
(2004) 08 CAL CK 0062
In the Calcutta High Court
Case No : F.A. No. 97 of 1994

Smt. Jayanti Mondal

APPELLANT

Vs

Sri Tushar Kanti Mondal

RESPONDENT

Date of Decision : 23-08-2004

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1A), 23, 23(1), 24, 9
Penal Code, 1860 (IPC) — Section 323, 504, 506, 541

Citation : (2005) 1 CALLT 137 : (2005) 1 DMC 869

Hon'ble Judges : Mahammed Habeeb Shams Ansari, J; Joytosh Banerjee, J

Bench : Division Bench

Advocate : Dilip Kr. Mondal and Neetu Pachal Ghosh, for the Appellant; Gouri Sankar Pal and Kazi Sajjad Alam, for the Respondent

Final Decision : Dismissed

Judgement

Mahammed Habeeb Shams Ansari, J.—Wife is the appellant before us. The appeal is directed against the judgment and decree dated December 23, 1992 passed by the learned additional District Judge, 7th Court, Alipore, 24- Parganas (S), thereby decreeing the suit filed by the husband and dissolving the marriage between the parties by a decree of divorce.

2. It must be stated here that the suit filed by the husband was u/s 13(1A)(ii) of the Hindu Marriage Act, 1955. It was founded on the ground that the parties to the suit were married on May 8, 1979. There is no issue of the marriage. Respondent-wife left the matrimonial home on October 23, 1979 whereupon the husband filed a suit for restitution of conjugal rights being Matrimonial Suit No. 587 of 1980 which subsequently was renumbered as 64 of 1981 and a decree was passed on May 30, 1983 by the learned Second Court of Additional District Judge, Alipore granting restitution of conjugal rights in favour of the husband. It is further averred that the wife filed an application u/s 24 of the Hindu Marriage Act in the said proceedings and on the date of hearing fixed in those proceedings namely November 18, 1983 husband requested and the wife agreed to lead a

happy conjugal life and on the assurance that the wife would behave normally with the husband and also other members of his family, the husband took her back in the matrimonial home on November 18, 1983 and they stayed in the matrimonial home up to March 13, 1984. It is alleged that the real motive of the wife was declared by her, when she openly stated that she had come not to lead a conjugal life but to demolish the decree obtained by the husband on May 30, 1983 for restitution of conjugal rights. It is alleged that during the stay at the matrimonial home the wife treated the family members and her husband as her servants. She never did any household work nor a single day shared the bed with the husband. On and of she went out of the house and mixed with some men belonging to party politically opposed to the family of the husband and went several times to her brother's house and on most of the days against the wishes of the husband. Lastly on March 13, 1984 while the husband was at work she left the matrimonial home with all valuables and belongings without the consent of the elders of the family. The husband searched for her at different places and lastly came to know that the wife was staying at her brother's house. She lodged a complaint being C.C. No. 298 of 1984 against the husband, his elder brother and elder brother's wife alleging offences under Sections 323/541/504/506 of the Indian Penal Code. The case ended in acquittal. It is alleged that there was no restitution of conjugal rights between the parties to the marriage for more than a period of 3 years since the passing of the decree, for restitution of conjugal rights dated May 30, 1983 and that the husband apprehends that it would be harmful and injurious to live with the wife any more. Decree of divorce was prayed for.

3. Wife contested the matter by filing written statement and denying all material allegations. It is the case of the appellant/wife that the husband obtained decree for restitution of conjugal rights on the basis of false assurance and thereafter took no steps whatsoever to take her back to the matrimonial home. She was compelled to file an application for permanent alimony and on the date set down for hearing of the said application husband proposed to take the wife back to the matrimonial home with the undertaking to live peaceful conjugal life and accordingly joint petition was preferred based on which the petition u/s 25 of the Act was disposed of. It is alleged by the wife that the aforesaid action of the husband was with the wrongful intention to avoid permanent alimony. It is her further case that the husband took her to the village house and kept her in a separate room situated adjacent to the cowshed under confinement and did not share the bed for a single day. The wife was treated with cruelty and inflicted physical torture and was compelled to leave the matrimonial home on March 13, 1984 when she was rescued by her elder brother.

