

Bani Devi Vs. A.K. Banerjee

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Court : Delhi

Decided On : Jul-19-1971

Reported in : AIR1972Delhi50

Judge : V.D. Misra, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1)

Appeal No. : F.A.O. No. 70 of 1970, from judgment and decree of K.S. Sidhu, Addl. Dist. J., Delhi, D/- 25-3-1970

Appellant : Bani Devi

Respondent : A.K. Banerjee

Advocate for Def. : Kailash Narain, Adv.

Advocate for Pet/Ap. : R.M. Lal, Adv

Judgement :

1. The main question which arises for decision in this appeal by the wife under Section 28 of the Hindu Marriage Act (hereinafter referred to as the Act) is as to what is meant by the expression 'incurably of unsound mind' used in Section 13(d)(iii) of the Act

2. The [Hindu Marriage Act, 1955](#) does not define the term 'unsound mind' I find that while laying down the conditions for a Hindu Marriage under Section 5(ii) of

the Act the Parliament used word 'idiot or lunatic' for disqualifying a party from entering into a valid marriage. Under Section 10(1)(e) the term 'unsound mind' has been used for giving a right to a party to pray for a decree of judicial separation. Under Section 13(1)(iii) of the Act a party is entitled to ask for dissolution of a marriage by a decree of divorce on the ground that the other party has 'been incurably of unsound mind' for a continuous period of not less than three years immediately preceding the presentation of the petition. The use of different expressions in the same Act by the Parliament shows that they are not meant to convey the same meaning.

3. Under Section 12(1)(b) of the Act, a marriage may be annulled by a decree of nullity on the ground that a party to the marriage at the time of the marriage was an 'idiot or a lunatic'. This remedy is based on the ground of incapacity of a party to marry. It envisages a mental disorder or such a degree of unsoundness of mind that a person is not in a position to comprehend nature of the contract of marriage and so is not in a position to give the consent. However, by using the expression 'unsound mind' for the purposes of judicial separation and divorce, the Parliament seemed to convey different intention than that which was shown by the use of expression 'idiot or a lunatic'. My attention has also been drawn to the Indian Lunacy Act, 1912. Section 3(5) defines 'lunatic' meaning 'an idiot or a person of unsound mind'. This Act while providing for the establishment of asylum, also makes provision for judicial powers over person and estate of lunatic. Section 46 and 67 of this Act are *pari materia* and are in the following terms :

'46. (1) The Court may make orders for the custody of lunatics so found by inquisition and the management of their estates.

(2) When upon the inquisition it is specially found that the person to whom the inquisition relates is of unsound mind so as to be incapable of managing his affairs, but that he is capable of managing himself, and is not dangerous to himself or to others, the Court may make such orders as it thinks fit for the management of the estate of the lunatic including proper provision for the maintenance of the lunatic and of such members of his family as are dependent on him for maintenance, but it shall not be necessary to make any order as to the custody of

the person of the lunatic.'

This provision shows that where the degree of unsoundness of mind of a person may be such that he is capable of managing himself but he is incapable of managing his affairs., still he is to be termed a 'lunatic and the court may pass necessary orders for the management of the estate of the lunatic including proper provisions for his maintenance. Order 32 of the Code of Civil Procedure provides in Rule 15 for the extension of Rules applicable to minors to be applicable to persons 'adjudged to be of unsound mind and to persons who though not so adjudged are found by the court on inquiry, by reason of unsoundness of mind or mental infirmity to be incapable of protecting their interest when suing or being sued'. Here again. If the degree of unsoundness of mind or mental infirmity is such that a person is incapable of protecting his interest in a suit then necessary steps have to be taken to safeguard the interest of such a person. Section 38 and 62 of the Lunacy Act show that the test of a person of unsound mind is his incapacity of managing himself and his affairs.

4. Section 84 of the Indian Penal Code, which is framed on the lines of McNaghten Rules saves a person from criminal responsibility and the test laid down is that at the time of doing the act complained of he 'by reason of unsoundness of mind is incapable of knowing the nature if the act, or that he is doing what is either wrong or contrary to law.' The purport of his Section is to save those from punishment whose a unsoundness of mind is of such a degree that they are incapable of knowing the nature of the act.

5. Under Section 12 of the Indian Contract Act the soundness of mind for the purpose of making a contract has been described as the capacity of understanding the contract and of forming a rational judgment as to its effect upon his interest.

6. The afore-mentioned enactments show that different degrees of unsoundness of mind have been taken into consideration by each Act to meet its object.

