

A. Vs. B.

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Court : Gujarat

Decided On : Aug-27-1980

Reported in : (1981)22GLR273

Judge : D.C. Gheewala, J.

Appellant : A.

Respondent : B.

Judgement :

D.C. Gheewala, J.

1. A wife having applied under Section 125 of the Cr.P. Code for maintenance from respondent No. 1 husband before the learned Metropolitan Magistrate, 7th Court, Ahmedabad and having emerged second best in the said proceedings has preferred the present revision application.

2. The main contention on which she based her claim was that the husband was sexually impotent and that he was unable to discharge his primary responsibilities towards his wife. The parties were married on 27-5-1978 at Ahmedabad according to the Sunni Muslim Shariat rites. After the marriage the petitioner had gone to the house of respondent No. 1 to live with him and lived with him as his legally wedded wife under the same roof upto 11-7-1978. According to the petitioner wife during that particular period of about six weeks the respondent No. 1 did not sleep

with her; and she was asked to sleep in a separate bed and he did not talk with her. When questioned about the strange behaviour the respondent No. 1 is alleged to have told her that he is physically incapable of sexual relations and when petitioner told him to avail of some medical treatment, the respondent No. 1 is further alleged to have told her that his disability is beyond any medical assistance. She was also told to stay in the house either as his mother or his sister or in the alternative she was asked to leave the marital home. She has further alleged that she was mal-treated and on 11-7-1978 she was driven out of the house by respondent No. 1.

3. On 17-10-78, respondent No. 1 sent a registered notice Ex. 5 wherein he stated *in alia* that as he had no physical disability they would be able to enjoy marital bliss, and on 25-10-78 the petitioner filed the application for getting maintenance under Section 125 of Cr.P. Code.

4. The respondent No. 1 opposed the petition and contended vide his written statement Ex. 3 that he is not impotent and denied that he had no sexual relations with the petitioner. According to him, on 11-7-78 while he was not present in the house, the sisters of the petitioner had come to his house and had taken away the petitioner and in spite of repeated efforts on his part to call back the petitioner, he had not succeeded therein. He has also shown his willingness to keep the petitioner with him and maintain her.

5. On behalf of the petitioner only the petitioner was examined. The respondent No. 1 examined himself and also adduced the evidence of one more witness.

6. The learned J.M.P.C. found that there was considerable substance in the allegation of the wife that the respondent No. 1 was physically incapable of having sexual relations. However, relying upon a decision of the Allahabad High Court reported at 1978 Cr.L.J. 1661 *Bundu v. Maherulnish* he held that the wife was not entitled to claim maintenance while staying separate from the husband. In the said case the learned Single Judge of the Allahabad High Court had held that mere impotence of the husband was not a sufficient ground for awarding maintenance to the wife who chooses to stay separate from the husband. Being aggrieved by the said order of the learned Metropolitan Magistrate, the petitioner-wife has preferred

the present revision application.

7. Mr. Pathan, the learned Advocate appearing on behalf of the petitioner-wife assailed the order of the learned Metropolitan Magistrate and urged that in the present case apart from the evidence regarding impotence of the husband, there is sufficient material on the record to come to the conclusion that the respondent No. 1 husband had also mal-treated the petitioner wife. Mr. Pathan further urged that if impotence of the husband, when proved, can be considered to be a good ground for the wife to obtain a divorce and if under the new provisions of Section 125 of the Cr.P. Code, even a divorced wife would become entitled to get maintenance from her husband, there would be little logic and less justification in coming to the conclusion that mere impotence of the husband would not provide sufficient ground to the wife for claiming maintenance while staying separately from the husband. As a corollary to the above argument, Mr. Pathan urged that if a husband who is otherwise physically fit to have sexual intercourse with his wife and intentionally desists from satisfying the sexual cravings of his wife, then it would definitely be construed as cruelty which might result in great mental agony to the wife, then it would be in the fitness of things to hold that a husband who is not possessed of the necessary physical and sexual virility for having sexual intercourse with his wife, would be a constant source of mental agony to the wife. This would amount to mental cruelty and should necessarily entitle the wife to live separately and claim maintenance.

