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Court : Allahabad

Decided On : Dec-20-1962

Reported in : AIR1963All564

Judge : S.N. Katju, J.

Acts : Hindu Law

Appeal No. : Second Appeal No. 3804 of 1959

Appellant : Ram Devi

Respondent : Raja Ram

Advocate for Def. : Baleshwari Prasad, Adv.

Advocate for Pet/Ap. : Girraj Kishore, ;V.K.S. Chaudhary and ;N. Kumar, Advs.

Disposition : Appeal allowed

Judgement :

S.N. Katju, J.

1. This is a plaintiff's appeal arising out of a suit for maintenance brought by her against her husband the defendant-respondent. She claimed maintenance for three years at the rate of Rs. 50/- per month and also claimed future maintenance at Rs. 100/- per month.

2. The plaintiff alleged that she was the legally married wife of the respondent and she had lived with him for some time after her marriage, that her husband treated her cruelly and had driven her away after taking her clothes and ornaments and she was forced to come back to her father's home and had been living with her father for eight years prior to the institution of the suit. She alleged that the defendant had remarried another woman and was not maintaining the appellant.

3. The defendant-respondent contested the suit Inter alia on the ground that the parties were not married according to legal rites and since the plaintiff was impotent she could not be legally married to the respondent. It was alleged that the genital organs of the plaintiff were not normal and she was unfit for sexual intercourse and was incapable of begetting children and consequently the marriage between the parties was a nullity. The respondent further denied that he had maltreated the plaintiff.

4. The parties produced medical evidence on the question of physical condition of the appellant. The appellant got hereself examined by Dr. Preetam Kaur, while the respondent relied on the evidence of Dr. (Smt) Savitri who had also examined the appellant. Dr. Preetam Kaur who examined the appellant at her own request and at the request of her brother gave the following report :

'She is a woman of average height and weight. Her external genital organs appear normal for her age. The vagina is slightly narrow and admits one finger easily. The hymen shows old rupture. From the above findings Srimati Ram Devi appears to be physically fit for sexual intercourse.'

Dr. Savitri, Medical Officer Ujhani Female Dispensary, en-mined the appellant at the instance of the defendant. According to the doctor the external appearance of the genital organs of the plaintiffs was normal and the breasts wen very much under-developed. The internal examination per vaginum revealed that there were very few pubic hair, labia majora and labia minora were under-developed and the hymen had an old tear. Only one finger could be inserted with great difficulty as the vagina was very narrow. The cervix was very hardly reached which showes that it was under-developed. In her opinion the plaintiff was not fit for marriage and was unfit for sexual intercourse.

5. The trial Court held that the appellant was not impotent and was not incapable of bearing children, that the defendant had ill-treated the plaintiff and had remarried and thus the plaintiff was entitled to get past main-tenance as claimed by her and also future maintenance at the rate of Rs. 50/- per month, it accordingly decreed the suit.

6. The respondent appealed from the aforesaid decree and the Civil Judge allowing the appeal remanded the case to the trial Court for redecision according to law in the light of the observations made by him. The Civil judge was of the opinion that while Dr. Savitri was examined in Court Dr. Preetam Kaur who had examined the appellant was not produced in Court and one Kishori Lal Mehrotra gave evidence on the basis of the two reports of the lady doctors. The Civil Judge directed that another medical examination of the appellant be conducted by soma other expert doctor.

7. After remand the plaintiff produced Dr. Preetam Kaur. After the conclusion of the arguments before the trial Court the respondent made an application to the Court for getting the appellant examined by another lady Doctor of Lucknow or Agra. That application was, however, rejected and the Munsif gave the same finding which he had given earlier and decreed the suit. The respondent again appealed from the decree of the trial Court. Before the Court below the parties agreed to get the appellant examined by Dr. Nawal Kishore, Professor and Head of the Department of Midwifery and Gynaecology, Medical College, Agra. Dr. Nawal Kishore examined the plaintiff on 2-11-1957. Hif report runs thus :-

Breast:- Normal in development except the nipple. Labia Minora-Sloptic and replaced by reddish white tissue. Vagina-Admits one finger length about three and half inchet. Increase in size can be attempted by an operation with reasonable chances of success.

Cervix and Uterus- Clinically absent except a nodule of the size of a pea.'

