

**(2006) 08 CAL CK 0057**  
**In the Calcutta High Court**  
**Case No : F.A. No. 27 of 2000**

Sabita Chowdhury

APPELLANT

Vs

Dulali Mondal Chowdhury and Others

RESPONDENT

**Date of Decision :** 11-08-2006

**Acts Referred:**

Constitution of India, 1950 — Article 142  
Hindu Marriage Act, 1955 — Section 13(1), 15

**Citation :** AIR 2006 Cal 318 : (2006) 3 CALLT 614 : (2006) 4 CHN 445 : 111  
CWN 650

**Hon'ble Judges :** Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

**Bench :** Division Bench

**Advocate :** P.B. Sahoo, Amit Baran Das and Ashok Bera, for the Appellant;  
Basudev Gayen, for the respondent Nos. 2(b) and 2(c) and Amal Krishna  
Samanta, for the respondent Nos. 2(a) and 2(d), for the Respondent

## **Judgement**

Kalyan Jyoti Sengupta, J.—I have had the benefit of going through erudite draft judgment of my learned brother. I fully agree with the conclusion arrived at by His Lordship and the consequential order passed by him. However, I wish to add a few words of my own which are as follows:

2. The plaintiff Monoj (now deceased) and the appellant were found to have married under Hindu rites and ceremonies. They had led their happy and modestly eventful marital life till 1981 from the date of their marriage. They had produced three children who are successful and pride of any family. Two sons are products of IIT (Kharagpur) and younger son is enviously placed in his life and working in America and elder son is also not lagging behind, he is in decent employment in the State of Andhra Pradesh. Daughter is also married with an Income Tax Officer. What more a fighting and very lower middle class family could achieve during their struggling marital life? After 50's they migrated from East-Pakistan now Bangladesh in quest of their destiny which fructified in this country, in a small happy family. Reality in life is that poverty keeps family united. Prosperity sometimes becomes the cause of unhappiness in the family,

we find exactly what we observe just now. Trouble started as it appears from plaint when appellant got a job of primary school headmistress. The allegations of cruelty levelled by plaintiff/Monoj is that appellant started neglecting him. She used to quarrel with Monoj, did not cook food, nor washed clothes, and did not prepare tiffin. Monoj was compelled to cook his own food. His aged mother was not at all looked after, as she was occasionally visiting India from Bangladesh. Appellant abused in filthy languages, insulted not only the plaintiff but his aged mother as well and this became routine affairs from 1987. Situation created by appellant in the house is so unbearable that his aged mother was compelled to leave his place. All these allegations of cruelty coupled with act of desertion of the appellant has inflicted mental cruelty on Monoj. It further appears the suit was filed not only on the ground of cruelty but desertion in March, 1996. In the written statement she denied all the allegations. Appellant made counter-allegation of mental and physical cruelty inflicted on her. She alleged in her written statement that her husband's act of cruelty had reached in such a State that the family happiness disappeared, peace was shattered, and it affected the mind of the children as well, two sons stopped visiting their father. His unusual and quarrelsome behaviour was started immediate before marriage of their only daughter. Monoj initiated proceedings both, civil and criminal, for driving them out from the house. She was compelled to leave the house because of the proceedings and physical torture inflicted upon her though she was never inclined to leave her marital home and her husband.

3. The learned Trial Judge as it appears from the judgment found on evidence both parties are guilty of mental and physical cruelty inflicted on each other. He felt that act and conduct of both the parties were such that no marital tie could survive at the age of late fifty of the husband and early fifty of the wife. Following Supreme Court decisions as cited and discussed by my learned brother, the learned Court below dissolved marriage by passing decree. It appears after decree of divorce Monoj is said to have married another lady. The second lady came with an application for being added as a party in view of death of Monoj. The application was not pressed because of non-appearance. We find no material except one or two sentences of statement of marriage that too without any particulars. As such we dismissed the said application. Even if it is assumed that there was marriage it appears to be violative of Section 15 of the Hindu Marriage Act. The scope of the said Section has been cited and discussed by my learned Brother in details, which I do not need to repeat.

4. Now the question before us is whether the learned Judge was justified under the law to pass decree on the fact finding of mental act of cruelty and also desertion or not. As far as desertion is concerned we have checked that there was no continuous desertion for a minimum period of two years preceding the date of filing of the suit, which is sine qua non to maintain divorce action on this ground.

