

Calcutta High Court

Smt. Arunima Bhattacharjee vs Sri Shyama Prosad Bhattacharjee on 2 December, 2003

Equivalent citations: AIR 2004 Cal 161, (2004) 1 CALLT 324 HC, II (2004) DMC 146

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Bench: S Banerjea, A Barua

JUDGMENT Barua, J.

1. In the present appeal arising out of Matrimonial Suit No. 635 of 1994/18 of 1995 before the learned Additional District Judge, 24-Parganas (S), the appellant is the wife, Arunima Bhattacharjee and the respondent is Shamaprasad Bhattacharjee. That Matrimonial Suit No. 18 of 1995 was decided and disposed of by Sri P. Biswas, Additional District Judge, Alipore, 24-Parganas (S) on 15.9.97 whereby the learned Additional District Judge decreed the suit on contest in favour of the plaintiff-husband and the marriage between the parties which was solemnized on December 3, 1979 was ordered to be dissolved and the husband got a decree for divorce against the wife. Being aggrieved by the said judgment and order passed by the learned Additional District Judge, Alipore, the wife Arunima has preferred the present appeal before this Court.

2. The learned Additional District Judge in the said Matrimonial Suit framed as many as six issues and recorded his findings thereto in coming to the decision he did. The learned Judge took up all the issues together for the sake of convenience of discussion and decided the case. It appears that the entire focus of the learned Additional District Judge was on a decision on the principal point involved in the case as to whether the wife, Arunima Bhattacharjee had treated the husband, Shamaprasad with cruelty, both physically and mentally. Having considered the evidence on record both oral and documentary the learned Judge decided the issue in favour of the husband. According to the learned Additional District Judge, series of so-called gross misdemeanour and misconduct resulting in physical as well as mental torture upon the husband by wife, which according to the learned Judge amounted to "cruelty", had entitled the husband to get a decree of divorce on that ground alone. The learned Additional District Judge has also found that the marriage between the parties had irretrievably broken down and that there as no point in maintaining the marital relation between the parties any longer and that too had justified the decree of divorce.

3. The parties went into wedlock way back in December 1979 according to Hindu Rites and Customs. They started living together as husband and wife in husband's house at Rainagar Harisava, P.O. Bansdrani, Dist. South 24 Parganas. However, the marital relation ran into rough weather soon after the marriage and according to the husband (respondent) the wife (appellant) was found to be very much moody, naughty and whimsical. The husband had alleged that the wife was quarrelsome, abusive towards her mother-in-law, that the husband wanted her to leave her job as a school teacher and look after the mother-in-law and their child, a daughter which was born on 24.1.82 but the wife did not comply thereby deliberately neglecting the child and the family. It was the husband's further allegation that he was physically assaulted with fist and blows by the wife and was also once mercilessly beaten up by some anti-social elements hired by the wife. Because of physical and mental torture, the husband alleged that he had to leave his own house leaving the wife and the child over there and started living in a rented house alone, that the wife also visited the office of the husband, made abuses to him over there in presence of his colleagues causing him mental pain and

suffering, that the wife also pressurised the husband to part with his house in favour of the wife to get money, that in 1989, having treated with cruelty by the wife the husband brought a matrimonial suit being Matrimonial Suit No. 43 of 1989 at the Alipore Court on the ground of cruelty but that was dismissed, thereafter there was a written agreement dated 11.11.90 between the parties whereby the wife promised to have a peaceful marital life with the husband but that agreement was not acted upon. According to the husband as a result of the mental and physical cruelty that were perpetrated on him. He was compelled to leave the company of his wife and child and had to rent a house separately to live there alone. The marriage, the husband maintains has irretrievably broken down and that there is no chance of their return to live as husband and wife and dissolution of the marriage was the only solution left to the parties.

