

Item-26. 17-04-2023

sg Ct. 8

FA 335 of 2014

Smt. Gopa Ghosh
Versus
Goutam Ghosh

Mr. Manishankar Chattopadhyay, Adv.
Ms. Shalini Singh, Adv.

...for the appellant

Mr. Debasish Roy, Adv.

...Amicus Curiae

The appellant is the wife. The appellant filed an application under Section 13 of the Hindu Marriage Act, 1955 against her husband, Goutam Ghosh for dissolution of marriage by way of divorce. The wife alleged that after solemnisation of marriage on 5th July, 1991, they lived in the maternal uncle's house of the husband. Thereafter the wife constructed a house on her land and the husband started to stay there with her. In the wedlock, a daughter was born in the year 1996. Thereafter, the nature, character, attitude and habits of the husband have changed. He started mental and physical torture upon the wife. She was not provided with adequate food and clothes. She was not allowed to enter into the bedroom. She used to sleep elsewhere in the house. She was subjected to cruelty and torture. With a hope that the attitude of the husband would change, she continued to reside with the husband. During her stay, she also noticed illicit relation of the husband with one Ratna Bouri. When she protested, she was subjected to assault and threat. They have a mentally challenged daughter. The husband has shown no interest and care in the daughter. It was further alleged that the husband used to force the wife to engage her in

prostitution or illicit intercourse with the others. On being refused, the husband threatened her to sell the brothel house or to be murdered. The wife alleged that the husband made reckless allegations about her activities and also made allegation of adultery against the wife. As for the last three years they did not have any physical relation, there was no chance of any reconciliation. On that ground, the suit was filed in the year 2012. The husband contested the suit.

The specific stand of the husband was that the parties to the suit nourished the child with great care and caution. The husband made all possible arrangements for the treatment of the child. The wife got furious when it was learnt that there was no possibility of the child being developed. She was busy with her business and NGO and husband extended all possible help to assist her to continue with her business. She became greedy and run after wealth and she was highly ambitious and started ignoring the child. She made frequent business trips. The wife wanted to construct multi-storeyed building in joint family property but she could not make any such construction due to opposition of the other co-sharers and this has caused frustration in her. They are residing in a common house and shared common bedroom. The husband prayed for dismissal of the suit.

The learned Trial Judge on consideration of the pleadings, framed five issues. The learned Trial Judge has held that the plaintiff has failed to establish the cruelty and desertion. The learned Trial Judge in arriving at the said finding has taken note of the fact that the wife has failed to establish that the husband lead an adulterous life. The allegation of adultery was found to

he wild and baseless. At the trial, the husband in his evidence has stated that since he lost his parents at a young age, he decided to stay at the place of the appellant wife and out of her own earning and he contributed to the building where they are staying.

The learned Counsel for the appellant, apart from the evidence of the appellant, has relied upon the evidence of the daughter who deposed as PW 2 to establish that the daughter has proved mental cruelty and adultery. We have read the evidence of the daughter. As rightly pointed by the learned Trial Judge, the daughter in her cross-examination admitted that she has no idea about the term 'adultery' and 'extra marital relation', although in her affidavit in chief, she used those terms without any hesitation. It is unfortunate that the daughter is dragged in this procedure to settle the score between the parties. In fact, the daughter has stated in her deposition that her mother treated her as abnormal child. The deposition of the parties would show that there were some kind of mis-trust between them as both the parties made allegations against each other with regard to adultery but none of the parties have made it a ground for divorce. The persons with whom such adulterous relationships are alleged, have not been made parties in the suit nor they were called at the trial. The wife has categorically stated in her evidence that she is not willing to examine the Ratna Bouri to prove the allegation of adultery. She did not make her a party. The husband in his deposition has stated that it was a marriage of choice and a result of long love affairs. The child Aishi is a gift of god and the parties had nourished the child with great care

and caution. In fact, the evidence would show that the respondent has made all arrangements for the treatment of Aishi and he accompanied the child to Vellore. The learned Counsel for the appellant has submitted that once it is established that the parties have separated and the separation continued for a sufficient length of time and one of them has presented a petition for divorce, it could well be presumed that the marriage has broken down. Once it is found that the break down is irreparable, then the divorce should not be withheld.

Mr. Mani Sankar Chattopadhyay, the learned Counsel appearing for the wife submits that this principle has been recognized by the Hon'ble Supreme Court in the matter of *Naveen Kohli vs. Neelu Kohli*, reported in *2006(4) SCC 558*. It is submitted that in such circumstances, the consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery of the parties. Mr. Chattopadhyay submits that this is a case of irreparable break down of marriage and once it is established that this has been long period of separation, the initial cause of separation could hardly be any relevance between the parties and it would be nothing but only fictional if this matrimonial bond is allowed to be continued. It will exist only in form and not in substance. Mr. Chattopadhyay also referred to the decision of the Hon'ble Supreme Court in the case of *Sukhendu Das vs. Rita Mukherjee*; reported in *(2017) 9 SC 632* and *Sandhya Rani vs. Kalyanram Narayanan*; reported in *1994 Supp (2) SCC 588*. It is submitted that the consistent view of the Hon'ble Supreme Court is to put an end of the marriage when the marriage

between the parties has irretrievably break down and found to be beyond repair.