5. According to us the approach of the learned Judge for dissolution of the

marriage on the ground of mental cruelty is not acceptable. Language of Section 13 Sub-section (1)(ia) of the Hindu Marriage Act shows that in order to grant a decree the Court has to find the petitioner has proved his case of cruelty as against the wife with preponderance of probability. It seems to us the learned Court below having found in his own way act of cruelty perpetrated by parties mutually to each other, is a factor to hold breaking down of marriage irretrievably. In our view that is not so under law. We have read evidence adduced by the plaintiff with the supporting evidence of his mother and neighbour. Evidence of the plaintiff is not good enough and is not minimum required standard for which one can say that wife perpetrated cruelty. His charges against Sabita not performing house hold duties viz. not washing clothes, cooking food, etc. are not justified on fact on records as admittedly Sabita was working lady. Sometimes it might become impossible after hectic school duty to do so. It could have been got to be done engaging domestic help which is normal step usually taken in any middle class family. Testimony of picking up quarrel by Sabita is not such that exceeds limit of normal behavioral pattern between married couple. Some degree of altercation or hot exchange of words is bound to happen in any family, but that does not mean that either of spouse will not have reasonable power of tolerance. Sabita's alleged misbehaviour with his mother is not believable as she was not residing with them permanently. As far as the evidence of mother is concerned the same is of no value as she came to stay permanently after desertion of Sabita. It appears from the evidence that two sons and daughters almost have deserted the plaintiff and severed almost all connection.

6. I am of the view that the case of cruelty has not been proved and a case of desertion does not lie, on the facts and circumstances of the case.

7. Therefore, the judgment of the learned Trial Judge is not sustainable and the same has rightly been set aside by my learned brother.

Sanjib Banerjee, J.—By the time Monoj Kanti Chowdhury sought divorce through Court on the grounds of cruelty, he had been married to Sabita, unhappily for the most part, for 34 years. By then, elder son Dibyendu was happily settled, daughter Chanda was married and younger son Subhendu was living in the United States of America.

2. By the time we have heard this appeal against the decree for divorce of April 26, 1999, one Monika Chowdhury claimed (in CAN No. 7646 of 2004, which we have dismissed) that Monoj had married her on September 8, 1999 and further that Monoj had died on January 20, 2000.

3. Sabita has still pressed the appeal to vindicate her stand that notwithstanding the differences with her husband and the litany of mutual tirades and vicious unpleasantness, her conduct had not been such as to entitle her late husband to obtain divorce on the grounds of cruelty.

4. In assailing the judgment and decree, Sabita has maintained that neither had

her conduct been, nor was it found to be by the Court below, of such type which endangered the living of her husband with her. Her principal ground has been that cruelty or disgust, without intending permanently to cease cohabitation, would not be ground enough for obtaining divorce. She has also urged that she had not intentionally or permanently forsaken or abandoned her spouse, nor was her conduct without reasonable cause.

5. In support of his petition based almost exclusively on Section 13(1)(ia) of the Hindu Marriage Act, 1955, Monoj claimed ill-treatment by his wife for an unspecified period and pegged his case on an incident alleged to have taken place on August 17, 1992 and the alleged desertion by Sabita from July 19, 1994. Monoj had not, as he could not under Clause (ib) of Section 13 of the said Act, sought dissolution of the marriage on the grounds of desertion.

The statutory period of two years had not elapsed prior to his institution of Matrimonial Suit No. 313 of 1996 on March 26, 1996.

6. Monoj's assertion of the act of desertion by Sabita was, therefore, to be looked into purely as an allegation of cruelty.

7. Before the Court below, Monoj amplified his version of his wife's conduct and, particularly, the incident of August 17, 1992. Monoj's mother, all of 85 when she deposed in September, 1998, came to support her son. Monoj also had neighbour Satya Ranjan Roy depose in support of Monoj's claim of acts of cruelty by Sabita.

8. It appears from Sabita's evidence that there had been continuing unpleasantness, which ultimately led to mediation attempts in the presence of several persons including Satya Ranjan Roy, particularly on March 6, 1994.

9. Following such meeting, Monoj wrote a letter to the members attending the meeting. At the foot of the letter dated March 7, 1994, the following appears:

P.S. : Regarding the subject that Sabita cannot be assaulted I (was) asked to write as follows, "If she is assaulted Ajit Babu or Satya Babu should be informed immediately. Any complaint made afterwards shall not be accepted". I request to write this.

Signed

10. It is, thus, evident that in course of the mediation, the question of assault of Sabita by Monoj had come up and it is also evident that Monoj himself had accepted that there would be no future assault.

11. On the incident of August 17, 1992, Monoj's version runs thus:

On 17.8.92 at night while I was getting myself prepared to take my meal after cooking food personally, my wife without any reason picked up quarrel with me and in the midst of that quarrel she threw out my cooked food. Such torture in this way augmented on me by my wife. Finding no other alternative way, ultimately on 26.8.92, I lodged G.D. at Kasba P.S. against my wife....

It is not a fact that on 17.8.92 entering into the kitchen I abused my wife. It is not a fact that for ill-treating my wife and also advising in filthy language she became ill.