8. The following are the only questions, therefore, which require to be determined in the present revision application.

(1) Whether the physical inability of the husband to have sexual intercourse with his wife can be considered to be amounting to cruelty?

(2) If so, whether such cruelty can be considered to be a just ground within the meaning of Second proviso to Sub-section (3) of Section 125 of Cr.P. Code, which would entitle the wife to claim separate maintenance from the respondent?

9. In a revision application this Court would not enter into reappreciation of evidence and a finding of fact recorded by the trial court would not be lightly

disturbed unless it is of the opinion that there was a complete misappreciation of the evidence or that the finding of fact recorded by the trial court is such that on a reasonable and fair appreciation of evidence, that finding is unsustainable. In the instant case, the learned Metropolitan Magistrate has very correctly appreciated the evidence adduced by the parties and his finding that there is considerable force in the petitioner-wife's allegation that the respondent No. 1-husband was incapable of having sexual intercourse is unassailable.

10. Thus, viewing the evidence of the husband as a whole, it does appear that he was incapable of satisfying the biological urge of the petitioner, the satisfaction of which biological urge forms the main bull-wark of any happy matrimonial alliance. This physical disability of the husband would undoubtedly result in great mental agony to the wife.

11. It may be stated here that the respondent No. 1-husband had contended that he is prepared to maintain the petitioner and he is prepared to accept her back under the marital roof. It was also his contention that the efforts were made from his side to bring back the petitioner to matrimonial home but due to the recalcitrance of the petitioner herself and her relatives those efforts have failed.

12. Second proviso to Sub-section (3) of Section 125 of the Cr.P. Code reads as under:

Provided further that if such person offers to maintain his wife on condition of her living with him. and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing
Explanation: If a husband has contracted marriage with another woman or keeps a mistress, it shall be considered to be just ground for his wife's refusal to live with him.

Even if it is presumed that the wife in the instant case refuses to live with the husband and even if it is accepted that the respondent No. 1 -husband is prepared to maintain the petitioner if she stays with him, it shall have to be considered as to whether the wife's refusal to live with the respondent No. 1 is on a just ground.

Needless to add that the explanation quoted above is not exhaustive. If the husband inflicts torture, either mental or physical, or behaves. In a way which is continuously insulting and annoying, or imputes unchastity, it would definitely mean that all or any of those acts would come within the meaning of legal cruelty. In a case reported at : AIR1973 Delhi200 Mrs. Rita Nijhawan v. Shri Balkishan Nijhawan, the Division Bench of the said High Court in paragraph 21 of the judgment defined the concept of legal cruelty and it was observed that the legal concept of cruelty is conduct of such a character as to cause danger to life, (sic) or health (physical and mental) or as to give rise to a reasonable apprehension of such danger. To quote the said paragraph it was observed as under:

Thus the law is well settled that if either of the parties to a marriage being of healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent, this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty. Prior to Gollin's case 1963-2 All ER 966 in 1963 the Courts in England had been taking the view that unless cruelty was aimed at either of the parties the acts would not amount to cruelty. But that is no longer a correct view and therefore, subsequently the Courts have proceeded on the basis that it is not necessary to prove the capability of the respondent in order to hold him guilty of cruelty. What has to be found in each case is whether the act is such which the complaining partner should not be asked to endure. The Court of appeal in Sheldon v. Sheldon. 1966-2 All ER 257 granted a decree to the wife on the finding that the husband's persistent refusal of sexual intercourse amounted to a grave injury to the wife's health and amounted to cruelty on his part. Lord Dunning observing that: 'the categories of cruelty are not closed. The persistent refusal of sexual intercourse is not excluded.

