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Court : Delhi

Decided On : Dec-19-1980

Reported in : 19(1981)DLT239; 1981RLR255

Judge : S.N. Kumar, J.

Acts : [Divorce Act, 1869](#) - Sections 18

Appeal No. : First Appeal Order No. 251 of 1979

Appellant : Annie Benjamin

Respondent : BanjamIn Mathew

Advocate for Pet/Ap. : Mahajan, Adv

Judgement :

S.N. Kumar, J.

(1) This is an appeal against the order of the Additional District Judge dismissing the petition under Section 18 and 22 of the Indian Divorce Act, 1969. The petition was tried and heard on the following issues:-

1. Whether the respondent is impotent, as alleged in the petition? If so, to what effect Opa
2. Whether the respondent has treated the petitioner with cruelty, as alleged in the petition Opa
3. Relief.

All the issues were decided against the appellant-wife. Before me the learned counsel for the appellant has pressed issue No. 1 only.

(2) The petitioner/appellant is a qualified nurse and the parties were married in Kerala according to Christian Rite as stipulated by the Church of South India on 11th August, 1977. Both the parties were employed in Delhi and they finally separated on 12th December, 1978 in Delhi, where they last resided together. The petitioner in her statement on the point of impotency of the husband stated as under :-

'THE respondent has failed to discharge his marital obligations towards me. In fact, he is never interested in having sexual relations with me. Once or twice, I myself asked him to have such relations but he declined to do so. I even excited him but he could not do the sexual act. Respondent is impotent. He has never been able to cause erection. In fact, he would discharge even before the sexual act. She further deposed that 'number of times I tried my level best to excite the respondent to have sexual acts with me but he failed to do any such act' ...And went on to state that 'Even at the aforesaid residence at Sarojini Nagar, the respondent failed to consummate the marriage or to perform sexual intercourse.'

The respondent in his statement, however, stated as under :-

'OUR marriage was actually consummated within thirty seven days of the marriage while we were staying at Kerala. I am perfectly potent. In fact the petitioner became pregnant also three times... It is wrong to suggest that I have myself been avoiding sexual relations with the petitioner. It is also wrong to suggest that I am impotentIt is wrong to suggest that I used to get discharged before the sexual act. It is wrong to suggest that I ever begged to be forgiven by the petitioner. Letter Exhibits P-1 and P-2 are mine and I had written them to the petitioner. Letter Exhibit P-4 is also mine. I had written it to the petitioner.'

(3) Although, one of the parties stated in the pleadings that the petitioner became pregnant at any time during the period 11th August 1977 to 12th December, 1978, the petitioner in her cross-examination when asked stated 'that once on account of the involuntary discharge of the respondent I became pregnant. However, the

respondent has not been able to satisfy me as he is otherwise impotent. That pregnancy was voluntarily got terminated by me.' No other evidence was led that was relevant issue No. 1 and the evidence was closed on the statement of parties. Afterwards, the husband-respondent moved an application to lead additional evidence on both the issues which was allowed and he summoned the record of All India Institute of Medical Sciences where the petitioner was working. The record was produced and the statement made by the petitioner was found to be correct that she became pregnant once during the aforesaid period.

(4) The first point taken note of by the trial court is that the petitioner did not in her petition state that she ever became pregnant, whereas in her cross-examination she has admitted so. It is correct that this was a material fact which should have been brought out in the petition and the petitioner did suppress this material fact but this would not disentitle her to 'relief after a full trial. I think, it is more surprising that the respondent-husband in his written statement did not mention this fact, although from the material on record it appears that he fully knew about the pregnancy and its termination when the parties were living together. No explanation has been given by the husband as to why such an important fact in support of his case was not stated in the pleadings.

(5) The second point taken specific note of by the trial court is that the wife did not ask for the medical examination of the husband and the trial court was of the view that she is to be blamed for it. I do not think medical evidence could be of any assistance in the present case. It is 'quite apparent that the case pleaded by the wife was not of any mal-formation of physical defect. It was also not the case of the petitioner that the sexual organs of the husband could not produce healthy semen. The case set up was of psychical impotency of the husband qua the petitioner, his inability to cause erection and perform sexual intercourse with her.

(6) The impotence may be on account of physical or mental condition which makes the consummation of the marriage a practical impossibility. Marital relationship has its own peculiarities which vary with different individuals who enter into this relationship. Dealing with a case of cruelty Lord Reid in his speech in *Gollins v. Gollins* (1963) 2 A.E.R. 906 said :--

'IN matrimonial cases we are not concerned with the reasonable man, as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with 'a presumption that the parties are reasonable people, because, it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people.'

(7) Although this is not a case of cruelty but I think due weight to individual peculiarities has to be given in such matrimonial causes too. This aspect is well illustrated by *Patra v. Patra*, : AIR1966 Ori224 , decided by a Special Bench consisting of three judges. There the husband filed a petition on the ground of impotency of the wife pleading that whenever , petitioner-husband tried to have sexual intercourse with the respondent wife, she shrieked and fainted. The Explanationn given by her was that whenever there was any advance or overture made by the husband she used to develop burning sensation in her vagina and, .therefore, it was not possible for her, to have any sexual intercourse. The respondent-wife did not object to the grant of a decree for nullity for arid on the contrary took the plea that she had a positive hatred and disgust the husband-petitioner. On these facts their Lordships took the view that it leaves no manner of doubt that the respondent-wife was impotent vis-a-vis the petitioner.

