

Birendra Kumar Biswas Vs. Hemlata Biswas

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Court : Kolkata

Decided On : May-31-1920

Reported in : 6Ind.Cas.362

Judge : Asutosh Mookerjee, Acting C.J. and; Asutosh Chaudhuri, J.

Appellant : Birendra Kumar Biswas

Respondent : Hemlata Biswas

Judgement :

Asutosh Mookerjee, Acting C.J.

1. This is an appeal from a judgment of Mr. Justice Fletcher in a suit by a husband under Section 18, read with Section 19, of the Indian Divorce Act, 1869, to declare his marriage with the defendant null and void on two grounds, namely, first, that the respondent was impotent at the time of the marriage and at the time of the institution of the suit, and secondly, that his consent to the marriage was obtained by fraud, The parties are Indian Christians in an humble state of life and were married on the 15th February 1918 at the Baptist Church at Entally in the suburbs of this City. The petitioner alleged that the parents of the respondents as also the respondent herself, were, at the time of the marriage, suffering from a highly infectious and insurable form of syphilis; that this fact was wilfully concealed from him; that his consent to the marriage was thus brought about by fraud, and that he discovered the condition of his wife only On the second day after his marriage.

Toe petitioner further stated that he had found it impossible to consummate the marriage and had accordingly instituted this suit on the 4th April 1918, so that the marriage might be declared null and void. The respondent denied that she bid syphilis at the time of her marriage and asserted that the marriage had been consummated with the result that she had contracted the disease from her husband. The question of fraud does not appear to have been investigated in the Court below; but three medical practitioners who had seen the girl deposed as to her condition, the petitioner and the respondent also testified in support of their respective allegations. Mr. Justice Fletcher has found on the evidence that he marriage has not been consummated; that the respondent is a virtuous girl, and that she suffers from hereditary syphilis. This is undeniable on the medical testimony and is evidenced by the ulcerated condition of her palate and nose. As there had been no examination of the private parts of the girl, it was impossible to say whether they were in any way diseased. In these circumstances, Mr. Justice Fletcher declined to annul the marriage, although he found that the husband would run a degree of risk if he had sexual intercourse with his wife. On the present appeal, Mr. Avetoom has contended on behalf of the husband that the test to be applied in cases of this description is, whether the condition of one of the parties to the marriage, at the time of the marriage, rendered consummation practically impossible, and if this is established the marriage is voidable. In support of this argument, he has relied upon the decisions in *G. v. G.* (1871) 2 P. & C. 287 : 40 L.J. Mat. 83 : 25 L.T. 510 : 20 W.R. 103 and *H. v. P.* (1873) 3 P. & D. 52. In the former case a middle-aged wife had successfully resisted consummation for three years not because of malformation or structural defect, but because she suffered from excessive sensibility; her condition was by sterical and to a certain extent beyond her control. Lord Pendece held that as there was practical impossibility of sexual intercourse, without which the ends of marriage, namely, the procreation of children and the pleasures and enjoyment of matrimony, could not be attained the husband was entitled to a decree for nullity. In the second case, Sir James Hinnen ruled that the impediment in the way of intercourse must be physical, and made a decree for nullity, as it was established that, whenever the husband endeavoured to consummate the marriage, the act brought on hysteria, so that he could not effect his purpose without employing such force as, but for the marriage, would

have amounted to rape. Mr. Bannerjee, on behalf of the wife, has contended that the decisions mentioned prescribe the extreme limit of the rule of impotents and should not be extended to cases like the present. In support of his argument, he has referred to the judgment of Sir Cresswell in *Stagg v. Edgecombe* (1863) 3 Sw. & Tr. 240 : 32 L.J. Mat. 153 : 9 Jur. (N.S.) 698 : 8 L.T. 643 : 12 W.R. 19 where a petition for nullity by a wife was on the authority of the decision of Dr. Bettesworth in *Welde v. Welde* (1731) 2 Lee 580 at p. 866 : 101 E.R. 447 that the impotence must be a visible incapacity dismissed, as the alleged impotence of the husband was not due to disease or natural infirmity but was occasioned by the indulgence of a disgusting and degrading habit. None of the cases cited in argument is directly in point, and the question raised is plainly one of first impression, so far as this Court is concerned. The matter consequently requires careful investigation, specially in view of the fact that it is only in comparatively recent times that the true nature of syphilis has been revealed by scientific investigators.

