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Court : Rajasthan

Decided On : Jan-04-1980

Reported in : 1980WLN(UC)198

Judge : G.M. Lodha, J.

Appeal No. : S.B. Civil Misc. Appeal No. 16 of 1979

Appellant : Shankardutt

Respondent : Vidyadevi

Advocate for Pet/Ap. : Mr. Mehta

Disposition : Appeal dismissed

Judgement :

G.M. Lodha, J.

1. This is an appeal under Section 28 of the Hindu Marriage Act, 1955 against the judgment of Additional District Judge, Sri gaganagar dated 8-12-78 dismissing the petition of the appellant Shankardutt (husband) for annulment of marriage by a decree of nullity against his wife Smt. Vidyadevi on the ground of her impotency.

2. It is not in dispute that there was a marriage according to the Hindu religious rites and ceremonies between the parties on 4-2-76 and then the husband and

wife lived together atleast till May, 1977

3. The husband's case is that he could not consummate the marriage because of the physical impotency of his wife as her vagina was only 1 1/2' deep which created structural difficulty in the sexual intercourse.

4. In the lower court, after framing an issue on the point of impotency of the wife, evidence was led by both the parties and on a comprehensive discussion of the entire evidence, the lower court has come to the conclusion that the appellant has failed to prove that non-petitioner Vidyadevi physically Impotent.

5. In this Court, the only submission made by Mr. Mehta appearing for the appellant is that the lower court has committed a serious illegality in rejecting the prayer for medical examination of Vidya Devi in order to prove the petitioner's case that she was physically impotent. It has been argued that the prayer was rejected on the basis of the judgment of the Gujarat High Court reported in Bipin Chandra v. Madhuri Ben : AIR1963 Guj250 but this Coast, In Ramchandra v. Mst. Bhuri 1979 WLN (UC) 71 has taken the view that on material, the court has got ancillary jurisdiction and in the exercise of its judicial discretion, it can pass suitable orders for taking the sample of the blood of a person for the purpose of testing and if the person so directed unreasonably refuses to allow the sample of blood being taken from his person, it would be open to the court to treat his refusal as evidence against him and to draw Inference therefrom. Paras 12 and 13 of the above judgment of this Court read as under

On the question whether any direction can at ail be given by the court to a person to undergo medical examination or to allow a sample of blood being taken from his person, there is no unanimity of opinion amongst the various High Courts. The Calcutta High Court in Birendra Kumar Biswas v. Hemlata Biswas (11) has laid down that Court has the power to direct the medical examination of the person of the respondent subject to such conditions as will afford protection from violence to natural delicacy and sensibility. In that case the respondent had not objected to the medical examination. In the Madras High Court one learned Judge in Venkataswarlu v. Subbayya (10) has taken the view that the Court cannot make an order directing the examination of the plaintiff by a medical expert for the

purpose of taking some blood from him for the purpose of testing a case where the plaintiff was not prepared to offer his blood for such a test. Another learned Judge of the Madras High Court in Subbayya Gounder v. Bhoopala (6) has, however, laid down that the Court can give a direction to a party to give a sample of his blood for testing and the only consequence of his refusal will be that it will be taken into consideration, along with the circumstances, in evaluating, the evidence against him. A third Judge in Ranganathan Chettiar v. Chhinna Lakshmi Achi (12) while laying down that the court cannot compel a party to be examined by a doctor against his or her consent, has observed that the court might draw any adverse inference against a party who refuses to examine himself or herself. The decision of the Madras High Court in Venkataawarlu v. Subbayya (10), has been followed by the Andhra Pradesh High Court in Sreerama murthi v. Lakshaikanthan (13) and the Gujarat High Court in Bipin Chandra v. Madhuri Ben (14), and it has been laid down that the court has no jurisdiction to direct the medical examination of a party. The Gujarat High Court has further observed that if the Court has no jurisdiction to order medical examination of a party then it would be wrong for the court to draw any adverse inference against any party who refuses to submit to an illegal order. The Punjab & Haryana High Court in Shanti Devi v. Ramnath (15) has laid down that even though the court cannot physically force the husband to undergo observation at the mental Hospital but the court can draw any adverse inference against him, which is available under the law, for his not doing so. In Vasu v. Santha (7), the Kerala High Court while upholding the order of the trial court refusing to allow the application of the plaintiff for a blood test of himself and the children, has observed that the maximum that can be done where a party refuses to have blood test Is to draw an adverse inference.

In my view the 'ancillary jurisdiction' which is exercised by the courts in England is equally available to the courts in India and for a just and proper trial of the issues joined between the par I Its before it, the court, in the exercise of its judicial discretion, can pass suitable orders or directions, including an order directing sample of blood to be taken from a person for the purpose of testing and if the person so directed unreasonably refuses to allow the sample of blood being taken from his person it would be open to the court to treat his refusal as evidence against him and to draw inference therefrom.

The submission of Mr. Mehta appears to be correct that there cannot be a blanket prohibition Id respect of the authority of the court 10 issue orders and directions for the medical examination of a party in a case, either to prove or to disprove or to ascertain the truth about the allegations of impotency. However, even on that assumption, ft is to be examined whether the present one was a proper case in which the judicial discretion should have been exercised in favour of the petitioner for directing a medical examination of the non-petitioner (wife) for ascertaining whether she was potent or impotent for the purpose of consummation of marriage by having sexual intercourse with the husband.

