Bombay High Court
Raghunath Gopal Daftardar vs Sau, Vijaya Raghunath Daftardar on 15 March, 1971
Equivalent citations: AIR 1972 Bom 132, (1971) 73 BOMLR 840, ILR 1972 Bom 511
Bench: Malvankar
JUDGMENT

1. This is a second appeal against the Judgment and decree passed by the learned District Judge, Poona, in Civil Appeal No. 646 of 1967 on his file from the decree in Marriage Petition No. 18 of 1963 of the Court of the Civil Judge (Senior Division), Poona. It arises this way.

2 The appellant-petitioner was married to the respondent at Poona on 30th March 1962 according to Hindu religious rites. The petitioner alleged that during the negotiations as well as at the time of the solemnization of the marriage the respondent and her parents not only concealed the fact that she was suffering from epilepsy since childhood but also misrepresented to him and his father that she was quite healthy. Within a fortnight after the marriage which was consummated in the first week of April 1962, the respondent started getting epileptic fits. These fits recurred in the months of April, May and June at an interval of about a fortnight. The petitioner further alleged that in the first week of July 1962, he, for the first time, realised that the respondent was suffering from epilepsy which was an incurable disease and, therefore, he took her to the place of her elder sister Mrs. Deshpande in Poona and left her there on 6th July 1962. He also alleged that since after the discovery of this fraud on 2nd July 1962 till he took her to the house of her elder sister Mrs. Deshpande on 6th July 1962, he did not live with her as her husband. From 6th July 1962 the respondent never returned to his house. Alternatively, the petitioner alleged that within a short time after the marriage was consummated, the respondent started behaving in a queer way and also used to insult the petitioner and other members of his family. He, therefore, contended that having regard to the nature of the disease and the strange and unbecoming behaviour of the respondent, he reasonably apprehended that it would be harmful and injurious for him to live with her. He, therefore, prayed for a decree of nullity of the marriage on the ground of fraud, and in the alternative, a decree for judicial separation on the ground of cruelty.

3. The respondent contested the petitioner's claim vehemently. She denied the allegation of fraud and alleged that the fact that the respondent was suffering from epilepsy was brought to the notice of the petitioner's father and the petitioner during the negotiations. She denied that any fraud was practised on the petitioner and contended that he married her with free consent. She also alleged that soon after the marriage, the mother of her mother-in-law discovered a small white spot on her ways while giving her bath, whereupon the members of the family suspected that she was suffering from leucoderma, when in fact it was scar left of an insect-bite. The rest of the contentions in the written-statement are not material for our purpose.

4. On these pleadings, the learned trial Judge framed the necessary issues and on consideration of the evidence adduced by the parties, came to the conclusion that the petitioner had failed to prove that his consent was obtained by fraud or that the respondent was suffering from an incurable disease, and that, therefore, the petitioner was not entitled to a decree of nullity. As regards the alternative plea of the petitioner, the learned trial Judge found that the petitioner had failed to prove

the alleged cruelty and, therefore, dismissed his claim on that ground also. The petitioner then filed an appeal in the District Court, Poona. The learned District Judge found that the petitioner or his father was never told at any stage of the marriage either during the course of the negotiations or at the time of the solemnization that the respondent was suffering from epilepsy, that generally there might have been statements made by the parents and the relations of the respondent that she was healthy, that the respondent herself never told either the petitioner or any of his relations that she was healthy, that the type of epilepsy from which the respondent was suffering was not an incurable disease, that the alleged fraud was discovered by the petitioner on 26th June 1962 or at the most on 2nd July 1962, that thereafter till the respondent was taken by the petitioner to the house of the former's sister on 6th July 1962, both of them were living together as husband and wife with free consent of the petitioner, and that the non-disclosure of the disease of epilepsy either during the course of the negotiations or at the time of the solemnization and the alleged misrepresentation that the respondent was healthy did not amount to fraud in law, and that the petitioner had also failed to prove the alleged cruelty. The learned District Judge, therefore, confirmed the decree of the trial Court and dismissed the appeal with costs. Being aggrieved by this judgment and decree, the petitioner has come to his Court in second appeal.

