

Calcutta High Court

Annapurna Ganguly vs Dipak Kumar Ganguly on 31 August, 1990

Equivalent citations: 95 CWN 806, I (1992) DMC 88

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Bench: G Roy, P K Banerjee

JUDGMENT Pabitra Kumar Banerjee, J.

1. This appeal arises out of the husband's petition for divorce under the Hindu Marriage Act on the grounds of desertion and cruelty. The petitioner Dipak Ganguly was married to the respondent Annapurna Ganguly according to Hindu rites on 24th January, 1974 at Calcutta and a son Ashoke alias Bapi, was born out of the wedlock after 21/2 years. Since the marriage the respondent Annapurna lived in the matrimonial home till January 1982 when she left the house and stayed away till the filing of the petition for divorce. During the period between 1974 and January 1982 the respondent who is a woman of violent temperament, nagged, abused and humiliated the petitioner in presence of other members of the family. She failed and neglected to look after, the health and welfare of her husband, son and the mentally retarded brother of the petitioner. It is alleged that the respondent often accused the petitioner of having illicit sexual connection with his sister-in-law and in this way the respondent behaved with the petitioner so cruelty and shamelessly that it caused injury to his mental and physical health and the petitioner feels that it is impossible for him to live with his wife any longer. Hence the petitioner filed for a decree of divorce.

2. The respondent wife resisted the petition by filing a written statement in which she denied the allegations of mental torture to her husband and disputed incidents referred to by the petitioner in support thereof. The respondent insisted that she always looked after the health and well-being of her husband and son and that she never misbehaved with the members of her husband's family. She complained of the torture on her by her husband and alleged that, the conduct of the second brother's wife with the petitioner at times, was found to be suspicious. The respondent asserted that she never deserted her matrimonial home, but that the petitioner drove her out of his house at the instigation of the other members of the family.

3. On the above pleadings the learned Additional District Judge, 10th Court, Alipore framed several issues on recorded evidence and came to a finding that the respondent wife was guilty of conduct amounting to legal cruelty and he accordingly passed a decree of divorce under Section 13 of the Hindu Marriage Act by the Judgment and order dated 8.8.84. The aforesaid judgment and decree is under challenge in this appeal.

4. The learned Counsel for the appellant took us through the pleadings and evidence on record and contended in the first instance that the conduct of the appellant wife never amounted to legal cruelty so as to justify a decree of divorce in favour of the petitioner husband. It was next contended that even if the wife had behaved improperly this was condoned by the husband. It was contended in the last resort that the appellant never left the matrimonial home of her own accord, but that the husband and the other members of the family drove her out of the house. The learned Counsel representing the respondent (in this appeal) supported the decree appealed against mainly on the ground that the Ingredients necessary to constitute legal cruelty having been established at the trial

on evidence, the impugned decree must not be disturbed. The learned Counsel relied on and cited several decisions which we propose to discuss at the appropriate stage.

5. In the context of the rival contentions aforesaid the only question which falls for the decision of the Court is whether in the facts and circumstances of the case the decree of divorce as passed by the Court below can be sustained. At the very outset it would be important to note that the ground of desertion has been rejected by the Court below and the respondent did not file any cross-objection in this appeal. The only ground which survives is the ground of cruelty within the scope and ambit of Section 13(1)(ia) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act).

6. The petitioner Dipak Ganguly is an employee of the Traffic Department (goods) Eastern Railway and the respondent wife Annapurna is a Ph. D. in Political Science. At the stage of negotiation, as Annapurna (DW 1) has stated in her deposition, mejaja (Mandira) met her and told that Dipak used to mix with her freely and cautioned that she (Annapurna) would not be happy if she married Dipak. Negotiation was almost broken off when Annapurna wrote a letter to Dipak's father tendering apology (Ext. 1). Annapurna was also given to understand that soon after her marriage Dipak would shift to the railway quarter with his newly married wife. At the time of their marriage in January 1974 Dipak was 38 years of age and his wife Annapurna was 36. Out of the lawful wedlock a son, Ashoke, alias Bapi, was born in September 1976. Dipak, his five brothers and their parties were living jointly in the same house at 20 Binodelal Ghosh Lane, Calcutta. One of the brothers, Provat, was mentally disabled and physically handicapped and the other named Sanat Kumar had been suffering from T.B. and Thalossamela. Dipak's mother was diabolic and a patient of tuberculosis. Annapurna was grafted upon the cursed Ganguly family. The second brother Hemantoa was married to Mandira 5 or 6 years before Dipak's marriage and they used to stay in the first floor their children and Dipak and Annapurna occupied the ground floor room.

