P. Vs. K.

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SooperKanoon Citation : sooperkanoon.com/348693

Court : Mumbai

Decided On : Jul-15-1981

Reported in : AIR1982Bom400; 1982(1)BomCR454

Judge : Mody, J.

Acts : Hindu Marriage Act, 1955 - Sections 12 and 12(1); Hindu Marriage (Amendment) Act, 1970; Hindu Marriage (Amendment) Act, 1976

Appeal No. : First Appeal No. 374 or 1980

Appellant : P.

Respondent : K.

Advocate for Def. : C.R. Dalvi, Adv.

Advocate for Pet/Ap. : M.K. Nesart, Adv.

Judgement :

1. The appellant (original petitioner), the husband, and the respondent the original respondent were married an 20th June 1976, The appellant and the respondent were both Hindus and were about 36 and 27 years of age respectively at the time of marriage. Due to certain unfortunate circumstances, the husband was driven to file a petition for nullity within a short time which he did on or about 30th Nov. 1976.

2. The petition proceeds to made the following allegations. The marriage has not been consummated owing to the impotency of the respondent refused to have sexual intercourse saying that for one year she would not have sexual intercourse with the appellant. The respondent appeared to be very much upset at the approach of the appellant to consummate the marriage and was averse to any sexual act. It was decided by the petitioner and his eiders to take the respondent on a pilgrimage so that there might be a change in her mentality and outlook by the blessings of God. Even during pilgrimage the matter die not improve. Soon after return from pilgrimage on 29-11-1679 the respondent's father had come to the petitioner's house and the petitioner complained by her father about the behaviour of the respondent. Father ignored the complaint. The respondent's attitude continued. Then bellowed a medical check up on 27-8-1975. By Cr. Bhatia when it was discovered by the petitioner that the respondent was suffering from second degree prolapsed of the uterus. This was indicative of nonvirginity. Taking into consideration the medical report and the odd behavior of the respondent and the surrounding circumstances. The petitioner had reasons to suspect that the respondent wanted to conceal facts from the petitioner and that was one of the main reasons why she was refusing to have sexual intercourse with the petitioner and have the marriage consummated. It was clear from the conduct of the respondent and that of her parents that frand was committed and that the marriage had been brought about by frand and misrepresentation. The respondent and her parents had suppressed malarial facts about the sexual lapse and defect. The petitioner's consent to the marriage was obtained by frand and misrepresentation as to the material fact or circumstances concerning the respondent, in any event, the respondent was impotent at the relevant time, and there was non-consummation by reason thereof. The petitioner prayed for annulment of the marriage under Sec, 12 (1) (a) and (e0, In the written statement the respendent denied that marriage was not consummated or that she refused to consummate the marriage or was averse to sexual act or that she was impotent at any time. It is alleged that she was taken to Dr. Bhalia on 27th Aug., 1976 but the respondent did not understand the result of the said examination. It is deemed that the respondent suffered from sexual defects before her marriage and it is averred that neither she nor her parents were aware of any defect at any time before or after the marriage.

3. Mr. Nesari for the appellant has taken me through the evidence and the judgment and contended that the learned trial judge has not correctly appraised the evidence and on the balance ought to have accepted the evidence of the petitioner and Dr. Bhatia and rejected the evidence of the respondent as unreliable and that of Dr, Pancholi as not very reliable on certain aspects of the matter in view of contradictions and that if the evidence of petitioner and Dr. Bhatia is accepted, the grounds for nullity stand Proved.

