

Kerala High Court

Joy vs Shilly on 13 September, 1995

Equivalent citations: I (1996) DMC 200

Author: P N Nambiar

Bench: P N Nambiar

JUDGMENT P.V. Narayanan Nambiar, J.

1. Husband is the petitioner. He seeks a declaration that the marriage between him and the respondent is null and void on the ground that the respondent was impotent at the time of marriage and at the time of institution of the proceedings; that the respondent was a lunatic at the time of marriage and consent of the petitioner for the marriage was obtained by fraud.

2. Parties to the marriage are Christians governed by the Indian Divorce Act, 1869 (for short 'the Act')- The marriage was celebrated on 26.12.1988 at St. Sebastian's Catholic Church, Kottappady. It is alleged in the Original Petition that a representation was made by the respondent and her parents that she (the respondent) was having physical and mental health and she has passed the Pre- degree examination. It is believing this representation that the petitioner consented to the marriage with the respondent. At the time of marriage and immediately thereafter, respondent has shown serious symptoms of psychotic disorders. After the marriage, both of them lived together for a few days in the respondent's house. She was exhibiting signs of mental disorder. She failed to perform her marital obligations. The mental disorder made her sexually impotent and cohabitation never took place between the petitioner and the respondent. Thereafter, respondent and the petitioner left for the petitioner's house at Kottappady where they lived together for a few days. Respondent was showing symptoms of very serious mental disorder. On 9.1.1989 she attempted to commit suicide. On 20.3.1989, respondent was taken to Nair's Hospital, Ernakulam for mental disorder and she had undergone treatment as an inpatient there for about 60 days during intermittent periods. She was an inpatient from 20.3.1989 to 23.3.1989 and thereafter from 10.4.1989 to 16.5.1989. She told the petitioner that she never wanted to marry and she was forced to do so by her parents. Though on subsequent occasions also the petitioner tried to consummate the marriage, it was not successful. All attempts made by him to have sexual intercourse with the respondent did not materialise due to the impotency (rigidity) of the respondent.

3. Petitioner, on 13.6.1989, moved the Eparchial Tribunal for declaration of the marriage between himself and the respondent as null and void. A decree was granted by the Tribunal which was affirmed by the Appellate Tribunal. Subsequently, the petitioner filed the present Original Petition as he was advised that despite the decree of the Eparchial Tribunal, a decree of the Court is necessary for declaring the marriage null and void. (See: George Sebastian v. Molly Joseph, 1994 (2) KLT 387 FB). Thus, this application is filed under Sections 19(1) and (3) of the Act seeking for declaration of the marriage between the petitioner and respondent null and void.

4. The wife /respondent filed a counter affidavit opposing the application. The suppression of material fact alleged in the Original Petition regarding the disease of the respondent was denied by her. Likewise, the allegation that she had passed Pre-degree examination and that the consent of the petitioner was obtained on that representation is also denied by her. According to her, she was

physically and mentally healthy before the marriage and also at the time of marriage. She stated that after the marriage, she was ill-treated by the petitioner and members of his family and this had caused some mental disorders in her. She added that the marriage could not be consummated because of the fault of the petitioner. Whenever the respondent took initiative to have sex with the petitioner, he remained rigid and cold. According to her, the cohabitation had not been taken place due to the non-cooperation of the petitioner. The allegation regarding consummation of kerosene and admission in the hospital are denied by her. She admitted that once she was treated at Nair's Hospital, but that was not for mental disorders. She sought for a dismissal of the Original Petition.

5. The evidence consists of Exts. P1 to P10 produced by the petitioner and oral evidence of PWs. 1 to 7. On the side of the respondent, no exhibits are marked, but she examined R.Ws. 1 to 4.

6. PW1 is the petitioner, who spoke in terms of the allegations contained in the Original Petition. PW 2, Dolly Antony, who is the wife of the petitioner's brother, was examined to prove that the respondent appeared to be insane at the time of marriage, PWs 3 and 4, Narayanan Ilayath and Kochan Anthony respectively, are the neighbours of the respondent examined to prove the mental condition of the respondent before the marriage. The Administrator of St. George's Hospital, Muvattupuzha is examined as PW 5 to prove that the respondent was admitted as an inpatient as she consumed kerosene. The Psychiatrist attached to Nair's Hospital, Ernakulam, Dr. M. Chandra Sekharan Nair, examined as PW 6, spoke regarding the mental condition of the respondent. PW 7, Dr. Philip John, Psychiatrist, who was formerly attached to the Medical Trust Hospital, Ernakulam was also examined for the same purpose.

7. Respondent is RW 1. RW 2 is her father who spoke about the mental condition of the respondent deposed that she started showing signs of mental disorders after the marriage. RW 3, who is the respondent's uncle's son, deposed that the respondent had no mental illness at the time of marriage. A neighbour by name Vijaya Kumar was also examined as RW 4 to prove the same fact.

