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Smt. Minakshi Dhar Vs Biresh Ranjan Dhar

Court: Gauhati High Court

Date of Decision: July 1, 1987

Acts Referred: Hindu Marriage Act, 1955 â€" Section 13(1), 23(1)

Citation: AIR 1987 Guw 90

Hon'ble Judges: B.L. Hansaria, J

Bench: Single Bench

Advocate: S.K. Homchoudhuri, S. Dutta and S. Dasgupta, for the Appellant; S.K. Sen, B.R. Dey and G. Uzir, for the Respondent

Final Decision: Allowed

Judgement

B.L. Hansaria, J.
Cruelty is a matrimonial offence. It has, however, defied definition. It cannot, of course, be doubted that physical, or

mental torture has to be taken as cruelty. It is equally evident that normal wear and tear of married life cannot amount to cruelty. In this context we

have also to remember that for the. Hindus with whom this case is concerned, marriage is still a sacrament and as such it is moral and religious

responsibility of a spouse to try to live with his partner as long as possible, suffering in the process some pinpricks and pangs. The door of cruelty

cannot be opened too wide lest we find ourselves granting divorce on the ground of even incompatibility of temperament. This would endanger the

sacred institution of marriage. If the situation, however, becomes unbearable, a spouse would be within the parameters of law to knock the door of

a Court. If the acts constituting cruelty are committed day-in-and-day-out, night-in-and-night-out, it would definitely become impossible for the

offended spouse to live with the offending spouse without physical or mental agony, torture or distress. So, a Court would be justified in snapping

marriage tie if its conscience is satisfied that the relationship between the parties has deteriorated to such an extent that the offended spouse cannot

reasonably be expected to live with the other spouse.

2. From what has been stated above, it is apparent that apart from physical violence, the term ""cruelty"" would include mental cruelty as well So,

though the Hindu Marriage Act, 1955, for short the Act, has not defined cruelty, which is now a good ground for divorce u/s 13(1)(ia), the same

takes within its fold mental cruelty. This is an accepted and established position. What amounts to mental cruelty would, however, depend on facts

and circumstances of each case.

3. In the case at hand we are primarily concerned with the allegation of mental cruelty by the wife towards the husband who approached the Court

seeking a decree of divorce on that ground. To believe the husband, the cruelty started within 10 days of the marriage which had taken place on

21-1-72. The culminating point, however, came in 1980 whereafter the present suit was filed in Sept., 1981. In the suit as filed the respondent

claimed for a decree of nullity of marriage, u/s 12(1)(c) of the Act, and for a decree of divorce by dissolving the marriage u/s 13(1)(ia) and (ib) and

(iii) of the Act. The learned trial Court, however, felt satisfied only about the allegation of cruelty and instead of passing a decree of divorce,

ordered for judicial separation u/s 10 of the Act. Feeling aggrieved, the wife has preferred this appeal The husband in his turn has filed cross-

objection as he wants divorce.

4. The broad facts which gae rise to the petition are these : The starting point of the strained relationship between the parties is the occurrence

which took place after about 10 days of the marriage. On the relevant date after the respondent had left for office, 2/3 aged boys came to his

house at about noon, and the wife started gossiping with the boys -- all of whom were lying on the same bed. This action of the appellant was not

liked by the mother-in-law and so she was rebuked. The respondent was informed about the same after his return from the office. The next

occurrence took place after about a month of the marriage. On that day some 20/25 boys came chasing one Chayan Dutta, who is a relation of the

parties. At that time the appellant was in the bath room and on hearing hulla outside she came out of the bath room in wet clothes. There were

some scuffles between the parties as a result of which the blouse, saree and the wearing of the appellant were torn. The respondent knew about

this after his return from Pathecherra Tea Garden where he had gone on tour. After about 3/4 months another occurrence took place and the same

is related to the desire of the appellant to prepare her meals separately from the joint family. This was strongly resisted by the respondent following

which the appellant yielded. The next occurrence took place on 13-12-72. On that day at about 8 p.m. some children passed by the road singing.

The appellant then herself started singing in the same tune. This was not liked by the husband when he scolded the wife. She flared up and poured

kerosene on her saree and set fire to it. The respondent could with difficulty extinguish the fire, which caused injury to both the spouses.