7. Finding that various disorders of the mind or illness which need medical treatment and the old legal concepts of insanity do not portray medical advancement in the treatment of mental sickness, the English Mental Health Act.

1959, providing for the care and protection of persons of unsound mind notes the concepts of mental illness by the use of terms 'severe subnormality', sub normality, and 'psychopathic disorder' in place of old terms of 'idiots' imbeciles', feeble minded'. 'Moral defectives' and 'moral insanity'.

8. The essential feature of mental illness is given in 'Taylor's Principles and Practice of Medical Jurisprudence. Twelfth Edition, thus;

'Perhaps the essential feature of mental illness from a medico legal point of view is the failure through incapacity of the individual to maintain normal contact with external reality, and to appreciate the distinction between what is going on solely in his own mind, and what is going on beyond it in the external world, and is therefore common to his own experience and that of others. The older term 'alienation of the mind.' despite its disagreeable implication that mentally ill patients were a race apart, certainly owed something of its force to just this characteristic of mental illness in general : that the mentally ill person is separated from common experience and appreciation of external reality, and to a greater or lesser degree is compelled by his illness to live in a world different from that inhabited by his fellow men.

Mental health is assumed to be normal : mental illness to be abnormal; but there is no definite dividing line between one and the other; and one may pass imperceptibly into the other in the development of the illness which ultimately disables the patient and thereby nullifies or modifies individual legal responsibility or capacity.

Taking the failure of contact and appreciation of reality as the basic criterion, it is obvious that the term insanity as ordinarily used must denote a fairly advanced degree of disturbance or unsoundness of the mind. Since it is by means of normal mental activity that an individual is able to adapt himself to his environment, and to adjust him self to relationships with his fellow men, disorder or disease of the mind is apt to display itself primarily in disturbance of thought and conduct, which may bring the individual into conflict with his environment or with his fellows.'

9. Relief of judicial separation or a divorce under Sections 10(1)(e) and 13(1)(iii) of the Act has been given to a party where during the marriage unsoundness of mind supervenes. In my opinion, the Parliament intended to enable a party to get the relief of divorce where the opposite party has been suffering from unsoundness of mind for a continuous period of not less than three years before the presentation of the petition and this unsoundness of mind was incurable because it was impossible for them to live a normal married life with no prospect of improvement in the mental health of the opposite party.

10. The expression 'incurably of unsound mind' used in Section 1(1)(d) of the Matrimonial Causes Act, 1950 came to be considered in *Whysall v. Whysall* (1959) 3 All 389 wherein it held that :

'In deciding whether a person is 'incurably of unsound mind' the test to be applied is whether by reason of his mental condition he is capable of managing himself and his affairs and, if not act whether he can hope to be restored to a state in which he will be able to do so. I would add to the above test the rider that the capacity to be required is that of a reasonable person.' It was further observed :

'In my judgment the test to be applied to the word 'incurably' is to be applied with common sense and with regard to the popular understanding of the term. In a sense, no doubt anyone who has suffered a severe disease, mental or physical cannot be cured in that he cannot expect to enjoy a mind or body as robust or healthy as before. Nevertheless we regard such a person as cured a normal life. The mere fact that he may have to take prophylactic measures to preserve his cure does not in ordinary language class him as an invalid. In the physical sphere injections in the case of a diabetic provide a parallel to the Largactil which the schizophrenic must always take even after he is discharged as clinically 'recovered'. There will always be borderline cases, such as cases where there is a real prospect of relapse at an early date, but if these cases are to be properly assessed and the interest of the mentally affected are to be protected a practical test must be found a test which enables a doctor to say with some confidence on which side of the line the particular patient falls. If a man can hope to resume a normal married life and to manage himself and his affairs no ordinary persons

would describe him as incurably of unsound mind or insane because he has to take a drug once a week or once a day Equally. However. If in the light of medical knowledge at the time of the inquiry it is said that the patient's mental state is such that the best can be hoped for is discharge to conditions where he will not be required to manage himself or his affairs but will live an artificial existence protected from the normal incidents and problems of life he sill properly be termed incurable. A parallel in the physical sphere is the patient who can go home but will always be bedridden, whom we would term a permanent invalid.'

This was followed in Chapman v. Chapman. (1961) 3 All 1105 and Robinson v. Robinson. (1964) All Er 232.

11. Keeping the aforementioned test in mind I will discuss the evidence produced by the parties.

12. The evidence in this case consists of the medical doctors produced by the parties as well as evidence of laymen to show the behavior of the appellant.

