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Asr

F.A.T 638 of 2015
Mukul Roy
Versus
Samar Bijoy Roy

Mr. Kushal Paul
.....for the appellant
Mr. Partha Sarathi Bhattacharyya
Mr. Raju Bhattacharyya
Mr. Tanweer Mondal
Mr. Arunava Maiti
....for the respondent

Oral

The parties were married on 19th November, 1992.

The cause of action in the plaint is framed principally on the ground of cruelty. On making a search of the facts pleaded in support of the cause of action, the major part of it, if not the whole, relates to refusal of sex by the wife. They had physical relationship for a few days only. This pleading in the plaint is not controverted in the written statement. The trouble seems to have taken firm root by 2001. According to the respondent/husband the wife completely refused to have physical relationship with him from that time.

Admittedly, the appellant/wife a junior school teacher is staying in a house in Raiganj, Uttar Dinajpur built with a contribution from the husband.

The suit was filed in 2008 by the husband in the Court of the Additional District Judge, 1st Court, Raiganj, Uttar Dinajpur and was decreed in his favour on 11th December, 2015, on the ground of irretrievable breakdown of marriage.

The wife preferred an appeal before us against the said judgement and decree.

The judgement analyses the relationship of the parties from the very beginning, the absence of physical relationship between them from 2001, their separated lives and so on and came to the conclusion that the marriage between the parties had broken down irretrievably. On that ground divorce was granted.

The Supreme Court has specifically opined in **(Vishnu Dutta Sharma – versus- Manju Sharma reported in (2009) 6 Supreme Court Cases 379)** and **(Darshan Gupta –versus-Radhika Gupta reported in (2013) 9 Supreme Court Cases 1)** that irretrievable break down is not a ground to grant divorce in a contested action. So, the legal premises for granting divorce was incorrect

The learned Judge of the Court below upon analysis of the evidence has also come to the conclusion that no mental cruelty was reached by the respondent/husband to the wife.

In my opinion, here he was in complete error. The Supreme Court in **(Satish Sitole –versus-Smt. Ganga reported in AIR 2008 SC3093)** remarked that out of sixteen years of marriage in that case the parties had been living separately for fourteen years. The marriage had broken down irretrievably. Since the marriage between the parties was dead for all practical purposes and there was no chance of it being retrieved, “the continuance of such marriage would amount to cruelty”.

In **(V. Bhagat-versus-Mrs. D. Bhagat reported in A.I.R 1994 SC 710 paragraph 17)**, the Supreme Court has defined mental cruelty as the pain or suffering which a party to a marriage suffers internally.

In my opinion, when the psychological feeling of pain becomes unbearable, the Court takes note of it as mental agony or cruelty and relieves the parties of the relationship, which is causing this pain and suffering. Obviously the assessment of the Court has to be made in a subjective manner. What would amount to mental cruelty is not a closed category and would depend from case to case on the subjective satisfaction of the learned Judge.

“What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case” as per Justice B. P. Jeevan Reddy in the above case.

In this case the marriage between the parties is dead and there is no chance of reviving it. A lot of distance has been created between the parties which cannot be bridged and there is total lack of any mental or physical relationship. There is evidence to suggest that from 2001 the respondent/husband had been requesting his wife to be physically proximate with him, which she repeatedly denied to him. This more than anything was sufficient mental torture which entitled the husband to obtain divorce. The learned Judge failed to appreciate these factual and legal premises.

In those circumstances, there is no point in dragging the relationship on.

The learned Judge came to the right conclusion on facts that there should be dissolution of marriage but has given the wrong legal reason in support of it.

I affirm the judgement of the Court below.

The appellant does not claim alimony as submitted by learned Counsel.

The appeal is dismissed.

(I. P. Mukerji,J.)

Judgment on : 05.02.2019

Amrita Sinha, J.:-

I have heard the judgment delivered by brother Mukerji, J. in Court. As I have a different view I am delivering this judgment separately.

This is an appeal challenging the judgment and decree dated 11th December, 2015 passed by the learned Additional District Judge, First Court, Raiganj, Uttar Dinajpur in MAT Suit No. 205/2008 granting divorce on the ground of irretrievable break down of marriage between the parties.

The husband filed the matrimonial suit under Section 13 of The Hindu Marriage Act (herein after referred to as the HMA). The primary allegation of the husband was that though the marriage was solemnized on 19th November,

1992 the parties did not have any physical or mental relationship for about last six years. They resided in the same house in two separate bed rooms. The wife had purchased a flat at Raiganj approximately 20 kms. away from the matrimonial house at Kaliaganj without intimating him. The wife is a teacher of a government school and leaves home at 8 o' clock in the morning and returns back around 8 o' clock in the evening. The wife was not interested in cohabitation and due to her physical structure she was unable to conceive. It was also alleged that the wife tried to kill him by mixing medicines with sweets. She has failed to discharge her matrimonial obligations and deserted the petitioner husband in the year 2001. The husband prayed for divorce on the grounds of cheating, cruelty and desertion.