The doctor was examined in Court and he stated that in the existing condition of the appellant sexual cohabitation would be very painful and difficult both for the husband and the wife. He further stated that the uterus and cervix court not be

developed by an operation and on such findings there should be no menstruation. The Court below held that the plaintiff was impotent and sterile and according to Hindu Law her marriage with the husband was a nullity, and therefore she was not entitled to get any maintenancefrom the respondent. On these findings the Court below allowed the respondent's appeal and set aside the decree of the trial Court.

8. Aggrieved from the aforesaid decision of the Court below the plaintiff has come in appeal before this Court.

9. The questions for consideration which arise in the present case are firstly, whether the appellant is impotent, secondly whether the extent of impotency is such which could result in making the marriage between the parties a nullity and thirdly, whether the appellant is entitled to maintenance as claimed by her.

10. Taking the second question first, it has to be considered whether the marriage of an impotent woman is a nullity and there would be no binding ties of marriage between the parties even if sacramental rites, under the Hindu Law had been performed and had united them in ties of matrimony. The parties belong to Vaishya community; and it is not denied that the parties were married according to Hindu rites. Hindu Law recognises different forms of marriage but most of such forms have now become obsolete. , The general presumption of law in case of marriage between persons belonging to the regenerate classes among the Hindus is that the marriage was performed according to the Brahma form. Where, however, the parties are married according to the Brahma form could the marriage be treated as inoperative and a nullity if one of the parties, as in the present case the woman, is impotent. 1 am assuming for the present that the woman is impotent i.e. impotent in the sense that she is unfit' for sexual intercourse and the deficiency is due to physical deformity.

11. Marriage between parties whether sacramental or contractual implies that the parties belong to opposite sexes i.e. are man and woman. It is now well recognised that there may be persons who belong to what is now termed as intermediate class of sex, the male or female coming neither in the category of a man nor a woman. If that is so there would be considerable force in the contention that there would be no valid marriage where any one of the parties comes under

such category and the marriage whether sacramental or otherwise would be a total nullity. I am, however, taking a case where a man or a womaji may have some physical deficiency which renders it impossible for him or her to permit any sexual intercourse between the parties. Taking such persons to be impotent the question is whether in a case where the woman is impotent could her marriage with a man according to the Brahma form of marriage be inoperative and a nullity.

12. The question was considered in A. v. B., AIR 1952 Bom 486. In that case a suit was filed by a Hindu husband against his wife for a declaration that the marriage performed according to Hindu Vedic rites was null and void and in the alternative for a decree for divorce under the Bombay Hindu Divorce Act, 1947 on the ground that the wife was unable physically to consummate the marriage and was impotent at the time of the marriage and continued to be so on the date of the institution of the suit. It was alleged that the defendant did not have at the time of marriage either a vagina or uterus and she still had no vagina or uterus and she had no development of vaginal cervix, uterine or genital tract and the internal organs and therefore she was impotent and incapable of having sexual intercourse with any male. It was urged on behalf of the wife that the marriage was a sanskara (sacrament) and it could not be dissolved. Tendolkar, J. after elaborate and extensive consideration of the Smriti writers and commentators held that the defendant was at the time of marriage as well as onthe date of the suit impotent and incapable of consummating the marriage and such marriage was null and void. Some of the texts referred to by Tendolkar, J. in the aforesaid judgment may be quoted : Manu IX-203 states :... 'If the eunuch and rest (klibadi) should somehow or other desire to take Wives, the offspring of such among them as have children is worthy of a share.'

Tendolkar, J. referred to the difference of opinions in the meaning to be attributed to the expression 'kleebadi' i.e. eunuch and rest and expressed the opinion that there was no uniformity even among the commentators as to whether the expression 'kleebadi' is to be interpreted in the sense that it refers to eunuchs and persons having other physical deficiencies or it excludes the others and refers only to a person who is a eunuch. The text of Yajanavalkya (II-140-141) runs as follows :

'An impotent person, an outcaste, and his issue, one lame, a mad man, an idiot, a blind man, and a person afflicted with an incurable disease and (like) others, must be maintained; excluding them from any share.

The aurasa and kshetraja sons, however, of these, if frea from defects, are entitled to allotments.'

Sarasvativilas, volume II p. 1023 points out that the above-mentioned text of Yajanavalkya 11-141 is applicable only to Dwaparyuga and not to the present age. It says :

''As to what Yajnavalkya says : 'out their sons legitimate and Kshetraja are entitled to shares if free from similar defects', that was applicable in the Dwspara Yuga as the Kshetraja son is prohibited in the Kali Yuga.'

