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**(2009) 08 CAL CK 0018**  
**In the Calcutta High Court**  
**Case No : F.A. No. 308 of 2008**

Smt. Shampa Mukherjee

APPELLANT

Vs

Sri Pranab Mukherjee

RESPONDENT

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**Date of Decision :** 03-08-2009

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 161  
Hindu Marriage Act, 1955 — Section 10, 12  
Penal Code, 1860 (IPC) — Section 498A

**Citation :** (2009) 08 CAL CK 0018

**Hon'ble Judges :** Prasenjit Mandal, J; Bhaskar Bhattacharya, J

**Bench :** Division Bench

**Advocate :** Probal Mukherjee, Shreya Seal and Paramita Pal, for the Appellant; Swapan Kumar Mallick and Manish Pal, for the Respondent

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## **Judgement**

Prasenjit Mandal, J.—This first appeal is directed against the judgment and decree dated 30.09.2005 passed by the learned Additional District Judge, Sixth Court, District - South 24 Parganas at Alipore in Matrimonial Suit No. 47 of 1996 whereby the learned Additional District Judge decreed the suit against the wife/appellant.

2. The respondent filed the suit for annulling the marriage by a decree of nullity u/s 12 of the Hindu Marriage Act, 1955 alternatively for judicial separation u/s 10 of the said Act. The husband/respondent and the wife/appellant were married according to the Hindu rites and ceremonies on 3rd June, 1996 after negotiation. Thereafter, they lived together. On the night of Phoolsajya, that is, on 05.06.1996 the husband/respondent discovered that the wife/appellant did not possess breasts like those of a female person and she had a black spot line on her back. On noticing such deformities, he informed his mother of the fact next morning. The marriage was not consummated. The parents of the wife/appellant suppressed such deformities. The appellant is a primary school teacher and she compelled the respondent to take her to Puri immediately after the marriage. The respondent had no relation with his elder brother though they reside in the

same house. But the appellant mixed with the family of his elder brother and she became a witness against the husband and his sister in a criminal case u/s 498A of the Indian Penal Code. She treated the respondent with cruelty for which it was impossible for the respondent to live with her. So the respondent filed the suit for the reliefs already stated.

3. The appellant contested the suit by filing a written statement denying all the material allegations. She contended that marriage was duly held after negotiation and then it was registered. Immediately after the marriage, the husband arranged for honeymoon at Puri and they stayed at Sonali Hotel in Puri and visited local sights. The respondent is a practising advocate of the High Court, Calcutta and he himself along with other members of his family went to see the wife and after seeing her from a close range, the marriage was settled. Thereafter, the marriage was consummated. The averment of the plaint relating to deformity is not true. Nothing was suppressed. The appellant was examined by medical experts and it was found that the allegation of the respondent with regard to deformities was false. She did not do any act of cruelty at all. So the allegation of fraud and cruelty as stated by the respondent is false. The suit should, therefore, be dismissed.

4. Upon taking evidence on behalf of both the sides, the learned Additional District Judge decreed the suit granting the relief for judicial separation against the appellant from the date of decree. Being aggrieved, the appellant has filed this first appeal.

5. Upon consideration of the submission of the learned Advocate of both the sides and on perusal of the materials-on-record, we find that admittedly, the marriage between the appellant and the respondent was solemnised according to Hindu customary rites on 03.06.1996 and that the ceremony of phoolsajya was held on 05.06.1996 as per customary rites in the house of the respondent. Admittedly, Astamanglya was held and immediately thereafter the parties went to Puri for honeymoon and they stayed at Sonali Hotel in Puri. Admittedly, the appellant is a primary school teacher and she has been residing in the house of her husband. Admittedly, the husband is an advocate of this Hon"ble Court and from the evidence on record, we find that the husband and other members of their family are in the habit of lodging several cases, G.D. entries, etc. over the family matters. Admittedly, the husband was married previously and that marriage was dissolved by a decree for dissolution of marriage. Admittedly, thereafter, the respondent married the appellant for the second time. The respondent sought for reliefs in the alternative form as stated earlier on the ground of fraud and cruelty. The learned Trial Judge did not grant any relief that the marriage is a nullity; but he passed the decree for judicial separation on the ground of cruelty.

6. Mr. Mukherjee, learned Advocate for the appellant, submitted that the learned Trial Judge granted the decree of judicial separation on the ground that the appellant suffers from physical deformities and such fact was concealed and that

she became a witness to the criminal case u/s 498A of the I.P.C. against her husband and his elder sister. Such grounds are not tenable at all because the marriage was held after negotiation. Police, after investigation, submitted chargesheet citing the appellant as a witness in a criminal case lodged by the wife of the elder brother of the respondent. So these grounds are not tenable.

