

**AIR 2017 SUPREME COURT 5092**

SUPREME COURT

(From : AIR 2012 Cal 144)

S. A. BOBDE , J. and L. NAGESWARA RAO , J.Civil Appeal No. 7186 of 2016, **D/- 9 - 10 - 2017**

Sukhendu Das v. Rita Mukherjee

**Special Marriage Act (43 of 1954), S.27(b), S.27(d) - Divorce - Ground of desertion and mental cruelty - Marriage irretrievably broken down - Parties, both Judicial Officers, living separately since 17 years - Wife not participating in divorce proceedings - Attempts to be posted at same place never made by either parties - Forcing husband to stay in dead marriage would constitute mental cruelty - No purpose in compelling parties to live together - Court by invoking inherent powers u/Art. 142, granted divorce to husband. Hindu Marriage Act (25 of 1955), S.13(1)(ia), S.13(1)(ib) - Constitution of India, Art.142 - AIR 2012 Cal 144, Reversed. (2007) 4 SCC 511, AIR 2010 SC 1099, Followed.**

**(Paras 7 , 8)**

Raja Chatterjee, Ms. Runa Bhuyan and Piyush Sachdev (for Satish Kumar), for Appellant.

**Judgement**

**1. L. NAGESWARA RAO, J. :-**The Appellant and the Respondent are District Judges working in the State of West Bengal. Their marriage was performed on 19th June, 1992 as per the Special Marriage Act, 1954 (hereinafter referred to as "the Act"). A girl child was born out of the wedlock on 14th April, 1993. There was matrimonial discord between the Appellant and the Respondent and they were living separately since the year 2000. The Appellant filed an application under Section 27 of the Act seeking a divorce.

**2.** The Appellant alleged that the differences arose because of the improper behaviour of the Respondent in not showing due respect to his ailing father. It was further alleged that the Respondent deserted him and refused to give the custody of the child to him. The Appellant further averred in the application that the Respondent did not visit him even when he was seriously ill. The Respondent is accused of using intemperate language and threatening the Appellant with filing of criminal cases if he perused the petition for divorce which he proposed in the year 2005.

**3.** The Respondent filed a written statement denying the allegations made in the application filed by the applicant for divorce. She refuted all the averments in the application and sought for dismissal of the application for divorce. The Respondent did not participate in the proceedings before the trial court after filing the written statement. The Chief Judge, City Civil Court, Calcutta by the judgment dated 6th August, 2009 dismissed the application for divorce. The Appeal filed against the said judgment was dismissed by the High Court of Calcutta on 4th April, 2012. The Respondent did not seek to appear before the High Court also. The correctness of the judgment of the High Court is assailed in the above Appeal.

4. After referring to the pleadings in the case, the trial court found that the Appellant failed to prove cruelty on the part of the Respondent. The evidence adduced by the Appellant was scrutinized by the trial court to come to a conclusion that the Appellant did not make out a case for divorce. The High Court, taking note of the fact that the Appellant and the Respondent are judicial officers, made an attempt for conciliation between the parties. However, in spite of the effort of the High Court, both the Appellant and the Respondent did not appear personally before the High Court. Despite taking note of the fact that the Appellant and the Respondent were living separately since the year 2000, the High Court dismissed the Appeal by holding that irretrievable breakdown of marriage cannot be a ground for divorce. The High Court held that the Appellant failed to prove mental cruelty on the part of the Respondent.

5. Notice was issued to the Respondent on 8th October, 2012 to explore the possibility of an amicable resolution to the matrimonial dispute. The parties were directed to appear before the Mediation Centre of the Supreme Court on 21st November, 2012. The Respondent did not appear before the Mediation Centre in spite of service of the Notice. She chose not to appear before this Court. Fresh Notice was ordered on 17th August, 2015 but the Respondent did not appear in spite of receipt of Notice again.

6. Mr. Raja Chatterjee, learned counsel appearing for the Appellant submitted that the Respondent deserted the Appellant about 17 years back and she refused to come back and live with him. Apart from the allegation of desertion, the learned counsel also alleged mental cruelty on the part of the Respondent who threatened the Appellant in the year 2005 that she would get a criminal case filed against him if he did not stop attempts to get the divorce. The learned counsel further submitted that the Appellant and the Respondent have been living apart due to matrimonial discord since 17 years and for all practical purposes the marriage has broken down.

7. The Respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of Notice, the Respondent did not show any interest to appear in this Court also. This conduct of the Respondent by itself would indicate that she is not interested in living with the Appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty [Samar Ghosh v. Jaya Ghosh<sup>1</sup>]. The High Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the Appellant and the Respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage.

1. (2007) 4 SCC 511 [para101 (xiv)].

8. This court in a series of judgments has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted [Manish Goel v. Rohini Goel<sup>2</sup>]. Admittedly, the Appellant and the Respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in matrimony [Rishikesh Sharma v. Saroj Sharma<sup>3</sup>]. The daughter of the Appellant and the Respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the Appeal in exercise of our power under Article 142 of the Constitution of India, 1950.

2. (2010) 4 SCC 393 [para 11] : (AIR 2010 SC 1099, Pr. 6).

3. (2007) 2 SCC 263 [paras 4 and 5].

**9.** For the aforementioned reasons, the Appeal is allowed and the application for divorce filed by the Appellant under Section 27 of the Act is allowed.

**Appeal Allowed**