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Court : Mumbai

Decided On : Feb-01-1928

Reported in : AIR1928Bom279; (1928)30BOMLR523; 110Ind.Cas.266

Judge : Amberson Marten, Kt., C.J.,; Crump and ; Blackwell, JJ.

Appeal No. : Civil Reference No. 17 of 1927

Appellant : H.

Respondent : H.

Judgement :

Amberson Marten, Kt., C.J.

1. This case is another illustration of the difficulties confronted by those who have to administer jurisdiction under the Divorce Act in this country as compared with the Divorce Courts in England. We have already referred in Premchand Hira v. Bai Galal : AIR1927 Bom594 as to the course which ought to be adopted by Indian Courts in dealing with these petitions. The present is a nullity suit brought by the wife. Under Section 19 of the Indian Divorce Act the petitioner has to prove that her husband the respondent was impotent at the time of the marriage and at the time of the institution of the suit. She has also to comply with the other provisions necessary to constitute jurisdiction for this Court under the Act. It is clear from the evidence that the husband was not impotent as regards all women, but it is alleged by the petitioner that he was impotent so far as she is concerned, and that in fact

the marriage was never consummated. The husband admits that after the first fortnight he never had intercourse with his wife because he felt a coldness towards her. but he alleges that on three occasions during the first fortnight of the marriage he had successful intercourse with his wife. The learned Judge did not believe portions of the story of the lady, but he accepted the fact that the parties had desisted from sexual intercourse, and he held at the end of his judgment that despite the words in the Act he had an equitable jurisdiction to dissolve the marriage.

2. He states :-

Under these circumstances, I feel some diffidence in giving a decree for nullity of marriage strictly under the law, which seems to require impotency even at the time of the marriage. But taking an equitable view and seeing that the real purpose of the marriage fails in the absence of capacity for consummation, though it be with reference to the particular individual,... lam inclined to think that the spirit of the law permits me to follow the decision reported in the 16 Bow., case, and hold that in a case lika this the practical impotency of the husband in relation to the plaintiff would be sufficient to declare the marriage a nullity.

3. The learned Judge, with all respect, has misunderstood the use of the word 'equitable', as, indeed, could easily be demonstrated by referring to the origin and the history of the equitable jurisdiction of the Chancery Courts. Equity follows the law, and the learned Judge had no power whatever under the guise of equity or on any other ground to depart from the plain meaning of a plain statute.

4. On the merits of the case one important question is, what is the meaning of the word impotent in Section 19? That must be read along with Section 7 of the Act which provides that the Courts should give relief on principles and rules which, in their opinion, are as nearly as may be conformable to the principles and rules on which the Court for divorce and matrimonial causes in England for the time being acts and gives relief. Fortunately, here we have an express decision on the point by Lord Birkenhead when Lord Chancellor in C. (otherwise H.) v. C. Contrasting the mode of trial in the two countries, the Lord Chancellor there had the advantage of leading counsel on both sides and a four days' trial. Here we have not had the

advantage of the appearance of any pleader nor even of the parties themselves, and yet, as I shall presently show, the procedure adopted in the lower Court is open to serious objection. Turning to C. (otherwise H.) v. C. the Lord Chancellor, after stating the extreme difficulty of a case like the present, and after citing old authorities going back to the seventeenth century, eventually held that a decree of nullity can be pronounced in a case like the present whore, although the husband is not impotent as regards all women, he may be regarded as impotent in fact as regards a particular woman, viz., his wife. Accordingly, in that particular case, although the parties had been married in 1911, and tho suit was filed after 1919, a decree was granted.

5. Applying then that decision to the present case, we think there would be jurisdiction to pronounce a decree on the merits, provided the Court was satisfied that no intercourse took place between the parties during tho first fortnight of the marriage. But as to this there is no express finding by the learned Judge. Moreover, there is one step which, I think, undoubtedly ought to have been taken, viz., the medical examination of the petitioner if she was willing to submit to it. Speaking for myself, in a difficult case like the present I would not be prepared to accept the lady's story unless she had submitted to a medical examination, and one thus knew as much at any rate as the doctors were able to tell us on the point. As regards the husband, he has been examined by no less than three doctors. One of them gave evidence, and they clearly establish that he is not, generally speaking, impotent. If, therefore, there was nothing further in the case, I think it would be necessary to send the case back on this point to the lower Court for further evidence.