5. On the arguments advanced before me, the first point that arises for consideration is whether the petitioner has been able to prove in this case that the type of epilepsy, from which the respondent is suffering is an incurable epilepsy. The learned District Judge has recorded a finding against the petitioner on this point. The finding is based on appreciation of evidence and, therefore, ordinarily the appellant-petitioner is not entitled to ask this Court to go into the evidence again and come to its own finding. However, the learned counsel Mr. Parajnape, appearing on behalf of the appellant-petitioner, has argued that though the finding is a finding of fact, the learned Judge having misread the whole evidence, this Court may not accept it and at any rate, for finding out whether or not the learned Judge has misread the evidence, it would be necessary to consider the evidence again in this Court. The learned Counsel Mr. Paranjape, therefore, took me through the evidence on this point and I must say that on going through the evidence, I find that there is no reason why I should differ from the view taken by the learned District Judge.

6.The most important piece of evidence on this point is that of Dr. Sardesai, P. W. 5. The witness is an M. D. of the Bombay University and has also passed M. R. C. P. examination of the Edinborough Royal College of Physicians. Since February 1959 he is attached to the Sassoon Hospital as an Honorary consulting physician. He is both a physician and neurologist practising as a consulting Physician at Poona since August 1960. He is also practising in Neurology since then. Admittedly, the respondent is being treated by this Doctor since about February 1961 for epilepsy. Now, he says that it would not be correct to say that the type of epilepsy the respondent is suffering from, is incurable. He has prescribed 'Dilantin Sodium' to the respondent for this disease and the Doctor says that he has prescribed it with a view to keep her malady under control. When he was asked whether it could be said that the respondent was cured of the disease, he replied that it would not be possible for him to say whether he epilepsy had been cured, because this could only be said if the drug is withdrawn. Later on, he has stated thus :-

"It would be wrong to say that epilepsy is a disease which cannot be cured. The latest publication on 'Therapeutics' by Goodamn and Gillam is the standard book on the Science of Treatment. An older view which believed in the past was that epilepsy was incurable. It would not be correct to say and it is also not to my knowledge that at the present day, there are some authorities in medical science of treatment, who believe that epilepsy is incurable."