2. An examination of the cases in the British and American Courts shows that the question of the legal effect of the existence of syphilis on contracts to marry or on the married status has been considered from three standpoints, which, though distinct, are mutually related, namely, first is the existence of such a disease a valid defense to an action for breach of a contract to marry, secondly, is the existence at the time of the marriage a ground for annulling the union and, thirdly, is it a ground for divorce.

3. As regards the first question, namely, whether the existence of syphilis in one of the parties to a contract to marry is a good ground for rescission by the other, we have not been able to trace any reported case in England where the point has been judicially determined. Lord Kenyon in *Atchison v. Baker* (1796) 2 Peake 103 is reported to have laid it down as a general rule that if the condition of the parties was changed after the making of the contract, it was good ground for either to break off the engagement. In the case before him, he ruled that where the plaintiff had become afflicted with an abscess in his breast and the defendant had refused to marry him on that ground, an action for breach of contract could not be sustained. The same rule has been applied where the affliction was syphilis; *Kutzler v. Grant* (1878) 2 Ill. App. 286, *Allen v. Baker* (1882) 41 Am. Sep. 414 : 86

N.C. 91, Schackleford v. Hamilton (1892) 15 L.R.A. 531 : 19 S.W. 5. The rule enunciated in these cases may be briefly formulated; where syphilis contradicted, prior to but was not known to exist at the time that the contract to marry was entered into, or where such disease was protracted subsequent to the making of the contract to marry, but through no wrongful act of the defendant, its existence furnished a good defence to an action for breach of promise. It is to be observed that in both the Cases just mentioned, the affliction was of a serious type, and, perhaps, incurable; the rule might well be otherwise where the disease is Such as to be easily curable and where the plaintiff assents to a postponement of performance. The reason for the rule is best stated in the words of Ruffin, J. in Allen v. Raker (1892) 16 L.B.A. 531 : 19 S.W. 5.

4. We cannot understand how one can be liable for not fulfilling a contract when the very performance thereof would in itself amount to a great crime, not only against the individual but against society itself. However, once doubted, it is now generally, conceded that if the performance of a contract be rendered impossible by the act of God alone such fact will furnish a valid excuse for its non-performance; and Such a stipulation will be understood to be an inherent part of every contract. It is likewise true that, whenever the main part of an executory contract becomes impossible of performance from any cause beyond the power of the party to control, it will be treated as having become impossible in toto. Why should not the same principle apply to a contract, the fulfilment of which, owing to causes subsequently intervening and altogether independent of any default of the party, can only be productive of consequences disastrous to the parties themselves, and Such as may entail misery upon others to come after them?.... The usual, and we may say legitimate, objects sought to be attained by such agreements to marry are the comfort of association, the consortium vitae, as it is called in the books; the gratification of the natural passions rendered lawful by the union of the parties; and the procreation of children. And if either party should thereafter become by the act of God and without fault on his own part, unfit for such relation, and incapable of performing the duties incident thereto, then the law will excuse a non-compliance with the promise--the main part of the contract having become impossible of performance, the whole will be considered to be go.... The law will constrain no man to assume a position so full of peril, as to have

placed within his reach the lawful means of gratifying a powerful passion, at the risk of another's health or life and the possibility of bringing into the world children in whose constitution the seeds of a father's sin shall lurk.'

