

Smt. Ann Sarkar Vs. Anil Sarkar

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Court : Guwahati

Decided On : Jan-27-1988

Judge : K.N. Saikia, C.J., Manisana and J.M. Srivastava, JJ.

Acts : [Divorce Act, 1869](#) - Sections 10; [Hindu Marriage Act, 1955](#) - Sections 13B

Appeal No. : Divorce Suit No. 5 of 1987

Appellant : Smt. Ann Sarkar

Respondent : Anil Sarkar

Prior history : Saikia, C.J. 1. The decree nisi dt. 11-11-87 passed by the District Judge, Dibrugarh under Section 10, Divorce Act, 1869, hereinafter referred to as 'the Act', has come up for confirmation in this reference under Section 17 of the Act. 2. The petitioner sued for dissolution of her marriage with the respondent on ground of adultery coupled with cruelty. Examining herself as witness 1, she deposed that she was married to the respondent Anil Sarkar on 6-12-79 at Dibrugarh Christ Church as both

Judgement :

Saikia, C.J.

1. The decree nisi dt. 11-11-87 passed by the District Judge, Dibrugarh under Section 10, [Divorce Act, 1869](#), hereinafter referred to as 'the Act', has come up for confirmation in this reference under Section 17 of the Act.

2. The petitioner sued for dissolution of her marriage with the respondent on ground of adultery coupled with cruelty. Examining herself as witness 1, she deposed that she was married to the respondent Anil Sarkar on 6-12-79 at Dibrugarh Christ Church as both of them were Christians. Ext. 1 was their marriage certificate. After marriage they lived conjugal life at Moran but had no issue. Since about 3 months after the marriage the respondent showed indifference towards her, at the same time having affairs with other women and when her protests proved to be useless she went to her mother's house. When her husband used to be with other women

and when she objected her husband threw things at her and behaved very rudely in presence of her daughter by her previous marriage. The respondent also had a son by his previous marriage. It appears the previous marriages of both the petitioner and the respondent ended in divorce. She apprehended that she could not live with her husband safely, and she left respondent's company in April, 1981 and went to her mother at Pangeri where after the respondent never enquired about her. She further deposed that the respondent was living an adulterous, life and hence she prayed for dissolution of marriage without claiming any alimony from him.

3. The respondent appeared in Court and filed petition No. 585/87 giving his consent to the dissolution of marriage stating that they have been living separately since 1981 and have not been able to live together. He however did not appear or examine himself in Court and also did not file written statement and hence the suit proceeded ex parte. The respondent, however, made no comments on the allegation of cruelty and stated that the marriage between them had broken down irretrievably and that continuation of marriage tie would only add misery to the respondent.

4. Learned District Judge after observing, and we think rightly, that the Act does not contain a provision similar to Section 13B, [Hindu Marriage Act, 1955](#) for divorce by mutual consent and in view of the provisions of Sections 12, 13, 14 and 47 of the Act has held that a decree for divorce on consent is not permissible.

5. The learned District Judge on the basis of the evidence on record was satisfied that the respondent had been guilty of adultery coupled with cruelty as envisaged in Section 10 of the Act and that the petitioner had not condoned the adultery committed by the respondent. He further found that there was no collusion in filing the petition and accordingly the decree nisi was passed dissolving the marriage.

6. We have perused the evidence on record and the decree nisi. While agreeing that the marriage could not be dissolved on mutual consent the learned District Judge failed to notice that under Section 10 of the Act any wife may present a petition praying that her marriage may be dissolved on the ground that since the solemnization thereof her husband has been guilty of adultery coupled with such cruelty as without adultery would have entitled her to divorce a mense et toro or of adultery coupled with desertion, without reasonable excuse, for two years or upwards and the burden of proof is on the party who alleges. Again under that Section every such petition shall state, as distinctly as the nature of the case permits, the facts on which the claim to have such marriage dissolved is founded. In the instant case desertion, cruelty, and adultery have not been specifically alleged as grounds for dissolution. On the other hand she deposed that her husband used to be very friendly with other women and had affairs with them and her protests were of no avail and that her husband was living an adulterous life. No particular name of any woman has been mentioned and no specific instances have been given. What she stated was about her husband's becoming very friendly with other women and having affairs with them. The petitioner did not examine any other witness than herself. On the basis of such particulars we find it difficult to hold that the respondent committed adultery providing grounds for dissolution of the marriage.