4. The wife (the present appellant) in a written statement in the suit denied all the material allegations of the husband. She had contended that the allegations of cruelty, both physical and mental as made by the husband are all concocted and baseless. She had specifically stated that her husband with a intention to leave the wife and their daughter lived elsewhere and totally neglected to take care of the wife and the child, that he did not pay any attention to her only child that is the daughter, that she and her daughter went to the office of the husband and requested him to stay with them but the husband using filthy language drove them away from the office. The wife had further contended that no maintenance was provided to her and the daughter, and the husband did not live in his own house only to neglect the wife and her daughter and that being a helpless woman she had to spent in the house of her husband with her daughter only with worry and fear and also with great financial difficulty due to neglect and non-cooperation of her husband that is the respondent here.

5. The learned advocate appearing for the appellant-wife having assailed the judgment and decree passed by the learned Additional District Judge has submitted that the learned Additional District Judge had erred both in law and fact in coming to the conclusion about the cruelty, physical and mental, as alleged by the respondent-husband. The learned advocate for the appellant-wife has maintained that the allegation of cruelty suffers from want of evidence, that there is hardly any corroboration whatsoever to what the husband has deposed with regard to the stray bites of incidents that allegedly constituted the so-called cruelty having been perpetrated upon husband by the wife. He has further submitted that the husband had intentionally left his house leaving his wife in the lurch to avoid his material duty and obligation towards them. He has further submitted that the respondent-husband cannot thus take advantage of his own wrong to seek a decree for divorce on the ground of cruelty alone which is not established on facts. Moreover, he has further submitted that it is a lame excuse on the part of the husband to pile up unfounded allegations of mental and physical torture and then to allege that it is not possible under the facts and circumstances to live with his wife and daughter under the same roof. He has further maintained that irretrievable break down of marriage as alleged is by itself no ground to break the marriage between the parties and thereby try to destroy the sacred institution of marriage itself. According to the learned advocate for the appellant-wife the impugned judgment and order passed by the learned Additional District Judge, Alipore was not in accordance with law and that the same is liable to be set aside. The appellant-wife lives in a hopeless and helpless condition having denied of love, affection and financial assistance or maintenance from the husband and since the appellant-wife has always been

willing to maintain the marital relation, it would not be in the best interest of the party as well as the society to break the marital tie by a decree of divorce, the learned advocate for the appellant strenuously argues. In support of his contention the learned advocate for the appellant has cited the following case laws:

(A) Savitri Pandey v. Prem Chand Pandey, .

(B) Swapan Kr. Ganguly v. Smritikana Ganguly, (2001)3 Cal LT 148 (A Division Bench judgment of this Court, Per: Samaresh Banerjea and Asim Kumar Banerjee, JJ.)

6. The learned advocate for the respondent-husband in his submission has fully justified the findings and decision of the learned Additional District Judge and has maintained that the respondent-husband has successfully established by evidence the allegations of cruelty, both physical and mental, meted out to the husband by the appellant-wife. He has further submitted that the appellant-wife had made the marital life of the respondent-husband miserable and that because of the wilful wrong occasioned by several incidents of gross misconduct and even physical assault had compelled the husband to live alone in a separate rented house leaving his own house with his wife and daughter. According to him, the facts and circumstances being what they are, it is neither possible nor desirable that the parties should any longer live as husband and wife and that because the marriage has virtually irretrievably broken down, dissolving the marriage was the only right solution to the problem and the learned Additional District Judge was completely justified in granting a decree of divorce in favour of the respondent-husband. In support of his contention the learned advocate for the respondent husband has cited the following case laws:

(A) Smr. Krishna Sarvadhikari v. Alope Ranjan Sarvadhikari, (DB) (B) Smt. Gouri Manna v. Sri Swapan Manna, (1996)2 CAL LT 23(HC) (C) Nityananda Karmi v. Smt. Kumkum Karmi, a Division Bench judgment of this Court, per: Dilip Kumar Seth and Joytosh Banerjee, JJ. reported in 2003(1) ICC 249 (D) Ramesh Chander v. Smt Savitri,

7. We have carefully considered the pleadings, the respective submissions of the learned advocates of both sides and the case-laws pointed out by them. We have also duly gone through the evidence, oral and documentary, placed on record as well as the impugned judgment and order passed by the learned Additional District Judge, 3rd Court, Alipore, dated 15.9.97. We also have ourselves minded to refer to a few recent decision of the Apex Court that might help resolve the issue.

