

Olga thelma Gomes Vs. Mark Gomes

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Court : Kolkata

Decided On : Jan-27-1959

Reported in : AIR1959Cal451,63CWN395

Judge : S.C. Lahiri, ;B.N. Banerjee and ;A.N. Ray, JJ.

Acts : [Divorce Act, 1869](#) - Sections 7 and 10; ;[Indian Penal Code \(IPC\), 1860](#) - Section 497

Appeal No. : Divorce Suit No. 3 of 1958

Appellant : Olga thelma Gomes

Respondent : Mark Gomes

Advocate for Def. : Alak Gupta, Amicus Curiae

Advocate for Pet/Ap. : Nrisingha Ch. Basu, Adv.

Disposition : Reference accepted

Judgement :

S.C. Lahiri, J.

1. This is a Reference under Section 17 of the Indian Divorce Act for confirmation of a decree nisi for dissolution of marriage between the petitioner Olga Thelma Gomes and her husband Mark Gomes. The petitioner filed the petition for

dissolution against her husband on the allegation that her husband was guilty of adultery coupled with desertion for more than two years and also on the allegation that her husband was guilty of adultery coupled with cruelty. From the marriage certificate which has been produced in this case it appears that the petitioner was married to the respondent on 26-4-1936, at St. Francis Xavier Church at 68, Bow Bazar Street according to Christian rites. As a result of the marriage one daughter was born to the petitioner. Upon the evidence which has been believed by the court below the petitioner and her husband lived happily for some time and their last matrimonial home was at premises No. 38 Beckbagan which is within the jurisdiction of the District Judge of 24-Parganas. The petitioner states on oath that both she and her husband have been living in India since their birth and both of them are Indian Christians. The court of the District Judge, 24-Parganas, therefore, has jurisdiction to make a decree for dissolution of marriage under Section 2 of the Indian Divorce Act.

2. On the merits the petitioner's case is that she lived quite happily with her husband up to the end of the year 1954 but from 1955 her husband became cold and indifferent towards her. Very often he used to return home at night in a drunken condition and on some occasions he did not return home at all. In her evidence she states that on 2-6-1955, her husband wanted to go away for the night alleging that he was going out on a pressing business. As she protested, her husband slapped her on her cheek, gave her a push as the result of which the petitioner fell down and sustained a bleeding injury on her forehead. Her neighbour, one Mrs. Mathanda, gave her first aid. She further states that she heard from Mrs. Mathanda that her husband was living at premises No. 105, Collin Street with girls of bad repute and Mrs. Mathanda told the petitioner that she got this information from one of her (Mathanda's) friends Warned J. C. Gomes. On 20-7-1957, the petitioner was taken by Mrs. Mathanda to J. C. Gomes and at the request of the petitioner J. C. Gomes knocked at the door of the respondent who opened it and while the respondent was having a talk with J. C. Gomes the petitioner rushed inside the respondent's bed room and found a girl lying in his bed with her body covered with a sheet up to the throat. In support of this statement the petitioner has examined Mrs. Mathanda as P. W. 2, and also J. C. Gomes at P. W. 3, both of whom have corroborated the petitioner on these points. Upon this

evidence it has been found by the learned Additional District Judge 24-Parganas, that the respondent was spending his nights at premises No. 105 Collin Street with different girls of bad repute.

It has also been found that since the 2nd of June, 1955, the respondent did not care to maintain the petitioner or the daughter born of the marriage. Upon this evidence the learned Additional District Judge has found:

(a) that the respondent was guilty of cruelty;

