

(1968) 08 CAL CK 0015

Calcutta High Court

Case No: Appeal from Original Decree No. 796 of 1965

Sm. Tushar Kana Debi

APPELLANT

Vs

Bhowani Prosad Roy Chowdhury

RESPONDENT

Date of Decision: Aug. 21, 1968

Acts Referred:

- Bengal, North- Western Provinces, Agra and Assam Civil Courts Act, 1887 - Section 37
- Evidence Act, 1872 - Section 134, 157
- Hindu Marriage Act, 1955 - Section 10, 13, 20

Citation: 73 CWN 143

Hon'ble Judges: S.K. Dutta, J; Bijayesh Mukherji, J

Bench: Division Bench

Advocate: Bhabesh Chandra Mitter and Aruna Mukherjee, for the Appellant; Priti Bhusan Barman and Manan Kumar Ghosh, for the Respondent

Final Decision: Dismissed

Judgement

Bijayesh Mukherji, J.

This is an appeal by the wife Sm. Tushar Kana Debi whose application for judicial separation u/s 10, subsection 1, clauses (a) and (b), of the Hindu Marriage Act, 25 of 1955, fails in the court of first instance. The two spouses were married on January 25, 1951. The appellant Tushar Kana was then 23 or thereabouts. The respondent, her husband Bhowani Prosad Roy Chowdhury, was then 33 or thereabouts.

2. After visits to and fro by Tushar Kana now in her husband's home and then in her father's, she shifted to the matrimonial home in March 1952 to live there permanently. The matrimonial home is at Sahanagar Road in the town of Calcutta. Unfortunately, however, she left her husband's home on September 13 1952, never, never, to return.

3. To add to the misery of the parties, various unfortunate things happened one after another. The father-in-law of the respondent, that is, the appellant Tushar Kana's father, had to take a loan of a considerable sum from the son-in-law himself, Interest was being paid at the rate of Rs. 15 a day, though with breaks here and there. Ultimately that led to a suit for the recovery of the money on March 13, 1954. Going by the plaint of that suit. ext. B, it appears that the principal sum sought to be recovered was Rs. 22,000. To that was added a sum of Rs. 5,359 odd by way of interest. Fortunately, however the suit culminated in a compromise on January 7, 1955. A decree for payment of the decretal dues, as agreed upon between the parties, by instalments, was passed. Thus, one unfortunate chapter was closed.

4. But another chapter- a far more unfortunate chapter at that - began on July 24, 1959, when some 7 years after the appellant wife Tushar Kana had left the matrimonial home, she raised an action for divorce u/s 13 of the Hindu Marriage Act 1955, alleging inter alia that seldom she and Bhowani Prosad, the respondent, devoid of any love for her, lived as husband and wife and that cohabitation, if any, that took place a few years ago, was never spontaneous. More, her husband was in the habit of living in adultery with some women- a fact which he himself had admitted before her. inadvertently though. The certified copy of the petition dated July 24, 1959, to that end, for divorce, is exhibit 2. A petition as this converted into the plaint of a suit under the rules of the court was suffered to be dismissed for default on December 5, 1959, when the respondent was present in court with his lawyer as the certified copies of the order-sheets in that case, exts. 1 and 1(a), reveal, and as is the admission too of the appellant Tushar Kana in the 15th paragraph of her present petition for judicial separation (out of which this appeal arises)-such averment being evidence u/s 20, subsection 2. of the Hindu Marriage Act, 1955. But she attributes such default of her divorce case to the negligence of her tadbirkar in charge thereof. Thus came to a close another chapter in this sort of unsavoury relation between the two spouses, though even a particle of the softening influence of mutual love and esteem could have prevented this preventable calamity in their married life.

5. Then began the present chapter with which we are now concerned. Some four years after her divorce case was dismissed for non-prosecution on December 5, 1959, to be exact, on December 19, 1963, the appellant Tushar Kana filed her present petition for judicial separation u/s 10, subsection 1, clauses (a) and (b) on the ground of desertion and cruelty - allegations which Bhowani Prosad denied in his written statement.

6. The petition converted again into a suit under the rules of the court was set down for trial on evidence. The appellant examined herself and none else. The respondent husband likewise examined himself and none else. It is the only evidence led at and during the trial.

