
(2018) 07 GAU CK 0064
In the Gauhati High Court
Case No : Mat.App. 58 Of 2017

Sri Ganesh Ch. Saikia

APPELLANT

Vs

Smti Gita Saikia

RESPONDENT

Date of Decision : 19-07-2018

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1)(ia)
Family Court Act, 1984 — Section 7(1)
Indian Penal Code, 1860 — Section 497

Citation : (2018) 07 GAU CK 0064

Hon'ble Judges : AJIT SINGH, CJ;ACHINTYA MALLA BUJOR BARUA, J

Bench : Division Bench

Advocate : K Deka

Final Decision : Dismissed

Judgement

AM Bujur Barua, J

1. Heard Mrs. K Deka, learned counsel for the appellant. None appears for the respondent.

2. The appellant, Sri Ganesh Chandra Saikia and the respondent Smti Gita Saikia weremarried on 27.04.2001 as per the Hindu rites and customs and in course of the marriage they had one daughter Ms. Dhriti Sikha, who was born on 07.03.2002 and one son, Master Nilav Saikia, who was born on 09.07.2006.

3. According to the appellant, the respondent refused to have any physical relationship with him and also did not have any regards toward him and her in-laws. Further she preferred to remain outside the house for most of the time and even refused to perform the house hold duties as a wife.

According to the appellant, the respondent used to roam around with some

unknown persons and often found at the market place or in the road and that the respondent entered the room of her brother-in-law and had developed an illicit relationship and inspite of the appellant trying to correct the respondent, she had not responded in the required manner. Allegations were made that the respondent used to leave her matrimonial home at her own sweet will and the appellant in order to maintain a family cordiality and also for the welfare of the daughters, shifted to a new house, with the expectation that the respondent would leave a peaceful married life in the new environment. A specific allegation was also raised that in the last week of May, 2007, when the appellant had returned home from school duties, he found the respondent in a compromising position in his house with one Arun Nath and that person after seeing the appellant had fled away from the house. As a consequence, the appellant had asked the respondent not to indulge in such illicit activities and to maintain a peaceful married life as a wife and a mother. But after the said incident, the respondent had left the house of the appellant along with the children and on 23.12.2007, when the appellant went to her house to bring her back, she had misbehaved with him. Later on, at the intervention of the village Panchayat and the Mahila Samiti, the respondent along with the children returned back and they lived together. In the meantime, the respondent filed a maintenance case against the appellant and he was directed to pay an amount of Rs.1500/- per month, and the appellant had filed a divorce suit and a guardianship suit against the respondent.

4. During the pendency of the suits, the appellant arrived at a settlement with the respondent and from 08.01.2010, both of them started living together as husband and wife along with their children in a rented house at Changsari. But after one month of living together, the respondent again started having an illicit relation with a person. On 10.06.2012, when the appellant had raised an objection, the respondent abused him in filthy language and on 11.06.2012, she had left her matrimonial home along with the children.

5. On the aforesaid set of allegations, the appellant preferred a petition under Section 13(1) (ia) of the Hindu Marriage Act, 1955, read with Section 7(1) of the Family Court Act, 1984. The said suit was numbered as FC(Civil) Case No.365/2009 in the Court of the Principal Judge, Family Court at Guwahati.

6. In his plaint before the Family Court, the appellant had reiterated as to what is indicated hereinabove, and, in response thereof, the respondent took

the stand that the appellant used to torture her by raising a false allegation that she is having illicit relationship with her brother-in-law and one Arun

Nath and that she had the habit of roaming around with other people.

7. In the proceeding, the appellant examined himself as PW-1, he had deposed that from 08.01.2010, he arrived at a settlement with his wife and had

started living together in a rented house along with the children. But after about one month thereof, when the appellant and the children are out for

school, the respondent started having illicit relationship with other persons in his house. When questioned, the respondent abused him and on

11.06.2012, she along with certain other persons had inflicted both mental and physical torture upon him. The respondent also forcibly took his ATM

card and left the house along with the children by taking away all the gold ornaments and had withdrawn Rs.20,000 from the Bank account of the

appellant.

