

(2004) 08 OHC CK 0035

In the Orissa High Court

Case No : Civil Appeal No's. 22 and 23 of 2001

Usharani Lenka

APPELLANT

Vs

Panigrahi Subash Chandra Dash ' Sahoo
 Panigrahi
Subash Chandra Dash ' Sahoo Vs Usharani Lenka

RESPONDENT

Date of Decision : 19-08-2004

Acts Referred:

Family Courts Act, 1984 — Section 7

Hindu Marriage Act, 1955 — Section 12, 13, 13(1)

Citation : (2004) 08 OHC CK 0035

Hon'ble Judges : A.K. Patnaik, J;A.K. Parichha, J

Bench : Division Bench

Advocate : S.K. Nayak, P.K. Paikray, B.K. Rout, M.K. Jena, P. Mishra, M.K. Pati, P.R. Routray, in Civil Appeal No. 22 of 2001, S.S. Das, P.K. Nayak and K.C. Khuntia, in Civil Appeal No. 23 of 2001, for the Appellant; Soubhagya Katan Nayak, Digambar Sha in Civil Appeal No. 22 of 2001, S.K. Nayak, P.K. Paikray, B.K. Rout, M.K. Jena, P. Mishra, M.K. Pati and P.R. Routray, in Civil Appeal No. 23 of 2001, for the Respondent

Judgement

A.K. Parichha, J.—Both the appeals are directed against the order of the learned Judge, Family Court, Cuttack in Civil Proceeding No. 182 of 1997, wherein the learned Judge, Family Court has granted divorce by dissolving the marriage between the parties subject to payment of permanent alimony of Rs. 40,000/- by the husband to the wife.

2. Panigrahi Subash Ch. Dash " Sahoo, (hereinafter called as "the husband") filed Civil Proceeding No. 182 of 1997 under Sections 12 and 13 of the Hindu Marriage Act read with Section 7 of the Family Courts Act for declaration that the marriage between him and Usharani Lenka (hereinafter to be called as "the wife") is null and void and also for a decree of divorce dissolving their marriage. The case of the husband as set out in the civil proceeding is that his marriage with Usharani Lenka was solemnized on 22.5.1997 according to Hindu Rites and Customs. But the marriage never consummated as the wife refused to have sexual relationship

with him on the 4th night of their marriage and also on subsequent nights. Suspecting that the wife had recently undergone an abortion or has some permanent gynaecological problem, he insisted for medical examination, but the wife refused to do so and left the matrimonial home only few days after the marriage. Since then she has been living with her parents and has avoided the company of the husband. All attempts to bring her back having failed, the husband was constrained to file the civil proceeding for dissolution of the marriage and a decree for divorce.

3. The wife in the written, statement while denying all the allegations of the husband, pleaded, inter alia, that the husband and his family members demanded cash dowry of Rs. 1 lakh and when that demand was not met by her parents, they ill treated her and threatened to kill her and so in order to save her own life, she had to leave the matrimonial home and take shelter in the house of her parents. She claimed that the husband filed the Civil Proceeding for dissolution of marriage on false grounds in order to protect himself as well as his family members from the criminal prosecution for dowry demand and torture.

4. Considering the pleadings of the parties, the learned Judge, Family Court framed as many as four issues, received evidence from the parties and on consideration of the evidence and submission of the respective parties, passed a decree of divorce subject to payment of permanent alimony of Rs. 40,000/- to the wife within two months from the date of the order. Aggrieved, the wife has preferred Civil Appeal No. 22 of 2001 challenging the decree of divorce and the quantum of permanent alimony. The husband has also filed Civil Appeal No. 23 of 2001 challenging the award of permanent alimony as a condition precedent for decree of divorce. Since both the appeals arise out of the same order and involve identical questions of fact and law, they are heard together and disposed of by this common order.

5. The husband has taken the ground of adultery and cruelty on the part of the wife. The wife, on the other hand, has taken the ground of ill treatment and dowry demand on the part of the husband and his family members. Section 12 of the Hindu Marriage Act (hereinafter referred to as "the Act") contemplates the grounds of voidable marriage. Sub-section (1) (a) of Section 12 of the Act says that any marriage solemnized, whether before or after the commencement of the Act, shall be voidable and may be annulled by a decree of nullity if that marriage has not been consummated owing to the impotence of the wife. Sub-section (1) (d) of Section 12 of the Act stipulates that the marriage would be voidable and can be annulled by a decree of nullity if the Respondent wife was at the time of marriage present by some person other than the husband. In the present case, the husband has alleged that the wife was probably pregnant by some other person and she terminated that pregnancy just before the marriage. He also alleged that the wife had permanent gynecological problem for which she refused to have sexual relationship with him, as a result, the marriage was never consummated. Although he made all these allegations, he could not produce any