7. The documentary evidence consists mostly of letters to and fro, between the appellant Tushar Kana and her mother and between Tushar Kana and her husband Bhowani Prosad, of the certified copies of the compromise decree in that unfortunate but unavoidable suit between Bhowani Prosad and his father-in-law, that is, the appellant Tushar Kana's father, for recovery by the former of Rs. 22,000 as the principal sum from the latter, of petition by Tushar Kana for divorce, and of all the orders in the order-sheets in that case.

8. The learned trial judge dismisses the appellant Tushar Kana's cause for judicial separation, holding inter alia:

1. The respondent Bhowani Prosad is not guilty of desertion.

2. The wife's allegation of cruelty lacks corroboration and substance too.

Hence this appeal by the wife Tushar Kana.

9. Mr. Bhabesh Chandra Mitter, appearing for the appellant wife has addressed us on three main points:

(i) Cruelty, mental and physical, (ii) Desertion at law.

(iii) The application of the rule of justice, equity good conscience u/s 37, subsection 2, of the Bengal. Agra and Assam Civil Courts Act, 12 of 1887. On no other point have we been addressed.

10. True it is, as urged by Mr. Miller, on the authority of (1) [Kusum Lata Vs. Kampta Prasad](#), the term "cruelty" has not been specifically defined in the Hindu Marriage Act, 1955. But, as pointed out in the very decision Mr. Mitter cites, section. 10, subsection 1, clause (b), does provide for "the character and composition of cruelty which is sufficient for a decree for judicial separation". Clause (b) indeed prescribes:

To constitute cruelty on which a decree for judicial separation can rest, one spouse must be found to have treated the other with such cruelty as to cause a reasonable apprehension in the mind of the complaining spouse that it will be harmful or injurious for such a one to live with the spouse complained against.

That is the definition in section 10. subsection 1, clause (b), containing its own lexicon. Thus, cruelty per se or any type of cruelty will not do. A little more is needed: is it such to cause a reasonable apprehension in the mind of the appellant wife that it will be harmful or injurious for her to live with the respondent husband? So, if the whole of the evidence satisfies us that the requirement of this definition is well met, the appellant wife, it must be held, has made out a case for judicial separation.

11. Unfortunately for the appellant, however, the whole of the evidence does not so satisfy us, as it has not satisfied the learned trial judge. We proceed to state why, dealing first with the evidence of mental or psychological cruelty under suitable heads.

1. Litigation between the appellant's husband and father.

12. Mr. Mitter sees in it psychological cruelty inflicted by the husband upon the wife. We do not. The husband granted an accommodation loan to her father to the tune of Rs. 22,000 or more, part of which was paid back amicably and the vast residue of which was not. Put in such a predicament, if the son-in-law would sue the father-in-law for recovery of Rs. 22,000 as the principal sum plus interest, he is hardly to be blamed. And to see cruelty in it is to see much too much. How many amongst us can afford to forego such a heavy sum, only because the debtor happens to be a father-in-law? To say, as Mr. Mitter does, that the husband could bring himself to institute the suit he did against his wife's father, only because all affection for his wife had left him, is to say the unsayable. Certainly it was not a pleasant thing for the husband to do so. But what else could he have done to get back so vast a sum, which he did, in terms of the instalment decree on the basis of the compromise come to, ext. B? And be it remembered that the loan was taken soon after the marriage on January 25, 1951. Before the appellant had left the matrimonial home on September 13, 1952, she was writing to her mother a letter, ext. A, to say that more than 18 months ago her father had taken the loan. So, the loan was taken in or about March 1951. Hence the suit by the son-in-law against the father-in-law on March 13, 1954, was not a day too soon. It very much looks that the suit was then all but time-barred. So, a suit had to be there.

13. We realize, in such circumstances, no one is entitled to more commiseration than the wife who ordinarily must have found herself torn between her husband on the one hand and her father on the other. But this cannot be reckoned as cruelty, even though the wife grouses a lot in her letter to the respondent husband (ext. A/5 dated October 28, 1956) about her father being dragged in court, about her mother being cited as a witness, and about a writ of commission for examination of an absent witness being executed right in her grandfather's room etc. etc. In a litigation, steps as these are unavoidable without any impropriety anywhere. The respondent husband is entitled to fight his case with all the weapons his disposal. And the weapons he chose for the suit against his father-in-law were perfectly legitimate weapons to use. Hence, for all this, we find it impossible to attribute cruelty to him.

