AIR 2003 Cal 287 : (2003) 3 CALLT 60 : (2004) 2 CivCC 147 : 108 CWN 588 : (2004) 2 DMC 336 : (2003) 2 ILR (Cal) 1 : (2004) 1 RCR(Civil) 633

Calcutta High Court (Port Blair Bench)

Case No: F.A.T. No. 002 of 2003

Smt. Kakali Das (Ghosh)	APPELLANT
Vs	
Dr. Asish Kumar Das	RESPONDENT

Date of Decision: May 28, 2003

Acts Referred:

- Hindu Marriage Act, 1955 - Section 13, 9

Citation: AIR 2003 Cal 287 : (2003) 3 CALLT 60 : (2004) 2 CivCC 147 : 108 CWN 588 : (2004) 2 DMC 336 : (2003) 2 ILR (Cal) 1 : (2004) 1 RCR(Civil) 633

Hon'ble Judges: Pradipta Kumar Roy, J; Ajay Nath Ray, J

Bench: Division Bench

Advocate: B.K. Das, for the Appellant; Haradhan Banerjee, for the Respondent

Final Decision: Allowed

Judgement

A.N. Ray, J.
This is an appeal filed by the wife from a judgment and decree of the learned District Judge allowing a petition filed by the husband for divorce.

2. The short facts of the married life, and the litigation, are as follows.

The parties were married on 12.12.1994 and a son was born to them on the 3rd day of January, 1996. The wife is a single issue of her parents but the husband had two other brothers, of whom one, a police officer was unfortunately killed.

3. The parties resided with the parents of the husband at Mangultan village.

4. The facts clearly show that the appellant all along wanted her husband to live separately with herself and not in joint mess with her-in-laws. Sometime on or about the 1st of June, 1996, the appellant left the matrimonial home with her son. But a sort of

reconciliation was made on the date of their marriage anniversary i.e. 12.12.1996 the wife returned to the matrimonial home.

5. Thereafter on the 12th of February, 1997 she finally left the house of her in-laws with her son.

6. It appears from the evidence that she left in the early morning, and empty handed.

7. The respondent filed on 11.4.1997 a petition for restitution of conjugal rights.

8. In that petition there is no whisper of his being in any manner affected by any allegations of bad character imputed by his wife to him.

9. However, the allegations are there that she did not leave with any good cause and that she used to return home very late in the evening i.e. at or around 8.30 p.m. even though her school, where she was teaching, gave over as early as at 2.30 p.m. She left the matrimonial home suddenly, without telling anybody, and never explained the late comings and absences. It was also stated in paragraph 16 of the restitution petition that the husband is very much willing to live happy and healthy normal life and that especially he is missing his only child which is causing a lot of pain to him.

10. The appellant filed an answer to the petition for restitution of conjugal rights and a denial was made in regard to any remissness of performing any marital duties on her part. However, it was stated in paragraph 16 to her answer that:".... the respondent apprehends from the previous conduct of the petitioner that he is having some illicit connection with some other woman elsewhere". She went on to state in her answer that for the purpose of regaining her confidence in him she would like to live with her husband with her parents for some time until her confidence is regained.

11. The event which took place hereafter is a matter of the utmost importance. On the 17th of February, 1998, the respondent-husband simply sought to withdraw his petition of restitution of conjugal rights. As such on 17.2.1998, the petition for restitution was dismissed for non-prosecution. There was no leave taken for the purpose of re-agitating any of the grievances which the husband harboured until then; however, not taking of such leave has not been pressed either in the Lower Court or before us as a point of any very great importance and accordingly, we do not wish to place an overmuch technical importance on this. But the substance of the matter cannot be overlooked. The substance is that until withdrawal on 17.2.1998, the husband was ready and willing to live with his wife, and wanted her to come back to him.

12. It seems that the husband was so rankled by the above allegation made by the wife of his unfaithfulness that he filed on 17.2.1998, the very day of dismissal of his petition for restitution of conjugal rights, a petition of judicial separation. One of the principal grounds in that petition was that his wife had assassinated his character.

