

(2022) 11 GAU CK 0038

Gauhati High Court

Case No: Mat. Appeal No. 21 Of 2019

Sudipta Nath

APPELLANT

Vs

Mrinalini Sarkar

RESPONDENT

Date of Decision: Nov. 25, 2022

Acts Referred:

- Family Courts Act, 1984 - Section 19
- Hindu Marriage Act, 1955 - Section 13(1)(ia), 28(1)

Hon'ble Judges: R.M. Chhaya, CJ; Soumitra Saikia, J

Bench: Division Bench

Advocate: U.B. Sarma, A. Sarma

Final Decision: Dismissed

Judgement

1. Feeling aggrieved and dissatisfied by the judgment dated 03.12.2018 and decree dated 15.12.2018 passed by Â the learned Principal Judge, Family

Court No.II, Kamrup (M), Guwahati in F.C. (Civil) Case No.618/2015, the original petitioner/appellant has preferred this appeal under Section 19 of

the Family Courts Act, 1984 read with Section 28(1) of the Hindu Marriage Act, 1955.

2. The following facts emerge from the record of the appeal.

The marriage between the appellant/husband and the respondent/wife was solemnized on 08.02.2014 as per Hindu rites and rituals at Chakitup,

Nagaon. It is the case of the appellant that after the marriage both of them stayed at the residence of the appellant and attempted to cohabit. It is

the case of the appellant that the respondent refused to cohabit with him and that instead of giving birth to a child, the respondent often suggested

the appellant to adopt a child. The appellant also alleged that the respondent misbehaved with the parents of the appellant. It is further the case of the appellant that the parents of the respondent were also informed about the behaviour of the respondent and ultimately without permission of the appellant, the respondent left her matrimonial home on 08.05.2014 on the pretext that her mother was ill. It is further the case of the appellant that thereafter he came to know from the discussion with his parents and the parents of the respondent had with each other that the respondent was suffering from some gynecological problem since last seven years and was undergoing treatment at Nagaon. The appellant has further contended that on 28.06.2014, the respondent again went to her parental house and returned back to her matrimonial home on 07.08.2014. It is also the case of the appellant that the respondent's parents took her to gynecologist in the month of October, 2014 and after various tests, a minor surgery was advised which was declined by the respondent. According to the appellant, the respondent was not interested in giving birth to any child. It is also the case of the appellant that on 14.02.2015, the respondent informed the appellant that a new child is born in a poor family at Kachuwa, Nagaon and the natural parents of the child are ready and willing to give the said child in adoption. It is further the case of the appellant that as the appellant refused to do so, the respondent abused him in filthy language. It is alleged by the appellant that the respondent again ill treated the family members of the appellant and ultimately on 05.03.2015, the respondent left the matrimonial home and since then she has been staying with her parents.

3. As the record unfolds, attempts were made for reconciliation but as the same failed, the appellant filed the petition for divorce under Section 13(1)

(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as the "1955 Act" for the sake of brevity) on the ground of cruelty and prayed for dissolution of marriage.

4. On notice being issued, the respondent/wife filed her written statement and while denying the allegations made in the above mentioned petition, it was alleged in her written statement that the appellant/husband and his mother treated her with cruelty. The respondent also contended that she never

suggested to adopt a child instead of giving birth to a child. According to the respondent, on the contrary, the appellant was not much interested in giving birth to a child. The respondent also contended that she never laid down any condition before the appellant, as alleged, and never went to her parental house without informing her in laws. The respondent also denied of taking any gynecological treatment. The respondent also contended that in fact the appellant took the respondent to three different doctors and all of them prescribed different treatments and no proper treatment was suggested by any doctor. It is the case of the respondent that she requested the appellant to take her to All India Institute of Medical Sciences (AIIMS), New Delhi for treatment but the appellant and his family members forced her to undergo surgery at Guwahati only. It is the case of the respondent that the mother of the appellant treated her with cruelty and labeled the parental house of the respondent as "Baijikhana" (brothel). It is alleged by the respondent that on the contrary, the respondent was driven out from her matrimonial home on 05.03.2015 and thereafter, the present petition for divorce has been filed by the appellant.

5. The appellant examined himself as PW-1 and one Honuba Begum as PW-2 and his mother Smti. Santana Nath as PW-3, whereas the respondent examined herself as DW-1.

6. PW-1, i.e. the appellant, in his evidence-on-affidavit has stated that the marriage between him and the respondent was solemnized on 08.02.2014.

After the marriage, the appellant came to know that the respondent was suffering from gynecological problem for last seven years for which she was undergoing medical treatment at Nagaon. He further stated that the respondent often suggested the appellant to adopt a child. When he asked the respondent about having a baby of their own, the respondent told him that before marriage she had a relation with one Shri Budhaditya and she is not happy with the appellant. In the month of October, 2014, the appellant took the respondent to a gynecologist and after conducting various medical tests, the respondent was advised to undergo a minor surgery but the respondent denied to do so and quarreled with the appellant. The respondent also scolded her mother in law and threatened by saying that if they force her again for a baby, she would commit suicide.

