

(1985) 05 SC CK 0013

Supreme Court of India

Case No: Special Leave Petition (Civil) No. 2047 of 1985

Ms Jorden Diengdeh

APPELLANT

Vs

S.S. Chopra

RESPONDENT

Date of Decision: May 10, 1985

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 125
- Dissolution of Muslim Marriages Act, 1939 - Section 2
- Divorce Act, 1869 - Section 10, 18, 19, 22
- Hindu Marriage Act, 1955 - Section 13(1A), 13B

Citation: AIR 1985 SC 935 : (1985) 1 SCALE 952 : (1985) 3 SCC 62 : (1985) 1 SCR 704 Supp : (1986) 1 UJ 247

Hon'ble Judges: R. B. Mishra, J; O. Chinnappa Reddy, J

Bench: Division Bench

Advocate: Mohinder Narain, S.S. Jauhar and Zubeda Begum, for the Appellant;

Final Decision: Allowed

Judgement

1. It was just the other day that a Constitution Bench of this Court had to emphasise the urgency of infusing life into Article 44 of the Constitution which provides that "The State shall endeavour to secure for the citizens a uniform civil code through out the territory of India." The present case is yet another which focuses attention on the immediate and compulsive need for a uniform civil code. The totally unsatisfactory state of affairs consequent on the lack of a uniform civil code is exposed by the facts of the present case. Before mentioning the facts of the case, we might as well refer to the observations of Chandrachud, C.J., in the recent case decided by the Constitution Bench (Mohd Ahmed Khan v. Shah Bano Begum and Ors.)

There is no evidence of any official activity for framing a common civil code for the country.... A common Civil Code will help the case of national integration by

removing disparate loyalties to laws which have conflicting ideologies. No community is likely to bell the cat by making gratuitous concessions on this issue. It is the State which is charged with the duty of securing a uniform civil code for the citizens of the country and, unquestionably, it has the legislative competence to do so. A counsel in the case whispered, somewhat audibly, that legislative competence is one thing, the political courage to use that competence is quite another. We understand the difficulties involved in bringing persons of different faiths and persuasions on a common platform. But, a beginning has to be made if the Constitution is to have any meaning. Inevitably, the role of the reformer has to be assumed by the courts because, it is beyond the endurance of sensitive minds to allow injustice to be suffered when it is so palpable. But piecemeal attempts of courts to bridge the gap between personal laws cannot take the place of a common civil code. Justice to ail is a far more satisfactory way of dispensing justice from case to case.

2. The facts of the case are somewhat novel and peculiar. The wife, who is the petitioner before us claims to belong to the "Khasi Tribe" of Meghalaya, who was born and brought up as a Presbyterian Christian at Shillong. She is now a member of the Indian Foreign Service. The husband is a Sikh. They were married under the Indian Christian Marriage Act, 1872. The marriage was performed on October 14, 1975. The present petition for declaration of nullity of marriage or judicial separation was filed in 1980 under Sections 18, 19 and 20 of the Indian Divorce Act, 1869. The prayer for declaration of nullity of marriage was rejected by a learned single judge of the High Court, but a decree for judicial separation was granted on the ground of cruelty. On appeal, a Division Bench of the High Court affirmed the judgment of the learned single judge. The wife has filed this petition for special leave to appeal against the judgment of the High Court. She seeks a declaration of nullity of marriage. The ground on which the declaration was sought in the courts below and the ground on which it is now sought is the impotence of the husband in that though the husband is of achieving erection and penetration, he ejaculates prematurely before the wife has an orgasm, leaving the wife totally unsatisfied and frustrated. At this stage, we are not concerned with the question how far the wife has been able to establish her case. The real problem now is that the marriage appears to have broken down irretrievably. Yet if the findings of the High Court stand, there is no way out for the couple, they will continue to be tied to each other since neither mutual consent nor irretrievable break down of marriage is a ground for divorce, under the Indian Divorce Act. Section 10 of the Indian Divorce Act prescribes the grounds on which a husband or wife may petition for dissolution of marriage. The ground on which a husband may obtain a decree for dissolution of marriage is the adultery of the wife. The ground on which a wife may obtain a decree for dissolution of marriage are change of religion from Christianity to another religion and marriage with another woman, incestuous adultery, bigamy with adultery, marriage with another woman with adultery, rape, sodomy or

bastiality, adultery coupled with cruelty, adultery coupled with desertion for more than two years. It must be noted that the Indian Divorce Act applies only to cases where the petitioner or respondent professes the Christian religion. Section 19 provides that a marriage may be declared null and void on the ground ♦

(1) that the respondent was impotent at the time of the institution of the suit;

(2) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity;

(3) that either party was a lunatic or idiot at the time of the marriage;

(4) that the former husband or wife of either party was living at the time of the marriage and the marriage with such former husband or wife was then in force.

