

THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 16th JUNE, 2016

**D.B. : HON'BLE MR. JUSTICE SUNIL KUMAR SINHA, CHIEF JUSTICE
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE**

Mat.App. No.01 of 2015

Appellant : Smt. Mala Rai,
W/o Shri Bal Krishna Dhamala,
R/o Chalamthang,
Pakyong,
East Sikkim.

versus

Respondent : Shri Bal Krishna Dhamala,
S/o Dadhiram Dhamala,
R/o Amba Busty,
Pakyong,
East Sikkim.

**Appeal under Section 19(1) of
the Family Courts Act, 1984**

Appearance

Mr. B. K. Gupta, Advocate (Legal Aid Counsel) for the Appellant.

Appellant in person.

Mr. Umesh Ranpal and Ms. Kesang Choden Tamang, Advocates
for the Respondent.

Respondent in person.

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J U D G M E N T

Meenakshi Madan Rai, J.

1. In the instant Appeal, the Appellant assails the Judgment and Decree dated 18-04-2015 of the Learned Judge, Family Court, East Sikkim at Gangtok, in Family Court (Civil) Case No.83 of 2014, ordering dissolution of the marriage between the Appellant and the Respondent under Section 13(1)(i) of the Hindu Marriage Act, 1955 (for short “the Hindu Marriage Act”).

2. Advancing his arguments before this Court, Learned Counsel for the Appellant put forth the grounds that there are no independent witnesses to the alleged adultery claimed to have been witnessed by the Respondent and his elder brother, which they failed to either photograph or videograph. That, according to the Respondent, he was informed by P.W.3, a well-wisher, that he had seen the Appellant entering her house along with one man at around 10.30 p.m., but the evidence of this witness is not reliable as before the Learned Family Court, P.W.3, deposed that earlier he had illicit relations with the Appellant. If such be the case, it cannot be fathomed as to how he could be the well-wisher of the Respondent. In the next leg of his argument, emphasising on the provisions of Order I Rule 10 of the Code of Civil Procedure, 1908 (for short “CPC”), it was contended that D.W.3, alleged to be in an adulterous relationship with the Appellant, is a necessary and proper party to the proceedings, but was not impleaded

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as a party on which ground alone, the impugned Judgment and Decree of the Learned Family Court is liable to be set aside. To fortify this submission, reliance was placed on the decision of the Hon'ble High Court of Andhra Pradesh in **Smt. Ch. Padmavathi** vs. **Ch. Sai Babu**, F.C.A. No.21 of 2009 dated 12-09-2012, wherein it was, *inter alia*, held that, the alleged adulterer will be a proper party to a proceeding under Section 13(1)(i) of the Hindu Marriage Act.

3. It was urged that the Learned Family Court had also wrongly observed that there are satisfactory and convincing circumstantial evidence as well as direct evidence of the Appellant having extra marital relations with other persons and indulging in illicit sexual relationship with them, when to the contrary, the Respondent lives in adultery with another lady. That, the Respondent had earlier filed a Petition for Divorce on grounds of "Cruelty", but as the matter was dismissed on 26-03-2013, the instant matter was filed subsequently reflecting an ulterior motive and *mala fide* intention. It is prayed that the impugned Judgment and the resultant Decree, dated 18-04-2015 be set aside.

4. *Per contra*, the arguments put forth by Learned counsel for the Respondent is that, in the first instance there is no shortcoming in the impugned Judgment of the Learned Family Court which has made its decision after analysing the evidence on record. In the next limb of his argument, it was expostulated that although Order I Rule 10 of the

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CPC requires that the Court at any stage of the proceedings may strike out or add any person as a Plaintiff or Defendant to effectually and completely adjudicate the matter but one cannot lose sight of the mandatory provision of Order I Rule 13 of the CPC, which requires that all objections on grounds of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity. The Appellant cannot be heard to say belatedly, at the stage of Appeal, that the alleged adulterer ought to have been added as a necessary party. That, therefore, in view of the lack of substance in the Appeal, the same be dismissed.

5. We have heard the rival arguments of Learned Counsel at length and given due and anxious consideration to the same. We have also carefully perused all relevant documents on record including the evidence and the impugned Judgment.