4. On the aforesaid pleadings as many as 5 issues were framed which are as under;

"1. Is the suit maintainable?

2. Is the respondent guilty of cruelty and desertion as alleged?

3. Is the respondent guilty for causing co-habitation with others as alleged?
4. Does the respondent avoid to live with the petitioner peacefully as husband and wife as per decree dated 30.05.83?
5. Is the petitioner entitled to get a decree for divorce, as prayed for?
5. On the side of the husband three witnesses were examined including the husband as P.W.-1. P.W.-2 is the neighbour and P.W. 3 is the elder brother of the husband. Amongst the documentary evidence filed on behalf of husband Exts. 1 and 2 are the certified copy of the Judgment and decree in the suit filed for restitution of conjugal rights. Ext.3 is the certified copy of the judgment in the Criminal Case No. 298 of 1984.
6. On the side of the wife, apart from documentary evidence being letters written by the wife to her elder brother, the oral testimony led on her side is that of herself as OPW-1. OPW-2 is one Kartick Chandra Baidya, resident of the village who contested the Panchayat election, the elder brother of the husband belongs to opposite political party. OPW-3 is Prabhit Kumar Purkait, brother of the appellant-wife. OPW-4 is the eldest brother of the appellant wife. Exts. A, B, C & D written by the appellant were addressed to OPW-4.
7. A perusal of the judgment under appeal shows that based upon the judgment in the criminal case (Ext.3) the plea of the wife as regards the ill-treatment and torture was disbelieved. Learned trial Court was, therefore, of the view that the case of the wife is bound to fail and it was observed that the allegation of illicit relationship between the husband and her elder sister-in-law alone is sufficient to grant a decree of divorce. It was opined that it is not possible for the parties to live together and, therefore, there should be a decree for divorce. The conclusions so arrived at by the learned trial Court are assailed in the instant appeal.
8. It is the contention of Mr. Dilip Kr. Mondal appearing along with Mrs. Neetu Pachal, learned counsel for the appellant, that the statement in the judgment with respect to illicit connection between the respondent husband and his elder brother's wife are "de hors the pleadings. No such allegations are made in the pleadings in the matrimonial suit which was filed u/s 13(1A)(ii). It was strenuously urged that the appellant wife had accompanied her husband on the assurance that they will lead happy conjugal life but the husband had no such intention but was really interested in obtaining divorce which was also the relief claimed in the alternative in the earlier Matrimonial Suit No. 517 of 1986. Reliance was placed upon the judgment of the Supreme Court in T. Srinivasan Vs. T. Varalakshmi (Mrs), and Hirachand Srinivas Managaonkar Vs. Sunanda, .
9. Mr. Gouri Sankar Pal appearing along with Mr. Kazi Sajjad Alam, learned counsel for the respondent, on the other hand, contended that the husband committed no wrong so as to deny him the decree of divorce as prayed for. Reliance has been placed upon the judgments of this Court in Sm. Mita Gupta Vs.

Prabir Kumar Gupta, ; Sri Anukul Kumar Ghosh v. Smt. Chhanda Ghosh 2000(2) CLJ 40 and of the Supreme Court in V. Bhagat Vs. Mrs. D. Bhagat, and Dharmendra Kumar Vs. Usha Kumar,

10. Having heard learned counsel for the respective parties, we are of the view that as the matrimonial suit in question was instituted u/s 13(1A)(ii) the only question for consideration in this appeal is whether the said suit could be decreed granting divorce on the ground of non-restitution of conjugal rights between the parties for more than one year after the passing of such decree for restitution.