Section 22 provides for judicial aspersion at the instance of either husband or wife on the ground of adultery, cruelty or desertions for two years or upwards.

3. The provisions of the Divorce Act may now be compared with the provisions of other enactments and laws which provide for decrees of nullity of marriage, divorce and judicial separation. Under the Hindu Marriage Act, Section 10 provides for judicial separation. It enables either party to a marriage to seek judicial separation on any of the grounds specified in Section 13(1) and in the case of a wife also on any of the grounds specified in Sub-section 2 of Section 13. Section 11 provides for a declaration that a marriage is a nullity if it contravene as any one of the conditions specified in Clauses (I), (iv) and (v) of Section 5. Section 5(i) requires that neither party has a spouse living at the time of the marriage. Section 5(iv) requires that the parties are not within the degrees of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two. Section 5(v) requires that the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two. Section 12 further provides that a marriage is voidable and may be annulled if (a) a marriage has not been consummated owing to the impotence of the respondent; or (b) a marriage is in contravention of the conditions specified in Section 5(ii) (marriage without valid consent); or (c) the consent of the guardian, where required, u/s 5 was obtained by force or fraud; or (d) the respondent was, at the time of the marriage was pregnant by some person other than the petitioner. Section 13(1) enumerates the grounds for the dissolution of a marriage on the petition of a husband or wife. It provides that a marriage may be dissolved by a decree of divorce if the other party ♦

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse, or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty, or

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

(ii) has ceased to be Hindu by conversion to another religion, or

(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

(EXPLANATION omitted for the present purpose)

(iv) has, been suffering from a virulent and incurable form of leprosy, or

(v) has been suffering from venereal disease in a communicable form, or

(vi) has renounced the world by entering any religious order, or

(vii) has not been heard of as being alive for a period of seven years or more by these persons who would naturally have heard of it, had that party been alive.

(EXPLANATION omitted for the present purpose)

Section 13(1-A) provides◆

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after passing of a decree for judicial separation in a proceeding to which they were parties, or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of the decree for restitution of conjugal rights in a proceeding to which they were parties.

Section 13(2) provides◆

(2) A wife may also present a petition for the dissolution of her marriage by a decree of divorce on the ground◆

(i) in the case of any marriage solemnized before the commencement of this Act, that the husband had married again before such commencement or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner, or

Provided that in either case the other wife is alive at the time of presentation of the petition, or

(i) that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality, or

(iii) that in a suit u/s 18 of the Hindu Adoptions and Maintenance Act, 1956, or in a proceeding u/s 125 of the CrPC, 1973 (or under the corresponding Section 488 of the CrPC, 1898), a decree or order, as the case may be, has been passed against the

husband awarding maintenance to the wife notwithstanding that she was living apart and that since the passing of such decree or order, cohabitation between the parties has not been resumed for one year or upwards, or

(iv) that her marriage (whether consummated or not) was solemnized before she attained the age of fifteen years and she has repudiated the marriage after attaining that age but before attaining the age of eighteen years."