7. The petitioner has set out the particulars of the cruel acts and behaviour on the part of the respondent in para 10 of the petition. It is stated that Annapurna neglected to look after the ailing brothers of Dipak, The quarrelsome habit of Annapurna, her failure to look after the health and wellbeing of her husband and son, her shameless behaviour with the members of family, her violent temperament at times, habitual desertion of the matrimonial home are some of the instances cited by the petitioner which, according to him, constituted legal cruelty and contributed to the loss of mental peace and relapse of tuberculosis of the petitioner. All these grounds could not, however be established during the trial and the Court below has rightly refused to take note of these grounds. The only other ground which is of some consequence and on which the respondent relied heavily for a decree of divorce, is that soon after the marriage, when the respondent came to live in her matrimonial home, she stated suspecting her husband's character and she expressed her displeasure and disapproval in various ways including noisy quarrels with her husband in filthy language. It appears that the petitioners did not consider the same imputation seriously because in para 10 of the petition out of 18 grounds only one ground had been devoted to that part of the ill-treatment by the wife towards the husband and that too most casually. Emphasis was laid on the ill-treatment by Annapurna towards the husband, son, other members of the family and married sisters of the petitioner. Her alleged attempt to take away her son from the husband's custody and the desertion from the matrimonial home in January 1982 without permission were highlighted. The grounds set

out in sub-paragraphs I, vii and ix to viii could not however be established by any convincing proof of any standard. The Court below did not also find and substance in those allegations. The respondent did not file any cross-objection in this appeal and these adverse findings have not also been challenged at the time of hearing of this appeal. Even if the wife was found to be emotional at times or had domestic quarrels with the husband or other members, the conduct could not from the basis of a decree of divorce. In the opinion of the learned Judges in the case of *Dastane v. Dastane*, reported in AIR 1875 SC page 1334, "passion and petulance of manners, attention to the needs of the husband and household are rudeness of language or want of civil perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a partner". This view was endorsed by Their Lordships in the cases of *Parihar v. Parihar* and *Krishna Surabadhikari v. Alope Sarbadhikari* reported respectively in and , In the last mentioned decision the observation was like this. "It would not be sufficient to show that the other spouses moody, whimsical, exacting inconsiderate and irascible, defects of temperament must ordinarily be accepted for better or for worse. There may be unhappiness in marriage and the Court cannot have for that cause alone find cruelty."

7. To revert back to the question of suspicion nourished by Annapurna about her husband having some immoral intimacy with his brother's wife, Mandira, it appears that the wife had so suspected and she made no secret of it either in the written statement or in her statements before the Court. In her written statement it has simply been alleged that "The conduct of the second brother's wife with the petitioner at times, was found to be suspicious". In her deposition as D.W. 1 she has stated how her husband behaved with Mandira after he returned late from his office. It is her evidence that "I also saw that after coming from office petitioner would go to Mandira with packets of sweets and stay there up to 2 night." Annapurna suspected that Mandira's husband Hemanta would allow Dipak to stay in his room because they could avail the railway passes obtained by Dipak. This suspicion by the wife about the character of the husband would undoubtedly amount to cruelty provided it is shown that the said conduct is likely to harm or injure the health, reputation, working career or the like of the other spouse. The threat by the wife to her husband that she will put an end to her own life or that she will set the house on fire, the threat that she will make him lose his job and have the matter published in newspapers and the persistent abuses and insults hurled at the husband and his parents are all of so grave an order as to imperil the husband's sense of personal safety, mental happiness, job satisfaction and reputation are important considerations in determining whether the conduct of the respondent amounts to cruelty [see *Dastane v. Dastane* (supra)] In *Krishna Sarbadhikari's* case (supra) similar observations were made by Their Lordships. We have so far discussed the circumstances which amount to 'cruelty' and those which do not and now we proceed to scrutinise the evidence adduced by the parties at the trial and to see how far and to what extent the petitioner Dipak, on whom lies the burden of proof, has been successful in making out the case of cruelty as one of the grounds justifying the decree of divorce.

