

Valsa Vs. Moore

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Court : Kerala

Decided On : Nov-29-1990

Reported in : I(1991)DMC576

Judge : Sreedharan, J.

Acts : [Divorce Act, 1869](#) - Sections 19

Appeal No. : O.P. No. 6080 of 1989

Appellant : Valsa

Respondent : Moore

Advocate for Def. : K.P. Dandapani, Adv.

Advocate for Pet/Ap. : S. Ananthasubramanian, Adv.

Judgement :

Sreedharan, J.

1. This is a petition under Sections 18 and. 19 of the Indian [Divorce Act, 1869](#). Petitioner is the wife. She prays for a declaration that the marriage between her and respondent is null and void.

2. The material averments made by the petitioner which are germane for disposal, are as follows : Petitioner then a spinster of 22 years of age was married by

respondent, a widower aged 42, on 12-6-1978 at the C.S.I. Immanuel Church, Ernakulam. From the date of their marriage till 17-12-1980 she lived with respondent as his wife. At the time of celebration of the marriage respondent was by reason of his impotency legally incompetent to enter into the contract of marriage. The marriage was fraudulently brought about without disclosing the fact that respondent was impotent. He is a well to do lawyer practising at Parappanangadi. He had three grown up children; two daughters and a son. He having lost his wife, mother of the children, was eager to marry again. Petitioner's father is an Ex-serviceman getting a meagre pension of Rs. 204/- per month. He has eight children : five daughters and three sons Petitioner is the eldest among the children. Mr. N.V. Antony, a friend of the petitioner's father was approached by the sister of the respondent living at Fort Cochin and the offer was attractive in as much as it was made clear that no dowry need be paid nor any ornaments need be given. Petitioner's father and mother requested Mr. N.V. Antony to ascertain whether the respondent had undergone vasectomy as he had three children and all are fairly grown up. Her parents were assured that he has not undergone vasectomy. Even-after living with respondent with regular carnal copulation for nearly two years, petitioner did not conceive and ultimately he in a weak moment confided to her that he has undergone vasectomy. Petitioner had the natural desire to become a mother. Respondent having wilfully and fraudulently suppressed the fact of having undergone vasectomy to entrap petitioner, assured that he will get back potency by undergoing recanalisation operation at Vellore. On that assurance both went to the Medical College, Vellore and consulted an expert doctor. As the doctor was about to leave India, he fixed a later date for operation. The respondent on coming back home embraced the Pentecost denomination along with his children. Operation or treatment being opposed to his new faith, he became adamant that he would not undergo operation. Respondent was thus impotent at the time of marriage and he continues to be so even now. He began to behave cruelly towards the petitioner. He did not like her continuance as C.S.I. Jacobite Christian. On that account he began to manhandle her. Finding that she can no longer lead a happy married life and her dreams to become a mother frustrated, she sought asylum with her parents from 17-12-1980. Respondent is not maintaining her. O.P. 9467/86 moved by her for a declaration that the marriage

between the parties is null and void happened to be dismissed on account of the filing of a joint statement. A petition was filed for reviewing that judgment as R.P. 40/88. While disposing of that Review Petition this court observed :

'The earlier proceedings will not prejudice the right of the petitioner to file a fresh Original Petition for the same relief.'

Hence this petition for reliefs mentioned earlier.

3. Respondent filed a detailed counter affidavit. The averments made therein are as follows: The grounds justifying the passing of a decree declaring the marriage null and void have not been made out in the Original Petition. There is no allegation that respondent was incapable of entering into sexual intercourse either at the time of marriage or there-after. The averment that the marriage was fraudulently brought about without disclosing the fact that respondent was impotent is base-less and hence denied. It is true that respondent has undergone vasectomy operation at the time when his first wife was seriously laid up with tuberculosis. Petitioner's parents approached him through Advocate Sri P.M. Chandran for marriage with petitioner. Her father's friend Shri N.V. Antony, in the presence of petitioner's father and 2 uncles had in fact asked Shri Chandran whether respondent had undergone vasectomy operation and Shri Chandran had clearly informed Shri N.V. Antony that the respondent had undergone vasectomy operation. Query about vasectomy operation struck slightly incongruous. The reason for the query became apparent soon after the marriage when she was showing great reluctance to sexual intercourse. When asked for the reason she revealed that she was suffering from rheumatic arthritic condition of the heart. She said it was dangerous for her to conceive. The query regarding vasectomy operation was really to re-assure that there is no chance for her getting pregnant. When both Allopathic and Ayurvedic system failed to give any relief to her ailments and they were advised that there is no cure for her condition they decided to follow the path of prayers and fasting. By following that path petitioner was substantially cured of her condition. On 4th April, 1980 she was completely cured in the prayer ministry of Brother D.G. Dinakaran and she testified to this fact from the platform of a great public gathering at Kannur. Under these circumstances she wanted to

embrace the Penthacost faith. After the petitioner was cured on 4th April, 1980 question of respondent undergoing recanalisation was brought up. Both went to Vellore in October 1980. Doctor had asked to go to the hospital in September, 1981 for recanalisation. In the meanwhile she insisted on being taken back to her house. Thereafter her father did not allow the petitioner to join him for the reason that she might take adult Baptism. He had never manhandled her or behaved cruelly towards her. She is employed in Kariyappalli Coconut Products, and is getting a salary of not less than Rs. 600/-. The marriage between the parties is perfectly legal and valid. There was no suppression of material facts. Petition is only to be dismissed.