Narada in Chapter XII, 8 to 19, states as follows in verse 8.

'The man must undergo an examination with regard to his virile; when the fact of his virile has been placed beyond doubt, he shall obtain the maiden (but not otherwise).'

Verses 18 and 19 are as follows :

'If a man is potent with another woman but impotent with his own wife, his wife shall take another husband. This is a law promulgated by the Creator of the world.

Women have been created for the sake of propagation, the wife being the field and the husband the giver of the seed. The field must be given to him who has seed. He who had no seed is unworthy to possess the field.'

Vishnu quoted in Viramitrodaya, Sanskar Prakash (Chowkham-bha Sanskrit Series, 1913 ed., p. 551) says :

'The crooked, the dwarf, the blind by birth, the impotent, the lame, and other diseased persons, as they are not entitled to a share on partition they should remain celibate for the whole of their life.'

It is now well recognised that the reference to Kshetraja sons refers to an ancient practice which was invoked, al-though in extreme cases, but which has now become obsolete. Nevertheless an inference can be drawn from the aforesaid reference to Kshetraja son that where a party to the marriage was wholly incapable of begetting progeny the marriage itself was not treated as a nullity. The references in the texts with regard to the desirability of avoiding the marriage of deficient persons are obviously of directory nature and could not be treated as mandatory.

Manu VIII-226 says :

'Nuptial texts are meant only for 'kanyas' and not for those who are not kanyas (Akanya) because they are excluded from religious ceremonies.'

Then Medhatithi further explains the aforesaid texts as follows :

'Those who are not entitled to help in the performanceof agnihotra and other rites or in the begetting of children are not fit to be married.'

Viramitrodaya says :

'Mantras for the sacrament can only apply to kanyas, by which is meant girls who are virgo intacta (whose yoni is uncut). Kulluka in his commentary points out that marriage with a virge intacta is Dharmya (religious) but marriage with a girl who is net a Virgo intacta is not forbidden although it may be Adharmya (not approved by religion). But the emphasis of Viramitrodaya obviously is not on whether the 'yoni' (genital organ) is cut as on the fact that the woman must possess a 'yoni', whether cut or uncut, and if she does not possess one, she cannot be considered to be a 'kanya' and cannot be married'.

Smritimuktafala says :

'Such of the twice-born persons as are intoxicated, insane, idiot, impotent or fallen; for them there is no marriage no sankara, no impurity, no libations; they may be married to a plantain tree or in its absence to the branch of a sun plant. This is what Manu has said.'

Katyayana says :

'A lunatic, one guilty of grave sins, a leper, an im-potent, a sagotra, one bereft of eye sight and hearing, of epileptic, these defects are to be avoided both in the bride and the bridegroom, whether these defects arise prior of subsequent to the marriage, the gift of the daughter shall be nullified.'

13. All the aforesaid texts are directory and refer tothe principles of selection in the choice of marriage and couldnot be said to mean that the marriage of persons who ameither undesirable or who are physically deficient should inall cases be treated as a nullity. If that were so the sanctity attached to a sacramental marriage would be entirelylost. A sacramental marriage implies that the ties of marriageare indissoluble and where the marriage is between a maleand a female who could legally marry under the rules ofHindu Law there could be nothing by way of physical incapacity which could dissolve the marriage ties. Physical incapacity which prevents consummation of marriage is something distinct than barrenness. A woman may be physicallyfit for consummation of marriage and yet may be barren andmay not have any children. It could not be said that barrenness in a woman would nullify the marriage ties, formerly,before the enactment of the Hindu Marriage Act polygamywas permitted under the Hindu Law. While it was alwaysthought desirable that monogamy should be practised polygamy was not barred by the Hindu Law. Barrenness in thecase of a Hindu wife was very often a ground for adoption.

14. Therefore, the case has to be considered on the basis that mere barrenness in any case could not be a ground for treating the marriage a nullity. So far as the question of impotency in a woman is concerned, and assuming it is of such a character that consummation of marriage is impossible, the question is whether the marriage of such a woman would be in every case a nullity.

