Calcutta High Court
Rabindra Nath Mukherjee vs Iti Mukherjee @ Chatterjee on 22 January, 1991
Equivalent citations: 95 CWN 1085, II (1991) DMC 227
Author: Bhattacharjee
Bench: A Bhattacharjee, P K Banerjee
JUDGMENT Bhattacharjee, J.

1. A petition under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage by a decree of divorce filed by the appellant-husband against the respondent-wife on the ground of cruelty has been dismissed by the trial Court on merits as well as on the ground of the petition having been presented few days before the expiry of one year from the date of the marriage in contravention of the provisions of Section 14(1). My learned brother Banerjee, J. has, for the reasons stated in his judgment hereinafter, upheld the decision of the trial Judge on merits. While I respectfully agree with the view of Banerjee, J. that the petition has been rightly dismissed on merits and that the alleged cruelty by the wife has not been proved. I have my doubts as to whether the provisions of Section 14(1) prohibiting the entertainment of a petition for divorce before the expiry of one year from the date of marriage is that mandatory to require compliance with mathematical precision and to warrant rejection for any and every non-compliance. The provisions of Section 14(1) are reproduced herein below :

"14(1) Notwithstanding anything contained in this Act, it shall not be competent for any Court to entertain any petition for dissolution of a marriage by a decree of divorce, unless at the date of the presentation of the petition one year has elapsed since the date of the marriage.

Provided that the Court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of the marriage or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said one year upon the same or substantially the same facts as those alleged in support of the petition to dismissed."

2. These provisions and their counter-part in Section 29(1) of the Special Marriage Act, 1954, are not Indian innovat ons, but are the results of blind imitation, so often resorted to by us, of British Legislations. There is no corresponding provision in the Indian Divorce Act of 1869 governing the Christians or the Parsi Marriage & Divorce Act of 1936, governing the Parsis, the obvious reason being that when those legislations were enacted, we had no such provisions in the corresponding British Laws to serve as our guide or. model. These provisions were introduced in United Kingdom for the first time by the Matrimonial Causes Act of 1937, and continued to be retained in the successive Matrimonial Causes Acts of 1950, of 1965 and of 1973. These provisions came to be known as "Fair Trial to Marriage Rule", the avowed object being to prevent hasty divorce

proceedings resorted to rashly and in the heat of passion and to require the spouses to give a trial to the marriage for a period of three years so that the heated passion may spend up and calm of mind is restored and marriages are maintained for the stability of the Society.

3. It is not easy to appreciate the objects of these provisions. The Courts have been mandated by the Legislature (vide. Section 23(2) & (3) of the Hindu Marriage Act, Section 34(2) & (3) of the Special Marriage Act and now Section 9 of the Family Courts Act, 1984), to make every endeavour to bring about reconciliation between the parties and that should go a long way to prevent rash and hasty divorces. But otherwise, a blanket interdiction against initiation of divorce proceedings may inflict unbearable miseries in a case, for example, where one spouse finds the other to suffer from virulent and incurable leprosy or veneral disease in a communicable from or to indulge in adultery and the like. And if the societies of the Christians, the Parsis and also the Muslims (whose women can also sue for divorce without any such waiting period under the Dissolution of the Muslim Marriages Act, 1939), did not break down notwithstanding the absence of any such provision in their matrimonial laws, there could have been no good reasons to import these provisions from abroad in the laws relating to Hindus and the persons marrying under the Special Marriage Act, 1954.

4. The Law Commission of India, under the Chairmanship of Justice Gajendragadkar, an eminent Jurist and a former Chief Justice of India, recommended the deletion of these provisions in its 59th Report on the Hindu Marriage Act and observed (at paragraphs 2.31) as hereunder :

"While we appreciate the legislative policy of placing an emphasis on reconciliation rather than on a hasty divorce, we think that there should be no restriction as to time. The Court will have, under Section 23(2), opportunity to consider if the peace and harmony are beyond retrieval. If they are not beyond retrieval, reconciliation under Section 23(2) will succeed, because Section 23(2) is intended to create condition for maintaining or restoring the mutual confidence between the parties.

