

**HIGH COURT OF TRIPURA  
A G A R T A L A**

**F.A. 07 of 2008**

Smt. Mani Sarkar  
D/O- Shri Jogendra Sarkar  
Resident of Maiganga,  
Teliamura, P.S. Teliamura,  
District- West Tripura.

..... **Appellant**

**- V e r s u s -**

Shri Sukhlal Sarkar  
Son of Late Manmohan Sarkar  
Resident of Bhunban West,  
Near Natunnagar Bazar,  
P.S. Airport, West Tripura.

..... **Respondent**

**BEFORE  
HON'BLE THE CHIEF JUSTICE MR. DEEPAK GUPTA  
THE HON'BLE MR. JUSTICE S. TALAPATRA**

For the appellant : Ms. P. Dhar, Advocate.  
For the respondent : Mr. H.K. Bhattacharjee, Advocate.

Date of hearing : **16.09.2013**

Date of delivery  
of Judgment & Order : **30.09.2013**

Whether fit for reporting : 

<b>YES</b>	<b>NO</b>

**JUDGMENT & ORDER**

*(S. Talapatra, J)*

To question the legality of the judgment and decree dated 02.08.2008 delivered in Title Suit (Divorce) 62 of 2005 by the Judge, Family Court, Agartala, West Tripura, granting the decree of divorce, this appeal under Section 19(1) of the Family Courts Act has been preferred by the appellant.

**2.** The respondent has instituted the petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955 for a decree of divorce dissolving the marriage between the appellant and the respondent herein. Their marriage was solemnized sometime in the month of Falguna, 1402 B.S. (corresponding to the Gregorian year 1993) as per Hindu rites and customs, satisfying the conditions as laid down in Section 5 of the Hindu Marriage Act, 1955. In the wedlock, a female child was born in the year 1995. While the appellant and the respondent were staying together at a rented house at Gurkhabasti, Agartala, it has been alleged in the petition that the appellant had developed an adulterous relation with one person (name withheld as that person has not been made party in the proceeding). The respondent has further alleged in the said petition that on 24<sup>th</sup> day of Falguna of 1410 B.S. when the respondent had returned home he found the appellant and the said person in compromising position. Thereafter, on 30.12.2004 the appellant left the matrimonial home surreptitiously and never came back.

**3.** The appellant had denied all such grave allegations by filing a written statement. In the written statement the appellant has made allegation of torture against the respondent. The respondent (the petitioner in the said divorce proceeding) to prove his case has made the following statement on oath as PW-1:

**"I am the petitioner of the instant suit.**

**The respondent is my wife. I married her in the year 1993 according to the Hindu Rites religion and custom and thereafter, we had been living together as husband and wife. On account of our wedlock a daughter was born.**

**My wife deserted me leaving behind the minor child with another boy and at present had been living**

**with him. Subsequently, she had taken back all her belongings which her father had given to her during her marriage. I tried my level best to bring her back to her residence but she did not turn up. So, I pray to have an order from the Court for dissolution of my marriage with her as she deserted me."**

**4.** On appreciation of the evidence so led by the respondent, the Judge, Family Court, Agartala, West Tripura passed the impugned judgment where it has been observed that the respondent, the appellant herein had maintained illicit relation with one person and had accounted her sexual conduct. The respondent has adduced another witness namely, Saraswati Majumder (PW-2) who has stated that the appellant had eloped with that person. From the deposition of the respondent as made in the Family Court, it appears, in absence of any other evidentiary material, that there is no element of cruelty including cruelty qua adultery against the appellant. The respondent has stated that the appellant had eloped with 'another boy', without naming anyone and she has been living with that boy. Apart that, he has stated that she had taken back all her belongings. Despite his best efforts to bring back her to his residence the appellant did not turn up. He has further asserted that the appellant has deserted him.

**5.** The Judge, Family Court, Agartala has correctly held that 'no finding' can be given on the involvement of the adulterer/adulteress without having that adulterer/adulteress made a party in the proceeding in terms of Rule VIII of the Gauhati High Court Hindu Marriage Act Rules, 1988. But the decree of divorce has been granted in the premises of irretrievable breaking down of marriage.

**6.** The entire statement as made by the respondent in the Family Court has been reproduced hereinabove and it is apparent therefrom that the respondent has failed to prove his pleading as regards the cruelty and what he has deposed does not constitute cruelty. Moreover, what he has deposed is beyond the realm of his pleadings. Therefore, the Court cannot lawfully take judicial notice of such statement.

**7.** The Apex Court on discussing the decision in **Naveen Kohli v. Neelu Kohli**, reported in (2006) 4 SCC 558 held in **Samar Ghosh vs. Jaya Ghosh**, reported in (2007) 4 SCC 551 that irretrievable breaking down of marriage cannot be made statutory ground for divorce within the framework of the Hindu Marriage Act, 1955. As such the basis on which the impugned judgment and decree has been passed cannot be held tenable in law and accordingly, it is interfered with and set aside. It is to be noted further that in view of the Apex Court decision that if a grave allegation like adultery is made by way of pleadings against the respondent-spouse and the said pleadings are left without proof, such conduct by itself constitutes cruelty against the alleging spouse. In the impugned judgment that aspect of the matter has not been considered in terms of **Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate**, reported in AIR 2003 SC 2462 where the Apex Court propounds as under:

“**11. .... The allegations leveled and the incidents enumerated in the case on hand, apart from they being per se cruel in nature, on their own also constitute an admission of the fact that for quite some time past the husband had been persistently indulging in them, unrelented and unmindful of its impact. That the husband in this case has treated the wife with intense cruelty is a fact, which became a fait accompli the day they were made in the written statement. The continued on record at any rate till 5.10.1988 and the indelible**

**impact and scar it initially should have created, cannot be said to have got ipso facto dissolved, with the amendments ordered. Therefore, no exception could be taken to the courts below placing reliance on the said conduct of the appellant, in this regard, to record a finding against him."**

**8.** The appellant has preferred not to adduce evidence. That by itself cannot be used as a tool for drawing up adverse presumption. The Judge, Family Court ought to have on the contrary dismissed the petition for failure of the respondent in placing evidence to prove the grave allegation of cruelty qua adultery as asserted by him. This apart, the conduct of casting the cruelty by way of making grave unfounded allegations as aforesaid should have persuaded the Family Court to dismiss the petition for divorce. Unhesitatingly, can it be inferred that the respondent has utterly failed to make any ground for granting divorce dissolving the marriage and as such the petition for granting divorce being Title Suit (Divorce) 62 of 2005 stands dismissed.

**9.** In the result, the appeal is allowed.

Prepare the decree accordingly.

Send down the LCRs forthwith.

**JUDGE**

**CHIEF JUSTICE**