

Anjali Ghosh Vs. Subodh Kumar Ghosh

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Court : Kolkata

Decided On : May-16-2005

Reported in : 2005(3)CHN274

Judge : Bhaskar Bhattacharya and ;Rajendra Nath Sinha, JJ.

Acts : Indian Penal Code (IPC) - Sections 34 and 498A

Appeal No. : F.A. No. 18 of 1999

Appellant : Anjali Ghosh

Respondent : Subodh Kumar Ghosh

Advocate for Def. : Asit Kumar Banerjee and ;S.N. Chattapadhyay, Advs.

Advocate for Pet/Ap. : Biswajit Basu, ;Manali Biswas and ;Gunjan Shah, Advs.

Disposition : Appeal allowed

Judgement :

Bhaskar Bhattacharya, J.

1. This appeal is at the instance of a wife in a suit for divorce and is directed against the judgment and decree dated 31st July, 1998 passed by the Additional District Judge, 8th Court, Alipore in Matrimonial Suit No. 61 of 1993 thereby granting a decree for divorce in favour of the husband on the ground of cruelty.

2. The aforesaid suit was filed by the husband alleging cruelty on the part of the present appellant and the case made out by the husband may be summed up thus:

(a) The parties were married on 27th January, 1989 and thereafter they lived together as husband and wife in the residence of husband at 93/A, Kalighat Road. The said marriage was the outcome of negotiation through newspaper.

(b) After about six months from the date of marriage, the husband started receiving letters from anonymous persons alleging that the wife had pre-marital affairs with many persons, that she was even raped by some persons who were convicted, that she underwent abortion to cause miscarriage of two babies and that she had been the mother of a child. The husband wanted to verify the authenticity of those allegations from the wife but the wife did not reply to the queries of the husband and became hostile to him.

(c) The husband further noticed abnormal sexual behaviour of the wife which strengthened the suspicion already dwelt in his mind. Although, the husband was eager to have a child, as the wife did not become pregnant in due course of time, she was taken to B. R. Singh Hospital for medical test and medical opinion was that the wife had developed infertility because of her past experience in sexual life and past operational trauma. After the detection of the truth of those allegations, the wife with the assistance of his brother subjected the husband to physical cruelty and ultimately lodged a complaint before the Bhowanipore Police Station against the husband and her parents-in-law and sisters-in-law under Section 498A of the Indian Penal Code, as a result, they were arrested and ultimately were granted bail.

(d) The wife assaulted the mother-in-law with a chappal, and consequently, she became blind for ever. As a result of false allegation by the wife, against the husband and the members of his family, there was loss of reputation and even some anti-social elements attacked their house and ransacked the articles of husband for which the Belilious Road in a rented house and ultimately, shifted to Railway Quarter at Behala.

(e) The wife came to the office of the husband on 28th May, 1991 and 29th May, 1991 and threatened him with dire consequences if he did not pay her a sum of Rs. 50,000/- and also demanded return of those letters which the husband received from unknown persons. The behaviour of the wife was such that it was impossible for the husband to live with her.

3. The wife contested the said proceedings by filing written statement and her defence was inter alia as follows:

(i) Initially, at the time of negotiation, due to huge demand of cash money, ornaments and other articles by way of dowry, the father of the wife could not agree and thereafter, the husband himself about 2/3 years thereafter met the father of the wife and requested for renegotiation and ultimately, the marriage was settled. At the time of marriage the father of the wife according to his capability gave gold ornaments and cash amount of Rs. 15,000/- besides other articles, furniture, etc.

(ii) In the house of the husband, there were parents-in-law, two sisters-in-law, one of whom was a divorcee and the other unmarried, and shortly after the marriage, the mother-in-law and two sisters-in-law started making ugly comments for the presentations, for instance, gold ornaments given by the father of the wife. The mother-in-law used to threaten the wife that unless further cash money was brought from her father, she would be badly treated.