7. It is stated by the appellant in his evidence that on 14.02.2015, the respondent proposed the appellant that they should adopt a child born in a poor family in Kochuwa, Nagaon, which was negated by the appellant for which respondent abused the appellant with filthy language and said that their house was a "Jailkhana" for her. It is also stated that the respondent never performed any household activities and also did not take care of her bed-ridden father-in-law. On 05.03.2014, the respondent left her matrimonial home without informing the appellant or his parents and since then there was no relation between the appellant and the respondent. It is further stated that the gynecological problem being suffered by the respondent was not disclosed to him prior to their marriage and the respondent always refused to keep any physical relation with the appellant. The respondent asked the appellant for her treatment at AIIMS, New Delhi, but she always refused medical treatment at Guwahati for her gynecological problem which, according to the attending doctor, could be cured with a minor surgery even at Guwahati.

During cross-examination, the appellant stated that he had not submitted any document to substantiate the fact that the respondent had gynecological problem since prior to her marriage. The appellant stated that he did not take the respondent to any Nephrologist for treatment of her kidney problem as he did not get any time due to the ailment of his father. Though the appellant denied the allegation that he never referred the parental home of the respondent as "baijikhana", but later on he stated that his mother might have said so out of anger. In his cross-examination the appellant also conceded that he had referred the respondent as a witch as she never allowed him to come closer to her. The appellant also stated that he had not filed any case for restitution of conjugal rights as he fears to go before Court.

8. PW-2, who worked as a domestic help in the neighborhood of the appellant, stated in her examination-in-chief that on 05.03.2015, when she was working in front of the appellant's house, she saw the respondent leaving the house of the appellant silently. When she went to the appellant's house to enquire about the same, she came to know that the respondent had left her matrimonial house without informing the parents of the appellant and at that time the parents of the appellant were in the bathroom.

In her cross-examination, PW-2 stated that she lives in Barpeta and she knows the incident as was stated in her examination-in-chief as she saw the same with her own eyes. She also denied the suggestion that the facts stated by her in her examination-in-chief are false.

9. PW-3, who is the mother of the appellant, in her evidence reiterated the facts as stated by the appellant in his evidence. She stated that the respondent visited her parental house frequently; that the respondent was suffering from a gynaecological problem and as the respondent had been undergoing treatment at Nagaon for the said gynaecological problem, she frequently visited her parental house. It is also stated that the respondent always forced the appellant to adopt a child instead of giving birth to a baby; the respondent always misbehaved with PW-3 who was suffering from orthotic problem; that the respondent never did any household activities and even did not give a glass of water to her bed-ridden father-in-law and sometimes the respondent also threatened the appellant and the PW-3 by showing dao. It is further stated by the PW-3 that the respondent had also threatened to commit suicide if she was forced to give birth to a baby.

In her cross-examination, PW-3 stated that she had submitted documents to show the gynaecological problem suffered by her daughter-in-law since after her marriage and that she did not institute any case against her daughter-in-law for threatening them with dao or for subjecting them to any torture.

10. The respondent was examined as DW-1, who in her evidence deposed that after her marriage with the appellant in the year 2014 they were staying together at her matrimonial home at Guwahati. However, as she was not able to conceive any child, they consulted a Gynaecologist at Guwahati and after undergoing medical tests they came to know that actually instead of any gynaecological problem the respondent was suffering from PUJ obstruction in her left kidney. It is also deposed that although the respondent was suffering from kidney problem, the appellant did not take her to a nephrologist for treatment but took her to different gynaecologists who suggested different treatments. Although the respondent requested the appellant to take her to AIIMS, New Delhi, for her treatment, the appellant refrained from doing so and, instead, the appellant and his mother inflicted

mental cruelty upon her every now and then and insisted upon her to get pregnant. It is further stated by DW-1 that though the appellant and her

mother were well aware of the fact that the respondent was not suffering from any gynaecological but a kidney problem, they insisted upon her to

undergo medical surgery at Guwahati without consulting any Nephrologist and threatened her that if she did not undergo such surgery the appellant

would file divorce case against her. The appellant and his mother also called DW-1 as a witch and referred her parental house as "baijikhana".