evidence except his own statement. In his statement before the learned Judge, Family Court he stated that on the 4th night when he approached the wife for sexual intercourse, she bluntly refused and on subsequent nights also all his attempts to consummate the marriage failed because the wife refused to have sexual intercourse with him. He also stated that he noticed some bleeding from the private part of his wife and suspecting recent abortion, he insisted for medical examination, but the wife refused to undergo any medical examination. The wife (O.P.W.1) in her statement, denied the above noted allegations and claimed that she has no gynaecological problem and she had not undergone any abortion before her marriage with the husband. According to her she is sexually fit and she never refused the company of the husband, but a false story has been created by the husband to cover up their act of ill treatment and demand of dowry. She specifically alleged in her statement that soon after the marriage, the husband and his family members demanded cash dowry of Rs. 1 lakh and when that demand was not fulfilled, they ill-treated her and even threatened to kill her and to save her own life, she had to leave the matrimonial home and stay with her parent. There is absolutely no evidence on record to indicate that the wife was pregnant by some other person before her marriage with the husband or that she had undergone any kind of abortion before the marriage. There is also no specific evidence that the wife had any gynaecological problem rendering her unfit for sexual intercourse. On the contrary during the course of trial of civil proceeding, the learned Judge, Family Court, Cuttack sent her to S.C.B. Medical College for examination by a Gynaecology Specialist and the said Specialist after examination reported that the wife is of suffering from any gynecology problem and that she is sexually healthy. In such situation, the bald statement of the husband cannot be accepted to inter sexual impotency of the wife or her pregnancy by some person other than the husband. Such inference is supported by the High Court of Madhya Pradesh in (1992) 1 D.M.C., 27 (M.P.) Harprasad Sanore v. Anita Santore. In that case the husband claimed annulment of the marriage on the ground that the wife's vagina was not well-developed and she was not fit for sexual intercourse. The High Court held that bare statement of the husband does not satisfy the requirements of the provisions of Section 12(1)(a) of the Act and refused to grant decree of nullity of marriage. In the present case, there is only the bald statement of the husband and such statement can never be taken to be sufficient to satisfy the requirements of Section 12(1)(a) and (d) of the Act.

6. The next allegation of the husband is cruelty of the wife. According to him the wife not only refused sexual intercourse with him, but also deserted him soon after the marriage. He further alleged that the wife and his family members filed number of criminal cases against him alleging ill-treatment, dowry demand, etc. causing him intense mental pain and psychological agony. It is the admitted case of the parties that the wife left the matrimonial home a few days after the marriage and thereafter has never returned to the company of her husband for the last seven years. It is also not disputed that the wife and her family members

filed criminal cases against the husband alleging ill-treatment and dowry demand and that those cases ended in acquittal. Now, the question that arises is whether the aforesaid conduct of the wife would amount to cruelty.

7. In the case of *V. Bhagat Vs. Mrs. D. Bhagat*, , the husband, a practising advocate of the SC and High Court, had filed divorce petition against his wife on the ground of adultery. The wife who was working as the Vice-President of a Public Sector Corporation in her written statement and the question put by her counsel to the Petitioner in cross-examination had made allegation that the Petitioner was a mental patient requiring expert psychological treatment. She had also branded all the members of his family including his grand father as lunatics. The said allegations were not made in a fit of anger or under emotional stress. They were made in a formal pleading filed in the Court and questions to that effect were put by her counsel, at her instructions, in the cross-examination. Taking note of the facts and circumstances of the case and the social standing of the parties, the apex Court held that making such allegations in the pleadings and putting such questions to the husband in cross-examination amounted to cruelty, as such allegations and questions are bound to cause the husband to intense mental pain and anguish besides affecting his career and professional prospects.

8. In the case of *G.V.N. Kameswara Rao Vs. G. Jabilli*, , the Petitioner, who was a double Doctorate-holder working in USA, married a Post Graduate degree holder. Their marital life ran into rough weather from the very beginning of their stay in the United States. Few years later, the wife returned to India with their only daughter. The husband then filed a suit for divorce on the ground of cruelty of the wife alleging that when he along with his relatives had been to the house of the wife's sister to persuade the wife to join his society, the wife prevented the entry of the husband in the house and that she also filed criminal complaint of assault against the husband and her mother. The SC held that the act of the wife amounted to cruelty. It was specifically observed that the way in which the husband was treated by the Respondent when he visited her sister's house and subsequent filing of criminal complaint must have caused mental agony and loss of reputation of the husband.