We, therefore, recommend that Section 14 should be deleted."

I have already indicated that, in my view, the utility of the provision of Section 14 is very much doubtful, And the observations of the Law Commission of India, extracted hereinabove also go to show that in the view of the Law Commission also, the provisions serve no useful purpose, so much so, to warrant deletion. I may be wrong, but I have no doubt that if a legislative provision is that useless, it should, so long it exists, be construed to be directory and not mandatory, unless such construction is not at all reasonably possible. I would accordingly be inclined to hold that the provisions of Section 14 are not mandatory as in my view the contrary construction is not irresistible.

5. Mr. Roy Chowdhury appearing for the petitioner-husband has urged that it is the settled law that even though a right was inchoate at the date of the commencement of the Us, the proceeding for its enforcement would nevertheless be maintainable, if the inchoate right has matured into a full-fledged one during pendency of the proceeding. Mr. Roy Chowdhury is undoubtedly correct and the authorities of this Court and also of the apex Courts, referred to and followed in the Division Bench decision of this Court in (1) Krishna Chandra v. Hart Sadhan, (86 Calcutta Weekly Notes 105)

are binding authorities for this view. But I do not think that this view can be straightway pressed into service in this case because, as pointed out in Krishna Chandra (Supra, at 107), those were cases where there was bar to the proceeding being initiated by the parties before the expiry of certain period, but "no express statutory bar on the tribunal entertained" the proceeding. But, going by the latters, Section 14(1) appears to impose a bar on the Court to entertain, the relevant words being, "it shall not be competent for any Court to entertain any petition .....unless at the date of the presentation of the petition one year has elapsed since the date of the marriage".

6. The expression "entertain", however, as pointed out by the Supreme Court in (2) Laxmiratan Engineering Works and in (3) Hindusthan Commercial Bank , may not necessarily mean receiving or accepting the plaint or the petition, or the initiation of the proceeding, but may mean "adjudicate upon" or "proceed to consider on merits". Therefore, if the relevant expression in Section 14(1) was "it shall not be competent for any Court to entertain any petition unless one year has elapsed since the date of the marriage" I would have held that all that is necessary is the expiry of one year, not necessarily before the presentation of the petition, but before the date on which the Court adjudicates thereon or proceeds to consider on merits. But the express user of the word "presentation" in the expression "unless on the date of the presentation of the petition one year has elapsed since the date of the marriage" nakedly stands in the way of such a construction and I regret my inability to delete the words "on the date of presentation of the petition" by any amount of judicial activism.

7. But the reasons that are weighing with me for holding these provisions to be directory and thus to require substantial compliance only, and not to be mandatory warranting strict adherence on pain of rejection or dismissal, are as hereunder.

8. The period of three years, as originally enacted by the Legislature, has now been reduced to one year only by the Amendment Act of 1976. That, in my view, clearly indicates that the Legislature itself has been convinced that the period provided for "fair trial" to marriage was unduly long and required circumscription,

9. If the Legislature considered this "fair trial rule" to be of that great importance and of that paramount necessity for the stability of marriage to make it mandatory, it would have inserted similar provisions in the other matrimonial legislations also by way of later amendments. It may be noted that the Legislature has amended rather extensively the Parsi Marriage & Divorce Act, 1936 but without inserting any such analogous provision. If the Legislature really intended the provisions to be that mandatory, it would have a fortiorari inserted such provisions in the other matrimonial legislations, with Article 14 of the Constitution mandating equal protection of laws and Article 15 interdicting any discrimination on the ground of religion. If Hindu 'Marriages and Special Marriages warranted protection of "fair trial rule", the Christian or the Parsi marriages cannot be discriminated by denial of such potection.