8. In this case the petitioner Dipak has examined himself and three other witnesses. P.W. 2 Tapas is his younger brother, P.W. 3 Swapan claims to be a close neighbour and P.W. 4 Urbibrata is stated to be a colleague of the petitioner in the office. The petitioner who has deposed as P.W. 1 has stated in his evidence that "in order to humiliate and slight me she would falsely state that I was drunkard or smelling alcohol". In another place P.W. 1 states, due to her behaviour I could not sleep properly, could not concentrate on my work and have no peace of mind for which I had repeated attacks of

T.B., once in 1976 and again in 1978". The conduct of Annapurna has been described by P.W. 2 Tapas in this way, "She was quarrelsome. When the petitioner would leave for office respondent would say "I wish he must not return home". When he return home, she would cry out" drunkard, debauch, office is not open till late night". Significantly enough, although P.W. 2 is the fittest person to speak about the mental condition of the petitioner, he stated nothing about the mental sufferings of his brother. His evidence is that whenever the respondent used to abuse his brother the latter would keep quiet. It would be Interesting to note that P.W. 3 who claimed to be a close neighbour of P.W. 1 was attracted by the loud protest by P.W. 1. In any view of the matter, there is absolutely no evidence in support of the petitioner's allegation that he lost his mental peace due to the respondent's alleged ill-treatment. It is alleged that the petitioner could not concentrate on his work due to the ill-behaviour of the respondent. This cannot be true because P.W. 4 has stated that in 1981 the petitioner has been promoted to the post of Assistant Traffic Officer (Goods). If the ill-treatment of the respondent alone was the cause of the disease of the petitioner, then since 1978 till the filing of the petition in 1982 and even till his deposition in 1984 the disease must have relapsed. But it did not, although according to his statement, the ill-treatment and mis-behaviour of the respondent continued till the first part of 1982. Excepting P.W. 2 none of the inmates of the petitioner's house or his sisters have deposed to substantiate the allegation of cruel conduct on the part of the respondent towards her husband affecting his health, mental peace or working career.

9. It appears that the Court below took Annapurna's letter to her sop [Ext. l(c)] as a document containing scurrilous imputations against her husband. The learned Judge thinks that the letter displays her "bad taste" and that it clinches the whole issue. It is difficult to understand how a letter displaying very bad taste on the part of the respondent could form the basis of cruelty. It is unfortunate that the learned Judge in his anxiety to condemn the respondentwife overlooked that the said letter was written about one year and four months after the filing of the matrimonial suit. Again, not a word has been spoken Jay the petitioner himself in his deposition about this letter and for the first time when the respondent was in the witness box the letter exbt. l(c) was shown to her. We must appreciate that for more than one year the petitioner was living alone away from her son and husband and her future was extremely uncertain. Her motherly affection keenly desired to get back her son and in this context the letter was brought into existence. What is more important is that at the time of his deposition the petitioner made no reference of this letter and it can be legitimately inferred that the contents of the letter had no adverse effect on his mind. The impugned judgment and order can be upset only on this ground alone because the learned Judge was influenced more by sentiments than by reasonings. Attempts have been made to prove through P.Ws. 3 and 4 that the respondent used to give vent to her suspicion about her husband's immoral intimacy with his brother's wife even to the outsiders. P.W. 3 is a chance witness and it is not believable that the respondent wife would tell her that the petitioner had illicit connection with 'is younger brothers' wives. The witness went so far as to say that the respondent complained about her husband's connection even with his friend's wife. Similarly. P.W. 4 (even assuming that he works with the petitioner) has stated that Mrs. Ganguly (Annapurna) complied before him about the character of Mr. Ganguly having illicit connection with his brother's wife. Perhaps the witness himself was ashamed of this false statement because in his cross-examination he admitted that it struck him as unnatural for a housewife complaining against her husband before an unknown person. Both PWs. 2 and 4 have testified that the respondent had no mental disease and that she

behaved normally with the outsiders. The husband must have taken those allegations in his stride. A question then arises as to whether such allegations of the wife, even if they turn out to be unfounded, would not result in mental agony of the gravest character to the husband.