13. The respondent appeared as P.W. 7. After describing how the marriage was arranged between the parties, he stated that on the first night or marriage at about mid-night the appellant shouted and yelled. Her face had become distorted and eye balls had gone in different directions. She had cramping of the body and foaming from the mouth. She however, re-gained consciousness after sometime. The following morning the appellant's brother and a doctor was sent for. Her brother informed the respondent that such attacks were transitory and the appellant had medicine with her which would be helpful. He also gave a brief history to the doctor. The respondent goes on to say that one day his nephew, who is six or seven years of age entered the appellants room without giving a knock and she slapped him. When the respondent's sister intervened, the appellant used filthy language. The doctors informed him that she was suffering from epilepsy and advised him to put her in mental hospital. Shahdara. He further stated that the appellant suffered these strokes for durations ranging from 15 minutes to 45 minutes. Sometimes their frequency would be two a day and once she suffered as many as 12 strokes in 8 hours.

14. The appellant's brother K.N. Pathak, R.W. 5 admitted that he had been called by the respondent to his house on the day following the marriage. However, he describes the sickness of the appellant as 'a little bit of headache'. He did not state that he did not inform the respondent that the appellant had been having such attacks which were transitory and for which she carried medicines.

15. The appellant appeared as R.W. 4 and stated that she had suffered some fits because of the death of her father but she claims to have recovered from them. She denied that she suffered from any disease on the first day of marriage in the house of the respondent. She further stated that she had only a headache and she denied that she was carrying any medicine. She further admitted that she was taken to Dr. Bose on the day following the marriage-night by her brother. She admitted coming from the mental hospital. Shahdara to give evidence in the case and stated that during her stay in the hospital she did not suffer from any fit.

16. The evidence of the parties in such a situation is bound to be prejudiced. However, it is clear that the appellant did suffer from a fit on the night of the marriage and that fit was of such an alarming nature that her brother had to be sent for in the morning and he had taken the appellant to Dr. Bose. Moreover it is also apparent that the appellant was in the habit of keeping medicines to overcome such fits.

17. The medical evidence consists of various doctors. Dr. V.M. Rao, P.W. 1 who is a F.R.C.S. and has been practicing as Neuro Surgeon since 1965, examined the appellant in 1967. It may at this stage be stated that the marriage had taken place on 23rd November, 1963 and the petition for divorce was moved on 25th May, 1968. The appellant was brought to this witness by her brother and he diagnosed that she was suffering from epilepsy with some associate mental deterioration. He could not say whether this disease could be cured or not. This evidence is not helpful except to the suffering from epilepsy. It does not show the duration of the sickness nor whether it was curable.

18. The next witness is Dr. B.N. Bohra, P.W. 2, who is attached to Civil Hospital at Kota and his evidence is also not helpful because he is not shown as an expert on mental diseases.

19. Dr. R.C. Jindal P.W. 3 is working as a psychiatrist in the Hospital of Mental Diseases. Shahdara where the appellant was admitted and was under treatment. He has been in the medical profession for 11 years and in psychiatry for 7 years. He stated that the appellant was admitted to the hospital on April 20, 1968 and she was found to be suffering from mental deficiency together with epileptic psychosis. According to him, mental deficiency is incurable and epileptic fits and fits of violence can be controlled to a variable extent but they cannot be cured completely. The appellant was discharged on June 15, 1968, the criteria for discharge being 'that whatever was possible to be done had been done to her'. At the time of discharge her epileptic fits had been controlled to some extent. He described the appellant as a person of unsound mind whose mental deficiency seemed to be congenital. This doctor had been attending on the appellant throughout her stay in the hospital. He had stated that she was officially discharged on June 15, 1968, but nobody had come to take her away and so she continued to be in the hospital at the time of his making the statement in the court on 20th March 1969, she was still getting epileptic fits and fits of violence. He was not cross-examined regarding the sickness or its nature.

20. The respondent produced Dr. P.B. Bakshi, R.W. 3. Medical Superintendent and Senior Psychiatrist of the Mental Hospital, Shahdara. He claims to be in the profession of psychiatry for about 18 years and started working as the Medical Superintendent since March 15, 1967. On the basis of the record of this hospital he states that 'she suffers from epileptic fits with episodic attacks of violence. These fits can by regular treatment be relieved in severity and frequency' According to this doctor the appellant could not be described as a 'lunatic in the strict sense but she could not be described as fully normal since she was occasionally excited and agitated. The Board of Doctors of Hospital on June 15, 1968 had approved her discharge from the hospital on the ground that her fits had improved , in cross-examination Dr. Bakshi states that he had been seeing the appellant on his grand rounds on Saturdays as also on other rounds which he made in the hospital. He sees indoor patients on his usual weekly rounds on Saturdays and on those occasions he talked to the appellant. Admitted that Dr. Jindal was the Specialist-in charge of the appellant. He found it a routine case of epilepsy and approved the line of treatment suggested by Dr. Jindal. From the