II. The husband calling his wife names.

14. The appellant wife asks the court to believe that the husband used to bestow all sorts of abuses on her, such as "an ugly woman", "fatty", "squint-eyed", "bald-headed" and "Khodar Khashi" (a castrated goat run into enormous fat as if the animal has been in the keeping of Khoda, that is, God). The husband did not spare her mother and grandmother even one of whom he called "fatty" and the other he called "a witch". If this can be believed and if it is found that the husband did exceed so the limits of decorum and decency time and again, mental cruelty will prove itself. But, again, unfortunately for the appellant wife, the trial judge disbelieves such

evidence. So do we. Sure enough, the appellant is not a witness of the type of whom we can say: "There is section 134 of the Evidence Act, 1 of 1872, and we can in safety go by her uncorroborated evidence."

15. It is, however, said: what corroboration can there be when such choicest epithets were showered upon her inside of her matrimonial home? To that, the answer is. Why? She might have reported such rudeness, unbecoming of a gentleman, to her father and mother, immediately or soon after her arrival in her father's place. And that would have furnished excellent corroborative evidence under the "at or about" rule embodied in section 157 of the Evidence Act. Mr. Mitter's explanation that a Hindu wife is very slow to complain against her husband explains little save absence of a good and acceptable explanation. Because here is a Hindu wife who had already sued her husband for divorce and who has sued him again for judicial separation. It is no good simulating modesty, when there can be no earthly reason for that, and when the wife charges her husband for meanness and innumerable faults, in her letters.

16. And the appellant wife might have protested to her husband in some of her letters to him saying: "Why did you call me names like that? So unworthy of you to have done so?" But nothing like that is found in any of the letters. Only in that letter of October 28, 1956, ext. A/5, she attributes to her husband saying to one Badal's mother: "Pooh, how the girl (the wife) looks. Just as fat as an elephant. And so many things of that sort." Mr. Mitter sees in it, an exhibit for the respondent husband, an admission by him that he had really said so to Badal's mother. With respect, we do not. Badal's mother is not examined. There is a difference between the factum of a statement and the truth thereof. If all that is in issue here is: whether or no Badal's mother made a statement like that attributing all this to the respondent husband, such statement may not be hearsay and is admissible in evidence. But if the truth of what Badal's mother says is at issue-as it is very much indeed- the statement she attributes to the respondent husband degenerates into hearsay and is clearly inadmissible, as is the law laid down by the Privy Council in (2) Subramaniam v. Public Prosecutor, (1956) 1 W. L. R. 965. Once it goes down as hearsay, the fact that it is contained in an exhibit of the appellant's adversary will not elevate it to the height of legal evidence. It is not merely a question of mode of proof here and waiving such a mode, simply standing by, that is, without raising any objection. Had that been so, the outlook would have been otherwise. It is a question which goes much deeper: the evidence itself being inadmissible, the worst type of hearsay as it is, in the absence of Badal's mother as a witness. A long line of cases cluster round this and enunciate the principle we are going by. Here are a few which remain in my memory: (3) Miller v. Babu Madho Das, (1896) L.R. 23 L.A. 106, (4) Amber Ali v. Lutfe Ali, (1917) 21 CWN 996, (5) Jainab Bibi Saheba v. Hyderally Saheb. (1920) ILR 43 Mad 609 (FB), (6) [Kumar Kalika Nand Singh and Others Vs. Kumar Shiva Nandan Singh and Others](#), , and (7) Gopal Das v. Sri Thakurji, (1943) 47 CWN 607 (PC).

17. In her letters to the husband, she gives vent to other grievances, but not to this one: that she was called all sorts of names. In sum, agreeing with the learned trial judge, we regret our inability to believe the appellant's evidence on this part of her case.

18. (iii) Previous petition dated July 24, 1959, ext. 2, by the appellant wife for divorce.

Mr. Mitter likes us to weigh this in our mind as an expression of feelings by the wife whose married life came to shipwreck. Is Mr. Mitter after *res gestae*? If that, it is the weakest species of evidence. Then, you make a serious allegations against the husband who you say has been living in adultery with some women. You do not pursue such allegations. Far less you prove them. Your *tadbirkar* might have let you down. But you make no attempt to restore your divorce case. And still it will be weighed in your favour. Such a contention has only to be stated in order to be rejected.