8. The sister of the appellant, Smti Hiranya Prabha Baruah, examined herself as PW-2 and had stated that the respondent did not respect their ailing

mother and other family members. The said witness also deposed that her elder brother who was serving in the Assam Rifles used to visit the paternal

house when he was on leave and the said witness had seen the respondent entering the room of her brother and staying there for more than an hour

on different occasions. When the respondent was asked not to enter the room of her brother, she had abused her in filthy language.

^ ^ ^ ^ In cross examination, the PW-2 had stated that she does not know as to why the respondent had entered her brother-in-law's room.

9. Sri Kuladhar Nath, who is the brother-in-law of the appellant in his deposition as PW-3 stated that the respondent used to leave her matrimonial

house without any reason and that the respondent had maintained illicit relation with one Khagen Nath.

^ ^ ^ ^ But in cross examination, he said that the appellant had told him that the respondent had relation with one Khagen Nath, but he on his own

did not have any knowledge regarding the same.

10. PW-4 and PW-5 who claim to be knowing the appellant, in their deposition stated that the attitude of the respondent was not proper and she left the

house of the appellant in the year 2012 and is presently staying at her paternal house.

Â Â Â Â In cross examination, PW-5 had stated that he had not seen the respondent roaming with any other person.

11. The respondent while examining herself as DW-1 had deposed that the appellant used to torture her and had thrown her out of the house by threatening that if she re-enters, she will be inflicted injuries with a dao and because of such incident, she had to take shelter in the house of the neighbour namely, Rajani Kanta Nath, who in-turn had informed her parents about the incidents. Thereafter, her parents came over and took her away.

12. The learned Family Court by its Judgment and Order dated 31.03.2017 had proceeded in the matter on the premises that the appellant had taken the ground of cruelty alleging adultery for seeking divorce. Accordingly, by the said Judgment, the learned Family Court arrived at a conclusion that the appellant had failed to adduce any oral or documentary evidence to sustain the allegation of the respondent having illicit relationship with other persons. According to the learned Family Court as the appellant had raised the issue of the respondent inflicting cruelty by means of committing adultery, and had failed to prove that the respondent is indulging in any illicit relation with other person, therefore, the ground of cruelty could not be established by the appellant.

13. Being aggrieved by the Judgment and Order dated 31.03.2017, the present appeal has been preferred mainly on the ground that the learned Family Court had proceeded on a wrong premises that the appellant is seeking a dissolution of marriage on the ground of adultery. According to the appellant, the ground of seeking dissolution of marriage was of cruelty and desertion, but the learned Court had incorrectly considered the said suit on the ground of adultery. Another ground of the appellant is that the evidence of DW-3 being the mother of the respondent was expunged, inasmuch as, she was not subjected to a cross examination, but the learned Court had taken into consideration the evidence of DW-3 and, therefore, the Judgment stood vitiated.

14. As regards the first ground of the appellant that the learned Family Court proceeded on a wrong premises that although the ground of seeking a

dissolution of marriage was cruelty and desertion, but the learned Court had proceeded as if the dissolution were sought on the ground of adultery. It is

taken note of that such stand on the part of the appellant is not tenable on the face of the Judgment itself, inasmuch as, the premises upon which the

learned Family Court had proceeded was:

“The petitioner had taken the ground of cruelty through the ground of adultery as a weapon for divorce to which the respondent

denied.”

15. From the said premises upon which the learned Family Court had proceeded, it is taken note of that the learned Court had proceeded on the

question as to whether cruelty was meted out by the respondent by committing adultery and not that the learned Court had proceeded on the premises

that the respondent had lived in adultery.

16. Be that as it may, as per Section 497 of the Indian Penal Code, adultery is committed by a man if he enters into sexual act with the wife of another

person, knowing it to be so, and without his consent. Therefore, under the said definition, adultery can be committed only by a man and not by a

woman. In the instant case all that can be said is that if the allegation of the appellant is to be accepted, the respondent had an illicit relation with some

other man, such act during the subsistence of her marriage can be construed to be an act of cruelty upon the husband. Therefore, from the said point

of view, it cannot be said that the learned Family Court was wholly incorrect in examining the question of cruelty being meted out by the respondent to

the appellant by having an illicit relationship with another man.

