

S. Vs. R.

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Court : Delhi

Decided On : Feb-17-1967

Reported in : AIR1968Delhi79

Judge : K.S Hegde, C.J. and; Jagjit Singh, J.

Acts : Civil procedure code, 1908 - Sections 100 and 101 - Order 6, Rule 2; [Hindu Marriage Act, 1955](#) - Sections 11 to 28, 23(1); Indian Divorce Act - Sections 7; [Evidence Act, 1872](#) - Sections 101

Appeal No. : Letters Patent Appeal No. 94-D of 1966, against the judgment of H.R. Khanna, J., reported in AIR 19

Appellant : S.

Respondent : R.

Advocate for Def. : A.K. Sen, ; Anand Parkash and ; Usha Mehra, Advs.

Advocate for Pet/Ap. : P. Narain and; A.B. Saharya, Advs

Judgement :

(1) The marriage of the appellant with the respondent has been declared a nullity by the Additional District Judge of Delhi in pursuance of an application under Section 12 of the [Hindu Marriage Act, 1955](#) (to be hereinafter referred to as the Act) made by the respondent. The complaint of the respondent was that the

appellant was impotent at the time of marriage and continued to be so until the institution of the proceedings. That case has been accepted by the trial Judge. The decision of the trial Court was affirmed by Khanna, J., sitting singly. Hence this appeal.

(2) Shri Parkash Narain, the learned counsel for the appellant questioned the correctness and legality of the decision in this case on four grounds, namely,-

'(1) The appellant was prejudiced in his defense because of the fact that the necessary particulars were not given by the respondent either in her petition or in the particulars supplied later;

(2) the Courts below erred in opining that the respondent has satisfactorily established that the appellant was impotent at the time of the marriage and continued to be so until the institution of the proceedings;

(3) the Courts below should have dismissed the petition of the respondent on the ground of lack of sincerity on her part or at any rate on the ground that she had approbated the marriage; and

(4) the same should have been at least dismissed on the ground that the petitioner was guilty of laches.'

While examining the appellant's contentions we cannot lose sight of the fact that the two Courts below. After a careful examination of the material on record were pleased to accept the version of the respondent. In the matter of appreciation of oral evidence, the appellate Court attaches a great deal of weight to the opinion of the trial Judge who had the benefit of observing the demeanour of the witnesses in the box. In this case, the conclusions reached by the trial Court have been affirmed by a learned Judge of the High Court and that after carefully analysing the evidence on record and weighing the probabilities. It is true that in a Letters Patent Appeal, the powers of the High Court are very wide. But as a matter of practice, the learned single Judge's finding on questions of fact more particularly when it accords with the findings of the trial Court are treated with great deal of respect. They are not interfered with except for every good reasons.

(3) Bearing in mind the above principles, we shall now proceed to examine the contentions advanced by the learned counsel for the appellant.

(4) The appellant married the respondent in 1948. They lived together from 1948 to 1956. During that time, they extensively travelled in various parts of the world. After 1956 the respondent and the appellant did not live together.The respondent filed the petition for declaring her marriage with the appellant nullity on March 19, 1962. These are undisputed facts.

(5) We shall now take up the contentions advanced on behalf of the appellant for examination.

(6) There is no substance in the contention that the particulars given by the respondent as regards the impotency of the appellant are inadequate. There is no issue on that point. That contention does not appear to have been taken either during the trial of the case or before the learned single Judge. Such a plea cannot be entertained at this state. We have gone through the pleadings. Even on merits we see no substance in that contention.

(7) The burden of establishing that the appellant was impotent at the time of the marriage and continued to be so until the institution of the proceeding is no doubt on the respondent. As mentioned earlier, the two Courts below have accepted the evidence adduced by the respondent in that regard. The findings of the Courts below that the appellant was impotent at the time of the marriage and that he continued to be so until the institution of the proceedings are essentially findings of fact. Those findings are primarily based on oral evidence.