5. The married life incident did not stop at the above inasmuch as the further allegation of the respondent is that when his mother had expired on

21-8-73, the appellant had not cared to call upon from her father''s house where she had gone because of the advanced stage of pregnancy. The

further allegation of the respondent is that as the acts of the appellant became more and more unbearable he could not keep regularity in the mode

of living and food habits so much so that he fell ill and the illness was diagonised as melina. This had happened after the respondent had been

transferred to Jorhat. The most objectionable act on the part of the appellant took place in March, 1977 when she had undergone tubectomy

operation without the consent of the respondent. This operation upset the respondent inasmuch as in the first two deliveries the appellant had given

birth to two daughters and as such the respondent and, for that matter, the entire family was looking forward to birth of at least one son. After the

second delivery the respondent brought his family to Jorhat in June/July, 1977. According to the respondent his mental worries knew no bounds

after the family had been brought to Jorhat, There was some altercation between the couple in Dec., 1977, regarding hospitality shown to three

guests who belonged to the department of the respondent. It is the case of the husband that following this altercation, the wife left the house without

leaving any word relating to her whereabouts. This caused anxiety to all concerned. The husband left for Gauhati in search of the wife thinking that

she might have gone there to the house of her elder sister. While at Gauhati, the husband, however, received a telephonic message from Jorhat that

a telegram has been received from Siliguri which carried the news that the wife had reached there. The wife and the two babies were thereafter

sent to Silchar and it is the case of the husband that she started living with her father from the month of Dec., 1977, whereafter she has not returned

back to live with her husband. The last incident took place in 1980 which was after the transfer of the respondent to Silchar. What happened then

was that the appellant would very often come to the office where the respondent was working and would start nagging him which made his life

unbearable and finding no way out he filed the present suit.

6. The aforesaid allegations were denied by the appellant, hi the trial which followed, the husband examined himself and four other witnesses

whereas the wife examined only herself. After perusing the materials on record, the learned trial Court did not feel satisfied about the allegation of

mental disorder on the strength of which divorce was sought for u/s 13(1)(iii) of the Act, nor was the Court satisfied about desertion of the

husband by the wife because of which decree was refused on the ground covered by Section 13(1)(b) of the Act. There were no materials before

the learned Court below to pass a decree of nullity on the ground mentioned in Section 12(1)(c) of the Act. The only ground which ultimately

prevailed with the learned District Judge is that of cruelty. As the parties came from respectable families and as, the learned trial Court hoped that

there may be possibility of retrieving the deemed conjugal harmony of the parties"" the learned trial Court decreed the suit for judicial separation

instead of outright divorce.

7. Before proceeding further, we may have a bird''s-eye view of the legal position relating to granting of divorce on the ground of cruelty. Before

the Act was amended in 1976 by the Marriage Laws (Amendment) Act, 1976, cruelty was a ground only for judicial separation u/s 10(1)(b) of

the Act which had read as below :--

10(1). Either party to a marriage, whether solemnised before or after the commencement of this Act, may present a petition to the district Court

praying, for a decree for judicial separation on the ground that the other party-

(a) *****

(b) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious

for the petitioner to live with the other party"".

This statutory provision came up for discussion before the Supreme Court in Dastane v. Dastane, AIR 1975 SC 1534. The Court at first noted in

this connection the decision of the Privy Council in M. B. Raheem v. Shumsoonissa Begum, (1867) 11 Moo Ind App 551, where the Privy

Council had dealt with this question in the context of Mohammadan Law. Thereafter the observations of D. Tolstoy''s ""The Law and Practice of

Divorce and Matrimonial Causes"" (Sixth Ed., p. 61) were noted. In both these cases, something was said about the danger to life, limb or health or

to give rise to a reasonable apprehension of such a danger before the conduct in question could be regarded as cruelty. The Apex Court then

observed that though an awareness of foreign decisions could be useful asset in interpreting our own laws it has to be remembered that the Court

has to interpret specific provision of specific enactment and as such what constitutes cruelty must depend upon the terms of the statute. After noting

the statutory provisions, the Court observed as below : --

The inquiry therefore has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable

apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as under the English law, that the cruelty

must be of such a character as to cause ""danger"" to life, limb or health or as to give rise to a reasonable apprehension of such a danger. Clearly,

danger to life, limb or health or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious

for one spouse to live with the other.

It was further observed that though the apprehension in this regard has to be reasonable, it is wrong, except in the context of such apprehension, to

import the concept of a reasonable man as known to the law of negligence for judging of matrimonial relations. It was then stated that ""the Court

has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple

or a near ideal one will probably have no occasion to go to a matrimonial Court for, even if they may not be able to drown their differences, their

ideal attitudes may help them overlook or gloss over mutual faults and failures.

