Smti. Aparna Chakraborty Vs Shri. Nayan Bhowmick

Court: Gauhati High Court (Shillong Bench)

Date of Decision: April 13, 2011

Acts Referred: Constitution of India, 1950 â€" Article 142
Hindu Marriage Act, 1955 â€" Section 13, 13(1), 23(1)

Citation: (2011) 5 GLR 791

Hon'ble Judges: T. Vaiphei, J

Bench: Single Bench

Advocate: R. Choudhury and D.K. Acharjee, for the Appellant; K.S. Kynjing and I.C. Jha, for the Respondent

Final Decision: Dismissed

Judgement

T. Vaiphei, J.
This appeal is directed against the judgment and decree dated 9-3-2010 passed by the learned Additional Deputy

Commissioner, East Khasi Hills District in Divorce Case No. 13(T) of 2007 dissolving the marriage between the Appellant and the Respondent on

the ground of desertion.

2. The controversy arose on the following facts and circumstances pleaded by the Appellant. The Appellant, who is the wife, and the Respondent

were married according to Hindu rites and rituals, which was solemnised on 4-8-2000 at Shillong. Prior to their marriage also, they were known to

each other as they worked together as Development Officers under the Life Insurance Corporation of India Ltd. since 1992. Thus, according to

the Appellant, their marriage was a love marriage. Though the Respondent knew the nature of her duty and responsibility in their office even before

their marriage, he and his family members, after their marriage, started demanding her to confine herself at home as a housewife and give up her job

at the instigation of her father-in-law, who was then alive and had expressed his dislike for a working woman as a daughter-in-law. The

Respondent and his family members also ignored the fact that she had to look after and extend financial assistance to her old and ailing mother, her

brother and other dependants for which he had promised not to interfere. They then slowly started to ill-treat her and ultimately created a situation,

which, when it became unbearable, compelled her to leave her matrimonial home. The Respondent taking advantage of this immediately instituted

Divorce Suit No. 6(T) of 2003 before the learned Additional Deputy Commissioner (Judicial), Shillong for dissolution of their marriage u/s 13(1)(i-

b) of the Hindu Marriage Act, 1955 (""the Act""). The suit was, however, dismissed by the learned Additional Deputy commissioner (J), Shillong as

premature but he preferred RFA No. 9(SH) of 2006 before this Court, but the same was withdrawn by him with a liberty to file a fresh suit. This is

how the instant suit was filed by him. The suit was contested by her, who filed her written statement. The following issues were framed by the

learned trial court:

1. Whether this suit is maintainable in its present form?

2. Whether his Court has got its jurisdiction to try the suit?

3. Whether the marriage was solemnized in between the Petitioner and the Opposite Party/Respondent?

4. Whether any cause of action is there in this case?

5. Whether the Petitioner is entitled to any other relief/reliefs in this case?

6. Whether the suit is in consonance with Section 13 of the Hindu Marriage Act, 1955?

7. Whether the Petitioner prior to filing of this suit filed a Divorce Suit against the Respondent and the same was dismissed being devoid of merit?

3. In the course of trial, as many as seven witnesses were examined on behalf of the Respondent whereas three witnesses were examined on behalf

of the Appellant. At the conclusion of the trial, the suit was decreed as noted earlier. Though no specific issue was framed by the trial court on the

question of desertion, the decree for dissolution of marriage was apparently allowed on the ground of desertion. The settled law is that even when

no specific issue has been framed on the question of desertion in a matrimonial dispute, but the parties had led evidence clearly knowing the stance

taken by each of them, this Court is not barred from examining such evidence. The trial court had proceeded to record the findings that the

evidence of the Respondent that after the death of his father, the Appellant had left his residence and was not willing to return, was fully

corroborated by the evidence of P.W. 1, P.W. 2, P.W. 3, P.W. 5, P.W. 6 and D.W. 2; that the Appellant herself had admitted that she was not

wearing Shangkha and did not also wear the same when she appeared before it; that there was nothing to substantiate the allegation of the

Appellant that she was asked by the Respondent to leave his house as she refused to give up her job; that the Appellant never Responded to the

letter sent by the Respondent for settlement with him; and that the record categorically proved that the Appellant had deserted the Respondent for

a period more than seven years. The trial court, therefore, concluded that the Appellant has intentionally abandoned her husband, which

established the case of the Respondent of desertion u/s 13(1)(i-b) of the Act although he had failed to establish his case u/s 13(1)(i-a). The

correctness of these findings is called into question in this appeal.

4. Section 13(1)(i-b) of the Hindu Marriage Act, 1955 reads as follows:

13. Divorce.-(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the

husband or the wife, by dissolved by a decree of divorce on the ground that the other party-

(i-b) has deserted the Petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

* * *

Explanation .-In this Sub-section the expression ''desertion'' means the desertion of the Petitioner by the other party to the marriage without

reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the Petitioner by the other party to the

marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

5. The term ''desertion'' in the context of Section 13(1)(i-b) has been explained by the Apex Court in Savitri Pandey Vs. Prem Chandra Pandey, in

the following manner:

8. ""Desertion"" for the purpose of seeking divorce under the Act, means the unintentional permanent forsaking and abandonment of one spouse by

the other without that other''s consent and without reasonable cause. In other words it is a total repudiation of the obligation of marriage. Desertion

is not the withdrawal from a place but from a state of things. Desertion therefore means withdrawing from matrimonial obligations i.e. not permitting

or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the

concept of marriage which in law legalizes the sexual relationship between man and woman in the society for the perpetuation of race, permitting

lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a

continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the view

of various authors, this Court in Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, held that if a spouse abandons the other in a state of temporary

passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion...