12. The mother-in-law had this to say of her daughter-in-law's conduct on August 17, 1992:

In my presence when my son was engaged in taking his dinner she i.e. bouma picked up quarrel with Monoj. In the midst of that quarrel she abused him in filthy languages in my presence and thereafter all on a sudden she thrown (threw) out his dish with rice and curry snatching it from Monoj.

13. Sabita's recollection of what happened on August 17, 1992 is, obviously, somewhat different:

...It is not a fact that on 17.8.92 at night when nay husband was engaged in cooking his food I picked up quarrel with him and in the midst of that quarrel I threw out cooking materials including food on that night over taking milk my husband became very much angry and threw out that milk in the drain. At that time when I raised my protest my husband assaulted me mercilessly.

14. It is necessary to set out the oral evidence of the happenings of August 17, 1992, as the other plank of Monoj's assertion of cruelty by Sabita does not pass muster.

15. Apart from oral evidence, the documentary evidence before the Court below included, inter alia, letters addressed by Dibyendu, over a long period of time, to his father; a letter by Chanda to Dibyendu shortly after the birth of her first child; and, two letters addressed by Monoj to one Nilu, who appears to be the husband of a niece of Monoj.

16. It appears that none of the sons and daughter has openly taken sides for either parent. Subhendu appears to have removed himself from the family imbroglio by flying away, almost literally, from the field of disharmony altogether. In the unfortunate milieu of parental discord, the sons and daughter appear to be non-aligned satellites, loathe to keep in touch or cross each other's paths. Incidents of parental acrimony and even violence find mention in some of the letters. What comes through, however, is not what Monoj would have us believe.

17. A ground of cruelty for seeking dissolution of marriage cannot be founded on conduct of the spouse which can be said to be a reaction to one's own actions. Monoj has failed to establish cruelty of the kind for which he cannot, at least partly if not substantially, be blamed.

18. There is, of course, the matter of the two letters addressed by Monoj to Nilu in April, 1996. These two letters have to be seen against the backdrop of the petition for divorce having been filed only in end March, 1996. On April 10, 1996, Monoj wrote to Nilu expressing particular concern regarding one Sikha. Sikha, we have been told, was not Monika, who later claimed to have married Monoj. In

this letter of April 10, 1996, Monoj expresses anguish at Nilu having informed him earlier of Sikha having apparently remarried. Monoj implores Nilu to plead with Sikha to meet Monoj.

19. In passing, Monoj also mentions to Nilu, as if to convince Nilu to impress on Sikha, that Monoj had instituted three sets of proceedings against Sabita -- a criminal case, the divorce petition and a civil suit "for driving out from house". Monoj also requests not to "tell anybody else regarding the suits".

20. In the second of the two letters to Nilu, Monoj again expresses his longing for Sikha. Monoj also wanted Nilu to assure Sikha that Sikha should not be afraid to come to Monoj's house - "Pintu (Dibyendu) and others shall not get the courage to do anything. I have filed case against them in Court all of them may be arrested. They cannot do anything." Monoj also talks of an incident when Dibyendu and his father-in-law "were driven out from the house". While repeating that following such incident Dibyendu does not come to Monoj's house any more, Monoj also acknowledges that Sabita lived in one room in the upper floor of Monoj's house.

21. We do not know if Nilu acted as his wife's Jetha Babu had required him to do. At least in respect of one categorical instruction, Nilu chose to act contrary to Monoj's wish. Monoj had requested Nilu to burn up both the letters of April 10 and April 26, 1996.

22. There is no dispute as to Monoj having written the two letters to Nilu. Given that Monoj's claim of alleged desertion by his wife dated back to " July, 1994, his assertion to Nilu that Sabita still occupied and stayed in Monoj's house completely demolishes his case of cruelty on the ground of desertion.

23. Sabita is right. Monoj could not establish cruelty on Sabita's part entitling him to a divorce on such ground. If there was cruelty, at the least, it was mutual. If there was unpleasantness, there was unpleasantness at the behest of both Monoj and Sabita. At the very least, Monoj's claim of cruelty by Sabita remained unsubstantiated.

24. Cruelty is made of sterner stuff than what Monoj put on display. Though varying in degrees, cruelty conjures up visions of a predator and a prey; of an aggressor and the meek. Monoj is hardly the kind that would inherit the earth. And, a bark for a bite is scarcely cruelty.

25. We cannot persuade ourselves to concur with the findings of the Court below on Monoj's claim of cruelty. Even making allowance for the advantage that the Court below had of seeing and hearing what was said, we cannot convince ourselves that cruelty has been established by what has been said and presented. There may, indeed, have been cruelty, but that cruelty has not been established.