4, Before considering the evidence of the petition. I will deal with the evidence of the respondent as in my view her evidence is completely unreliable and the petitioner's evidence not being inherently unreliable will have to be accepted irrespective of some discrepancies. (After discussing evidence of respondent His Lordship proceed-Ed)

5. and 6. X X X X

7. Mr. Dalvi has attacked the evidence of the petitioner and contended that the case now made our by the petitioner is different from the one in the petition. He save that initially in the notice of the advecate, case was made out of misrepresentation as to the virginity of the respondent, while the case sought to be made out in the petition is that of concealment of the evidence of prolapse and of impotency and in the evidence there are further embellighments. In support be refers to a statement 'My client has reasons to suspect, taking into consideration, the medical report and your behaviour and the surrounding circumstances, that you were not a virgin and you wanted to conceal the fact from my client, and that, that was one of the main reasons why you were refusing in have sexual intercourse with my client and have the marriage consummated' However, the notice has to be read as a whole, Moreover notice is not a pleading and not to be interpreted as a pleading. The notice does mention that the marriage had not been consummated till the date of the notice due to the impotency of the respondent. It is further stated that she was examined by Dr. Bhatia and she had given a certificate to the effect that it was found that the hymen was torn and the there was a second decree prolapse of the uterus, indicative of non-virginity. It would appear that words 'indicative of non-virginity' are the inference drawn by the petitioner or

his advocate based on the facts disclosed in the certificate, Then follows a sentence relied on by Mr. Dalvi followed by another sentence in the same paragraph 'that you have suppressed the material facts and your sexual lapse and defect, which were within youth own knowledge.' It is therefore, clear that the notice proceeds on the basis of non-disclosure of sexual lapse i.e loss of virginity before marriage as also concealment of sexual defect viz, protanse. I do not think that either the petition or petition read with notice are open to the attack made by Mr. Dalvi.

8. The evidence of the petition practically follow the petition. However, it gives more details than the petition and the notice, Mr. Dalvi attacks the evidence of the petitioner by contending that certain details given in the evidence do not and place in either the notice or the petiion. And there fore, should not be believed. I must here point out what is normally required of a notice and a petiion. No face is supposed to give only the bare outlines of the grievances of the party sending the notice. How much to revest how much not to reveal, will depend on the opinion of the advocate who is sending the notice. Not mentioning of a particular fact in the notice, unless it is so material as ought to have found place in the notice, cannot be a subject of any serious comment nor can such an omission by itself affect the veracity of the evidence. In fact, often a notice is sent even though not necessary as notice is rarely a part of the cause of action. The function of partition is to give material facts which give rise to the cause of action it should not contain evidence or other unnecessary details. In my view the petition in the present case contains sufficient particulars that cause of action and no fact which forms material part of the cause of action has come out for the first time in the evidence. The cause of action of the petitioner is that the respondent was suffering from second degree prolapsed of uterus and this fact was concerted from him at the time of marriage. That the respondent showed disinclination to any sexual intercourse and repelled the attemplts of the petitioner to consummate marriage and which he subsequently came to know could be because of the prolapse. He claims that be is entitled to annulment on the ground of concealment of material face concerning the respondent and non-consummation due to impotency. This case is brought out in the petition. It is averred that sexual lapse and the defect of the nature described were knows to ber but they were not disclosed before the marriage, and therefore,

he is entitled to annulment on the ground of fraud (What is meant thereby is obviously concealment) of material facts relating to the respondent. Having asserted non-consummation of the marriage, it was not necessary to mention in the petitioner made to the respondent and which was repulsed. It was sufficient to say generally that from the very first night till the relevant date, there was no consummation of marriage. Therefore I do not see any substance in the attack of Mr. Dalvi that facts brought out in the petition and so the petitioner is improving upon the story from time to time and his evidence should not be accepted. I do not see any substance in Mr. Daivi's attack as the notice or the petition are not proper place for minute details and entire evidence is not required to be stated in them.

(After examining the evidence of the petitioner in paras 9 to 13, His Lordship proceeded - Ed.)

