
(2009) 04 GAU CK 0043

Gauhati High Court (Agartala Bench)

Case No: None

Nabakumar Banik

APPELLANT

Vs

Smt. Amita Datta

RESPONDENT

Date of Decision: April 3, 2009

Acts Referred:

- Evidence Act, 1872 - Section 102, 3
- Hindu Marriage Act, 1955 - Section 10, 13, 23, 28
- Penal Code, 1860 (IPC) - Section 494

Citation: AIR 2009 Guw 103 : (2010) 1 DMC 514

Hon'ble Judges: U.B. Saha, J; T. Nandakumar Singh, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

T. Nandakumar Singh, J.

Heard Mr. S. Talapatra, learned Senior Counsel assisted by Mr. D. Bhattacharjee; learned Counsel appearing for the appellant as well as Mr. P. Roy Barman, learned Counsel for the respondent.

2. This appeal u/s 28 of the Hindu Marriage Act, 1955 is directed against the judgment and order dated 25-2-2005 passed by the learned Judge, Family Court, Agartala, West Tripura in Title Suit (Divorce) No. 22 of 2001 dismissing the said Title Suit for dissolution of marriage.

3. The factual panorama, in brief, of the appellant/husband in title Suit (Divorce) No. 22 of 2001 is recapitulated hereunder:

The appellant/husband filed an application u/s 13 of the Hindu Marriage Act, 1955 (for short "Act") for dissolution of marriage between the appellant/husband and the respondent/wife by a decree of divorce on the, inter alia, grounds as laid down in Section

13(1)(ia) and (ib) of the Act in the Court of the learned District Judge, West Tripura, Agartala. The appellant/husband pleaded in the application for a decree of divorce that the appellant/husband and the respondent/wife are the Hindu by religion and marriage between them took place on 10-11-1985 in the house of the appellant/husband at Town Pratapgarh, Agartala, West Tripura by performing Hindu rites and rituals. After the marriage, they were residing in a rented house at Manu Bazar. Since after the marriage, the respondent/wife was showing her arrogance and irritated temperament even on trifling family matters. In August, 1991, the appellant/husband was transferred to Madhupur H.S. School and the respondent/wife was transferred to Konaban H.S. School and, as such, they left the rented house at Manu Bazar and began to reside in the house of the appellant/husband at Town Pratapgarh, Agartala. Both of them were performing the daily journey to their respective schools. By their wedlock, a daughter was born in the year 1987. While residing at Manu Bazar, the respondent/wife on a few Occasions became so violent on denial of her demand for sending money to her father. She assaulted the appellant/husband physically, torn his wearing garments, mosquito net etc. The appellant/husband became at a loss to manage, the respondent/wife. Though the respondent/wife had no gold ornaments and other valuables of her own at the time of her marriage, she even used to complain that some ornaments had been lost or stolen away by some one. Such cruel, abnormal, irritating and violent behaviour of the respondent/wife became more frequent while residing at Town Pratapgarh and her such behaviour put the appellant/husband's tolerance at the anvil of ordeal.

The appellant/husband further pleaded that In the year 1993, the respondent/wife was transferred to Dukli H.S. School, Madhuban and the appellant/husband continued to serve at Madhupur H.S. School till he was transferred to Durlay Narayan H.S. School in January, 2001. Sri Chiranjib Datta, an Engineer, is the brother of the respondent/wife; his wife, Smt. Samita Datta, set up a business in stationery goods at Kaman Chowmohani, Agartala at the premises belonging to the appellant/husband. The appellant/husband had to advance some loan to Sri Chiranjib Datta at the instance and pressure of the respondent/wife. The respondent/wife made heavy pressure upon the appellant/husband to pay a sum of Rs. 1,27,000/- to Smt. Samita Datta, w/o. Sri Chiranjib Datta, who would quit the premises of the appellant/husband leaving the business. The appellant/husband had to sell his share of the house at Town Pratapgarh at Rs. 1,20,000/- and after selling his share he paid Rs. 1,27,000/- to Sri Chiranjib Datta. As a result, both the appellant/husband and the respondent/wife had to live in a rented house at Ramnagar Road No. 2, Agartala as the house of the appellant/husband had been sold. Since 1993 the respondent/wife began to avoid to share the bed with the appellant/husband and since January, 1995 she started living separately from the appellant/husband. The tie of marriage has been broken down irretrievably and while residing at Ramnagar Road No. 2, the torture and violent attack of the respondent/wife upon the appellant/husband became frequent and gradually almost a matter of daily routine giving her sadistic pleasure. The appellant/husband found his wife miserable and at danger.