7. On the other hand, Mr. Mallick, learned Advocate for the respondent, supported the judgment stating that the decree had been passed properly.

8. Therefore, on hearing the submission of the learned Advocate of both the sides and on perusal of the materials on record, the only point to be decided in this appeal is whether the learned Trial Judge was justified in recording the decree of judicial separation on the ground of cruelty.

9. From the evidence on record, we find that several allegations were levelled against the appellant by the husband even on trifling matters. It was contended that the appellant returned home at 10/10.30 p.m. and on reaching home she rang the bell with high sound and thereafter she closed her door with a bang. Admittedly, the appellant is a teacher of a school situated nearby her parent's house. The appellant lives in her matrimonial house certainly, of course, with the hope of having cordial relationship on one day, by lapse of time. Till that day does not come, she may pass sometime in the house of her parents after school hours. Such contentions do not constitute at all any defect or fault on the part of the appellant so as to treat the same as cruelty against the respondent. The main contention of the respondent is that he discovered that his wife possesses breasts like those of a male person and that there were black spots on her back. Actually, the husband wants to say the wife suffers from deformities in her body and the same were suppressed. Such facts amount to cruelty. From the following facts and circumstances, the contention of the respondent in this regard cannot be accepted:

1. First of all, the respondent contended that at the time of negotiation of marriage he and his mother went to see the wife and at that time they saw the appellant at a distance of 50 feet away in a room. The appellant wore a saree covering her body and so they could not detect the deformities. It is difficult to believe that the length of a room of a common family would be more than 50 feet in Kolkata. Moreover, during her deposition, the mother of the respondent stated that they saw the appellant from a distance of 7/8 feet in a room at her father's house. This statement of the mother of the respondent appears to us to be reasonable and convincing. It was not the only occasion of seeing the bride before her marriage. As per evidence on record, the elder brother and his wife also went to see the appellant for negotiation. Above all, no decree of nullity of marriage or divorce can be passed on the ground of deformities of the appellant.

2. The husband stated that the marriage was not consummated; but this is, we find, contrary to the evidence on record. On the Phoolsajya day they lived together in one room of the house of the husband. On the day of Astamanglya

they also lived in one room in the house of the father of the wife.

3. The husband stated that on the auspicious ceremony of Phoolsajya he discovered the deformities of the wife, that is, on 05.06.1996 and he told such fact to his mother but he did not feel any necessity to state such fact to any member of the house of the father of the appellant.

4. On 06.06.1996 the parties to the matrimonial proceedings filed an application for registration of their marriage and such marriage was registered on 02.07.1996. Had the respondent treated the so-called suppression as cruelty, he could not have applied for the certificate of registration of marriage (exhibit-C) within one month from the date of the social marriage.

5. Immediately after the ceremony of Astamanglya the husband and wife went to visit Puri on honeymoon and they travelled for sight seeing to different places. The husband contended that his wife compelled to take her to Puri. This statement of the husband is not believable for the reasons that the marriage was held after negotiation and the wife came to the house of the husband just for 7/8 days at that time. Again from the evidence of the mother of the husband, we find that his mother admitted that his son (respondent) went to Puri after taking permission from her. She also stated that it was a fact that her son had gone to Puri willingly with his wife. So this contention of the husband cannot be believed.

6. At Puri they took some photographs and out of them the wife has produced 2 photographs marked exhibit - A series. On perusal of the photographs, it appears to us that the photographs exhibit mutual love, respect and attraction to each other at the place of honeymoon immediately after marriage. The only inference that can be drawn is that the contention of cruelty cannot be believed.

10. The husband has also contended that the wife is in the habit of leaving their house at her sweet-will and she returns home whenever she likes. As the appellant is a teacher of a primary school situated nearby the house of her parents, she may spend some time at the house of her father after school hours. So the contention of the husband in this regard cannot be accepted. As regards cruelty on the allegation that the appellant became a witness against her husband and his sister in a criminal case u/s 498A of the I.P.C., we find from the evidence on record that the members of the family of the respondent are in the habit of lodging cases, G.D. entries, etc. The wife of the elder brother of the respondent filed the said criminal case before police. After investigation, police submitted chargesheet against the respondent and his sister. The appellant might be interrogated in the process of investigation and on the basis of the result of investigation police submitted chargesheet against the respondent and his sister in the said criminal proceedings. The statement made by the appellant before the police authority is not before us. So without any other material particularly any statement u/s 161 of the Cr. P. C., 1973 in support of the criminal case u/s 498A of the I.P.C. against the respondent and his sister, it cannot be said that the appellant intended to send her husband to jail. Under the above facts and

circumstances, the contention that police after investigation made the appellant as a witness in a criminal case, her action tantamounts to cruelty against her husband, cannot be accepted.