(After discussing the evidence in Para the judgment proceeded;-) We think that there is satisfactory evidence to support the conclusion of the Courts below that the appellant was impotent at the time of the marriage and that he continued to be so till 1956 when the respondent chose to leave him.

(9) Shri Prakash Narain contended that even if we accept the evidence of the respondent that the appellant was impotent at the time of the marriage and that he continued to be so till 1956, there is no evidence to show that he continued to be

impotent after 1956 or that he was impotent at about the time of the institution of the proceeding. It is not the case of the appellant that he ceased to be impotent after 1956. On the facts established, the Courts below were right in presuming that the appellant continued to be impotent even after 1956. It is not the appellant's case that he got himself treated for his impotence after 1956. As he grew older he is not likely to have acquired potency.

(10) Next it was urged that the respondent's application should have been dismissed on the basis of the rule laid down by the House of Lords in *G.v. M.*, (1855) 10 AC 171. The rule in question is known as the 'doctrine of want of sincerity'. The said rule was also applied to cases arising under the Indian Divorce Act, See *H. v. H.*, Air 1928 Bom 279. This was done evidently; because of Section 7 of the Indian Divorce Act, which requires the Courts in India to act and give relief on principles and rules which, in the opinion of the said Courts, 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. It is clear from the decision of Selborne, L. C., who rendered the principal judgment in (1855) 10 AC 171 that the rule in question was not recognised in Scotland. It is a peculiar English rule, Hence the first thing that we have to see is whether that doctrine can be applied to cases arising under the Act. The Hindu Law did not contemplate dissolution of marriages. Under that law marriages are sacrosanct. The Act made a serious inroad into that law when it provided for the dissolution or nullification of marriages. It is an entirely new right created by the Act. For finding out the scope of that right we must look only to the provisions of the Act. Section 12 of the Act lays down under what circumstances a marriage solemnized shall be voidable and under what circumstances a marriage can be annulled by a decree of nullity. therefore, in a given case, the Court has first to see whether the requirements of section 12 are satisfied. Then the Court has next to see whether even if any ground for granting the relief exists, the petitioner is not entitled for the same for any of the reasons mentioned in Section 23(1) of the Act. Ss.11 to 28 of the Act form a complete code by themselves as regards the law relating to nullity of marriage and divorce. In considering the scope of those provisions we cannot fall back on the English common law. We are in agreement with Shri. A. K. Sen, the learned counsel for the respondent that the rule laid down by the House of

Lords in (1855) 10 Ac 171 is wholly inapplicable to cases arising under the Act.

(11) It was said on behalf of the applicant that clause (a) of sub-Section (1) of Section 23 of the Act merely incorporates the equitable rule laid down in (1855) 10 Ac 171. That clause reads thus:

'In proceedings under this Act, whether defended or not, if the Court is satisfied that any of the grounds for granting relief exists and the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief then, and in such a case, but not otherwise, the Court shall decree such relief accordingly.'

The appellant neither pleaded nor proved that the respondent was in any way taking advantage of her own wrong or disability for the purpose of getting the relief she is seeking. The respondent did not put forward any disability of her own for the purpose of getting the relief she is seeking; nor is it proved that she, in any manner, is taking advantage of her own wrong for getting the said relief. All that is proved is that after the marriage the appellant had made certain gifts in favor of the respondent. It is the case of the respondent that those gifts were made with a view to avoid wealth tax and that plea has been accepted by the Courts below. Even if we accept the plea of the appellant that he made those gifts with a view to confer some right on his wife in his affairs that would not bring the case within clause (a) of Section 23(1) of the Act.

(12) We also do not think the doctrine of 'approbate' and 'reprobate' referred to in (1855) 10 Ac 171 is relevant for our present purpose. That doctrine has no place under the Act.

