Calcutta High Court
Swapan Kumar Ganguly vs Smiritikana Ganguly on 18 April, 2001
Equivalent citations: (2001) 3 CALLT 148 HC, 2001 (3) CHN 124, I (2002) DMC 433
Author: A Banerjee
Bench: S Banerjea, A K Banerjee
JUDGMENT A.K. Banerjee, J.

1. The matrimonial suit was filed by the appellant against the respondent under Section 10 read with Section 13 of the Hindu Marriage Act, 1955 principally on the ground of desertion.

2. The learned judge of the Court below on appreciation of evidence held that although the wife being the respondent herein deserted the husband the appellant above named, there has been cogent reason for the same and hence the suit was dismissed by him. The Court below hold that the husband has not been able to prove that he has been treated with cruelly by wife.

3. Being aggrieved by the judgment and decree of the dismissal of the Court below the husband preferred the above appeal.

4. Mr. Bidyut Banerjee, appearing for the appellant has strenuously contended that since the desertion has been proved and since the wife being the respondent herein has categorically stated in her evidence that she would not come back to her husband's place there has been irretrievable breakdown of the marriage. Hence, the appellant is entitled to a decree for divorce. In support of his contention Mr. Banerjee has cited Division Bench judgments of this Court reported in 1996 WBLR, Calcutta, Page 30. Relevant paragraph cited by Sri Banerjee is quoted below :-

"Further, the basic postulate of break down theory is that when a marriage has broken down without any possibility or chance to repair the same, then it should be dissolved without looking to the fault of the party. There the parties are not willing to return to the marital life where the cohabitation has come to its permanent end. The above theory since alien to the matrimonial laws is no ground to refuse relief."

5. Mr. Banerjee also cited Division Bench judgment reported in 1996 WBLR (Calcutta) Page 39 wherein the Division Bench has held that the ground of irretrievable break down of matrimonial home can be taken recourse to only in exceptional case.

6. Both the said judgment have been delivered by the same Division Bench. Although by the earlier judgment divorce was given the later case divorce was refused and Their Lordships were pleased to hold that such ground can be taken recourse of only in exceptional case. We do not find any exceptional facts relevant herein and we hold that no such exceptional case has been made out which could prompt us to follow such rule.

7. Mr. Banerjee has also cited two apex Court decision and 1995 Volume 11, Supreme Court Cases. Page 7. In the first judgment of the apex Court cited by Sri Banerjee, the apex Court following Section 13(1)(i)(a) held that mental cruelty has wide connotation and mental cruelty must be of such

a nature that the parties can not reasonably be expected to live together. In the instant case the evidence would go to show that the husband caused both mental and physical torture to the wife compelling the wife to leave her matrimonial home. There has been evidence of physical cruelty caused to the wife, learned judge of the Court below on appreciation of such evidence held that there is cogent reason for the wife to stay away from her matrimonial home. Such an act can not be termed as mental cruelty to the husband which could entitle him to get a decree from divorce on the ground of mental cruelty. Hence this judgment of the apex Court does not support the case of appellant.

8. In the second case apex Court invoked Article 142 of the Constitution to grant divorce, we have no such power.

9. Shri Banerjee has lastly contended that since it is an impossible task to have the wife back to her matrimonial home the Court should pass a decree for divorce on the basis of such impossibility.

10. Mr. Pranab Gangopadhyay, appearing for the wife respondent, submitted that the petition for divorce is not maintainable in view of the provisions of 13(1)(I)(b) as the petition has been filed well within the two years period stipulated in the said provision of law. Sri Gangopadhyay has referred to the relevant portion of the judgment of the Court below which shows that the appellant husband made a serious charge of unchastity and unfaithfulness against the wife and such allegation could not be proved and the learned judge found those allegations without any basis. Referring to such appreciation of evidence by the Court below the learned advocate has submitted that the allegation of mental cruelty made by the wife has not been proved and hence the husband is not entitled to any decree for divorce.

11. Sri Gangopadhyay has further contended that in the Hindu Marriage Act there is no provision for dissolution of marriage on the ground of irretrievable breakdown and the Court is not entitled to pass any decree on the said ground. In this regard reliance has been placed on the judgment of this Court . Reliance has also been placed by Sri Gangopadhyay in this regard on the decision reported in 1996, Calcutta Law Journal, Volume II, Page 195 and AIR 1998 SC 296 .

12. The case (supra) has considered the Division Bench judgment in case of Sukhomoy Bag (supra) cited by Sri Banerjee and distinguished the same by observing that the said decision did not lay down that irretrievable breakdown of marriage by itself construed a ground for divorce. The decision in Sukhomoy Bag was also followed by another Division Bench in the case reported in AIR, 1998, Calcutta, Page 120 (Harendranath Burman v. Suprava Burman).