11. During argument the learned Advocate for the respondent submitted that the marriage between the parties had been broken irretrievably and so there is no use of keeping the marriage tie to continue and there should be an end of the situation. In support of his contention, he relied upon the decisions in the case of Durga Prasanna Tripathy Vs. Arundhati Tripathy, ; Naveen Kohli Vs. Neelu Kohli, ; Samar Ghosh Vs. Jaya Ghosh, G.V.N. Kameswara Rao Vs. G. Jabilli, ; J. Jayachandra v. Aneel Kaur reported in 2005(3) ICC 291 and Subhash Chandra Das Chowdhury v. Sandhya Das Chowdhury reported in (2008) 3 WBLR (Cal) 815.

12. Cruelty has not been defined in the Hindu Marriage Act. There cannot be any straight-jacket formula with regard to cruelty. Nor is there any boundary limit of the activities which could be treated as cruelty. We are to consider the fact of cruelty in each and every case independently and then to conclude whether the facts and circumstances as appeared in the particular case amount to cruelty.

13. So far as the decision Durga Prasanna Tripathy (supra) is concerned, we find that the wife stayed in the house of her father. Even she did not attend the marriage ceremony on request. She declined to come to the house of her-in-laws and even she misbehaved and insulted her mother-in-law. In that case the Hon''ble Apex Court held that there was no chance of re conciliation and so the decree of divorce was granted. But this is not the situation in the present appeal.

14. So far as the case of Naveen Kohli (supra) is concerned, the wife stayed for a long period in the house of her father and thus both the parties lived separately for more than 10 years. So the Hon''ble Apex Court held that the marriage had been wrecked beyond the hope of salvage. There was no acceptable way in which a spouse could be compelled to resume life with the consort. So the Hon''ble Apex Court observed that no useful purpose would be served to keep the marriage tie live.

15. In the case of Samar Ghosh (supra) the Hon''ble Apex Court observed that the actions of the wife amounted to cruelty. The husband suffered mental cruelty when the wife took unilateral decision as to child bearing so that the future prospect of her promotion might not be hampered. In that case, the wife even adopted indifferent attitude towards her husband during his illness (heart problem) and even she refused to cook for the husband. Such acts amounted to cruelty. The fact of the present case is quite distinguishable from that of Samar Ghosh. 16. In G.V.N. Kameswara Rao's case (supra), both the parties were highly qualified and the husband resided in U.S.A. and the wife though stayed sometime in U.S.A. returned to India with her daughter after its birth. The wife filed the criminal complaint of assault against the husband and his mother. When the husband came to India to persuade through her sister, the wife did not behave well towards her. Thus, the husband suffered severe humiliation. The

Hon''ble Apex Court observed that such conduct of the wife amounted to mental cruelty and so the marriage between the two had broken irretrievably. The Apex Court granted the decree of divorce on cruelty. But the present case is quite distinguishable from the said decision.

17. In J. Jayachandra's case (supra), the wife gave priority to her profession over her husband's freedom. Both the parties were doctors working the same hospital. The wife suspected the character and fidelity of her husband over certain facts. They belong to different religion and province. The wife suspected that her husband mixed with other ladies. Thus, we find that the wife suspected the character and fidelity of her husband. So the decision reported therein is quite distinguishable from the one under appeal.

18. In the case of Subhash Chandra Das Chowdhury (supra) the wife pressurised her husband to remain as domestic son-in-law. Ultimately the wife lodged criminal case u/s 498A of the I.P.C. against the husband and other members of his family. The wife entered into the house of her husband forcefully during pendency of the divorce proceeding. Thus, the Hon''ble Court observed that such facts amounted to cruelty and granted the decree of divorce. This is also quite distinguishable from the present one.

19. So upon consideration of the entire facts and circumstances on the matter, we are of the view that the conduct of the appellant cannot be said to be unjustified at all. Such conduct, i.e., the so-called allegation as made against the appellant, as discussed above, does not amount to any cause for mental or bodily cruelty or danger to life at all. So, we are of the view that the respondent has failed to prove cruelty on the part of the appellant. Still now, the appellant has been residing in the house of the respondent with a hope to re-unite, if possible. She is taking her meals in the joint mess. Therefore, the learned Trial Judge was not justified in granting the decree for judicial separation. So the judgment and decree passed by the learned Trial Judge cannot be supported. The appeal succeeds. It is, therefore, allowed.

20. The judgment and decree dated 30.09.2005 is hereby set aside. The suit stands dismissed on contest without costs.

21. Considering the circumstances, there will be no order as to costs.

22. Urgent xerox certified copy of this order, if applied for, be made available to the learned Advocate for the parties on their usual undertakings.

Bhaskar Bhattacharya, J.

23. I agree.