(13) Even if we had come to the conclusion that 'doctrine of sincerity' or to put it more correctly, the 'doctrine of insincerity' is applicable to cases under the Act, on the facts of this case, that doctrine would not have been attracted. It is true that the appellant transferred in the name of the respondent substantial sums of money during the years 1948 to 1956. The Courts below have come to the conclusion is justified by the evidence on record. Those gifts were not procured by the respondents by holding out to the appellant that she would continue to remain as

his wife even though he was unable to discharge his material obligation. Most of the presents were made at a time when it was not possible for the respondent to break her marital ties with the appellant. Till the Act came into force, the respondent had to remain as the wife of the appellant whether she liked it or not. It is true that even after the respondent began to live separate from the appellant, the appellant was paying her a monthly allowance of Rs.1,000 . That again is not on the seeking of the respondent. It is also true that the appellant permitted the respondent to operate on his bank accounts. The appellant admits that he did so because he did not want the respondent to have any financial difficulty during his absence from India. Even before the appellant and the respondent left for England in 1955 the appellant had thought of transferring two of his houses to the name of his wife, evidently with a view to reduce the burden of wealth tax. After the appellant left for L., the respondent on the advice of Sri. T., the topmost official in the service of the appellant, forwarded to the appellant a draft for the purpose of effectuating the transfer previously thought of. But the appellant did not execute the necessary document evidently because of the fact that the respondent had ceased to live with him. The respondent admits that she had transferred a sum of rupees two lakhs from the account of the appellant to her own account during the time she had the authority to operate on his account. Her Explanation for so doing is that at the time of the marriage, her father had given the appellant a sum of rupees two lakhs as Tilak and as she wanted to put an end to her marital ties with the appellant, she wanted to take back that money. This Explanation has been accepted by the Courts below. According to the findings reached by the Courts below, when the respondent transferred the sum of rupees two lakhs from the account of the appellant to her own account, there were still about nine lakhs of rupees standing to the appellant's credit in his account. That circumstances lends weight to the respondent's Explanation for drawing the amount in question. It is true that during the time the appellant was at L., there was continuous correspondence between the appellant and the respondent. From that correspondence it is not possible to spell out that the two agreed to remain as husband and wife after their separation in July 1956. The correspondence that passed between them thereafter though of very polite nature, does not mean show any warmth between the two. It was formal and business-like.

(14) Dealing with the 'doctrine of sincerity' this is what Selborne, L.C., observed in (1885) 10 AC 171: 'the real basis of reasoning which underlies that phraseology is this, and nothing more than this, that there may be conduct on the part of the person seeking this remedy which ought to stop that person from having it; ask for instance, any Act from which the inference ought to be drawn that during the antecedent time the party has, with the knowledge of the facts and of the law, approved the marriage which he or she afterwards seeks to get rid of, or has taken advantages and derived benefit 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 ever existed. Well now, that Explanation can be referred to known principles of equitable, and, I may say, of general jurisprudence. The circumstances which may justify it are various, and in cases of this kind, many sorts 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....' In that very case, Lord Bramwell had something different to say. This is what he observes: 'Now one word as to this question of 'sincerity'. It is a most remarkable expression, a very curious word, and I am not at all sure that it has not resulted from this, that sincerity is a very important matter in ascertaining whether the spouse complained of is impotent or not, and sincerity has been dwelt upon for that purpose till at last it has been taken to be a separate head of objection to the complaining party's proceedings. It seems to me very strange/ What the complaint does in a suit of this sort is to come to the appropriate Court for a declaration of the truth: 'I say that this man is impotent and was so at the time of the marriage, and I ask you to declare that fact'. The very words of the summons are, 'Declare the truth, that this man was impotent when he married me:'. The Court say, 'No, we will not, ' or the argument is that the Court ought to say, 'No, we will not -We know that it is true, but we will not say so'why? In my opinion a man who has inflicted this cruel wrong upon a woman ought not to be heard to object to her complaining, when she comes forward with her complaint of this wrong that he has done her, unless in some way or another he can show that he sustains some injury from the double matter of her not having complained earlier, and of her complaining now. In such a case, I should indeed think that a law might be made (perhaps it exists, for