10. The Proviso to Section 14(1) would also indicate that the provisions requiring intervention of one year between the date of marriage and the date of presentation for petition for divorce are not that mandatory. The Proviso provides for leave to the parties by the Court to present petition before the

expiry of such period on the ground that the case is of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent. But the proviso proceeds to provide that at the trial "if appears to the Court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the Court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect untill the expiry of one year from the date of the marriage.....". Now a leave obtained by suppress veri or suggestio falsi should be treated as vitiated to the extent of being not est, and the Proviso, therefore, provides that "the Court may dismiss the petition" but without prejudice to any petition which may be brought after the expiry of one year as aforesaid. But since the Court may also decree the petition only with the rider that the decree shall not be operative before one year from the date of the marring.', the petition, though filed before the prohibited period of one year, and that too on misrepresentation or concealment, stands fully legalised and regularised and the prohibition that the decree shall not be effective until one year from the date of marriage may itself become of no practical effect or utility as in contested divorce cases, a decree is seldom available before that period, notwithstanding the directive' in Section 21B(2) of the Act.

11. A premature petition presented with leave wrongfully obtained is no better, if not worse, than one presented without leave, and if such a tainted petition can nevertheless be decreed, then I am yet to know why premature petition, without any such taint, cannot be similarly decreed. Once the Legislature has been found to have permitted decreeing of a premature petition founded on leave obtained dishonestly, the provision in Section 14(1) prohibiting presentation of petition before the prescribed period cannot be held to be that mandatory to warrant rigid compliance, and must be held to be directory to require substantial compliance only. For, to hold otherwise would amount to rule that law favours the dishonest maneuverer and discriminates against the honest errant.

12. There is yet another way of looking into the matter. While I do not suggest that the Legislature, or even the Judiciary, goes or can always afford to go in a common-sense course, we must, whenever possible, interpret laws in a common-sense way and by importing a little bit of common-sense, whenever necessary. Now, Section 14(1) does not at all provide for any waiting-period for a matrimonial proceeding for judicial separation which can be decreed only on grounds which justify divorce, nor for dissolution of marriage by a decree of nullity under Section 11. Now, while pregnancy of the wife per alium at the time of marriage is a ground for nullifying the marriage under Section 11, pregnancy per alium after the date of marriage is a ground for divorce under Section 13 and, therefore, for judicial Separation also under Section 10. Judicial Separation is very often a stepping stone to a divorce and, more often than not, a decree for Judicial Separation serves, as the foundation for a decree of divorce under Section 13(lA)(i). From the matrimonial point of view, a post-marital per alium pregnancy is obviously more deprecable than a premarital one and if the aggrieved husband intending to proceed for divorce on the ground of post-marital per alium pregnancy of the wife is still mandatorily required to give a "fair trial" to the marriage for one year, I do not understand why a husband shall be relieved therefrom when he proceeds to sue the wife for Judicial Separation on the same ground or to sue the wife for a declaration of nullity on the ground of per alium pregnancy of the wife at the date of marriage.

13. Then again, under the provisions of Section 23A, if one spouse sues the other for, say, restitution of conjugal rights or for Judicial Separation, the other spouse may not only oppose the relief sought, but may himself or herself claim for any relief, including divorce, on the ground of the suing spouse's adultery, cruelty or desertion. One can, therefore, easily visualise a case where one spouse has sued the other for restitution or Judicial Separation within, say, a month from the date of marriage and the other spouse on entering appearance within, say, one month thereafter, makes a claim fir divorce in the written statement. As at present advised, I have my doubts as to whether the provisions of Section 14(1) would stand in the way of such a counter-claim.

14. At any rate, a petition for Judicial Separation is no within the ambit of Section 14 and, as already noted, under Section 13A, the Court, in a divorce proceeding on the ground of cruelty, as is the case before us, may grant Judicial Separation. A petition, even though labelled as one for divorce, should not therefore be rejected on the ground of having been presented before one year from the date of marriage, but the Court should proceed to trial in order to ascertain whether the materials on record would justify a decree for Judicial Separation. As the Supreme Court observed is (4) Pratap Singh v. Shri Krishna Gupta, , the tendency of the Courts towards technicalities or formalities are to be deprecated for it is the substance that must count and must prevail and take precedence over form. A party's bonafide right to Judicial Separation cannot be scuttled in limine solely on the ground that the party, on legal advice or otherwise, brought himself within the prohibition of Section 14(1) by labelling his or her petition as one for divorce.

