

Amarendra Chaudhary Vs. Nalini Chaudhary

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Court : Delhi

Decided On : Aug-16-1974

Reported in : 11(1975)DLT105; 1975RLR63

Judge : H.L. Anand, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 12

Appeal No. : First Appeal No. 11 of 1973

Appellant : Amarendra Chaudhary

Respondent : Nalini Chaudhary

Advocate for Pet/Ap. : R.L.Tandon and; H.L. Narula, Advs

Judgement :

H.L. Anand, J.

(1) This First Appeal by the husband under Section 23 of the [Hindu Marriage Act, 1955](#), hereinafter called 'the Act' is directed against the judgment of the Addl. District Judge, Delhi dismissing the appellant/husband's petition under Section 12 of the Act for annulment of the marriage solemnised between the parties on the ground that the respondent/wife was impotent at the time of the marriage and continued to be so until the institution of the petition. The appeal has been filed in the following circumstances.

(2) The appellant and the respondent were married on January 31, 1971 according to Hindu rites, the respondent/wife was about 16 years of age at the time of marriage. After the marriage, the parties lived as husband and wife for a total period of little over three months at different places, and since, July, 1971 when she left the appellant's home with her father, the respondent has been living with her parents. There is controversy between the parties as to whether the marriage was duly consummated, if the respondent was impotent from the beginning and continued to be so, the reasons for the rupture between the parties, the manner in which the appellant treated the respondent and the circumstances in which she left his care. It, however, appears that by his counsel's notice of October 12, 1971, copy of which was produced and exhibited at the trial as Ex. P2, the appellant sought restitution of conjugal rights by the said notice from the respondent in course of which, it was made out that the marriage had been 'properly consummated', that the respondent lived happily with the appellant during the short period they lived together, that the appellant was aware of the 'difficulties and limitations' of the respondent and that the respondent's act of leaving the care of the appellant was 'thoughtless and wanton desertion' of the husband, that the respondent's parents had the impression that she had been neglected and had suffered from 'fits and faints'. It was 'further alleged that the respondent's withdrawal from the appellants society was unjustified. The notice threatened the respondent with legal action 'for restitution' of the appellant's conjugal rights There is no reference in the notice either of the physical or psychological fear of the respondent for coitus or of any aversion to intercourse generally or with the appellant or of any doubt on the part of the appellant that the respondent was otherwise impotent from the very beginning. In reply to this notice, however, the respondent's father wrote to the counsel a letter of November 5, 1971, a copy of which was also produced and exhibited at the trial as Exhibit P. 3., setting out what appears to be the respondent's version of the circumstances in which she left the care of the husband. In the said letter, it is made out that since her marriage, the respondent has been 'extremely unhappy' on account of 'inhuman treatment' meted to her by the appellant which appeared to the respondent's father to be attributable to 'compliance of disgraceful conduct' which was demanded of her by the appellant and which was resisted by her. It was further alleged that the

appellant 'inflicted mental and physical tortures on her, rather she was subjected to brutal acts at Delhi' to the extent of 'driving her out' from the appellant's residence. The letter proceeds to describe the then state of the respondent in the following terms:

'2.All the acts of your client have created such a terror in the mind of my daughter Nalini that whenever the name of your client is uttered in her presence, she becomes nervous and when any suggestion is put to her to go to your client the magnitude of her nervousness causes faints to her and at times, she becomes delirious. I have since got her medically examined at Panichobh which, as a matter of fact ought to have been done at Delhi when she was in the company of your client as she had developed this disease there. She has developed abhorrence to your client and hence it is unsafe for her life if she is compelled to go to him and live in his society rather it may prove fatal to her if she is insisted upon to go there against her will.'

