

(1968) 08 CAL CK 0001**Calcutta High Court****Case No:** None

Leelabati Pakhira

APPELLANT

Vs

Kashinath Pakhira

RESPONDENT

Date of Decision: Aug. 14, 1968**Acts Referred:**

- Evidence Act, 1872 - Section 112
- Hindu Marriage Act, 1955 - Section 13, 23

Citation: 73 CWN 19**Hon'ble Judges:** S.K. Datta, J; Bijayesh Mukherji, J**Bench:** Division Bench**Advocate:** Jyotirmoyee Nag and Miss Monjuli Sen Gupta, for the Appellant; Satyendra Nath Ganguly, for the Respondent**Final Decision:** Allowed**Judgement**

Bijayesh Mukherji, J.

This is an appeal by the wife Leelabati Pakhira against whom her husband Kashinath Pakhira, now the Respondent before us, has obtained a decree of divorce in the court of the District Judge, Howrah, u/s 13 of the Hindu Marriage Act, 15 of 1955.

2. The decree under appeal is rested on a specific ground: that the Appellant, the wife, has been living in adultery with one Lakshmi Kanta, who however, does not figure as a co-Respondent to the husband's petition for divorce filed in the court below on September 28, 1964.

3. After having heard Mrs. Nag, the learned Advocate appearing for the Appellant and Mr. Ganguly, the learned Advocate appearing for the Respondent, and after having considered the whole of the evidence on our own, we are satisfied that the reasons which weigh with the learned trial Judge do not appear to be sufficient to bring home the charge of adultery as made against the Appellant.

4. Married in 1954, the two spouses had the gift of a son Satyendra Chandra Pakhira in or about 1956. But soon they fell out, so much so, that the wife Leelabati had to go to the length of taking proceedings for maintenance u/s 488 of the Code of Criminal Procedure. Fortunately, that culminated on August 7, 1959, in a compromise, the arresting features of which are -

(1) The husband Kashinath will not live any more with a woman Jamunabala whom he commits to remove from his house.

(2) That done, the wife Leelabati will live with Kashinath as a loving and dutiful wife does.

(3) Should Kashinath not do what he commits himself to, Leelabati will get a maintenance of Rs. 45/- a month for herself and the son.

5. An important admission as this, the learned trial Judge passes by, on the ground that the aforesaid solenama has not been acted upon. That, in our judgment, is not the right way to look at the matter. Acted upon or not, the admission remains and stares the husband Kashinath in the face. And the husband faces it by saying on cross-examination:

"I do not know Jamunabala."

A most unconvincing way of explaining one's own admission concerning a woman with whom he admits by the clearest implication to have been living and with whom, he assures the Magistrate and his wife Leelabati, he will live no more. Was then the Jamunabala of the solenama dated August 7, 1959, a figment of his imagination? Such evidence must be reckoned against the husband Kashinath, if only to show what he is like.

6. There were proceedings again for maintenance u/s 488 of the Code of Criminal Procedure and that too at the instance of the wife Leelabati on December 28, 1960. The proceedings culminated too in a compromise, ext. 1. By virtue thereof, the husband took charge of his son Satyen and bound himself to pay Leelabati a maintenance of Rs. 20 a month right from December 1960. But it was agreed to that she would live separately in her husband's home.

7. Now the trouble began over again. In or about April 1964, Leelabati was delivered of a female child. Kashinath says: he is not the father of this child. Leelabati says: he is. Kashinath says: Lakshmi Kanta Pakhira is the father of the female child. Leelabati says: nothing of the kind. Separation and maintenance of Rs. 20/- are no doubt there. But, even after that, they, husband and wife, had access to each other. And the female child is the result.

8. The learned trial Judge rejects the wife's untrammelled by the common-sense view - and so natural a view at that - that the relation of husband and wife is such that one is appointed to attract the other normally, no matter what feuds they have

gone through in the past; the more so, when they live in the same house, as, indeed, they do. On top of that, a serious matter is at issue here: legitimacy of the female child a child who is born during the continuance of a valid marriage between Leelabati and Kashinath. So, u/s 112 of the Evidence Act, 1 of 1872, here is a conclusive proof that the female child is the legitimate daughter of the two spouses, unless of course it can be shown that they had no access to each other, when she could have been begotten.

9. Has that been shown? The learned trial Judge thinks: it has been. Indeed, he holds that Lakshmi Kanta Pakhira had access to Leelabati. Upon the whole of the evidence, we think otherwise and hold just the opposite.

