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Probhat Kumar Mitra Vs. Sukriti Mitra

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Court : Kolkata

Decided On : Jun-29-1970

Reported in : AIR1971Cal1,75CWN168

Judge : Amaresh Roy, ;S.N. Bagchi and ;C. Mookerjee, JJ.

Acts : Divorce Act, 1869 - Sections 14 and 19(1); ;Evidence Act, 1872 - Section 114

Appeal No. : Divorce Suit No. 22 of 1969

Appellant : Probhat Kumar Mitra

Respondent : Sukriti Mitra

Advocate for Def. : Mrinmoy Bagchi, Amicus Curiae

Advocate for Pet/Ap. : Mihir Kumar Roy, Adv.

Disposition : Reference accepted

Judgement :

Chittatosh Mookerjee, J.

1. The learned District Judge, 24 Parganas has made this reference for confirmation of a decree nisi passed by him declaring the marriage between the aforesaid parties as null and void on the ground that the respondent wife was

impotent within the meaning of Sub-section (1) of Section 19 of the Indian Divorce Act at the time of the marriage with the petitioner and also at the time of the institution of the suit.

2. On 13th January, 1969 Provat Kumar Mitra, the petitioner abovenamed had presented an application under Section 18 of the Indian Divorce Act in the court of the learned District Judge, 24 Parganas alleging that on 26th day of July, 1963 he went through a form of Christian Marriage of Protestant Creed with the respondent at Jamshedpur. According to the petitioner they had come back to Barrackpur on the day following their marriage. Both the petitioner and the respondent had again visited Jamshedpur, and thereafter returned to Barrack-pore and had lived unto 23rd August, 1963. The petitioner alleged that the respondent was dead to all amorous appeals and had unconquerable aversion and invincible repugnance to consummation rendering her incapable of sexual intercourse. The petitioner further alleged that the marriage was never consummated, as it was impossible to have sexual intercourse with the respondent without doing brutal violence. The petitioner accordingly prayed that the marriage be declared null and void on the ground of impotency of the respondent.

3. The summons of the said Matrimonial Suit was served upon the respondent and she had appeared in the said suit and had prayed for time to file her written statement. The learned District Judge by his order No. 2 had allowed time till 7th March, 1969 for the filing of her written statement. But therespondent took no step and no written statement was ultimately filed by her. The learned District Judge by his order No. 3 dated 7th March, 1969 fixed 28th March, 1969 for ex parte hearing.

4. On 28th March, 1969 the petitioner filed a petition in the court of the learned District Judge stating that due to peculiar facts and circumstances of the case it was necessary that the respondent should submit to a medical examination selected by the court. The petitioner prayed that the notice should be issued on the respondent asking her to show cause why she should not submit to the proposed medical examination. The learned District Judge issued a notice upon the respondent for a notice to show cause whether she was willing to be examined by a medical expert to be appointed by the court. The respondent filed a petition

on 28th April, 1969 stating that she was unwilling to submit to any medical examination as she felt it to be an utter humiliation on her part. The learned District Judge by his order No. 6 dated 28th April, 1969 noted the said fact and fixed 16th May, 1969 for ex parte hearing. The respondent did not thereafter participate in the proceedings.

5. On 16th June, 1969 the learned District Judge ex parte heard the suit decreed the same declaring that the marriage between the petitioner and the respondent was null and void subject to confirmation by this Court.

6. After the expiry of 6 months from the pronouncing of the aforesaid decree nisi the learned District Judge, 24 Parganas had made this reference to this Court for confirmation of the same. The respondent wife has not also appeared in this Court. We are thankful to Mr. Mrinmoy Bagchi Advocate who had consented to appear as an amicus curiae for assisting us to come to a correct decision.

7. Having heard both Mr. Boy, the learned advocate for the petitioner and Mr. Bagchi we are satisfied that the decree nisi passed by the learned District Judge declaring the marriage of the petitioner and the respondent as null and void should be confirm-ed.

8. The point for consideration is whetherthe petitioner has succeeded in satisfactorily establishing that the respondent was impotent at the time of marriage and at the time of the institution of the suit. The word 'Impotency' has not been defined in the Indian Divorce Act. But the same has come to acquire a definite meaning in view of series of judicial decisions both in England and in this country. The Supreme Court in Yuvraj Digvijay Singh v. Yuvrani Pratap Kumari, : [1970]1SCR559 considered a case under Section 12(1)(a) of Hindu Marriage Act 1955. The Supreme Court laid down in para. 5 of their judgment that

'A party is impotent if his or her mental or physical condition makes consummationof the marriage a practical impossibility. The condition must be one according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his

wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.'

