



IN THE HIGH COURT OF SIKKIM : GANGTOK
(Civil Appellate Jurisdiction)

Mat. App. No.02 of 2019

Suk Bir Chettri
Timburbong,
P.O. and P.S. Soreng, West Sikkim. ... Appellant

Versus

1. Jamuna Chettri
Thongling Dodak,
P.O. and P.S. Soreng, West Sikkim.
2. Sachin Rai
Thongling Dodak,
P.O. and P.S. Soreng, West Sikkim. ... Respondents

BEFORE
HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.
HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, J.

For Appellant : Ms. Gita Bista, Advocate.
For Respondent No.1 : Mr. Tashi Norbu Basi, Legal Aid Counsel.
For Respondent No.2 : None appears.
Date of hearing : 17.09.2020.
Date of Judgment : 25.09.2020.

J U D G M E N T

(Arup Kumar Goswami, CJ)

Being aggrieved by the judgment and order dated 28.06.2019 passed by the learned Judge, Family Court, East Sikkim at Gangtok in F.C. (Civil) Case No.13 of 2019 rejecting the petition filed by the appellant under Section 13(1)(i) of the Hindu Marriage Act, 1955 (for short, the Act) for divorce , this appeal is preferred by the appellant.

2. In the petition under Section 13(1)(i) of the Act, it is stated that the marriage between the appellant and the respondent no.1 was solemnized in the year 1993 and they have three daughters, namely, Apsana Chettri, Asha Chettri and Anisha Chettri. At the time of the filing of the petition, they were aged about 23, 21 and 13 years, respectively and he was staying at Legship because of his work.



It is stated in the petition that at around 02.00 am of 25.05.2018, when Asha Chettri requested respondent no.1 to give her a glass of water as she was suffering from diarrhoea, the respondent no.1 refused to give her water and asked her to fetch it herself and as such, she had gone to the kitchen to get water. Thereafter, Asha Chettri requested the respondent no.1 to give her a shawl. Initially, despite several requests respondent no.1 had refused to open the door of her room. However, finally the respondent no.1 had opened the door of her room whereupon she was found to be inside the bedroom along with the respondent no.2, who, thereafter, had gone away taking respondent no.1 along with him.

4. Further case of the appellant in the petition is that, fearing that something untoward may happen to her mother, Asha Chettri lodged an FIR before Soreng Police Station. When the appellant came to know about the said incident from his daughter, he had submitted a complaint before Soreng Police Station requesting that both of them be called to the Police Station. The respondent no.2 was arrested by Soreng Police on 26.05.2018 and he was released on bail on 27.05.2018. The respondent no.2 had given an undertaking on 27.05.2018 before Soreng Police in presence of witnesses stating that Asha Chettri had seen him and her mother sleeping together and therefore, it was his responsibility to look after respondent no.1. It is also alleged that in the year 2016, the respondent no.2 was involved in some cases and as the respondent no.1 had given shelter to the respondent no.2, she was assaulted by the villagers.

5. Reference is made to a maintenance case filed by his wife being FC (Crl.) No.37 of 2018. Allegation is also made that out of a loan amount of Rs.15 lakh taken by him from the Bank, Rs.2 lakh was taken away by the respondent no.1 along with 5 *tolas* of gold when she had eloped with respondent no.2.