19. IV. A letter, ext. A, by the appellant to her mother before she had left the matrimonial home on September 13, 1952.

In a letter as this, the appellant writes to her mother:

Very soon we shall be going to Rajsahi. Because it is not possible to stay here after submitting to so much humiliation.

Such humiliation, Mr. Mitter says, is humiliation inflicted by the husband upon the wife and therefore amounts to cruelty. With respect, to read the letter so is to misread it. The husband, a man of means, comes from Rajsahi in East Pakistan. The wife belongs to Serampore in the District of Hooghly in West Bengal. Naturally, uprooted from his hearth and home in East Pakistan, the husband must be constantly smarting under this humiliation or that, in India, where he has to start over again from a scratch. His humiliation is his wife's humiliation too. That is the sort of humiliation the appellant Tushar Kana is writing about to her mother. Then, if the appellant wife is complaining here of the humiliation heaped upon her by the husband, how is it that she writes to her mother: "Very soon we-the accent is on "we"- shall be going to Rajsahi"? To be humiliated so much the more? On the other hand, in this very letter, she is espousing the cause of her husband and making a grievance of irregular payments of the interest of Rs. 15 a day by her father for the loan he had taken from her husband. She complains too that more than one and half year ago her father had borrowed the money but does not speak a word about it now. Again, she tells her mother with acerbity:

I am but the only child of yours. And the treatment you mete out to me is so excellent indeed.

It is, therefore, impossible to spell out in this letter cruelty on the part of the husband.

20. V. The appellant wife's letter dated September 26, 1956, to the respondent husband, ext. All.

By this letter, the wife says to the husband:

For innumerable faults on your part, do apologise to my father, mother and all members of my maternal uncle's family, and do say:

I shall never, never, show such meanness of my mind". Then, and then only, you and I shall come to terms; otherwise not.

Mr. Mitter sees ill-treatment here. We do not. What are the innumerable faults of the husband? Not that we know of. Not that the evidence does disclose that. Then, faults against whom? Not against the wife? But against her father, mother and members of her maternal uncle's family. The letter, it will be seen, is dated September 26, 1956. By then the husband's suit against his father-in-law was over. It ended in a compromise decree on January 7, 1955. So, some of the husband's numerous faults must be bringing of the suit and the steps-very very legitimate steps at that- taken by him for its carriage. But, for that we are clear, the husband cannot be regarded as blameworthy, unless it be held that to lend money to the father-in-law is blameworthy. Thus, on such a "liquid" averment, we cannot find cruelty either.

21. VI. The very fact that the appellant petitioned for judicial separation shows the mental anguish she had been going through. Find, therefore, mental cruelty.

Were this a sound argument, no petition for judicial separation would ever fail either. But that is not the test in a court of law. The race is not to those who come first. The race is to those who prove their case. The appellant wife has not proved hers.

22. Now comes the charge of physical cruelty against the husband. Under this charge come the allegations the appellant wife makes on the following:

1. Provided with inadequate food.

2. Forced to lie on bare floor.

3. The husband throttled her by the neck on three occasions and pushed her down too on four or five occasions.

4. She was kept confined in a room which her husband used to lock up from outside and none were allowed to see her.

23. Here also the approach is just what goes before: lack of corroboration, not by eye-witnesses who, we realize, are seldom to be expected to depose to rubs of married life right inside the zenana, but by evidence under the "at or about" rule and other circumstances as well. One of the loudest circumstances appears to be that, in a single letter written by the wife to the husband, nothing like this is there, though the husband's misdeeds, supposed or real, against her father, mother and

even the maternal uncle's family have been referred to.