(3) The letter thus justifies the refusal of the respondent to join the appellant and advises patience and restraint to the appellant, In a separate letter addressed to the counsel, which was produced in original and exhibited as Ex. P4 at the trial; the respondent affirms the allegations made in her father's reply to the counsel and maintained that because of the inhuman treatment meted out to her, she had developed fits and recites an incident when she fainted when the appellant went to her father's residence to bring her back:. This was followed by the petition out of which this appeal has arisen by which the appellant sought annulment of the marriage on the ground that the respondent had been impotent from the beginning and continued to be so, and is grounded on the allegation that the marriage had never been consummated, that on the very first night of the marriage the respondent showed complete absence of desire for coitus, excused herself by fear of resultant pain, expressed absence of desire for conjugal intercourse even on the following night, exhibited extreme repugnance to the sex act and did not permit the appellant to consummate the marriage. It was further alleged that there was no change in the attitude of the respondent and the appellant made an attempt at coitus on July 5. 1971 to allay her fears, was able to achieve partial penetration but had to abandon the attempt because the respondent started crying. It was

further alleged that on occasions, the respondent would show 'nervousness and fear and developed hysterical fits' on the very mention of the coitus. In her reply to the petition, the respondent denied the averment that the marriage had never been consummated but did not specifically assert that it had been so consummated but characterised the allegation made in the petition as being false and drew attention to the admission made in the aforesaid notice of the 'counsel to the effect that the 'marriage was properly consummated.' This is how the matter was dealt with in para 2 of the reply.

'PARA 2 of the Petition;-That the statement made in para 2 of the petition is false and hence denied to the extent that 'The said marriage has never been consummated. ' In this connection . Para 2(b) of the Legal Notice dated 12th October 1971 (enclosed) duly signed by the petitioner's counsel Mr. S N.Dutt (Retd.), Advocate, New Delhi may kindly be pursued Where, the petitioner had stated that the 'Marriage was properly consummated.' Rest of the contents of para 2 of the petition are not denied.' 4. In the course of the reply, the respondent however, alleged that the behavior of the appellant with the respondent caused rupture in the matrimonial relationship' and that the appellant made attempts 'to mete out cruel acts on the respondent which caused grave apprehension in her mind for safety of her life in the company of the petitioner.' It was further alleged that the appellant had taken somersault and was seeking a case for annulment having realised that he could not make out a case against the respondent either for restitution of conjugal rights or for judicial separation and it was alleged that the appellant's case for annulment had been met by the legal notice referred to above where in para 2 (b) the appellant had admitted that the ' marriage was properly consummated ' In the last para of the reply, the respondent however, expressed her sincere wish for the success of the petition in the following terms : ' That from the aforesaid circumstances, the truth remains that the respondent is not at all willing to join the company of the petitioner to save her life and therefore, she sincerely wishes the petitioner to get a decree of nullity of his marriage with the respondent. It is, therefore, prayed accordingly.'

(5) In the replication filed on behalf of the appellant, the circumstances in which the word ' consummation ' had been used in the counsel's notice was sought to be

explained as having relation to the plea for the restitution of conjugal rights and without the knowledge of 'full import of the word'. It was further alleged that the appellant thought that the solemnisation and consummation were one and the same thing. It was further alleged that when the notice was issued, the parties had lived together for a period of about three months out of a total married life of 8 months and although there had been no complete intercourse inspire of several attempts and the appellant suspected that the respondent suffered from ' some physical and mental disability ' and had advised her for medical examination but the appellant ' felt that in due course of time shs will be persuaded for medical check-up and treatment to cure her of any disability.' It was further alleged that the respondent's unwilling ness to permit the appellant sexual intercourse and her subsequent conduct in laving the appellant without a reasonable cause ' confirmed his suspicion that something was physically and mentally wrong with her which prevented her from discharging her marital duties ' and that ' it struck him them then that the respondent was impotent and unfit for conjugal intercourse ' and that he was ' defrauded in marrying the respondent.' The allegations made in the petition were generally reiterated.

(6) On April 15. 1972, when issues were framed, the learned Addl. District Judge recorded an order that the learned counsel for the appellant had sought the medical examination of the respondent and that the learned counsel for the respondent sought time to check up from the respondent if she was prepared to subject herself to medical examination or not. The matter was accordingly adjourned to April 24, 1972. When the matter came up at the adjourned date, there was no appearance on behalf of the respondent and proceedings were ordered to be and were eventually taken ex-parte.