13. A written statement was filed to the application for judicial separation by the appellant wife, no character assassination was made in that written statement. After that an additional written statement was filed wherein allegations were again made against the husband''s good character. The additional written statement was, however, withdrawn by the appellant wife. The husband then amended the petition for judicial separation and turned that into a petition for outright divorce. At the trial, the husband did not even press for judicial separation. After the amendment, the wife again delivered a written statement the amended petition and now the character of the husband was again attacked. It was said that he had had illicit relationship with one Suja Philip, a Pharmacist who was working under him and also a lady name Taramani Das, who was at one time a Staff Nurse under the respondent-husband.

14. There were various interlocutory litigations in between; the attempts at amendment and the attempt of delivery of written were reciprocally challenged as amongst the parties; two Civil Revision Orders of the High Court are in the paper book and also an order passed by the Hon''ble Supreme Court, wherein it was ordered on 16.11.1999 that the permission to amend the petition for judicial separation into a petition for divorce can remain, since it was still open to the wife to challenge the same before the trial Court saying that the materials brought on record by amendment cannot be looked into for granting relief. The parties thereafter went to trial and a Full Bench hearing took place. The respondent-husband examined himself and as many as eight other witnesses. The appellant-wife also examined herself and three other independent witnesses.

15. The husband''s case made from the box was that he never had any illicit relationship with any of the two ladies. That Suja Philip was almost psychiatric. That he considered her to be like his sister. That Taramoni Das and all other subordinates were like brothers and sisters to him. Taramoni''s father and his father were friends, and Taramoni''s husband gave evidence for him. He said that it was impossible to leave his aged parents. He pressed his claim for outright divorce because of character assassination and because of unexplained late returns and absence by his wife. Not much evidence was given by him in regard to a sort of counter attack made by him upon the activities and whereabouts of his own wife. It was said in the amended plaint of the husband that some well-wishers of the husband had reported that they saw the appellant at Carbyn''s Cove (a sea beach at Port Blair) with some particular person and sometimes they were found in public places like restaurants etc.

16. The learned District Judge found that the appellant had most certainly made adverse remarks about the husband''s character and accepted the evidence given in this regard by as many as four different witnesses, two of whom was a college and an old school friend of the respondent. The appellant denied making allegations of this nature to anybody but the learned District Judge had accepted the evidence given by the husband''s witnesses in this regard.

17. In dealing with this part of the facts, and with other parts of the facts we go by the old and well established principle that the appeal Court should not lightly interfere with findings of fact made by the trial Court, which saw the witnesses, heard them, and could assess their demeanour and truthfulness. The jurisdiction to upset the first Court on facts, the Court of Appeal no doubt possess but that jurisdiction is never exercised unless the Appeal Court feels sufficiently satisfied that the lower Court had failed to take full and proper advantage of its having the opportunity of seeing, hearing and assessing the witnesses.

18. The learned District Judge further found that the appellant was returning home quite late very often; and further that she often stayed away from her in-laws'' place and went to live with her father. The combined effect of unproved character assassination and frequent late returns and absences were opined by the learned District Judge as sufficient cruelty giving a right to the husband Justly to claim a decree for divorce.

19. An issue was also framed as to desertion by the wife in February, 1997. In the evidence given in this regard the wife made complaints that the husband had asked for money and property from her and that he had threatened that he would enjoy other women in front of her eyes unless she acceded to his request. The wife''s father also said that once his son-in-law had asked for the property to be transferred in him name and had also asked for a car. The learned District Judge''s positive findings in this regard are wholly in favour of the appellant, and in this regard also we do not upset the findings of the lower Court. It was, indeed, a positive finding of the lower Court that the appellant never deserted her husband, but only the house where her husband was living. She was all along willing to return. The finding is that the husband had miserably failed to establish a case of desertion by the wife. The further finding is that the wife was thrown out from the place of joint residence.