In both this two cases the decision of the apex Court (Swaroj Rani v. Sudarshan) was applied on an erroneous impression that the apex Court has held irretrievable breakdown of marriage by itself a ground for dissolution. Such observation was made by a Division Bench reported in AIR 1997, Page 134 in the case of Tapan Kumar v. Jyotsna (supra). In fact the later judgment of the same Division Bench in the case of Sukhendu v. Anjali (supra), 1996, WBLR, Calcutta, Page 39 has observed that such rule of irretrievable breakdown can be applied in exceptional cases. Ultimately, the Division Bench in the case of Tapan Kumar v. Jyotsna (supra) held in the facts and circumstances of the said

case that judicial separation would be appropriate in the case of dissolution of marriage.

13. Lastly, Mr. Gangopadhyay has submitted that since the ground on which the husband approached the Court below could not be proved and since the irretrievable breakdown of marriage by itself is not a ground of divorce the learned judge of the Court below has rightly refused the prayer for divorce.

14. Initially, there was no representation on behalf of the respondent wife despite several notices and as such we directed Mr. Jyotirmoy Bhattacharjee, Advocate of this Court to assist us on behalf of the wife. However, lastly Sri Gangopahdyay have appeared who was originally appearing for the respondent wife and we have directed Sri Bhattacharjee to assist this Court as Amicus Curiae.

15. Sri Bhattacharjee as Amicus Curiae has made the following submission :--

1. The decree for divorce under the Hindu Marriage Act is available on proof of any of the ground mentioned in Section 13 of the said Act or by a mutual decree under Section 13B thereof. Since there is no such ground of irretrievable breakdown of marriage under Section 13 the appellant is not entitled to pray for decree of divorce on the said ground.

2. In the case of Ms. Jordan the apex Court observed that the marriage law should be uniformly applicable in all cases and there should be a reform to the said extent. Despite such observation the Hindu Marriage Act has not been amended by the Legislature to the said extent.

3. With regard to Vagat v. Vagat (supra) Sri Bhattacharjee has contended that irretrievable breakdown of marriage is not a ground by itself as observed by Their Lordships of the apex Court in paragraph 21 thereof.

4. In a subsequent judgment reported in 1995, Volume 11, SCC, Page 7 the apex Court in exercises of the power under Article 142 of the Constitution of India dissolved a marriage on the ground of irretriev-

able breakdown of marriage. According to Mr. Bhattacharjee in absence of such power we are not competent to take recourse to the said ground as a ground by itself to dissolve this marriage.

5. According to Sri Bhattacharjee the Division Bench in the case of Burman v. Burman (supra) has laid down the law correctly by observing that irretrievable break down of marriage can not by itself a ground for divorce.

6. With regard to the case of Sukhomoy Bag Sri Bhattacharjee has contended that it was a case under the Special Marriage Act and not under Hindu Marriage Act.

7. Lastly Sri Bhattacharjee has cited the latest Division Bench judgment of this Court in the case of Sitbodh v. Ajanta reported in 2000 Volume II, Calcutta High Court Notes Page 323 wherein the Division Bench held that the same view as in the case of Burman v. Burman.

16. Coming back to the present case referring to various Division Bench decision of different high Courts , AIR, Delhi 1987, Page 203; AIR 1984, Delhi Page 121 and . Sri Bhattacharjee has contended that since the husband has come with unclean hands for granting divorce to him which would support his own wrong, the Court should not grant divorce to the husband which would in effect would be granting support to the wrong doer against the oppressed.

17. Before taking a decision let us now analyse as to what is the present position in law with regard to irretrievable break down of marriage.

18. Divorce under Hindu Marriage Act can only be given on any of the ground under Section 13. Allowing divorce on any other ground not mentioned in Section 13 would be an act without any sanction of law. Such power is only with the apex Court under Article 142. We are afraid we can not go beyond the law. So long the ground of irretrievable break down of marriage is not made a ground under Section 13 such ground by itself can not be a ground for divorce. With deepest respect to Their Lordships we are constrained to hold that two Division Bench decisions in the case of Sukhomoy Bag in our view do not lay down the correct law. However same Division Bench has modified its stand in the later decision that Sukhendu v. Anjali (supra).

19. Hence, we hold that the appellant is not entitled to any decree for divorce on the ground that the marriage has irretrievably broken down.