5. The point, as we have said, has not been directly decided in England. The defendant in *Hall v. Wright* (1858) El. Bl. & El. 746 : 113 R.R. 881 : 27 L.J.Q.B. 845 : 5 Jur. (N.S.) 62 : 120 E.R. 688 refused to carry out his promise by reason of his having become afflicted with bleeding of the lungs rendering sexual intercourse dangerous to himself. The Court held that this was not a sufficient answer to the petition. The Court of Queen's Bench was equally divided, while in the Court of Exchequer Chamber, the decision was pronounced by a majority of four against three. The rule adopted by the majority is a deviation from the general doctrine that in contracts of a personal matter, illness of the promisor rendering him incapable of fulfilling the terms of his agreement is an excuse for non-performance: *Boast v. Firth* (1868) 4 C.P. 1 at p. 8 : 38 L.J.C.P. 1 : 19 L.T. 264 : 17 W.R. 29, *Robinson v. Davison* (1871) 6 Ex. 267 : 40 L.J. Ex. 172 : 24 L.T. 756 : 19 L.T. 1036. It may be noted, however, that the rule in *Hall v. Wright* (1858) El. Bl. & El. 746 : 113 R.R. 881 : 27 L.J.Q.B. 845 : 5 Jur. (N.S.) 62 : 120 E.R. 688 was approved by Montague Smith, J., in *Boast v. Firth* (1868) 4 C.P. 1 at p. 8 : 38 L.J.C.P. 1 : 19 L.T. 264 : 17 W.R. 29, where he distinguished marriage contracts from other contracts. In the case of a contract to marry, the man, though he may be in a bad state of health, may nevertheless perform his contract to marry the woman and so give her the benefit of social position so far as in his power, though he may be unable to fulfil all the obligations of the marriage state, and it rests with the woman to say whether she will enforce or renounce the contract.' Sir Frederick Pollock, in his *Treatise on Contract*, has adversely criticised this decision and has expressed the opinion that it cannot be maintained except against the common understanding of mankind and the general treatment of marriage by the Law of England that the acquisition of legal and social position by marriage is a principal and independent object of the contract. It may well be doubted whether the rule will be applied to a case where the disease is of a dangerous and infectious character.

6. As regards the second question, namely, whether the existence of syphilis in either party at the time of the marriage renders the marriage voidable, the answer must depend primarily on the nature and objects of the marriage relation itself. As observed by Dr. Lushington in *Deane v. Aveling* (1845) 1 Robertson Eco. Rep. 279 at p 298 : 163 E.R. 1239, the two principal ends of matrimony are, a lawful indulgence of the passions to prevent licentiousness and the procreation of children according to the evident design of Divine Providence. Whatever other object theorists may ascribe to the marriage relation, the practical statesman must continue to regard it as a civil institution whose chief purposes are the legalisation of sexual commerce between the parties and the perpetuation of the case. Capacity for sexual intercourse must exist at least in posse, at the time that the marriage is entered into. It is for this reason that permanent and incurable impotency existing at snob time and of such nature as to render complete and natural sexual intercourse between the parties practically impossible is recognised as a ground for the amendment of the marriage. See the judgment of Lord Johnston and Lord Dunedin, in *A.B. v. C.B* (1906) 8 F. 603 : 13 Scot. L.R. 411 and of the House of Lords in *A.B. v. C.B.* (1885) 12 Rettie 36 : 22 Scott L.R. 461. The capacity for sexual intercourse it is true, is not necessarily affected by the existence of syphilis and yet Such disease may render coition practically impossible. Reference may, in this connection, be made to the following passage from the judgment of Ross, C.J., in *Ryder v. Ryder* (1894) 44 Am. St. Sep. 888 : 66 Vermont 158.

7. While there was no malformation which renders complete sexual intercourse impossible, there was a physical condition that rendered her (the defendant) incapable of healthy coition. Every Such act; by reason of her physical condition, was attended with great danger of communicating to him incurable disease, a disease endangering his health and life.... In the case of Bar the petitioner's organs of generation at the time of the marriage were in an incurably diseased condition, which, while it did not physically render her incapable of copulation, or of bringing into life a child, a mass of syphilitic sores, as good as dead when born, yet it did render copulation and procreation on the part of the petitioner impracticable, because the act endangered both his health and life.'

8. To the same effect is the opinion of a Fall Bench of the Supreme Court of Massachusetts in *Smith v. Smith* (1898) 171 Mass. 404 : 68 Am. St. Rep. 440 : 41. In that case the action for the annulment of marriage was brought by the wife on the ground that, at the time of the marriage, her husband was constitutionally afflicted with syphilis in Such state of development as to render a cure very remote and doubtful; he had knowledge of his condition at the time he entered into the marriage, but concealed the fact from the plaintiff, who immediately upon learning of it and before the marriage was consummated, left him, and refused to live with him as his wife. Knowlton, J., in pronouncing the decree for annulment of marriage, observed as follows:

His concealed disease was Such as would leave with him no foundation on which the marriage relation could properly rest. It had advanced to each a stage as probably to be incurable. The libellant could not live with him as his wife without making herself a victim for life and giving to her offspring, if she had any, an inheritance of disease and suffering.... Few, if any, would be bold enough to say that it was the duty of the libellant on discovery of the fraud before consummation of the marriage to give herself up as a sacrifice and to become a party to the transmission of such a disease to her posterity.