7-A. The Apex Court thereafter went into the facts and circumstances of the case and felt satisfied that the actions of the wife constituted cruelty.

But then relief of judicial separation was denied to the husband on the ground that he had condoned the cruelty. We may have a look as to what is

meant by Condonation in a matrimonial matter. Before this is done it may be pointed out that Section 23(1)(b) of the Act states that if in any

proceeding under the Act, the Court is satisfied that the petitioner has not in any manner condoned the cruelty then, but not otherwise, the Court

shall grant relief in question. As such, the question of condonation has to be examined by the Court even though the same has not been pleaded as

a defence by the respondent.

8. Condonation as per the aforesaid decision means forgiveness of the matrimonial offence and the restoration of offending spouse to the same

position as he or she occupied before the offence was committed. To constitute condonation there must, therefore, be two things : forgiveness and

restoration. As to what constitutes forgiveness would apparently depend upon the facts of each case. But then if there be evidence showing that the

spouses had led a normal sexual life after a series of cruelty, the same has to be regarded as a proof that the other spouse had condoned the

cruelty. It was further observed that intercourse is not a necessary ingredient of condonation because there may be evidence otherwise to show

that the offending spouse has been forgiven and received back into the position previously occupied in the home.

9. The above was the position as it stood before the Act had come to be amended by the Marriage Law (Amendment) Act, 1976. This Act was

passed after the Law Commission of India had submitted its 59th Report on the Hindu Marriage Act, 1955, and the Special Marriage Act, 1954.

The Law Commission dealt with this aspect of the case in Paras 2.11 to 2.17 of its report. A draft on the. following line was suggested during

discussion : --

that the respondent has, since the solemnisation of the marriage, treated the petitioner with such cruelty that the petitioner cannot reasonably be

expected to live with the respondent.

The Commission did not favour the addition of the limiting words because it felt that the Court would ""even in the absence of such words broadly

adopt the same approach"". (See 2.12 of the Report at page 21).

After having considered all aspects of the matter, the Commission recommended that Section 13(1) of the Act, a new clause should be added as

follows : --

has treated the petitioner with cruelty"".

A reference to the Marriage Law (Amendment) Act, 1976, shows that the recommendation of the Law Commission was accepted as it is. In the

Statement of Objects and Reasons, it was, inter alia, stated that the object of the legislation was to liberalise the provision relating to divorce.

10. In the Act as amended the position is that treating of a spouse with cruelty without anything more is a ground not only for judicial separation but

also for divorce. A Full Bench of the Bombay High Court in Keshaorao Krishnaji Londhe Vs. Nisha Londhe, had occasion to interpret the newly

added Section 13(1)(ia) of the Act. A contention was advanced before the Full Bench that the intention behind the amendment was to bring back

the concept of cruelty at par with the age-old English concept of doctrine of danger and to nullify the Dastane''s case. This contention was not

accepted because in the first place there is not even a whisper in the Statement of Objects and Reasons, directly or indirectly, about Dastane''s

case or the view that prevailed before that decision. Secondly, the Bill in terms refers to the recommendation in the 59th Report which itself was

submitted on 6th March, 1974, that is, more than one year before the decision in Dastane''s case. It was thereafter observed that as the entire

general trend of the Amending Act is towards a forward step of liberalisation of divorce it is fallacious to hold that only with relation to cruelty as to

ground for divorce intention was to make law more stringent and to move backward. Being of this view, the Full Bench concluded that the cruelty

contemplated u/s 13(1)(ia) of the Act neither attracts the old English doctrine of danger nor the statutory limits embodied in old Section 10(1)(b)

and the cruelty contemplated is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. I am in

respectful agreement with what has been stated by the Full Bench decision of the Bombay High Court.

11. It is also worth mentioning here that normal wear and tear of married life would not amount to cruelty. In this connection, reference may be

made to the following observations finding place in Para 34 of the Dastane''s case :

We do not propose to spend time on the trifles of their married life. Numerous incidents have been cited by the appellant as constituting cruelty

but simple trivialities which can truly be described as the reasonable wear and tear of married life have to be ignored. It is in the context of such

trivialities that one says that spouses take each other for better or worse. In many marriages each party can, if it so wills, discover many a cause or

complaint but such grievances arise mostly from temperamental disharmony. Such disharmony or incompatibility is not cruelty and will not furnish a

cause for the dissolution of marriage.

