

Sm. Sandhya Chatterjee Vs. Salil Chandra Chatterjee

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Court : Kolkata

Decided On : Apr-15-1980

Reported in : AIR1980Cal244

Judge : Monoj Kumar Mukherjee, J.

Acts : [Contract Act, 1872](#) - Section 23; [Hindu Marriage Act, 1955](#) - Section 10;
;Hindu Law

Appeal No. : Second Appeal No. 679 of 1977

Appellant : Sm. Sandhya Chatterjee

Respondent : Salil Chandra Chatterjee

Advocate for Def. : R.N. Mitra and ;Prosanta Bandopadhyaya, Advs.

Advocate for Pet/Ap. : Sudhis Das Gupta and ;A.K. Sanyal, Advs.

Disposition : Appeal allowed

Judgement :

Monoj Kumar Mukherjee, J.

1. This second appeal it by the wife in a suit instituted by hex against her husband for enforcement of an agreement entered into by them on May 12, 1973.

2. Various disputes and differences arose between them at an earlier stage which prompted the wife to file a suit for judicial separation. During the pendency of the said suit the husband wrote a letter to the wife as under:--

'Sm. Sandhya Chatterjee,

194/C, Rash Behari Avenue,

Calcutta-29.

12-5-1973.

I agree to pay you Rs. 260/- (Rupees two hundred and sixty only) for your maintenance and the maintenance and educational expenses of my son and shall pay Rs. 90/- (Rupees ninety only) to my daughter for her maintenance and educational expenses. I also agree to pay 55% of the bonus which I shall get annually from my company. I shall bear the marriage expenses of my daughter Shyamalima according to my means on receipt of the information of the marriage provided the groom is approved by me.

The amount of maintenance will increase or decrease in proportion to rise and fall of salary and allowance.

This will take effect from the month of April 1973 and first payment will be made by the 30th of the month of May 1973 and subsequent payments shall be made by the first week of the following month,

Besides the above I shall pay you Rs. 500/- (Rupees five hundred only) within December 1973 and Rs. 250/- (Rupees two hundred and fifty) by March, 1974 out of love and affection to my children.

Yours faithfully,

Salil Chandra Chatterjee

12th May, 1973.'

3. The wife in her turn replied to the said letter as follows :--

'To

Sri Salil Chandra Chatterjee,

18/2B, Kundu Lane,

Calcutta-25.

12-5-1973.

This is to place on record that in consideration of your offer for payment of the sums contained in your letter dated 12-5-1973 addressed in my name to me I hereby withdraw all allegations and charges made in the plaint against you in Matrimonial Suit No. 49 of 1972 in 5th Additional District Judge at Ali-pore and I am filing today a petition for dismissal of the suit for non-prosecution. I also agree that you will have free access to my residence at 194/C, Rash Behari Avenue, Calcutta-29 as well as to our son who may be taken to your residence at 18/2B, Kundu Lane, Calcutta-25 once a week and your guidance in the future education of Saibal will be accepted by me. The son shall not be taken except from my residence under normal circumstances.

Yours faithfully,

Sandhya Chatterjee.'

4. After exchange of those letters, the wife, on the self same day, filed a petition praying for dismissal of the suit to which no objection was raised by the respondent. The suit was accordingly dismissed for non-prosecution without costs.

5. According to the appellant, some payments were made in terms of the agreement, reached through the above correspondence, but ultimately the respondent stopped making payment which compelled her to serve legal notice upon him. Since the terms of the said notice were not complied with, she instituted the suit, out of which the present appeal arises, praying, inter alia, for a declaration that the agreement executed by the respondent on May 12, 1973 was binding upon him, for recovery of a sum of Rs. 425/- being the arrears due under the agreement and for a direction upon him to state the amount of bonus received by

him from his office in 1973, in default for appointment of a commissioner for ascertaining the amount payable to her on account of bonus.

6. The suit was resisted by the defendant, firstly on the ground that the purported agreement was opposed to public policy and as such void. The other ground on which the suit was resisted was that the letter written by him on May 12, 1973 was a mere offer to do certain things if the plaintiff carried out her obligations contained in the said letter. As the plaintiff did not comply with her obligations thereunder he was under no obligation to perform his part. Both the courts below decided against the plaintiff solely on a finding that the agreement was opposed to public policy.