The appellant/husband also pleaded in the plaint that on several occasions the respondent/wife used to rebuke the appellant/husband in abusive language, broke her conch bangles and wiped out vermillion from her forehead roughly saying that she was treating the appellant/husband as, dead. The appellant/husband's elder sister, Smt. Milan Banik, was residing in the house of the appellant/husband till January, 1994 during which period the respondent/wife used to harass and used abusive languages towards her. Ultimately, his elder sister had to leave the appellant/husband in January, 1994 and she has been residing in Delhi. From Delhi she used to come to Agartala from time to time. She made all endeavour to convince the respondent/wife that she should stop her cruel treatment and behave well with the appellant/husband.

The appellant/husband further pleaded that there were several instances of physical torture upon him by the respondent/wife. In the night of January, 1999 while the appellant/husband was residing with the respondent/wife in the house of S.B. Sarkar at Ramnagar Road No. 2, she assaulted the appellant/husband physically and he could not raise his voice for fear of loss of prestige to the house owners and the neighbours. Hence, the application for dissolution of marriage on the ground mentioned in Section 13(1)(ia) of the Act, i.e. cruelty and Clause (ib) of Sub-section (1) of Section 13 of the Act, i.e. desertion.

4. The respondent/wife filed written statement to the said application for a decree of divorce. The respondent/wife in her written statement had categorically denied the allegation of assertion of the appellant/husband about the cruelty and desertion in the application. The respondent/wife categorically pleaded in the written statement that the respondent/wife was not properly maintained by the appellant/husband. The respondent/wife has been maintaining herself and their small daughter with her earning.

The respondent/wife farther pleaded in her written statement that she and the appellant/husband sailed the matrimonial boat smoothly during first 10-12 years of their marriage and trouble started when the appellant/husband got involved in an illicit relationship with one Smt. Priti Debbarma, D/o. Sri Benu Debbarma. The respondent/wife objected against such illicit relation of the appellant/husband with Smt. Priti Debbarma and she tried her best to dissuade him from maintaining¹ such extra-marital relationship. The respondent/wife further pleaded that the appellant/husband has withdrawn himself from the matrimonial home and by doing so he has committed cruelty to the respondent/wife. Such behaviour of the appellant/husband has deeply hurt the respondent/wife and her minor daughter. The appellant/husband has confessed that he was involved in extramarital affairs with Smt. Priti Debbarma in presence of Smt. Rupa Das, Smt. Anjana Roy and Smti. Sangita Bhattacharjee on many occasions. In the written statement the respondent/wife categorically pleaded that the appellant/husband could not take the advantage of his wrong.

5. The learned Trial Court after perusal of the rival contention of the parties in their respective pleadings framed as many as 4(four) issues, which are quoted below:

(A) Whether the respondent was the legally married wife of the petitioner and if so whether she used to torture continuously on the petitioner both mentally and physically?

(B) Whether the petitioner had to leave his own rented house leaving their only daughter in the custody of the wife respondent for her torture on him and also for his safety and security?

(C) Whether the petitioner is entitled to have a decree for the dissolution of his marriage with the respondent on the ground of cruelty?

(D) Whether the petitioner is entitled to any relief and if so up to what extent?

