Smti Ananta Vs Ramchander

Court: Calcutta High Court

Date of Decision: Nov. 24, 2008

Acts Referred: Hindu Marriage Act, 1955 â€" Section 13, 13(1)
Penal Code, 1860 (IPC) â€" Section 498A

Citation: AIR 2009 Cal 167

Hon'ble Judges: Dipankar Datta, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: K.M.B. Jayapal, for the Appellant; Anjili Nag, for the Respondent

Final Decision: Allowed

Judgement

Ashim Kumar Banerjee, J.
I have read the well versed judgment written by my esteemed brother, I am in full agreement with the

conclusion My Lord has arrived at. To supplement, I however wish to add few lines in this regard.

2. His Lordship referred to the conciliation proceeding we had in our Chamber. We intentionally held the conciliation proceeding in presence of the

minor child who was accompanying his father. From the demeanour of the child I cannot resist my temptation to observe that My Lord is correct

to the extent that the child was under the influence of his father. The child was about 6-7 years when he was separated from his mother, according

to the respondent. He deposed before the learned District Judge when he was 11 years. Now, he is 12 years. The factum of influence, in my view,

is not unnatural because of his tender age and long dissociation with his mother.

3. As has been observed by My Lord, the learned District Judge placed heavy reliance on the evidence of the minor child while coming to the

conclusion that the appellant was responsible for mental cruelty being inflicted on her husband. My Lord has analyzed the evidence in detail. I need

not repeat the same. My endeavour is to find out whether the evidence available on record could support the allegation of mental cruelty.

4. According to American Jurisprudence term ""mental cruelty"" means a course of unprovoked conduct towards one''s spouse which causes

embarrassment, humiliation and anguish so as to render the spouse''s life miserable and unendurable.

5. The Apex Court in the case of A. Jayachandra Vs. Aneel Kaur, observed, ""To constitute cruelty, the conduct complained of should be ""grave

and weighty"" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be

something more serious than ""ordinary wear and tear of married life"". The conduct, taking into consideration the circumstances and background

has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be

considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions,

customs and traditions, it is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute

cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent

due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the

complaining spouse to secure divorce.

6. In this backdrop, I am of the view that there cannot be any straightjacket formula wherein available evidence could be put to test to have the

result whether it would amount to mental cruelty entitling the complaining spouse to get decree of divorce.

7. In the case in hand, we find that according to the husband and the child the lady was ill-tempered, in the habit of quarrelling with landlords,

abusing husband and the son by calling them ""dhobi"" and ""dhobi ka aulad"" respectively, cooking food for herself only, insisting the husband to live

separately leaving his parents. If we consider these evidences on their face value, we would find that the lady was selfish in nature, wanted to have

a nuclear family. She was also ill-tempered. Do we not find several women in our society having all these shortcomings? If we grant divorce to their

respective husbands our society would break down immediately. Marital bond, in my view, is not a glass pane or a fragile object which could be

broken considering the wear and tear of the marital life. It is such that a man and a woman after considering each and every aspect of life and after

being satisfied that they would be in a position to live jointly for ever enter in a marital bond forgetting their respective past. This tradition is

continuing for decades after decades, ages after ages. A person might be ill-tempered by nature or because of physical ailments. Once both of

them enter into marital bond it is their solemn duty to maintain the same unless it is irretrievable that it should be broken. If one is ill tempered it is a

duty of the other to keep him or her cool. To maintain a relationship both of them would have to sacrifice by sacrificing their personal wish or

choice and by adopting other''s wish or choice of his or her own. This is how a marital bond is strengthened. If the Court of law encourages

breaking down of relationship on trifle issues sooner or later our society would face a disastrous situation.

8. In the case in hand, according to the respondent husband the appellant left her marital home five years ago in 2003. There might be repentance

on her side. She might have amended herself. We asked the respondent to go for conciliation by spending the week end at a suitable place in a

congenial atmosphere. The appellant agreed, however, the respondent did not. He kept mum before us, however, did not adhere to our request.

Both the parties are educated. They are working under the Administration. There is no allegation of physical violence from either side. We failed to

appreciate as to what damage could have been caused to the respondent husband while trying for a conciliation in deference to the desire of the

Court. This would only show that the respondent is bent upon to sustain the order of divorce as he is not interested in maintaining the marital bond.

