marriage between appellant and respondent solemnized on 18th February, 2005 according to Hindu Marriage Act following rites and rituals.
2. For the sake of convenience parties to the appeal would be referred to as they have been arrayed in the suit.

3. Briefly stated, Shyamasree Basu (nee Ghosh) filed a petition under Section 13 of the Hindu Marriage Act, 1955 before the learned Additional District Judge at Sealdah, which was registered as Matrimonial Suit No. 36 of 2011.
4. It is contended that the marriage between the parties was solemnized on 18th February, 2005 after negotiation between two families. The said marriage was registered under Section 8(1) of the Hindu Marriage Act.
5. At the time of marriage different articles including gold ornaments were presented to the petitioner worth Rs. 5,00,000/- and the opposite party was also gifted with a gold ring, gold button, wrist watch and a cheque of Rs. 80,000/- in addition to gift in the form of cash.
6. After the reception (*Boubhat*) on 22nd February, 2005 the petitioner for the first time came to know that the opposite party is a patient of acute Asthma which was not disclosed at the time of negotiation.
7. However, the parties moved to Bangalore where the opposite party used to stay and started residing together at 303 Jay Paradise, 10th Cross, Hal 2nd Stage, Bangalore-560008. After a short while the couple proceeded for their honeymoon when the petitioner found that the respondent was addicted to alcohol. While honeymooning the respondent started complaining against the family members of the petitioner.

8. Sometime in the month of March, 2005 the petitioner bagged a job in Manipal Hospital Bangalore with a salary of Rs. 25,000/- per month, to the displeasure of her husband. He insisted that the salary of the petitioner should be credited to a joint account. The petitioner saved some money out of her fellowship during the year 2000-2005, the opposite party started insisting the petitioner to transfer the said amount to the joint account, though he never disclosed his income to the petitioner.
9. During her stay at Bangalore, the petitioner was physically abused by her husband. The opposite party could not accept the petitioner as a working lady; he used to raise question whenever she was late in returning home. She was not allowed to participate in special training programme arranged by the employer and ultimately the opposite party compelled the petitioner to quit the job.
10. Even the mother of the opposite party did not lend support to the petitioner, rather she supported son. The petitioner was told to walk out of the marriage by her mother-in-law.
11. It is contended that in January, 2006, the petitioner again bagged a part-time job of lecturer at Miranda College, Bangalore. She had to hand over her salary to the respondent every month. In the month of June, 2006, the petitioner was told to fetch money from her father to purchase a flat at Bangalore.
12. In July, 2006, the petitioner called her parents to Bangalore which infuriated the opposite party and he hurled abusive

languages towards her parents. She was beaten up again and again. Ultimately the petitioner informed the jurisdictional police station about her plight and decided to leave Bangalore with her parents.

13. The opposite party at that point of time made a promise not to abuse the petitioner physically and convinced the petitioner to withdraw the complaint she lodged before police.
14. In September, 2006, the petitioner became pregnant and there was none to take care of her. The respondent did not allow her parents to come and stay with her. She became ill and it was detected by ultrasonic test that the child in her womb had cleft lip. After the birth child had to go for surgery.
15. By end of November, 2007 she bagged a new job at St. George College and along with the opposite party, she moved to new flat at Bangalore with their son. Her husband was unwilling to share household expenses and if insisted for, he used to react violently. The petitioner since was not interested to put an end to this marital knot, endured all kind of torture meted out to her by her husband with a hope for better tomorrow.
16. In December, 2007 she had to come to Kolkata as the child became very ill and her husband, the opposite party refused to shoulder any responsibility. The child had to be admitted to Park Nursing Home, Kolkata. The opposite party did not bear the medical expenses to the tune of Rs. 25,000/- for the treatment of

the child, though he stated that the medical expenses would be claimed by him from his office.

17. In June, 2018 she got a job at Bangalore City College on no work no pay basis. The petitioner requested her parents to come to Bangalore to help her in raising the child. Though her father through CARE Kolkata arranged for domestic help, but it did not work.

18. The opposite party started staying on the upper floor of the duplex during October, 2008-2009 and stopped shouldering any financial burden either for the petitioner or for the child. The opposite party used to return home drunk and used to threaten the petitioner. Even she was physically assaulted on 22nd April, 2009. On 3rd May, 2009 she was again beaten up; the petitioner with the help of her neighbour went to Manipal Hospital for her treatment, then she informed Madhavpur police station about the incident and left for Kolkata with her child.