7. The allegation of cruelty has not also been specifically made and proved. Cruelty has not been defined in the Act. Section 10 includes the ground of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et toro. Thus cruelty to be a ground for divorce must be of such character as would have entitled the wife to a judicial separation. Under Section 22 of the Act there is bar to decree for divorce a mensa et toro, but judicial separation is

obtainable by husband or wife on ground of cruelty. Neither Section 10 nor Section 22 of the Act defines it.

8. Legal cruelty has been defined in *Russel v. Russel*, (1897) AC 395 as conduct of such a character as to have caused danger to life,

limb Or health (bodily or mental), or as to give rise to a reasonable apprehension of danger. In the matrimonial law where the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent it will be an instance of cruelty. No hard and fast rules can, however, be laid down; and in determining what constitutes cruelty, regard must be had to the circumstances of each particular case, keeping in view the physical and mental condition of the parties, and their character and social status.

9. Generally speaking any intentional and malicious infliction of physical or mental suffering; or the wanton, malicious, and unnecessary infliction of pain upon body, or the feelings and emotions would amount to cruelty. In domestic relation it includes mental injury as well as physical. Generally single act of cruelty is not sufficient for divorce and there must be course of cruel conduct over period of time. The word cruelty as ground for divorce has been used in its ordinary sense. It has not esoteric or artificial meaning. There must be some grave or weighty matters to constitute cruelty (*Le Brocq v. Le Brocq*, (1964) 1 WLR 1085. There may be cruelty without intention to injure as was held in *Gollins v. Coffins*, (1964) AC 644.

10. In Halbury's Laws of England, Third Edition, Volume 12, para 514 we read the following meaning of cruelty.

'The legal conception of cruelty, which is not defined by statute is generally described as conduct of such a character as to have caused danger to life, limb, or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger. To be a ground of divorce the treatment with cruelty since the celebration of the marriage, but revelation after marriage of deception before it may be cruelty where it is aggravated by circumstances.'

There is nothing in the authorities to justify the proposition that a decree based on cruelty is a remedy given, not for a wrong inflicted, but solely as a protection for the victim.

11. To find cruelty it is not necessary to,

find physical violence. It is doubtful whether any definition of cruelty applies equally well to cases where there has been physical violence and to cases of nagging or to cases where there has been a deliberate intention to hurt and to cases where temperament and unfortunate circumstances have caused much of the trouble. It is undesirable, if not impossible, by judicial pronouncements, to create certain categories of acts of conduct as having or lacking the nature of quality which renders them capable or incapable in all circumstances amounting to cruelty in cases where no physical violence is averred.

12. In para 516 we read the following considerations which in general are material. Either of the spouses may be guilty of the offence of cruelty. The general rule in all questions of cruelty is that the whole matrimonial relations must be considered and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion, a judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must weigh from the point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status. In some cases one act may be so grievous as by itself to constitute cruelty, although this is seldom the case; but a blow followed by minor acts may be enough. A course, of conduct with the deliberate intention of wounding and humiliating the other spouse and making his or her life a burden and then to continue in that course of conduct in the knowledge that it is seriously affecting his or her mental health will amount to a great matrimonial offence. Such course of conduct may consist of a number of acts each of which is serious in itself, or it may be even more effective if it consists of a long continued series of minor acts none of which could be regarded as serious in isolation. However, if such acts continued

for only a short time due to peculiar circumstances of

the movement and they cause no real danger of life or health or even future happiness of the husband, it may not amount to offence. The conduct alleged must also be judged up to a point by reference to the victim's capacity for endurance insofar as that capacity is known to the other spouse. The more serious the original offence, the less serious may be subsequent matters to constitute cruelty as they have to be considered in light of the past acts.

13. Though malevolent intention is not always essential to cruelty, it is the most important element where it exists. Intentional acts may amount to cruelty though there is no intention to be cruel. The effect of the intentional acts would be important as the intention to be cruel. Mere negative conduct is not cruelty but it may be so when used as a weapon to reduce the other spouse into subjection. In other words, a course of conduct calculated to break the spirit of the sufferer continued till health breaks down or is likely to break down under the strain is a ground for relief, but not mere neglect and want of affection. Again a previous deception coming to the knowledge of the wife in such a manner as greatly to aggravate the shock of revelation, may, in conjunction with other circumstances, amount to cruelty. However, the onus of proof is on the person alleging cruelty. Threats of actual personal violence sometimes constitute cruelty and the court need not wait to act until such threats are carried into effect.