(iii) The wife used to do all household works and none of the other members of the husband's family co-operated with her in the matter of running the family. The wife was not even provided with sufficient amount of food and any protest against such mental torture resulted in physical torture by the husband, the parents-in-law and the sisters-in-law. Whenever the husband used to come back home at night with false complaints against the wife, the parents-in-laws and the sisters-in-laws used to instigate the husband by making further false allegations.

(iv) The mother of the husband often threatened that she would arrange for the second marriage for the son the moment the wife was dead. The husband insisted the wife on putting her signatures on blank papers but she having refused, was

subjected to severe torture. The husband by putting undue pressure upon the father of the wife obtained substantial amount of money and bought a Car but ultimately it was sold.

(v) At the instance of the wife, she was taken to B. R. Singh Hospital for check up and had undergone a minor operation to facilitate conception but due to the passive attitude and cold treatment on the part of the husband she could not become mother having no fault on her part. The respondent was found to be frigid in the matter of sexual approach and used to show his reluctance in normal sexual intercourse. The respondent adopted preventive measures as a result the wife was not allowed to be a mother.

(vi) On 26th May, 1991 at about 4 p.m. the brother of the wife went to bring her back to her father's house and at that time, mother-in-law and both the sisters-in-law started quarrelling with the wife and the husband told the brother of the wife that she should not be further taken back to his house and when the brother of the wife asked for the reason, the husband slapped on the cheek of the brother of the wife and ultimately, when the said brother refused to take her out of the matrimonial home, the husband by taking the wife by neck drove her out of the matrimonial home. Thereafter, the brother and the relatives of the wife wanted to meet the husband in his office on several occasions but they could not meet him.

(vii) On 14th July, 1991 the wife taking her father and brother at about 8:30 a.m. went to her matrimonial home but as the door was kept closed, they were not allowed to go inside and door was not opened in spite of humble requests by wife and her father. The neighbouring people gathered there and requested the father of the husband to open the door and to allow her to go inside but the door was not opened and the ultimately, she had to come back and lodge a Diary in Bhowanipore Police Station. The Police then took action in the matter and the husband came down to Police Station and gave an undertaking that they would bring her back from her father's house.

(viii) On 21st July, 1991 the wife along with her brother again went to the matrimonial home but the husband was not found there and his father told that the husband was out of Calcutta for the last few days and could not say when he

would come back. The wife had to lodge a Police Case No. 302 dated 23rd July, 1991 under Section 498A read with Section 34 of the Indian Penal Code and the same was pending.

4. At the time of hearing of the suit, the husband himself, his father, one of the office colleagues, one of the neighbours and the divorcee sister gave evidence in support of the plaint case while the wife herself, two of the neighbours of the husband, viz., Anil Kumar Das and Jotish Chandra Das, and the two younger sisters of wife deposed in opposing the claim of the husband.

5. The learned Trial Judge on consideration of the materials on record came to the conclusion that the husband had proved cruelty on the part of the wife and it was impossible for the husband to stay with such a wife and accordingly, granted a decree for divorce.

6. Being dissatisfied, the wife has preferred the present first appeal.

7. During the pendency of this appeal, the husband having died, his heirs and legal representative are made respondents in this appeal and at present, the two sisters of the husband are contesting this appeal.

8. Mr. Basu, the learned advocate appearing on behalf of wife has cogently contended before us that the learned Trial Judge while arriving at the conclusion that the wife was guilty of cruelty totally overlooked the evidence adduced on behalf of wife. Mr. Basu contends that the learned Trial Judge proceeded as if the allegations contained in the complaint under Section 498A read with Section 34 of the Indian Penal Code were frivolous notwithstanding the fact that the same was then pending. Mr. Basu contends that the learned Trial Judge could not consider those allegations to be false so long the criminal proceedings did not end in acquittal of the accused.

