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Kanthy Balavendram Vs. S. Harry

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Court : Chennai

Decided On : Aug-10-1953

Reported in : AIR1954Mad316; (1953)IIMLJ689

Judge : Rajamannar, C.J., ;Balakrishna Aiyar and ;Venkatarama Aiyar, JJ.

Acts : Divorce Act, 1869 - Sections 18, 19 and 19(1)

Appeal No. : Referred Case No. 9 of 1951

Appellant : Kanthy Balavendram

Respondent : S. Harry

Advocate for Def. : G.A. Pais, Amicus curiae

Advocate for Pet/Ap. : G.J. Arputhanathan and ;V. Natesan, Advs.

Judgement :
1. This is a petition under Section 18, Indian Divorce Act for a declaration that the marriage between the petitioner and the respondent is null and void. The petitioner is the wife and the respondent the husband. They were married under the Christian Marriage Act, 1872, at Cuddalore on 29-5-1945. The petition was founded on the allegation that the respondent, the husband, was impotent at the time of the marriage and at the time of the institution of the suit. Under Section 19(1) of the Act, a decree for nullity of marriage can be made on that ground. The petitioner alleged that the respondent's male organ was so abnormally big as to

render sexual intercourse with her impracticable, and it proved to be positively dangerous to the life of the petitioner; that on the several occassions when the respondent attempted to have intercourse with her the petitioner evinced great aversion to the act and also suffered great pain on each occasion, with the result that she had to push the respondent away or jump out of bed. She stated that in the above circumstances the marriage was never consummated and that consummation of marriage was impossible. She submitted that it was a case of incurable impotence on behalf of the respondent towards the petitioner and that the marriage should be declared null and void on the ground of impotency.

The respondent in his memorandum of objections denied that his male organ was so abnormally big as alleged by the petitioner. He further stated that he had had sexual intercourse with the petitioner on several occasions and that the application was not bona fide. The learned District Judge before whom the petition came on in the first instance directed the respondent to appear before the District Medical Officer, Cuddalore, to submit himself to medical examination, The respondent would not appear before the officer, even though repeated opportunities were given to him.

On 16-2-1951, when the petition came on for hearing, though the respondent's vakil was present, the respondent refused to be examined as a witness, nor did he tender any other evidence on his behalf. The petitioner herself gave evidence and deposed to the material facts above referred to relating to the abnormal size of the respondent's organ and the failure of all attempts on his part to consummate the marriage. In the absence of any evidence to the contrary and having regard to the refusal of the respondent to submit to a medical examination, the learned District Judge held that the petitioner had made out her allegation of impotence of the respondent. The learned District Judge did not think that there was any collusion between the parties. He therefore held that the petitioner was entitled to the relief prayed for by her. The matter comes before us under Section 17 of the Act.

2. The petitioner was represented by counsel, but the respondent appeared neither in person nor by advocate. As no direct authority on the question in issue was brought to our attention by the learned counsel for the petitioner, we

requested Mr. Pais to act as 'amicus curiae' and to assist us in arriving at a decision. Mr. Pais accordingly appeared today, and we are obliged to him for the assistance he gave us by referring us to some of the relevant authorities on the point.

3. The question to be decided in this case is whether the respondent can be held to be impotent at the time of the marriage and at the time of the institution of the suit from the facts which emerge from the uncontradicted evidence of the petitioner. If we hold that the respondent was impotent at the time of the marriage, it is obvious that it must follow that he was likewise impotent at the time of the institution of the suit, having regard to the special ground of impotence which she alleged, namely, abnormal size of the organ. We have also the additional circumstance that the respondent refused to submit to a medical examination to substantiate his denial of the petitioner's allegation.

4. Impotency has been understood by Judges in England in matrimonial cases as meaning incapacity to consummate the marriage, that is to say, Incapacity to have sexual intercourse, which undeniably is one of the objects of marriage. The question is, what does "sexual intercourse" mean? We cannot do better than refer to what has been considered to be the leading decision on this topic, namely -- 'D. E. v. A-G.', (1845) 163 ER 1039 (A). In that case, the husband prayed for a declaration of nullity of his marriage with the respondent who was married to him on the ground that carnal consummation was impossible by reason of malformation of his wife's sexual organ. Dr. Lushington dealt with the point, namely, what exactly is to be understood by the term "sexual intercourse", because as he said every one was agreed that in order to constitute the marriage bond between two persons, there must power, present or to come, of sexual intercourse. Dr. Lushington stated:

"Sexual intercourse, in the proper meaning of the term, is ordinary and complete intercourse; it does not mean partial and imperfect intercourse; yet, I cannot go the length of saying that every degree of imperfection would deprive it of its essential character. There must be degrees difficult to deal with; but if so imperfect as scarcely to be natural, I should not hesitate to say that legally speaking, it is no

intercourse at all.... If there be a reasonable probability that the lady can be made capable of a 'vera coupla' of the natural sort of coitus, though without power of conception I cannot pronounce this marriage void. If, on the contrary, she is not and cannot be made capable of more than an incipient, imperfect and unnatural coitus, I would pronounce the marriage void,"

In -- 'G. v. G.', (1871) LR 2 P. & D. 287 (B), the rule laid down by Dr. Lushington was followed. The ground on which the husband in that case sought a declaration of nullity of marriage was the wife's peculiar condition which made it impossible for him to consummate the marriage. The wife was suffering from excessive sensibility. Lord Penzance in dealing with the case, after laying down the law that the ground of interference of the courts in cases of impotence is the practical impossibility of consummation said:

"The invalidity of the marriage, if it cannot be consummated, on account of some structural difficulty, is undoubted; but the basis of the interference of the court is not the structural difficulty but the impracticability of consummation."

The learned Judge was prepared to hold that even in the absence of a physical structural defect, there may be other circumstances which render sexual intercourse practically impossible. "The question is a practical one" he said

"and I cannot help asking myself what is the husband to do in the event of being obliged to return to cohabitation in order to effect consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Every one must reject such an idea".

Taking what he described as a practical and reasonable view of the evidence, he thought that the consummation of the marriage in that case was practically impossible, owing to the peculiar mental reaction of the wife. The rule in -- '(1845) 163 ER 1039 (A)', was again followed in -- 'Dickinson v. Dickinson', LR 1913 P. 198 (C), though that was a case of impossibility to perform the intercourse on account of the wilful and persistent refusal of the wife.

5. In the present case, the evidence leaves us in no doubt that the marriage cannot be consummated in the ordinary and normal way on account of the abnormal size of the respondent's organ. According to the petitioner's evidence which must be accepted, ordinary and complete intercourse is physically impossible. It must be held therefore that the respondent was impotent so far as the petitioner was concerned both at the time of the marriage and at the time of the institution of the suit.

6. The decree nisi passed by the learned District Judge is hereby confirmed. We may add that the decree as drafted in the court below is not correct, because it reads as if it were a decree for dissolution of marriage. The decree should be drafted in accordance with Section 18 of the Act and should declare the marriage between the petitioner and the respondent null and void. No order as to costs.

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