10. We may refer to two decision one reported in 1980 Mah. LJ 391= I (1981) DMC 175, (Madanlal Sharma v. Smt. Santosh Sharma) and the other where the question of the alleged cruel conduct on the part of the wife towards her husband was raised and decided against the husband. In the Bombay case the wife had indulged in making allegations of immorality against her husband in quite obscene language. The learned Trial Judge upon appreciation of evidence, observed that the allegation of immoral conduct could not legitimately be found to be a basis for divorce on the ground of cruelty. The Court found that the husband, who was at the receiving end, had not taken the allegations seriously at all and had not allowed his mental equilibrium to be perturbed by those allegations. In the Delhi case the petitioner husband and the respondent wife were living in the house of and along with the family of one Juneja and he wife Bindra Devi. The wife however suspected that her husband was having immoral intimacy with said Bindra Devi. According to the husband there were constant quarrels between himself and his wife on this account and in that connection the wife once tried to commit suicide. In view of these allegations and acts of cruelty the husband had filed the petition of divorce. In the written statement the wife repeated the allegations of adulterous acts against her husband. On evidence the Court found that the husband did not make any statement in his deposition about the mental torture caused to him by virtue of the wife's allegations. The Delhi High Court further held that such facts did not necessarily give rise to the inference of mental agony and mental torture. In the present case taking an overall picture of the conduct of the appellant wife and in the absence of any evidence that the suspicious conduct of the wife was such as to cause extreme mental distress to the husband or it was so grave an order as to imperial the husband's sense of personal safety, mental happiness, job satisfaction and reputation", we hold that the said conduct of the respondent did not amount to legal cruelty so as to justify a decree of divorce.

11. It would be Important to note that the relief prayed for under Section 13 of the Act can be decreed only if the Court is satisfied that the petitioner is not taking advantage of his or her wrong. Section 23 is the rider to that effect. In the case at hand Dipak sent an 23 is the rider to that return to the matrimonial home within 10 days. It is an admitted position that Annapurna returned to the matrimonial home, but as she fell sick she was admitted in Lilloah Rly. hospital where she was confined till 10th January 1982. Again in March 1982 she was re-admitted in hospital. All these facts were within the knowledge of the petitioner husband. From the hospital records (Ext. A series) it appears that Dipak took his wife from the hospital on 10.1.82. Strongly enough, in the petition these facts have been suppressed and the petitioner all along insisted that his wife permanently deserted the matrimonial home in December 1981 or January 1982. Then, where did the husband tale his wife from the hospital ? D.W. 1 Annapurna has categorically stated that she was driven out by the petitioner and his relations. The preponderance of probability suggests that perhaps the allegation of the weaker sex is true. The preservation of two letters Exts. 1 and l(a) written in or about 1973, the service of advocate's letter in September 1981, the false allegation of desertion in December 1981 or January 1982 while admittedly the wife was being treated for asthma in the Rly. hospital, the wild allegations of the wife trying to take away her son from the husband's custody with the help of local

ruffians and the refusal to give the wife the status of "Barabou", taken together speak volume about the vindictive character of the husband and his long preparation for the ground for divorce. What is more, in the petition for divorce the respondent's address was wrongly described for which summons had returned unserved. On three occasions the petitioner did not turn up although the dates were fixed by the trial Court for reconciliation. For all these reasons our considered view is that the petitioner husband does not deserve any decree for divorce.

12. The learned Counsel for the appellant argued before us that the invitation extended by the husband to the wife through advocate's notice requiring her to return to the matrimonial home constituted condonation of the alleged cruel acts of the wife. We cannot countenance the argument for more than one reason. As observed by Their Lordships in Dastanr's case (supra), condonation comprises two things-forgiveness and restoration. It is true after the notice the wife lived in the matrimonial house for some period. But there is no evidence or even suggestion that since then the husband intended to forgive all past misdeeds (?) of his wife. Moreover, since our findings in the preceeding paragraphs are against the petitioner's charge of 'cruel acts' of the wife, the of the supposed cruel acts does not arise.