26. The Court below has also proceeded to find that the marriage had broken down irretrievably. We have been taken through the three decisions that weighed

with the Court below:

(1) V. Bhagat Vs. Mrs. D. Bhagat,

(2) Romesh Chander Vs. Smt. Savitri, and

(3) Sukhomoy Bag v. Jaya Bag reported at 1996 (1) CHN 210.

27. In the Bhagats" case, mental cruelty has been interpreted thus by the Supreme Court:

Mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

28. In that case, despite unsubstantiated allegations of the heinous kind by the wife in contesting the husband's case of divorce on the grounds of adulterous course of life, the Supreme Court held that the wife's conduct did not constitute cruelty. Though the Supreme Court ultimately dissolved the marriage to give a quietus to the mutual animosity, the ground of cruelty was found to have been "not proved.

29. In the second of the above cases, the marriage was dissolved by the Supreme Court exercising powers under Article 142 of the Constitution, the kind of authority that we and the Court below lack.

30. The third judgment, one rendered by a Division Bench of this Court under the Special Marriage Act, 1954 concluded that even if allegations and counter-allegations are not proved to the satisfaction of the Court, divorce may result if the Court finds that the marital bond had broken down irretrievably without any chance of reconciliation. The nature and extent of charges by either side in that case, where a divorce was sought by the husband within six years of marriage, are not akin to the grounds set forth by Monoj in the instant case. That judgment has also been doubted in a subsequent Bench decision reported at Tapan Kumar Chakraborty Vs. Smt. Jyotsna Chakraborty, which was not placed before the Court below.

31. The Court below has prefaced its conclusion by recording that the husband and wife "exercised cruelty and counter-cruelty on each other." The Court below has also believed Monoj's case that the spouses had been living separately since July, 1994, without taking into account Monoj's letter of April 26, 1996 where Monoj had claimed that Sabita was occupying a room on the upper floor of the Monoj's house. The Court below has further concluded that there was no scope at all to restore conjugal relationship between the parties.

32. Having found that there were acts of cruelty on either side, the Court below ultimately held that "... the marital tie between the petitioner and the respondent has totally been broken down on the ground of cruelty and also on the ground of desertion." We cannot agree with such conclusion on the basis of the material that we have seen, nor can convince ourselves to hold, as the Court below did, to dispose of the issue of cruelty in favour of Monoj. In fact, the Court below even found in favour of Monoj in respect of the third issue, which read as follows:

3) If the respondent deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the instant petition?

33. This is patently an error. The alleged desertion, according to Monoj, commenced on July 19, 1994 and the petition was instituted on March 26, 1996. Even without relying on Monoj's claim to Nilu that Sabita continued to reside in a room in the upper floor of the Monoj's house, the period of two years from the alleged commencement of desertion had clearly not elapsed, nor do we find that Monoj had sought divorce on the legal ground of desertion. Monoj had referred to the alleged desertion merely as an additional ground of cruelty.

34. The Court below has overlooked that the two grounds sine qua non for founding divorce on desertion had not been made out : the factum of separation and animus deserendi. Divorce on the ground of desertion is justified upon the statutory condition as to time being fulfilled and upon it being demonstrated that the spouse seeking divorce on the ground of desertion had not consented to the absence of the other; and the conduct of the former did not give reasonable cause to the other to leave the matrimonial home. Neither of the essential conditions for desertion has been established nor had Monoj's conduct satisfied the two principal elements of desertion.

35. The judgment and decree of the Court below are, accordingly, set aside. The honour and character of Sabita stands vindicated.

36. Though somewhat academic now, the alleged marriage of Monoj and Monika and the effect of such claim needs now to be gone into.

37. Section 15 of the said Act permits a divorcee to remarry when either there is no right of appeal against the decree of divorce or, if there is such a right, the time for appealing has expired without an appeal having been presented or on an appeal from the decree of divorce having been dismissed. Sabita's appeal was presented on May 21, 1999 against the decree of April 26, 1999, well within



time. We do not know if Monoj was aware or made aware of the filing of the appeal. If Monoj wanted to remarry and obtained the benefit u/s 15, he ought to have ascertained whether his second marriage was permissible u/s 15.

38. On behalf of Sabita the decisions reported at 1994 (2) PLJR 61 (SC) Savitri Pandey Vs. Prem Chandra Pandey, and Debjani Sinha Vs. Bikash Chandra Sinha, have been pressed into service to assert that Monoj's adventure to remarry was undertaken at his risk and the consequence arising out of the judgment in the pending appeal. The second marriage was, therefore, a misadventure and in view of the decree for divorce being set aside, such second marriage is void.

39. Sabita will be entitled to enjoy all legal benefits of the second marriage having been annulled.

40. Parties shall bear their own costs.

41. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on the usual undertakings.