6. In order to assess the matter in its correct perspective, it would be necessary to first consider the averments made by the parties before the Learned Family Court. According to the Respondent, he was married to the Appellant in the year 1999, according to customs prevalent amongst the Nepali Hindu Community and from the wedlock, they have two children, i.e., one son aged about 11 years and one daughter aged about 8 years. The parties lived together at Pakyong, East Sikkim, in the Respondent's house after their marriage, where he was working as a Range Officer in the Forest Department. For some time they had good matrimonial relations, but with the passage of time,

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the Appellant started picking up quarrels on trivial issues and harassing him mentally as well as physically. Admittedly a Petition for Divorce on grounds of 'Cruelty' was filed previously but was dismissed on failure to establish cruelty. After such dismissal, the Appellant's behaviour towards him deteriorated and the Appellant started indulging in illicit relations with other men, of which, he alleges, was one man from Rhenock. That apart, she was missing from their home from 03-07-2014 when he was on duty, which he learnt of on 11-07-2014 and come to know that she was out with another person with whom she had illicit relations and returned on 14-07-2014. Following this incident, on 17-07-2014 when the Respondent had gone for dinner to the house of his Superior Officer in Pakyong, he was informed by P.W.3, that the Appellant was seen entering her house with one man at around 10.30 p.m. The Respondent immediately called his brother P.W.2, who resides at Amba Busty, Pakyong and both of them reached the Respondent's home at around 11.40 p.m., where they saw the Appellant and D.W.3 in a room inside the house of the Appellant, having sexual intercourse. On repeated knocking, the Appellant opened the door after 10 minutes, where D.W.3 was hiding in a corner of the room. It was alleged that both admitted their illicit relations and the act of adultery. That, in view of the said act, the marriage has broken down irretrievably and hence, the prayer for divorce.

7. The Appellant to the contrary, *inter alia*, averred that on 17-07-2004, the Respondent, his brother and sister-in-law came to their

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matrimonial house at around 10 p.m. and suddenly started assaulting her with kicks and blows in front of her visitors. Her contention is that D.W.3 is a neighbour and a distant brother from her mother's side and on the relevant day after parking his vehicle at around 9.30 p.m., in the common compound, he had sought shelter her house as it was raining heavily. She denies that such an incident, as alleged, ever occurred with D.W.3 and that photographs allegedly taken in her house have been manufactured by the Respondent. She denied all allegations of adultery.

8. The Learned Family Court after hearing the parties, framed the following issues;

- (i) Whether after the solemnization of their marriage, the respondent had voluntarily (*sic, voluntary*) sexual intercourse with any persons other than her spouse.
- (ii) Whether the Petitioner is entitled to a decree of divorce.

9. After the parties led evidence, the Learned Family Court on analysing the same decided both issues in favour of the Respondent and decreed the marriage between the Appellant and the Respondent as dissolved.

10. The question that arises for determination before this Court is whether the Learned Family Court was correct in granting the divorce to the Appellant based on the evidence placed before it.

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11. In this regard, we may go through the relevant provisions of Section 13 of the Hindu Marriage Act, which reads as follows:-

“13. Divorce.—(1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party—

- (i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

.....”

Therefore, for divorce to be granted under Section 13(1)(i) of the Hindu Marriage Act, voluntary intercourse by the spouse with a third person has to be proved by the person seeking the relief.

12. However, *in construing the provisions of Section 13 of the Hindu Marriage Act one has to remember that divorce is not generally favoured or encouraged by the Courts and is permitted only for very serious and grave reasons.* [See *Swarajya Lakshmi vs. Dr. G. G. Padma Rao* : (1974) 1 SCC 58] While at the same time it must be borne in mind that in allegations of adultery law does not postulate direct proof of adultery, the assumption of which is to be drawn from the conduct of the parties and the evidence on record. Therefore, the accepted rule is that circumstantial evidence can normally be expected in proof of the allegation, the general rule being that the circumstances should be such as would lead a reasonable and just man to the conclusion of adultery. It is also essential to mention here that such proof does not extend to one which is beyond reasonable doubt, but is sufficient if there is a

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preponderance of probability. [*Vide Dr. N. G. Dastane vs. Mrs. S. Dastane : AIR 1975 SC 1534 and Subbarama Reddiar vs. Saraswathi Ammal : AIR 1967 Madras 85*]

13. On the anvil of the principles enumerated above, we now turn to analyse as to whether the evidence on record proves that the Appellant had indulged in adultery.