14. Mr. Dalvi then attacks the evidence on the ground that except the details as to what happened on the first night, there are no details as to what happened on the first night, there are no details given regarding the attempts made approach the respondent by the petitioner and as to what was the response either in the advocate's notice or the petition or the evidence. This attack of Mr. Dalvi has no substance. It is not necessary for the petitioner to prove each and every approach made with dates and other details. It is sufficient if he says that he made attempts which were repulsed by the petitioner. It is obvious that the attempt of first night only is described as that would be the most important and it is stated and maintained by the petitioner in his evidence that there was no change in the situation after there was no change in the situation after the first night. It is the respondent who will Ave to say that it is not true, give some details as to when the relations took place and then the question will be as to whom to believe, but the minute details as contended by Mr. Dalvi are not required to be given in the notice, petition or examination in chief when the case is of complete non-consummation and impotency. If it is the allegation of cruelty by reason of some positive acts, the details are obviously necessary with dates and particulars, but in respect of a negative case, such as non-consummation, a statement that throughout the period there was not been consummation will normally suffice, with details of one or two attempts Moreover, if it is believed that the respondent was aware of her condition

since prior to marriage as appears to be the case. It is possible that she will try to repulse the petitioners advances and the petitioners version becomes probable, (After discussing the medical evidence in paras 75 and 16 His Lordship proceed Ed.

17. The evidence therefore, establishes that the respondent must be deemed to be aware of her condition of prolapse since prior to marriage and that either she wanted to hide her condition from the petitioner of had developed abhorrence or repugnance towards intercourse. Not only did she not inform the petitioner about the same at or before the time of marriage but also did not submit to the petitioner with the result that the marriage remained unconsummated.

18. This bring me to the question as to whether it can be said that the respondent was impotent at the relevant time or that the non-disclosure of a known prolapse amounts to obtaining consent of the petitioner 'by force or by fraud as to the nature of the ceremony or as to the material fact or circumstances concerning the respondent''

19. Dealing first with the second aspect of the matter, it is to be considered as to what amounts to frand as to any material fact or circumstance concerning the respondent prior to the amendment of the Hindu Marriage Act by Act 68 of 1976, S. 12(1)(c) read as follows:-

'that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Section 5, the consent of such guardian was obtained by force or frand'.

These words were interpreted by this Court in Raghunath Gopal v. Vijaya Raghunath, : AIR1972 Bom132 . In that case the consent to the marriage was procured by concealing from the husband the fact that the wife was suffering from curable epilepsy and false representation though otherwise fraudulent did not amount to fraud within the meaning of S. 12(1)(c) as then existing. The reason for coming to this conclusion is that the Hindu Marriage though may be in the nature of a contract for some purpose was still a sacrament and therefore, 'fraud' cannot be interpreted in light of its definition in the Contract Act. After relying on certain

well-known treatises on the l;aw of divorce prevailing in England, and the commentary in Mulla's Hindu Law (13th Edition) page 862, and on Derrett's Introduction to Modern Hindu Law (1963 Edn) page 193: it was held by Malvankar J. (At p. 137 of AIR):

'It would thus be seen that the word 'fraud' used in S. 12(1)(c) of the 'fraud' used in S. 12(1)(c) of the Hindu Marriage Act does not speak of fraud in any general way, nor does it mean every misrepresentation or concealment which may be fraudutent. It the consent given by the parties is a real consent to the solemnization of the marriage. The same cannot be avoided by showing that the petitioner was induced to marry the respondent by fraudulent statement relating to her health.'

Malvankar J. Then proceeded to consider Indian Cases in which the physical deficiency or illness or suppression of the fact that the wife was a naikin by profession or of her having been kept be more than one person prior to the marriage were not considered as amounting to fraud. After considering all these authorities, it was stated (at p. 138 of AIR).

'These, decision, therefore, before and after the Hindu Marriage Act, 1956, came into force definitely show that the Indian Contract Act, 1872, does not apply to the marriage under the Hindu Marriage Act, 1955, and that the word 'fraud' used in S. 12(1)(c) of the Hindu Marriage Act does not mean any fraudulent representation or concealment. The test to be applied is whether there is any real consent to the solemnization of the marriage'.