(b) that the respondent was also guilty of adultery, and

(c) that the respondent was guilty of desertion. The evidence of cruelty and desertion is quite satisfactory and there is no reason why that evidence should not be believed. On the question of adultery also the facts proved by the petitioner show that the respondent was living with unknown women of questionable character in a flat in premises No. 105 Collin Street. The question that requires consideration in this case is whether this amounts to adultery within the meaning of Section 10 of the Indian Divorce Act. As this is a point of some importance, we asked Mr. Alak Gupta to appear in this case as *amicus curiae* to give such assistance as to the interpretation of the word 'adultery' as he could. We have now heard the learned Advocates appearing in the case. The word 'adultery' has been defined in Section 497 of the Indian Penal Code. According to that definition, in order to constitute an offence of adultery three ingredients are necessary: (a) the woman with whom sexual intercourse is committed must be or must be known to be or must be reasonably believed to be the wife of another man, (b) the act of sexual intercourse must be committed without the consent of the man and (c) the act of sexual intercourse must not amount to an offence of rape. According to this definition, a man who commits an act of sexual intercourse with a prostitute or with an unmarried woman or with a widow or with the consent or connivance of the husband of the woman with whom sexual intercourse is committed, is not guilty of adultery. If the word 'adultery' as used in Section 10 of the Indian Divorce Act has the same meaning as in Section 497 of the Indian Penal Code, the respondent in the present case cannot be said to be guilty of adultery because the girls with whom he is alleged to have committed acts of sexual intercourse have not been

proved to be married women. In our opinion, however, this narrow definition of the word 'adultery' as given in Section 497 of the Indian Penal Code has no application to a proceeding for divorce under Section 10 of the Indian Divorce Act. The definition of adultery in Section 497 of the Indian Penal Code applies only to male offenders and under the Indian Penal Code a woman cannot be said to be guilty of adultery but the very first paragraph of Section 10 of the Indian Divorce Act authorises a husband to present a petition for dissolution of marriage on the ground of adultery by his wife. This fact, by itself, is sufficient to show that the word 'adultery' has been used in a wider sense in Section 10 of the Indian Divorce Act than the definition given in Section 497 of the Indian Penal Code.

The learned Advocate appearing for the petitioner has also invited our attention to Section 7 of the Indian Divorce Act under which in proceedings under the Indian Divorce Act the Court is to apply the principles and rules laid down by matrimonial courts in England in respect of matters which are not dealt with by the Indian Divorce Act itself. The word 'adultery' has not been defined in the Indian Divorce Act. Accordingly, by the express terms of Section 7 we must adopt the principles laid down by English Divorce Courts. In Halsbury's Laws of England, Simonds' Edition, Article 444, page 235, the law laid down by matrimonial courts in England has been summarised in the following words:

'For the purposes of relief in the matrimonial jurisdiction adultery means consensual sexual intercourse during the subsistence of the marriage between one spouse and a person of the opposite sex not the other spouse.'

In *Latey on divorce*, 14th Edition, (1952), at page 74 the learned author observes as follows:

'In the divorce court, adultery means willing sexual intercourse between a husband or wife and one of the opposite sex while the marriage subsists.' In the case of *Abson v. Abson*, (1952) 1 All E. R. 370, the question arose whether a divorced woman could be held guilty of adultery, the allegation being that the divorced wife was guilty of adultery as she took part in acts of sexual intercourse with one Rayner. On this question Karminski J. observed as follows at page 372 of the Report: 'When the wife took part in an act of sexual intercourse with Rayner, was

he then dishonouring or defiling her own marriage bed or that of the man with whom the intercourse took place? Clearly, so far as the wife was concerned, she could not be defiling or dishonouring her own marriage bed, because, as a single woman, she had no marriage bed and no married home, but Rayner was a married man, and, if she had sexual intercourse with him, she was committing adultery, because she was defiling or dishonouring the marriage bed of Mr. and Mrs. Rayner.'

In Murray's Oxford Dictionary adultery has been defined as 'Violation of the marriage bed'; 'the voluntary sexual intercourse of a married person with one of the opposite sex, whether unmarried or married to another (the former case being technically designated single, the latter double adultery).' Upon these authorities we have no doubt in our mind that the definition of adultery as given in *Latey on Divorce* and the definition of adultery as given in Murray's Oxford Dictionary are the true meaning in which the word 'adultery' has been used in Section 10 of the Indian Divorce Act. Mr. Gupta appearing *amicus curiae* also invited our attention to the provisions of Section 46 of the Indian Divorce Act which provides that the forms set forth in the schedule to the Act may be used for the respective purposes mentioned in such schedule. Form No. 5 of the Schedule is a form of petition by wife for judicial separation on the ground of her husband's adultery. Paragraph 3 of Form No. 5 shows that the wife is to allege that on divers occasions her husband committed adultery with a certain woman who was then living in the service of her husband at their residence and paragraph 4 shows that the wife is to state that on divers occasions the husband committed adultery with certain other women. What is significant in these paragraphs is that the wife is not required to state that her husband is guilty of adultery with certain other women who are married to certain other persons. From the absence of any provision relating to the marriage of the women with whom the husband is alleged to have committed adultery, Mr. Gupta argues and in our opinion rightly, that the wife is not required to allege or to prove that the women with whom the husband has committed acts of adultery are married women. Paragraphs 3 and 4 of the Form therefore support the conclusion that the word 'adultery' as used in Section 10 of the Indian Divorce Act does not bear the same meaning as in Section 497 of the Indian Penal Code.