If we uphold the decree of divorce it would be a premium to his ill-will and would carry a wrong signal to the society at large. I, therefore, fully

agree with My Lord when My Lord allows the appeal by setting aside the decree of divorce.

Dipankar Datta, J.

9. The respondent/husband instituted a suit in the Court of the District Judge, Andaman and Nicobar Islands against the appellant/wife u/s 13 of the

Hindu Marriage Act praying for a decree of divorce to dissolve their marriage. The suit was decreed. Feeling aggrieved thereby, the wife is in

appeal before this Court.

10. This Court heard the spouses in chamber for exploring whether any reconciliation is possible or not. While the appellant was agreeable to

return forgetting past incidents, the respondent did not agree. The Court then requested the respondent to have a conversation with the appellant

outside the Court during the weekend so that if the differences are sorted out, the marital bond could be saved. While before the Court the

respondent agreed, it has since been informed by Mr. Jayapal, learned Counsel for the appellant that the respondent did not contact her. Thus the

endeavour of the Court to bring about a reconciliation failed leaving no other option but to decide the appeal on merits.

11. Mr. Jayapal invited the attention of the Court to the pleadings and the evidence on record and contended that the learned trial Court failed to

appreciate the same in the proper perspective and rendered a judgment which cannot be sustained in law. Over reliance placed on the evidence of

P.W. 2, being the child of the parties, was criticized on the ground that the child"s competence to depose had not been duly verified and therefore

the same ought not to have been acted upon. According to him, the child had been tutored. Further, he contended that the incidents complained of

in the plaint were not such so as to warrant a decree of divorce on the finding that the appellant had treated the respondent with cruelty. He invited

the Court''s attention to paragraph 101 of the Apex Court decision reported in Samar Ghosh Vs. Jaya Ghosh, , Samar Ghosh v. Jaya Ghosh and

contended that cruelty cannot be said to have been established. So far as the ground of desertion is concerned, he submitted that the learned Trial

Court erred in law in not duly considering the evidence of the defence witnesses and rejected the same without cogent reason. He urged the Court

to set aside the impugned judgment and decree.

12. Per contra, Mrs. Nag, learned Counsel appearing for the respondent, contended that the impugned Judgment did not suffer from any legal

infirmity warranting interference. She stressed that in the present case the child was an independent disinterested witness who deposed from the

core of his heart and the learned trial Court was justified on placing reliance on his evidence. She also placed reliance on the decision of Samar

Ghosh (supra) to buttress her contention that the relation between the spouses was estranged and their marriage having broken down irretrievably,

the decree of divorce granted by the learned Trial Court ought not to be upset. She prayed for dismissal of the appeal.

13. Before this Court proceeds to examine the contentious issues, it would be worthwhile to take note of paragraph 101 of the decision in Samar

Ghosh (supra). It reads thus:

101. No uniform standard can ever by laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which

may be relevant in dealing with the cases of ""mental cruelty"". The instances indicated in the succeeding paragraphs are only illustrative and not

exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain agony and suffering as would not make possible for the parties to

live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party

cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may

reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a

long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health, of the other spouse. The treatment

complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury

to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset

may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of

divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct

must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent what because of the acts and behaviour of a

spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge, of his wife and

similarly, if the wife undergoes tubectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of

the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may

amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The

marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of

marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

14. Keeping in mind the instances extracted supra, the respective claims and the judgment under appeal may now be considered.

15. The respondent founded his claim on the grounds that mental cruelty was perpetrated by the appellant on him and that she had described him

and the minor child, born in their wedlock, for more than two years. The respondent, inter alia, alleged in his petition that immediately after the

marriage had been solemnized on 2nd March, 1994, the appellant insisted for a nuclear family showing dislike towards the joint family of the

respondent; that she frequently shouted and abused him in front of the members of his joint family; that since her demand for a separate house was

not accepted by him, she lodged a complaint u/s 498A of the Indian Penal Code, which was later on withdrawn by her realizing that it was she

who was at fault; that she had also lodged a complaint before the Women Cell and on being summoned, he had stated the entire facts whereupon

no further action was initiated; that because of the constant torturing which was inflicted on the members of the joint family by her, he had to