It was then held (at p. 138 of AIR) -

'A person who feely consents to a solemnization of the marriage under the Hindu Marriage Act with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Moreover, in the present case, the fraud alleged is non-disclosure or concealment of epilepsy from which the respondent was suffering since before her marriage, and fraise representation that she was healthy. I have found that the

type of epilepsy she was suffering from is curable. I am also, therefore, of the opinion that non-disclosure or concealment of epilepsy from which the respondent was suffering since before her marriage, and fraise representation that she was healthy. I have found that the type of epilepsy she was suffering from is curable. I am also, therefore, of the opinion that non-disclosure or concealment of such curable epilepsy and false representation that the respondent was healthy does not amount to frand within the meaning of that word used in Sec. 12(1)(c) of the Hindu Marriage Act, 1955. The petitioner, therefore, has failed to prove that his consent was obtained to prove that his consent was obtained by fraud.' It is therefore, clear that according to the learned Judge the fraud contemplated was such as must be regarding the ceremony or the identity of the respondent and not as regards the condition of the respondent or her life at the time of or before the marriage. This judgment was followed in David v. Kalpana (1975) 78 Bom LR 65, which was a case under the Indian Divorce Act.

20. If the matter rested there the things would have been simple and I would had no alternative but to hold that no fraud could be said to have been committed in the present case. However, the wordings have now been changed by the amendment of Section 12(1)(c) which now reads as follows:-

'12 (1) (c) - that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under Sec. 5, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent.'

This amendment clearly contemplates change in law and brings into the ambit of frand, misrepresentation or concealment of any material fact or circumstance concerning the respondent. Fraud must mean representing as existing what is not and concealing what is material. The misrepresentation ro concealment necessarity presupposes that the respondent was aware of the facts and circumstances which were misrepresented or concealed. In the present case as I have already held that the fact of the prolapse of uterus was knows to the respondent and the only question is whether the non-disclosure thereof can be fraud as to any material fact or circumstance concerning the respondent. Every

fact and circumstance cannot be materials. Therefore,concealment of misrepresentation of every fact and circumstances cannot be said to be fraud sufficient for annulment. It is difficult to define with any certainty what can be said to be material fact or circumstance but it may be safely said that the face or circumstance which is of such nature as would materially interfere with the marital life and pleasure including sexual pleasure will be a material fact or circumstance. The only limitation is that the material fact, or circumstance must be concerning the respondent, meaning thereby that it must be in respect of the person or character of the respondent. It is immaterial whether such fact or circumstance is curable or remediable. If a party to a marriage is suffering from some abhorrent disease such as leprosy or venereal disease and this is not disclosed it will be definitely concealment and consequently fraud as to material fact and circumstance. Similar would be the case with suppression of the fact of immoral life prior to the marriage. Without going into the detail or definition as to what may or may not constitute material fact or circumstance.. If can be said that existence of a condition in the respondent which materially interferes with the sexual intercourse or its pleasure of which makes its indulgence in a normal way difficult or is such as is likely to cause dislike or abhorrence in the mind of the other spouse to have sexual fact or circumstance even though it may or may not amount to impotency. In the present case as I have already held the sexual intercourse was not possible without manipulation of the protruding uterus by hand, which obviously is likely to cause dislike abhorrence or disgust to a newly wed husband; concealment of such a fact will be fraud as to material fact of circumstance concerning the respondent as new contemplated by Section 12(1)(c), In the circumstance, the marriage solemnised between the petitioner and the respondent is avoidable and is liable is be annulled.

21. This beings me to the questions of impotency. This question was considered by the Full Bench of Madras High Court in K. Balavendram v. S, Harry, : AIR1954 Mad316 (FB). In that case, the petitioner had altered that the respondent's mate organ was so abnormally big as to render sexual intercourse with her impracticable. It has proved to be positively dangerous to the life of the petitioner. She stated that on several occasions when the respondent attempted to have intercourse with her the petitioner evinced great aversion to the act and also

suffered great pain on each occasion, with the result she had to push the respondent away or jump out of the bed and in the circumstances, the marriage has not been consummated and that the consummation of marriage was impossible. The respondent in his reply asserted that intercourse was possible and that it had taken place on several occasions. The facts alleged by the petitioner were held to be proved as the respondent did not give evidence or appear. On the basis of these facts the question arose whether these facts amounted to impotency. The said judgment has considered various authorities to come to the conclusion as to what amounts to impotency. The relevant portion of the judgment is as follows (at p. 317); -