20. Bearing in mind the various allegations made by the wife and the various pressures which might have been created by the husband and all his relations against the wife, we are not at all in a position to upset the finding of fact by the learned District Judge in this regard.

21. The summing up of the facts of this case is, therefore, as follows.

The wife wanted to have a separate matrimonial home with her husband. The husband refused. There might have been some claims of property made by the husband from the wife and her father. The wife, not liking her matrimonial home stayed away from it as much as possible, but she was forced out of the home in February, 1997 with her son. When husband and wife live together for a few months at Port Blair, they were happy. She harboured great doubt about her husband''s moral character. Some statements in this regard were made to several persons connected with or known to the respondent. The respondent also made an allegation against the wife going out with some other person to the sea beach and to restaurants. The wife could not prove that her husband

had any illicit relationship with either Suja Philip or Taramoni Das. The husband did not make any attempt to prove the bad character of his wife or her tendencies of going out with some other man behind the back of her husband.

22. The learned District Judge has also noticed that the petition for restitution of conjugal rights was withdrawn but there is no mention that, in fact, the petition was rejected as not pressed.

23. The principal reason why we are unable to agree with the findings of the learned District Judge even though we agree on practically all findings of fact by him, is this. Leaving aside for the present the allegations made in the pleadings, all the character assassination made by the wife in regard to her husband''s character took place before the restitution petition was rejected. Thereafter the imputations if any, were made in the pleadings and the pleadings alone. All the frequent late comings by the wife, and the departures from her in-laws'' place, without informing the husband, took place, not only far before the rejection of the restitution petition, but even before 12th February, 1997 when she was thrown out of the Manglutan house.

24. Notwithstanding all these, the husband had filed on 11th April, 1997 a petition for restitution. He wanted his wife back to himself on 11.4.1997. We shall deal with a few cases hereafter, but the present one is mainly of a case on facts. If it is the husband''s case, that it is cruel and unreasonable to compel him to live with a wife who assassinates his character and who stays away from home because she does not like to live with her in-laws, then and in that event the filing of the restitution petition by the husband becomes wholly inexplicable.

25. The only reasonable way to construe the entirety of the circumstances of this case is, that notwithstanding the doubts and apprehensions raised by the wife about the husband''s character, and notwithstanding the departures from her husband''s house, the husband felt no difficulty at all. in living with his wife, who had all these faults. He did not find it unreasonable to live with that wife, nor did he consider it a matter of any cruelty at all to him to have that wife brought back to himself by a decree of Court.

26. In these circumstances, it was impossible for a Court of law to opine that these very points could constitute points in favour of the husband whereby he could spell out cruelty to himself and claim a decree for divorce.

27. The parties cited several cases before us but it is not necessary to deal with those cases in great details, because the legal view is not in dispute.

28. The cases in our respectful view, bear out the following propositions.

I. Character assassination is a serious matrimonial offence and can found a decree for divorce.

II. Cruelty to a spouse has not been defined in the Hindu Marriage Act, and it has to be judged from the facts and circumstances of each different case, where there has been cruel treatment of one spouse by the other.

III. The English doctrine of cruelty having to be a reasonable threat of injury to life, limb or health, does not hold in India; in our country it is sufficient if the spouse can prove that it could be unreasonable or cruel to force him or her to live with the other spouse as man and wife, in the entirety of the facts and circumstances of the case.

IV. The allegations of bad character etc. made in pleadings can find a cause of action for divorce and the aggrieved spouse is not necessarily to be driven to a subsequent litigation based on the pleadings of the present litigation.

29. In regard to the above, we mention that these principles are to be found from amongst others, the case of V. Bhagat Vs. Mrs. D. Bhagat, ; the case of Ramachandra Bhate v. Neela Bhate reported at 2003(3) Supreme Today 416 and the case of Nanda v. Nanda reported at : The first two cases were cited, amongst others, by Mr. Banerjee appearing for the respondent and the third case, amongst others, by Mr. Das appearing for the appellant.