15. The Division Bench decision of this Court in (5) Smritikana v Dilip Kumar, (AIR 1982 Calcutta 247), cannot, on a careful reading, be construe ed to have laid down any contrary proposition, but, on a meaningful reading would go to support the ratio of my view. There also the Division Bench after holding the petition for divorce to be not maintainable on the ground of having been filed within about 61/2 months from the date of marriage, nevertheless proceeded to consider as to whether a decree of Judicial Separation could be awarded. It is true that, a already noted, under Section 13A, a decree for Judicial Separation can be awarded "on a .petition for dissolution of marriage by a decree for divorce". If the Division Bench held Section 14(1) to be that mandatory, then it would have had to hold that the petition, as one for divorce, being beyond the competence of the Court to entertain, there was no legal and proper "petition for dissolution of marriage by a decree of divorce", on which alone a decree for Judicial Separation could be awarded under Section 13A.

16. To go back to the decision of the Supreme Court in Pratap Singh v. Shri Krishna Gupta , some rules are so important and fundamental that they go to the root of the matter and must be treated as mandatory and any non-compliance therewith would vitiate everything. Some are not that fundamental and even though mandatory in form substantial compliance therewith would be good enough. In the absence of the "fair trial" rule in the Indian matrimonial legislations for the Christians, the Parsis, the Muslim women and also in the absence of any such provision even in the Hindu Marriage Act or the Special Marriage Act for matrimonial proceedings for Judicial Separation and for declaration of nullity, and for the other reasons stated hereinbefore, I have not been able to pursuade myself to hold that Section 14(1) is that mandatory to warrant rejection or dismissal of the petition presented without rigid and strict compliance thereof. I would rather hold them to be

directory to require substantial, but no literal, compliance. This aspect was not considered by the Division Bench in Smritikana v. Dilip Kumar (Supra), but there is nothing contrary either to the view I propose to take.

17. In Smritikana (Supra), as already noted, the petition was filed even before the expiry of 7 months from the date of marriage. In the case before us, it was filed only about 9 days before. That is enough substantial compliance Law does not take notice of trifles.

18. I would, therefore, hold that the trial Judge was wrong in holding and dismissing the petition as not maintainable. As however I agree with my learned before Banerjee, J. in holding that the trial judge was right in dismissing the petition on merits on the ground that the allegations relating to cruelty were not proved, I agree with the order of Banerjee, J. that the appeal should be dismissed.

Banerjee, J.

The question as to whetherer the bar, imposed under Section 14(1) of the Hindu Marriage Act, 1955 (called the Act) in respect of petitions for dissolution of Marriage by a decree of divorce filed prematurely, is absolute or not is not free from controversy and while questioning the wisdom of the legislature, the circumstances giving rise to such controversy have been dealt with exhaustively by My Lord Bhattacherjee, J. in the preceding paragraphs. I find no reason to take a contrary view in that regard.

20. It appears that the learned Trial Judge dismissed the suit both on merits as also on the ground of its non-maintainability. Although the disposal of the suit on both the issues was not illegal, it was not proper and legitimacy should not be confused with propriety. Still, as there are findings on the merits of the petition and as because we entertain doubts as to the true import and impact of Section 14(1) of the Act, it becomes necessary to enter into the merits of the petition for divorce and to see whether the petitioner could succeed in getting a decree as prayed for. We propose to discuss only those facts which are germane for this purpose.

21. The petitioner Rabindra Nath Mukherjee, a Commerce Graduate working in a Bank, was married to the respondent Iti on the 4th December, 1979 according to Hindu rites. At the time of their marriage, which was a negotiated one, Rabindra Nath was 34 years old and Iti 19. On the following day, that is on 5th December, the petitioner brought his wife to his place of reidence at Makardah within district Howrah where he used to live jointly with his widowed mother P.W. 3 Binapani, brother P.W. 4 Madan, his wife and their children P.W. 5 Ranjit and P.W. 6 Kalpana. 'Phulsajya' Ceremony took place in the groom's house on 6th December. The petition for divorce starts with the narration of two incident stated to have taken place in the petitioner's house on that night. It is alleged that the petitioner was surprised to see "the ugly and silly behaviour of the respondent towards her brother-in-law before the petitioner's relations who had to move away'. The second one is alleged to have occurred when the petitioner got his wife exclusively in the bed-room after the formalities of the ceremony were over. At the earliest opportunity, as the petitioner (P.W. 1) states, the respondent wife firmly demanded in a commanding tone that (1) the title of the house must be transferred in her name; (2) she was to be made nominee in respect of the LIC policy and Provident

