Himachal Pradesh High Court
Shamla Devi vs Surjit Singh on 27 December, 1996
Equivalent citations: AIR 1998 HP 32
Author: A K Goel
Bench: K Sharma, A K Goel
JUDGMENT Arun Kumar Goel, J.

1. Appellant, hereinafter referred to as the wife' has preferred this appeal against the judgment passed by Shri Janeshwar Goel, District Judge, Una District Una. Vide judgment dated 3-5-1995, the Court below has dismissed the petition of the wife filed by her against the respondent (hereinafter referred to as the husband) for annulment of her marriage by a decree of nullity on the ground that the marriage between the parties has not been consummated, owing to the impotence of the husband as per Section 12(1)(a) of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act).

2. Facts which are not in dispute are that the marriage between the parties was solemnised on 30-11-1992 at Village Katohar Kalan, Tehsil Amb, District Una and the parties lived together up to 12-12-1993 at Village Bhanjal, the native village of the husband. Case of the wife further as pleaded before the trial Court was that the husband refused to cohabit upon wife and showed his ignorance and asked her to sleep. This was the position when she was at the house of the husband at Village Bhanjal on 3-12-1993 when they were givenadoublebedforsleeping when the husband did not approach the wife, after waiting for sometime when the wife tried to remove the quilt from the husband, he declined to cohabit and further on one pretext or the other, the husband was not ready to perform the marital relationship with the wife. It was in these circumstances that the petition was filed.

3. This petition was contested and resisted by the husband who while denying the averments made by the wife, pleaded that she left his house on 10-12-1993 in the company of her brother. It was also specifically pleaded that he is potent and had sexual intercourse with the wife during her stay and at no point of time she ever complained either to his sister or sister-in-law (Jathani). It was further pleaded by the husband that the husband of the elder sister of the wife did not like this marriage and this was an attempt on his part to break the marriage of the parties and the marriage was slated to have been consummated and while leaving the house of the husband the wife had taken all the ornaments and clothes to her own house.

4. On the aforesaid pleadings, following issues were framed:

1. Whether the respondent has been impotent and thus the marriage has not been consummated, if so its effect? OPP

2. Relief.

After conclusion of the trial the petition for annulment of marriage between the parties was dismissed by he trial Court and the wife has approached in this appeal for reversal of the said judgment by allowing this appeal and consequently annulling the marriage as prayed for by her.

5. Wife appeared as PW-1 and has specifically stated on oath that there was no cohabitation between the parties during the entire period of 10 days from 3-12-1993 and she came back to her parental house after the 10th day of her marriage. PW-2 Sansari Devi is wife's aunt who has stated that she came back ten days after her marriage and thereafter wife stated that she would not go to her husband's house as the boy is not suitable to her. PW-3 Bansi Lal is the father of the wife who amongst other things stated that when his daughter returned, she informed that the husband did not do anything with her and he is impotent. This witness further stated that he informed his brothers and called few persons to whom this witness informed that the boy is totally simpleton and the girl does not want to go to him due to mental weakness and she does not want to live with him. In cross-examination he has admitted that he does not like the boy who is a simpleton. However, he showed his ignorance regarding there being any defect with the boy. PW-4 is Dr. Charanjit Singh. On a reference made by the Court to constitute a Board for examining the husband as to whether he is potent and was able to consummate the marriage. This witness constituted the Board and issued certificate Ex. PW-4/A and in the opinion of the Board there was nothing to suggest that he is incapable of doing sexual intercourse. Though no reasons have been given by this witness in the opinion certificate Ex. PW-4/A, yet his statement shows that whatever measures were adopted by the Board to ascertain whether the husband is potent or impotent or was capable of performing sexual intercourse or not fully are detailed therein. Although the fact remains that N.P.T.R. was not available in the District Hospital and it was not carried out in the case of the husband, similarly no drug or injection was administered to the respondent to secure his erection. He has specifically stated in the statement that the husband was able to masturbate and to ejaculate and the doctor had found him physically and psychologically potent. According to this witness erection on masturbation is an important factor for coming to the conclusion about the potency of a man. Against this evidence of the wife, husband has appeared as his own witness and has stated that during the period the wife remained with him after marriage, he had been consummating the marriage and was doing sexual intercourse with her. He has further given the details of the manner in which marriage was consummated right from the day of marriage. He has further corroborated the fact of his having been medically examined about his potency by three doctors. This is entire evidence produced by the parties in support of their respective pleas.

6. Shri Bhuvnesh Sharma, learned counsel appearing for the appellant has urged that the statement of his client PW-1 is enough to allow the present appeal. According to him husband may be potent but as per his client he was unable to consummate the marriage for lack of coitus, as such, the Court below has fallen into error in not dismissing the divorce petition. It was further urged that despite the fact that a person is a potent yet for psychological and other reasons qua a particular woman he can be impotent and thus on this analogy it was urged with vehemence that the statement of PW-1 does not require any corroboration and, therefore, the appeal deserves to be allowed according to the learned counsel.

7. On the other hand, Shri N. K. Thakur, learned counsel appearing for the respondent has controverted all the submissions urged on behalf of the wife and further pointed out that there is no reason to doubt much less disbelieve the statement of husband who has appeared as RW-1 and has given vivid details regarding the consummation of marriage between the parties and performance of coitus during the period the parties lived together before the wife left with her brother for her

parental house. It was also urged on behalf of the husband that in this case, the wife has been prompted by her elder sister's husband to file this petition who wants to get her settled somewhere else. Reference has been made to number of decided cases by both the learned counsel for the parties to which reference will be made hereafter.