30. The particular features of this case we have to emphasise. The first is whether the desire of the wife to have a separate matrimonial home with her husband away from in-laws is a reasonable and a legal desire. In our opinion, in the present day, when the equality of the genders is accepted as a matter of first principle and inflexible law, it is no longer the matrimonial rule that the girl must leave her parents and come and live with the boy, who will continue to live with his parents. This might no doubt be the situation if both the husband and wife agree. But if the wife reasonably insists on having a separate matrimonial home with conjugal privacy for herself and her husband only, then the husband is bound to make all reasonable efforts to set up such a separate private matrimonial home for the purpose of living privately and alone with his wife, enjoying, hopefully, connubial bliss, and in good time, raising and nurturing a family of their own.

31. This does not mean that either the husband or the wife will do no duties to their respective parents or cut off relations altogether. But this does mean that no husband has a right to insist that his wife will play a role subservient to his mother or his other relations and must live with his mother and all his other relations under the same roof and in joint mess.

32. It might be thought that this is a European idea and not an Indian one. We wholly disagree with this view. At one time, when the Indian life was vibrant and rich, and at the top of the world, the value of the wife was fully understood. It is only now that a re-understanding of that value has become necessary. When Sri Ramachandra went to the forest, he did not go with his mother Kausalya Devi but he went with his wife Sita Devi. The great battle was fought over her. When Yudhistir and his brothers went to the

forest they did not go with their mother Kunti Devi, they went with Draupadi and the battle of Kurukshetra was probably fought over her.

33. It is the duty of every husband, after marriage to look after his wife as a matter of the greatest, and perhaps a first priority; such duty is reciprocally cast on the wife also and she is bound to look upon her husband as her first priority. These ideas flourish much better in a private matrimonial home than under the policies and politics of in-laws and other relations.

34. We are of the opinion that the desire by the wife to have a separate matrimonial home was not an unreasonable or an illegal desire. The husband refused to pay any attention to it.

35. The next point of importance is the point of making allegations in the pleadings. If the growth of allegations in the present case is watched with care, it would be found that those were provoked greatly by the husband and his own pleadings and litigations. We trace out this history in brief once again.

36. In the petition for restitution, the husband made no character assassination of the wife. In answer to this the wife said in a single sentence that she had doubts about her husband''s fidelity. Immediately thereafter the petition for judicial separation was filed and the allegation of the wife going out with somebody else were levelled. It is in evidence that only at this time, during the middle period of the litigation, that she had made searches and came to know about Suja Philip and Taramoni Das. She made allegations involving these women in her additional written statement, she withdrew those, and then she remade those allegations in the ultimate written statement to the petition for divorce.

37. We are firmly convinced that these allegations were poked out of the wife during the course of litigation and by the husband''s own pleadings. The apprehensions about the husband''s bad character, unfounded though those might have been, the statements made about the husband''s bad character, uncalled for though those might have been, were not a matter of extreme Importance to the husband, who filed a petition for restitution, those doubts and allegations of the wife notwithstanding. As such, the statements in the pleadings provoked by the course of litigation are not sufficient for the purpose of establishing the case of cruelty against the wife and in favour of the husband.

38. If the case of V. Bhagat Vs. Mrs. D. Bhagat, : is read carefully, various important guidelines (and we say this with great respect) would be found. It will be seen that the test of the spouse not being reasonably accepted to live together with the other one is propounded there. It is also said that the whole facts of the case have to be taken into account. It is mentioned in paragraph 18 that the effect of the behaviour of the allegedly guilty spouse, upon the complaining spouse has to be adjudged. It is also said that if the protestation by the wife are not mere protestation by her and positive allegations, then those would bear a different significance and status.