7. In assailing the above finding of the learned court below, Mr. Dasgupta, the learned Advocate for the appellant, contended that the decisions on which they relied upon, did not lay down the proposition that the agreement, as in the present case, was opposed to public policy and that those decisions had no manner of application to the facts of the instant case. Mr. Mitra, the learned Advocate appearing for the respondent, supported the finding of the court below and further contended that even if the agreement was not opposed to public policy, still then the agreement could not be enforced as the appellant did not comply with her obligations before asserting her rights thereunder.

8. Both the court below relied upon the judgment in the case of *Tekait Mon Mohini Jemadai v. Basanta Kumar Singh* reported in (1901) ILR 28 (Cal) 751 in concluding that as the plaintiff did not reside with the defendant in spite of non-existence of any judicial order to that effect, the contents of the defendant's letter dated May 12, 1973 were against public policy and not enforceable by him. In that judgment it was held that the duty imposed upon a Hindu wife to reside with her husband, wherever he might choose to reside, was a rule of Hindu Law and not merely a moral duty and consequently an ante-nuptial agreement on the part of husband that he would never be at liberty to remove his wife from her parental abode would defeat that rule of Hindu Law and was invalid on that ground as well as on the ground that it was opposed to public policy. In the present case however the wife intends to enforce not an ante-nuptial agreement but an agreement entered into during the subsistence of the marriage for present separation. In that

judgment, Ghosh J., observed as follows: --

'The principle underlying the cases in, which it has been held that contracts providing for present separation are valid, is as I understand it, the preservation of the peace and reputation of families while on the other hand, an agreement for future separation is bad and opposed to public policy.

There is a fundamental difference between case where an agreement for separate living for a time is entered into during the continuance of the marriage and an agreement before or at the time of the marriage controlling the rights of the parties which the law confers upon them after the marriage and which, if enforced, might make the marriage itself nugatory or infructuous. Such an agreement would seem to be opposed to public policy.

The agreement with which we are concerned is an agreement of that latter character'

9. It would thus appear that the above) decision is an authority for the proposition that an agreement for future separation is bad and opposed to public policy and it does not lay down that an agreement for present separation is opposed to public policy.

10. The other decision on which the trial court relied upon is in the case of Balfour v. Balfour, reported in (1919) 2 KB 571. That decision has no manner of application to the facts of the present case. Considering the agreement of that case, their Lordships held that it did not constitute a legal contract but was only an ordinary domestic arrangement which could not be sued upon because mutual promises made in the ordinary domestic relationship of husband and wife did not of necessity give cause for action on a contract.

11. The lower appellate Court, besides the decision in Tekait Mon Mohini Jemadai (supra), relied upon the judgment in the case of Thirumal Naidu v. Rajammal reported in : AIR1968 Mad201 . Alagiriswami, I. (as His Lordship then was) who delivered the judgment, quoted in extenso from the decision in Tekait Mon Mohini Jemadai (supra) and observed that the statement of law made therein did not

make a distinction between a prenuptial and post-nuptial agreement or between an agreement for the present separation and the one for future separation. His Lordship also relied upon an earlier judgment of the Madras High Court in *Krishna Aiyer v. Balammal*, reported in (1911) ILR 34 Mad 398 and observed that though the agreement in that case was one for future separation, the decision was put on the broader ground that it might be doubted whether under the Hindu Law any agreement between a husband and wife to live apart from each other was valid and it might well be deemed to be forbidden under the Hindu Law. In view of the above two Division Bench judgments, Alagiriswami, J. found himself unable to agree with the following view expressed by the learned author of *Mulla Hindu Law*, 13th Edition :---

'There seems no reason why a valid agreement for immediate and not future separation bona fide entered into during the continuance of marriage with a view to enable the parties to live in peace should not be treated as empowering the court to refuse a decree for restitution. It is submitted that a different rule would have the effect of enabling a party of non-compliance with the decree for restitution on facts contrary to the truth of the case. Moreover a spouse who is living separate after a bona fide agreement of this nature cannot properly be said to have withdrawn from the society of the other spouse without reasonable excuse.'

12. The above judgment of the Madras High Court no doubt supports the case of the respondent but, with respect to the learned Judge, I am unable to share his view. The learned Judge himself observed that the question as to whether an agreement for present separation was opposed to public policy did not directly arise in the cases of *Tekait Mon Mohini Jemadai* (supra) and *Krishna Aiyer* (supra) and consequently any observation made in respect thereof in those judgments is obiter. That apart, after carefully going through the judgment of our High Court in the case of *Tekait Mon Mohini Jemadai*, I find that it confined its attention to a pre-nuptial agreement and observed that such an agreement permanently controlled the rights of the husband, as conferred upon him by the Hindu Law, so soon as the marriage was effected and it was an agreement which, if enforced, might practically lead to the separation of the husband and wife in

future. It was in that context that it was held that public policy demanded preservation of the peace and reputation of families; and since an agreement for future separation was for their destruction, it was opposed to public policy.