9. In *Praveen Mehta Vs. Inderjit Mehta*, , right from the day one after marriage, the wife was not prepared to co-operate with her husband in having sexual intercourse. When the husband offered to have the wife treated medically she refused. The wife misbehaved with the husband and his friends, relations and left the matrimonial home and also filed criminal cases against the husband. When all attempts by the husband to persuade the wife to come back to his company and undergo medical treatment proved futile, the husband filed a petition for divorce on the ground of cruelty. Their Lordships of the SC held that the wife's refusal to have sexual intercourse with the husband, desertion for years, filing of criminal cases, etc. were sufficient to cause extreme mental agony to the husband and such act of the wife amounted to mental cruelty.

10. Cruelty for the purpose of Section 13(1)(i-a) of the Act is to be taken as a behaviour by one spouse towards the other which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one spouse due to the behaviour or behavioural pattern by the other. Unlike physical cruelty, mental cruelty is difficult to be established by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. The inference has to be drawn from the attending facts and circumstances taken cumulatively and the Court has to come to a conclusion whether the acts committed by counter Petitioner amount to cruelty, and it is to be assessed having regard to the status of the parties in social life, their customs, traditions and other similar circumstances. It is also necessary to consider whether the conduct of the counter-petitioner is such that it has become intolerable for the Petitioner to suffer any longer and to live together is impossible. In the present case, the wife refused to have sexual intercourse with the husband right from the day one after marriage and she also left the matrimonial home after a very short period and thereafter she lived away from the husband for long 7 years. In the meantime, she also filed criminal cases against the husband and the husband had to defend those cases for a considerable time. All these factors must have been a traumatic experience and very humiliating in the social circle for the husband. The act and conduct of the wife therefore, clearly amounted to mental cruelty as contemplated u/s 13(1) (i) of the Hindu marriage Act. Section 13(1) (1-a) says that a decree of divorce can be granted if after solemnization of the marriage, the Petitioner was treated with cruelty by his or her spouse. The husband, in the instant case was therefore, entitled to a decree of divorce on the ground of cruelty of his wife.

11. It is worthwhile to mention here that during pendency of the present civil appeals, the husband and wife along with their respective counsel were called by this Court and all efforts were made to bring about reconciliation between them. But it became evident from the response of the parties that there is no scope for any reconciliation. When the feelings of the parties have become so bitter towards each other and when the mental distance has become so long, it will be meaningless now to continue with the marriage specifically for the reason that none of the spouse would be happy with the continuance of the marriage.

12. Considering all the above noted factors cumulatively, we are of the view that grant of a decree of divorce will be in the best interest of the parties. But before doing so we are inclined to give serious consideration towards the plea of the wife about the inadequacy of permanent alimony granted by the learned Judge, Family Court, Cuttack. It is apparent from the record and also from the discussions during reconciliation that the wife has no income of her own and that she is totally depending on her parents. If the marriage between her and her husband is brought to an end by a decree, she must be provided with adequate alimony so that she can meet her bare needs and live a dignified life. The husband has taken a plea that the wife is not entitled to any maintenance or

alimony as she is an erring wife. This plea does not appear legally convincing to us for the simple reason that the marriage between the parties is admitted and the indigenous status of the wife is established. The conduct of the husband in the civil proceeding has also to be taken note of. He made allegations of adultery and impotency against the wife, which were found to be baseless. For all these reasons, we are of the considered view that the husband has to pay sufficient alimony. As to the quantum of alimony, while the wife claims that Rs. 40,000/- as granted by the Family Court, is highly inadequate, the husband claims that even paying Rs 40,000/- as alimony is not within his capacity. It is an admitted fact that the husband is working as a Lecturer in a private college according to him he only gets Rs. 1500/- per month. The wife, on the other hand, alleges that he gets Rs. 7,000/- per month. Whatever may be the exact income of the husband, the fact remains that he is Lecturer in a college and has a social standing. The wife is also from a reasonably respected family. Considering their social status and some of the surrounding factors, which came to light during reconciliation proceeding, we feel that permanent alimony of Rs. 40,000/- as awarded by the learned Judge, Family Court, Cuttack is highly inadequate. In our opinion, permanent alimony of Rs. 1 lakh to the wife will be just, adequate and reasonable.

13. In the result, therefore, we confirm the decree of divorce granted by the learned Judge, Family Court, Cuttack annulling the marriage between the parties but enhance the quantum of permanent alimony from Rs. 40,000/- to Rs. 1 lakh. An amount of Rs. 25,000/- has been deposited by the husband towards the permanent alimony as per the direction of the learned Judge, Family Court, Cuttack. The said amount will be adjusted against the permanent alimony, which is now granted by us. The balance amount of Rs. 75,000/- shall be paid by the husband to the wife in three equal quarterly installments starting from October, 2004.

14. With the aforesaid observations and directions, the Civil Appeals are disposed of No. costs.