In the written statement filed by the respondent no.1, it is stated that Apsana Chettri had completed Computer Engineering and she was working in Delhi. Asha had completed her Diploma in Civil Engineering and is employed at RMDD, Government of Sikkim and Anisha was studying in Class VIII at Dodok. The allegations made in the divorce petition that Asha had asked for a shawl and that she had refused to open the door despite requests made by Asha and had opened the door only after much persuasion were denied. It is stated that she and her husband had started to run a shop selling liquor to supplement the income of her husband and the respondent no.2, who is a neighbor, is a regular customer. It is pleaded that in the evening of 24.05.2018, as Asha and a male friend had come home drunk, she had scolded her daughter. Respondent no.2 had come to her shop at around 09.00/10.00 pm and had asked for a bottle of beer. As she had scolded her daughter for drinking and smoking, she had asked respondent no.2 to drink beer inside the room while keeping the door open. Around 11.00 pm, when Asha started arguing with respondent no.1, the respondent no.2 had left the house. Thereafter, without apologizing to her, when Asha asked for a glass of water, out of anger, she had asked Asha to get it herself. Respondent no.2 was called by Asha at around 02.00 am to take the respondent no.1 with him. Respondent no.2 went back as Asha was drunk. In view of the accusations made by Asha, being hurt, she had left for her mother's home without informing Asha, contemplating to come back to her residence after a day. But when the appellant put a condition that she would be accepted only if she accuses respondent no.2 of raping her and as she was not willing to make false allegation, she started to live with her brother and his family at Gangtok. It is stated that Asha lodged the false FIR out of fear that she might be blamed if something untoward happened to her mother.



The respondent no.2, in his written statement, narrated the events of 24.05.2018 and 25.05.2018, more or less, in the same vein as respondent no.1. It is further stated that the Second Officer In-Charge of Soreng Police Station had asked him to come to the Police Station on 26.05.2018 and when he reached the Police Station at around 04.00 pm, he was illegally detained till 06.00 pm of 27.05.2018 because of the influence of the appellant, who is an Assistant Sub- Inspector and besides, he was also forced to execute an Undertaking before Soreng Police Station stating that he had slept with the respondent no.1. He was threatened by the appellant that he would not be released until he executed the Undertaking. It was only after executing the Undertaking, he was released from the Police Station.

8. During trial, the appellant examined himself as PW-1. Asha Chettri was examined as PW-2. The respondent nos.1 and 2 had examined themselves as DW-1 and DW-2, respectively.

9. Ms. Gita Bista, learned Counsel for the appellant has submitted that the evidence of PW-1 and PW-2 clearly demonstrates that the appellant had been able to prove the case to the hilt. It is submitted that learned Court failed to sift the evidence in its proper perspective and guided by a wrong notion that the appellant was the Sub-Inspector of Soreng Police Station, where respondent no.2 had given the Undertaking, did not rely on Exhibit-3, the Undertaking (Ekrarnama), holding that the respondent no.2 could have been easily pressurized to execute Exhibit-3. It is submitted that though in the written statement, the respondent no.1 had made allegations that Asha had come home drunk, there was no evidence to that effect and further, when Asha was examined as PW-2, no suggestion was also given to that effect. She submits that the materials on record go to show that it is an admitted position that the respondent no.2 was with the respondent no.1 in the bedroom at 02.00 am in the night. The above fact coupled with the



mission of respondent no.2 in the Undertaking establish beyond a shadow of doubt that the respondent no.1 had committed adultery with respondent no.2, she contends. She places reliance on a judgment of this Court in the case of *Smt. Mala Rai vs. Shri Bal Krishna Dhamala* (Mat. App.No. 01 of 2015), which was decided on 16.06.2016.

10. Mr. Tashi Norbu Basi, learned Legal Aid Counsel appearing for respondent no.1, while supporting the impugned judgment, submits that PW-2, in her deposition, did not mention the time when DW-1 and DW-2 were found to be together. He contends that there was no allegation in the FIR lodged by PW-2 or in the petition under Section 13(1)(a) of the Act that PW-2 had found respondents no.1 and 2 in a naked condition as deposed by her in her evidence and therefore, the learned Court below was justified in holding that allegations made by her is exaggerated and an after-thought. He has also submitted that the learned Court below rightly did not place any reliance on Exhibit-3 as the same was executed in the police station by respondent no.2 while being illegally detained for a day without registration of any case. He has submitted that no case is made out for interference with the impugned judgment and the appeal deserves to be dismissed.

11. Respondent no.2 had appeared once in person and thereafter had chosen not to appear. No counsel was also engaged by him. Today also, the respondent no. 2 has not appeared.

12. We have considered the submissions of the learned Counsel for the parties and have perused the materials on record.

13. Though in the evidence as also in the judgment, the Exhibits have been referred to as 1, 2 and 3, it is seen that Exhibits were marked as Exhibit-A, B and C.