4. The issues that arise for consideration are :

(i) Whether the marriage between the petitioner and respondent is liable to be declared nullity on account of the respondent was impotent at the time of the marriage and at the time of the institution of the proceedings;

(ii) Whether the marriage between the parties is to be declared null and void on the ground that the consent of the petitioner was obtained by fraud; and

(iii) reliefs and costs.

5. In the nature of the contentions raised by the parties and the evidence let in, I consider it advantageous to deal with issues (i) and (ii) jointly.

6. Petitioner gave evidence as P.W. 1. Respondent was examined as CPW-1. He proved Exts. R1 to R8.

7. PW-1 has given evidence in support of the averments made by her in the petition. She would say that when the marriage proposal was mooted respondent was asked whether he had undergone. Vasectomy operation and that he replied in the negative. Even after 30 months when she did not become pregnant she enquired about the reason and then he revealed that he had undergone vasectomy. According to her, he added that he kept back this information thinking that she would not marry him if she knew about it. It is further stated that at her instance he agreed for recanalisation at Vellore hospital. But he backed out after

he joined the Pentacost Assemblies of God Church. In cross examination she deposed that when her sisters got married the prospective grooms were not asked as to whether they had undergone vasectomy. That was not done because they had not married earlier. She was not aware whether Chandran had informed Antony that the respondent had undergone vasectomy. She did not marry the respondent knowing that he had undergone vasectomy. Since he had three children by the first marriage, her father wanted to ascertain whether he had undergone vasectomy. After ascertaining from the respondent, according to her, Antony informed her father that the respondent had not undergone vasectomy. Her knowledge is based on the statement of Antony. She had no cardiac problem and she denied the suggestion that she was treated by Dr. Radhakrishnan. She went on to state that she had not resorted to prayer to cure any ailment. But she had attended the prayer meeting of Brother Dinakaran as respondent wanted her to attend the meeting.

8. Respondent as CPW-1 stated that the petitioner was suffering from rheumatic arthritis of the heart. It was cured at the prayer meetings conducted by Brother Dinakaran. . Petitioner left him on account of her father's compulsion on 16-12-1980. To prove that she got cured of the ailments at the meeting he produced Ext. R1 publication. According to him, petitioner was treated in the Medical College Hospital at Alappuzha and Thiruvananthapuram. Dr. Radhakrishnan of Parappanangadi treated her and the prescriptions given by that Doctor are marked as Exts. R3 to R4. Ext. R5 is the prescription given by Aryavaidyasala. The postal acknowledgement signed by her on receiving the letters sent by him are marked as Exts. R6 to R8. He denied the allegation of impotency. He has given his monthly income as Rs. 700/ He deposed that petitioner became unconscious for about two hours when he had sexual intercourse with her for the first time. The reason for unconsciousness during sexual intercourse was given by her as rheumatic arthritis of the heart. He was cross examined with reference to the medicines administered by the Doctor and the Ayurvedic Physician. When he was specifically asked whether Chandran had told Antony that he had undergone Vasectomy, the reply was 'Chandran told me that everything was disclosed to Antony and petitioner's father. I was not there'. He was then asked 'Is it because of the deception practised by you through Chandran and Antony that you had not

undergone vasectomy, that petitioner married you?' The answer was 'No deception was made by me'.

9. The allegation of impotency has been made only on account of the fact that the respondent had undergone vasectomy operation. Can it be said that by vasectomy operation one will become impotent Vasectomy means surgical removal of all or part of 'vas deferens'. Vasectomy is a mode of sterilisation. 'Sterilisation' according to the Black's Law Dictionary means 'the act or process by which one is rendered incapable of procreation as, for example, the act of tying the female Fallopian tubes or a vasectomy'. Vasectomy is thus only a mode of sterilization. Sterilization does not render a man impotent. 'Impotent' is one who suffers from 'impotency'. 'Impotency' is the inability to perform the sexual act. 'Sterility' is inability to procreate. Existence of conditions of sterility does not necessarily imply the existence of the other. An individual may be sterile, but not impotent. There may be cases where a person who is impotent may not be sterile. 'Impotency' is a physical incapacity of accomplishing the sexual act, while 'sterility' means inability for procreation. An impotent individual need not necessarily be sterile, nor a sterile individual impotent. Both conditions may some-times be combined in the same individual. 'Impotence' is the inability to have sexual intercourse whereas 'sterility' is the inability to impregnate. Impotency as a ground of divorce means want of capacity to consummate the marriage and not merely incapacity for procreation. The capacity to copulate and capacity to procreate are two different capacities. The resultant incapacities are also different. Impotency thus means incapacity, physical or mental on the part of either spouse to copulate. This incapacity may be permanent and incurable. The impotency of the husband means his incapacity to perform sexual intercourse meaning thereby ability to perform a normal and complete coitus, as distinguished from incipient, partial or imperfect one. Sterility is not necessarily associated with impotency. In paragraph 6 of the Original Petition it is averred :

'Even after living with the respondent with regular carnal copulation for nearly two years, the petitioner did not conceive and ultimately the respondent in a weak moment confided to the petitioner that he had undergone vasectomy'.