19. Based on her information, Madhavpur police station registered F.I.R. No. 0164/2009 dated 3rd May, 2009 and after investigation submitted charge sheet under Section 498A of the Indian Penal Code and 3 and 4 Dowry Prohibition Act against the opposite party, who was arrested and subsequently, released on bail.

20. The petitioner filed an application claiming maintenance for herself and for her child. The petition was registered as M/93 of 2009 and she received a sum of Rs. 5,500/- from the respondent

as interim maintenance. However, she withdrew her claim for maintenance after she has bagged a job.

21. By filing this petition under Section 13(1) of the Hindu Marriage Act, the petitioner prayed for divorce on the ground of cruelty.

22. The opposite party husband contested the suit by filing written statement denying all material allegations made against him by the petitioner. Even the opposite party tried to depict himself as a person who was treated with cruelty by his wife. But he did not adduce evidence. Pleading without any prove is of no value.

23. In order to prove her case, the petitioner wife adduced evidence as P.W. 1 by filing affidavit-in-chief under Order XVIII Rule 4 of the Code of Civil Procedure, replicating her petition under Section 13 of the Hindu Marriage Act. She tendered documents admitted as Exhibit-1 to 6. The opposite party husband, however, did not cross-examine the P.W. 1. Therefore, by his conduct, the opposite party husband is found to have admitted the testimony of his wife.

24. It is no more res-integra that wherever the opposite party declined to avail himself of the opportunity to put his essential and material case in cross-examination it should be held that he believed that the testimony of the witness as P.W. 1 could not be disputed. This is rule of essential justice and not a technical rule of evidence.

25. Such unchallenged testimony of P.W. 1, unerringly suggest that the petitioner-wife, who did her Ph.D. in Life Science, earned displeasure of her husband when she bagged a job in Manipal Hospital. She was initially asked to get her salary to the tune of Rs. 25,000/- deposited in the joint account; she was not allowed to participate in the training programme organized by her employer and ultimately she was forced to quit the job.
26. The petitioner was physically abused by the opposite party husband. P.W. 1 stated to have informed police once, which she withdrew, having found her husband apologetic. But after few days she was beaten up again by her husband.
27. Thus unchallenged testimony of P.W. 1 demonstrates the cruel nature of her husband who did not have any respect towards his wife. Instead of being supportive, he was instrumental in throttling her aspirations. He failed to accord her with dignity she deserved.
28. 'Cruelty' has not been defined in statute and it gives a very wide discretion to the Court to apply it literally and contextually. What is cruelty to one may not be cruelty to other; it depends upon the upbringing, education and social strata to which the parties belong, their ways of life temperament and emotion that have been conditioned by their social status.
29. While staying together in Bangalore the husband withdrew himself from the company of his wife and moved to the upper tier of the duplex, and P.W. 1 was staying with the child in the lower

tier of the duplex. Such conduct of the husband is but expression of his intention to make the marriage dead. There is every reason to presume that the opposite party husband had the animus deserendi. Ultimately he assaulted the P.W. 1 and drove her out with the child.

30. Such kind of sustained course of abusing and humiliating treatment by the husband should be considered as cruelty. P.W. 1 stated that she wanted to be in the marriage but ultimately she was forced to leave her matrimonial home as she failed to endure torture both physical and mental meted out to her by her husband.

31. Thus we feel no hesitation to hold that the appellant by his conduct has proved himself to be the epitome patriarchy and an utterly insensible person, having no respect for his wife far to speak of love and compassion. He has virtually made his intention clear to trample the promises he made during the marriage. He withdrew himself from the company of his wife and started living separately though in the same house, which can also be considered as his apathy towards his wife and child as well. There was absolute loss of affection. It would be detrimental for the mental and physical health of the respondent if she is asked to live with the appellant.

