

Delhi High Court

Smt. Sunita Devi vs Shri Om Prakash on 20 October, 2010

Author: Kailash Gambhir

IN THE HIGH COURT OF DELHI AT NEW DELHI

MAT.APP. No. 95/2009

Judgment delivered on: 20.10.2010

Smt. Sunita Devi

..... Petitioner

Through: Ms. Sobha Gupta and  
Mr. Mohd. Rafi, Advocate

Versus

Shri Om Prakash

..... Respondent

Through: Ms. Sahila Lamba, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR,

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not?  | Yes |
| 3. Whether the judgment should be reported in the Digest?                    | Yes |

KAILASH GAMBHIR, J. Oral:

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1. By this appeal filed under section 28 of the Hindu Marriage Act, 1955 the appellant seeks to challenge the order and decree dated 31.10.2008 passed by the Ld. Court of Additional District Judge, Delhi whereby the divorce petition filed by the appellant under section 13 (ia)&(ib) of the Hindu Marriage Act, 1955 was dismissed.

2. Brief facts of the case as set out in the present appeal are that the marriage between the parties was solemnized on 27.06.1988 at Village Jatola, Tehsil Kharkhauda, District Sonapat, Haryana according to Hindu Rites and Ceremonies. That after the marriage parties started living together at the house of respondent at WZ-161, Shadipur, Mandir Wali Gali, New Delhi. The marriage was duly consummated and out of the said wedlock two daughters and a son were born. The petition under Section 13(1) (ia) & (ib) of the Hindu Marriage Act was filed by the appellant wife against the respondent husband seeking divorce on the alleged ground of cruelty and desertion. One of the main allegations leveled by the appellant in the divorce petition was that the respondent was having illicit relationship with a lady named Geeta and it is on account of this illicit relationship the husband used to abuse and beat her mercilessly in the presence of Geeta. It is also because of that illicit relationship that the respondent had deserted the appellant in 2001. The appellant has alleged that due to addiction to liquor and gambling the appellant is involved in criminal activities. The other

allegation mainly leveled by the appellant in the petition against the respondent is that he had killed his illegitimate daughter of 1-1/2 years born out of his illicit relationship with Geeta and an FIR No. 348/04 u/s 302 IPC was registered on 25.11.2004 against him and since 2004 the respondent is in judicial custody. The appellant further alleges that after the passing of the said impugned judgment and decree the respondent has been convicted in the said case u/s 302 IPC for committing murder of his illegitimate daughter and has been sentenced to life imprisonment. The appellant has also stated that the acts of cruelty have not been condoned by the appellant. The appellant in support of her case before the trial court examined herself as PW- 1 and sister-in-law of the respondent who is the sister of the appellant as PW- 2. The respondent on the other hand examined himself as RW 1 and his sister as RW 2 to prove his case. Vide the impugned judgment and decree dated 31.10.2008 the Id. Addl. District Judge has dismissed the said petition filed by the appellant on the ground that the allegations of cruelty and desertion leveled by the appellant in her petition were not proved by her. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. I have heard learned counsel for the parties and gone through the records.

4. It is not in dispute between the parties that the respondent now stands convicted for the heinous crime of committing brutal murder of his illegitimate daughter who was aged about 1-1/2 years. It is also not in dispute that he has been sentenced to life imprisonment for committing the said offence. Without going into the merits of the other allegations leveled by the appellant in the trial court, this court is of the considered view that the said murder of the small child of 1- 1/2 years sufficiently proves that the respondent was having illicit relationship with the said lady named Geeta. The appellant in her petition clearly stated that the respondent was having illicit relationship with the said lady Geeta and due to the said relationship the respondent used to illtreat the petitioner. It is also proved that due to this relationship the appellant used to mercilessly beat the appellant and thus failed to discharge his obligations as husband as well as father of the children. It would be relevant to refer to the following paras of the criminal case No.18/2008, decided by the Addl. Sessions Judge. The same are reproduced as under:-

1. "On 25.11.2004, one Bulbul, a small girl, 16 months of age was brutally done to death by throwing her against a wall. The prosecution alleges that this gruesome act was committed by her father, the accused Om Prakash.