Fund and (3) henceforth the monthly salary of the petitioner was to be handed over to her. The petitioner tried to pacify his wife without success and when he approached her she violently pushed him back and insisted that the won't allow "the conjugal Union" until the demands were fulfilled. While after the first incident the petitioner was surprised at the shameless behaviour of his wife, on the next occassion he was shoked and dis-appointed. The story of both the incidents is liable to be rejected because of its improbability and absurdity. It is inconceivable that a newly-married girl could "hug and Kiss" her 'Jamaibabu' (elder sister's husband) before the very eyes of his wife and the petitioner's relations. Even if she had any immoral affair with his Jamaibabu, she must not have displayed such a shameless behaviour before the full house. D.W. 2 Mukti (Iti's Jamaibabu) has cetegorically denied any such incident having taken place that night and the photographs with the smiling faces of the couple, admittedly taken after the alleged incident, belie the statement of the petitioner in regard to the alleged ugly incident. It is unfortunate that the petitioner dragged the teenagers. P.W. 5 Ranjit and P.W. 6 Kalpana, to the Court to support such a false story.

22. The next incident relating to certain demands made by Iti is also improbable and unbelievable. It is impossible to hold that a girl of 19 would venture to press for the demands to her husband aged 34 on the very first night and would insist on fulfilment of those demands before the husband could touch her body. That the story of both the incidents aforesaid is false would be further evident from the discrepancies between the averments made in the pleading and the statements made by P.W. 2 at the trial. Thus, while in Paragraph 13 of the petition it was alleged that on 27th January, 1980 Iti for the first time, disclosed that, "she had her first happy sex experience with one of her relations" in his deposition the petitioner (.P.W. 2) indulged in saying that on the 'Phaulsajya' night (612.79) the wife had given out that she loved another person and asked the petitioner not to touch her body. Again, while in the petition it was alleged that on the very first night Iti grew furious and behaved rudely in his deposition P.W. 2 did not mention about the violent temperament of his wife on that night. The petitioner has examined his elder brother Madan (P W 4) to corroborate his statements regarding the 'Phulsajya' night incidents. His evidence is that on 7th morning Rabin (Petitioner) came out of his room weeping and reported that Iti did not allow him to touch her body and she had told that she had already taken Mukti Mukherjee, husband other Nanidi, as her husband He also reported about the demands made by Iti. It has already been pointed out that the story of the "Phulsajya' night incidents is improbable and false and accordingly the corroboration of the alleged incidents by P.W. 4 does not deserve consideration at all.

23. In the petition for divorce the petitioner made various complaints against the respondent and with reference to certain incidents on certain dates he tried to make out a case he feared that he might be killed by his wife and that it was impossible for him to live with such a woman any longer. The gist of such incidents, between 7.12.79 and 5.10.80, which the petitioner described as the period of utmost misery, is this:-(1) on 10th December respondent's second brother instigated his sister within the hearing of the petitioner that he (brother) would kidnap Rabin and Iti and force them to live in his house; (2) on 12th December when the petitioner had been to his father-in-law's place on invitation, he was insulted by Iti's parents who insisted that Robin must live in his father-in-law's house at Gharjamai; (3) on 18th April and 29th October the respondent kicked the petitioner and physically assaulted him with fists and blows: (4) In October that year the respondent assaulted her mother-in-law and left the matrimonial home with cash and ornaments; (5) on 14th October the

petitioner was attacked by his brother-in-law and his associate while he was returning home from the office; (6) on 4th and 15th October the father-in-law of the respondent and her relations visited the petitioner's office and threatened the petitioner; (7) on several dates in November, 1980 the respondent and her relations incited some local people and tried to ransack the petitioner's house.