9. Section 7 of the Indian Divorce Act lays down that subject to the provisions contained in the said Act the High Courts and District Courts shall in all suits and proceedings act and give relief on principles and rules which in the opinion of the said courts are as nearly as may be conformable to the principles and rules on which the court for Divorce Acts and Matrimonial Cause in England for the time being acts and gives relief. In Halsbury's Laws of England (Third Edition) Volume 12 at page 228 it has been stated that a party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage. Lord Penzance in the case of G. v. G., 1871-2 P & D and 287 = 40 LJ Mat 83 considered a case where the marriage could not be consummated owing to the hysteria or extreme sensibility of the wife and there was no question of any structural defect. The learned Judge laid down that:

'but the basis of the interference of the Court is not the structural defect but the impracticability for a consummation. If, therefore, a case presents itself involving the impracticability (although it may not arise from a structural defect) the reason for the inference of the Court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it be shown that connection is practically impossible or even if it be shown that it is only practicable after a remedy had been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to.'

10. Mookerjee, A. C. J. and Choudhury, J. in Birendra Kumar Biswas v. Hemlata Biswas, AIR 1921 Cal 459 dealt with a case in which one of the questions was whether the existence of syphilis in one of the parties furnished a good ground for declaring their marriage as null and void. Mookerjee, A. C. J. made a review of a large number of cases of the British and American courts and remanded the case to the trial court. Greaves, J. after remand annulled the marriage between the parties. The learned Judge observed that the consummation was no doubt

physically possible but having regard to the state of the Wife's health the consummation under the circumstances was a practicalimpossibility.

11. In the present case the husband Provat Kumar Mitra in his evidence stated that during the period of 26th July to 20th August, 1963 the respondent had lived with him for about a week from 14th August, 1963 to 28th August, 1963. During period he had tried in every way to have the marriage consummated but the respondent did not respond and she was frigid and unwilling to have the marriage consummated. He had further stated in his evidence that except by use of brutal force it was not possible to have the marriage consummated by any other means and he had adopted all the means to draw her into the act of sexual intercourse but she did not agree. The petitioner in his evidence also stated that he had requested the respondent to have herself medically examined. The respondent did not agree. He had written to the respondent on many occasions but she did not care to give any reply. According to the petitioner the respondent was unable and unwilling to have the marriage consummated or to perform the act of sexual intercourse up to the date of filing of the suit.

12. No doubt a refusal to consummate a marriage would not necessarily lead to a conclusion that the respondent was impotent at the time of the marriage or that she had continued to be so at the time of the filing of the application for declaring their marriage as null and void. But in the present ease from the evidence of the husband together with the other attendant facts and circumstances and the conduct of the respondent herself, it could be fairly inferred that the respondent was impotent as alleged by the petitioner. The evidence of the husband which we have no reason to disbelieve discloses that the respondent wife had persistently exhibited an invincible repugnance to consummate the marriage. The respondent was unwilling to get herself medically examined. Upon an application made by the petitioner the court below had issued a notice upon the respondent to show cause why she should not be examined by a medical expert appointed by the court. As stated already she expressed her unwillingness to get herself examined by a medical expert. Monkerjee A. C. J. and Choudhary, J. in AIR 1921 Cal 459 (supra) stated 'where a party refuses to attend for medical inspection, the Court may properly draw an unfavourable inference .... The Courts naturally exercisea wide

discretion in ordering physical examination and always do so, subject to such conditions as will afford protection from violence to natural delicacy and sensibility.' Halsbury's Laws of England (Third Edition) Volume 12 at page 229 it has been stated that 'A refusal by the respondent in a nullity suit for impotence to undergo the examination or treatment raises an inference of incapacity upon which the Court may granta decree, on affirmative evidence by or on behalf of the petitioner. Similarly, Tolstoy in his book 'A Law and Practice of Divorce', 6th Edition at page 113 states that the inability to consummate may be due to a physical defect which is incurable or to one which is curable but which the respondent refuses to have cured. Tolstoy at page 114 of his book says that the onus of proving that the marriage has not been consummated and that such non-consummation was due to the respondent's incapacity lies on the petitioner. In the absence of evidence of impotence a spouse will be presumed to be normal. The rules provide for a medical inspection of the parties in the case of nullity for impotence or wilful refusal to consummate (Rule 24), but the court may grant a decree though, the respondent refuses to submit to the inspection. In fact the respondent's refusal may incline the court to draw the inference that the petitioner's allegations are true.

13. In the present case it can be reasonably inferred from the persistent refusal of the respondent to have herself medically examined that the positive evidence of impotence given by the petitioner husband was true.

14. There is no evidence on record for holding that there was any connivance between the petitioner and the respondent or that the petitioner had in any way disentitled himself from obtaining the relief under Section 18 of the Indian Divorce Act. In the facts and circumstances of the case the delay in presenting the application under Section 18 could not be a ground for refusing the relief to the husband when he had otherwise proved his case.

15. In the above view, we agree with the findings of the learned District Judge, 24 Parganas. We accordingly, accept the reference made by the learned District Judge, 24 Parganas and confirm the decree declaring the petitioner's marriage with the respondent as null and void. There will be however, no order as to cost.

Amaresh Roy, J.

16. I agree.

Bagchi, J.

17. I agree.

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