It is further stated that the appellant refused her request to take her to AIIMS at Delhi for her treatment but instead she was treated by the appellant

and his mother with utmost cruelty and, ultimately, they turned her out of her matrimonial house on 05.03.2015 and thereafter they never allowed her

to enter her matrimonial house despite of her repeated requests. It is specifically stated in the evidence of DW-1 that before filing the Divorce Petition

the appellant had filed a false Complaint Petition against her before the Family Counseling Centre of Assam Pradeshik Mahila Samity, Guwahati. The

aforesaid Family Counseling Centre vide its report dated 14.09.2015 recorded that though DW-1 was willing to live with the appellant but the appellant

was not at all ready to live with her anymore because of her complications relating to her pregnancy nor was he ready to consult any doctor for her

treatment. It is also stated in her evidence that DW-1 was always ready and willing to give birth to a child but the appellant neglected DW-1 every

time.

In her cross-examination DW-1 reiterated the statements made by her in her evidence-in-chief. It is also stated by DW-1 that since prior to her

marriage she was having Homeopathy medicine for her kidney problem and as her husband never took her to any Nephrologist for treatment of her

kidney problem, she was still continuing taking Homeopathy medicine. It is also stated by DW-1 that prior to her marriage she had never visited any

Gynaecologist. She denied the suggestion that she did not have any physical relation with the appellant due to her gynecological problem and stated that

there was no physical relation between them since after their marriage. It is further stated that when her husband took her to a gynaecologist and the

gynecologist suggested her to undergo surgery, she requested the appellant to take her to AIIMS, New Delhi, but the appellant refused to do so. It is

further stated that although she proposed the appellant to adopt a child, the appellant did not agree. DW-1 denied the suggestion that she knew about

her gynecological problem prior to her marriage. She also denied the suggestion that she cheated the appellant by marrying him with her knowledge

about her gynecological problem.

11. The learned Family Court No.II, Kamrup (Metro) at Guwahati framed issues vide order dated 05.10.2016 and after appreciating the evidence on

record came to the conclusion that the appellant has failed to prove that he was being treated with cruelty by the respondent and accordingly

dismissed the divorce petition. Being aggrieved by the same, the present appeal has been filed.

12. Heard Mr. U.B. Sarma, learned counsel appearing for the appellant. Also heard Mr. A. Sarma, learned Legal Aid Counsel appearing for the sole

respondent. We have also gone through the original records and the proceedings.

13. At this stage, it is also appropriate to note that by an order dated 24.03.2021, a co-ordinate Bench of this Court referred the dispute between the

parties to the Gauhati High Court Mediation Centre. However, the same was unsuccessful and, therefore, the matter is now heard on merits.

14. Mr. U.B. Sarma, learned counsel appearing for the appellant contended that the appellant and the respondent could not cohabit due to some

health problem of the respondent. It was also alleged that after the treatment was taken, the respondent was advised HSG test and on basis of the

said report, the respondent was advised minor surgery which she objected to and insisted that she should be treated at AIIMS, New Delhi. Referring

to the cross-examination, it was contended by Mr. U.B. Sarma, learned counsel appearing for the appellant that the same shows that the respondent

did not have any kidney problem but was suffering from PUJ obstruction. The learned counsel for the appellant also contended that the evidence

clearly shows that the respondent did not co-operate with the appellant and did not cohabit as she did not want any child.

15. Mr. U.B. Sarma, learned counsel for the appellant further contended that the respondent did not allow any physical relation. Referring to the

documents on record, Mr. U.B. Sarma, learned counsel for the appellant contended that the respondent never denied the documents and according to

Mr. U.B. Sarma, unilateral denial of wife not to bear a child amounts to cruelty, which has been admitted by the respondent as the wife wanted to

adopt a child. Further, referring to the cross-examination of the respondent, Mr. U.B. Sarma, learned counsel for the appellant contended that the

evidence clearly establishes the fact that the respondent did not have any physical relation with the respondent. It was also contended by Mr. U.B.

Sarma, learned counsel for the appellant that the allegation that the appellant as well as his mother were ill treated by the respondent is not denied and

according to Mr. U.B. Sarma, therefore, the admitted facts need not be proved. It was also contended by Mr. Sarma that the respondent concealed

the fact about homeopathy treatment which also amounts to cruelty.

16. On the aforesaid grounds, it was, therefore, contended by Mr. U.B. Sarma, learned counsel for the appellant that the impugned judgment &

decree deserves to be set aside and the petition be allowed by passing a decree of divorce on the ground of cruelty. Learned counsel for the appellant

has also relied upon the judgment of the Apex Court in the case of Samar Ghosh -Vs- Jaya Ghosh, reported in (2007) 4 SCC 551 and more

particularly Paragraphs 101, 102 and 103 to buttress his argument.

17. Per contra, Mr. A. Sarma, learned Legal Aid Counsel appearing for the sole respondent has opposed this appeal and has submitted that the

medical papers do not lead to the fact that the respondent refused to bear any child. It was contended that no cruelty is proved and the learned Family

Court has correctly appreciated the evidence on record and has rightly come to the conclusion that the appellant has failed to prove the cruelty. It was

contended that the judgment of the Apex Court in the case of Samar Ghosh (supra) would not be applicable as the appellant has failed to prove that

the respondent had taken unilateral decision and had refused to have intercourse for considerable time without there being any physical incapacity. It

was also contended that the appellant has failed to prove that the respondent took unilateral decision after marriage not to have child from the

marriage and, therefore, the judgment of Samar Ghosh (supra) would not be applicable. It was, therefore, submitted that the appeal being meritless

deserves to be dismissed.