24. With regard to the incidents referred to in paragraphs 17 and 21 of the petition, there is no corroboration. Even P.W. 1 who claimed to be a colleague of the petitioner does not state anything about the alleged threatening by the father-in-law inside the petitioner's office. No neighbour has been examined to prove the incidents dated 16th and 19th November. P.W. 1, a colleague of the petitioner, speaks nothing about the relationship between Robin and Iti. Is it not surprising that the petitioner, who had been subjected to severe mental agony for more than eleven months, would not give vent to his feelings to his colleague working in the same branch ? As regards the accusation of physical assaults on Robin by Iti, P.W. 4. Madan has stated that Robin had reported that he was kicked twice on the belly by Iti, who also throttled her husband and on another occasion Iti pressed Robin's testicles and on the last occasion she hit him on the chest with a glass. P.W. 3 Binapani speaks about the incidents when Iti kicked Robin and pushed Binapani on the ground. P.Ws. 5 and 6 have stated about the incidents on two occasions. On a careful scrutiny of the evidence of the P.Ws. we are satisfied that the story of physical assault by Iti on Robin is a fabrication. It appears that in the petition there is mention of assault on two occasions only and there is no allegation that the respondent ever hit the petitioner with a glass or pressed his testicles violently. P.W. 3 simply stated that Iti threw a glass of water at Robin. She does not speaks about the physical assault on Robin, although P.W. 4 Madan has testified that on hearing the alarm raised by Robin on some occasions he along with his mother rushed to his room and got the report of assault by Iti on Robin. P.W. 4 is not truthful and so also the petitioner himself. That the allegations made in the petition are totally false would be evident from the circumstances set out below. It is alleged that on 5.10.80 Iti assaulted her mother-in-law and left the matrimonial home along with her parents and relations as a result of which Binapani fell down on the ground and became unconscious. The homeopath doctor who is said to have treated the lady has not been examined. If the incident dated 5.10.80 did at all occur in the manner alleged, then after nine days, that is on 14th October, the mother-in-law could not have showered plenty of love and blessings on her bouma (Iti) through the letter marked Ext. A. The authenticity of the letter has not been challenged by the petitioner or by his mother. The alleged incident dated 5th October is strongly contradicted by the statement made in Paragraph 15 of the petition which shows that on 29th October Iti assaulted Robin his house with fists and blows. The respondent herself and her father (D.W.5) and brother (D.W. 4) have categorically denied the material allegations made in the petition and in view of the contradictions and discrepancies appearing in the petition and in the evidence we find no reason to disbelieve them. Robin's mother tried to canvass simple that "the relationship between Rabin and bouma was not at all good. Bouma's behaviour with Robin was also bad". P.W.s 5 and 6 have also stated that the quarrel between Chotokaka and Kakima was a 'daily affair'. Even if Iti was quarrelsome and short tempered, in the absence of any convincing proof that the wife's conduct was so grave so as to endanger the husband's personal safety and destory his mental peace, the said conduct by itself would not constitute legal cruelty within the scope and meaning of Section 13(1)(ia) of the Act, because as observed by their Lordships in the case of (6) Dastane v. Dastane, , "Passion and petulance have perhaps to be suffered in silence as the price of what turns out to be an injudicious selection of a

partner". The natural wear and tear in the married life may not be taken note of seriously. It appear that from 5.12.79 till 5.10.80 the respondent wife lived in her matrimonial home with occasional visits to her father's place. Is it probable or believable that despite her shameless and cruel behaviour she would be allowed to stay in the matrimonial home for such a long period or that the man would simply weep on each occasion when he as assaulted by his wife? Thus on weighing various probabilities, we find that the preponderance is against the petitioner and accordingly the suit is liable to be dismissed. We find no reason to interfere with the findings of the learned trial Judge on the merits of the petition for divorce. The result is that the appeal fails and the same is dismissed, but in the circumstances of the case, without costs.