It is, therefore, quite clear from his evidence that the disease epilepsy is not an incurable disease. As regards the type of epilepsy from which the respondent is suffering, he has said that if the respondent ceased to get any epileptic fits for a period of three years, he would say that she is cured. He has also said that he was treating the respondent since February 1961 and he could find that for a period of about one year before her marriage, she did not get any epileptic fits. He further says that the drug which he prescribed has worked well. According to him, the respondent is receiving the treatment even today and the disease is well under control. Reliance is then placed on the testimony of Dr. Otturkar, P. W. 3. According to the petitioner the prescription, Ex. 179, dated 2nd June 1962, given by Dr. Sardesai to the respondent, was shown to Dr. Otturkar by his father. Dr. Otturkar being his close friend. Dr. Otturkar asked the petitioner's father whether the respondent was getting any fits and when the latter told him that she was, looking to the prescription, he told the petitioner's father that she was being treated for epilepsy. However, Dr. Otturkar further said that he would get it confirmed from Dr. Sardesai. Now, Dr. Otturkar has given his version of the talk Dr. Sardesai had with him, in his evidence. This version is little different on the point, from the one given by Dr. Sardesai and to which I have already made a reference. Now, according to Dr. Otturkar, what Dr. Sardesai told him was that epilepsy was such a kind of disease which could not be cured but could only be controlled. Dr. Sardesai also told him that the disease could only be kept under control by regular treatment and if the treatment is discontinued, the patient would again start getting epileptic fits. But later on, he admits that Dr. Sardesai also said that the patients suffering from epilepsy were required to take medicines for a very long time and continue the same treatment for about three years after they cease getting any epileptic fits. Now, I have already pointed out that Dr. Sardesai, who was examined by the petitioner himself, nowhere says that epilepsy does not admit of any cure. On the contrary, he says that it is not an incurable disease. But Dr. Otturkar, perhaps to oblige the father of the petitioner, who is his friend, told the Court something different from what the opinion of Dr. Sardesai was. It is material to note that no question was put to Dr. Sardesai regarding the version given by Dr. Otturkar. Coming to the evidence of the petitioner, he says that he came to know from Dr. Otturkar that the disease was incurable and hereditary. There is nothing in the evidence of Dr. Otturkar to show that the disease is hereditary. He only says that what he came to know from Dr. Sardesai was that it was incurable. But I have already pointed out that that was never the opinion of Dr. Sardesai much less he gave that opinion to Dr. Otturkar. The petitioner's father, who is also examined in this case (P. W. 1), repeats the same story. When the petitioner took the respondent to the house of the latter's sister on 6th July 1962, his father was not at home. He was on tour in Nagpur. He, therefore, contacted the petitioner on telephone and what he came to know from the petitioner was that the opinion of Dr. Sardesai was that the disease was incurable and hereditary. Thus the evidence adduced by the petitioner not only does not show that the disease is incurable, but on the contrary it shows that the disease of epilepsy can be cured.

7.Coming to the evidence of the respondent, she has said that for about a year before her marriage with the petitioner, she was not getting any epileptic fits and that is precisely what Dr. Sardesai has told us in his evidence. It was suggested to her in her cross-examination that she was also told by Dr. Sarde said that the disease was incurable, but she has refuted the suggestion. Her father also says in his evidence (R. W.2) that after the treatment of Dr. Sardesai was started, the respondent did not get any fits for about one year prior to her marriage. It is no doubt true that after the marriage which took place on 30th March 1962, the respondent had epileptic fits at least once or twice. But the evidence on the record shows that that was perhaps due to the mental worries from which the respondent suffered on account of the treatment given by the members of the petitioner's family to her and her relations. Considering, therefore, the evidence on the record and particularly the testimony of Dr. Sardesai, I have no hesitation in accepting the finding recorded by the learned Judge below on this point. I, therefore, find that the petitioner has failed to prove that the type of epilepsy the respondent is suffering from is an incurable disease.

8.Then the next question that is agitated before me is whether the consent of the petitioner to the marriage was obtained by fraud within the meaning of Section 12(1)(c) of the Hindu Marriage Act, 1955. In this connection, the facts found by the learned Judge below and which are not in dispute before me in this appeal are that the respondent was suffering from epilepsy before her marriage, that the petitioner or his father at no stage was told that the respondent was suffering from epilepsy, that the relations of the respondent had made general statements that the respondent was healthy, but that the respondent herself never represented either to the petitioner or to his relations at any stage that she was healthy. These findings of facts recorded by the learned Judge show that the fact that the respondent was suffering from epilepsy was never disclosed either to the petitioner or to his father, and secondly, the petitioner and his father were told that she was healthy. The learned Counsel Mr. Paranjape has, therefore, argued that this is a case where truth was suppressed deliberately and false representation was made to the petitioner that she was healthy. He also argued that if the fact that the respondent was suffering from epilepsy was disclosed to the petitioner or to his father, he would never have consented to this marriage. That being so, the conduct on the part of the respondent and her relations amounts to fraud within the meaning of that word used in Section 12(1)(c) of the Hindu Marriage Act, 1955.