(Citation supplied)

6. The question which falls for consideration in this appeal is whether there is an intentional permanent forsaking and abandonment of one spouse

by the other without the other''s consent and without reasonable cause? It is a well-settled proposition of law that in proceedings for divorce the

Plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt [see Bipinchandra Saisinhbhai

(supra)]. In my opinion, the Respondent is unable to clinchingly establish that the Appellant has deserted him. The evidence led by him are

absolutely insufficient to prove desertion. According to his evidence, after the Appellant deserted his house, he along with his family members and

some of his friends tried to patch up their differences in which she had proposed that if he would not keep his mother with him, then and then only

she could come back to him, which he refused to oblige. This evidence of the Respondent, who examined himself as P.W. 7, is conspicuous by the

absence of details such as the date, time and place when such reconciliation attempt was made by him. If the Appellant had made her return to her

matrimonial home conditional upon the abandonment by the Respondent of his mother as alleged by him, this could amount to an unreasonable

refusal on the part of the Appellant to go back to her husband. But none of the six witnesses examined by him corroborated him on this point.

Desertion is matter of inference to be drawn from the facts and circumstances of each case. Not an iota of evidence has been adduced by the

Respondent to show the attempt made by him for reconciliation with the Appellant. On the contrary, he appears to be quite content in the

Appellant leaving his house on 29-11-2001 after a month of the death of his father and did not return. All that he did was to send a letter to her on

12-11-2002 i.e. one year after she left his house. The contents of this letter, which is at Annexure I, is undisputed, are not only revealing but also

make an interesting reading. In the first place, the letter did not mention anything about the many attempts allegedly made by him for reconciliation.

Secondly, his statements that ""I know you might dislike so many things of our family at the time of you left my house. You might dislike my stand

also"" corroborate the case of the Appellant that she had been forced to leave her matrimonial house as he and his family wanted her to confine

herself as a housewife and to give up her job. Assuming that this part of the contents of the letter was a sincere attempt on his part to reconciliate

with her also, the last sentence seems to convey the idea that the letter, in substance, is an ultimatum. In my judgment, this cannot be construed to

be a sincere attempt on the part of the Respondent to welcome her back to her matrimonial home: this is merely eyewash. On the contrary, it is

difficult to believe that a husband longing for the return of his wife to him in his right mind could send such a letter, which is an ultimatum in nature.

Therefore, the absence of reconciliatory attempt by him for almost a year and the contents of the aforesaid letter lead me to one and one

conclusion, i.e., there is no intentional permanent forsaking and abandonment of the Respondent by the Appellant and that there is sufficient

evidence of conduct on the part of the Respondent and his family giving reasonable cause to her for leaving her matrimonial home. There is

evidence to show that the Appellant continues to affirm her marriage and is ready and willing to resume her married life with the Respondent. The

Respondent is, on the other hand, trying to take advantage of his own wrong or disability for the purpose of the relief contemplated u/s 23(1) of the

Act. As observed by the Apex Court in Savitri Pandey (supra), no party can be allowed to carve out the grounds for destroying the family which is

the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be

preserve the sanctity of marriage and be reluctant to dissolve the marriage on the asking of one of the parties.

7. Finally, Mr. K.S. Kynjing, the learned senior Counsel for the Respondent, heavily relying upon the decisions of the Apex Court in (a) Satish

Sitole Vs. Smt. Ganga, (b) Naveen Kohli Vs. Neelu Kohli, (c) Durga Prasanna Tripathy Vs. Arundhati Tripathy, and the decision of this Court in

Sri Ramen Chandra Deka Vs. Smt. Sujata Deka, , urges this Court to dissolve the marriage between the Appellant and the Respondent on the

ground of irretrievable breakdown. Countering this submission, Mr. R. Choudhury, the learned Counsel for the Appellant, contends that the

decisions of the Apex Court relied on by the learned senior Counsel were rendered in exercise of its special jurisdiction under Article 142 of the

Constitution and High Courts have no such corresponding power. In support of his contention, he relies on the decisions of the Apex court in

Neelam Kumar Vs. Dayarani, . I find force in the contention of the learned Counsel for the Appellant. That apart, even if it is assumed for the sake

of argument that this Court also has the power Ã¯Â¿Â½conflicting decisions are galore in this behalfÃ¯Â¿Â½ I cannot lose sight of the proven conduct of the

Respondent in rushing to the Court on earlier occasion without waiting for the expiry of the minimum period of two years prescribed by Section

13(1)(i-b) of the Act, which was rightly withdrawn by him later on, a conduct which lends credence to the contention of the Appellant that he has

never been serious about welcoming her back to this house. He is thus demonstrably interested only in creating a hostile atmosphere at home to

discourage the return of the Appellant to his house and then take advantage of his own wrong to obtain a decree of divorce by falsely projecting

that she has deserted him. This cannot be permitted. I must also remind myself that the equity jurisdiction exercised by the Apex Court under

Article 142 of the Constitution to do complete justice is admittedly not available to this Court. On the other hand, it will be instructive to refer to

the observations of the two-Judge Bench of the Apex Court in Savitri Pandey (supra): this is what it said:

17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has

broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought

it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as marriage has become

dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage

alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in V. Bhagat v. D. Bhagat held that

irretrievable breakdown of the marriage is not a ground by itself to dissolve it.

18. As already held, the Appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between

the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the

marriage.

8. In the result, the impugned judgment and decree cannot be sustained in law and is, accordingly, set aside by directing the parties to bear their

respective costs. Transmit the L.C. record forthwith.