8. Now I come to the documents; Ext. P1 is the certificate issued from Nair's Hospital proved by PW 6 which shows that the respondent was an inpatient in Nair's Hospital and was undergoing treatment for Schizo-affective disorder from 23.2.1989 to 16.5.1989. Exts. P2 and P3 are the prescriptions issued from Nair's Hospital. Exts. P4 to P6 are the decrees of the Eparchial Tribunal, the Appellate Tribunal and the notification respectively. Ext. P7 is the case sheet of the respondent maintained at Nair's Hospital. Ext. P8 is an agreement between the petitioner and the respondent's father showing that the Streedhanam amount was returned. Ext. P9 is the receipt showing payment of the amount Ext. P10 is the letter written by respondent's father to the Vicar of the Church to the effect that he has no subsequent claim in relation to the marriage of the petitioner and the respondent.

9. On the pleadings, the following issues arise for consideration :

(a) Was the respondent impotent at the time of marriage and at the time of institution of the proceedings ?

(b) Was the respondent a lunatic at the time of marriage ?

(c) Was the consent of the petitioner was obtained by fraud ?

10. Petitioner alleged that the respondent was impotent at the time of marriage and at the time of institution of this proceedings. It is also stated in the Original Petition that the marriage was not consummated. While he was examined as PW 1, he has narrated the details to stress the point that the respondent was impotent and that is the reason why the marriage could not be consummated.

11. It is significant to note that it is admitted in the counter affidavit filed by the respondent that the marriage was not consummated, but she has got different reasons. According to her, the marriage could not be consummated due to the rigid attitude of the petitioner. In the course of her examination, a specific question was put to her whether the marriage was not consummated due to her fault and her answer was that "she does not know". A reading of the evidence of PW 1 will show that he attempted to have sexual intercourse with the respondent on many occasions, but all those attempts were resisted by the respondent.

12. Sex is one of the purposes of the marriage. The institution of marriage believes in consummation of the same. Cohabitation is a corollary to the solemnisation of the marriage. When it is admitted by either side that the marriage was not consummated and cohabitation did not take place, the very foundation of the marriage is crumpled. We will have to find out in such circumstances whether the petitioner who alleges impotency on the part of the respondent as the reason for non-consummation of the marriage has succeeded in establishing the same. The evidence tendered by PW 1, which I am prepared to believe and the answer of the respondent while she was cross-examined make me to believe that the marriage was not consummated not due to the fault of the petitioner, but due to the fault of the respondent.

13. Refusal to give reasons for non-consummation of the marriage can lead to an inference regarding impotency of the respondent. In *J. Anthony v. M.S. Ammal*, AIR 1970 Mad. 103, the High Court of Madras had occasion to consider a similar question and it was held in a husband's petition for declaration of nullity of marriage on the ground of wife's impotency, the wife's consistent refusal to consummate the marriage and also her refusal to submit herself to medical examination are strong circumstances from which a legitimate inference of her impotency at the time of marriage and also at the time of institution of the proceedings against her, within the meaning of Section 19(1) of the Indian Divorce Act, can be drawn. In *Vincent Adolf v. Jume Beatrice Rama*, AIR 1985 Bom. 103, Justice Kania (as he then was) had occasion to consider the question whether the wife's resistance to the attempts of the husband to have sexual intercourse can be termed to be due to the impotency of the wife and it was held that the Courts will infer that the refusal arises from incapacity caused by nervousness or hysteria or from an invincible repugnance to the act of consummation resulting in a paralysis of the Will. It can also be held that the wife is impotent qua to the petitioner-husband. It was also held that it is not necessary to establish that the wife is impotent generally or physically incapable of the act of sexual intercourse. It is enough that she was impotent qua to her husband.

14. A similar question was considered by the Full Bench of the High Court of Madras in the decision reported in *S. John Dhanadurai v. J. Marry Suganthi*, AIR 1994 Mad. 81. This was a case where the parties to the marriage lived together for nine days and after the marriage the wife consistently refused to consummate the marriage and the Full Bench held that when there was no sexual intercourse between the parties to the marriage and that the wife has resisted all the attempts and that her refusal arises from incapacity caused by nervousness or hysteria or from invincible repugnance to the act of consummation resulted in paralysis of the Will and the husband made repeated and consistent approaches, but was not successful. So, it can be presumed that the wife was impotent and a decree for nullity of the marriage on the ground of impotency can follow.

15. Division Bench of this Court had occasion to consider the plea regarding impotency - its onus, nature and degree required in divorce cases in *Mary Kurian v. Joseph*, 1980 KLT 530. Though it is said that the burden of proving plea of impotency is on the person who alleges the same, when there is evidence that the respondent was not responsive in the matter of sexual relations for a fairly reasonable period, one must assume want of desire and intention on the part of the unresponsive spouse to consummate the marriage. This will go a long way of proving the fact of impotency on the part of the wife.

16 *Ponnen v. Pottnen*, AIR 1968 Ker. 129, a conclusion was arrived at by this Court that due to the persistent refusal to consummate the marriage, incapacity to have sexual intercourse can be assumed.