10. The oral evidence of Gajendra Pakhira, Dasarath Pakhira and Kashinath himself, the witnesses numbering 1, 3 and 4 for the husband Kashinath, finds favour with the learned trial Judge. To us, however, such evidence appears to be unsatisfactory in the extreme; so unsatisfactory, indeed, that it cannot afford a safe resting place for a finding on adultery, casting a slur on a woman, a married woman, and a mother of two children too. Gajendra, the uncle of Kashinath, says glibly enough that he has seen Leelabati and Lakshmi Kanta sleeping together in the same house, as if such a couple sleep so, with doors and windows wide open, so that people like Gajendra can see what they are doing. Self-defeating, therefore, appears to be the evidence of the uncle Gajendra Pakhira. More, he claims to have seen some 10 or 11 times Lakshmi Kanta getting into Leelabati's room at 10 or 11 p.m. and getting out in the morning, and that too through the courtyard of the house - the only access to Leelabati's room according to him. But when he cannot say. Again, the members of the family are some 20 strong. And this uncle along with the other elders makes the least noise about such extra-marital gallivanting going on under their very nose and in their very home. It is difficult even for credulity to swallow this.

11. Dasarath Pakhira, the third witness, claims to have been one evening near about March 1964 peeping through the window that Leelabati and Lakshmi Kanta were sharing the same bed. On cross-examination, the evening turns into night, and 9 p.m. when a furore raised that somebody had gone into Leelabati's room brought him there. Again, he speaks of a door towards the khal (the canal) on the east of Leelabati's room. But uncle Gajendra speaks of no access there except through the main courtyard of the house on one bigha of land, a wall partitioning Leelabati's hut without any access from one side to the other. No doubt, lovers can and do jump a wall which is no barrier between them and their love. But no witness says so.

12. The husband Kashinath says: he saw his wife and Lakshmi Kanta living together for 10 to 12 days on end near about September 1963, a year ahead of the institution of his matrimonial cause. The last time when he had seen them so was February 9, 1964. Why wait then until September 28, 1964, to raise the matrimonial cause for divorce? What is the reason for this unnecessary delay? He tells the court none. The court is, therefore, not satisfied that there has not been unnecessary delay. The

court cannot, therefore, grant a decree for divorce the husband prays it for, Section 23, Sub-section (1), Clause (d), of the Hindu Marriage Act, 1955, being what it is.

13. Oral evidence failing, and fail it must, there remains the refusal on the part of Leelabati to have the blood of the daughter examined even through court. but blood test is not conclusive ever. In spite of the advancement of medical science, all that can be said, with, say, 50 to 70 per cent chance, is that one is not the father of the girl. Science cannot say positively that Kashinath or Lakshmi Kanta is the father of the female child. Why make a fetish then of such inchoate science, not the science of mathematics, and draw a presumption adverse to Leelabati, as the learned trial Judge has done, all the more so, when Lakshmi Kanta is not a party even. The learned Judge recognizes too that a test as this cannot be regarded as conclusive.

14. Non-examination of Lakshmi Kanta has been weighed against Leelabati who takes plain to make it clear that he belongs to the opposite camp. And, then the onus is upon Kashinath and Kashinath alone to prove his case. Adopting a little the famous saying of Viscount Sankey, L.C., in (1) *Woolmington v. Director of Public Prosecution*, 1935 AC 462, it may well be said:

Throughout the web of our matrimonial law, one golden thread is always to be seen: that it is the duty of the Petitioner to prove the Respondent's adultery or any other matrimonial inelegance. If at the end of and the whole of the case, there is a reasonable doubt created by the evidence by either the Petitioner or the Respondent, whether the Respondent lives in adultery with the persons named by the Petitioner (here Lakshmi Kanta), the Petitioner has not made out a case, and the Respondent is entitled to leave the court with her reputation and integrity unsullied.

15. Upon the whole of the evidence, there is far more than a reasonable doubt. Nay, there is indeed certainty that Leelabati, the wife, is a chaste woman against whom an unfounded charge of adultery has been brought.

16. As Subba Rao, C.J. (then Subba Rao, J.) points out in his minority judgment in (2) Lachman Utamchand Kirpalani Vs. Meena alias Mota, at page 56, after referring to (3) Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, :

In short, the court equated the proof required in a matrimonial case to that in a criminal case.

That is the test we are going by.

17. Non-examination of Leelabati's father with a view to finding out as to who has been defraying the litigation expenses for her is wholly irrelevant to the main point of inquiry in this cause: the husband's charge against the wife of adultery. Yet, even this has been weighed against the Appellant. To allege that Lakshmi Kanta had been defraying her expenses is not to prove it.

18. In the result, the appeal succeeds and be allowed with costs here and below, subject, however, to deduction of the costs already paid by the husband to the wife. The judgment and decree appealed against be set aside. We assess the hearing fee at three gold mohurs.

S.K. Dutta, J.

19. I agree.