(See Gopal Krishan Sharma Vs. Dr. Mithilesh Kumari Sharma, Maya v. Brijnath AIR 1982 Delhi 240 and Smt. Asha Handa Vs. Baldev Raj

Handa, also).

12. Another legal aspect may be adverted to before entering into the evidence. The same is relatable to the word ""treated"" finding place in Section

13(1)(ia). This word on the face of it involves some action aimed at the other spouse. It has, however, been held that intention to injure the other

side is not a necessary element of cruelty. Reference may be made in this connection to a passage from Holden v. Holden (1810) 1 Hag Con 453

which has become locus classicus wherein it was observed as below : --

It is not necessary in determining this point, to enquire from what motive such treatment proceeds. It may be from turbulent passion, or sometime

for causes which are not inconsistent with affection and indeed have been consistent with it, as the passion of jealously. If bitter waters are flowing

it is not necessary to enquire from what source they spring.

(See pages 719-20 of Mulla''s Hindu Law (1974).)

13. The law on the subject was reviewed by Lord Merriman in Jamieson v. Jamieson 1952 AC 525, where it was observed that actual intention to

injure was not an essential factor, and that intentional acts may amount to cruelty even though there was no intention of being cruel. This aspect of

the matter was gone into in detail by a Full Bench of the Jammu and Kashmir High Court in Jia Lal v. Saria Devi AIR 1978 J & K 69. After

adverting to many decisions on this point, of which Gollins v. Gollins (1963) 2 All ER 966 was one, it was held by the Full Bench that it would be

hazardous to lay down as a general principle of law the necessity or otherwise of the element of intention as sine-qua-non for establishing or

rejecting a case for judicial separation or divorce on the basis of cruelty. In every case this aspect shall have to be judged on the facts of that case.

It was further pointed out that the concept of cruelty has varied from time to time, from place to place, from individual to individual in its application

according to social status of the person involved, their economic conditions and other matters.

14. With the aforesaid in mind we may now examine the facts of the case. A perusal of the evidence led in the case shows that the husband had

alleged 9 (nine) incidents (as briefly noted above) throughout their married life pointing towards cruelty. Of these, the incidents occurring between a

few days after the marriage on 21-1-72 and March, 1977 have to be ignored principally for the reason that the husband must be deemed to have

condoned the same inasmuch as there is positive evidence that the parties had cohabited which is apparent from the fact that the appellant had

given birth to her second child in March, 1977. This position has been fairly conceded by Shri Sen keeping in view what has been laid down in

Dastane. Though Shri Homchoudhury has also mentioned about Exhibits A and B -- two letters written by the respondent to the father and brother

of the appellant on 6-1-78 in this connection, I do not think if these documents can be accepted as condonation of cruelty. I have taken this view

for the reason that though these letters may speak of forgiveness on the part of the writer evinced by very cordiallity and warmth shown towards

the addressees who are none else than the father and brother of the appellant, there is nothing to show in these letters about restoration of the wife

to the prior position.

15. We have, therefore, to confine our attention to the allegations which had taken place after the appellant had given birth to the second daughter.

The first such incident sought to be relied on by the husband is undergoing of tubectomy operation by the wife immediately after the second child

was bora It has been urged by Shri Homchoudhuri that as the two issues had seen the light of the day following caesarean operation, it had

become medically necessary to undergo tubectomy operation. My attention has also been invited in this connection to the evidence of P.W. 2 Dr.

B. Choudhury who has stated in cross-examination that the tubectomy operation would not have been done if both the husband and wife would

not have their consent, though the consent form was said to be not available. It is urged by Shri Sen that as the husband was posted at Jorhat at the

relevant time, there could not have been any question of his having given consent in the form filled up at the time of caesarean operation. According

to D.W. 1, however, the husband had given the consent earlier after the same had been advised by Dr. Seal. From the evidence of D.W. 1 it

further appears that she had been left in her father''s house by her husband in Feb., 1977. Dr. Seal was then called and consulted by the husband

and after examination the doctor had opined that the wife was incapable of bearing the third pregnancy.

16. Shri Sen has referred the evidence of the respondent and has urged that the operation was carried out without his consent. Even if it is

conceded that the husband had not given his consent to the operation, it is difficult to regard this act as cruel. This is for the reason that there does

exist a medical opinion that a woman cannot carry for a third time after she has given birth to two babies with the aid of caesarean operation. It is

true that the couple were looking forward to have a male child. This must have been desired by the wife as well. But then the choice had to be

made between the risk of life and uncertain event of giving birth to a male child in the third delivery. On these facts I would not regard the act of

undergoing caesarean operation by the wife as cruel in any way.