39. The great point of importance of this dicta for our case is that cruelty is a matter of subjective assessment usually. This is the third particular feature of this case. No doubt if the wife is in the habit of hitting the husband with a stick and breaking his head every now and then, the matter can be said to be objective. But this type of objective and indisputable matrimonial offence is not usually found is hotly contested cases. What is usually found is a case of extreme incompatibility where the behaviour of one party puts the other party, allegedly, in a state of torture. Whether the aggrieved party is suffering torture. Whether the aggrieved party is under cruel treatment from the other one, these have to be judged in the facts and circumstances of every different case. The Court has to take a rational view. The husband and the wife have to be projected by the Court as two human beings and the Court has to understand their behaviour on the basis of the evidence given, the pleadings tendered and the arguments made. If on such a basis it is found that a party is really suffering beyond the point of reasonableness, matrimonial reliefs can be granted. But if that party himself says that I want my wife back, it is not possible for a Court to opine that he is likely to suffer inexplicably at the hands of his wife and he should not be asked to live jointly once again. The Lower Court''s finding is exactly this. As such we are unable to uphold the said finding.

40. The appeal is allowed, the order and decree under appeal is reversed, and the petition of the respondent for divorce is dismissed. There will be no order as to costs.

P. Ray, J.

41. I agree that the present appeal is to be allowed but I like to add my own reasons for allowing the present appeal and to give my views on certain principles involved in this case.

42. The learned brother, Ajoy Nath Ray, J., has dealt with the basic facts and their sequence in his judgment. I want to highlight only those factual features which appear to be relevant for supporting my views.

43. It has been recorded by my learned brother that the appellant all along wanted her husband to live separately with herself and not in joint mess with her in-laws. It, however, appears to me that the appellant''s wife expressed her intention to live separately with the husband not from the beginning but only she developed apprehension about her physical safety because of some alleged misbehaviour of the husband. She has even expressed her desire to go back to the matrimonial house once she regains her confidence in the husband.

44. Frequent absence of the appellant''s wife from her matrimonial home, her stay in her father''s house, the wife''s demand for residence separate from the husband''s family and her persistent assassination of the husband''s character have been cited, as instances of acts of mental cruelty.

45. After marriage, husband and wife both have duties towards each other and also to each other''s family, particularly the dependents, if any. The wife''s entry into the matrimonial home is through the relationship with the husband and obviously a wife can legitimately expect her husband to give preference to her reasonable requirements and demands and to satisfy those as far as possible within his capacity. A husband cannot deny a reasonable demand or desire of the wife on the plea of his duty towards other members of the family. A wife is entitled to demand a separate exclusive residence for herself and the husband for justifiable reasons. The reasons may be many and those depend upon several factors but such right does not extend to whimsical or unreasonable demand or sheer obstinacy. If there is no reason for the wife to feel uncomfortable in the matrimonial house and if she gets normal care, affection and facilities, a demand for separate residence merely to avoid company of the parents-in-law or the husband''s close relations may be an act of mental cruelty. A wife can demand reasonable freedom, care, comfort from the husband and it is the husband''s primary duty to see that the wife lives a comfortable life within the available means and at the same time, a wife cannot prevent the husband from discharging his duties to other members of the family, particularly, the dependents. Learned brother, Ajoy Nath Ray, J., has given examples from the Ramayana and the Mahabharata but Sita or Draupadi did not ask their husbands to leave their parents. They preferred accompanying their husbands to living in the palace with mother-in-law and others when circumstances compelled the husbands to move to the forest. Where husband lives separately the wife can very well demand that she will live with the husband at his place of residence. If she does not get proper respect, status and treatment from her parents-in-law or other relations of the husband, she can stay at a place of her choice away from such relations but in absence of any justifiable reason wife''s demand for a separate residence may amount to obstinacy and an act of mental cruelty. Wife''s insistence on separate residence per se cannot constitute a mental cruelty unless it is found to be totally unnecessary, unreasonable, inhuman and unfair.