6. In support of the case, the appellant/husband adduced only one witness, i.e., he himself as P.W. No. 1. On the other hand, the respondent/wife adduced four witnesses, i.e., D.W. No. 1, Smt. Amita Datta, D.W. No. 2, Shri Nikhil Banik, D.W. No. 3, Shri Rupchand Banik and D. W. No. 4, Shri Swapan Dey.

7. D.W. No. 3, Sri Rupchand Banik, is the uncle of the appellant/husband and he deposed that the appellant/husband has deserted the respondent/wife and her minor daughter without any reason. D.W. No. 2, Sri Nikhil Banik, is the relative of the appellant/husband and he also deposed that in the month of June, 2000 he came to know that there had been trouble in the matrimonial life of the appellant/husband and the respondent/wife and that the appellant/husband has become very much indifferent to the respondent/wife and her minor daughter. He also deposed that the appellant/husband deserted the respondent/wife and their minor daughter. As stated above, the appellant/husband did not produce or examine even a single witness in order to prove his pleaded case in the application for dissolution of marriage by a decree of divorce, save and except his statement before the Court as P.W. No. 1.

8. It is well settled law in the case of civil nature that the weakness of the defence or failure to establish the title suit by them would not entitle the plaintiff to a decree. We may here recall the decision of the Apex Court in [Ramchandra Sakham Mahajan Vs. Damodar Trimbak Tanksale \(D\) and Others](#), wherein the Apex Court in Para No. 13 held that "the suit is for recovery of possession on the strength of title. Obviously, the burden is on the plaintiff to establish that title. No doubt in appreciating the case of title set up by the plaintiff, the Court is also entitled to consider the rival title set up by the defendants. But the weakness of the defence or the failure of the defendants to establish the title set up by them, would not enable the plaintiff to a decree. There cannot be any demur to these propositions."

9. It is also equally fair settled law in the case of civil nature that the plaintiff shall succeed his or her case only on proving his or her pleaded case and the burden lies on the plaintiff to establish his or her pleaded case. The Apex Court in [Anil Rishi Vs. Gurbaksh Singh](#), held that in terms of Section 102 of the Indian Evidence Act, the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a

relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same. The Apex Court is of the same view in [R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, .](#)

10. The Apex Court in the case of [Dr. N.G. Dastane Vs. Mrs. S. Dastane](#), held that in a matrimonial petition, the burden of proof lies on the petitioner. Doubtless, the burden must lie on the petitioner to establish his or case for, ordinarily, the burden lies on the party which affirms a fact, not on the party which denies it. The relevant portion of para Nos. 23 and 24 of SCC in Dr. N.G. Dastane (supra) read as follows:

23. ...First, as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the Act Doubtless, the burden must lie on the petitioner to establish his or her case for, ordinarily, the burden lies on the party which affirms" a fact, not on the party which denies it. This principle accords with commonsense as it is so much easier to prove a positive than a negative. The petitioner must therefore prove that the respondent has treated him with cruelty within the meaning of Section 10(1)(b) of the Act. But does the law require, as the High Court has held, that the petitioner must prove his case beyond a reasonable doubt? In other words, though the burden lies on the petitioner to establish the charge of cruelty, what is the standard of proof to be applied in order to judge whether the burden has been discharged?

24. The normal rule which governs civil proceedings is that a fact can be said to be established if it is proved by a preponderance of probabilities. This is for the reason that under the Evidence Act, Section 3, a fact is said to be proved when the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists. The belief regarding the existence of a fact may thus be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the Court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The Impossible is weeded out at the first stage, the improbable at the second. Within the wide range of probabilities the Court has often a difficult choice to make but it is this choice which ultimately determines where the preponderance of probabilities lies. Important Issues like those which affect the status of parties demand a closer scrutiny than those like the loan on a promissory note: "the nature and gravity of an issue necessarily determines the manner of attaining reasonable satisfaction of the truth of the issue Per Dixon, J. in Wright v. Wright (1948) 77 CLR 191; or as said by Lord Denning, "the degree of probability depends on the subject-matter. In proportion as the offence is grave, so ought the proof to be clear Bivth v. Bivth (1966) 1 AER 524, 536. But whether the issue is one of cruelty or of a loan on a pronote, the test to apply is whether on a preponderance of probabilities the relevant fact is proved. In civil cases this, normally, is the standard of proof to apply for finding whether the burden of

proof is discharged.