17. The next allegation against the wife in this regard is that after she had been brought to Jorhat for the second time she had left her husband in

Dec., 1977, to be ultimately found in Siliguri in the house of a sister of the respondent. According to the husband the wife had left her matrimonial

home without any knowledge of the former leaving her two minor daughters at Jorhat. This allegation has been denied by the appellant. I am,

however, inclined to believe the truth of this allegation inasmuch as the same has been supported, inter alia, by the evidence of the sister of the

husband who was examined in the case as P.W. 4, and P.W. 5 an LDA in the office of the District Malaria Officer, Jorhat. The contrary evidence

of the wife stating that she had not gone to Siliguri alone is not sufficient to outweigh the weight of the evidence led by the husband. As the motive

or intention which impelled the wife to take this action is not known, I have my doubts whether this incident would constitute cruelty. I would think

that this is an incident where the intention of the wrongdoer has to be known, because going to the house of a sister of the husband cannot be

regarded as an act of cruelty towards husband in normal course. The intention or motive is, however, not discernible from the material on record.

18. The last allegation made in this regard by the husband is relatable to the nagging by wife by going to the office at Silchar where the husband had

been transferred in 1980. As to this incident I would state that the husband. had not been able to establish the same even by preponderance of

probabilities inasmuch as the only person to depose about this incident is the husband himself. It has been rightly submitted by Shri Homchoudhuri

that as the petitioner had examined some witnesses to bring home the incident of going to Siliguri, the same could have been done to establish this

act which is, however, found wanting. According to the learned counsel there was no difficulty in this regard as this incident had taken place in

Silchar and the case had been taken up by the District Judge, Silchar. It has been brought to my notice that the petitioner had taken the trouble of

bringing a witness from Jorhat to support the evidence of the husband on the incident of going to Siliguri. If the husband could take this trouble

there was nothing to stand in his way of examining a colleague from the Silchar office to support the respondent that the appellant used to go to his

office off and on and used to utter intolerable and insensible words very loudly. Though the standard of proof to be applied in this context is that of

establishing a fact of preponderance of probabilities, I do not think if even by this standard this allegation has been established inasmuch as the only

evidence is that of the husband who has to be regarded as an interested person.

19. Shri Sen has faintly submitted that the desertion of the respondent by the wife would also constitute a cruel act. I wouid hesitate to accept this

contention of the learned counsel because desertion provides for an independent cause of action u/s 13(1)(ib) of the Act. It clearly shows that the

legislature had not desired to equate desertion with cruelty. This apart, evidence is lacking in the present case to give a positive finding relating to

desertion which consists of (1) factum of desertion and (2) animus deserendi so far as deserting spouse is concerned; and two essential conditions

on the part of deserted spouse : (1) absence of consent and (2) absence of conduct giving rise to reasonable cause on the part of deserting spouse

to form necessary intention as aforesaid. (See Lachman Utamchand Kirpalani Vs. Meena alias Mota, There is total lack of material in the case to

hold for definite that the wife has been staying at her father''s house with the intention of bringing co-habitation to an end (animus deserendi), as her

evidence is that she had always been, and still is, willing to join her husband. The written statement is very eloquent on this aspect of the case.

20. The curtain may be drawn on this drama of action and reaction by mentioning about the allegation in the written statement that the respondent

has filed this case to get rid of the appellant as the former wants to marry again. Shri Sen submits that this allegation in itself constitutes cruelty. I

would demur. Though allegation of adultery may amount to cruelty in some cases, the mere statement that the husband is contemplating to marry

again cannot because it is not likely to affect adversely the physical or mental health of the husband.

21. Because of what has been stated above, it cannot be said that a case of cruelty has been established by the husband. The only act which could

be regarded as nearing uncondoned cruelty is that of leaving the matrimonial home by the appellant in Dec., 1977. Though in the eye of law a single

incident may be enough to establish a case of treating with cruelty (one swallow making a summer ?) the single act attributed and established in the

present case is definitely not of this nature. This act, even if it constituted cruelty about which I have doubt for reason already alluded, cannot be

regarded as such because of which it could be said that a husband would not reasonably like to live with his wife.

22. In view of all the above, I would allow the appeal by setting aside the order of judicial separation passed by the learned District Judge. The

parties are, however, left to bear their own costs.