(7) In the course of the ex-parte trial, the appellant examined his mother as Aw 2 and made a statement as his own witness as Aw 1.

(8) To the course of his statement, the appellant alleged that the appellant could not have sexual intercourse with the respondent that on the night following the marriage, when approached for sexual intercourse, the respondent declined ' saying that she apprehended that it would be something very painful ', that on the

following night, such an attempt was met with the remark that she did not like to have sexual intercourse ' and that the Subsequent attempts produced the same result and the respondent expressed that she was ' averse to such an act' It was further alleged that the appellant's persuasion did not prove of any avail and that apprehending physical or mental disability, the appellant advised medical examination but the respondent refused. The appellant further stated that he apprised his mother of the situation who consulted him that the respondent was probably too young and was for that matter not prepared for the sex act. She, however, promised that she would pursue her. It was further alleged that on July, 1971, he made a serious attempt for sexual intercourse and ' actually had started the act but the respondent started crying ' and it had to be given up. The appellant also proved respondent's letter Ex. P 1, copy of appellant's counsel's notice Ex. P2, reply to it Ex. P. 3 and subsequent letters Ex. P 4 and Ex P. 5 and concluded that he had inferred that ' respondent is physically or mentally unfit to perform her duties.'

(9) As the respondent was ex-parte, the learned Addl. District Judge took pains to elicit further information from the appellant by Court questions in reply to which the appellant admitted that his counsel's notice had been sent under his instructions and no additions had been made therein by the counsel of his own accord. He added that he had read the notice before it was issued and conceded that there was no reference in the notice to the alleged impotency of the respondent or to 'infructuous efforts' at sexual intercourse referred to in the statement. The appellant explained that he did not mention anything about this to his counsel at that time as the appellant only had 'suspicion that the respondent was impotent. But he did not like to mention it to the counsel 'on account of lack of confirmation' which according to the appellant was available because of the subsequent conduct of the respondent in refusing to join the appellant. The learned Addl. District Judge also drew attention to the apparent inconsistency between the statement in the notice that the marriage had been 'properly consummated' on the one hand and the averment in the petition and the statement in Court that the appellant could never perform the sex act on the other. This is how the inconsistency was sought to be explained by the appellant:

'ATthe time when the notice was sent, my motive soley was that the respondent should come back to me. Further I did not know the exact legal meaning of word consummation'. I thought that solemnisation and consummation were one and the same thing'.

(10) The appellant was, however, unable to give any Explanationn when confronted by the learned Addl. District Judge with the fact that there was separate reference in para 2(b) to the solemnisation of the mariage and consummation and as to how two different things were treated by the appellant 'as one and the same.'

(11) The mother of the appellant, who was examined asAW2, stated that during her stay with the appellant, she noticed that 'the relations between parties were not as they should have been' and supported the version of the appellant that the appellant complained to her that 'the respondent was not having proper conduct and dealings with him'. She added that the respondent would prefer to sleep near her while the appellant slept inside the room and that when asked, the respondent said 'it was hot inside'. She added that she tried to impress upon the r. spondent that she was newly married and she should have close relations with her husband but it had no effect. It was further stated that she thought 'thatthe respondent was young in age and that was the cause' and added that the respondent was not agreeable to the suggestion to be taken to a doctor. The witness, however, categorically stated that 'the petitioner told me that he could not have sexual intercourse with the respondent.' To Court question, the witness denied having written any letter to the respondent or having received any from her, and added that she never 'wrote to the respondent's parents at any time that she could not have sexual intercourse with the petitioner.' The witness further stated that the respondent never complained against the appellant and that the respondent was running 14th year at the time of the marriage.