9. Mr. Basu contends that the learned Trial Judge further came to the wrong conclusion that as the wife had alleged that the husband was sexually weak, such allegation amounted to mental cruelty by totally overlooking the fact that the husband in this case from the very beginning made baseless allegations against

the wife allegedly disclosed through anonymous letters, although, those letters could not be proved and brought on record as exhibit. Mr. Basu contends that the husband himself being guilty of making false allegations against the wife in the plaint as well as in evidence, the learned Trial Judge should have dismissed the suit on the ground that he failed to prove those unjustified allegations and consequently, was not entitled to get a decree for divorce. Mr. Basu further contends that if for the offence committed by the husband himself a criminal case had been started, initiation of such proceeding cannot amount to cruelty on the part of wife. Moreover, he contends that the findings of the learned Trial Judge that the mother-in-law had become blind due to physical torture by wife, should be set aside as no documentary evidence was produced in support of such allegation and even the mother-in-law did not come forward to give evidence in support of such allegation. Mr. Basu, thus, contends that the findings recorded by the learned Trial Judge are perverse findings of fact and submits that no divorce can be granted in the facts of the present case.

10. The aforesaid contentions of Mr. Basu are seriously disputed by Mr. Banerjee, the learned advocate appearing on behalf of appellant. Mr. Banerjee has practically supported the findings of the learned Trial Judge and has also referred to the decisions relied upon by the learned Trial Judge in the judgment impugned. Mr. Banerjee contends that the learned Trial Judge had the advantage of observing the demeanour of the witnesses and after considering the evidence on record having believed the versions of the plaintiff, this Court should not interfere with such finding of fact recorded by the learned Trial Judge. He, thus, prays for dismissal of the appeal.

11. Therefore, the only question that arises for determination in this appeal is whether the learned Trial Judge on the basis of materials on record was justified in passing a decree for divorce.

12. After hearing the learned Counsel for the parties and after going through the materials on record, we are unable to approve the findings recorded by the learned Trial Judge. It appears from his judgment that he has relied upon various judgments dealing with the cases of cruelty but those are not applicable to the fact

of the present case.

13. There is no dispute with the proposition of law that if a party to a matrimonial proceedings in the pleading makes wild allegations regarding moral character, physical impotency etc. of the other party but fails to establish such fact, in such a case, the same may constitute mental cruelty on the part of party making such allegations, but the law is equally settled that if one of the parties makes such allegation in the pleading and for the purpose of defending such allegation the other party also puts forward some counter-allegations, so long the allegations made by the first party are not proved to be true, the Court cannot infer cruelty against the other party for the assertions made in defence.

14. In this case, the plaint allegation itself shows that husband became suspicious as regards the moral character of the wife in view of the anonymous letters alleged to have been received by him and by relying upon the allegations contained in those letters he made out his case that wife was a lady of immoral character and even had abortions before her marriage. However, those letters could not be proved in evidence and no medical evidence was produced before the Court showing that the wife underwent any abortion in the past.

15. In our view, it is the husband who made baseless allegations on the basis of those anonymous letters against the wife without verifying the truth of the contents of those letters and thus, he is guilty of inflicting mental cruelty upon the wife. We are also not in a position to ascertain whether such letters were at all received or it is a cocked up story of the husband to get rid of wife.

16. It appears from the record that in the family of the husband there were two sisters, one unmarried and the other divorcee and he was only brother of those sisters. It further appears that the husband married in his forties and from the very beginning, the matrimonial disputes arose. The wife in her written statement simply made allegation that she could not be blamed for not becoming mother because the husband was sexually weak and over and above, he used preventive measures lest any child was born.

17. In our view, the learned Trial Judge made gross error of law in treating such a defence as cruelty on the part of wife when the husband even could not prove the allegation made against the wife that due to abortion in the past she could not become mother. If this type of allegation is made against a wife, a wife is entitled to defend such unfounded allegation by disclosing the real reason, which she thought, stood in her family way. The husband himself could easily come up with medical report showing that he was physically potent and that the allegation of the wife was not true but he has not come forward with any such evidence. Therefore, we find that the approach of the learned Trial Judge was totally erroneous.