24. Mr. Mitter argues that once the wife's evidence on such acts of physical cruelty is there, the onus shifts on to the husband who should have examined his servant, maid-servant and mali, all of whom used to regard the appellant, as the husband says, as the real mistress of the house. But if examined, they would have nonetheless been the servant, maid-servant and mali of the respondent husband and would have perhaps been condemned too as too interested to be believed. That apart, what would they prove? The negative: that their master had never ill-treated their mistress. But on the basis of the very case Mr. Mitter relies upon: (8) [Mt. Padma Vs. Parma Ram](#), evidence of a negative character coming from the husband cannot rebut the positive evidence of maltreatment adduced by the wife. Again, there in the Himachal Pradesh case, the wife's evidence was believed. Here the wife's evidence about ill-treatment and all that has not been believed and cannot be believed. So, no question of the onus being shifted can arise in any event, let alone the clear law that, in cases of this type, a heavy onus lies upon suing spouse to prove his or her case and that the proof required in a matrimonial cause is the proof required in a criminal prosecution, as pointed out by Subba Rao, C.J. (then Subba Rao, J.) in his minority judgment in (9) [Lachman Utamchand Kirpalani Vs. Meena alias Mota](#), after having referred to the law laid down by the Supreme Court in the earlier case of (10) *Bipinchandra v. Probhavati*, AIR 1957 S.C. 167. Upon the whole of the evidence, such onus remains undischarged.

25. We do not deny that it is so difficult to prove a matrimonial cause rested on ill-treatment, as emphasized by Mr. Mitter again and again. But such difficulty cannot be a valid ground for dispensing with dependable evidence which is very much needed, the uncorroborated testimony of the appellant being far from dependable. Why difficulty alone, even impossibility of getting at the evidence, say, in that class of case known as commorientes (common disaster), for example, (11) *K.S. Agha Mir Ahmad Shah v. Mir Mudassir Shah*, (1944) 49 C.W.N. 52 : 71 I.A. 171, cannot be a valid ground either, for dispensing with acceptable evidence. So, that way the appellant cannot succeed.

26. We, therefore, find, as the learned trial judge does, that legal cruelty, physical or mental, on the part of the husband, has not been proved.

27. Desertion at law is the topic now taken up. In order to constitute desertion, the husband is charged with, there must be a cessation of cohabitation, and an intention on his part to desert the appellant, or, as the Supreme Court lays down in *Bipinchandra v. Probhavati* (supra), there must be the factum of separation and animus deserendi- an intention permanently to put an end to the matrimonial consortium. The first ingredient is no doubt here, and with vengeance too, separation right from September 13, 1952. But what about the other ingredient - the requisite animus? Let the wife's evidence on cross-examination answer it:

My husband came to Serampore to bring me back. He did not come to take me to Sahanagar after the death of my mother-in-law.

So the husband had come. That is what the wife admits. And the husband's evidence on cross-examination is: that even after the dismissal for non-prosecution of the wife's divorce suit on December 5, 1959, he accompanied by sister and her husband came to the wife's place with a view to bringing her back. But they were not allowed to contact her. After all such evidence - and illuminating evidence at that-what remains of desertion at law on the part of the husband? Nil. So, here, also our finding must be against the appellant wife, unless there is anything to the contrary.

28. Mr. Mitter submits: three things are there to the contrary:

(i) conduct of both the spouses;

(ii) no demand of alimony on the part of the wife; and,

(iii) absence of any issue. But we see little contrary in these three elements, taken singly or collectively. The conduct of the wife is the conduct showing refusal by her to come back to the matrimonial home she had left on a pretext.

What we miss upon evidence is animus revertendi on her part : the intention to revert to her husband's place. True it is, as Mr. Mitter says, that the husband did not write any letter to his wife radiating love, affection and solicitude, after she had left the matrimonial home on September 13, 1952. On the contrary, by his undated letter, ext. 4, he gives somewhat of an ultimatum to his wife: "Come away to me within 10 days from today after having cut off all connation with your father's house. If you do not, I shall lake it you prefer your father's house to mine". This does not show the husband to be in desertion though the tone of the letter is rude and peremptory. Because of the festering recollection of the most unpleasant litigation with his father-in-law and all that it meant, the husband perhaps expressed himself so rudely. Condemn it by all means. But you cannot find desertion on his part only because of this.

29. Again, in this very letter, the husband addressed the as "Apani" instead of "Tnmi". Normally, a husband adresses the wife as "Tnmi". That may very well show an angry husband, as Mr. Mitter says. But that does not show desertion. The husband had reasons enough to be angry.

30. Absence of any demand by the wife for alimony only shows that the wife, the only daughter of a rich father, does not need it. It has very little to do with absence or presence of desertion at law; so also the other element: that the litigating spouses have not had the gift of a child.