The wife filed a written statement denying all the allegations made in the plaint. She specifically mentioned that after marriage the parties had a cordial relationship. They enjoyed several vacations together. She mentioned that she performed all her matrimonial obligations. She looked after and took care of her mother-in-law till her death. She also accompanied her husband to Vellore where he was undergoing treatment. Both of them attended several social functions together. As there was a dispute between her husband and her brother-in-law her husband proposed to shift from their matrimonial home to a rented accommodation. She was not willing to stay separately from her mother-in-law in the rented accommodation. Accordingly she proposed to her husband for purchasing a separate flat. With the permission of her husband she obtained loan and constructed her own flat at Raiganj. Her

husband provided money for constructing the said flat and also stood as a guarantor in respect of the loan taken by her. She claimed that her husband and her in-laws attended the Griha Prabesh function in the year 2007. She mentioned that the allegations made against her are absolutely false and baseless. There was absolutely not dispute in between the parties. She prayed for dismissal of the suit.

The learned Court below after appreciation of the evidence arrived at the conclusion that the wife had not treated the husband with cruelty and on the other hand the wife is under desertion on account of the conduct of the petitioner husband. The Court opined that a different approach should have been taken as the petitioner husband has been unable to prove his case of cruelty and desertion as grounds for seeking dissolution of the marriage.

The Court records that the wife was ready and willing to go back to the husband on any terms and conditions but the husband was not inclined to take her back. It was further recorded that the Court failed to pacify the dispute even after taking extra effort apart from the Court hours and all attempts ended in failure on account of the rigid stance taken on behalf of the petitioner husband.

The Court below observed that having regard to the irretrievable break down of the marriage keeping the dead relation in continuity without having any fruitful purpose would not be justice suited to the parties. It is beneficial in the interest of both the parties that the decree of divorce should be granted as the parties have lived under desertion, most of which has been spend in

acrimonious allegations against each other. There was no possibility of retrieving the marriage and an order should be passed to end the agony of both the parties.

Relying upon the decision of the Hon'ble Supreme Court passed in the case of **Satish Sitole vs. Ganga** in Civil Appeal no. 7567 of 2004 dated 10th July, 2008 the Court ordered that since the marriage between the parties is dead for all practical purposes and there is no chance of it being retrieved the continuance of such marriage could itself amount to cruelty and thus directed that the marriage of the parties should be dissolved subject to the payment of Rs.5,00,000/- by way of permanent alimony.

It appears from records that in the Court below the wife has categorically deposed that she lived in her matrimonial home with her husband and in laws and took care of her mother-in-law till she expired on 6th. December 2010. Apart from serving in the school she regularly performed her obligations as wife as well as daughter-in-law. She entrusted her family members to take care of her husband when he was undergoing treatment at Kolkata as she was duty bound to take care of her ailing mother in law at Kaliaganj. The wife has further deposed that when the petitioner husband underwent an operation in the year 2008 she took care and nursed the ailing husband during that time. Only after recovery the husband turned around and filed the suit for divorce.

The husband in his deposition admitted that he has partly financed the flat of his wife. He has also mentioned that the distance of the matrimonial

home and the school where the wife was serving as a teacher was quite far off and the wife had to take a lot of strain to reach the school and perform her duties there. He further deposed that the newly constructed flat of the wife was close to her place of work. It implies that the husband never objected to the wife residing at a separate place to attend her duties in the school. It further implies that the wife resided at a different place with the consent of the husband only for the convenience of her job. Apart from a bald statement the husband failed to prove that the wife refused to cohabit with her. The parties never intended to put an end to the marriage. The *animus decirendi* or the intention to desert was absent. The conduct of the wife does not amount to desertion.

From the depositions made by the parties the learned Court below rightly came to the conclusion that there was no cruelty or desertion by the wife on the husband. The learned Court below also rightly disbelieved the allegation of the husband that the wife mixed poison with sweets with the intention to kill him. The specific finding of the Court was that none of the grounds viz; cruelty and desertion taken by the petitioner has been proved. The Court being aware of the fact that since none of the grounds for divorce was proved opined that the husband ought to have taken a different approach for putting the relationship to an end.

Though cruelty has not been defined in the Act but the dictionary meanings as well as the decisions in this regard postulates that cruelty involves a conduct of such character as to have cause danger to life, limb or

health, bodily or mentally or as to give rise to a reasonable apprehension of such danger. Normally it means any conduct which may be dangerous to health or give rise to a reasonable apprehension of such danger.

The husband intended to highlight that there was mental cruelty on the part of his wife. She wilfully refused to cohabit with the husband. He tried to highlight that the behaviour of his wife towards him as well as his family members was such that amounts to mental cruelty and he presses on the ground of cruelty for obtaining the order of divorce.

He relies upon the following decisions to contend that the conduct of the wife amounts to cruelty and the decree of divorce has been rightly passed in the facts and circumstances of the instant case. *Sabitri Pandey vs. Prem Chandra Pandey* **(2002) 2 SCC 73** (paragraph 6), *Jyotish Chandra Guha vs. Mira Guha* **AIR 1970 Cal 266** (paragraphs 24-26, 35, 41-43) and *V. Bhagat vs. D. Bhagat* **AIR 1994 SC 710**.