18. No other or further submissions, grounds or contentions have been raised by the learned counsels appearing for the respective parties.

19. Upon considering the submissions made and upon re-appreciation of evidence on record, the following question arises for consideration of this

Court:-

“Whether the appellant proves that the respondent has acted with cruelty as provided under Section 13(1)(ia) of the Hindu Marriage Act, 1955 or

not?”

20. Having considered the submissions made and on re-appreciation of the evidences on record, on the contrary it shows that the appellant and the

respondent were staying as husband and wife immediately after the marriage and attempts were made to conceive a child. The evidence as adduced

by the parties clearly establishes the fact that after the ultrasound whole abdomen test on 19.11.2014, the diagnosis was that the respondent was

suffering from PUJ obstruction in left kidney instead of any gynecological problem. It has also come on evidence that on the contrary the appellant

instead of taking treatment of an expert Nephrologist took the respondent to different Gynecologist and even her request to be treated her at AIIMS,

New Delhi was declined by the appellant. As rightly recorded by the learned Family Court, even before the Family Counseling Centre, the respondent

showed her willingness to live with the appellant, which is evident from the counseling report at Exhibit-1.

21. The evidence of the respondent clearly establishes the fact that she was ready and willing to give birth to a child and, therefore, it cannot be said

that the respondent unilaterally took decision not to have child after marriage. Even the evidence of PW-2 Honuba Begum does not take the case of

the appellant any further as the same does not establish that the appellant and the respondent had any problem or dispute including health problem.

Even if the evidence of PW-1, i.e. the appellant and PW-3, i.e. the mother of the appellant is re-appreciated, the same does not reveal that the

respondent had any gynecological problem which retarded her chances of becoming a mother. The appellant on the contrary has admitted the fact that

the appellant and the respondent tried to conceive a child but it did not materialize that too for a period of one year and, therefore, the contention raised

by the appellant even before this Court that the respondent refused to bear a child is without any basis.

22. The evidence of the appellant himself in his cross-examination shows that till March, 2015, treatment was undertaken with Dr. Meghali Devi, Dr.

Singhania, Dr. Nilakshi Phukan Kumar and Dr. V. Nahata. Similarly, there is nothing in the evidence which even prima facie leads to the conclusion

that the respondent had any relation with one Shri Bhudhaditya prior to marriage and such allegation is made without any basis. The ultrasound report

dated 19.11.2014 shows that the respondent was not suffering from any gynecological problem but had a kidney problem in her left kidney. It is a

matter of fact that the appellant instead of taking the respondent to a Nephrologist undertook treatment of different Gynecologists. On the contrary,

from the cross-examination of the appellant, it reveals that the appellant has admitted that he did not take the respondent to any Nephrologist for

treatment of her kidney as he did not get any time as well as because of sickness of his father.

23. Upon re-appreciation of the evidences on record, thus it cannot be said that the respondent did not co-operate to bear a child. On the contrary, in

cross-examination, the appellant has also admitted the fact that the appellant and the respondent as a married couple made attempts to conceive a

child but failed. Upon re-appreciation of the evidence as a whole, the appellant has failed to prove that there was unilateral denial on part of the

respondent to bear the child. The contention raised before us that the allegation of ill treatment towards the appellant and his mother are not denied

and, therefore, stands proved, also deserves to be negated.

24. The ratio laid down by the Apex Court in the case of Samar Ghosh (supra) would not be applicable to the case on hand as there is no evidence on

record to show that the respondent refused to have intercourse for considerable period without there being any physical incapacity or that the

respondent as a wife took unilateral decision after marriage not to have child from the marriage and, therefore, it cannot be said that the respondent

wife has meted out any cruelty much less any mental cruelty as attempted to be contended by the appellant.

25. Upon re-appreciation of the evidence on record, this Court is of the opinion that the learned Family Court has correctly appreciated the evidence

on record and has rightly come to the conclusion that the appellant has failed to prove the cruelty as provided under Section 13(1)(ia) of the 1955 Act

and has rightly been dismissed the petition.

26. Thus, upon re-appreciation of the evidence on record and considering the submissions made, the appellant has not been able to prove that the

respondent has meted out cruelty as defined under Section 13(1)(ia) of the 1955 Act.

27. Resultantly, the appeal being bereft of any merits fails and is hereby dismissed. Parties to bear their own cost.

28. Registry is directed to send back the LCR back to the trial Court forthwith.