11. This Court being the first appellate Court and taken the considerable pain in reading the statements of the P.W. No. 1 and D.Ws. minutely for appreciation in the right direction. On such appreciation of the witness and the evidences available on record, We have no alternative except to the finding that the appellant/husband had utterly failed to prove his case for dissolution of marriage on the ground of cruelty and desertion, rather on perusal of the statement of the D.Ws., it is clear that it is the appellant/husband, who had actually deserted the respondent/wife and their minor daughter and not the respondent/wife. Therefore, we are of the firm view that the appellant/husband cannot take the advantage of his own wrong to break down his marriage. We may refer to the decisions of the Apex Court in [Chetan Dass Vs. Kamla Devi](#), and [Shyam Sunder Kohli Vs. Sushma Kohli @ Satya Devi](#), . The para Nos. 13, 14 and 19 of the SCC in Chetan Dass (supra) read as follows:

13. As observed earlier, the learned Counsel for the appellant has merely stressed for grant of relief on the ground that the marriage has completely failed and has irretrievably broken. In connection with this submission, it may be observed that it all depends on the facts and circumstances of the case as to in which case it would be appropriate to grant the relief as prayed.

14. Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective for regulating matrimonies norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission of "irretrievably broken marriage" as strait-jacket formula for grant of relief of divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.

19. In the present case, the allegations of adulterous conduct of the appellant have been found to be correct and the Courts below have recorded a finding to the same effect. In such circumstances, in our view, the provisions contained u/s 23 of the Hindu Marriage Act would be attracted and the appellant would not be allowed to take advantage of his own wrong. Let by things be not misunderstood nor any permissiveness under the law be Inferred, allowing an erring party who has been found to be so by recording of a finding of fact in judicial proceedings, that it would be quite, easy to push and drive the spouse to a corner and then brazenly take a plea of desertion on the part of the party suffering so long at the hands of the wrongdoer and walk away out of the matrimonial alliance on the ground that the marriage has broken down. Lest the institution of marriage and the, matrimonial bonds get fragile easily to be broken which may serve the purpose

most, welcome to the wrongdoer who, by hearty wished such an outcome by passing on the burden of his wrongdoing to the other party alleging her to be the deserter leading to the breaking point.

12. Para 12 of, the SCC in [Shyam Sunder Kohli Vs. Sushma Kohli @ Satya Devi](#), read, as follows:

12. On the ground of irretrievable breaks-down of marriage, the Court must not lightly dissolve a marriage. It is only in extreme circumstances that the Court may use this ground for dissolving a marriage. In this case, the respondent, at all stages and even before us, has been, ready to go back to the, appellant. It is the appellant who has refused to take the respondent back. The appellant has made baseless allegation against the respondent. He even went to the extent of filing a complaint of bigamy, u/s 494, IPC against the respondent. That complaint came to be dismissed. As stated above, the evidence shows that the respondent was forced to leave the matrimonial home. It is the appellant who has been at fault. It can hardly lie in the mouth of a party who has been at fault and who has not allowed the marriage to work to claim that the marriage should be dissolved on the ground of irretrievable breakdown. We, thus, see no substance in this contention.

13. For the reasons discussed above, we are of the firm view that the appellant/husband had utterly failed to make out any material for interfering with the impugned judgment and Order dated 25-2-2005 passed by the learned Judge, Family Court, Agartala, West Tripura in Title Suit (Divorce) No. 22 of 2001. Accordingly, the appeal is devoid of merit and the same is dismissed. The parties are directed to bear their own costs.