
(2013) 01 CHH CK 0010
In the Chhattisgarh High Court
Case No : First Appeal No. 181 of 2004

Smt. Mamta Namdeo

APPELLANT

Vs

Ghanshyam Bihari Namdeo

RESPONDENT

Date of Decision : 01-01-2013

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1)(ia), 23(1)(b), 27

Citation : AIR 2013 Chh 88 : (2013) 1 BLJ 506 : (2013) 1 CG.L.R.W. 238 :
(2013) 1 CGBCLJ 269 : (2013) 1 CGLJ 236 : (2013) 2 MPHT 10

Hon'ble Judges : Nawal Kishore Agarwal, J

Bench : Division Bench

Advocate : Viprasen Agrawal, for the Appellant; Y.C. Sharma with Shri Vivek Rathore, for the Respondent

Final Decision : Allowed

Judgement

N.K. Agarwal, J.—This appeal in a matrimonial case is by the wife and is directed against the judgment and decree dated 21.09.2004 passed by the Additional District Judge, Bemetara, in Civil Suit No. 7-A/2004 whereby the petition for dissolution of marriage filed u/s 13(1)(ia) of the Hindu Marriage Act, 1955 (for short, "the Act") has been allowed. It is not in dispute that parties to the proceedings were married as per Hindu rites some time in June, 1994. During this period, four children were born from the wedlock, out of which one has died and three are alive and are living with the respondent/husband. According to the plaintiff/respondent, the appellant expressed her unwillingness to live with the plaintiff as she wanted to marry somewhere else. She was in the habit of abusing, misbehaving and threatening to inflict in false criminal cases including dowry cases. However, the plaintiff/respondent, looking to reputation of his family in society, managed to live with her but the things became worse and it became impossible for him to live with her 7-8 months prior to the filing of divorce petition, and therefore, they started living in separate rooms and he was forced to file the divorce petition.

2. The appellant filed her written statement and denied all the allegations.
3. The respondent examined himself as PW-1, Laxmi (PW-2), Sarita Bai (PW-3), Ku. Keerti Jaiswal (PW-4), Bhagwan Deen (PW-5), Saroj (PW-6), Jamuna Bai (PW-7) and Manoj Jaiswal (PW-8), whereas, the appellant examined herself as DW-1 and one Radhelal as DW-2.
4. The trial court, on the basis of evidence adduced in the case, allowed the respondent's petition and granted decree of divorce; granted Rs. 1200/- per month as permanent alimony in favour of appellant while dismissing her application filed u/s 27 of the Act. Hence this petition.
5. Shri Viprasen Agrawal, learned counsel appearing for the appellant assails the decree of divorce mainly on following two grounds-
 - (i) The instances quoted by the respondent to prove appellant's guilt are trivial in nature and do not amount to cruelty within the meaning of Section 13(1)(ia) of the Act.
 - (ii) By placing reliance upon the judgment of Supreme Court in case of Dr. N.G. Dastane Vs. Mrs. S. Dastane, , it was further contended, the fourth child took birth even after filing of divorce petition, and therefore, the cruelty, if any, was condoned by the respondent, therefore, decree passed by the trial court is bad and deserves to be set aside.
6. On the other hand, Y.C. Sharma, learned counsel for the respondent supported the judgment and decree impugned and submitted the trial court has passed the decree based on evidence adduced in the case which does not call for any interference of this court.
7. I have heard learned counsel for the parties and perused the judgment and decree impugned as also the record of the court below.
8. The core question arises for determination of this Court is whether the court below was justified in granting decree of divorce in favour of respondent u/s 13(1)(ia) of the Act ?
9. After marshalling the evidence adduced in the case, the trial court came to a conclusion that it has been proved by the plaintiff/respondent that the appellant/wife was in the habit of abusing, insulting, misbehaving and threatening to inflict the plaintiff in false criminal cases including dowry cases and to send him and his family members in jail, which created a reasonable apprehension in the mind of the plaintiff that it is not safe for him and his family members to live with the appellant. The instances of cruelty, as observed by the trial Court para - 14 of its judgment are grave and weighty and are more serious than ordinary wear and tear of married life.
10. Section 13(1)(ia) of the Act uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behavior. It is

the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must be as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse (please see *Shobha Rani Vs. Madhukar Reddi*,

11. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties the responsibilities in particular, court find a sea change. They are of varying degrees from house to house and person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance.

12. The High Court of Calcutta in the case of *Broja Kishore Ghosh Vs. Krishna Ghosh*, observed in para 10 as under:

10. What acts would constitute mental cruelty depend upon the circumstances of each case e.g. environment, status in society, education, cultural development, local customs, social condition, physical and mental conditions of the parties. Each case depends upon a variety of facts and circumstances. Reference may be made among a host of decisions to one of our court reported in *Bijoli Choudhury Vs. Sukomal Choudhury*, *Bijoli Chowdhury v. Sukomal Chowdhury*. In fact, there is unanimity of judicial opinion that to constitute cruelty the conduct complained of should be "grave and weighty" so as to make cohabitation virtually unendurable. It must be something more serious than "ordinary wear and tear of the married life" as Lord Asquith observed in *Buchler v. Buchler*, (1947) 1 All ER 319. Again the conduct complained of "must" be such that no reasonable person would tolerate it or consider that the complainant shall be called upon to endure it. Before conduct can be called cruel, it must touch a certain pitch of severity.