records he stated that the patient had fits of violence 11 or 12 times and during those fits she was using violence against other patients as well as against herself. She had been getting fits at various intervals and there were occasions when she got more than one fit at short interval. According to this Doctor 'we recommend discharge because the patient had showed improvement in the severity and frequency of the fits and also because such patients can be managed at home. The patient has been having epileptic fits and fits of violence even after the date when the Board recommended her to be discharged but the fits had continued to be in a less severe form' Dr. Bakshi further states that the intelligence quotient (I.Q.) of the appellant was found to be 65 and thus she had to be put in the category of moron. Normal I.Q. was 90 to 110 and persons between 70 and 80 are called dull normal where as those between 80 and 90 are called border line case. He further states 'the patient is not unsound but during fits of violence she is of unsound mind, otherwise not'. Her I.Q. could not be improved at this stage.

21. It is true that Dr. Bakshi is Senior Psychiatrist of the Hospital but he was examining the patient only once a week whereas Dr. Jindal was the attending psychiatrist on the appellant. Both the doctors are unanimous that the appellant is suffering from epilepsy and she is prone to fits in which she uses violence against others as well as on herself. Again both are unanimous that she cannot be cured completely but her discharge from the hospital was recommended on the criteria that 'whatever could possibly be done in the hospital had been done and improvement in the severity and frequency of the fits had been noticed.' Dr. Bakshi has stated that the discharge was recommended also on the ground because 'such patient can be managed at home.' In other words, the appellant will need constant attention and will not be in a position to manage or look after herself. Dr. Jindal had clearly stated that the appellant was suffering from mental deficiency which was congenital and which was incurable. He was not cross-examined at all. No question was put by the appellant when she produced Dr. Bakshi to show that she is not suffering from congenital mental deficiency which was incurable. Dr. Bakshi is in agreement with Dr. Jindal that the epileptic fits from which the appellant was suffering cannot be cured completely. His statement that the appellant was being kept busy in the hospital in looking after other patients and doing some work in the kitchen and that she was doing fairly well cannot be given

much weight in view of the fact that he only visits the hospital once a week and no such question was put to Dr. Jindal, who was the attending doctor. Moreover it does not mean that she was not getting epileptic fits and fits of violence and was cured. Dr. Bakshi has unequivocally stated that the appellant has been having such fits even after the Board had recommended her discharge.

22. Another doctor examined by the respondent is Dr. B. Saha P.W. 5. He had examined the appellant soon after her marriage and found her to be suffering from epilepsy. He had given a certificate Exh. P.W. 5 which is dated 2.12.1963, i.e. about nine days after the marriage. This doctor categorically stated that the brother (who was present in court) had come with the appellant and had given her history and so has described her an epileptic since her childhood in the said certificate Dr. B.N. Bohra, P.W. 4 had examined the appellant on 2.10.1965 and found her to be suffering from violent epileptic fits. His prescription is Exh. P. 4. Dr. Rao had examined the appellant in 1967 when brought by appellant's brother. He found her suffering from epileptic . dr. B.N. Bohra, who examined the appellant again on 2.2.1968 also found her suffering from epilepsy.

23. The medical evidence shows that the appellant was suffering from December, 1963 from epilepsy and was also having epileptic fits. The evidence of the respondent shows that on the first night of marriage the appellant suffered from epileptic fits. The respondent in his petition for divorce had stated in paragraph 5 about the happening on the first night of marriage, when the appellant got the fits and her brother was summoned who gave some medicine from the box which the appellant was carrying and informed the respondent that the appellant was mentally ill and had been under treatment. I find that the appellant had specifically denied this allegation in her written statement. The brother of the appellant had not denied being called by the respondent on the day in question when he was informed of the fit suffered by the appellant. The incident of that night is further corroborated by P.W. 6. A. D. Ghosh who was not cross-examined with regard to the incident.

24. I am satisfied from the evidence on record that the appellant is a person of unsound mind since she is not capable of managing herself or her affairs as an

ordinary reasonable person would. I am further satisfied that this unsoundness of mind is incurable and that she has been of unsound mind since her marriage in November, 1963. The appeal, is therefore, dismissed but in the circumstances of the case there will be no order as to costs.

25. Appeal dismissed.

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