Coming back to the factual aspect, we are in total agreement with the learned judge of the Court below with regard to the appreciation of the evidence. We feel that the learned judge has correctly appreciated the facts of the case and is justified in holding that there has been cogent reason for the wife to stay away from her matrimonial home. There has been facts which have been proved to be correct which would go to show that the mental and physical cruelty had been caused by the husband to the wife. If we overlook those facts we would be doing an unpardonable wrong. We feel, law is not so stale that it could not give any support to the oppressed.

20. In the present case the husband being the appellant herein has approached the Court below in uncleaned hand being a wrong doer, the appellant is not entitled to take recourse of law to get rid off his wife who had been tortured both mentally and physically. Such factum of torture has been proved to be correct. On the contrary there has been no evidence of cruelty either mental or physical by the wife which can give right to the husband to pray for divorce.

21. Sri Banerjee has tried to contend that the desertion itself is a mental cruelty and that itself can be a ground for divorce. With due respect, on going through the records and upon examining the evidence we can not be of the same view with Mr. Banerjee. It is true that the apex Court has observed that mental cruelty has wide connotation. We are sure that the apex Court while observing that did not contemplate or could not mean any such situation as in the present case which could be said to be mental cruelty entitling the husband to get a divorce.

22. As we have said that in the present society when the law in changing so vast to support the oppressed to do social justice, the Courts of law in our view should interpret the law in such way so

that maximum benefit is given to the oppressed. If we do not follow such principle we would be falling in our duty being creature of constitution.

23. In the result the appeal fails and is hereby dismissed without any order as to cost. This order of dismissal would however not prevent the wife/ respondent to the recourse of law with regard to her maintenance and/or any other protection in law available to her.

S. Banerjea, J.

24. Although I agree with my learned brother fully not only as to the reasoning but also to the findings arrived at by His Lordship, I feel it necessary to add a few words in view of the fact that Mr. Banerjee, learned advocate appearing for the appellant, tried to contend strenuously that theory of irretrievable breaking down of marriage should be applied in the instant case.

25. Since my learned brother has also dealt with such point in details referring to all the judgments in respect thereof, it is not necessary to deal with the same again. Suffice it is to say, nowhere in the Hindu Marriage Act the legislature in its wisdom has provided that a decree for divorce can be granted if the Court finds that there has been irretrievable breaking down of the marriage between the parties.

26. Such being the clear intention of the legislature the Court should indeed be slow, in my view, to grant a decree on a ground which has not been provided for by the legislature.

27. Apart from the fact that the decision of the Supreme Court upon which Mr. Banerjee has relied, does not really help him in the instant case as such power of the Supreme Court was exercised under Article 142 of the Constitution of India, the power which we do not possess, it is to be kept in mind that inspite of the fact that the Hindu law of marriage has been codified in 1955 and thereafter was amended, the basic concept of the Hindu Marriage Act right from the beginning that it is more of sacrement rather than a contract has not undergone a total or radical change.

28. I am not oblivious of the fact that by amendment of the said Act, a provision has been made by which a divorce can be obtained by consent of the parties. But such change as aforesaid cannot be stretched beyond what was Intended by the legislature.

29. While it is fact that with the pace of time the society changes so many of the Ideas and views, at the same time it does not mean that the Court should always to act as a social reformer while dealing with such matters. Sometimes it does in interpreting the beneficial legislation but the same again is governed by certain norms.

30. In a particular case to decide that the decree has to be granted for divorce as the Court thinks that the marriage has been broken down irretrievably is also to overlook the sentiment of a party specially of a wife who may reasonably think that even if it may not be possible any further to remain together, the very fact that she is married and not divorced is a protection to her in our society where women are not treated equally.

31. In such situation the Court has to think whether such a theory of breaking down of the marriage irreparably can be applied when there are a number of women who think even if they are unable to go to the residence of the husband any further they can live apart or away room the husband because of the cruelty at least to declare herself before the society that they are married women and not spinsters or divorces. Even that sentiment, which again is a reality is to be understood by the Court before applying such theory. Whether such sentiment should be accepted any further or not is again a matter which has to be decided by the society itself and social thought obviously will be ultimately expressed through a legislation when in the legislation the law makers, being the people's representative will decide that a time has come because of change of time and the modern ideas, that such sentiment need not be accepted any further. It is because of that, I am of the view that the question of applying such a principle does not arise although insisted upon by Mr. Banerjee right from the beginning particularly when we are of the view that there is no such pronouncement of law of the Supreme Court which has to be applied.

The two decisions of our High Court which have been referred to which apparently have been said to be in favour of Mr. Banerjee, as discussed by my learned brother, would not apply. I am also of the view that such judgments are not binding upon us as those are clearly per incuriam as correct position of law has not been taken note of therein.

This appeal, therefore, stands dismissed.

32. Appeal dismissed