

Ruby Roy Vs. Sudarshan Roy

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Court : Kolkata

Decided On : Oct-30-1987

Reported in : AIR1988Cal210,92CWN709

Judge : A.M. Bhattacharjee and ;Ajit Kumar Nayak, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Section 12(1); ;[Evidence Act, 1872](#) - Section 115

Appeal No. : A.F.O.D. No. 22 of 1986

Appellant : Ruby Roy

Respondent : Sudarshan Roy

Advocate for Def. : Bidyut Kumar Banerji and ;Sakti Prosad Mukherjee, Advs.

Advocate for Pet/Ap. : Siddhartha Chowdhury, ;Jyoti Bhusan Chakraborty and ;Amaresh Das Gupta, Advs.

Disposition : Appeal allowed

Judgement :

A.M. Bhattacharjee, J.

1. The marriage of the wife-appellant with the husband-respondent has been annulled by the learned Judge on the ground that the consent of the husband was

obtained as a result of 'non-disclosure of material facts' concerning the wife. Having heard the learned Counsel for the parties and after going through the records ourselves, we are satisfied that we, in our turn, must annul that decree of annulment.

2. The husband has filed the petition giving rise to this appeal under Section 12(11)(c) of the Hindu Marriage Act whereunder a marriage may be annulled by a decree of nullity on the ground that 'the consent of the petitioner was obtained by force or fraud as to the nature of the ceremony or to any material fact or circumstance concerning the respondent,' In paragraph 3 of the petition, the petitioner has stated that 'the petitioner could not know that the respondent is devoid of female organ and incapable of cohabitation' and that 'had the petitioner known, he would not have entered into marriage with respondent.' At the trial, however, the case made out by the husband appears to be that he found that 'her entire body bears burn marks and she does not have the right breast and so far her left breast is concerned only the nipple was evident.'

3. Now as to the pleadings in a case of fraud, it is well-settled that the person alleging fraud must do so with clarity and precision, must set forth all the particulars in his pleading and that the case can be decided only on the particulars set forth without any deviation or departure. We are afraid that the husband having come forward with a definite case of fraud on the ground of non-disclosure that the wife was 'devoid of female organ and incapable of co-habitation', should not have been allowed to give a go by to that case at the trial and to proceed with the case that then on-disclosure related to the wife having defective or deformed breasts.

4. But that apart, we are also satisfied that the husband's petition ought to have been dismissed on merits also and that this appeal by the wife is to be allowed. Admittedly, the marriage was a negotiated one and was settled by the guardians. It is also not disputed that the father of the husband finalised the settlement on behalf of his son. In paragraph IV of the written statement it has been categorically asserted that at the time of negotiation, the respondent's father and her brother, PW-2, informed the petitioner's father about the physical defects of the bride. Such a case was also clearly put to the petitioner, PW-1, and to his sister, PW-2, during

their cross-examination. But far from being able to effectively deny that such disclosure was made to the father, the petitioner has stated that 'the talks which took place between my father and that of the respondent in the matter of marriage are not known to me' and his sister, PW-2, has stated that 'my father never discussed anything about the marriage with us.' It is also the categorical assertion of DW-2, the wife's brother Tapan, in his deposition that the petitioner's father was informed about the physical defects. But still then, this father of the petitioner has not been examined as a witness and no explanation is at all forthcoming for his non-examination.

5. About seven decades ago, the Privy Council in *Murugesam Pillai v. Gnana Sambandha Sannadhi*, AIR 1917 PC 6 at p. 8 condemned it as 'inversion of sound practice' for a party desiring to rely on a certain state of facts, to withhold, 'by trusting to the abstract doctrine of onus of proof', the best evidence in his possession which would throw light on any material issue in a proceeding. This view was again reiterated by the Privy Council in *Rameshwar v. Bajit Lal*, AIR 1929 P.C. 95 and has also been endorsed by the Supreme Court in *Hiralal v. Badkulal*, : [1953]4SCR758 and then in *Gopal Krishnaji v. Mohamed Haji Latif*, : [1968]3SCR862 . In the last cited decision, the Supreme Court has ruled that even if the burden of proof does not lie on a party, the Court may still draw an adverse presumption against him if he withholds important evidence which could be produced by him and which would throw light on the facts at issue. The Supreme Court has restated, what was stated by the Privy Council in *Murugesam Pillai* (supra), that 'it is not a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.'