3. The learned Advocate appearing for the petitioner cited before us the case of *Gantapalli Appalamma v. Gantappalli Yellayya* decided by a Full Bench of the Madras High Court and reported in ILR 20 Mad. 470. In that case their Lordships had to construe the meaning of the word 'adultery' as appearing in Sub-section (4) of Section 488 of the Code of Criminal Procedure which provides that no wife shall be entitled to receive an allowance from her husband under that section 'if she is living in adultery'. In that case there was nothing to show that the husband was guilty of committing acts of adultery with married women and was therefore not guilty of adultery within the meaning of Section 497 of the Indian Penal Code. Their Lordships however held that the definition given in Section 497 of the Indian Penal Code will not have any application in ascertaining the meaning of the word 'adultery' as appearing in Section 488 (4) of the Code of Criminal Procedure. Subramania J., in the aforesaid case made the following observations at page 473:

'Adultery, according to the Penal Code, is an act of which a man alone can be guilty. It is an offence committed by a third person against a husband in respect of his wife. If, as was held in *Queen Empress v. Manmatha Achari*, ILR 17 Mad 260, this limited meaning be adopted in construing the term adultery in Section 488 of the Criminal Procedure Code it would follow that the husband could not properly be charged with adultery in a maintenance case unless all the conditions of Section 497, Indian Penal Code, are complied with. Such however, could not possibly have been the intention of the legislature. For, what difference does it make to the wife whom the husband has neglected or refused to maintain, whether the woman with whom he is living in adultery is a married woman or not, and, if the woman is married whether the woman's husband connives at the adultery or not? So far as the wife is concerned her grievance is all the same. Therefore, while in Section 497, Indian Penal Code, adultery of one specific description only is dealt with, it is clear that in Section 488 of the Criminal Procedure Code adultery is used in the wider and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse.'

This meaning of the word 'adultery' is consistent with all the English authorities which I have considered above. I would accordingly hold that the respondent is guilty of adultery even though the petitioner has only proved that he is living with unknown women of bad character in a flat of premises No. 105. Collin Street.

4. For the reasons given above, this Reference must be accepted and the decree nisi for dissolution of marriage between the petitioner Olga Thelma Gomes and Mark Gomes must be confirmed.

5. We place on record our appreciation of the assistance received by the Court from Mr. Alak Gupta who appeared to argue this case *amicus curiae*. As there is no appearance on behalf of the respondent there will be no order as to costs.

B.N. Banerjee, J.

6. I agree with the judgment delivered by My Lord but I desire to add a few words of my own.

7. Adultery, as a criminal offence, is defined in Section 497 of the Indian Penal Code as herein below quoted:

'Whoever has sexual intercourse with a person who is or whom he knows or has reason to believe to be the wife of another man without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery.'

8. The definition limits the offence to sexual intercourse committed with a married woman and the male offender alone is made punishable under the Penal Code. As a crime, therefore, adultery is not and cannot be committed by a man who has sexual intercourse with an unmarried woman or with a widow.

9. The question for my determination is whether the word 'adultery', used in Section 10 of the Indian Divorce Act, has the same meaning as in the Indian Penal Code. In the instant case, there is evidence to show that the husband of the petitioner had sexual intercourse with a number of women but there is no evidence to the effect that any of them was a married woman. Can it be said in such

circumstances that the husband was guilty of adultery as a matrimonial offence?

10. Adultery is not defined in the Indian Divorce Act. But in interpreting a term in the Indian Divorce Act, not defined in the said Act, I am at liberty to draw my inspiration from English authorities. This is what is provided for in Section 7 of the Indian Divorce Act. I therefore propose to refer to the meaning of the word 'adultery' as given in some English Law Dictionaries.