46. Gender equality is equality for both the spouse. No spouse enjoys predominance and can impose his/her decision or desire on the other. Where desires and demands of two spouses move in opposite directions and they fail to reconcile each of them should be prepared to accept the inevitable consequence of break-down of marital ties. When such disputes concerning respective rights, liberty, and obligation come to the Court of law for adjudication those are to be decided on the touchstone of reasonableness of conjugal living in the context of the society they live in. A reasonable demand or refusal to meet an unreasonable and obstinate demand does not constitute an act of mental cruelty.

47. As already pointed out in this case the wife did not demand that the husband should stay with her separately, she wanted her husband to stay with her in her father''s house temporarily so that she could regain the confidence and faith lose due to alleged maltreatment by the husband.

48. A wife has every right to visit her parent''s house and she is not required to take permission each and every time. So long as such visit to her parents'' house does not

cause an unbearable inconvenience or does not amount to obduracy, the husband cannot treat such visits as acts of cruelty.

49. The main foundation of the husband''s claim for divorce rests on wife''s allegations against his moral character. It is the husband''s case that from June, 1996 the wife was propagating allegations against his moral character among his relations and friends and even after commencement of litigation between the parties the wife continued with her allegations against his character. According to the husband, repetitions of same allegations in different pleadings before the Court and in evidence aggrieved cruel impact of such allegations and it is no longer possible for him to live with the wife.

50. Post-litigation allegations of immoral character may amount to mental cruelty if the offended spouse gets mentally so hurt that he/she develops a genuine feeling that it is Impossible to live with the offending spouse. In the present case, according to the husband himself, same kind of allegations against his moral character were made earlier by the wife before his friends and relations, but still the husband did not feel it impossible to live with the wife. He not only brought her back in December, 1996 but filed an application for restitution of conjugal right on April 11, 1997 even after the wife''s departure in February, 1997.

51. In V. Bhagat Vs. Mrs. D. Bhagat, :the Supreme Court has explained:

"....What is cruelty in one case may not amount to cruelty in another case. It is a m.atter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations regard must also be had to the context in which they were made."

52. Thus, actual impact of the accusations and allegations on the mind of the offended spouse is to be carefully examined and assessed. Taking all the materials including the pleading and the evidence on record the Court should assess whether the complaining spouse has really felt hurt as claimed or is merely feigning to be so in order to get rid of the offending spouse. In her evidence the wife categorically stated that she had no personal knowledge about her husband''s alleged illicit relationship with Suja or Taramoni and she expressed only her apprehension on the basis of hearsay information. Such statements in evidence in fact diluted the allegations made earlier against the husband''s character. Post-litigation allegations made by the wife in the present case could not have a heavier impact than her pre-litigation allegations assassinating husband''s character before his relations and friends. When pre-litigation propagation of baseless allegations against his character could not hurt the husband so deeply and dissuade him from claiming restitution of conjugal rights, there is no reason to consider her post-litigation accusations as cruel acts sufficient to think it impossible to live with the wife anymore.

53. Mr. Banerjee, learned advocate appearing for the respondent-husband has also referred to the doctrine of irretrievable break-down of marital relationship. To apply the

"doctrine of irretrievable break down" following basic ingredients are to be satisfied.

(1) Both the parties are equally indulging in cruel behaviour, physical or mental, against each other.

(2) It is not possible for the Court to come to any definite conclusion about the role or responsibility of one particular spouse in creating and sustaining the bitterness.

(3) Marital relationship is emotionally dead and none of the spouse genuinely wants to live with the other spouse.

54. The aforesaid doctrine cannot be invoked in a case where one of the spouses is still really interested in living with the other spouse forgetting and forgiving the existing bitterness and its causes and he/she cannot be held solely responsible for the existing bitterness. In the present case it is not possible to hold that the wife is not really interested in continuing marital relationship or that she is solely responsible for the bitterness.

In the facts and circumstances of the present case I agree that the appeal is to be allowed and the petition for divorce is to be dismissed.