14. While going through the evidence of D.W.1, the Appellant, she has specifically denied having any relation with D.W.3. On the other hand, the evidence of P.W.1, the Respondent, is to the effect that on 17-07-2014, while he was having dinner with his Senior Officer at Pakyong, he received a telephonic call from P.W.3 informing him that, he had seen the Appellant entering her home with one man at around 10.30 p.m. The Respondent informed his elder brother P.W.2, who accompanied him to the house where they both witnessed the Appellant engaged in sexual intercourse with D.W.3. He also added that the Appellant accepted and admitted the act of adultery and having illicit relations with D.W.3. His evidence has not been demolished under cross-examination, but is duly supported by the evidence of P.W.2, his elder brother, who is a Teacher by profession at Takshang Government Primary School, East Sikkim. According to him, on 17-03-2014 at around 10.30 p.m. he received a telephonic call from the Respondent. He accompanied his brother to the Respondent's house where they found the room was locked from inside and from the ventilation they saw the Appellant and D.W.3 engaged in sexual intercourse. P.W.3 is the person

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who admits to having previously had extra marital relations with the Appellant when she was married to the Respondent and admits that they had physical relationship. According to him, the Appellant also had relations with another person after him. This witness is the one who saw D.W.3 entering the home of the Respondent on 17-07-2014 on which he informed the Respondent immediately, this evidence has withstood the cross-examination. On this aspect, it was pointed out by Counsel for the Appellant that in such circumstances it would be impossible to agree that P.W.3 was a well-wisher of the Respondent. We do not find any force in this argument since it is for Respondent to decide who his well-wisher is. D.W.3 is the alleged adulterer who states that as he shares a common compound with the Appellant, he parked his vehicle and went into the house of the Appellant due to the heavy rain along with a friend of his. Inside the house, when they were about to settle down, all of a sudden P.W.1 and P.W.2 as well as the sister-in-law of P.W.1, entered the house and assaulted the Appellant in their presence. Although he stated that he had entered the house of the Appellant with “one friend”, neither the identity of the person has been disclosed nor has the Appellant herself stated that any other person had entered her house along with D.W.3. Both P.W.1 and P.W.2 have made no mention of a third person, therefore, this statement of D.W.3 has to be taken with a pinch of salt. Also what is incongruous is, admittedly he shared a common compound with the Appellant then the question arises as to why he would take refuge from the rain in the house of the Appellant

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instead of going into his own house, after parking his car. The contention of the Appellant that D.W.3 is a distant brother of the Appellant can also be safely ruled out being improbable as D.W.3 himself has deposed that he has known the Appellant only for the last 10-12 years apart from which he is unable to name the parents or brothers of D.W.1.

15. On traversing the law points of the matter, Order I Rule 10 of the CPC clothes the Court with power to add any person as a party at any stage of the proceedings to enable the Court to effectively and completely adjudicate upon all issues involved. Thus, all necessary and proper parties can be added by the Court at any stage of the proceedings. The spirit behind impleading an adulterer as a party is to allow him an opportunity to defend himself against the allegations levelled and to vindicate himself. In the instant matter, the person who is alleged to have committed the adultery, i.e., D.W.3, has already been examined as a witness giving him sufficient opportunity to extenuate himself against the allegations foisted upon him. However, he has not been able to demolish the case of the Respondent, despite sufficient opportunity extended to him during his deposition. In such a situation, we are of the considered opinion that it would serve no purpose to implead him as a party to the proceeding. The involvement of a second person also as an adulterer was not strongly pressed by the Respondent and, therefore, we find that it is not essential to implead him. That

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apart, we may set out the provisions of Order I Rule 13 of the CPC which mandates as follows;

“I. Who may be joined as Plaintiffs.–

.....

13. Objections as to non-joinder or misjoinder.–All objections on the ground of non-joinder or misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been waived.”

16. On this point, it has to be stated that the prayer for impleadment is indeed belated, and it is not the Appellant's case that she was unable to agitate the point of impleadment as the ground arose subsequently, in which event even the provisions *supra* cuts some slack.

17. In view of the evidence on record which has been discussed hereinabove, there is no reason to doubt that the Appellant was in an adulterous relationship with D.W.3. It is thus apparent that the findings of the Learned Family Court warrant no interference.

18. In the result, the Appeal is dismissed. Decree be drawn accordingly.

19. Copy of this Judgment and Decree be sent to the Learned Family Court for information.

20. Records of the Learned Family Court be remitted forthwith.

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(Meenakshi Madan Rai)

Judge

16-06-2016

(Sunil Kumar Sinha)

Chief Justice

16-06-2016

Approved for reporting : **Yes**

Internet : **Yes**