

L.B. Vs. A.B.

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Court : Mumbai

Decided On : Jun-12-1990

Reported in : AIR1991Bom8; 1990(3)BomCR65; I(1991)DMC76

Judge : A.A. Cazi, J.

Acts : [Divorce Act, 1869](#) - Sections 19

Appeal No. : M.J. Petn. No. 1173 of 1990

Appellant : L.B.

Respondent : A.B.

Advocate for Pet/Ap. : George Rebello and ;Bharati Srinivasan, Adv.

Judgement :

ORDER

1. This petition is for the declaration that the marriage solemnised between petitioner (wife) and the respondent (husband) under Christian rites and ceremonies is null and void on the ground that the respondent was impotent at the time of the marriage and at the time of the institution of the petition.

2. The relevant facts are as follows :--

The parties are Indian Christians professing the Roman Catholic faith. They were married on 26th December, 1984 in St. Paul's Church at Dadar, Bombay in

accordance with Roman Catholic rites. There is one son born on 30th October, 1985 from this marriage. On 2nd April, 1990 this petition was filed by the wife. Her case is that the respondent is impotent relatively to her. As regards the birth of the child, she says 'In order to give a chance to the situation, the petitioner suggested to the respondent that they should go on a brief honeymoon out of Bombay, which they accordingly did sometime towards the end of January, 1985. The said honeymoon was a total disaster except for one attempt that was made by the respondent with great persuasion by the petitioner as a result of which the petitioner got pregnant. The respondent deplored the action on the part of the petitioner in order to have him motivated to have sexual acts with the petitioner and said that he was lured by the petitioner into the said sexual act.'

3. The petition has remained uncontested.

4. Mr. Rebello, Advocate for the petitioner, drew my attention to three authorities-- (1) K. Balavendram v. S. Harry, : AIR1954 Mad316 , (2) Mrs. Manjula S. Deshmukh v. Suresh Deshmukh, : AIR1979 Delhi93 (SB) and (3). Vincent Adolf Godinho v. Jume Beatrice Rama Godinho, : AIR1985 Bom103 .

5. In K. Balavendram's case the facts were that it was established that the sexual intercourse between the parties was not practicable on account of physical abnormality.

6. In Mrs. Manjula S. Deshmukh's case : AIR1979 Delhi93 (SB) the facts were that there was no sexual intercourse at all. In that case the wife did conceive and bear a child but it is necessary to note the circumstances in which that conception took place. The term used there is 'fecundation ab extra', which means conception without penetration. The facts may briefly be narrated by reproducing a portion of that judgment and the same reads as follows:--

'The wife alleged that at no time the husband was able to consummate the marriage. She recounted the husband's attempts to effect normal intercourse but without success. She said that the husband was incapable of ordinary complete intercourse. Her evidence was that she remained wrapped in his embraces but when it came to having sexual intercourse each time he attempted and each time

he had to make an ignominious retreat. The wife then said that as the husband was unable to penetrate her vagina he started masturbating. She narrated the crucial event of 6th November, 1972 in these words:

On 6th November, 1972 respondent again attempted intercourse but could not achieve any penetration for lack of erection. He started masturbating. He then discharged for the first time holding his penis in his hands. He rubbed it smeared with semen against my vagina for sometime, but there was no penetration. He also bit me on my breasts. I became pregnant by this act of rubbing of the wet penis against my organ and I did not get any menses after this act. A child was born to the wife on 24th July, 1973 at the Military Hospital, Delhi.'

7. In Vincent Adolf Godinho's case : AIR1985 Bom103 there was sexual intercourse leading to pregnancy and delivery and still it was held that the wife's impotency had been proved relatively to the husband. The facts in that case were that the wife was unwilling to have sexual intercourse with her husband but the husband on one occasion forcibly had sexual relations with her. The wife had complete aversion to any sexual relation with the husband. It was under these circumstances that it was held that the wife was impotent relatively to the husband.

8. Mr. Rebello also brought to my notice the decision given by this Court (Guttal, J.) on 16th August, 1989 in M. J. Petn. No. 802 of 1989, Paul Kurrien v. Pramila Kurian. There also the facts were that the wife had a deep seated aversion to sex and wanted to remain a spinster all her life. In the words of the husband as stated in his petition: 'After about two months of seeing a psychiatrist, the Respondent agreed to have sexual intercourse with the petitioner. This was some time in the month of October, 1977. However during the sexual intercourse, there was absolutely no reaction from the Respondent to indicate that she was enjoying the sexual pleasures. The Respondent was behaving like an inanimate object, almost like a log of wood, with no feelings whatsoever. The Respondent as a result of the sexual intercourse with the petitioner as aforesaid, became pregnant and the abovenamed son was born.' Here also it was a case of forced sexual intercourse upon a totally frigid wife.

9. What is impotency which is referred to in Section 19 of the Indian Divorce Act? It is incapacity to consummate the marriage, that is to say, incapacity to have sexual intercourse. Now what does sexual intercourse mean? This point is dealt with by Dr. Inshington in *D. E. v. A. G.* (1845) 163 ER 1039, where he states :

'Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that legally speaking, it is no intercourse at all..... If there be a reasonable probability that the lady can be made capable of a 'vera coupla' of the natural sort of coitus, though without power of conception I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect and unnatural coitus, I would pronounce the marriage void.'

10. What are the facts in our case? These are already stated in paragraph two above. More particulars are available in the petitioner's deposition where she has stated: 'According to me, that honeymoon was a total disaster, except for one single act whereby I motivated the respondent to have copulation which he did reluctantly. He told me that it was unfair on my part to have lured him for this single act of copulation. I then found that the respondent was vivid with rage on account of a single act. On account of this single act I became pregnant. This act of copulation was not voluntary on the part of the respondent but it was due to my persuading him.' Thus he was 'persuaded' and 'lured' into act of 'copulation' which rendered her pregnant and in due course she delivered a child.

11. Where impotency is the cause of a marriage remaining unconsummated it may be that (a) both the husband and the wife are impotent, (b) the husband alone is impotent, or (c) the wife alone is impotent. Impotency may be relative impotency, that is a person may be incapable of sexual intercourse with a particular person only though capable of normal sexual intercourse with another person. The incapability may be either physical or mental. Now let us take the case of a woman who is totally frigid (mental incapability to have sexual intercourse) and she is so

not relatively but absolutely. Certainly this would be a case of impotency. Now such a woman (an 'inanimate' woman) will not cease to be impotent if a man forcibly penetrates his penis into her vagina. The last two cases relied upon by Mr. Rebello are of this type. An 'inanimate' man cannot penetrate for sexual intercourse. A man having sexual intercourse cannot be said to be 'inanimate' or impotent. The fact that he has been 'persuaded' or 'lured' or 'seduced' makes no difference, nor does it make any difference that this was only a single act of copulation. In our case the man has copulated with her, that is penetrated her for sexual intercourse. Certainly this is no case of impotency.

12. Under these circumstances, I hold that the petitioner has failed to prove that the respondent was impotent. Hence, the petition is dismissed. No order as to costs.

13. Petition dismissed.