aught I know), that in some way or another the declaration of the truth should be accompanied by some compensation to him for the sort of injury which, as I have indicated, might have been done to him....' The scope of the doctrine of sincerity was further explained in Clifford v. Clifford, 1948 P. 187. Therein a marriage was declared a nullity twenty-seven years after the marriage. In this case, the respondent wants the Court to declare her marriage with the appellant a nullity because he was impotent at the time of the marriage and he continued to be so until the institution of the proceedings. The fact that the appellant is impotent is well established. We fail to see how lack of sincerity on her part or the fact that she had earlier approved the marriage, assuming that those things are established, can dis-entitle her to the relief to which he is entitled under the law. Lack of sincerity on her part or her approbation of the marriage cannot make the appellant impotent. The want of insincerity on the part of a spouse or his or her approbation of the marriage may be elements which can be taken into consideration in deciding whether the complaint of impotency is true. We think that the rule of 'sincerity' laid down by the House of Lords will have to be applied even in cases to which that rule applies, with great deal of caution.

(15) Lastly, it was said that the relief prayed for by the respondent should be refused as her application was a highly belated one. Unnecessary or improper delay in instituting the proceeding is undoubtedly a good ground for refusing to grant any relief under Section 12 of the Act. That much is provided in clause (d) of sub-Section (1) of Section 23 of the Act. therefore, the question for decision is whether there was any unnecessary or improper delay on the part of the respondent in approaching the Court. It is not denied that till the Act came into force in the year 1955, she was tied down to the appellant. There was no escape from her marriage with the appellant. The evidence in this case satisfactorily established that the respondent began to live separately from the appellant after July 30, 1956. On July 30, 1956, she wrote to the appellant, Exhibit P-2. Therein she had made it clear that she had reached the end of her patience. That letter read along with the evidence of the respondent clearly established that on July 30, 1956, the respondent made it clear to the appellant that she is not prepared to live with him as his wife thereafter.

The period preceding the coming into force of the Act cannot be taken into consideration in dealing with the question of delay in presenting the petition under Section 12. It is true that there was considerable delay even thereafter. The petition for declaration of the nullity of the marriage was presented only in 1962. The respondent's Explanation for the same is that her parents who are very conservative stood in her way from seeking relief under the Act. In considering whether there was unnecessary or unreasonable delay in seeking the relief, we cannot ignore the conditions of the society in which the parties lived and traditions of the families to which they belong. The Hindu society looked with disfavor dissolution of marriages. It was considered as something sinful. It requires courage to face the public odium. We can take judicial notice of the fact that even today considerable sections of the Hindu society look with disfavor the idea of dissolving a marriage. Further, as seen earlier, the respondent belongs to a highly aristocratic family.

We can very well believe when the respondent swears that her parents are highly conservative. They must have shuddered at the idea of their daughter approaching the Court for declaring her marriage with the appellant a nullity. The respondent further says that her parents told her that if her marriage with the appellant is dissolved, the society in which they lived would shun them and it would be difficult for them to get alliances for the daughters of her sisters and brother. therefore, she hesitated for long before approaching the Court. The evidence of the respondent on this point has been believed by both the Courts below. Her Explanation for the delay in approaching the Court is believable. They accord with the facts of life. therefore, we are unable to hold that there was any unnecessary or improper delay in instituting the proceeding under S. 12 of the Act. The question whether in a given case, there had been unnecessary or improper delay in instituting the proceeding has to be decided on its own facts. No hard and fast rule can be applied in deciding that question. It is worth remembering that the Act has not prescribed any period of limitation for presenting an application under Section 12 of the Act. In this connection it would be appropriate to again refer to the decision in 1948 P. 187. Reference may also be usefully made to the decision of the Rajasthan High Court in *Smt. Leela v. Dr. Rao Anand Singh*, .

(16) For the reasons mentioned above, this appeal fails and the same is dismissed with costs.

(17) Appeal dismissed

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