(12) By his judgment under appeal, the learned Addl. District Judge dismissed the appellant's petition on the ground that the appellant's version that the respondent was impotent at the time of the marriage, in being incapable of performing sexual intercourse on account of some peculiar and rare aversion to the act of coitus with him was belied by the averment in the appellant's counsel's notice, in that, it

contained an admission that the marriage had been 'consummated' and also sought restitution of conjugal rights which the appellant would not have if the respondent was incapable of performing the act of coitus with him. The learned Addl. District Judge dismissed the Explanationn of the appellant as to the circumstances and the sence in which the term 'connummated' had been used in the notice and understood by him at that time and expressed the view that the appellant had set up a plea of annulment on the ground of alleged impotency of the respondent with a view to take undue advantage of the admissions contained in the respondent's father's reply to the counsel and later in the reply to the petition to the effect that the respondent was nervous and had developed hysterical fits 'to spin a false story for seeking annulment of marriage in the absence of any legal ground ' In coming to the aforesaid conclusion, the learned Addl. District Judge, in all fairness to him, was considerably circumspect in the examination of the material on record, as indeed, conscious of the obligation cast by sub-section (1) of Section 23 of the Act on the Court to grant relief only on being satisfied that the ground had been established and adversely 'commented on the fact that the allegations made by the respondent's father in the reply to the counsel's notice to the effect that the respondent had developed nervousness and fits while at Delhi had been denied by the appellant as absolutely fantastic and baseless and the said allegations were sought to be made use of be the appellant to bolster up a false case of psychological impotency, which according to the learned Addl. District Judge the appellant could not be allowed ' to do.

(13) Shri R. L. Tandon, who appeared for the appellant, assailed the judgment of the learned Addl. District Judge on the ground that the material placed on the racord by the appellant coupled with the admissions made by and on behalf of the respondent and the other circumstances of the case, entitled the appellant to the annulment sought by him in the absence of any rebuttal and criticised the rejection by the learned Addl. District Judge of the Explanationn offered by and on behalf of the appellant as to the circumstances in wiich the appellant's counsel had admitted that the marriage had been duly 'consummated' and the adppellant had sought by notice a mere restitution of conjugal rights without any reference to the alleged impotence of the respondent.

(14) On the other hand, Shri H. L. Narula, the learned counsel for the respondent justified the impugned judgment on the various grounds on which it is based.

(15) After hearing learned counsel for the parties, it appears to me that, even though the way at which the learned Addl. District Judge has looked at the entire controversy represents a possible view that could be taken on the facts and circumstances of this case, there is no reason why the version put forward by the appellant and the Explanationn offered by him and on his behalf should not be accepted on the peculiar facts of this case in the absence of any rebuttal and, in particular, the failure of the respondent to submit to medical examination or even to make a statement in Court for which an' additional opportunity was given by me and which would be referred to in detail in due course.

(16) It was the common case of the parties at the trial that the marriage between the parties was rocked almost at the threshold and the respondent whether for the reason attributed to it by the appellant or for the reason advanced on behalf of the respondent in her own words and that of her father, developed a peculiar aversion to the appellant to such an extent that whenever the appellant's name was uttered in her presence, she became nervous and whenever any suggestion was made to her to join him, 'the magnitude of her nervousness causes faints to her and at times, she becomes delirious.' If the aforesaid state of mind of the respondent be the result of any ill-treatment of the respondent by the appellant either because of what was described by the respondent and her father as 'inhuman treatment' or 'compliance of disgraceful conduct' or because of 'mental and physical tortures', the appellant would certainly not be entitled to the relief, for, in that case, he would clearly be taking undue advantage of his own wrong. If, however, the aversion and abhorrence that the respondent hid developed for the appellant has its genesis either in her fear of the consequences of coitus or any aversion to it, either because of her tender age or perhaps because inspire of her tender age, the appellant may have tried to force himself on her inspire of her reluctance or on account of some such reason, the appellant would be entitled to a decree of nullity on the ground of impotence, in that, insuch a situation it could be said with justification that the aforesaid aversion or abhorrence to sex act generally or with the appellant constituted a phychological impotency in the respondent for an act of

coitus even though the respondent may not be physically unable or incapacitated for it.