11. The granting of divorce u/s 13(1A)(ii) of the Act is subject to the provisions of Section 23. A petition filed for divorce u/s 13(1A)(ii) has to be examined in the context of the requirements of Section 13(1A)(ii) which lays down that no spouse can take advantage of his own wrong. When the two provisions are read together as they must be then it will be evident that right u/s 13(1A)(ii) is subject to Section 13(1A)(ii) of the Act.

12. In a recent judgment in Sri Nityananda Karmi v. Smt. Kum Kum Karmi (2003) 1 WBLR (Cal) 348 : 2003(2) CHN 121, a Coordinate Bench of this Court observed that "The Apex Court in Dharmendra Kumar Vs. Usha Kumar, had dealt with the interaction of Section 13(1A)(ii) Hindu Marriage Act and Section 23(1) (a) of the Act and had laid down the proposition of guilt theory and breakdown theory in order to construe the meaning of "wrong" used in Section 23(1)(a). According to this decision (1) in order to be a wrong for the purpose of the Act, the conduct alleged has to be something more than a disinclination to an offer of re-union. It must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled; (2) the petition filed u/s 13(1A)(ii) must conform to the requirement of Section 23(1)(a) i.e., must not come under the ambit of taking of the benefit of his or her own wrong". It then proceeded to consider the question of "guilt theory" and "break down theory" of a matrimonial home in the context as to which of these two theories would prevail or succeed in a case where there is a conflict between the two theories. It was held that these two theories are to be balanced in a manner so as not to destroy the object and purpose of the matrimonial law which predominantly seeks to preserve the matrimony. After having considered several judgments of the Apex Court as also of the High Courts it was held that the Court has a duty to weigh the balance in between the two theories and to accept one or the other. In the given facts and circumstances of the case Court shall not while dealing with the matrimony contribute to the breakage unless it comes to a firm finding that the marriage has irretrievably broken and that one of the spouse is not taking advantage of his own wrong. It was further held "nor can such person obtain a decree on these grounds where he is guilty of wrong other than disinclination of re-union".

13. As judgments cited at the bar before us have been considered by the Division Bench in Nityananda Karmi (supra) it is not considered necessary to deal with the same in this judgment.

14. We shall now proceed to examine the case on hand in the light of the two theories referred to in Nityananda Karmi (supra) with a view to find as to which of the two theories would eclipse the other. Also we are to consider if any of the spouse, and if so, who is guilty or has contributed in greater measure to the break down of the marriage. In considering this aspect of the matter it must be noted as observed in Nityananda Karmi (supra) that the guilt must be so overwhelming resting upon the party seeking advantage that it would work injustice in granting the relief even where the matrimonial home is irretrievably broken. If the guilt can be ascribed to one of the spouse, to such a extent that the ultimate aim of the spouse was to obtain a divorce, then the guilt theory is to be acceded to ignoring the break down theory. In short, as held in Nityananda Karmi (supra) when a marriage breaks irretrievably the break down theory would supersede the guilt theory unless it is found on fact that the guilt theory is so overwhelming or predominant that it would be unjust to grant relief to the guilty spouse.

15. The failure to or avoidance of cohabitation by one of the spouse per se is not a wrong attracting guilt theory within the meaning of Section 23(1)(a) of the Act in a case where the marriage appears to have been broken down irretrievably.

16. From a perusal of Exts. 1 and 2 it would appear that the husband filed the Matrimonial Suit No."64 of 1981 praying for a decree of restitution of conjugal rights and alternatively for a decree of divorce. Same was founded on the ground that marriage between the parties was performed on May 8, 1979 and the wife mostly stayed at her father's house. On returning from her father's house she stayed at the husband's house for 2 days and went back to her father's house refusing to come back to the matrimonial home. The wife filed written statement in that case wherein she alleged illicit connection of the husband with his "boudi" and alleged that the husband assaulted her and thereafter turned her out of the house. There was a "salish" on June 29, 1980 at Kachuberia Anchal Panchayat Office. She expressed that she was ready and willing to live with the husband if he undertakes not to make physical and mental torture upon her and if he leaves his illicit society and mixing with his "boudi". The judgment (Ext.I) shows that despite the allegation of illicit relationship made in the written statement of the wife she made no specific allegation in her examination-in-chief about her husband's such connection with his "boudi". She had merely stated that she did not like his mixing with the sister-in-law. It was further noticed in the said judgment that a Panchayat meeting was held on March 2, 1980 at the instance of the wife's brother for settlement of the dispute between the parties. On the intervention of the Panchayat the wife went to ask apology from the husband. That suit was decreed holding that there was no justification on the part of the wife to live separately from the husband. Decree of restitution of conjugal rights was granted in favour of the husband.