The learned Trial judge passed the impugned order erroneously relying upon the judgment of the Hon'ble Supreme Court in the case of *Satish Sitole* (supra), without being apprised of the fact that the said judgment was taken into consideration by the Hon'ble Supreme Court in a subsequent judgment of *Vishnu Dutt Sharma vs. Manju Sharma* **(2009) 6 SCC 379** wherein the Court specifically held that as the ground of irretrievable break down of marriage is not a ground for obtaining divorce under Section 13 of the Act the Court cannot add such a ground as that would be amending the Act which is a function of the legislature. The Court further held that a mere direction of the

Court without considering the legal position is not a precedent. The Court by judicial verdict cannot add grounds for divorce which are not mentioned in the Act. It is for the Parliament to enact or amend the law and not for the Court. The Court went on to add that had the parties been willing then divorce by mutual consent could have been granted.

In *Darshan Gupta vs. Radhika Gupta* **(2013) 9 SCC 1** the Hon'ble Supreme Court was not agreeable with the contention of the appellant to grant divorce on the plea of irretrievable break down of marriage by invoking jurisdiction under Article 142 of the Constitution of India for doing complete justice between the parties. Suggestion was advanced that the appellant will be ready and willing to pay the respondent whatever was considered appropriate by the Court. Even then the Court did not accept the plea of the appellant. The Court held that to constitute justice the picture should appear to be same irrespective of the angle from which it is viewed. If the same sequence of fact cannot be viewed as doing justice to the husband, they have to be likewise viewed for the wife as well.

In *Chetan Dass vs. Kamla Devi* **(2001) 4 SCC 250** the Hon'ble Supreme Court held that the institution of marriage occupies an important place and plays an important role in the society in general and therefore it would not be appropriate to apply any submission of irretrievable break down of marriage as a straight jacket formula for grant of divorce.

In *Sabitri Pandey vs. Prem Chandra Pandey* (supra) (paragraph 17) the Court held that the sanctity of marriage cannot be left at the whims of one of

the annoying spouses. Irretrievable break down of marriage is not a ground by itself to dissolve it. It further held that the foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

In *Debjani Sinha vs. Bikash Sinha* **2006(2) CHN 235** this Court held that mere finding by the Trial Court that the marriage had broken down irretrievably cannot confer upon the Court the authority to grant a decree for divorce as the husband has failed to prove cruelty alleged in his petition for divorce.

In the instant case the wife was all along ready and willing to stay with the husband and continue with the marital tie. The learned Court below did not find any fault on the part of the appellant wife. On the contrary the learned judge observed that it was the husband who took a rigid stance to break the marriage. The husband himself is at fault by deserting the appellant wife and has claimed relief of divorce. It is he who inflicted mental cruelty to the appellant wife by leaving her alone and making all sorts of filthy allegations against her. The Court below disbelieved the evidences given against the appellant wife. It is very gracious on the part of the wife who in spite of all the allegations made against her is ready and willing to perform her marital duties. Law does not entitle a person to take advantage of his own wrong.

The learned Court below misdirected itself by coming to the conclusion that in the interest of both the parties the marital tie to be severed since the marriage has broken down irretrievably. The Court ought to have appreciated that the divorce was not in the interest of the wife. The wife was not interested in divorce. She was also not interested with the alimony that has been directed to be paid to her. It has been submitted that she never claimed alimony but the husband has directly transferred the alimony amount in her bank account. If directed she will return the same. She is eager to be united with her husband.

The parties are at ripe age. The husband is above 60 years and the wife is nearing 60. She submits that even though there was no fault on her part she has to bear the social stigma of being divorced by her husband. She has very cordial relationship with her in-laws even today. She submits that the husband is continuing with the matrimonial suit only at the instigation of some third party.

In the absence of legislation irretrievable break down of marriage cannot be held to be a valid ground for dissolution of the marital tie. The same will set a very bad precedent and will give rise to a dangerous trend in the society. Unwilling or erring partners without any fault of the other partner will proceed before the Court for obtaining divorce on the said ground. It is true that in modern time difference of opinion, culture, taste etc. often leads to acrimonious relationship in between the parties. Obtaining divorce by paying a price has become a common phenomenon but the same is possible only if

both the parties mutually agree to the same. In the absence of mutual consent divorce can be granted only on the grounds as mentioned in the Act and not otherwise.

In view of the discussions made herein above the impugned judgment and decree of divorce cannot be sustained. The same is set aside. The petition for divorce is rejected. The appeal is allowed.

The appellant wife will refund the alimony transferred to her bank account as and when the same will be demanded by the husband.

Urgent certified photo copy of this judgment, if applied for, be supplied to the parties expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)

LATER:

As there is difference between us as reflected in the separate judgements delivered by us in this appeal, we refer the matter to the Hon'ble Acting Chief Justice for taking an appropriate administrative decision in the matter.

(I. P. Mukerji, J)

(Amrita Sinha, J)