17. There is no allegation or proof that the husband/petitioner herein is suffering from any physical or mental illness which will disentitle him from having sexual union with the wife/respondent. There are no indications or circumstances which will warrant the conclusion that the marriage between the petitioner and the respondent could not be consummated due to the defect, physical or mental health of the petitioner. So, the only conclusion possible is that the marriage was not consummated due to the physical or mental condition of the respondent.

18. There is no evidence to show that there is anything physically wrong with the respondent which has caused impotency in her. But the evidence in this case shows that the respondent was impotent due to her mental ailments. There is evidence to show in this case that the respondent was lunatic at the time of marriage and it is due to this, she could not consummate the marriage. The evidence of PW 7, Dr. Philip John is categoric to the effect that a patient suffering from Schizo-affective disorder cannot have normal sexual relationship with his/ her spouse and they will be suffering from frigidity. The evidence of PW 6 to an extent also proves that the respondent will not be interested in sex. He deposed that it will not be possible for the respondent to discharge her marital obligations. So, it is reasonable to conclude that the impotency/frigidity of the respondent is due to the mental disorder which she was suffering from at the time of marriage.

19. The other question to be considered is whether the respondent was a lunatic at the time of marriage.

20. The evidence of PWs 6 and 7 will conclusively show that the respondent was a lunatic at the time of marriage. PW 6, Dr. M. Chandrasekharan Nair, Psychiatrist attached to the Nair's Hospital, Ernakulam proved Exts. P1, P2, P3 and P7. Ext. P1 is the certificate showing that the respondent was an inpatient from 23.2.1989 to 16.5.1989. Exts. P2 and P3 are the prescriptions and Ext. P7 is the case sheet of the respondent maintained in Nair's Hospital. PW 7, Dr. Philip John, has also treated the respondent. Both of them are qualified Psychiatrists and gave very convincing evidence that the respondent was suffering from Schizo-affective disorder, which is a type of incurable mental disease. Very descriptive evidence is given by them. Their evidence is unshaken in cross-examination. I am inclined to place reliance on their evidence and conclude that the respondent was suffering from lunacy.

21. The evidence of PW 6 will only prove that the respondent was suffering from lunacy after the marriage. But the evidence of PWs 2 to 4 throws light on the fact that the respondent was suffering from mental illness before marriage also. There is nothing for me to disbelieve PWs 2 to 4 and I am inclined to place reliance on their evidence. So, I conclude that the respondent was a lunatic at the time of marriage.

22. The only other question to be considered is whether the marriage could be declared as null and void on the ground of fraud.

23. It is in evidence that the fact that the respondent was insane was suppressed from the petitioner as well as his relatives. When the case of the respondent is that she was not insane before marriage, the question of disclosing about the insanity of the respondent to the petitioner before the marriage does not arise. Having come to the conclusion that the respondent was insane before marriage and in the light of the pleadings and evidence adduced in this case, it could be reasonably held that the consent of the petitioner was obtained by suppressing the fact that the respondent was insane. Concealing the fact that one of the parties to the marriage was insane will amount to fraud. Concealment of psychosis, which the respondent had, from the petitioner before the marriage was considered to be a fraud in matrimonial cases which led to a decree of divorce (see: *Asha Srivastava v. R.K. Srivastava*, AIR 1981 Del. 253). A similar view was taken by the Punjab & Haryana High Court in the decision reported in *Tarlochan Singh v. Jit Kaur*, (AIR 1986 P&H 379) and it was held that concealment of the fact that the wife was suffering from schizophrenia before the marriage will lead to grant of a decree for annulment of marriage as it amounts to a matrimonial fraud.

24. Concealment of abnormal mental condition of the respondent was sufficient to grant a decree for nullity of marriage as held in the decision reported in *Asha v. Pradeep Shelly* (II (1983) DMC 436). Even concealment of vasectomy performed by the husband was considered to be a sufficient ground for annulment of the marriage (see: *Valsa v. Moore*, 1991 (1) KLT132 = I (1992) DMC 551) and affirmed by the Division Bench in *P.J. Moore v. Valsa*, 1991 (2) KLT 504.

25. Going by the principles of the above decisions, a decree should follow for annulling the marriage between the petitioner and the respondent on the ground that the respondent was suffering from Schizo-affective disorder and this fact was concealed from the petitioner/husband which resulted in his extending consent to the marriage, and the respondent was suffering from impotency.

26. Counsel for the respondent argued that there is no evidence in this case to prove that the respondent was suffering from lunacy at the time of marriage. Evidence of PW 6 is pressed into service by him. I have already dealt with this aspect and come to the conclusion that going by the evidence of PW. 2 to 4, it can be very safely concluded that the respondent was a lunatic at the time of marriage. Her behaviour, and conduct have been described by those witnesses with special reference to the day of the marriage and even prior to that. She started exhibiting mental illness within four days of marriage without any specific reason. This will also indicate that she was insane on the date of the marriage.

27. In the result, the Original Petition is allowed. The marriage between the petitioner and the respondent is declared as null and void on the ground that the respondent was impotent at the time of marriage and at the time of institution of respondent was impotent at the time of marriage and at the time of institution of the proceedings; she was a lunatic at the time of marriage and that the consent of the petitioner was obtained by fraud. There will be a decree accordingly.