17. It is not in dispute that on November 18, 1983 a joint petition was filed in the earlier matrimonial suit. The document has not been exhibited in the case on

hand but from the evidence of both the parties it is evident that the wife went to live with her husband. She was made to stay at house in the village and not at the official quarter at Sonarpur where the husband was residing. She stayed there for four months and as according to her she was insulted and assaulted, she left the said house and lodged a complaint. The judgment in that criminal case is marked as Ext.3.

18. A perusal of the judgment (Ext.3) in the Criminal Case No. C298 of 1984 would show that the accused in that case were charged with the offence under Sections 323, 341, 506 IPC Court acquitted the accused on the ground that "the prosecution case is too weak to convince. And in result, the accused are entitled to benefit of doubt."

19. From the aforesaid judgment in the criminal case it would appear that the wife was not able to establish the offences of cruelty or assault by the husband or his family members.

20. More particularly in view of the findings and conclusions arrived at in the earlier Matrimonial Suit No. 64 of 1981 (Exts. 1 and 2) it has to be accepted that the wife left the matrimonial home on the earlier occasion without just cause. The findings arrived at in that case being inter parties is binding on the parties. Though a prayer was made for decree of divorce in the alternative by amendment of the original plaint Court decreed the Matrimonial Suit No. 64 of 1981 for restitution of conjugal rights. Going by the probabilities of the case, the subsequent assault or cruelty pleaded even if it be accepted that there was some justification for the wife to leave the matrimonial home, the guilt is equally of both the parties. The wife has contributed in equal measure to the break down of the marriage. She left the matrimonial home and returned only after decree was passed for restitution of conjugal rights. She left or even if we are to assume that she was compelled to leave the house because of cruelty she lodged criminal complaint and was unable to establish the offences for which the husband and his family members had been charged with. The allegations of subsequent cohabitation belies the allegations of the wife as to the alleged cruelty inflicted upon her by the husband or his family members. It was alleged by the wife that during the pendency of the instant suit there was cohabitation between the parties on February 25, 1991, March 16, 1991 and April 13, 1992, same cannot be believed as the wife deposed that she has been living separately from the husband for more than eight years. We also find from the evidence on record that there was no cohabitation between the parties for the period of over one year from the date of passing of the decree for restitution of conjugal rights. Though the wife stayed for four months at the village house of the husband there was no cohabitation during the said period. It is evident from the pleadings and the evidence on record that the parties have been living apart since March 13, 1984 and the only conclusion that can be drawn is that the marriage between the parties has irretrievably broken down.

21. We are also of the view that the break down theory eclipses the guilt theory

on the facts and circumstances of the case on hand. Wife has contributed, as already noticed, in equal measure to the break down of the marriage; firstly, by leaving the matrimonial home in the first instance, as held in the earlier suit, without just cause and subsequently on March 13, 1984 on the alleged ground of torture for which she filed criminal case. The accusations made by the wife in that Criminal Case No. C298 of 1984 have not been established. The inference that can be drawn is that the wife has no intention to go back or to lead a conjugal life with the husband.

In the circumstances the appeal fails and is accordingly dismissed, however, there shall be no order as to costs.

As no application has been made for permanent alimony before us it shall be open to the wife, if so advised, to file appropriate application before the learned trial Court.

Let the Lower Court Records be sent down forthwith.

Joytosh Banerjee, J.

22. I agree.