9.In support of this argument, the learned Counsel Mr. Paranjape has relied upon Section 25(iii) of the Special Marriage Act, 1954. It provides that any marriage solemnized under that Act shall be voidable and may be annulled by a decree of nullity if the consent of either party to the marriage was obtained by coercion or fraud, as defined in the Indian Contract Act, 1872. Now, fraud is defined in Section 17 of the Indian Contract Act, 1872, which runs thus :-

" 'Fraud' means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract :

(1) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(2) the active concealment of a fact by one having knowledge or belief of the fact :

(3) a promise made without any intention of performing it :

(4) any other act fitted to deceive :

(5) any such act or omission as the law specially declares to be fraudulent, "Explanation :- Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech."

The learned Counsel Mr. Paranjape argued that the word "Fraud" used in Section 12(1)(c) of the Hindu Marriage Act, 1955, must also be understood in the sense in which it is defined in Section 17 of the Indian Contract Act, 1872. The question, therefore, is whether the provisions of Section 17 of the Indian Contract Act, 1872, apply to fraud as understood in Section 12(1)(c) of the Hindu Marriage Act, 1955.

10. The difficulty arises because the word "fraud" is not defined in the Hindu Marriage Act, 1955. But in my opinion, the provisions of Section 17 of the Indian Contract Act cannot apply to fraud as understood in Section 12(1)(c) of the Hindu Marriage Act. It is necessary to bear in mind that there is a difference between the marriage under the Special Marriage Act, 1954 and the marriage under the Hindu Marriage Act, 1955. The Special marriage Act, 1954 provides a special form of marriage in certain cases. It is permissible to a Hindu, by virtue of this Act, to have his marriage with another Hindu or a person belonging to any other community solemnized in accordance with the requirements of the Act: The rights, obligations and status of the parties to such civil marriage in matters relating to restitution of conjugal rights, judicial separation, nullity of marriage and divorce are regulated by the provisions contained in that Act. The succession to property of two Hindus married under that Act as also to the property of the issues of such marriage is governed by the relevant provisions of the Indian Succession Act, 1925 and not by the Hindu Law of succession. It is significant to notice that no ceremonies are necessary for the marriage being valid under that Act. Obviously, therefore, the marriage under the Special Marriage Act, 1954, is a contract. The position under the Hindu Marriage Act, 1955, however, is different. It is needless to say that marriage under the Hindu Law is treated as a samskara or a sacrament. The Hindu Marriage Act, 1955, contemplates a ceremonial marriage which must be solemnized in accordance with the customary rites and ceremonies of one of the two parties. Non-observance of the essential customary rites and ceremonies of at least one of the parties would amount to failure to solemnize the marriage. In other words, a marriage under the Hindu Marriage Act which is not solemnized by performance of the essential ceremonies is, under the Act, no marriage at all: It is true that the conditions laid down in Section 5 of the Hindu Marriage Act must also be fulfilled before a marriage under that Act is gone through. But the non-fulfilment of every one of the conditions and requirements enacted in Section 5 does not ipso facto render the marriage null and void or even voidable: It seems to me, therefore, that under the Hindu Marriage Act, the marriage which is a ceremonial marriage which is a ceremonial marriage is essentially a sacrament (Samskara).

11.In this connection, I may refer to Boodapati Ankamma v. Boodapati Bamanappa AIR 1927 Mad 332, in which Vardachariar, J. has observed at page 334 that a Hindu Marriage is a sacrament and