13. Independent of the judgments, relied upon by the learned courts below, therefore, it has to be considered whether the agreement in the instant case is opposed to public policy. Before venturing to tread on the thorny path of public policy, which has had: been engaging the attention of the courts since long, it may be mentioned that it was common ground that the relations between the parties to this appeal were strained to such an extent that there was no possibility of reconciliation or rapprochement between them. Therefore even if the wife's suit for judicial separation eventually was to be thrown out in limine, there was no possibility of the wife's return to her husband or being received cordially by the husband under his roof. That is the main consideration which appears to have weighed with the parties to part company and to enter into the impugned agreement.

14. In the case of *Printing and Numerical Registering Co. v. Sampson* reported in (1875) 19 Eq 462, Jessel M. R. while commenting upon public policy said :

'It must not be forgotten that you are not to extend arbitrarily those rules which say that a given contract is void as being against public policy, because if there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider -- that you are not lightly to interfere with this freedom of contract.'

15. In the case of *Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co.* (1894) AC 535 Lord Watson observed ; --

'Since public policy reflects the mores and fundamental assumptions of the community. the content of the rules should vary from country to country and from era to era.'

Our Supreme Court discussed various English decisions in the case of 'Gherulal Parakh v. Mahadeodas', reported in : AIR 1959 SC781 and summarised the doctrine of public policy thus:--

'Public policy or the policy of the law is an illusive concept; it has been described as 'untrustworthy guide', 'variable quality', 'uncertain one', 'unruly horse', etc.; the primary duty of a Court of Law is to enforce a promise which the parties have made and to uphold the sanctity of contracts which form the basis of society, but in certain cases, the Court may relieve them of their duty on a rule founded on what is called the public policy; for want of better words Lord Atkin describes that something done contrary to public policy is a harmful thing, but the doctrine is extended not only to harmful cases but also to harmful tendencies this doctrine of public policy is only a branch of common law, and, just like any other branch of common law, it is governed by precedents; (the principles have been crystallized under different heads and though it is permissible for Courts to expound and apply them to different situations, it should only be invoked in clear and incontestable cases of harm to the public; though the heads are not closed and though theoretically it may be permissible to evolve a new head under exceptional circumstances of a changing world, it is advisable in the interest of stability of society not to make any attempt to discover new heads in these days.'

16. In the context of the above principles and the facts of the instant case, it has to be decided whether the agreement entered into by and between the parties for present separation is opposed to public policy.

17. The law so far as England is concerned is now well established that a contract providing for immediate separation of the spouses is valid and enforceable if followed by immediate separation even though such a contract is inconsistent with the basic and fundamental obligation of the married tie. Decisions laying down the above principle are numerous but the case of McGregor v. McGregor reported in (1888) 21 QBD 424 may be profitably looked into as the facts thereof are similar to those of the present case. A husband and wife, having taken out cross-summonses against each other for assaults, entered into an oral agreement with each other to withdraw the summonses and to live apart, the

husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children and to indemnify the husband against any debts contracted by her. The wife brought an action against the husband for six weeks' arrears of maintenance under the agreement, which ultimately came up for decision of the Court of appeal of the Supreme Court of Judicature. It was held that the husband and wife had power to make a contract for separation without the intervention of a trustee, by way of a compromise of legal proceedings, that the husband's contract to pay the wife a weekly sum for maintenance was binding, and that the action was maintainable.

18. Seemingly the above decision is an answer to the principal question involved in the present appeal, but having regard to the fact that the parties in the instant case are governed by Hindu Law, wherein marriage is not only a contract but also a sacrament and more religious than secular in character, it has to be ascertained whether the answer is infallible.