11. According to Stroud's Judicial Dictionary, adultery means 'the offence of incontinence by married persons'. In this meaning it is not necessary that the female with whom the offence is committed must be a married woman. It is enough that the passion of a married man is let loose on any woman, be she a married woman or not, on the other way round, namely, that a married woman becomes guilty of sexual intercourse with a person of the opposite sex, be he married or not.

12. In Tomlins Law Dictionary this aspect of the matter has been emphasised and a distinction has been drawn between single adultery and double adultery. I quote below the meaning of the word 'adultery' as in Tomlins Dictionary:

'The sin of incontinence between two married persons or if but one of the persons be married, it is nevertheless adultery; but in this last case it is called single adultery to distinguish it from the other, which is double.'

Therefore, it is enough, in order to be a matrimonial offence, that one of the parties to the sexual intercourse is a married person. If only one is a married person, it will be a single adultery. If both are married persons, the matrimonial offence will also be adultery but in that case it will be double adultery. The consequences of adultery, be it single or double, will be the same in the Indian Divorce Act.

13. That this is so is also clear from Section 10 of the Indian Divorce Act. Under the first paragraph of Section 10, any husband may present a petition praying that his marriage be dissolved on the ground that his wife has, since the solemnization thereof, been guilty of adultery. Similarly under the second paragraph of Section 10, any wife may present a petition praying that her marriage be dissolved on the

ground that since the solemnization thereof the husband has been guilty of one of the several forms of adultery mentioned in that section. If the meaning of the word 'adultery' in the Indian Divorce Act had been the same as in the Indian Penal Code, it would have been inconceivable to seek divorce on the ground that the wife had been guilty of adultery. Under the definition of adultery in the Indian Penal Code the female object is never guilty; it is only the male person who can be guilty of adultery as a criminal offence. Since, therefore, the Indian Divorce Act contemplates of cases in which the wife may also be guilty of adultery, it must be held that the word 'adultery' has been used in the Indian Divorce Act in a sense more general and wider than that to the Indian Penal Code.

14. Mr. Alak Gupta, who at our invitation appeared as *amicus curiae*, invited out attention to that provision of Section 10 under which a wife can obtain divorce upon proof that her husband was guilty of incestuous adultery.

Mr. Gupta also placed before us the definition of 'Incestuous adultery' in Section 3(6) of the Indian Divorce Act which I quote below. Incestuous adultery means 'adultery committed by a husband with a woman with whom, if his wife were dead, he could not lawfully contract marriage by reason of her being within the prohibited degrees of consanguinity (whether natural or legal) or affinity.' Mr. Gupta argued that under the aforesaid definition it was possible to commit incestuous adultery with an unmarried woman, the only requisite being that the woman fell within the prohibited degree. Mr. Gupta therefore argued that under the Indian Divorce Act it was not necessary that adultery must be committed with a married woman. In my opinion, Mr. Gupta is entirely correct in this submission.

15. The learned Advocate appearing for the petitioner wife invited my attention to a Full Bench decision of the Madras High Court in the case of *Gantappalli Appalamma v. Gantappalli Vellayya*, ILR 20 Mad. 470. That was, of course, a case under Section 488 of the Criminal Procedure Code and their Lordships were concerned with interpreting the meaning of the word 'adultery' as used in Section 488 of the Code of Criminal Procedure. Subramania Ayyar J., who delivered a separate judgment, made the following observation:

'Looking to the context, a different intention cannot but be inferred, considering that the offence of adultery under Section 497 of the Indian Penal Code, as already observed, is one against the husband, whereas under Section 488 of the Criminal Procedure Code the term includes cases where the wrong done is to the wife.'

I am of opinion, looking also at the context of Section 10 of the Indian Divorce Act it must be held that the word 'adultery' was used and was meant to be used in a sense far more general and wider than the sense in which it was used in Section 497 of the Indian Penal Code. I have already observed that if this had not been so, the first paragraph of Section 10 would not have contemplated a husband seeking divorce on the ground that his wife had been guilty of adultery.

16. For the reasons aforesaid I am of opinion that adultery as a matrimonial offence is wider than adultery as a crime and under the Indian Divorce Act a husband may be guilty of adultery even with an unmarried woman, a widow or a woman whose previous marriage stood dissolved.

A.N. Ray, J.

17. I agree.