'(4) Impotency has been understood by Judges in England in matrimonial cases as meaning incapacity to consummate the marriage. That is to say. Incapacity to have sexual intercourse, which undeniable is one of the objects of marriage. The question it what does 'sexual intercourse' mean? We cannot do better than refer to what has been considered to be the leading decision on this topic, namely 0 D. E. V. A. G.' (1845) 163 ER 1039. In that case, the husband prayed for a declaration of nullity of his marriage with the respondent who was married to him on the ground that carnal consummation was impossible by reason of malformation of his wife's sexual organ. Dr. Lushington dealt with the point namely, what exactly is to be understood by the term 'Sexual intercourse' because as he said everyone was agreed that in order to constitute the marriage bond between young persons, there must be the power, present or to come, of sexual intercourse, Dr. Lushingion stated.

'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 copula' of the 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.'

In - G. V. G, 1(1871) 2 P &D; 287 the rule laid down by Dr. Lushingion was followed. The ground on which the husband in that case sought a declaration of nullity of marriage was the wife's peculiar condition which made it impossible for him to consummate the marriage. The wife was suffering from excessive sensibility. Lord Penzance in dealing with the case, after laying down the law that the ground of interference of the courts in cases of impotence is the practical impossibility of consummation said:-

'The invalidity of the marriage, if it cannot be consummaged, on account of some structural dificult, is undoubted; but the basis of the interference of the Court is not the structural difficulty but the impracticability, of consummation.' The learned Judge was prepared to hold that even in the absence of a physical structural defect, there may be other circumstances which render sexual intercourse practically unposerble.

'The question is a practical one' he said and I cannot help asking myself what is the husband to do in the event of being obliged to return to cohabitation in order to effect consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Everyone must reject such an idea'.

Taking what he described as a practical and reasonable view of the evidence, he thought that the consummation of the marriage in that case was practically impossible, owing to the peculiar mental reaction of the wife. The rule in (1945) 163 ER 1939 was again followed in 'Dickinson v. Dickinson' 1913, p. 198 though that that was a case of impossibility to perform the intercourse on account of the wilful and persistent refusal of the wife.

'(5) In the present case, the evidence leases us in no doubt that the marriage cannot be consummated in the ordinary and normal way on account of the abnormal size of the respondent's evidence which must be accepted, ordinary and complete intercourse is physically impossible. It must be held, therefore, that the respondent was impotent so far as the petitioner was concerned both at the time of the marriage and at the time of the institution of the suit'.

22. The next decision relied on by Mr. Nesri is Digvijay Singh v. Pratap Kumari : [1970]1SCR559 where it is held (at p. 138);-

'A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of unility, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.'

23. Mr. Nesri then relied on the case of M. V. M. (1958) 3 All ER 769. In that case the respondent was suffering from veginismus which was curable by operation. Till the petition was filed the respondent had not undergone any operation but offered to do so after the petition was filed it is observed in that judgement, while considering this as follows:-

'It is suggested that there is still time, and that as there is a possibility of a cure I ought not to the present case to pronounce a decree on the ground that she was incapaide. If there is a reasonable prospect of her incapacity being cured. I have to apply my mind to the history of the case I think that the respondent knew very well before the separation that the petitioners was at any rale not satisfied with the sexual intercourse between them, and I have not the slightest doubt, having heard the medical evidence, that the husband had grave cause for his anxielies, if that word is suitable, and for his complaints in that regard'.

The learned Judge then proceeded to observe that he had to deal with the matter by looking at the practical aspect if the marriage can be consummated. The basis for interference of the Court is not the structural defect but the impracticability of consummation. He held that the evidence showed that the wife knew about her condition but took no steps to rectify it earlier and then granted decree of nullity.