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9. Prosecution has examined sixteen witnesses in all to prove its case against the accused. The material ocular evidence in the case is the deposition of PW- 7 Bittoo who is stated to be an eye witness of the whole incident. He has recounted the incident and has stated that the accused came on 25.11.2004 at about 11.15 a.m. with one Pardeep. During the course of his quarrel with Geeta, when Geeta insisted on living with him (the witness), the accused Om Prakash stated that he will finish her daughter. He picked up a broken quarter bottle and hit on the back of the daughter Bulbul due to which she started crying. Thereafter the accused Om Prakash picked up

Bulbul and threw her against a wall. The witness has also stated that he provided first aid to Bulbul and wiped the blood from her would as well as from the floor. He has also stated that at about 4.30 p.m. the condition of the child deteriorated. Her mother Geeta left the house to arrange for the money for her treatment and the child was in his lap when the police arrived. ....

13. PW- 1 Dr. L.K. Barua of DDU Hospital, Delhi had conducted the postmortem on the dead body of the deceased Bulbul. He has proved his report Ex. PW- 1/A. He also proved his opinion that scratches on the body of the deceased could have been caused by broken glass pieces as Ex. PW- 1/B. Ex. PW- 1/C is his opinion that the injuries suffered by the deceased on her head could have been caused by striking her head against the wall and the said injury was sufficient in the ordinary course of nature of cause death.

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23. Accordingly, I find no reason to disbelieve the testimony of PW 7 Bittoo and, therefore, it stands proved that on the relevant date and time, the accused Om Parkash first hit the deceased Bulbul with a broken glass bottle on her back and then struck her head against the wall. PW- 1 Dr. L.K. Baruah has recorded following injuries in his post mortem report:-

(i) Multiple vertically placed scratches present on the back side of the body, out of them 12 number could be counted. The individual length of the scratches varies from 9 to 16 cm in length and 0.1 to 0/2 cm in width. This injury was skin to muscle deep.

(ii ) Constitution over left side of forehead, size 4 x 3 cm placed 0.5 cm above the left eye brow and reddish in colour.

(iii) Defused contused area on the right side of forehead extending from mid line to tragus of the right ear and from above eye lid to frontall hair line.

(iv) Contusion over left occipital parital area and 5 cm above the left ear, size 2.5 x 1.5 c.m.

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26. No particular defence has been put up by the accused in his statement under Section 313 Cr.P.C. except a bare denial of all the evidence which was put to him for explanation. By producing the case file of a divorce case between him and one Sunita Devi, the accused seeks to contend that deceased Geeta was not his wife. However, there is no denial of the fact that Geeta was the mother of the deceased and he was the father. The Investigating Officer has also proved a noting dated 07.12.2004 from the Medical Record Officer of Lady Harding College to the effect that on 18.09.2003, a female child was born to Smt. Geeta wife of Om Parkash at that hospital. In these circumstances, even if Geeta was not legally wedded wife of the accused or if the accused had another wife also, it stands proved that the child Bulbul was daughter of Geeta and the accused, the same would have no effect on the case."

(emphasis supplied)

5. Although the respondent husband is stated to have challenged the said order of conviction in appeal but certainly now with the conviction of the respondent, the findings are clearly against the respondent and it stands proved that he was involved in the brutal murder of his 1-1/2 years old illegitimate child. There is no need to go into the other allegations of cruelty leveled by the appellant as the said observations clearly prove the existence of the illicit relationship of the husband with the lady named Geeta. It is not only that the respondent was having the said illicit relationship with lady Geeta but out of the said relationship a female child was born to Geeta. On perusal of the said judgment of the criminal court it is manifest that the Investigating Officer has proved on record that the birth of the said child was out of the relationship of the respondent with Geeta and she gave birth to the child at the Lady Harding College on 18.09.2003. It is thus quite apparent that the respondent was maintaining an illicit relationship with the said lady during the subsistence of his first marriage with the present appellant. A bare perusal of the chargesheet as borne out from the judgment of the criminal court placed on record, it is manifest that the respondent brutally murdered the said small child by striking her head against the wall and then throwing her on the ground. The said conduct of the respondent is quite barbaric besides being inhuman. It also stands proved that the respondent was having illicit relationship with the said lady Geeta and this act by itself constitutes a grave act of cruelty on his part and this act gets further compounded when he had murdered the small child born out of his illegitimate relationship.