(Emphasis supplied)

The above observations were quoted with approval by the Division Bench of the Karnataka High Court in a case reported at AIR 1980 Karnataka p. 8 Dr. Srikant Rangacharya Adya v. Smt. Anuradha. It may be stated that in the above referred cases, the Division Bench of the Delhi High Court as well as that of the Karnataka High Court were concerned with the interpretation of Section 10 and Section 13 of the Hindu Marriage Act, 1955 and the concept of cruelty and desertion under the said Act. However, as above quoted observations explain the concept of legal cruelty they are of great assistance for construing the words 'just ground' occurring in the second proviso to Sub-section (3) of Section 125 of the Criminal Procedure Code. If both the spouses are physically capable of having normal sexual relations and one party to the marriage persistently refuses to have such sexual relation with his other, then it would definitely amount to cruelty, but the Division Bench of the Delhi High Court went further and observed that it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any wilful refusal by the respondent. This is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence it would amount to cruelty. The spouse who is at the receiving end of such cruelty would be justified in harbouring an apprehension that if he or she tries to live with the other spouse in spite of such (legal) cruelty, then there would be a danger to his or her mental and physical health and well being. However, refusal to have sexual intercourse even for a prolonged period, in certain cases may not amount to legal cruelty. If the husband or the wife are suffering from some temporary ailment, which might sap the person's physical energy, or if one of the spouses is experiencing some mental tension springing from a variety of causes then unwillingness to have sexual intercourse during such a period can never amount to legal cruelty. In a given case it may also happen that there might be considerable difference in respective ages of the spouses and after having comfortable and satisfactory sexual life over a period of years, the husband on account of onset of senile debility may not be in a position to satisfy the sexual cravings of his comparatively young wife. However, none would ever imagine that under such circumstances a temporarily abstinence or even a pronounced aversion to the act of coitus or a frigidity of short duration

can ever amount to an act which might come within the ambit to the concept of legal cruelty. Many such cases may be envisaged but cannot be exhaustively enumerated, No spouse to a marriage would even ever think of complaining about it, but where at the threshold of the marital life, the wife were to receive a rebuff such as in the present case then there is no doubt that the act of the erring spouse irrespective of the fact that he never intended to harm would definitely tantamount to legal cruelty.

13. While impotence of the husband might provide a good ground to the wife to get the marriage annulled, it would be strange if the wife who complains of such cruel treatment from the husband should find herself unable to get maintenance under Section 125 of Cr.P. Code merely because she is not prepared to subject herself to that cruelty and on that score refuses to stay with the husband. To my mind in the instant case even if there would have been no other evidence of mal-treatment of the wife by the husband then also the petitioner-wife would be justified in refusing to stay with the respondent No. 1-husband. In the present case, however, from the evidence of the wife it does transpire that even when she made a mild suggestion to the respondent No. 1 to get himself medically treated she was insulted and driven out of the room. To ask a wife to stay with such a husband who adopts aggression as a defence mechanism to hide his inadequacy would tantamount to holding that the wife irrespective of the mal-treatment to which she was subjected in past, and is likely to be subjected in future, should go on staying with the husband. This would amount to subjecting her to a predicament which she cannot be asked to endure. To hold that if she refuses to do so, she would be disentiing herself from claiming maintenance under Section 125 Cr.P. Code would be to subject her to cruelty, by a judicial edict.

14. On behalf of the respondent No. 1 reliance was placed on a case reported at 1978 Cr.L.J. 1661 Bundoo v. Smt. Mahrul Nisa. In the said case the wife Mahrul Nisa had filed an application under Section 488 Cr.P. Code (old) claiming maintenance from her husband Bundoo on the ground that her husband was impotent. The wife then started living with her parents and alleged that the husband had neglected and failed to maintain her and claimed maintenance allowance of Rs. 100/- per month. The husband claimed that he was physically fit

and the Magistrate before whom the wife's petition under Section 488 Cr.P. Code was tried, came to a conclusion that the wife had failed to prove the impotence of her husband. He, therefore, dismissed the application and revision application was carried before the Sessions Judge, Shaharanpur, who reversed the finding of the Magistrate and came to the conclusion that the wife had succeeded in proving that the husband was incapable of satisfying her sexual needs. He, therefore, held that such an impotence would amount to legal cruelty. He, therefore, allowed the application of the wife and the husband took the matter to the High Court and the learned Single Judge reversed the finding of the Sessions Judge and restored that of the trial Magistrate. He considered as to whether the impotence of the husband is a valid ground for granting maintenance to the wife in proceedings under Section 488 Cr.P. Code. The learned Single Judge of the Allahabad High Court held that incapability of the husband to satisfy the sexual need of his wife would not amount to neglect within the meaning of the Code. In para 11 of the said judgment the learned Single Judge observed:

Assuming now for the purpose of argument that Bundoo was physically incapable of satisfying the sexual desire of his wife it cannot be said that this inability amounted intentionally to disregarding slighting, disrespecting or carelessly and heedlessly treating his wife. In this view of the matter, I am of the opinion that the element of neglect as envisaged under Section 488 Cr.P.C. old and under Section 125 Cr.P.C. new, has not been established and Shrimati Mahrul Nisa would, therefore, not be entitled to any maintenance on this ground. Inability to cohabit with his wife may be a ground for Shrimati Mahrul Nisa to obtain divorce from her husband but it would certainly not be a ground entitling her to a separate residence and maintenance.

The learned Single Judge also relied upon the decision of the Single Judge, reported at AIR 1948 Nagpur p. 69 Emperor v. Daulat Rajbhan where the facts were similar and wherein Hidayatullah J. held:

Circumstances may arise when the court may consider that it would not be proper for the wife to live with her husband and then the wife may be permitted to live separate and yet claim maintenance. All such grounds have reference to the

comfort and safety of the wife. Conjugal relations are hardly relevant to the order; for maintenance under Section 488A wife is not entitled to live apart from her husband and claim maintenance on the ground that her husband is impotent and unable to, perform his marital duties.

Similar view was also expressed by Burn J. in a case reported at AIR 1933 Madras 688 Arunachala Asai v. Section Anandayammal wherein once again the learned Single Judge of the Madras High Court observed:

I cannot see that Section 488, Criminal P.C. has anything to do with ordinary conjugal rights: it deals with 'maintenance' only and I see no reason why maintenance should be supposed to include anything more than appropriate food, clothing and lodging.

Deriving support for his view from AIR 1948 Nagpur 6 Supra) and AIR 1933 Madras 688 (Supra) the learned Single Judge of the Allahabad High Court allowed the revision application filed by the husband and the order passed by the learned Sessions Judge was set aside and that passed by the trial Magistrate was restored.

15. If the maintenance of a wife is supposed to include only food, shelter and clothing having no regard to the conjugal rights and if the just cause on which wife can refuse to stay with the husband and yet claim maintenance, can have reference only to the comfort and safety of the wife then it might reduce the wife to the status of a domesticated animal,

16. In the context of the dunging status of women in society such a proposition would seem outdated and obsolete. Again, as Hidayatulla J. has observed comfort safety of the wife are factors which need to be considered while determining as to whether the wife would be entitled to claim maintenance, while living separately from the husband. Thus, whether it is proper for her to refuse to stay with the husband or not would largely depend upon considerations of her safety and once it is held that the disability of the husband amounts to cruelty, the court cannot deny to the wife, her right to claim maintenance even while living separately. In other words the court cannot compel the wife to stay with the husband on the ground

that the husband though he is forcing her in a situation where her physical and mental well being might be adversely affected, as there is no intention on the part of the husband to inflict that cruelty, she should suffer that predicament without demure and be satisfied with a grab to bite and some rags to clothe her, and a roof over her head.