24. The next case is Samar v. Sadhana. : AIR1975 Cal413 , That was the case of a wife who he prior in the marriage undergone operation for removal of uterus and as such was alleged to e impotent at the time of marriage and untill for

constimmation or bearing child, It is held in that case (at p. 414) :-

'9. The principal case of appellant was that the respondent was impotent inasmuch as her uterus was removed by an operation before the marriage it cannot be disputed that a woman without a uterus is quite fit for sexual intercourse, Impotency is incapacity for sexual intercourse or when coition is difficult or painful. As has been stated already the presence or absence of uterus is quite immaterial to the question whether a woman is impotent or not. The leaned judge has rightly hold that because the uterus of the respondent was removed, she could not be held to be impotent and that accordingly, the marriage could not be declared to be void.'

Therefore, even when coition is difficult or painful it will amount to impotency but just because a woman cannot bear a child will not be impotency as contemplated by the laws governing divorce. I would like to add to this definition the words 'that the condition of the partner is such as to cause aversion or abhorrence in other partner to having intercourse.'

25. Then comes the case of Samar v. Snigdha, : AIR1977 Cal213 Prior to the amendment of 1976, the ground for nullity under Hindu Marriage Act was 'that the respondent was impotent at the time of the marriage and continued to be so untill institution of the proceedings.' There is a change in law, with the amendment of the relevant provisions which now reads 'that the marriage has not been consummated owing to the impotency of respondent' while interpreting the amended provisions, the Calcutta High Court has held:-

(Head note)

'Sexual intercourse or consummation is sometimes referred to as vera copula. Vera copula consists of erection and intromission, that is, or erection and penetration by the male of the woman. Full and complete penetration is an essential ingredient of ordinary and complete intercourse. The degree of sexual satisfaction obtained by the parties is irrelevant. Thus where the respondent wife was not possible, held, the petitioner was entitled to a decree'.

26. The next case relied on by Mr. Nesri is Suvarna v. G. M. Achary. Air 1979 AP 160, This case in my view is not relevant and I need not discuss it.

27. Mr. Dalvi on the other hand places strand reliance on Rajendra Pershad v. Shanti Devi AIR 1979 P&H; 181, this case also arose after the amendment of the 1976. In this case the wife had a vagina which was only it long. There was an all round septum at the junction of upper 1/3 with the 2/3rd lower of the vagina and the septum loosely admitted of two fingers. She was fit for cohabitation and could give birth to children. In cross examination she (the doctor) stated that the organ could go into the vagina easily and that the length of the vagina was normal and was about 11/2 She dented that the septum would obstruct the sexual enjoyment of the male partner, She also stated that the wife had told her that she was operated upon in connection with the septum. There was no further cross-examination about the capacity of the respondent for sexual intercourse and to give normal satisfaction to the male partner. The material available as to the condition of wife and on other aspect of the matter was scanty. It is in view of this position that the the husband's petition for nullity on the ground of impotency was dismissed and in the last paragraph it was observed:-

'In the absence of any other material, it is impossible to hold that the wife is impotent, whatever might have been the position at the time of the marriage. It is clear, be it due to the operation of otherwise, that the marriage is now capable of consummation. No decree dor annulment of marriage can, therefore, be granted.'

This is not an authority for the proposition that if the impotency is cured after the petition, there cannot be a decree dor nullity. In the case cited it is not even clear that the impotency existed or was cured after the filing of the petition.

28. However, following observations in the case are material 9at p. 184)

'Before the Marriage Laws (Amendment) Act, 1976 it was necessary to prove that the respondent was impotent at the time of marriage and continued to be so untill the institution of the proceedings. As a result of the Marriage Laws (Amendment) Act., 1978, the petitioner has now to establish that the marriage has not been consummated owing to the impotence of the respondent. It is common case that

the provisions of Ameded Act are attracted in view of the express provision made by Sec. 39 of the Marriage Laws (Amendment) Act, 1976.'