arrange for a separate accommodation, that she constantly abused him by calling him ""Dhobi"" and the minor son was similarly abused and was

called by her ""Dhobi ka aulad""; that because of her rude behaviour with the respective landlords and neighbours, he had to shift residence on a

number of occasions; that she refused to perform any household works and did not take proper care of the minor child for which he had to bring

food for the child from outside; that ultimately in the month of March, 2003, she left her matrimonial house and went to her parental house and did

not return since then; and that she had never behaved properly with the husband nor had she been a good mother for the child. It was further

alleged that the conduct and temper of the appellant created reasonable apprehension in the mind of the respondent that it would be unsafe for him

to live with her in future since she was frequently causing mental torture and harassment to him. Since the appellant had caused a high degree of

mental cruelty on the respondent and had even deserted him and living separately for more than two years, a decree of divorce was prayed for u/s

13(1)(ia) and 13(1)(ib) of the Act dissolving the marriage solemnized between the parties on 2nd March, 2004.

16. The suit was contested by the appellant by filing her written statement wherein she denied and disputed the material allegations contained in the

plaint. She asserted that she had never behaved improperly, disgracefully or irresponsibly, as wrongly alleged. It was alleged by her that since her

father was working as Chowkidar, the family members of the respondent were ill disposed towards her and that even grumbled for non-payment

of dowry by her family for the respondent, who was an Engineer. She also alleged that she withdrew the complaint u/s 498-A of the Code

considering her future and on being persuaded by her parents. She asserted that she took good care of her child and the question of inflicting

torture either on the respondent or on the child did not at all arise. She also leveled a very grave allegation that the respondent was involved in an

extra marital affair with a lady who was working under him. Whenever she confronted him in this respect, he raised his voice and shouted and

abused her and created a big scene and that he had made up his mind to live with that lady once the marriage between him and her is dissolved.

She accordingly, prayed that the suit should be dismissed.

17. In support of the plaint case, the respondent examined himself, the minor child and a servant whereas apart from the appellant who deposed In

defence, four other defence witnesses adduced evidence for her.

18. The suit went to trial upon framing of the following issues:

1. Has the petitioner any cause of action to file this application seeking for divorce?

2. Whether the ground taken by the petitioner are valid to provide remedy as sought for?

3.Whether the lady was treated with proper honour and dignity throughout her married life?

4. Whether the lady had/has hatred feelings towards her husband?

5. Whether the desertion of the lady was compulsion on her part?

6. Is the petitioner entitled to the relief as prayed for in the petition?

19. Although no issue was framed on the point of cruelty of the wife towards the husband, the learned trial Court considered issues 3, 4 and 5 to

cover the issue of cruelty and, accordingly proceeded to decide the same. It is noticed from the impugned judgment that issue No. 5 related to

alleged desertion and was considered by the Court separately. Printing of the figure ''5'' along with issues 3 and 4 appears to be a minor slip on

which nothing turns in favour of either party.

20. The husband alleged that frequent shifting of residence due to the quarrels the appellant had with the respective landlords and the neighbours,

which the appellant denied. Accordingly to her, shifting was necessitated once because the respondent desired so and on two other occasions due

to increase in rent demanded by the landlord and absence of sufficient quantity of water in the rented premises. Shifting of residential

accommodation too frequently was considered by the learned trial Court to be the consequence of hostile conduct of the appellant which

corroborated the case of the respondent that she compelled him to match her desire. The finding in this behalf does not appear to be sound in the

absence of any evidence from any of the various landlords and neighbours of the husband corroborating his version.

21. The evidence of the child was heavily relied on by the learned Trial Court to conclude that the appellant had often misbehaved with the

respondent and the child by calling the respondent ""Dhobi"" and the child ""Dhobi ka aulad"" and such utterances had adverse effect on both the

respondent and the minor child. Although it is the plaint case that the wife used to abuse the respondent by calling him ""Dhobi"", from the evidence

of the respondent it is found that it was not a fact that she used to impeach him by saying ""Dhobi"". Even if the version of the child that the wife used

to call him ""Dhobi ka aulad"" is to be accepted, in the considered view of this Court such utterance cannot be construed as one which would clinch

the issue in favour of the husband. When a parent finds his child t4ot behaving properly, to discipline him and" to ensure his proper behaviour,