13. On behalf of the respondent reliance was placed upon certain decisions reported respectively in (Parihar v. Parihar), (DB) (Smt. Krishna Rani v. Ghunilal Gulati), , (Krishna Sarbadhikari v. Alope Sarbadhikari), (FB) (Nimai Kr. Ghosh v. Mita Ghosh) AIR 1987, Bombay p. 220 (Joyshree Mohan Otavnekar v. Mohan Govind Otavnekar), and , (Japan Kumar Kundu v. Biva Kundu) and it was strenuously argued that in view of the legal principles emerging out of the aforesaid decisions, the acts complained of particularly, the suspicious conduct of the appellant wife, did constitute legal cruelty so as to entitle the petitioner husband to a decree for divorce under Section 13. Although ordinarily it would not be safe to compare one decided case with the others as no one has ever attempted successfully to give a comprehensive definition of cruelty, for the satisfaction of the learned Counsel for the respondent that we have considered those decisions, we propose to discuss the reported decisions briefly in this way. In the case of Nimai Kumar Ghosh v. Smt. Mita Ghosh (supra) the wife became suspicious about the character of her husband and used to doubt that the husband was in illicit connection with his own sister-in-law. In that case it was established on evidence that the husband held his sister-in-law (elder brother's wife) in high esteem like his mother and this relationship had been proved by the sister-in-law herself who deposed as P.W. 3. In the case at hand Mandira did not depose and moreover, she is much younger in age than the petitioner husband. In the Bombay decision the wife was the petitioner and the husband in his written statement put forth specific charge for adultery on the part of the wife and it was further alleged that the illicit affair between the wife and one Shankar Balaji dubekar had been published in the newspaper. The wife in the Calcutta case and the husband in the Bombay case did not contest the appeal inspite of service of notice and this was an additional ground which persuaded the Court to come to a conclusion that in both the cases the respective parties were not interested in defending the decree for divorce. In the Punjab case the wife lodged FIR at the P. S. making imputation against the husband of having illicit relations with one Smt. Parameswari, wife of his elder brother. On the basis of that FIR the husband had been arrested. Earlier the wife had taken out a divorce proceeding against her husband which was eventually dismissed. In these facts and circumstances the second divorce proceeding started at the instance of the husband was allowed. In the Rajasthan case, since

the date of their marriage the husband noticed his wife's affection towards an army officer and within a short period he came across the daily personal memoirs of the wife which disclosed her fondness for one Ramesh. The wife preferred to live as a 'happy' and suffered mental agony upon her helplessness to break the social bonds. It was further established that the wife had undesirable and unbecoming connection with the said Ramesh. Upon these facts proved at the trial His Lordship came to a finding that the conduct of the wife amounted to legal cruelty for which the husband was entitled to a decree for divorce. In Tapan Kumar Kundu's case (supra) the husband got his job through the wife's relations and taking advantage of the said position the wife wanted the husband to live separately from his joint family. When the husband refused to do so the wife misbehaved with him and even physically assaulted him; even the wife compelled the husband to tender resignation in service by using force through her brother. The Court held that such circumstances constituted cruelty as the husband suffered physically and mentally from wrong treatment meted out to him by the wife. In Krishna Sarbadhikari's case (supra) the respondent wife was a highly impulsive, emotional lady who lacked balance and was of suspicious nature. She had developed serious antipathy against her mother-in-law and sister-in-law. She very often used to tear the husband's shirts and destroy household articles. She also assaulted him in presence of his mother and his sister. Once she lodged a complaint at the Police Station against her husband. It was held that the series of acts committed by respondent wife amounted to cruelty towards her husband. None of the circumstances appearing in the reported decisions is present in the Instant case, the facts of which are clearly distinguishable. Although the list of the circumstances is not exhaustive, the circumstances which have been pleaded in this case as evidence of cruel conduct of the respondent wife are not so grave an order as to imperil the husband's sense of personal safety, mental happiness, job-satisfaction and reputations. Accordingly the principles emerging out of the reported decisions do not come in aid of the petitioner husband.

14. Divorce is not accure for the matrimonial unhappiness and may result in loneliness, despair and hardship more to the child who is 14 years of age. Dipak's parents are dead. His two other brothers have already been married. Mandira, who incurred the displeasure of the wife, has shifted to her newly-built house. The size of the joint family has thus been reduced considerably. Dipak is 54 and Annapurna 52. It is not possible for them to start a new life at this age. Is the reconciliation still an impossibility ? The marriage does not deserve dissolution and the petition of divorce is liable to be dismissed.

15. The appeal is allowed. The judgment and decree appealed against are set aside. The respondent husband shall pay to the appellant wife 100 Gms towards the cost of this appeal.