18. The learned Trial Judge, as it appears from his findings, has accepted the version of the husband as regards the incident which occurred in his house that resulted in initiation of criminal proceedings. It appears that the said criminal case was pending and as such, before conclusion of such criminal proceedings, it was too early to come to the conclusion that the allegations made in the complaint under Section 498A of the Indian Penal Code were unfounded. The learned Trial Judge, in this connection, has not at all considered the evidence given by two of the neighbours of the husband who came to the witness-box on behalf of the wife but on the other hand has relied upon the evidence given by one of the neighbours who deposed on behalf of plaintiff. Those two neighbours of the husband have specifically asserted that the evidence of PW-4 was false and it was not possible to see any incident which occurred inside the house of the husband from outside. The learned Trial Judge did not feel the necessity of even discussing the evidence given by those two witnesses. The PW-3, the office staff of the husband, even did not support the plaint case that the wife went to the office to demand Rs. 50,000/-. All that he said was that the wife with her brother went to the office demanding return of anonymous letters and such allegation had been disputed by the wife.

19. We are also unable to accept the finding of the learned Trial Judge that the wife by physical assault made the mother-in-law blind. The said mother-in-law, as indicated earlier, did not come forward to give evidence and no cogent explanation is given for not examining the said lady. Moreover, no medical evidence has been produced showing that the said lady really became blind and if so, what was the cause for such blindness. Even no evidence could be produced before Court

showing that any complaint was made against the wife before police over such incident. The alleged act comes within purview of 'grievous hurt' within the meaning of Indian Penal Code and it is very difficult to believe that no criminal case was initiated though the wife committed such offence. If the lady herself hesitates to appear as witness and to face cross-examination of the opponent without just cause, no Court should believe such allegation to be true on the basis of oral evidence of the other witnesses who allegedly saw the incident.

20. We further find substance in the contention of Mr. Basu that in this case the learned Trial Judge totally misapplied the decisions referred to in the judgment impugned to the facts of the present case against the wife. Mr. Banerjee appearing on behalf of the sisters-in-law relied upon those decisions before this Court. We do not dispute for a moment the propositions laid down in those decisions but as pointed out by us above, in the present case it has not been established that the proceedings under Sections 498A were based on unfounded allegations and at the same time, the other allegations of cruelty against the wife were not proved by evidence and as such, we cannot apply the principles laid down in those decisions against the wife.

21. The learned Trial Judge also proceeded to grant divorce on the ground that the marriage between the parties had irretrievably broken down. It is now settled law that merely because the marriage had permanently broken down, such fact cannot empower a Court to pass a decree for divorce if the person applying for divorce was responsible for such situation. In this case, in our view, it has been well-established that from the very beginning the husband became biased about the moral character of the wife without verifying the contents of the anonymous letters and we are not in a position to ascertain whether such allegation was an invented one because those anonymous letters even were not proved and marked as exhibits at the instance of the husband.

22. On consideration of the entire materials on record we find that once allegation against the wife regarding her moral character and past abortion during her maidenhood are not proved, the only conclusion that can be arrived at is that the husband either purposely made such baseless allegation or being influenced by

such unfounded allegation started torturing the wife and the mother-in-law and sisters-in-law instigated the husband in doing so in order to get rid of the wife on the basis of those false allegations. We are unable to place any reliance upon the evidence of PW-3 and PW-4 in view of the overwhelming evidence to the contrary given by two of the neighbours of the husband against him which were not at all considered by the learned Trial Judge.

23. Therefore, it is a fit case where the findings recorded by the learned Trial Judge should be set aside and the decree passed by the learned Trial Judge should also be quashed as the husband failed to prove any of the acts of the wife which would constitute cruelty on her part and on the other hand the baseless allegation made by the husband should be treated to be cruelty on his part and thus, husband cannot take advantage of his own wrong.

24. This appeal is, thus, allowed. In the facts and circumstances, there will be, however, no order as to costs.

Rajendra Nath Sinha, J.

25. I agree.