As regards the meaning of impotency it is observed (at p. 164) :-

'13. Impotence simply means inability to perform the sexual act. It may be pathological or psychological, permanent or temporay, complete or partial. The judgment of Ramaswamy J. In Rangaswami v. Arvindgminal, : AIR1957 Mad243 . Contains a full and comprehensive discussion of what impotence means. It is unnecessary to refer to the wealth of literature on the subject. I will confine myself to the consideration of a few cases where problems similar to the one before me had arisen.'

Then reference is made to the observation of Dr. Lushingtion. These observations of Dr. Lushingion show that the sexual intercourse in the proper meaning of the term is 'Ordinary and complete intercourse' It does not mean 'partial and imperfect intercourse'. He then observes that he cannot go to the length of saying that every degree of imperfection would deprive the intercourse of its essential character. There must be degree difficult to dealt with but if so imperfect as scarecely to be natural (sic) he would not hesitate to say that legally speaking, it is no intercourse at all. Then the observation proceeds to say that if it is curable the marriage cannot be declared void. But that observation appears to be made in the light of the law applicable then. Here as already held by Calcutta High Court, with which I respectfully agree, the question of curability is immaterial and that appears to be the present law in England also as is apparent from the case of M. V. M. Referred to earlier.

29. In my view, therefore, if the condition of a spouse is such as to make intercourse imperfect or painful it would amount to impotency. Even the aversion or abhorrence shown by spouse to having intercourse caused by prolapse can amount to impotency. In the present case in my view the respondent was impotent for two reasons. Firstly, it is proved that the respondent resisted all the approaches of he petitioner to consummate the marriage, possibly with a view to conceal the condition or presult because with such a prolapse the intercourse is possible only after manipulation with hands. The sight of the protruding uterus is more likely than

not to cool down the ardour and desire of the husband to perform the sexual act resulting in frustration for the husband. Even if the ardour and desire survive the sight of the protruding organ, the manipulation itself will cool It down in any case an intercourse which demands previous manipulation of the uterus before penetration cannot be said to be an intercourse in the normal way. Therefore, both reasons independently of each other are indicative of impotency and this coupled with non-consummation which I have already held, to have been established entitle the petitioner to annulment of the marriage.

30. The learned trial Judge in my view has not appreciated the evidence property and has come to erroneous conclusions. He has wrongly not believed the evidence of Dr. Bhatia, particularly when the evidence of the respondent is absolutely unreliable and has failed to appreciate the effect of the evidence of Dr. Bhalia which clearly leads to the conclusion that the respondent was aware or her condition since prior to marriage. He has no doubt strongly relied on the fact that certificate at D-1 did not mention that the espondent was having masturbation for last 3 years though Dr. Bhatia's said so in her evidence. He has erroneously come to the conclusion that Dr. Bhatia's enquiry about masturbation was unnecessary; as I have already pointed out she has not been cross-examined on this pointed and that the question could have arisen naturally in the course of iscussion with the respondent. He has failed to take notice of the fact that Dr. Bhatia had maintained notes on the basis of which she was giving evidence and though a question was asked about maintaining of notes to which she replied in the affirmative, she was not called upon to produce the notes. He has disbelieved Ex. D1 which ought not to have been discarded. He has failed to notice material discrepancies in the evidence of Dr. Pancholi. He has failed to appreciate the fact that the father of the respondent has not steeped in to the box to contradict the evidence of the petitioner that he had informed the father about the respondent's behavior on 25th July 1976 and has also not appreciated that the evidence of the respondent is toughly unbelievable and useless. In the circumstances, the judgment of the learned judge cannot stand. He had also failed to notice that there is now change in S. 12(1)(c) and the position is now different from what it was prior to 1976 when the decision of Malvankar J. Was given.

31 In the circumstances, I set aside the judgement and decree of the trial court dismissing the petition and make the petition absolute in terms of prayer (a)

32. As regards the quantum of maintenance and alimony it is agreed between Mr. Nesri for the petitioner and Mr. Dalvi for the respondent that the respondent should be paid a lump sum of Rs. 13,500/- as and by way of permanent alimony. I pass the order for alimony accordingly. This amount will be paid within 2 months from today. There will be no order a to the costs of the appeal.

33. Order accordingly,