32. In ***Smt. Roopa Soni vs. Kamalnarayan Soni*** reported in **AIR 2023 SC 4186** Hon'ble Supreme Court held :-

“6. These preliminary observations are intended to emphasise that the court in matrimonial cases is not concerned with ideals in family life. The court has only to understand the spouses concerned as nature made them, and consider their particular grievance. As Lord Reid observed in *Gollins v. Gollins* [1964 AC 644 : (1963) 3 WLR 176 : (1963) 2 All ER 966 (HL)] : (All ER p. 972 G-H) ‘... In matrimonial affairs we are not dealing with objective standards, it is not a matrimonial offence to fall below the standard of the reasonable man (or the reasonable woman). We are dealing with this man or this woman.’ ” xxx xxx xxx

32. *In Samar Ghosh v. Jaya Ghosh* [(2007) 4 SCC 511], this Court, after surveying the previous decisions and referring to the concept of cruelty, which includes mental cruelty, in English, American, Canadian and Australian cases, has observed that: (SCC pp. 545-46, paras 99-100) “99. ... The human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in the other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system, etc. etc. What may be

mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straitjacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances....” (emphasis supplied)

33. The opposite party before the learned Trial Court appeared through Advocate but did not contest the suit properly. Before this Court as appellant also his sole intention was to drag the proceeding.

34. Hon’ble Apex Court in ***Shiv Cotex vs. Tirgun Auto Plast (P) Ltd.*** reported in **(2011) 9 SCC 678** held :-

“16. No litigant has a right to abuse the procedure provided in the CPC. Adjournments have grown like cancer corroding the entire body of justice delivery system. It is true that cap on adjournments to a party during the hearing of the suit provided in proviso to Order XVII Rule 1 CPC is not mandatory and in a suitable case, on justifiable cause, the court may grant more than three adjournments to a party for its evidence but ordinarily the cap provided in the proviso to Order XVII Rule 1 CPC should be maintained..... The parties to a suit - whether plaintiff or defendant - must cooperate with the court in ensuring the effective work on the date of hearing for which the matter has been fixed. If they don't, they do so at their own peril.....”

35. In ***Noor Mohammed vs. Jethanand*** reported in **(2013) 5 SCC 202** Hon’ble Apex Court held :-

“.....The foundation of justice, apart from other things, rests on the speedy delineation of the lis pending in courts..... Delayed delineation of a controversy in a court of law creates a dent in the normative dispensation of justice and in the ultimate eventuate, the Bench and the Bar gradually lose their reverence, for the sense of divinity and nobility really flows from institutional serviceability. Therefore, historically, emphasis has been laid on individual institutionalism and collective institutionalism of an adjudicator while administering justice.....”

36. Court normally takes lenient view once a litigant appears in person and some amount of indulgence is also shown to the litigant. The appellant Manojit Basu is found to have been taking the fullest advantage of the Court being soft towards him and that started abusing the procedure of law.
37. Direction was given to the West Bengal Legal Services Authority to engage an Advocate to represent the opposite party-appellant. Ms. Runu Mukherjee, Advocate, of this Court was engaged. But she returned the brief and Mr. Anirban Mitra, learned Advocate expressed his inability to represent the appellant.
38. The respondent even made unsuccessful attempt to withdraw the appeal from this Bench by submitting a representation before the Hon'ble the Chief Justice. These were all part of his strategy to protract the litigation.

39. He was given liberty to submit written notes of argument but he refused to comply with the same. His conduct demonstrates his intention to protract the litigation.

40. On 20th September, 2023 Mr. Manojit Basu the appellant declined to make his submission on merit citing his mental health issue. The submission made to justify his inability to present his case on merit was found to be well structured and unequivocal his mental ability and coherent thoughts. The Court having adjourned the matter umpteen number of times, however, decided not to adjourn the matter any further. But the opposite party decided not to avail the opportunity to place his case.

41. Hon'ble Supreme Court in **Thakur Sukhpal Singh vs. Thakur Kalyan Singh** reported in **AIR 1963 SC 146** held :-

"4. Order XLI R. 16 of the Code provides the procedure to be followed by the appellate Court on the hearing of an appeal which has not been dismissed under sub-rule (1) of Rule 11 of that order. Rule 16 reads:

"(1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

(2) The Court shall then, if it does not dismiss the appeal at once, hear the respondent against the appeal, and in such case the appellant shall be entitled to reply."

It is clear from sub-rule (1) that it is the duty of Appellate Court to hear the appellant in support of the appeal. This however, does not mean that the appellate Court cannot decide the appeal if the appellant does not make his

submissions to the Court showing that the judgment and decree under appeal were wrong. The appellate Court is not to force the appellant to address it. It can, at best, afford him an opportunity to address it. If the appellant does not avail of that opportunity, the appellate Court can decide the appeal. Sub-rule (2) indicates that the appeal can be dismissed without hearing the respondent. The appellate Court will do so if it was not satisfied that the judgment under appeal was wrong."