not a civil contract and that it will not be permissible to apply to a Hindu marriage all the principles of the Law of Contract. Similarly, in Harbhajan Singh v. Smt. Brij Balab Kaur, Air 1964 Punj 359, which is a case after the Hindu Marriage Act, 1955, came into force, the Punjab High Court has said that the word "fraud" is not used in Section 12 of the Hindu Marriage Act in a general way and on every misrepresentation or concealment, the marriage cannot be dissolved. If the term "fraud" is to be interpreted according to the definition given in the Indian Contract Act, then it would become impossible to maintain the sanctity of the marriage. All sorts of misrepresentations will be alleged by the petitioners in order to break the marriage tie. This obviously could not be the intention of the legislature. In Anath Nath De v. Lajjabati Devi, also, the case was under the Hindu Marriage Act, 1955, and S. Datta, J., who delivered the judgment, has observed at page 779 that the marriage according to Hindu law not being a contract, the consent at the stage of negotiations though obtained by fraud cannot affect the validity of the marriage. It is true that in that case no fraud was alleged at the time of the solemnization of the marriage and, therefore, the petitioner could not be granted any relief. But at the same time, the case was decided on the footing that even under the Hindu Marriage Act, the marriage is a sacrament and not a civil contract. My attention is also drawn to the provisions of Section 19 of the Indian Divorce Act, 1869. That section, so far as it is relevant here, reads thus :-

"Nothing in this section shall affect the jurisdiction of the High Court to make decrees of nullity of marriage on the ground that the consent of either party was obtained by force or fraud." This Act also does not define fraud and, therefore, it is of no assistance to us in this case. But it is well settled under the Indian Divorce Act that fraudulent misrepresentation in inducing consent to marriage does not vitiate a marriage. I have not been pointed out any decided case under the Indian Divorce Act, 1869, which lays down that non-disclosure or concealment of a fact and/or misrepresentation of a fact amounts to fraud. It seems to me, therefore, that even under the Indian Divorce Act, 1869, the definition of 'fraud' given in Section 17 of the Indian Contract Act does not appear to apply. It is true that this High Court has held in A. v. B., 54 Bom LR 725 = (AIR 1952 Bom 486) that a Hindu marriage is also a civil contract. But at the same time, the learned Judge (Tendolkar, J.) has held in that case that a Hindu marriage is also a sacrament. The Hindu Marriage Act, 1955, does not depart from this position, under the Hindu Law. I am, therefore, of the opinion that Section 17 of the Indian Contract Act, 1872, does not apply to a case of fraud under Section 12(1)(c) of the Hindu Marriage Act, 1955.

12.The question still remains what then is the meaning of the word "fraud". D. Tolstoy of the Law and Practice of Divorce, 6th Edition, has expressed thus at page 112:-

"The test in all cases is whether there is real consent not only to marry, but also to marry the particular person. But provided such consent exists, it is immaterial whether it is induced by a fraudulent misrepresentation."

Similarly, Rayden on Divorce, 10th edition, at page 98, says that "fraudulent misrepresentation, or concealment, does not affect the validity of a marriage to which the parties freely consented with a knowledge of the nature of the contract. But if a person is induced to go through a ceremony of marriage by threats or duress, or in a state of intoxication, without any real consent to the marriage,

it is invalid. In all cases, the test of validity is real consent to the marriage." Latey on Divorce, 14th edition, at p. 19, also observes that "misrepresentation or concealment of facts which if known to one of the parties might have prevented his or her marriage does not invalidate a marriage, providing that there were free consent." Coming to the authors on Hindu Law, Derrett in his Introduction to Modern Hindu Law, 1963 Edition, at page 193, says thus :-

"If in fact the marriage would have been agreed to even had the facts been known, it seems that the marriage cannot be annulled, nor, it seems, in even stronger cases where full disclosurers would have prevented the marriage; for fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consented with knowledge of its nature and with the clear and distinct intention of entering into the marriage in question."

Similarly, in Mulla's Hindu Law, 13th Edition, at page 682, we have these observations :-

"A person who freely consents to a solemnization of the marriage with the other party in accordance with customary ceremonies, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot raise an objection to the validity of the marriage on the ground of any fraudulent representation or concealment. The test to be applied is whether there was any real consent to the solemnization of the marriage."

It would thus be seen that the word "fraud" used in Section 12(1)(c) of the Hindu Marriage Act does not speak of fraud in any general way, nor does it mean every misrepresentation or concealment which may be fraudulent. If the consent given by the parties is a real consent to the solemnization of the marriage, the same cannot be avoided on the ground of fraud. The marriage, therefore, solemnized under the Hindu Marriage Act cannot be avoided by showing that the petitioner was induced to marry the respondent by fraudulent statements relating to her health.