8. Now, the first thing first--what indeed does constitute "cruelty" in legal terms and implications to justify a ground of divorce in a matrimonial proceeding? Truly speaking, "cruelty" baffles a definition. The expression "cruelty" is not defined in the Act. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial wrong has not been defined under the Hindu Marriage Act. Recently, in the case of Praveen Mehta v. Inderjit Mehta, 2002(2) HLR 513(SC), also citing Mulla, Hindu Law, 17th Edition, Vol. II, the Supreme Court held, probably the legislature had advisedly refrained from making any attempt at giving a comprehensive definition of the expression that may cover all cases, realising the danger in making such attempt. The provision in Clause (ia) of Section 13(1), which was Introduced by the Marriage Laws (Amendment) Act 68 of

1976, simply states "treated the petitioner with cruelty". The object, it would seem, was to give a definition exclusive or inclusive, which will amply meet every particular act or conduct and not fail in some circumstances. As held by the Supreme Court in *Praveen Mehta v. Inderjit Mehta*. (supra), by the amendment the legislature must, therefore, be understood to have left to the Courts to determine on the facts and circumstances of each case whether the conduct amounts to cruelty. This is just as well since the actions of man are so diverse--and indeed so infinite that it is well-nigh impossible to except a general definition which could be exhaustive and not fail in some cases.

9. In fact, the word "cruelty" cannot be put in a strait-jacket of judicial definition. It must be judged on the facts of each case having regard to surrounding circumstances. Whether one spouse is guilty of cruelty is essentially a question of fact and previously decided cases, more often than not, can help precious little. It is, however, well-settled that this "cruelty" is to be judged by taking into consideration the status of life, education, the standard of living, the family background and the society or social environment in which the parties are accustomed to move. A particular behaviour may amount to cruelty in one set of circumstances and may not be so in other set of circumstances.

10. As to what can be treated as "treated with cruelty" is explained by the Apex Court in *Sabtttri Pandey v. Prem Chandra Pandey*, thus: "cruelty" postulates a treatment as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. The Court should consider whether the conduct of one party is such that it has become intolerable for the petitioner to suffer any longer and to live together is impossible. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances. It was also pointed out by the Supreme Court that a spouse was disentitled from claiming divorce if granting of divorce to him or her would result in allowing her to take advantage of his or her own wrong.

11. In *Savitri Pandey* (supra) one most important point was also settled by the Supreme Court--whether irretrievable break down of marriage can be said to be a valid ground for divorce of dissolution of marriage. We may cite the observation of the Supreme Court as laid down in paras 16 and 17 of the said judgment:--

(16) This Court in *Jorden Diengdeh v. S.S. Chopra*, , suggested for a complete reform of law of marriage and to make a uniform law applicable to all people irrespective of religion or caste. The Court observed: (SCC pp. 71, para 7):

"It appears to be necessary to introduce irretrievable break down of marriage and mutual consent as grounds of divorce in all cases..... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broke down. We suggest that the time has come for the intervention of legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situations in which couples like the present have found themselves in."

17. The marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in *V. Bhagat v. D. Bhagat*, , held that irretrievable break down of the marriage is not a ground by itself to dissolve it."