6. A few important speaking features of this care require to be noted first. It is admitted that the husband sent three letters to the wife which are Ex. A1 to Ex. A3 and they are of different dates between July to November, 1976. According to the version of the husband, as per the statement on oath, the husband and the wife lived together earlier to this period and they had several occasions when the sexual intercourse could have taken place. In this background, if Ex. A1 is read, it would show that the husband has expressed a keen desire to live with the wife. The relevant portion of Ex. A1 is as under:

fnukad&31&7&76

fiz; fo|k

esjs fny dh jkuh

e/kqj I;kj

rqEgs i= dk mRrj vo'; nsuk pkfg, Fkk uk ;gka ij nks fnu ls ckfj'k gks jgh gS A vPNk eSkle gS rqEgkjh ;kn Hkh vf/kd lrk jgh gS eu es Hkh gypy ep jgh fd Hkkxdj viuh fiz;k ls fyiV tkm D;k djs ;s 10 fnu rks eu dks nq[kh djds fuHkkus gh iMsxs fQj eS rqEgkjs ikl 10&11 rkjh[k rd ysus vk tkmxk D;ksfd eq>s dke dh cMh ijs'kkuh gS A

The above all shows an emotional approach of the husband for the wife and the fact that he has mentioned the following sentences:

eu es Hkh gypy ep jgh fd Hkkx dj viuh fiz;k ls fyiV tk

rules cut any possibility of a husband's knowledge of wife being impotent as alleged by the petitioner. A husband would never write the above to a wife who is impotent and with whom he has livid for considerable time and could not consummate the marriage on account of structural difficulty of a short vagina. The above emotional sentence show that he was having a feeling of cohabiting with the wife and was impatient for it, more so, because of the rainy season.

7. The appellant has failed to give any satisfactory explanation in his statement about all these letters and it is impossible to believe that when be has written three letters which have been produced and a few more letters which have been referred to in it, be would not have mentioned of the impotency or suspected impotency at least, or some vaginal trouble in these letters and would not have advised his wife to take medical treatment for the same. These three letters, read as a whole, completely negativate the entire story put up by the petitioner in his statement about the so called impotency of the wife.

8. Mr. Mehta, when called upon to explain these letters mentioned that they were written because the husband was order the influence of same `Taweej' given by the mother of the wife. The lower court has rightly rejected the story of such a 'Taweej' and this Court cannot give any credence to this story which is palpably absurd The opening citation in the letter of sweet love, parting words of offering a kiss, rule out the possibility of impotency of the wife. A young man who immediately after the marriately finds his wife impotent would develop abhorrence hatred and would behave with a feeling of revenge and revolt for having been trapped in a fraudulent marriage with a lady who is not even potent enough to consummate the marriage. It is impossible to conceive that Instead of the feeling of frustration, disappointment, revenge, hatred and abhorrence, which would have resulted in accusations, if not abuses, the husband would address his wife as darling, would offer him sweet love and kisses and show impatience and sexual starvation without her, as has been done in this case. I am convinced that these three admitted letters Ex. A1 to Ex A3 read as a whole, completely knock out and falsify the story of the petitioner that his wife was impotent having structural abnormality of vagina due to its being of a very small size making sexual intercourse impossible.

9. Yet another important feature of the case is that the appellant has nowhere mentioned in the statement that at any point of time, he made any serious attempt of penetration in the vagina of his wife and the same could not be possible because of the vagina being under-developed or of small size. Mr. Mehta pointed out to me that such an inference can be drawn from the examination-in chief and the re examination. I have carefully considered the entire statement as a whole and I am convinced that it is not possible to draw the inference of such a nature as suggested (sic)D Mr. Mehta It should not be for gotten that the petitioner came to the court for getting his Wife declared impotent which would result in a slur on the womanhood and a judicial verdict of that nature would have serious repercussions for the whole of life of the lady. This requires that the petitioner should prove such an allegation with positive and affirmative evidence rather than depending upon inferences and conjectures.

10. Mr. Mehta pointed out that Vidyadevi in her statement has also admitted that there was cohabitation and sexual intercourse between her and her husband and from this, he wanted this Court to infer that an attempt only was done which became unsuccessful. According to Mr. Mehta, though Vidyadevi has stated that marriage was consummated by sexual intercourse, this statement pay be read as a corroboration of hit client's statement that attempt was made to consummate the marriage but it could not succeed because of the structural difficulty of the vagina of the non-petitioner. I am afraid such an interpretation of the statement of Vidyadevi cannot be taken by any Court. If Vidyadevi's statement is to be considered, it would mean that marriage was consummated and sexual intercourse did take place and if that is so, that completely smashes the allegation of impotency of the wife.

11. The lower court has rightly held that the petitioner's statement, read as a whole, no where shows that any attempt for sexual intercourse was made by the husband. The story that he remained sitting and did not make any attempt because his wife told him that she was impotent, is very difficult to believe. If that would have been so, then since this event took place immediately after the marriage as per the version of the husband, the husband would not have waited for such a long period which is approximately two years, for filing the petition for

divorce. More over, he must have mentioned of it some where in the letters which he has written and then the letters would have been of absolutely different nature and not one of the type mentioned above.

12. Mr. Mehta then submitted that the physical impotency can test be tested by a medical examination and since it is a matrimonial matter, in the interest of justice, this Court should direct the medical examination of the wife so that once for all, this issue can be decided. The argument, to start with, appears to be plausible but as I have mentioned above, the manifold factors and circumstances, including the statement of the husband and his letters have convinced me that the entire case of this physical impotency of the wife is completely ruled cut and even the suspicion for the same is ruled out by letter dated 31-7-76. That being so, I am not inclined to accept the prayer of Mr. Mehta on this score also and I am of the opinion that instead of meeting the ends of justice, it would be abuse of the process of the Court if the non petitioner Vidyadevi is now called upon to submit herself for medical examination by a remand of the case after the above facts and circumstances make the case of the petitioner vexatious and frivolous on this count.

13. I am in complete agreement with the reasons given by the trial court and I do not find any reason what to ever for Interfering in this appeal.

14. The result is that the appeal fails and is hereby dismissed with costs.

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