In the FIR (Exhibit-A) which is referred to as Exhibit-1 in the judgment of the learned Court below, it is stated that at around 02.00 am of 25.05.2018, the informant (PW-2) caught her mother and the respondent no.2 in her house when they were together in the room and that the respondent no.2 had gone away taking her mother. It is further stated that she will not be responsible if anything untoward happens to her mother. Exhibit-B is a complaint given by the appellant to Soreng Police Station, stating that his wife, who was missing from the previous day, was found to have been taken by the respondent no.2 and that they are together at a place called Timberbong. Request was made to bring them to the Police Station and to investigate the matter. Exhibit-C is the Undertaking or the *Ekrarnama* and in the paper book, it is styled as Agreement Letter. The aforesaid document was admittedly executed in Soreng Police Station. It is stated therein that in the evening of 25.05.2018, he had slept with the respondent no.1 and the same was found out by Asha Chettri. It is further stated therein that if anything happened to Jamuna Rai, he would be responsible.

15. Evidently, PW-1 was not present on 24.05.2018 and 25.05.2018 and he had deposed on the basis of information given to him by PW-2. In his evidence, he had stated that PW-2 had seen the respondent no.2 and respondent no.1 in her bedroom in a naked condition. Significantly, there is no allegation in the divorce petition that the respondent nos.1 and 2 were found in naked condition. He has admitted that he was called by the police of Soreng Police Station in connection with the FIR/complaint lodged by his daughter. In his evidence, the appellant did not depose about the allegations of theft committed by his wife.

16. PW-2, in her evidence, had stated that on the fateful day, she was unable to sleep because of acute stomach pain and therefore, she had



knocked on the door of her mother but her mother told her not to disturb her and asked her to take medicine on her own. Because of the aforesaid conduct of her mother, she became suspicious and thought that since her mother had an affair with respondent no.2 earlier, he might be inside the room. When she forced her mother to open the door, to her utter surprise, she found her mother and respondent no.2 naked in the room and seeing that she thrashed respondent no.2 and ordered him out of the room. She called her father over phone and informed him about the incident and as her father instructed her to lodge a complaint to the Police, she lodged the FIR before Soreng Police Station.

17. DW-1 in her evidence stated that PW-2 and her boyfriend were smoking the same cigarette and also having food from the same plate. She was looking very pale and weak and on PW-2 being asked what had happened to her, she told her that it was none of her business. Nonetheless, she had prepared dinner for her daughter and her boyfriend and had served them. She admitted that respondent no.2 was in the bedroom drinking beer at around 10.00 pm. PW-2 accused her of having an extra- marital affair and she asked DW-2 to leave the house and he, accordingly, had left the house. PW-2 had called DW-2 at around 02.00 am. After his arrival, when PW-2 had forced him to take her along with him, she had left for her parental house. DW-1 stated that the PW-1 had personally told her to store and serve liquor to customers from her bedroom as it was a safe place.

18. DW-2 stated that at around 11.00 pm while he was having a beer in the bedroom of respondent no.1, PW-2 had an argument with DW-1 and then he returned to his house. When he was called by PW-2 at around 02.00 am to their residence, he found PW-2 in a drunken state. She asked him to take respondent no.1 to his residence whereupon he returned home without answering her. He had deposed that he was illegally detained by Soreng



ice Station from 26.05.2019 till 06.00 pm of 27.05.2019 and he was forced to execute an Undertaking (Exhibit-3) by PW-1, stating that he had slept with respondent no.1. He was told that unless and until he admitted the same and gave it in writing, he would not be released. After he had executed Exhibit-3, he was released from the Police station. He denied that he had any physical relation and extra-marital affair with respondent no.1 at any point of time.