Section 13-A provides that on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in Section 13(i)(ii)(vi) and (vii), the court may, if it considers it just so to do, having regard to the circumstances of the case, pass a decree for judicial separation. Section 13-B further provides that a petition for dissolution of marriage by a decree of divorce may be presented to the court by both the parties to the marriage together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have mutually agreed that the marriage should be dissolved. If the provisions of the Hindu Marriage Act are compared with the provisions of the Indian Divorce Act, it will be seen that apart from the total lack of uniformity of grounds on which decrees of nullity of marriage, divorce or judicial separation may be obtained under the two Acts, the Hindu Marriage Act contains a special provision for a joint application by the husband and wife for the grant of a decree of divorce by mutual consent whereas the Indian Divorce Act contains no similar provision. Another very important difference between the two Acts is that under the Hindu Marriage Act, a decree for judicial separation may be followed by a decree for the dissolution of marriage on the lapse of one year or upwards from the date of the passing of a decree for judicial if meanwhile there has been no resumption of cohabitation. There is no corresponding provision under the Indian Divorce Act and a person obtaining a decree for judicial separation will have to remain content with that decree and cannot seek to follow it up with a decree of divorce, after the lapse of any period of time. We may also notice that irretrievable break down of marriage is yet no ground for dissolution of marriage under the Hindu Marriage Act also, though the principle appear to have been recognised in Section 13(1-A) and Section 13(B).

4. We may now have a look at the provisions of the Special Marriage Act, 1954 which applies only to marriages solemnized under that Act. Section 23 of the Act enables the husband or the wife to present a petition for judicial separation (a) on any of the grounds specified in Sub-section (1) and Sub-section (1-A) of Section 27 on which a petition for divorce might have been presented; or (b) on the ground of failure to comply with a decree for restitution of conjugal rights. Section 24 declares that, a marriage may be declared nullity if (i) any of the conditions specified in Clause (a), (b), (c) and (d) of Section 4 has not been fulfilled; or (ii) the respondent was impotent at the time of the marriage and at the time of the institution of the suit. We may

notice here that Section 4 Clauses (a), (b), (c), (d) and (e) provide that neither party has been subject to recurrent attacks of insanity or epilepsy, that the male has completed 21 years of age and the female 18 years of age and that the parties are not within the degrees of prohibited marriage. Section 25 declares that a marriage shall voidable and may be annulled by a decree of nullity if,-

(i) the marriage has not been consummated owing to the with full refusal of the respondent to consummate the marriage; or

(ii) the respondent was at the time of the marriage pregnant by some person other than the petitioner; or

(iii) the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872."

(The provisos have been omitted as they are not necessary for the purposes of this case)

Section 27 enables either the husband or the wife to seek a decree of divorce on the ground that the respondent-

(a) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(b) has since the solemnization of the marriage treated the petitioner with two years immediately preceding the presentation of the petition; or

(c) is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code;

(d) has since the solemnization of the marriage treated the petitioner with cruelty; or

(e) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.

(Explanation omitted as it is not necessary.)

(f) has been suffering from venereal disease in a communicable form; or

(g) has been suffering from leprosy, the disease not having been contracted from the petitioner; or

(h) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent has been alive.

(Explanation omitted as it is not necessary)

Section 27(1 A) enables a wife to present a petition for divorce on the ground that her husband has since the marriage been guilty of rape, sodomy or bestiality, or

that an order for maintenance has been made against the husband and that cohabitation has not been resumed for one year or upwards after the making of the order. Section 27(2) further provides that a decree for divorce may be presented on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation. Section 28 provides for the passing of a decree of divorce on the presentation of a petition by both the parties together on the ground that they have been living separately for a period of one year or more, that they have not been able to live together and that they have actually agreed that the marriage should be dissolved. It will be seen that the Special Marriage Act like the Hindu Marriage Act contains provisions for a decree for judicial separation being followed up by a decree of divorce if there has been no resumption of cohabitation for a year or more and also for a decree of divorce by mutual consent. Here again, it will be seen that the principle of irretrievable break down of marriage seems to be accepted on principle, but is not specifically made a ground of divorce.

5. Under the Parsi Marriage and Divorce Act, 1936, Section 30 provides that a marriage may be declared to be null and void if consummation of a marriage is from natural causes impossible. Section 31 provides for the dissolution of a marriage if a husband or wife has continuously been absent for a period of seven years and has not been heard of as being alive within that time. Section 32 provides grounds for divorce :

(a) that the marriage has not been consummated within one year after its solemnization owing to the with full refusal of the defendant to consummate it;

(b) that the defendant at the time of the marriage was of unsound mind and has been habitually so up to the date of the suit; (Proviso has been omitted)

(c) that the defendant was at the time of marriage pregnant by some person other than the plaintiff;

(Proviso has been omitted)