scolding is the common reaction and if necessary, imposition of punishment is also resorted to. However, abusing one"s own child for the same

purpose may not be proper. The expletives used by the appellant calling the child ""Dhobi ka aulad"" by no means is proper, yet by itself would not

warrant a finding that the same amounts to such degree of cruelty that based thereon the respondent"s life became miserable and hence the marital

tie has to be snapped. Abusing one"s own child in the manner as deposed by the child may expose the intemperate behaviour or lack of culture of

the appellant but without there being some further element of treating the respondent with sustained course of cruelty intended to torture him that he

suffered acute mental agony and pain, the Court would not be justified in holding such an instance to be sufficient to dissolve a marriage. The

learned Trial Court ought not to have based the impugned judgment relying on this factual aspect.

22. The next allegation of the child which found favour of the Trial Court is that the appellant used to cook food for her own but was reluctant to

cook for the respondent and the child for which food had to be brought by the respondent from outside, thus amounting to mental cruelty. It

appears from paragraph 19 of the plaint that no allegation was levelled by the respondent that the appellant only cooked food for herself without

caring for the child and him. On the contrary, the allegation was to the effect that the appellant was reluctant to do any household works. In

paragraph 17 of the affidavit evidence in chief, the respondent did not allege that the appellant used to cook food for her only. Her reluctance to do

any household works, even if accepted, without anything more, on the face of the fact that she was also a working lady would not justify the

conclusion that the same amounted to cruel behaviour warranting a decree of divorce. The evidence of the child in this respect is therefore

unworthy of credence of the child in this respect is therefore unworthy of credence and paragraph 29 of the decision in Samar Ghose (supra)

would have no application here.

23. The learned Trial Court also appears to have been impressed by the evidence of the child when he objected to the appellant wanting to live

with him and his father. The child may have been deprived of care and affection which a non-working mother would have given to her child in

normal circumstances. Being a working mother, she may not have enough time to spare for her child resulting in a feeling of not being cared for and

even hatred towards her. Any expression of the child emanating from a sense of hatred towards his mother is due to incompatibility which is an

attitude problem and could have been solved. Being a child of tender years, he is yet to understand the significance of ""Maa"". The liking which the

child may have for his father may not be comparable with that of the appellant because of his incompatibility but this again by itself would not tilt the

balance in favour of the respondent since in a proceeding for divorce, it is the nature of cruelty inflicted on the spouse that is relevant and material

and the respondent failed in establishing that the present case is covered by the instances enumerated in Clauses (i), (ii) and (x) of paragraph 101

of the decision in Samar Ghosh (supra).

24. Reliance placed by the learned Trial Court on the evidence of the child appears to be misplaced. The child was born in January, 1996.

According to the plaint case, the appellant deserted the husband in 2003. The child was then only about 7 years old. His deposition was recorded

in September, 2007. By that time, he was 11 years old. A child would not ordinarily lie. But being of tender age, the likelihood of he being tutored

cannot be ruled out especially when he had been residing with his father since the alleged separation in 2003. Quite apart, it is unlikely that a child

of 11 years would remember every minute detail of his early life that he would not be inclined to have his mother stay with him or his father.

Whether the marriage had irretrievably broken down beyond repair is a question which has to be ensured having regard to the facts of the

particular case. But the evidence on record would certainly not justify a decree of divorce particularly when the, facts reveal situations covered by

Clause (ix) of paragraph 101 of the decision in samar Ghosh (supra).

25. The further conclusion drawn by the learned trial Court that institution of a criminal case u/s 498-A of the Indian Penal Code by the wife and its

withdrawal had an adverse impact upon the mind of the husband has also failed to impress us on the face of the defence, version that the parties

had arrived at a compromise, which was not disturbed in cross-examination, and not that the criminal case was meritless. Also the evidence of the

mother of the wife to the extent referred to the impugned judgment cannot be said to be adequate proof of the allegation that the complaint was

based on false accusation. True it is that filing of criminal complaint containing false and baseless allegations may disturb the conjugal life of a

couple and may amount to creating such anguish that the same adversely affects the mental health of the husband and thereby may, in an

appropriate case, be a ground for seeking divorce. However, the very fact that the respondent continued to live with the appellant even after

withdrawal of the criminal complaint is sufficient to hold that such filing of complaint may have been an aberration on the part of the appellant which

stood condoned by the respondent. Although the date of filing of the criminal complaint by the appellant u/s 498-A of the Indian Penal Code has

not been mentioned in the plaint, from the sequence of narration of events therein it appears to have been filed prior to the birth of the child. The

passage of time after such withdrawal till date of alleged separation of 2003, more or less seven years, is a relevant factor which appears to have

been overlooked by the learned Trial Court. The findings that the respondent did not condone such act of the appellant is based on erroneous

appreciation of facts.