12. Two recent Division Bench judgment of this Court are also of great importance in this connection. In the case of *Swapan Kr. Ganguly v. Smritikana Ganguly* (supra), Per Samaresh Banerjea and Asim Kumar Banerjee, JJ., it was held that divorce under Hindu Marriage Act could only be give on any of the grounds under Section 13, that allowing divorce on any of the grounds not mentioned in Section 13 would be an Act without any sanction of law; that such power was only with the Apex Court under Article 42 and that we are afraid, we could not go beyond the law. It was held by the Division Bench that irretrievable breaking down of marriage was by itself could not be a ground for divorce. In a later Division Bench decision of this Court (Per: Dilip Kumar Seth & Joytosh Banerjee, JJ.) in *Sri Nityananda Karmi v. Smt. Kumkum Karmi*, 2003(1) ICC 249, it is held that the Court shall not contribute to the breakage of matrimonial relation unless it comes to a firm finding that the marriage has irretrievably broken and that one of the spouses is not taking advantage of his own wrong of breaking the marriage irretrievably to obtain a divorce.

13. Talking of mental cruelty in a case of divorce, in a very recent judgment, the Supreme Court has this to say in *Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate*, reported in 2003 AIR SCW 2530.

"To satisfy the requirement of Clause (i-a) of Sub-section (1) of Section 13 of the Act, it is not as though the cruel treatment for any particular duration or period has been statutorily stipulated to be necessary. As to what constitute the required mental cruelty for purposes of the said provision will not depend upon the numerical count of such incidents or only on the continuous course of such conduct, but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home. If the taunts, complaints and reproaches are of ordinary nature only, the Courts perhaps need consider the further question as to whether their continuance or persistence over a period time render, what normally would, otherwise, not be a so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer."

14. Let us now examine the facts and circumstances of the instant case in the light of the useful guidelines afforded by the relevant case laws as discussed above.

15. The respondent husband has spelt out a number of allegations which according to him constitutes "cruelty". We may sum them up as follows:

(1) That his wife was very moody, naughty, and whimsical always findings fault with petty matters and picking up quarrels with him and her mother-in-law with abusive and filthy language thereby polluting the atmosphere of the family. The husband felt insulted and it was a mental pain and shook to him.

(2) That the husband was not treated well when he would visit his wife's parental house to see her and he had to leave the drawing room without even a single cup of tea.

(3) That the wife promised the husband that she would leave her job as school teacher after marriage but she did not. Since she carried on with her job, his old mother and their child, a daughter were neglected in his house.

(4) That the husband lost all feelings of love for his wife and filed a suit for divorce at the Alipore Court being that Suit No. 43 of 1989, on the ground of cruelty but that suit was dismissed. But after the dismissal of the suit there was a written agreement dated 11.11.90 between the parties in presence of local people that they would live together peacefully. But that agreement was not acted upon and the husband was not allowed by the wife to enter into the house; that is the own house of the husband and the matrimonial home of the appellant wife. The husband, therefore, had to live separately alone in a rented house away from the company of the wife and their only daughter.

(5) That the wife wanted to grab the husband's house where she was living with the daughter and used to put pressure and threat upon the husband to sell of property to have some lumpen money.

(6) That on a number occasions the wife personally went to the husband's office and abused the husband in filthy language in presence of others.

(7) That the wife assaulted him with fist and blows in order to evict the husband from his house and the wife also took the help of some anti-social elements to beat him up mercilessly when the husband tried to enter into his house.

(8) That on 8.4.94, the wife hired some rowdy people to beat him up and for this the husband had made a G.D. (being G.D. Entry No. 378 dated 8.4.94) with the Regent Park Police Station.

16. The wife, that is the appellant here, in his written statement before the Court below had squarely denied all the material allegations of the husband-respondent. She contended that already the husband had brought a matrimonial suit being Matrimonial Suit No. 43 of 1989 against her on the ground of cruelty but that was dismissed by the learned Additional District Judge, 14th Court, Alipore and that hence the present matrimonial suit over again was not maintainable. Her specific case is that the husband with a intention to leave the wife and only daughter lives elsewhere and does not look after her and their daughter at all, that he had deliberately did not provide for any maintenance, nor paid any attention to them, that both she and her daughter went to office of her husband and requested him to stay with them but the husband using filthy language drove them, away from his office, that the wife along with daughter are in a helpless condition and have to stay in the house with her daughter with lot of worry and fear. It has been further contended by the wife

that it is totally false that she had driven out the husband from the house, that the husband after the dismissal of the previous matrimonial suit wanted to teach her a lesson and left the house only to put pressure upon the wife and her husband himself is guilty of neglecting her and their only child. According to her the allegations made by the husband are all false and concocted and that both she and her daughter are eager always to continue the good relationship with the husband and keen to maintain a peaceful matrimonial life.