(d) that the defendant has since the marriage committed adultery or fornication or bigamy or rape or an unnatural offence;

(Proviso has been omitted)

(e) that the defendant has since the marriage voluntarily caused grievous hurt to the plaintiff or has infected the plaintiff with venereal disease, or, where the defendant is the husband, has compelled the wife to submit herself to prostitution;

(The proviso has been omitted)

(f) that the defendant is undergoing a sentence of imprisonment for seven years or more for an offence as defined in the Indian Penal Code;

(The proviso has been omitted)

(g) that the defendant the deserted the plaintiff for at least three years;

(h) that a decree or order for judicial separation has been passed against the defendant, or an order has been passed against the defendant by a Magistrate awarding separate maintenance to the plaintiff, and the parties have not had marital intercourse for three years or more since such decree or order;

(i) that the defendant has failed to comply with a decree for restitution of conjugal rights for a year or more; and

(j) that the defendant has ceased to be a Parsi."

(Proviso has been omitted)

Section 34 provides for judicial separation on any of the grounds on which divorce could be sought; or on the ground that the defendant has been guilty of such cruelty to him or her or to her children or has used such personal violence, or has behaved in such a way as to render it in the judgment of the court improper to compel him or her to live with the defendant. It will be noticed here that under the Parsi Marriage and Divorce Act also, mutual consent and irretrievable break down of marriage are not grounds of divorce though a decree for judicial separation may be followed by a decree of divorce if the parties have not had marital intercourse for three years or more since such decree or order.

6. Under the Mohammadan Law, a Muslim husband may divorce his wife by the pronouncement of talaq. A Muslim wife may after the passing of the dissolution of Muslim Marriages Act, 1939, obtain a decree for a dissolution of a marriage on one of the following grounds :

(i) that the whereabouts of the husband have not been known for a period of four years;

(ii) that the husband has neglected or has failed to provide for her maintenance for a period of two years;

(iii) that the husband has been sentenced to imprisonment for a period of seven years or upwards;

(iv) that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years;

(v) that the husband was impotent at the time of the marriage and continues to be so;

(vi) that the husband has been insane for a period of two years or is suffering from leprosy or a virulent venereal disease;

(vii) that she, having been given in marriage by her father or other guardian before she attained the age of fifteen years, repudiated the marriage before attaining the age of eighteen years

(Proviso has been omitted as it is not necessary)

(viii) that the husband treats her with cruelty that is to say❖

(a) habitually assaults her or makes her life miserable by cruelty of conduct even if such conduct does not amount to physical illtreatment, or

(b) associates with women of evil repute or leads an infamous life, or

(c) attempts to force her to lead an immoral life, or

(d) disposes of her property or prevents her exercising her legal rights over it, or

(e) obstructs her in the observance of her religious profession or practice, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran;

(ix) on any other ground which is recognised as valid for the dissolution of marriages under Muslim Law.

(The proviso has been omitted as it is not necessary in the present case).

We may add that under strict Hanafi Law, there was no provision enabling a Muslim women to obtain a decree dissolving her marriage on the failure of the husband to maintain her or on his deserting her or maltreating her and it was the absence of such a provision entailing "inspeakable misery in innumerable Muslim women" that was responsible for the dissolution of the Muslims Marriages Act, 1939. (See Statements of Objects and Reasons of that Act). If the legislature could so alter the Hanafi Law, we fail to understand the hallabalcoo about the recent judgment of this Court in the case of Mohd. Ahmed Khan v. Shah Bano Begum and Ors. interpreting the provisions of Section 125 of the Criminial Procedure Code and the Muslim Law. It is also necessary to add that Mehamedan Law provides for a decree for divorce known as Khula and mubara" at by agreement of parties.

7. It is thus seen that the law relating to judicial separation, divorce and nullity of marriage is far, far from uniform. Surely the time has now come for a complete reform of the law of marriage and make a uniform law applicable to all people irrespective of religion or caste. It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases. The case before us is an illustration of a case where the parties are bound together by a marital tie which is better untied. There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of the legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law

for a way out of the unhappy situations in which couples like the present have find themselves in. We direct that a copy of this order may be forwarded to the Ministry of Law and Justice for such action as they may deem fit to take. In the meanwhile, let notice go to the respondents.