6. Section 13(1) (ia) of the Hindu Marriage Act, 1955 makes cruelty as a ground for divorce. The term 'cruelty' however has not been defined in the Act. The Court has to rest its decision on the facts and circumstances of each case on assessment of human nature and human affairs with due regard to social conditions and customs of the parties. Here it would be useful to the judgment of the Apex court in the case of Shobha Rani vs. Madhukar Reddi (1988) 1 SCC 105 wherein it was held that:

Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted."

7. In the present case, the respondent husband had an illicit relationship with one lady named Gita. The fact that the husband of the appellant is having a relationship with some other woman is undoubtedly a cause of mental agony and stress for the wife. The Kolkata High Court in the case of Smt. Barnali Sen vs. Debashish Sen (2002) DMC 579 (DB) held that a case of mental cruelty is made out on behalf of the spouse who appears to have been compelled to file the suit for divorce after a series of incidents where the marital fidelity of the other spouse comes to be questioned and the marital ties comes under severe strain. The Court held that such circumstances were sufficient to establish mental cruelty suffered by the spouse on account of the actions of the erring spouse. The judgment of the Madhya Pradesh High Court in the case of Smt. Vimal Ladkani vs. Dr. Chandra Prakash Ladkani (1996) DMC 142 is to the same effect. In the case at hand, the appellant has sought the decree of divorce on the ground of cruelty. The learned Trial Court decided the issue No. 1 that 'whether the petitioner has been treated with cruelty by the respondent after solemnization of marriage?' against the appellant due to the absence of proof of the illicit relationship of the respondent. The learned trial court observed that the ground of divorce pleaded is not adultery but cruelty which could not be sufficiently proved. Although the conviction of the respondent for murdering his illegitimate child is a subsequent development but the same can be taken into consideration at the stage of appeal. The existence of an illicit relationship between the respondent and the said lady Geeta is sufficient to establish cruelty as envisaged under section 13(1)(ia) of the Act. The question that the trial court needed to ask was that whether the mental anguish caused to the appellant by the fact of the illicit relationship of the respondent was enough to constitute an act of cruelty on the part of the respondent husband. This court is of the considered view that the answer would be in the affirmative.

8. Human emotions do not run on dotted lines. Every person has a different level of tolerance and sensitivity and certain allegations of cruelty leveled by one spouse may cause mental cruelty to his/her spouse and the same very allegations in some other case may not be considered of that magnitude to cause cruelty of such nature. Each case is dependent upon various factors; social, economic, family background, upbringing, education, etc. However one thing which can be considered universal in all situations is that no spouse can tolerate his/her spouse having illicit relations or extra marital relations. It would be useful to refer to the judgment of the Apex Court in the case of Naveen Kohli vs. Neelu Kohli AIR 2006 SCC 1675 here where it was held that:

"To constitute cruelty, the conduct complained of should be "grave and weighty" so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse. It must be something more serious than "ordinary wear and tear of married life". The conduct taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for

them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent."

9. In the present case, from the facts on the record it is clearly borne out that the respondent has caused mental pain of such a magnitude that it has severed the bond between the wife and husband and as a result of which it has become impossible for the appellant wife who has suffered to live with the other party. Thus the requirement of section 13(1)(ia) stands fulfilled. Therefore if a spouse is found living or having any kind of illicit relationship with any other person then such an act in itself is sufficient to prove cruelty on the part of such spouse. Although the passing of the judgment of conviction is a subsequent development but since an appeal is a continuation of the original petition therefore the same can be taken into consideration for deciding the issue involved.

10. In any case the appellant has sufficiently proved her allegations of cruelty in her petition by alleging that the respondent was having illicit relationship with Geeta and due to the said relationship he used to mercilessly beat and ill- treat the appellant.

11. In the light of the aforesaid facts the appellant succeeds in the present appeal. The impugned judgment and decree is accordingly set aside. The marriage of the appellant and respondent is dissolved under Section 13 (1) (ia) of the Hindu Marriage Act, 1955. The aforesaid observations will not, however, come in the way of the respondent so far the challenge of the respondent against his conviction order is concerned.

KAILASH GAMBHIR, J October 20, 2010 pkv