

C. Howel Vs. R.S. Howel

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Court : Delhi

Decided On : May-05-1982

Reported in : 1982RLR522

Judge : S.S. Chadha and; N.N. Goswamy, JJ.

Acts : Indian Divorce Act - Sections 10

Appeal No. : Matrimonial Reference Appeal No. 40F of 1980

Appellant : C. Howel

Respondent : R.S. Howel

Judgement :

S.S. Chadha, J.

(1) Parties are Christians. In 1970, petitioner was a teacher at Delhi while Respdt. was a gaurd in Northern Rly. at Ludhiana. They were married on 6.5.70. Relations between the two were not smooth and they cohabited for brief periods at Delhi and at Ludhiana. A daughter was born to them on 6.12.72 at Delhi. To patch up strained relations husband's father took the wife to Ludhiana, in Dec., 73. In early 1974, she got a job there in a school. Neighbours told her that Respdt. was having indecent relations with a girl of 11, 12 years. She did not believe this until she saw them both in the room indulging in indecent behavior in April, 1975. She again

noticed this in Nov., 75 when she saw that Respdt. and the girl were semi naked and latter was sitting in his lap and he was kissing her. Petitioner left the house and then filed petition for divorce. She deposed the aforesaid facts and Adj granted her decree which came before High Court for confirmation. [After give above facts, judgment runs :]

(2) N.N. Goswami, J. 10. Question for our consideration is whether from the aforesaid evidence the allegation of adul ery can be inferred. Nobody has yet attempted to define adultery, but in Rayden on Divorce. 1979 13ed. 196 it is stated :

'ADULTERY may be defined as consensual sexual intercourse between a married person and a person of the opposite sex, not the other spouse, during the subsistence of the marriage. There must at least be partral penetration for the act of adultery to be proved. The attempt to commit adultery must not be confused with the act itself, and if there is no penetration some lesser act of sexual gratification does not amonut to adultery. Once sexual intercourse is proved, the onus of proof is on the respondent to show it was not consensual. Artificial insemination by a donor not the husband is not adultery, since there is no penetration.'

(3) The aforesaid passage is based on various judgments on the subject. In Sansford v. Sansford and Furtade, (2) Aer 373, it was found that on a number of occasions, the wife masturbated the co-accused. It was held that mere masturbation of the one by the other does not come within the ambit of mutual sexual intercourse. That of course is an act of sexual familiarity which on any view of the marriage can hardly be thought to be consistent with the duties of a wife towards her husband but the same cannot amount to an adultery. In Damir v. Dornis 1955 (2) Aer 51, the husband pleaded that in or about the autum of 1941 the wife frequently committed adultery with one Mr. C.B. Spillett and prayed that the marriage be dissolved on the ground of adultery as well as other grounds. The wife in her evidence stated that she was attracted by Mr. Spillett and that she was ready and willing to commit adultery with him, that on the only occasion they attempted Mr. Spillett was enable to do that. She also described her fondness for

Mr. Spilett and stated that he had visited her flat several times and on the important day she went to the bed room, took off most of her clothing and Mr. Spillett after a little time followed her to the bed room and he took off part of his clothing and having put on his person a sheath he got on to the bed on which she was lying. He tried to have sexual intercourse with her but he was unable to effect this purpose. On these facts, the Court of Appeal came to the conclusion that the act of the parties did not constitute adultery. It was further held that adultery cannot be proved unless there is some penetration. It is not necessary that the complete act of sexual intercourse should take place but if there is penetration by the man of the woman adultery may be inferred but if there is no more than an attempt it is not possible to record the finding of adultery.

(4) In the light of the passage from the Rayden on Divorce reproduced above and the conclusions in the two cases cited above, it is not possible for us to infer 'adultery' on the evidence in this case. All that the petitioner has deposed is that her husband and her girl of 11 to 12 years of age were indulging in indecent acts and were naked in a room. Even while describing the incident on the second occasion she deposed that the respondent was lying on the girl with his hand on the private part of the girl. Obviously after she noticed this nothing further could have happened because she had entered the room thereafter. There is not even an allegation in the petition or a suggestion in the evidence that there was any penetration by the man of the girl. At best these could be said to be indecent acts of sexual gratification and as long as they are unaccompanied by some penetration they cannot amount to adultery. The learned counsel for the petitioner relied on Saroj Kumar Sen Vs Kalyankanta Roy 85, Calcutta Weekly Notes 78 for the proposition that it is not necessary to have a direct evidence and a preponderance of probability is enough to infer adultery. This proposition cannot be disputed but in that case, it was not found as a fact that Dr. Saroj Kumar Sen had voluntarily committed adultery with Devika in petitioner's quarters in the morning after 9.00 a.m. and he also committed adultery with her in the bed room of the petitioner's quarter on the morning of 6.11.1969. This finding was arrived after considering the admissions and other evidence led by the parties. In our opinion that case can be of no help to the petitioner.

(5) For the reasons recorded above, we are unable to confirm the decree nisi passed by the learned A.D.J. and consequently dismiss the petition.

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