26. The final ground on which the learned trial Court based its judgment allowing the petition for divorce on the ground of cruelty is that the

appellant had utterly failed to prove that the respondent had been involved in an extramarital affair, and this allegation had an adverse impact on the

conjugal life. It considered the status of the respondent and the said lady (a daily rated mazdoor) and returned a finding that the allegation was not

founded on any reasonably acceptable evidence, and thus the allegation was unfounded. This Court is unable to be ad idem on this score. The

appellant had mentioned the name of the lady with whom the respondent allegedly was having an affair. Though the respondent admitted that the

lady was working with him, the allegation that he was having an affair with her was denied. If one is involved in an extra-marital affair, which is a

social crime, it would hardly be an open affair and in most cases be a clandestine one. It would be difficult for a wife to prove such allegation by

adducing witnesses. Mere failure of the wife in such a case to prove her allegation ought not to have weighed in the mind of the learned Trial Court

in decreeing the suit and thereby putting an end to a long standing relationship of almost fourteen years.

27. For the reasons aforesaid and on analysis and evaluation of the entire evidence, we are unable to agree with the learned trial Court that the

ground of mental cruelty had duly been established by the respondent.

28. Turning now to the ground of desertion, we find that the learned trial Court did not agree with the submission advanced on behalf of the

appellant that the D.Ws. 2, 3 and 4 had seen the spouses together even during 2005, and that their version stood undisturbed during cross-

examination. It proceeded to record that, I failed to agree with the submission, because by some way or other that contention of those witnesses

was controverted in cross-examination"". On what score the evidence of D.Ws. 2, 3 and 4 was not found reliable, however, has not been indicated

with any degree of clarity in the impugned judgment. Having perused the evidence of the said witnesses, this Court does not find that the evidence

of the said witnesses was unworthy of credence.

29. The learned Trial Court, therefore, committed an error of law in not appreciating the evidence of the D.Ws. 2, 3 and 4 in the proper

perspective which has the effect of vitiating the judgment under appeal.

30. The evidence on which the ground of desertion has been found to be proved is that of the child. The statement made by the child that the

appellant voluntarily left his father''s house in the year 2003 although has weighed in the mind of the learned Trial court, however, has not inspired

the confidence of this Court. A child of seven years is not so mentally developed so as to understand whether leaving the house by his mother was

voluntary or not, particularly when he was not present in the house when she left the house which he noticed after returning from school. It is also

impossible for such a child to acquire any knowledge at the age of seven years that it is his experience that his father was affectionate to his mother.

Although we learned Trial Court has been impressed by the evidence of the child as one coming from the heart and ruled out that he was not a

tutored witness, this Court is unable to share the same view. Evidence of a child witness has to be scrutinized carefully. A child witness is prone to

be influenced by his elders and in a case of the present nature where the appellant being a working lady had to detach herself from the family for

official reasons, it is quite natural that being in the company of the father he may develop a predisposition of giving a version favourable to him.

31. This Court is of the considered view that the learned Trial Court placed too much reliance on the evidence of the child although the same did

not so deserve. A marital bond between a couple is a sacred one which ought to be severed only on clear establishment of cruelty of such a nature

that the life of one of the spouses becomes miserable and not worth living together. The conduct of the appellant that had been complained of

appears to be not so grave and weighty that it can be treated to be more serious than ordinary wear and tear of married life. The learned Trial

Court was not justified in decreeing the suit by dissolving the marriage between the appellant and the respondent on the state of the evidence

adduced before it.

32. The appeal therefore succeeds and is allowed. The impugned judgment and decree stands set aside. The suit is dismissed.

33. Parties shall bear their own costs.