15. I am of the opinion that physical incapacity in a woman for sexual intercourse could not render a sacramental marriage performed under the rules of Hindu Law into a nullity. Sexual intercourse for procreation may be the chief reason for the marriage tie but such cases cannot be excluded where the parties may live together without having any sexual intercourse. It was not uncommon in this

country and it is not even uncommon now for children to get married by their parents and elders. Under the Child Marriage Restraint Act, while it is an offence to get such children married, it has not been laid down by the Act that the marriage itself would be a nullity. There may be cases where children were married during infancy and it may not be possible to find out the physical condition of the girl. She may be normal for a child of her age at the time of marriage and subsequently on attaining majority meet with an accident and get such a deformity which may make the act of cohabitation impossible. Could it be said that in such a case the marriage itself would be a nullity and the matrimonial ties between the parties had no effect in the eye of law. There may be cases where a woman because of a peculiar temperament may refuse to permit sexual intercourse by the husband. Could it be said that the marriage tie by itself would be a nullity. There have been cases where the husband and wife have lived together without having any sexual relations between them. Could that by itself dissolve the marriage tie.

16. Even assuming that a woman is wholly incapableof having sexual intercourse and is thus impotent the sacramental ties of marriage give her protection in society andher marital status is not disturbed and she gets protectionunder the law. In such a case it would lead a woman toa very precarious position if her marriage ties, were to betreated as a nullity and she is deprived of her marriedstatus. Formerly, prior to the enactment of the Hindu Marriage Act under such circumstances it was open to the hus-band to take another wife and keep the first wife even thoughimpotent in the enjoyment of her full marital status. Nowafter the enactment of the aforesaid Act it is open to ahusband where the wife is impotent to ask for the dissolution of the marriage, but where the husband' for some reasonor the other is not anxious to enter into another matrimonialalliance it would be a dangerous proposition to lay downthat the wife even though impotent has no married statusand the husband is not her husband.

17. I find myself in agreement with the views expressed in Kantilal v. Vimla, AIR 1952 San 44, that under the Hindu Law a marriage of a person with a woman who is impotent cannot be treated as void or a nullity nor can it be dissolved under the Hindu Law before the passing of the Hindu Marriage Act.

18. In K. Malla Reddy v. K. Subbama, AIR 1956 Andh 237, Viswanatha Sastry, J. observed that though the marriage of an impotent person is condemned as reprehensible and improper and still the marriage has been solemnised with the customary rites it would be deemed to be valid. Such a marriage is not void 'ab initio' but only voidable at the instance of the wife. That was a converse case where the husband was impotent and Viswanatha Sastry J. held that so long as the wife did not choose to get the marriage annulled under Section 12 of the Hindu Marriage Act she was entitled to be maintained by her impotent husband. He observed as follows :

'The marriage ceremonial creates a spiritual or religious tie between the spouses which once created cannot be untied. Cohabitation and begetting of children are not the only objects for purposes of marriage and a marriage once celebrated with due ceremonial is valid irrespective of any defects in the spouses.'

I respectfully agree with the above observations.

19. In Amirthammal v. Vallimayil Ammal, AIR 1942 Mad 693 and Bhagwati Saran v. Parmeshwari Nandan, AIR 1942 All 267 (2) it was held that even congenital idiots could be lawfully married under the Hindu Law. Thus, I am of the opinion that the marriage of the appellant with the respondent could not be treated as a nullity on the ground that she was impotent.

20. Coming to the next question i.e. whether the appellant was impotent or not I am of the opinion that the extent of the plaintiff's physical deficiency would not bring her case within the meaning of total impotency. Dr. Nawal Kishore found that even though in her present physical condition sexual intercourse would be painful and difficult her physical deficiency could be set right by a surgical operation. Dr. Nawal Kishore has expressed the opinion that the increase in the size of vagina can be attempted by an operation with reasonable chances of success. She) may be barren woman and may not be fit for producing children but it cannot be said that she is wholly incapable of having sexual intercourse with her husband. In any view of the matter whether she is wholly or partially impotent I consider that her marriage with the respondent cannot be treated as a nullity unless it is dissolved under the previsions of the Hindu Marriage Act.

21. The Court below has found that the appellant was cruelly treated by the respondent and it was not denied that the husband has remarried and is now living with another wife. Under the circumstances I am of the opinion that the plaintiff has a right to be maintained by the respondent. She had claimed past maintenance for three years at the rate of Rs. 50/- and future maintenance at the rate of Rs. 100/-. The Trial Court while decreeing the claim for past maintenance had allowed future maintenance at the rate of Rs. 50/- only. I am of the opinion that the decree passed by the Trial Court was eminently just and proper.

22. I allow the appeal, set aside the decree of the Court below and restore that of the Trial Court and direct that the suit be decreed in terms of the decree passed by the Trial Court. The appeal is allowed with costs.

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