(17) The appellant has placed before the Court the necessary material in support of his version and the respondent had full opportunity to disprove it or to place before the Court material in support of her version. The respondent however, even while denying the allegation by her written statement, chose to be ex-parte. The appellant would, therefore, be entitled to his version of the circumstances being accepted in the absence of any rebuttal.

(18) The version of the appellant is further reinforced by the circumstance that the respondent chose to be ex-parte only after the trial Court asked the learned counsel for the respondent to obtain her instructions with regard to her readiness to submit to medical examination. This attitude of the respondent would certainly justify an inference that the medical examination would perhaps have provided material in support of the appellant's case.

(19) Even at the hearing of the appeal, I made an offer to learned counsel for the respondent to obtain instructions if the respondent was prepared at that stage to submit to medical examination even at the place she was at present residing and gave an opportunity to the respondent's counsel to produce her to make a statement on oath in support of her version and as to the circumstances leading to the rupture and, even though learned counsel sought a couple of adjournments to enable him to obtain the necessary instructions, he was unable to avail of the opportunities and expressed the respondent's unwillingness either to submit to medical examination or to come forward to make a statement on oath in this Court controverting the material placed on the record by the appellant.

(20) It further appears to me that the rejection by the learned Addl. District Judge of the appellant's Explanation with regard to the circumstances in which the appellant's counsel described the marriage as having been duly 'consummated' and as to his plea for restitution of conjugal rights in the notice and a total absence of any reference to the alleged inability or incapacity, physical or psychological of the respondent for an act of coitus is unjustified. The term 'consummation' in relation to marriage has never presented any difficulty when used in common

parlance for it would indicate an act by which the parties perfected their marriage and had a sex relation. The juridical meaning of the term has, however, been subject matter of considerable controversy and it is by now well settled that in legal parlance 'consummation' must mean full and complete penetration and a partial penetration or an abortive attempt at intercourse or an incomplete act of coitus would not constitute consummation' : AIR1970 Guj43 . The explanation of the appellant is, therefore, reasonable that when the counsel used the phrase 'duly consummated' he had the ordinary meaning in view i.e., of the perfection of the solemnisation of marriage, in that, they lived together as husband and wife and shared a common bed. It must also be remembered in this context that at that stage counsel had been instructed to seek restitution of conjugal rights, and had not been told as to what had actually transpired between the couple besides references to matrimonial disharmony. The marriage between the parties was until then a very recent one. The respondent was admittedly of very tender age. Her disinclination to a sex act or aversion to it or fear of it in the circumstances could not have justified a definite conclusion at that stage that this had its genesis in any psychological inability or incompetence for a sex act. Such a conclusion on behalf of the appellant would have been considered rash. The appellant's attitude, therefore, that he should initially seek restitution of conjugal rights was, therefore, quite understandable and would appear to me to be reasonable. It must be further remembered in this context that if the appellant thought that the respondent had aversion to the act of coitus at that tender age, it would not constitute such a disability as would have morally justified the appellant to avoid the respondent. The fear of the appellant was to an extent borne out by the respondent and the respondent's father's description of the state of mind of the respondent disregards the appellant and the prospect of her continuing the married life with the appellant.

(21) Having regard to all the circumstances of the case I am satisfied on the material placed on the record to the face of the respondent's refusal to submit to medical examination and to avail of the opportunity to produce any material to the contrary, that the respondent had a peculiar aversion to the sex act with the appellant, for reasons which do not appear to be clear, which would entitle the appellant to a decree for the annulment of the marriage under Section 12(1)(a) of

the Act. I am also satisfied from the circumstances of the case that there has been no collusion between the parties even though in her written statement, the respondent even while denying the allegations, expressed her sincere desire that the petition succeeded, and stayed away from the proceedings and declined twice, once before the trial Court and once in this court, the opportunity to submit to medical examination or to produce any material to meet the case set up by the appellant.

(22) In the result, the appeal succeeds. The impugned judgment of the learned Addl. District Judge is set aside and the petition of the appellant for annulment of marriage is decreed under Section 12(1)(a) of the Act.

(23) In the peculiar circumstances of the case, however, the parties would bear their respective costs.

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