9. In both the cases just mentioned the persons were, it will be observed, afflicted with an incurable form of syphilis. It can hardly be doubted that sound public policy would not permit an extension of the rule to cases where the disease is easily curable it is the permanent or probably permanent character of the malady, rendering sexual intercourse impracticable throughout the continuance of the marriage, that furnishes the reason for the annulment and the maxim should apply *cessante ratione cessat lex ipsa*. The determination of the question, whether in a particular case the disease is or is not curable, may be a matter of considerable difficulty. But it must be remembered in this connection that recent scientific investigations have brought to light the grave injury which as the inevitable consequence of it infection, may result to the husband or the wife, as the case may be, and to their progeny. We need refer only to the monographs by Dr. Shillitoe on the Primary Lesions and Early Secondary Symptoms of Syphilis as seen in the female, of Dr. Grow on Syphilis in Obstetric and of Dr, Atkinson on Medico-Legal

Association of Syphilis (See System of Syphilis, Oxford Series, Volume I, Chapter 18, Volume II, Chapter 26 and Volume VIII, Chapter 15). In these circumstances, the rule as enunciated in the American Courts may well be applied. The fact that one spouse is afflicted with syphilis does not necessarily make him or her impotent. Impotency is ordinarily understood to mean incapacity, which admits of neither copulation nor procreation, capacity for sexual intercourse seeming to be the matter chiefly regarded in the adjudged cases on the subject-Hence impotency has been taken to mean physical and incurable incapacity from entering into the marriage, that is, incapacity to consummate the marriage. From this it has been held, in *Ryder v. Ryder* (1894) 4 Am. St. Rep. 833 : 66 Vermont 158, that where at the time of the marriage the wife was afflicted with incurable syphilis, which, though not an absolute bar to copulation, rendered the act impracticable as endangering both the health and life of the husband, there was such incapacity as entitled him to a decree for annulment of marriage. On the other hand, it was ruled in *Vondal v. Vondal* (1900) 175 Mass. 383 : 78 Am. St. Rep. 502 that the concealed existence of such a disease was not a sufficient ground for a decree of nullity of marriage, where it appeared that by medical treatment the danger from intercourse could have been obviated. The destination appears to us to be based on reason and good sense.

10. As regards the third question, namely, does the existence of Syphilis in one of the parties furnish a good ground for divorce to the other; there are cases in the English as also in the American Courts where the matter came up for consideration directly or indirectly. These decisions have in general held that in such cases a divorce may be decreed on the ground of cruelty. To constitute such a ground of cruelty, it is usually required that the disease should have been actually communicated to the complainant, that the complainant should have been ignorant of the existence or nature of the defendant's disease at the time of its communication and that the defendant should have infected (the petitioner knowingly and wilfully. If all these facts are established, no question obviously arises as to the propriety of granting the divorce unless there are facts showing a condonation of the offence *Popkin v. Popkin* (1791) 1 Hagg. Ecc. 733 (note), *Collett v. Collett* (1838) 1 Curt. 678 : 163 E.R. 237, *Ciocci v. Ciocci* (1854) 1 Spink. Ecc. 121 : 18 Jurist 194, *Jones v. Jones* (1860) Searle & Smith 138, *N. v. N.*