(8) The third point noticed by the trial court is that there is no other evidence besides the statement of the petitioner either medical or otherwise to show that the husband could not cause erection and perform sexual intercourse. In cases involving pyschic condition the only direct evidence available by the very nature of things would be of the parties. It may validly be said in this case that the statements made by the parties are not in great detail. However, in my opinion, the wife has stated on oath the facts which, if believed, would lead to the conclusion that the marriage between the parties was not consummated. The husband in his statement did not try to meet the case set up by the wife in her testimony, as I will presently discuss.

(9) The fourth circumstances considered material and I think rightly so, by the trial court was the pregnancy. *Manjula'a case*. 1979 Rlr 261 decided by three judges of

this Court in a matrimonial reference under the same Act was brought to his notice wherein this Court held that the birth of a child does not necessarily lead to the conclusion that the marriage was consummated. Their Lordships held on the basis of the material on record that the child born to the petitioner-wife by her husband was the consequence of fecundus ab extra and there was no intercourse. The trial court has taken the view that Manjula's case proceeded ex parte and there was nothing to rebut the testimony of the wife about the circumstances which led to her conception without sexual intercourse, whereas in the present case there was opposition by the husband who swears by his potency. Whether a matter was heard and decided ex parte is not the deciding factor. The question to be answered always is whether or not the evidence on record is believed by the Court discloses all the facts and circumstances that would enable the court to validly hold that the respondent was incapable of consummating the marriage. This leads me to the next step that is, to look into the oral evidence on record, about impotency which I have reproduced above.

(10) The petitioner in her statement has made a specific allegation regarding the inability of the respondent to perform sexual intercourse and also her failure to excite him. She has further stated that he has never been able to cause erection. In the cross-examination she was not put any question about the inability of the husband to cause erection. Her Explanation that the pregnancy on one occasion was on account of an involuntary discharge of the respondent was not at all pursued further in the cross-examination and no question was put to her to elaborate it, which, I think, was called for particularly when both the parties did not plead the pregnancy.

(11) The respondent in his statement on oath has stated that the marriage was consummated and that he was perfectly potent. In fact, these are the conclusions which have to be arrived at by the court. 'There are no facts brought on record in the testimony of the husband to arrive at the conclusion that he was actually able to consummate the marriage. In his examination-in-chief he does not even attempt to rebut the specific statement made by the wife on oath that once or twice she herself asked the husband to have sexual relations but he declined to do so and that she even excited him but he could not do the sexual act and further that he

has never been able to cause erection. The husband also did not depose about the Explanationn of the wife that the pregnancy was caused on account of an involuntary discharge. He stated that he was fully potent and that the marriage, was consummated within the .first 37 days of the marriage. This statement by the husband itself puts the matter in some doubt. No doubt, because of the admitted fact of pregnancy of the petitioner, the burden was heavy on the petitioner. She gave the Explanationn for it but this Explanationn was not questioned at all. As noticed by me, above, fact of pregnancy was raised in the cross-examination of the petitioner for the first time and she explained that it was on account of the involuntary discharge of the respondent. She simultaneously was maintaining that the respondent was not able to perform sexual intercourse. It was for the respondent to seek further elaboration of this statement. It is evident that had the cross-examination proceeded further the petitioner would have explained in greater detail what she precisely meant by involuntary discharge and in what circumstances it took place. The respondent on the other hand, in his evidence is completely silent about it. The appellant in my opinion has succeeded in establishing on record that the respondent was not able to perform proper sexual intercourse with her. In Manjula's case the learned Judges observed that :-

'IMPOTENCY is inability to consummate the marriage and to be a ground of nullity, such inability must exist at the time of marriage and continue to exist at the time of the institution .of the suit. For this purpose sexual intercourse has been defined as ordinary and complete intercourse, not partial ' and imperfect intercourse. If so imperfect as scarcely to be natural, it is no intercourse at all.....' . Impotency means incapacity to consummate the marriage, and not merely incapacity for procreation. The test is consummation and capacity to consummate.'

Rayden on Divorce (1974) 12th Ed. Vol. I at page 160 observes :

'FULL and complete penetration is an essential ingredient of ordinary, and complete, intercourse.'

(12) This Court held in Manjula's case that even if there was conception it is not to be assumed that it was the result of proper intercourse. Their Lordships further look note of a passage from Taylor'S Medical Jurisprudence which reads :-

'A curious, though no. doubt legally correct, decision, was reached in a' case in 1950 in which a wife asked the court to accept her plea that though she had a child by her husband, it was a consequence of fecundus ab extra. Though he attempted sexual intercourse without success owing to ejaculatio praecox. the Court held that the marriage: had never been consummated owing to the incapacity of the husband.'

Further, I notice that the trial court has not taken note of Exhibit P-4 which is a letter written in Malayalam by the respondent to the petitioner. Its true translation is on record. It was written on 4th December 1978, by the respondent-husband to the petitioner-wife who states I have gone to her native place in Kerala, whereas the husband was, in ' Delhi.' The parties finally separated on 12th December, 1978 and this a letter which was written about a week before the final between between the parties and about sixteen months after marriage. The respondent-husband wrote:-

'ANNIE, after you left this place I was thinking day and 'night where I have mistaken. After marriage also I was trying to get love from others like before marriage. I was doing. Then I have mistaken. But to understand it took 16 months.'

Although, this letter was proved in cross-examination of the respondent husband, there was absolutely no attempt by the husband to explain as to what he meant by laying that

'AFTER marriage also I was trying to get love from others as before marriage.'

(13) I find that on material points that evidence of the appellant- wife remains un rebutted. The husband did not depose as to how he considers himself potent As I have observed above potency is to be found by the Court on the facts proved. Without proving facts on record which lead to the inference that the husband was able to perform and did not perform proper sexual intercourse, his deposition about the conclusion cannot be of much help to him.

(14) In view of the above discussion, the appeal is allowed, and the marriage between parties is declared null and void. There will be no order as to costs.

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