19. The evidence of PW-2 seems to suggest that the respondent no.2 had clandestinely entered her mother's bed room and it was only because of the fact that she was unable to sleep because of stomach pain, per chance, her mother and respondent no.2 being together in the bedroom, came to light. In her deposition, PW-2 did not indicate the time when she found her mother and respondent no.2 together. In the FIR as well as in the divorce petition, there is no allegation that the respondent nos.1 and 2 were found together in a naked condition inside the room, though it is mentioned therein that they were found to be together at around 02.00 am in the morning. It is highly improbable that after consistent knocking of the daughter the mother would come out naked and allow any other person in the room to remain in naked condition. Obviously, it is an embellishment and improvement of the case projected by PW-2. It appears that a liquor shop was being run without license in the house of the respondent no.1. The respondent nos.1 and 2 had admitted that the respondent no.2 was there in the room of the respondent no.1 at around 10.00/11.00 pm drinking beer. Both of them had asserted that when PW-2 had a confrontation with her mother, respondent no.2 had left the house of the respondent no.1. Both of them had also stated that PW-2 had again called the respondent no.2 to their house and when the respondent no.2 had gone there, PW-2 had asked respondent no.2 to take her mother along with him. Significantly, this part of the evidence of DW-1 and DW-2 remained un-impeached. There was no cross-examination with



ward to PW-2 having an argument with respondent no.1 and PW-2 again calling respondent no.2 at 02.00 am. There is also no cross-examination about PW-2 asking respondent no.2 to leave the house at around 10.00 pm at the first instance. Thus, it appears that there are two different events on the relevant day: one around 10.00/11.00 pm and the other at 02.00 am. There is no acceptable material on record to hold that respondent no.1 was taken away by respondent no.2 from the residence of respondent no.1. PW-2 is conspicuously silent about respondent no.2 taking away respondent no.1 along with him as stated in the FIR. If respondent no.1 had actually been taken away by respondent no.2 from the residence of respondent no.1, it is not understood why PW-1 had stated in Exhibit-B that his wife was missing from the previous day and that it had been found out later on that she had been taken away by respondent no.2. Going by the un-impeached evidence of DW-1 and DW-2 and in absence of any positive evidence on the part of PW-2 that she had found both of them together at around 02:00 am in the bedroom of respondent no.1, it will be difficult to accept the version sought to be projected that the respondent nos.1 and 2 were found in a naked condition in an unearthly hour of 02.00 am in the bedroom of respondent no.1. The admission of both the respondents to the extent that respondent no.2 was having a drink in the bedroom of the respondent no.1 as a customer at around 10.30/11.00 pm will not lead to a conclusion that respondent no.1 was committing adultery with respondent no.2.

20. It is in this context Exhibit-C assumes significance wherein the respondent no.2 had admitted to have slept with respondent no.1. It must not be forgotten that Exhibit-C was executed in the Police Station while the respondent no.2 was in illegal detention. While it was true that the learned Court below was not correct in holding that the appellant was also working in the Soreng Police Station, it is established on record that he being a Head Constable of another Police Station had filed a complaint (Exhibit-B) asking



t both the respondents be called to Soreng Police Station. Accordingly, without there being registration of any case, the respondent no.2 was not only called to the Police Station but was also detained from 26.05.2018 to 27.05.2018 till 06.00 pm. Evidence of DW-2 that he was forced to execute Exhibit-C and that he was released only after execution of Exhibit-C are not even tested by way of cross-examination. Therefore, the learned Court below was justified in not placing any reliance on Exhibit-C.

21. In *Smt. Mala Rai* (supra), on which reliance was placed by Ms. Gita Bista, evidence was to the effect that when a neighbor had seen the appellant entering her home with a man at around 10.30 pm, he had informed her husband who, thereupon, accompanied by his elder brother, had gone to the house and both of them had witnessed through the ventilation that the appellant was having sexual intercourse with the person with whom she had come home. It was on the basis of the above evidence that this Court had upheld the grant of divorce. The facts are clearly distinguishable in the instant case.

22. Having regard to the evidence on record, we are of the considered opinion that the learned Court below was justified in dismissing the petition filed by the appellant for grant of divorce.

23. Accordingly, finding no merit, the appeal is dismissed.

24. Registry will send back the records of the Court below.

MEENAKSHI
MADAN RAI

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MEENAKSHI MADAN RAI
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JUDGE

ARUP KUMAR
GOSWAMI

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CHIEF JUSTICE

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