14. As regards cruelty for the purpose of the Hindu Marriage Act, prior to the Amendment Act of 1976 in the [Hindu Marriage Act, 1955](#), the connotation of 'cruelty' was indicated in Section 10(1)(b) by way of a ground for judicial separation. It read :

'Has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party'.

However, the Amending Act of 1976 deleted the connotation. Interpreting the above Section 10(1)(b) the Supreme Court observed :

'The inquiry, therefore, has to be whether

the conduct charged, as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the respondent. It is not necessary, as, under the English law, that the cruelty must be of such a character as to cause danger to life, limb or health so as to give rise to a reasonable apprehension of such danger. Clearly, danger to life, limb or health, or a reasonable apprehension of it is a higher requirement than a reasonable apprehension that it is harmful or injurious for one spouse to live with the other'.

Even injury to health, reputation, the working career or the like may amount to cruelty,

'Plainly, what we must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles, of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious to live with the respondent.'

The above Section 10(1)(b), Hindu Marriage Act, having since been deleted and there having been no such provision in the [Divorce Act, 1869](#) the English decision will still be guide full in case of divorce under the Indian Divorce Act. In *Gollins v. Gollins* (1964 ACC 644) (supra) the House of Lords held that an intention on the part of the spouse to injure the other was not a necessary element of cruelty as a matrimonial offence though if such intention was found, it would be material and crucial; whether cruelty as a matrimonial offence had been established was a question of fact and degree which might be determined by taking into account the particular circumstances of the case rather than by any objective standards; accordingly, in cases where two spouses were of normal physical and mental health and the conduct of the respondent spouse was so bad that the other should not be called on to endure it, cruelty was established. It was immaterial whether the offending spouse aimed at it or not,

15. In *Williams v. Williams*, (1963) 2 All ER 994 : (1964) AC 698 (HL) where the

husband deliberately accused the wife of
adulterous associations, but he thought that
such accusations were justified, the House of,
Lords ruled :

'The fact that the husband did not know that his acts were wrong did not itself constitute a defence to a suit for divorce on the ground of cruelty, and accordingly the appeal should be allowed.

In *Crawford v. Crawford*, (1955) 3 All ER 592 the following principles have been culled out regarding mental cruelty :

'(i). cruelty must be inferred from the whole facts and atmosphere disclosed by the evidence;

(ii) actual intention to injure the other, spouse is an important, but not an essential factor;

(iii) it is impossible to create categories of acts or conduct which do not amount to cruelty;

(iv) sexual offences directly relevant to the husband's conjugal obligations may constitute ill treatment of the wife;

(v) mental ill treatment may be coupled with physical ill treatment in order to found a charge of persistent cruelty; and

(vi) even different forms of mental ill treatment may be taken together in order to found a charge of persistent cruelty.'

In *Sheldon v. Sheldon*, (1966)2 All ER 257 (CA) persistent refusal of sexual intercourse without any reason, it was held may amount to cruelty. Intention may be presumed from an act. Malignity is not a necessary ingredient. In *Durant v. Durant*, (1824-34) All ER Rep. 459 a groundless and malicious charge against the wife's chastity with other acts, it was held, would amount to cruelty. The husband

falsely accusing the wife of impotency was held to be cruelty.

16. In the instant case the petitioner's allegations were that her husband was becoming indifferent to her and had no feelings for her; that he used to be very friendly with other women and had affairs with them, and she protested but to no effect; that when for sometime she went to her mother's house her husband used to take women and have sex with them; and that she objected but he fought with her and sometimes threw things at her. It has also been alleged that he also behaved rudely with the petitioner in presence of others and in presence of her daughter by her previous marriage. No specific instances have been given.

17. Admittedly, both the parties broke their previous marriage by divorce and each has an issue by the previous marriage. The allegations were not denied by the respondent husband. In his petition he only said that he had no comments on the allegations of cruelty made by the petitioner against him.

18. Admittedly, the parties have no communication between them after April, 1981. The circumstance, of course, indicate that there is little likelihood of the parties leading a happy conjugal life. Even so, we do not find sufficient grounds for dissolution of marriage. We find neither reliable evidence of adultery, nor any evidence of cruelty sufficient to justify the decree for dissolution of the marriage.

19. In the result, there having been no specific allegation and satisfactory proof of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et toro*, we are unable to confirm the decree *nisi*. The reference is rejected. There shall be no bar for the petitioner to file fresh petition for divorce on other or fresh cause of action if so advised.

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