6. We are inclined to think that when the material issue in this case is whether the physical defects of the wife were disclosed and the consistent case on behalf of the wife in the pleading as well as at the trial is that those were duly disclosed to the father of the husband, who admittedly was negotiating the settlement from the side and on behalf of his son, and that father has not been examined by the petitioner for no satisfactory reason, then we are entitled to presume against the

petitioner that the physical defects were duly disclosed to the father.

7. As already noted, the father of the petitioner was held out as the person having authority to select the bride and finalise the settlement. It is the evidence of PW-2, the sister of the petitioner, that the petitioner 'is very obedient to his father', and the petitioner as PW-1 has also stated that he is in 'good terms with his father.' If an obedient son, who is in good terms with his father, authorises his father to negotiate for and settle his marriage including the selection of the bride, and the father selects a bride after full knowledge about her physical defects and the son marries that bride, the son cannot thereafter be allowed to turn round and to have the marriage annulled on the ground that he would not have consented if the defects were made known to him. A marriage may not be a contract only; but is nevertheless a contract also; it may be that all the principles of law of contract may not apply with all their rigour to a contract of marriage[^] but there can be no reason as to why the fundamental principle, so well-known in the Law of Agency, namely Qui Facit Per Alium Facit Per Se, that is, he who acts through another acts himself, shall not apply where, as here, the petitioner has held out his father as the authority to finalise the negotiation and to select the bride and has not disputed that the father was given such authority. Under such circumstances, the disclosure to the father was obviously disclosure to the son and consent of the father on such disclosure was consent of the son on such disclosure. Borrowing the concept from the Law of Estoppel, we would like to add that once the petitioner, as an obedient son, held out his father as his representative and to have the authority to consent on his behalf and to select the bride and the father selected the bride with the knowledge of physical defects of the bride and the marriage has taken place, the petitioner would not be allowed to turn round and would be estopped from denying that the father had such authority. At any rate, as already indicated, the petitioner at no point of time has disputed that his father had the requisite authority.

8. It is true that the wife as DW-1 has stated that 'at the time of my marriage my idea was that the petitioner was not in the know of the burn marks of my body' and some statements in some of her letters to the petitioner, which have been marked Exhibits, are also to the similar effect. We do not say that the materials on record show that the physical defects of the wife were duly disclosed directly to the

petitioner himself. But all that we say is that if we are entitled to presume, as we do, that all these were duly disclosed to the father of the petitioner and we find that this father was held out by the petitioner to have all the authority to negotiate on his behalf, to select the bride and to finalise the marriage, then the petitioner can no longer be allowed to have the marriage annulled on the ground that the defects were not disclosed to him directly. We have also noted that in his letters to the wife-appellant, Ext. B series, the father of the petitioner, far from making any whisper as to any fraud or misrepresentation having been committed by or on behalf of the wife-appellant or her guardians and relations, has blamed his own son, the petitioner, for the whole thing and has regretted that the petitioner has gone astray. We would, therefore, hold that it has not been proved on the materials on record that the consent of the petitioner was obtained by fraud as to any material facts or circumstances concerning the wife within the meaning of Section 12(1)(c) of the [Hindu Marriage Act, 1955](#).

9. We would accordingly allow the appeal with costs, set aside the judgment and decree under appeal and dismiss the petition filed by the petitioner.

Ajit Kumar Nayak, J.

10. I agree.

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