17. Mr. Khatri, the learned Advocate appearing for the respondent No. 1-husband urged that in the instant case it is not the allegation of the wife that the respondent No. 1-husband is capable of having sexual relation and intentionally desists from doing so. Mr. Khatri, therefore, urged that though on proof of impotence of respondent No. 1, the petitioner wife might be entitled to get the marriage annulled, she would not be entitled to claim maintenance under Section 325 Cr.P. Code as she has failed to prove that the husband had neglected to maintain, in view of the Division Bench ruling of the Delhi High Court reported at : AIR1973 Delhi200 (supra), it appears that inability of the respondent No. 1 in the instant case which even the learned Metropolitan Magistrate held to have been proved, would definitely amount to legal cruelty causing a genuine apprehension in the mind of the petitioner-wife that if she were to stay with the husband i.e., respondent No. 1 her health, physical as well as mental, might be detrimentally affected. Once it is held that the capacity and willingness to perform act of coitus is the very basis of a happy marital life and conversely inability or unwillingness to discharge such duties would undermine the very root of matrimonial bliss, it naturally follows as an inescapable conclusion that inability to discharge those duties springing either from a wilful intent to hurt or from physical inability would definitely lead to a situation wherein the spouse, who is denied the satisfaction of the sexual urge, would be a victim of cruelty. Such a spouse therefore, cannot be compelled to stay with the erring spouse even though the erring spouse were to be willing to maintain the wife, provided she stays with him. If the husband, who either by any act of omission or commission has afforded the wife a ground, which can be considered to be a just ground for the wife's refusal to stay with him, refuses to provide separate maintenance to her, he can definitely be said to have neglected or refused to maintain the wife. In the instant case, therefore, even if there would have been no evidence regarding the respondent No. 1 having mistreated the petitioner, the wife's refusal to stay with the husband shall have to be treated as a

just ground within the meaning of explanation appended to the second proviso to Section 125 of Cr.P. Code.

18. As observed above, apart from the physical incapacity of the husband to discharge his marital obligation, there is evidence on the record which goes to suggest that the wife was not treated with the respect and consideration which she was entitled to and she was annoyed and insulted to such an extent that she was forced to avoid the marital home. Therefore, the evidence of legal cruelty in the present case is indisputable and in that view of the matter, both the questions have to be answered in the affirmative, and the finding of the learned Metropolitan Magistrate that she would not be entitled to maintenance requires to be set aside. The learned P.P. Mr. Mehta appearing for Respondent No. 2 state, also urged that in the instant case, the husband should have been directed to pay maintenance to the petitioner.

19. As the learned Metropolitan Magistrate was of the view that the petitioner-wife's claim for maintenance is liable to be rejected on the preliminary ground that she is not entitled to stay separately and claim maintenance, he had not determined the quantum of maintenance to which she would be entitled. However, evidence is adduced in this behalf by the parties and hence I proceed to determine the quantum of maintenance to which she would be entitled

20. As per the evidence of the petitioner-wife the respondent No. 1 was earning Rs. 1000/-, regarding which of course she has not been able to adduce any documentary evidence. The respondent No. 1-husband in his evidence posed that the petitioner-wife is doing tailoring work and is earning Rs. 200/- per month for which also of course there is no evidence. In the absence of any material, indicating that the petitioner-wife is capable of maintaining herself she would be entitled to claim maintenance from respondent No. 1 -husband. The income of the respondent No. 1, as evinced from Ex. 7 which is a certificate of his income, appears to be nearly Rs 575/- from which of course some deduction towards festival advance and G.P.F. are made. The net pay-packet, therefore, as certified by the Superior Officer of the respondent No. 2 comes to Rs. 527-15 ps.

21. The respondent No. 1 has to meet other obligations. However, in these days of spiralling prices where the rupee continuously and constantly displays a tendency of corroding its intrinsic value an able bodied adult cannot maintain on self for anything less than Rs. 5/- per day. The petitioner-wife, therefore, would at least require Rs. 150/- per month to maintain herself even on a shoe-string budget, and even if she were not to indulge in even petty and insignificant luxuries. She would, therefore, be entitled to claim Rs. 150/- per month by way of maintenance from respondent No. 1.

22. The revision application is, therefore, allowed. The order of the learned Metropolitan Magistrate is hereby set aside and the respondent No. 1 is directed to pay an amount of Rs. 150/- per month by way of maintenance to the petitioner from the date of the application. The respondent No. 1 shall also pay Rs. 200/- by way of costs to the petitioner.

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