Since the husband was not represented, we appointed Mr. Debasish Roy, Advocate as Amicus Curiae. Mr. Roy has submitted that merely because the defendant has failed to appear in the appeal that is not sufficient for the Court to jump to a conclusion that the plaintiff is entitled to divorce. Mr. Roy submits that the divorce can be granted only on the grounds specified in the act. This is a statutory mandate under Section 23(1)(ia) of the Hindu Marriage Act, 1955. Mr. Roy submits that the oral testimony of PWs 1 and 2 has failed to prove the facts to the effect that the respondent has illicit relationship with Ratna Bouri and other women and she was badly assaulted by the husband. The allegation made against the husband with regard to illicit relationship or forced her to engage prostitution could not be established.

In terms of Section 13(1)(ia) of the Hindu Marriage Act, 1955 a marriage can be dissolved on the grounds of cruelty by one spouse to the other. Cruelty may be physical or mental. The term "cruelty" means one spouse has so treated the other so as to cause such feelings towards the other spouse in his/her mind a reasonable apprehension that it will be harmful or injurious to live with the other spouse.

A perusal of the grounds on which divorce can be sought under Section 13(1) of the Hindu Marriage Act, 1955 would reveal that the same are grounds based on the "fault" of the party against whom dissolution of marriage is sought. In matrimonial jurisprudence, such provisions are founded on the "matrimonial

offence theory” or the "fault theory". Under this jurisprudential principle, it is only on the ground of an opponent's fault, that a party may approach a court for seeking annulment of her matrimonial alliance. If either of the parties is guilty of committing matrimonial offence, the aggrieved party alone is entitled to divorce. The party seeking divorce under the "matrimonial offence theory" / "fault theory" must be innocent. A party suffering "guilt" or “fault” disentitles herself from consideration. The grounds for annulment is available only if the desertion is on account of fault of the opposite party, and not fault of the party which has approached the Court. Here it is the wife herself was at fault and not the husband.

The question that requires to be answered first is as to whether the averments, accusations and character assassination of the husband by the appellant wife in the plaint constitutes mental cruelty and whether for sustaining the claim of divorce under Section 13(1)(ia) of the Act by the wife such averments can be taken into consideration in granting divorce.

Mr. Roy submits that the allegations are found to be unfounded and unsubstantiated.

The appellant has failed to substantiate the allegations of unchastity of the respondent with Ratna Bouri. The allegations of extra marital relationship of the respondent is viewed as a grave assault on his character, honour, reputation and status. The appellant is guilty of false allegations about bad character or unchastity of the respondent which amounts to wrong and disability on the part of the appellant.

The said misconduct appears to be serious enough to

justify denial of the relief to the appellant wife. In actuality the appellant is making out a claim for a decree of divorce on the basis of allegations for which she herself is singularly responsible and that on the said allegations, it was the appellant who deserves to be castigated.

We are in agreement with the Amicus Curiae in this regard. We have already noted that the allegations of adultery and cruelty are wild and baseless. The testimony of cruelty sought to be proved through the daughter, PW 2, is unacceptable since she was not aware of the nature of the allegations and she like a parrot repeated what her mother wanted her to say in court. The wife has stated in her evidence that the neighbours have witnessed the torture mentally and physically and also the adulterous nature of her husband but she did not produce any witness in support of alleged torture or adulterous relationship of her husband. Her relations who could have witnessed such alleged torture or adultery were not produced. Instead, she produced her mentally challenged daughter to prove torture and adultery.

The word 'cruelty' has not been defined in the Hindu Marriage Act, 1955. The cruelty would mean obnoxious and unacceptable human behaviour. The conduct should be in relation to and in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The wife has to establish that the conduct complained of is bad enough, obnoxious and it is such a nature that it would be harmful and injurious to reside with other spouse. Once this evidence is led then it has to be assessed if it is a false accusation

in which case it is likely to backfire.

We are unable to find any material or course of conduct complained in the trial on the basis of which we could have arrived at a conclusion that the appellant was able to prove cruelty. It is true that the parties are living separately for several years and the wife alleged that three years prior to the institution of the suit there has been no physical relationship. As pointed out by the Amicus Curiae the Court is required to find who is at fault. Until it is a willful refusal and neglect on the part of the others, it is difficult to infer that a cruelty has been perpetrated by the spouse against whom such allegations have been made. Moreover, even if it appears that the marriage has irretrievably broken down, we are unable to pass any decree in absence of a suitable provision to that effect in the Act.

On such consideration, we feel that there is no reason to interfere with the judgment passed by the trial court. The appeal stands dismissed. However, there shall be no order as to costs.

LCR may be sent down to the learned Trial Court.

We record our appreciation for the assistance received from Mr. Debashis Roy, Amicus Curiae.

(Uday Kumar, J.)

(Soumen Sen, J.)