42. The ***Privy Council in Mt Fakrunisa vs. Moulvilzarus*** reported in **1921 PC 55** held :-

"In every appeal it is incumbent upon the appellants to show reason why the judgment appealed from should be disturbed; there must be some balance in their favour when all the circumstances are considered, to justify the alteration of the judgment that stands. Their Lord-ships are unable to find that this, duty has been discharged."

With respect, we agree with this and hold that it is the duty of the appellant to show that the judgment under appeal is erroneous for certain reasons and it is only after the appellant has shown this that the appellate Court would call upon the respondent to reply to the contention. It is only then that the judgment of the appellate Court can fully contain all the various matters mentioned in Rule 31 Order XLI."

Opportunity was given to the appellant to present his case though learned Counsel or by himself. But he refused to do so on different excuses. It was his chosen inaction.

43. The appellant by filing an application under Section 26 of the Hindu Marriage Act prayed for custody of the child. Learned Trial

Court while disposing of the suit by passing the order impugned also dismissed the petition filed by the appellant seeking custody of the child.

44. In course of hearing it is brought to the notice of the Court that the appellant was not paying maintenance, he was directed to pay for the son. Appellant denied such allegation but turned deaf ear to the direction given by the Court to submit affidavit indicating the compliance of the order of learned Trial Court towards payment of maintenance to his son.
45. On 1st July, 2022 the appellant was directed to pay a sum of Rs. 50,000/- towards the maintenance of the child as interim measure. It was not complied with. He was directed to submit an affidavit in consonance with the direction of the Hon'ble Apex Court in ***Rajnish vs. Neha*** reported in **(2021) 2 SCC 314**. He did not comply with the same. Therefore, there is every reason for this Court to presume that the allegation made by the respondent wife as to non-payment of maintenance after February, 2020 for the minor son, is correct.
46. The appellant admittedly is a businessman and as it appears from the testimony of the appellant made in the proceeding under Section 26 of the Hindu Marriage Act, he owns the business under the style Tech Yugardi IT Solutions and Consultancy, Bangalore. But he neither disclosed his income in discharge of his obligation under Section 106 of the Evidence Act nor complied with the direction of the Court by filing affidavit in consonance with the

direction of Hon'ble Apex Court in *Rajnesh (supra)*. Therefore, there is every reason to presume that he is not only a man of means, he earns more than what has been disclosed by his wife and is capable of paying maintenance to the tune of Rs. 25,000/-.

47. It is pertinent to mention that considering the submission of the appellant by order dated 16th June, 2022 this Court directed the respondent wife to permit the minor child to interact with his father on Saturday, 18th June, 2022 between 12 p.m. to 1 p.m. at the Chamber of Ms. Sumitra Das, Advocate but the appellant preferred to interact with his son on virtual mode.

48. Be that as it may, non-payment of maintenance to the minor son and at the same time non-submission of affidavit to substantiate the claim that he has been paying maintenance to his minor son regularly, the appellant has exhibited his apathy towards the child.

49. Therefore, he cannot be held to be a fit person to have the custody of the child. Taking into consideration the paramount welfare of the child we do not find any reason to interfere with the decision of learned Trial Court in rejecting the petition under Section 26 of the Hindu Marriage Act filed by the appellant.

50. In fine the appeal merits no consideration and is dismissed with cost of Rs. 2,00,000/- to be paid to the Calcutta High Court Legal Services Committee within four weeks from date.

51. By an order passed on 22nd August, 2022, the Manager/ CEO of City Bank NA MG Road Bangalore was directed not to allow Mr.

Manojit Basu to operate the account except for the purpose of payment of EMI and an additional amount of Rs. 30,000/- subject to maintaining the balance of Rs. 1,83,000/-. But the authorized signatory of the bank informed vide report dated 29th August, 2022 that on 25th August, 2022 there was balance of Rs. 6816.33/-. This again would show the intention of the appellant to disown his responsibility as father. The appellant is directed to clear the arrears maintenance awarded in favour of his minor son within four weeks from date failing which, the respondent will be at liberty to take out execution for realization of arrears of maintenance.

52. Pending application, if any, stands disposed of.
53. Copy of the judgement along with L.C.R. be sent down to the learned Trial Court immediately.
54. Urgent Photostat certified copy of this judgment, if applied for, should be made available to the parties upon compliance with the requisite formalities.

I agree

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)