31. (12) [Smt. Leela Devi Shriwastava Vs. Manoharlal Shriwastava](#), , is confined to maintenance only, there having been no appeal from the decree for judicial

separation. So, Mr. Mitter cites it in vain. It cannot be assimilated to the facts here. Deviation from the duty of the husband makes out a case for maintenance- But, in view of all that goes before, we find no deviation from the duty of the husband here. He did attempt to compass the return of the wife in spite of all that had happened in the past.

32. We, therefore, reiterate our finding that the husband is not guilty of desertion on which however, there is no issue in spite of the pleadings to that end, but which has been dealt with all the same by the learned trial judge without any objection by either party. There is no objection before us too. Hence no illegality can lurk here : (13) Rani Ch. Kunwar v. Narpat Singh, (1907) 34 I.A. 27, and (14) [Nagubai Ammal and Others Vs. B. Shama Rao and Others](#), where both parties go to trial on issues on matters nothing like which is pleaded in the pleadings. Hence the case before us appears to be so much the stronger, because the pleading of desertion is there, though no issue.

33. The last point of Mr. Mitter remains. The point is: even if the Hindu Marriage Act, 1955, cannot come to the aid of the appellant, she is entitled to relief, in any event, according to the rule justice, equity and good conscience, embodied in section 37, subsection 2, of the Bengal, Agra and Assam Civil Courts Act, 1887, the fact that the two spouses have been living separately from one another for a little less than 16 years, right from September 13, 1952, being kept in the forefront of one's consideration. Section 37, by subsection 1, provides, in so far as it is material here, that in any suit concerning marriage between two Hindus-here the spouses are Hindus-the Hindu law "shall form the rule of decision except in so far as such law has, by legislative enactment, been altered or abolished". Then follows sub-section (2) which bears :

In cases not provided for by subsection 1 or by any other law for the time being in force, the Court shall act according to justice, equity and good conscience.

34. Such being the law, it completely beats us how it can endure to the benefit of the appellant a Hindu wife. The old. Hindu Law on marriage is no more. The Hindu Marriage Act, 1955, a legislative enactment, has altered it beyond recognition. So, that the Act will govern the present unfortunate litigation between the parties. Subsection 1, section 37, providing so, the Hindu Marriage Act, 1955, the law for the time being in force, providing so, the rule of justice, equity and good conscience, provided for in sub-sec. (2) of section 37 of the Bengal, Agra and Assam Civil Courts Act, cannot rear its head here. That is the answer to Mr. Mitter's contention.

35. But Mr. Mitter will not pass such ineluctable analysis of section 37 by. He argues that some 16 years of separation having been there between the two spouses, it is pre-eminently a fit case where the rule of justice equity and good conscience applies and calls for a judicial separation by the Court. We are unable to agree. Judicial separation can there be only when the requirements of section 10 of the Hindu

Marriage Act, 1955, are satisfied. They are not satisfied here. Sure enough, in the name of justice, equity and good conscience or even in the name of judicial conscience and social conscience, as appealed to by Mr. Mitter, we cannot as appealed to by Mr. Mitter, we cannot rise above the law laid down in section 10 and create a new law of our own.

36. (15) In [Smt. Umri Bai Vs. Chittar](#), , no doubt, separation of the two spouses for 8 years was there, whereas the separation here is for nearly double that time, as Mr. Mitter rightly argues. So what? The ratio of the decision is not that: the number of years of separation. The ratio is that the husband falsely charged the wife with immorality and adultery, and what is worse, still persisted in such baseless charges even at the trial. Naturally it was regarded as the worst type of ill-treatment and cruelty. Say that here? You cannot, upon the whole of the evidence. So this Madhya Pradesh case does not reach the case in hand.

37. Thus, the last contention of Mr. Mitter fails too.

38. In the result, all the contentions urged on behalf of the appellant failing and fail they must -the appeal fails too and is dismissed. But, upon all we see, we order that the parties do pay and bear their costs here and below. It goes without saying that, in view of the manner in which this appeal ends, the amount granted by this Court by way of maintenance pendente lite cannot receive any effect. But, if the costs ordered by the Court have already been paid and taken away by the appellant, that will remain as it is. We do not interfere with that.