17. In order to get a decree for divorce on the ground of cruelty as alleged the respondent-husband had got to prove by adequate and convicting evidence that he was, in fact, treated with cruelty by his wife, the appellant here.

18. Now, the set of facts and circumstances laid bare in this case irresistibly make us ask ourselves--who really was wronged, the husband or the wife? The respondent-husband seems to have made no mistakes in mounting a serious of allegations of mental and physical cruelty against his wife, the appellant, to show as though he is in a miserable mess, driven and discarded by the wife-- to the extent of leaving his own house and leaving his wife and only child (daughter) to be desperately lodged in a rented house. Under the normal circumstances, he possibly tries to project his wife as a woman so mighty and merciless to have braved to do that, or, place himself, unwittingly, to the position of a man who is either too weak and imbecile even to withstand the normal wear and tear of a family life or, totally bent or shirking the responsibility of a husband and a father. If that is not true for his wife, this may be what he really is. Evidence--or, want of it--would betray that.

19. The husband-respondent in order to prove his allegation had only one witness, Subimal Dutta, as PW 2, besides himself as PW 1. Admittedly, theirs' was a negotiated marriage--Arunima Bhattacharjee and Shayama Prosad Bhattacharjee. He is a clerk in Calcutta Municipal Corporation; she was a teacher in a deaf and dumb school. He had only a mother besides his wife and only child, a daughter, in the entire household to look after. The mother died way back in 1984. And the instant matrimonial suit was filed nearly ten years after in 1994. There was obviously no point in bringing the mother into the fray alleging infliction of mental fortune upon him by the so-called naughty and whimsical wife allegedly hurling filthy abuses on the mother in the matrimonial home. Besides, at any rate, no one is coming to support the husband-respondent on this. The husband (PW 1) started off with the allegation that it was settled during the marriage negotiation that the wife-appellant would leave her school-teaching job after the marriage but the wife broke the promise and continued with the job. If the husband was hurt at that the wife one could not possibly help; but this by no means was an instance of mental cruelty. Nor was it an instance of the like if the husband had to leave the wife's parental house without a cup of tea. To become careless and discourteous on small occasions is not the other name of cruelty. There is then the story of an office-scene when the husband says, the wife came over and verbally abused him. But PW 2, his office colleague, is his only eye-witness to support him and that too only on this point alone. PW 2 says, there was a loud, heated exchange of words between the husband and wife which created a scene. But then, the husband had also himself contributed to the situation as well at the scene. Also, that was the solitary instance of the scene. Besides, the wife (DW 1) had said in her deposition that she tried to meet her husband in the office only to persuade him return to his house. Then, there is the story of the husband being driven away by this wife from his own house and the one of pressurising him to part

with the house in her name with the help of anti-socials, which not only sound highly Improbable under the circumstances but also totally bereft of any corroborative evidence whatsoever. The physical assault part of the story allegedly constituting physical cruelty also suffers from gross inadequacy of evidence and cannot be relied upon. Besides, the earlier suit being Matrimonial Suit No. 43 of 1989 on the self-same ground of cruelty had already failed him, being dismissed.