17. On a perusal of the evidence led by the appellant, it is taken note of that the appellant in the plaint had stated that the respondent often entered the

room of her brother-in-law and remained there for long hours. It is also stated that in the last week of May 2007, when the appellant returned home

early, he found the respondent in a compromising position with one Arun Nath in his house. In his deposition, the appellant as PW-1 had stated that the

respondent often entered the room of her brother-in-law and remained there for long hours and that in the last week of May 2007, while he returned

home early he found the respondent in a compromising position with one Arun Nath in his house. In his evidence, the appellant had stated of a further

incident on 16.08.2008 that he had witnessed a big hole in the wall of the

kitchen and seen one Khagen Nath loitering around.

^ ^ ^ ^ In his cross-examination, the PW-1 had stated that Arun Nath does not come to his house when he is present but he used to visit the house, in his absence.

18. Although the PW-1 had stated in his deposition that the respondent after returning back developed another illicit relation with one Khagen Nath and that he had seen Khagen Nath in his bedroom along with the respondent in a very bad position, but no such plea was taken in the plaint.

19. PW-2 being the sister of the appellant in her deposition also stated that she had seen the respondent entering the room of her brother and staying there for more than hours on several occasions.

20. The respondent in her deposition as DW-1 stated that after marriage, the appellant required her to bring money from her parents and when she could not provide the money she was driven out of her house along with her children. DW-1 also stated that the appellant had raised false allegations against her and used to quarrel with her on the basis of such false allegations. But in spite of the same, the respondent used to return back to the house of the appellant thinking of the welfare of the children.

^ ^ ^ ^ As the appellant was not maintaining his family, the respondent was compelled to file applications for maintenance and as a result of which, she is receiving Rs.2000/- per month.

^ ^ ^ ^ In her cross examination, the respondent had denied that she used to enter the room of her brother-in-law.

21. From the reading of the evidence, it is noticed that although the appellant as PW-1 had stated that the respondent frequently entered the room of her brother-in-law, she was found in a compromising position with one Arun Nath on a given date and that she was also found in a compromising position with one Khagen Nath, but such evidence had not been supported by any other witness on behalf of the appellant, although they had corroborated, the PW-1 in all other aspect. Further the appellant had not stated in the plaint that the respondent was found in a compromising position with one Khagen Nath. But when the said evidence of the appellant as PW-1 is weighed with the stand of the respondent in her written statement as well as her deposition as DW-1, it is taken note of that the respondent had stated that the appellant used to quarrel with her by raising false allegations

on her character and that he used to demand money from her and when the money was not brought, he used to torture her physically and mentally and had also driven her out of the house.

Â Â Â Â In cross examination, on a suggestion made by the appellant, the respondent had denied that she visited the room of her brother-in-law frequently.

22. In such view of the matter, the appellant had failed to prove that the respondent had an illicit relation with other person. As the ground of cruelty taken by the appellant is examined from the point of view as to whether the respondent had any illicit relationship with other man, the absence of any credible evidence to that effect leads the Court to conclude that the ground of cruelty is unacceptable.

23. The other ground of the appellant that the respondent frequently stayed away from him also cannot be the basis of a cruelty, inasmuch as, sufficient evidence is available that because of torture meted out by the appellant, the respondent at times was compelled to go out and stay in her parental house. Evidence is also available that the appellant by his conduct had driven out the respondent and the children from his house.

24. A further ground taken by the appellant that the expunged evidence of the DW-3 was also taken into consideration, we find that in the Judgment of the learned Family Court, no conclusion has been arrived at against the appellant on the basis of the evidence of DW-3, other than a statement that the fact of torture by the appellant had been corroborated by DW-2 and 3. Even if the evidence of DW-3 is taken out, we do not find any substantial change in the reasoning of the learned Family Court, and, therefore, it cannot be said that its Judgment is vitiated as the expunged evidence of DW-3 was taken into consideration.

25. In view of the said conclusion, we find no infirmity in the Judgment and Order dated 31.03.2017 passed by the learned Family Court in FC(Civil) Case No.365/2009. Accordingly, the appeal stands dismissed.