

Major Ashok Kumar Singh Vs. Vith Additional Sessions Judge and ors.

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Court : Allahabad

Decided On : Dec-17-1990

Reported in : 1991CriLJ2357

Judge : R.B. Mehrotra, J.

Acts : [Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 125; [Constitution of India](#) - Article 226

Appeal No. : Civil Misc. Writ No. 706 of 1990

Appellant : Major Ashok Kumar Singh

Respondent : Vith Additional Sessions Judge and ors.

Advocate for Def. : S.C.

Advocate for Pet/Ap. : Yogesh Agarwal, Adv.

Disposition : Petition dismissed

Judgement :

ORDER

R.B. Mehrotra, J.

1. By means of this writ petition under Article 226 of the [Constitution of India](#), the petitioner has challenged the order of the II Munsif Magistrate, Varanasi, dated 8th

of March, 1989 and the order of the IV Addl. Sessions Judge, Varanasi, dated 19th January, 1990, dismissing the petitioner's revision filed against the order of the II Munsif Magistrate, Varanasi allowing the application of Smt. Geeta Singh, under Section 125 of the Code of Criminal Procedure, 1973.

2. It is not disputed in the present case that Smt. Geeta Singh was a legally wedded wife of the petitioner and the petitioner married Smt. Geeta Singh on 22-11-1981. Thereafter Smt. Geeta Singh stayed with the petitioner at Sultanpur and lived there for sometime and then returned to her parents house at Varanasi. She again went to petitioner's house at Mhow (Madhya Pradesh), where the petitioner was posted as a Captain and lived with him for few months.

3. The case of Smt. Geeta Singh, the wife of the petitioner, who has been arrayed as respondent No. 3 in the petition, is that the petitioner in the month of November, 1982 took her to her parents house and left there and thereafter she is not being maintained by her husband. The petitioner's contention is that he is ready and willing to maintain respondent No. 3 and keep her, but respondent No. 3 refused to live with him and as such the application under Section 125 of the Code of Criminal Procedure is not maintainable. The petitioner's contention is that he has already filed a suit for restitution of conjugal rights against respondent No. 3 which is pending.

4. Both the courts below have recorded a concurrent finding that the petitioner was impotent and was unable to perform sexual intercourse with his wife, namely, Smt. Geeta Singh. The courts below also held that respondent No. 3 was justified in living separately from her husband on the ground that the husband of respondent No. 3 is impotent and is unable to discharge his marital obligations and was also unable to have any sexual intercourse with her.

5. The case of the petitioner before the trial Court as well as before this Court is that the petitioner is potent but respondent No. 3 is abnormally oversexed and as such she is not sexually satisfied with the petitioner. This case of the petitioner has, however, been disbelieved by the courts below and concurrent findings of fact have been recorded by both the courts below that the petitioner was impotent qua her present wife, namely, Smt. Geeta Singh. In this regard the proposition of law is

well settled that a person can be potent against a particular person but still be impotent against some other individual. In *Jagdish Lal v. Smt. Shyama Madan*, reported in : AIR1966 All150 , Hon'ble Mr. Justice Gangeshwar Prasad held as under (at page AIR (152) All):--

'Impotency means incapacity for accomplishing the act of sexual intercourse and by sexual intercourse, in this context is meant not an incipient, partial or imperfect but a normal and complete coitus. Impotency is to be distinguished from sterility which may in some cases accompany impotency but is not necessarily associated with it, the two expressions denoting lack of two different powers. A person may be incapable of accomplishing the sexual act and yet be capable of procreating and, conversely too, a person may be incapable of procreating and yet be capable of accomplishing the sexual act. The cause of impotency may be in the malformation or structural defect in the parts; in the functions, resulting in imperfect erection or premature ejaculation; in diseases whether local or general or in the mind, manifesting itself a repugnance for the sexual act, fear, lack of confidence etc. It may also happen that a person is capable of having sexual intercourse but incapable of performing it with a particular individual, and in such a case the person must be regarded as impotent in relation to that particular individual regardless of his potency in general. These matters are too well settled to need reference to any medico-legal or legal authorities.'

The only contention of the learned Counsel for the petitioner Sri Yogesh Agarwal, is that merely on the ground, that a husband is impotent, no maintenance can be awarded under Section 125 of the Code of Criminal Procedure. He has placed reliance on the following two decisions :--

(i) AIR 1948 Nagpur 69 : 1948 (49) Cri LJ 52, *Emperor v. Daulat Raibhan*;

(ii) 1978 ALJ 1002 : 1978 Cri LJ Vol.2 1661, *Bundoo v. Smt. Mahrul Nisa*.