From this averment it is evident that the respondent was having the physical capacity to have normal and complete coitus with the petitioner. When they had such a normal and complete coitus it cannot be said that the respondent was impotent. As stated earlier, impotence is the inability to have sexual intercourse. On the petitioner's own showing the respondent had the ability to have complete sexual intercourse with her. Consequently her contention that the respondent was impotent at the time of the marriage and that he continues to be so at the institution of this proceeding has only to be rejected. I do so.

10. Under Section 19 of the Indian Divorce Act the High Court can make a decree of nullity of the marriage on the ground that the consent of one of the parties to the marriage was obtained by the other by playing fraud. 'Fraud' as envisaged by the section takes in the active concealment of a fact by one having knowledge or belief of that fact. (Vide Section 17 of the Indian Contract Act). Fraud is committed wherever one person causes another to act on false belief by a representation which he does not himself believe to be true. 'Fraud' means a false statement 'made knowingly, or without belief in its truth, or recklessly, careless whether it be true or false'. (Derry v. Peek (1889) 14 AC 337). If the respondent has concealed the vasectomy operation from petitioner before the marriage was solemnised, will it amount to 'fraud' Was there concealment or deception by the respondent as to Vasectomy operation in this case According to the petitioner, enquiry was made as to whether the respondent had undergone vasectomy. This was so done because, he had grown up children and his first wife was ailing for a pretty long period. According to her, the respondent made her believe that he had not undergone vasectomy operation. The case put forward by the respondent is that petitioner's relations wanted to know whether he had undergone vasectomy operation, or not, because petitioner on account of her heart ailment was not capable of becoming pregnant. To alleviate their fear, it is stated by him that he had divulged the true state of affairs. To the specific question put to CPW-1 as to whether deception was practised by him through Chandran and Antony in concealing his vasectomy operation, his answer was 'no deception was made me'. According to me, this answer goes a long way to support the contentions put forward by the petitioner that the factum of his having undergone vasectomy operation was not made known to her. CPW-1 has only stated that he did not keep the fact a secret and

whether his agent has revealed the same to the petitioner or not is not known to him. Even silence in such circumstances constitutes misrepresentation.

11. Maternity is the natural inclination of a woman. C.A. Stoddard said :

'There can be no higher ambition for a Christian woman than to be a faithful wife and a happy and influential mother. It is the place which God has given woman, and she who fills it well, is honourable and honoured as the most illustrious man can be.'

Petitioner had the craving to become a mother through her husband. But the sterility of the respondent as a result of the vasectomy operation has gone to wither her ambition. Vasectomy operation which he had undergone was a material aspect which he should have revealed to the petitioner. Such a material matter was kept concealed. The concealment of that fact by the respondent has resulted in playing fraud against the petitioner.

12. The contentions raised by the respondent regarding the rheumatic arthritis of the heart of the petitioner is not supported by any evidence. Exts. R3 to R5 do not support the same. Ext. R5 shows that Ayurvedic Physician prescribed 'Sukumara Ghrutbam' to the petitioner. The medicine even according to CPW-1 is one to have easy conception. The respondent took the petitioner to Ayurvedic Physician and got 'Sukumara Ghrutham' prescribed. According to him 'Sukumara Ghrutham' is prescribed for easy conception because she did not conceive. From this it is evident that even at the time when the petitioner was taken to the Ayurvedic Physician, she was not told about the vasectomy operation underwent by the respondent. By that operation he become sterile. Thereafter, I fail to understand why he got Sukumara Ghrutham administered to her for easy conception. This action of the respondent goes a long way to establish the case of the petitioner that fraud was played by him in getting the consent of the petitioner. That fraud was continued to be played even after the marriage. So, I have no hesitation in holding that the marriage between the parties has to be declared as nullity on the ground that the consent of the petitioner was obtained by respondent by playing fraud. Issues (i) and (ii) are found accordingly.

13. Issue No. (iii).

Marriage between the petitioner and respondent is declared null and void.

14. Petitioner contends that she is not having any means of livelihood. This allegation is denied by the respondent. But no material has been placed before court to substantiate this denial. Respondent is a practising advocate. He is having sufficient means. So, he must pay maintenance to the petitioner. Accordingly, I direct the respondent to pay Rs. 300/-per month to the petitioner for her life or till she re-marries, whichever is earlier, towards her maintenance.

The Original Petition is disposed of in the above manner. I make no order as to costs.

Issue photo copy of the judgment to the parties on Usual terms.

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