(1862) 3 Sw. & Tr. 234 : 9 Jur. (N.S.) 1203 : 9 L.T. 26, Brown v. Brown (1665) 1 P. & D. 46 : 35 L.J. Mat. 13 : 11 Jur. (N.S.) 1027 : 13 L.T. 645 : 14 W.R. 149, Boardman v. Boardman (1866) 1 P. & D. 233 : 14 W.R. 1024, Morphett v. Morphett (1869) 1 P. & D. 702 : 28 L.J. Mat. 23 : 19 L.T. 801 : 17 W.R. 471 which were all reviewed by Lord Shand in Strain v. Strain (1885) 13 Rettie 132 at p. 136 : 23 Scot. L.R. 90. Reference may also be made to the decision in R. v. Bennett (1865) 4 F. & F. 1105, Reg. v. Sinclair (1867) 18 Cox C.C. 23, Hegarty v. Shine (1878) 2 L.R. Ir. 273 : 4 L.R. Ir. 288 : 14 Cox. C.C. 145 and Reg. v. Clarence (1888) 22 Q.B.D. 23 : 58 L.J.M.C. 10 : 53 L.T. 280 : 37 W.B. 166 : 16 Cox. C.C. 511 : 53 J.P. 149 in the last mentioned case, the Judges of the Court of Queen's Bench as the Court for consideration of Crown Cases Reserved, held by a majority of nine against four that a husband who had fraudulently concealed from his wife that he was suffering from syphilis and had thereby obtained her consent to sexual intercourse with the result that the disease was communicated to her was not guilty of having committed an 'assault' upon her, 'occasioning actual bodily harm' within the meaning of 24 and 25, Vict. C. 100, Sections 20 and 47.

11. We have finally to consider the allegation of fraud. It may be stated as a general rule that, concealment of a loathsome and insurable form of syphilis is recognized as a fraud sufficient to warrant divorce or annulment, specially where the existence of the disease is discovered by the other party before the marriage is consummated and the parties immediately separate. It seems that such disease must be actually or probably incurable, but annulment has been granted notwithstanding a more remote possibility of a cure Smith v. Smith (1898) 171 Mass. 404 : 68 Am. St. Rep. 440 : L.R.A. 800. Vondal v. Vondal (1900) 175 Mass. 383 : 78 Am. St. Rep. 502, Svenson v. Svenson (1908) 178 N.Y. 54 : 70 N.B. 120, Crane v. Crane (1899) 62 N.J. Eq 21 : 49 Atl. 734 see also the notes to State v. Lowell (1899) 79 Am. St. Rep. 868 at p. 378 : 78 Minn. 166 : 80 N.W. 877, Lyon v. Lyon (1907) 230 Ill. 866 : 13 L.R.A. (N.S.) 996 : 82 N.E. 850, Burger v. Burger (1911) 85 Kan. 564.

12. In these circumstances, we must hold that there has not been that full investigation of the case which the gravity of the result to the parties concerned required. The appeal must consequently be allowed, and the case remanded for

re-trial. The allegation of fraud will be investigated and the question whether (he condition of the respondent makes the rule of impotency, as explained above, applicable, will be carefully reconsidered. We may add that it is necessary that there should be a proper medical examination of the person of the respondent. Reference may on this point be made to the following passage from the judgment of Lord Stowell in *Briggs v. Morgan* (1820) 8 Phill. 325 : 2 Hag. Con. 824 : 16 E.R. 1389: 'It has been said that the modes resorted to for proof on these occasions are offensive to natural modesty: but Nature has provided no other means; and we must be under the necessity either of saying that all relief is denied, or of applying the means which our power, The Court most not sacrifice justice to notions of delicacy of its own;' See also *Norton v. Seton* (1819) 3 Phill. 147 : 161 E.R. 1283, *Pollard v. Wybourn* (1828) 1 Hag. Boo. 725 : 162 E.R. 732, *Aleson v. Aleson* (1728) 2 Lee. Ecc. 576 : 161 E.R. 445, *Sparrow v. Harison* (1841) 3 Curt. 16 : 163 E.R. 638, affirmed in *Harrison v. Harrison* (1842) 4 Moo V. C. 96 : 6 Jur. 899 : 13 E.R. 238. Where a party-refuses to attend for medical inspections the Court may properly draw an unfavourable inference. This was laid down in the case of ft female respondent *F. v. P.* (1896) 75 L.T. 192 and was extended to the case of a male respondent in *B. v. B.* (1901) P. 39 : 70 L.J.P. 4 and was applied again in the case of a female respondent in *W. v. S.* (1905) P. 231 : 74 L.J.P. 112 : 93 L.T. 456. The Courts naturally exercise a 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. We understand that the respondent does not object to a proper medical examination.

13. Costs of this appeal will be costs in the suit.

Chaudhuri, J.

14. I entirely agree.