8. In case Suvarnabahen v. Rashmikant Chinubhai Shah, AIR 1970 Guj 43, it has been held that wife's evidence has to be tested in the light of probabilities and conduct of the parties, a corroboration is not required if the evidence is otherwise reliable and there is no collusion. Impotency could be due to psychological inhibition or physical incapacity. However, both have to be proved accordingly. In the background of this case, after finding the evidence of the wife reliable, divorce was granted, as such, it is clear that it is a judgment of its own facts. In case Mst. Bawi v. Nath, AIR 1970 J&K 130, it was held that an individual generally potent but impotent with respect to his own spouse is impotent for the purpose of the provisions of Hindu Marriage Act and in those circumstances marriage was annulled. However, principle of law enunciated in this judgment is the same as in the case of Suvarnabahen v. Rashmikant Chinubhai Shah (supra).

9. Decision in Jagdish Kumar v. Smt. Sita Devi, AIR 1963 Punj 114, is a judgment of its own facts because when a fair trial was given by wife to the husband to perform sexual intercourse and he was unable to do so, therefore, it was held that he is impotent within the meaning of Section 12(1)(a) of the Hindu Marriage Act, 1955.

10. In case Gudivada Venkateswararao v. Smt. Gudivada Nagamani, AIR 1962 Andh Pra 151, it has been held that marriage may be avoided or dissolved on the ground of impotence, if it is established that at the lime of the marriage either of the spouses was incapable of effecting the consummation either due to structural defect in the organs of generation rendering complete sexual intercourse impracticable or due to some other cause. There can hardly be any dispute regarding the proposition laid down in this judgment. In another case Promila Kumari v. Krishan Kumar Malhotra, 1982 Hindu LR 232 (Delhi), it has been held that husband was charged to be impotent and non-consummation of marriage was pleaded and the medical evidence corroborated the version of the wife, she was held entitled to annulment of marriage by a decree of nullity on the ground of impotence of the husband.

11. Similarly in case Smt. Suvarna v. G. M. Achary, AIR 1979 Andh Pra 169, it was held that it is enough if it is proved that the marriage has not been consummated and the absence of consummation is due to the impotency of the husband i.e. impotency with other women is also not required and where the medical evidence clearly proved that the wife was virgin even after her filing the petition under Section 12(1)(a) for nullity of marriage, then the husband's case that he had sexual intercourse with the wife many times was found to be false, and in those circumstances it was held that the marriage having not been consummated the husband was impotent.

12. What is impotency has also to be seen in the context of the provisions of the Act. Impotency in fact is the lack of ability to perform full and complete sexual intercourse. By now it is very well accepted that partial and imperfect intercourse is not consummation and if a party was not capabale of performing the sexual intercourse fully, he would in law be deemed to be impotent. Further any

penetration, howsoever, it is transient would not amount to consummation of marriage. As per observations in Taylor's Principles and Practice of Medical Jurisprudence, Volume II, 11th Edition, in Chapter II, it is observed:

"If a fairly resistant hymen with small opening be found quite intact, there is a strong presumption of chastity; if on the other hand, there be a very soft and resilient hymen with a large opening, no opinion can be offered."

13. In the context of the present case, wife while appearing as PW-1 has stated that the husband did not perform sexual intercourse with her during 10 days when she lived with him and after that she returned to her parental house and now she is not willing to live at husband's house because he is incapable of marriage. However, in her cross-examination she was categorical that she does not want to get herself medically examined. On the otherhand husband get himself medically examined by a Board of Doctors on a reference having been made by the trial Court. This medical was performed on the application filed by the wife for getting her husband medically examined and when the statement of PW-4 Dr. Charanjit Singh is referred, it is evident that there is nothing to suggest that the husband is impotent or incapable of performing the sexual intercourse.

14. Potence in case of males means power of erection of the male organ plus discharge of healthy semen containing living spermatozoa and in the case of females menses. For the purpose of consummating of marriage ordinary and complete sexual intercourse must take place. In admitting whether intercourse is ordinary or complete the words consummate must be construed as it is understood in common parlance and in the light of the social condition known to exist. For this proposition a reference can be made to the observations of Dr. Lushinton in the case of D.V.A. (1845) Rob Eccl 279 and were cited with approval in Grimes v. Grimes, (1948) 2 All ER 147, Dr. Lushinton observed :--

"That 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 to 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. I can never think that the true interest of society would be advanced by retaining within the marriage bonds parties driven to such disgusting practices."

15. The burden of proof that the husband was impotent was on the wife. When a reference is made to the statements of PW-1 wife, PW-4 Doctor and RW-1 husband, we find that the evidence on record falls short to record a confirmed finding that the husband was in fact impotent as alleged by the wife. Sub-clause (a) of Section 12(1) is to the following effect:

(a) that the marriage has not been consummated owing to the impotence of the respondent; or....."

This provision was substituted for the earlier provision wherein it had to be shown that at the time of marriage and thereafter the respondent continued to be impotent. So far the present case is concerned, the wife has failed to prove that the husband was impotent or that the marriage has not

been consummated, this view gets strength from the fact that she declined to get herself medically examined. Had she been virgin or the marriage had not been consummated, the medical evidence after her examination would have established the said fact. On the other hand on the application of the wife, the husband was medically examined and had been found to be potent.

16. Incidently, it may be worth while to mention here that attempts were made for reconciliation and when those failed, then the parties at one stage had agreed for settling the matter mutually and seek dissolution of their marriage by mutual divorce under Section 13-B of the Hindu Marriage Act, 1955 as well as for converting the present proceedings under the said provisions of the Act. hOWEVer, and getting number of opportunities the attitude of the husband was not reasonable so the matter could not be settled one way or the other and finally it came to be Heard.

17. From whatever angle we may examine the case of the wife, we find no reason to interfere with the judgment passed by the Court below on the basis of evidence referred to hereinabove. Accordingly, there is no merit in this appeal which is dismissed accordingly. Costs on the parties.