6. In the first case, Hon'ble Mr. Justice Hidayatullah as he then was, held that a wife is not entitled to live separately from her husband and claim maintenance on the ground that her husband is impotent and unable to perform his marital duties. In this decision, a decision of Madras High Court was relied upon which was

reported in AIR 1933 Mad 688 : 34 Cri LJ 52.

7. In the second case, Hon'ble Mr. Justice P. N. Bakshi, as he then was, relying on the said decision of Hon'ble Mr. Justice Hidayatullah took the same view.

8. On the basis of the aforesaid two decisions, Sri Yogesh Agarwal contended that if something happens which is beyond the control of a person then it cannot amount as an act of neglect by such a person. Sri Agarwal further contended that if a husband becomes blind or suffers from some other diseases, the same cannot be a ground for a wife to live separately and also claim maintenance. According to the petitioner's counsel impotency is like any other disease and as such merely on the ground that a husband is impotent, the wife cannot claim to live separately on this ground, and also claim maintenance under Section 125 of the Code of Criminal Procedure. He laid stress that the opening words of Section 125 of the Code of Criminal Procedure clearly require some positive action on the part of a person, which can result in neglect or refusal to maintain the persons mentioned in Section 125 of the Code of Criminal Procedure. If a person not by his own act but due to something beyond his control is not in a position to perform some of his marital obligations then the other sex cannot claim maintenance under Section 125 of the Code of Criminal Procedure.

9. All these arguments stand exploded by a decision of the Hon'ble Supreme Court in Sirajmohmedkhan Janmohamadkhan v. Hafizunnisa Yasinkhan, reported in AIR 1981 SC 1972 : (1981 Cri LJ 1430). In this decision, the decisions relied upon by Mr. Yogesh Agarwal i.e., AIR 1948 Nagpur 69 : (1948-49 Cri LJ 52); 1978 ALJ 1002 : (1978 (2) Cri LJ 1661) and AIR 1933 Mad 688 : (34 Cri LJ 951) been specifically overruled and the contention of Sri Agarwal that unless by some positive act a person neglects or refused to maintain, Section 125 of the Code of Criminal Procedure cannot be invoked have also been rejected. It has been held by the Hon'ble Supreme Court that Hon'ble Mr. Justice Bakshi gave his decision since his attention was not drawn to the provisions of second proviso of Section 125 of the Code of Criminal Procedure which provides that the Magistrate may consider the grounds of refusal of the wife to live with her husband if the husband offers to maintain his wife and wife refused to live with him. In that view of the

matter the Hon'ble Supreme Court has held that the wife will be justified in refusing to live with an impotent husband and claim maintenance Under Section 125, Cr. P.C. In this decision, the Supreme Court has also approved the decision of the Karnataka High Court in Dr. Srikant Rangacharya Adya v. Smt. Anuradha reported in : AIR1980 Kant8 , wherein it has been held that it is unthinkable in these days that the sexual weakness of the husband is of no consequence and, therefore, cannot amount to cruelty. If a wife does not get proper sexual satisfaction it will lead to depression and frustration. It must be recognised that nothing is more fatal to marriage than disappointments in sexual intercourse.

10. In view of this Supreme Court decision, the arguments advanced by Mr. Yogesh Agarwal were not open to him.

11. It is very unfortunate that this decision i.e. AIR 1981 SC 1972 : (1981 Cri LJ 1430) of the Supreme Court was not cited at Bar on behalf of the counsel of either side. It is also unfortunate that responsible members of the Bar are citing overruled decisions which may also result in obtaining wrong judgments from the Court. It is expected that in future the members of the Bar will take care in citing decisions and will at least not cite overruled decisions.

12. Sri Yogesh Agarwal, however, faintly also contended that since respondent No. 3 was an educated lay, it cannot be said that she has no means to support herself because an educated lady can always get employment and can support herself. This contention has also no merits. It is not disputed that respondent No. 3 is not employed anywhere and has no other means to maintain herself, merely for the fact that a woman is educated, she cannot be deprived of her right to get maintenance under Section 125 of the Code of Criminal Procedure.

13. No other point has been pressed before me by the counsel for the petitioner. The quantum of amount of compensation has also not been challenged.

14. I accordingly, dismiss the writ petition with costs, which I quantify, in the present case, to Rs. 2,000/-.