6. But there are certain technical matters, apart from the merits, which also show defects. I will not repeat what was said by this Court in PremcJiand v. Bai Galal, but I would respectfully point out to those District Judges who have this difficult jurisdiction to exercise, and who may in some cases not have had the advantage of advising on evidence at the bar that there is a simple method of testing a petition whether ex parte or otherwise. The first step is to read carefully the Code which you have to administer, more particularly in a case like the present, which deals with the personal law of a community to which the Judge does not belong.

Secondly, to see from that Code what points a petitioner must establish in order to obtain a decree. Thirdly, to see closely by what evidence those particular points are established, and if necessary to tee whether the evidence produced would satisfy for instance, the strict proof required in a criminal Court. Fourthly, to test the matter by seeing what questions one would put to the petitioner's witnesses supposing one was in the position of cross examining counsel for the respondent. Had the learned Judge adopted that course in the present case, these technical defects, which I will presently mention, would have been obviated, for, judging by the record before us, the case was not one on which he could rely on adequate assistance being given to him by the pleaders engaged in the case.

7. In the first place then it is necessary to prove the marriage strictly. That should have been done by producing a certificate of the marriage, which was not done. It is also necessary to prove that the parties-the petitioner at any rate-professed the Christian religion. It is also necessary to prove that the parties were domiciled in British India, for otherwise the Court would have had no jurisdiction. Merely saying that the parties were born in India of English parents does not necessarily involve an Indian domicile. Another question or two would have cleared up that point.

8. But assuming those matters could be easily remedied on remand, there is a very serious obstacle in the way of the petitioner obtaining her relief. I refer to her former petition, which eventually was dismissed by consent. Now, for that purpose, I will assume, for the sake of argument, that she has proved her case as regards non-consummation of the marriage during the first fortnight and afterwards, As to this her story may possibly be true, provided it should be found consistent with the medical examination if and when held. That being so, she brought her first petition, alleging impotency on the part of the husband. But that was compromised by an agreement under which the parties undertook to live together, at any rate when a certain house was provided, and the husband undertook to pay certain moneys in certain events. Moreover, the petition was by a formal order dismissed on the ground of a compromise. Is it then open to the petitioner now to present this second petition? The learned Judge has held that she can on the ground that she has a continuing cause oi action, and that the impotency continues as regards herself. It seems to me that at least two answers may be given to that contention.

One is that under the Code of Civil Procedure (which, generally speaking, is made applicable by Section 45 of the Indian Divorce Act) she allowed this petition to be dismissed without any liberty being reserved to present a new petition. I see the greatest difficulty in her way, having regard to that dismissal, in her power to present the present petition founded upon the same grounds.

9. But, if there is any doubt on that point, it seems to me to be concluded by an authority which my brother Blackwell has brought to the Court's attention, i. e., G. v. M. (1885) 10 App. Cas. 171. That was a nullity suit by a wife on the ground of the husband's impotency where the parties were married in Bombay in 1877 and had slept in the same bed for about nineteen months, but only during two months and a half did the respondent make any attempt to consummate the marriage. It was admitted the marriage had never been consummated, and in 1879 the parties finally separated. In 1853 the wife brought this nullity suit in Scotland following on proceedings by her husband for divorce on the ground of her adultery. It was eventually held that the wife had not debarred herself by her conduct from bringing the nullity suit. But, on the other hand, the judgment of Lord Selborne at pp. 185 and 186 with reference to the English authorities shows that a petitioner cannot approbate and reprobate with knowledge of the facts, and that ii' he or she once deliberately affirms the marriage, then the second petition may be objected to, He says (p. 186):-. that there may be conduct on the part of the person seeking this remedy which ought to estop that person from Laving it; as, for instance, any act from which the inference ought to be drawn that during the antecedent time the party has, with a knowledge of the facts and of the law, approbated the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefits from the matrimonial relation which it would be unfair and inequitable to permit him or her, after having received them, to treat as if no. such relation had over existed,.. The circumstances which may justify it are various, and in cases of this kind many aorta of conduct might exist, taking pecuniary benefits for example, living for a long time together in the same house or family with the status and character of husband and wife, after knowledge of everything which it is material to know.

10. Under these circumstances I would hold that, having regard to the dismissal of the former petition, the petitioner cannot now maintain the present petition, even if on a remand she might be able to make good her case on tho merits apart from the rest of the case. Under these circumstances I would, therefore, decree that this Court sets aside the order of the District Judge, and directs the petition to be dismissed. Under the circumstances we make no order as to coats.

Crump, J.

11. I agree.

Blackwell, J.

12. I agree.

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