20. At the hearing of this appeal we had tried a compromise between the parties by calling both the wife-appellant and the husband-respondent as well as their young daughter separately in our Court chamber. The appellant-wife seemed to be still very eager that her husband came back so that the matrimonial relation was restored peacefully, specially in the interest and welfare of their only child, the daughter. The daughter too seemed to have a lot of soft corner for the father whom she still occasionally visited at his rented house but failed to persuade her father to be sensible and come back to the house so that they could again live peacefully together. The father unfortunately seemed extremely adamant and stubborn in his attitude apparently without any good reason and said, he was still choosing to stay back in his rented house and was not inclined to get back to his wife and daughter. And we had to give it up at that. We have this from the evidence that the husband-respondent had deliberately chosen to live separately from his wife and daughter and was never seriously minded to cement the marital breach. Nor has he cared to take any of the marital obligations towards his wife and grown-up daughter. The appellant-wife has to foot the electric bill, build a bathroom, sink a tubewell in that household at her own expense, has to maintain and educate the daughter. The husband is merrily on his own without having to bear any responsibility, good at fancying and fuming that he has been cruelty treated by the wife, piling up unfounded allegations against her and is bringing up one case after another against the wife. The mental pressure, agony, and suffering of the wife and the daughter living with her as a result of all this is understandable.

21. The situation of a so-called "irretrievable break down of the marriage" relied upon by the husband-respondent and resorted to by the learned Additional District Judge in his impugned judgment is more a make-belief than a reality. It is the husband's own brainchild. If he is hypersensitive, law does not help. If he is a shirker, law looks hard. And if in some ways, he himself is the tormentor, law gets tougher still.

22. In the above context, the decision of the Apex Court in Savitri (supra) that of the Division Bench of this Court in Swapan Kumar (supra), that irretrievable break down of marriage by itself is no ground for a divorce, and that of the another Division Bench ruling in Nityananda Karmi, 2003(1) ICC 249 (supra), that Court shall not contribute to the breakage of the matrimony unless it comes to a firm finding that the marriage has irretrievably broken down and that one of the spouse is not taking advantage of his own wrong of breaking the marriage irretrievably to obtain in divorce, are also decisive of the matter.

23. We might add that the respondent-respondent in trying to fortify his case has resorted to a documentary evidence in the name of a G.D. Diary, vide Ext. 2 to show as though at the behest of his wife, the appellant, he was mercilessly beaten up by some anti-social elements. But this must also be reckoned as yet another futile attempt of the husband to establish cruelty. The G.D. Diary Entry No.



378 dated 8.4.94, Ext. 2 only spells out that Arunima Bhattacharjee, the appellant-wife, used antisocial language and threatened him. This proves precious little.

24. On ultimate analysis, we find that the allegations in bits and pieces as alleged and as stated above either cumulatively or taken singly, in isolation, cannot make out a case of either physical or mental cruelty allegedly perpetrated by the appellant-wife upon the respondent-husband. That way, intensity, gravity and stigmatic impact of the alleged ill-treatment, amounting to cruelty, are beside the mark.

25. In our considered view, the respondent-husband having failed to prove his case was not entitled to get decree for divorce before the learned Court below, that the impugned judgment and order of the learned Additional District Judge, Alipore, dated 15.9.97 cannot be sustained and should be set aside. Accordingly, the same stands dismissed and the appeal is allowed.

26. Urgent xerox certified copy of this order, if applied for, be given to the parties.

S. Banerjea, J.

I fully agree with my learned brother.

28. But only thing which we add that if the judgment of another Division Bench of this Court in the case of Nityananda Kurmi v. Kumkum Kurmi, reported in 2000(1) Indian Civil Case, 249 can be interpreted by the learned counsel for the respondents to be authority for the proposition that the High Court also can grant the decree of divorce on the irreparable breaking down of marriage, the same would be per-incurium not having taken notice of judgment of the earlier Division Bench in which one of us as a party (Samaresh Banerjea, J.) in the case of Swapan Kumar Ganguly v. Smritikana Ganguly, reported in (2001)3 Cal LT 23(HC) : 2001(3) CHN 124 which has been held already after referring to various Division Benches judgment of this Court as also latest decision of the Supreme Court that the legislature not having provided for divorce of such ground. The High Court does not possess power to grant decree on such ground and whenever the Supreme Court held in the facts and circumstances of the case granted such decree, the same was done invoking its power under Article 142 of the Constitution to do complete justice between the parties.