13. A Division Bench of Kerala High Court in case of *Gangadharan Vs. T.K. Thankam*, , has held in para 19 as under:

19. In the statement of objects and reasons of the Amending Act of 1976, the object was stated to be liberalise the provisions relating to divorce (vide Gazette of India Extraordinary Part II Jan-April 1976 page 780), and therefore, it is difficult to agree with the view that the amendment was intended to restore the law as to cruelty as interpreted by English Courts. Therefore, the intention in bringing the amendment could not have been to reintroduce the concept of danger

of life or limb. According to the amended provision, the courts have to interpret and analyse and define what would constitute cruelty depending upon many factors such as social status of parties, their education, physical and mental conditions, customs, and traditions and come to its own conclusion that acts proved would amount to cruelty in a given case. It is difficult to lay down a precise definition or to give an exhaustive description of the circumstances which would constitute cruelty. The amendment was brought on the basis of the 59th report of Law Commission which was prior to Dastane's case to the effect that it is sufficient to prove cruelty as a ground for divorce and leave it to the court on the facts of each case to decide whether the conduct amounts to cruelty. In our view the cruelty should be of such a nature as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent that it would be impossible for them to live together without mental agony, torture or distress to entitle the party to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

14. The Supreme Court in the case of Dr. N.G. Dastane (supra) has held, the standard of proof in matrimonial cases would be same as in civil cases, that is, the Court has to decide the cases based on preponderance of probabilities.

15. After re-appreciating the material and evidence available on record, it is crystal clear that the appellant was in the habit of abusing, insulting, misbehaving and threatening the plaintiff to inflict him and his family members in false criminal cases. The above conduct of the appellant clearly amounts to cruelty, within the meaning of Section 13(1)(ia) of the Act as the above conduct may create a reasonable apprehension in the mind of the plaintiff that it is not safe for him and his family members to live with the appellant. The appellant's above conduct was not of trivial in nature but was grave and weighty and was more serious than ordinary wear and tear of married life and the first ground raised by Shri Agrawal is devoid of merit.

16. The next question for consideration is whether the plaintiff had, at any time, condoned the respondent/wife's cruelty? u/s 23(1)(b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty." The above section casts an obligation on the Court to consider the question of condonation and obligation which has to be discharged even in undefended cases. The relief prayed for can be granted only if the Court is satisfied that the petitioner has not, in any manner, condoned the cruelty. It is, of course, necessary that there should be evidence on record of the case to show that the appellant had condoned the cruelty.

17. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation, there must be, therefore, two things: forgiveness and restoration.

18. The evidence of condonation in this case is, in my opinion, as strong and satisfactory as the evidence of cruelty. The evidence of condonation consists here in the fact that the spouses led a normal sexual life, despite the appellant's act of cruelty. Marriage between the appellant and the respondent took place sometime in the month of June, 1994. Four children were born from the wedlock within a period of less than six years. At the time of filing of divorce petition, i.e., on 25.03.2000, indisputably, both the parties were residing in the same house. Their fourth child-Ruby was born on 12.05.2000, i.e., about two months after filing of the divorce petition. As per the statement para - 15 of the respondent (P.W. 1), the appellant gave her full support till the birth of fourth child. The divorce petition has not been filed by the plaintiff seeking divorce on the ground of appellant's cruelty establishing instances of cruelty subsequent to the birth of fourth child or in any case after appellant conceived fourth pregnancy.

19. The Supreme Court in the case of Dr. N.G. Dastane (supra) has held in para - 56 as under:

56. The evidence of condonation consists here in the fact that the spouses led a normal sexual life despite the respondent's acts of cruelty. This is not a case where the spouses, after separation, indulged in a stray act of sexual intercourse, in which case the necessary intent to forgive and restore may be said to be lacking. Such stray acts may bear more than one explanation. But if during cohabitation the spouses, uninfluenced by the conduct of the offending spouse, lead a life of intimacy which characterizes normal matrimonial relationship, the intent to forgive and restore the offending spouse to the original status may reasonably be inferred. There is then no scope for imagining that the conception of the child could be the result of a single act of sexual intercourse and that such an act could be a stark animal act unaccompanied by the nobler graces of marital life. One might then as well imagine that the sexual act was undertaken just in order to kill boredom or even in a spirit of revenge. Such speculation is impermissible. Sex plays an important role in marital life and cannot be separated from other factors which lend to matrimony a sense of fruition and fulfillment. Therefore, evidence showing that the spouses led a normal sexual life even after a series of acts of cruelty by one spouse is proof that the other spouse condoned that cruelty. Intercourse, of course, is not a necessary ingredient of condonation because there may be evidence otherwise to show that the offending spouse has been forgiven and has been received back into the position previously occupied in the home. But intercourse in circumstances as obtain here would raise a strong inference of condonation with its dual requirement, forgiveness and restoration. That inference stands uncontradicted, the appellant not having explained the circumstances in which he

came to lead and live a normal sexual life with the respondent, even after a series of acts of cruelty on her part.

20. By applying the ratio of law laid down by the Supreme Court in the case referred hereinabove in the facts and circumstances of the case, in my considered opinion, although the appellant was guilty of cruelty but the respondent condoned it, the trial Court, without considering this aspect of the matter, has granted decree, which is not sustainable in law.

21. For the reasons mentioned herein above, the appeal is allowed. The judgment and decree is set aside. The plaintiff's petition for grant of divorce on the ground of cruelty is dismissed.

22. No order as to costs. A decree be drawn accordingly.