19. The concept of Hindu marriage and the obligations of the wife arising therefrom have been elaborately discussed in the case of *Tekait Mon Mohini Jemadai* (supra). Various texts and authorities have been quoted in the said judgment and we can profitably look to the following passage from Golap Chandra Sarkar's Book on Hindu Law as quoted in the said judgment:

'Although the conjugal relation is based upon a contract of either of the parties to the marriage or their guardians, the rights and the duties of the married couple do not arise from any implied contract, but are annexed by law to the connubial relation as its incidents. The wife is bound to reside with the husband wherever he may choose to live. The fact of the husband having another wife will not relieve her from that duty; nothing short of habitual cruelty or ill-treatment will justify her to leave her husband's house and reside elsewhere.'

The other passage worth quoting is from Dr. J. N. Bhattacharjee's Commentaries on Hindu Law :

'Where the wife is sui juris and refuses to live with her husband, he can, according to Hindu Law, keep her by force under his protection. Under the Indian Penal

Code the husband cannot be punished for merely keeping his wife under restraint without using violence or subjecting her to cruel treatment.'

20. Such was the cloistered life of a Hindu wife in the society. Any breach of her obligations was considered to be more than a personal matter and detrimental to the interest of the society at large. That necessarily meant that any agreement which was likely to affect the relationship of husband and wife and for that matter the society was opposed to public policy.

21. With the passage of time and progress of the society radical changes became inevitable to certain areas of Hindu Law. Keeping in view the social and economic conditions of the Hindu society, the law relating to marriage, succession, adoption, maintenance, minority and guardianship was codified through the enactment of the Hindu Marriage Act, Hindu Succession Act, Hindu Adoptions and Maintenance Act, 1956 and other allied Acts. The provisions for judicial separation and divorce in the Hindu Marriage Act made the concept of Hindu marriage being a union which is indissoluble, a part of history. Section 18(2) of the Hindu Adoptions and Maintenance Act recognised wider grounds which could justify a Hindu wife's claim for separate residence and maintenance. Judged in that context it cannot be said that the wife's claim for separate maintenance while living separately under justifiable circumstances is against public policy in the present day society.

22. Mr. Mitra however argued that since Section 18(2) of the 1956 Act specified the grounds for which a Hindu wife could live separately from her husband and claim maintenance, a claim to maintenance, while living separately, on any other ground was opposed to public policy. In view of Clause (g) thereof and the facts and circumstances of the case I am however unable to accept this contention of Mr. Mitra.

23. In this connection the following passage from Cheshire and Fifoot's Law of Contract (Ninth Edition), page 367 may be referred to:

'Once the melancholy fact is apparent that the parties cannot live together in amity, it is desirable that the separation which has become inevitable should be concluded upon reasonable terms; but a promise for the benefit of one of the

parties in the event of a possible future separation, if it does not put a premium on immorality, at least weakens the resolve or the promise to maintain with loyalty and fidelity the obligations of the marriage tie. If a separation has actually occurred or become inevitable, the law allows the matter to be dealt with according to realities and not according to a fiction. But the law will not permit an agreement which contemplates the future possibility of so undesirable a state of affairs.'

24. Considering the fact that the estrangement between the parties hereto is final, it is just and desirable that they should live separately and comply with the terms of the agreement entered into between them. That will be beneficial to their interest as also their son, who is living with the mother. In view of the above discussions I am unable to hold that the agreement in the instant case is opposed to public policy and hence not enforceable.

25. The other contention of Mr. Mitra was that the offer that was made by the husband regarding the maintenance allowance to be paid to their daughter was conditional and since the condition regarding her marriage was not fulfilled the same is not enforceable. This contention of Mr. Mitra cannot be accepted as the payment of allowance to the daughter for her maintenance and educational expenses was unconditional and no claim was raised in the instant suit for marriage expenses of the daughter.

26. In view of the above discussion, the appeal succeeds and the same is hereby allowed. The judgments and decrees of the learned Courts below are hereby set aside and the suit is decreed. It is hereby declared that the agreement executed by the defendant/respondent on 12-5-73 is binding. The plaintiff is entitled to recover a sum of Rs. 425/- from the defendant for arrear dues towards maintenance together with interest thereon @ 6% per annum from the date of the suit to the date of recovery. The defendant is also directed to furnish a statement disclosing the amount of bonus received by him in the year 1973 within 4 months in the trial Court failing which the learned trial Court will appoint a commissioner for ascertaining the same. After ascertaining the quantum of bonus received by the defendant, the trial court will pass a final decree for the amount to be received by the plaintiff against bonus, in terms of the agreement (Ext. 1) on plaintiffs payment

of the proportionate court fees. The appellant will also be entitled to costs of this appeal. Hearing fee assessed at 10 G. Ms.

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