13.Turning to the decided cases on the point, I first propose to refer to the cases decided before the Hindu Marriage Act, 1955, came into force. In Emmanuel Singh v. Kamal Saraswati AIR 1934 Pat 670(1)(FB), which was a case under the Indian Divorce Act, the Patna High Court held that the fact that the marriage was induced by some sort of fraud is not ground for divorce under the Indian Divorce Act. In Bai Appibai v. Khimji Cooverji, 38 Bom LR 77 = (AIR 1936 Bom 138) this High Court has held that a fraudulent misrepresentation or concealment does not affect the validity of a marriage to which the parties freely consent with knowledge of its nature and with the clear and distinct intention of entering into the marriage, unless one of the spouses is induced to go through a form of marriage with the other by threats or duress or in a state of intoxication or in an erroneous belief as to the nature of the ceremony and without any real consent to the marriage. That was a case where the plaintiff who was a Naikin or a dancing girl by profession, and was in the keeping of several persons as mistress from time to time, was married to the defendant. The defendant contended that the marriage was null and void and of no legal effect because of certain representations made to him by the plaintiff or on her behalf and with her consent, which according to him were false. The representation were that the plaintiff was the widow of one Ramchandra Kamat, that she was a Brahmin by caste, that she was a person of good character, and that she was willing to live with the defendant at Ujjain. The defendant also alleged in that case that the plaintiff

suppressed from him the fact that she was a Naikin by profession, and the fact of her having been in the keeping of more than one person prior to her meeting the defendant in Bombay. Even then, this Court held that such a fraudulent misrepresentation or concealment did not affect the validity of the marriage. Coming to the cases decided after the Hindu Marriage Act, 1955, came into force, in , the allegations of the husband was that during the course of the negotiations of the marriage, the respondents represented to him that the wife Lajjabati Devi was of sound health and was not suffering from any disease. However after the marriage it was discovered that she was suffering from Tuberculosis from some time before the marriage was gone through. Though this case was decided also on the point that there was no allegation in the plaint that the alleged fraud was perpetrated at the time of the solemnization of the marriage, the Calcutta High Court observed that the marriage, according to Hindu Law, not being a contract, the consent at the first stage though obtained by fraud cannot affect the validity of the marriage. In AIR 1964 Punj 359, the allegation was that the respondent was of bad character before the solemnization of the marriage. The petitioner alleged in that case that the negotiations for his marriage with the respondent took place between him and his father on the one hand, and the father of the respondent on the other, in the month of February 1955 at Jullundur, and the respondent's father assured him that she was a virgin. He was further assured that the character of the respondent was unblemished. On this assurance, his consent for the marriage was obtained by the respondent. The Punjab High Court held that the fact that the respondent was of bad character before the solemnization of the marriage could not be a ground for the annulment of the marriage, because fraud as a ground for the annulment of the marriage under the Hindu Law is limited only to those cases where the consent of the petitioner at the solemnization of the marriage was obtained by some sort of deception. It is not used in a general way and on every misrepresentation or concealment, the marriage cannot be dissolved. In that case, the Punjab High Court also found that because there was a specific Cl.(d) of Section 12(1) dealing with such a matter, it indicated that the Legislature did not intent that the past conduct of the respondent, except what is mentioned in Clause (d), should become a ground for the dissolution of the marriage. Similarly, in Surjit Kumar v. Smt. Raj Kumari, , the allegation was that the girl had an unchaste career and this fact was not disclosed to the husband. On the contrary, it was generally represented to him that the girl was good. The Punjab High Court held that a general observation by the relation of the girl at the time of engagement to the effect that the girl was good did not amount to obtaining consent of the husband by force or fraud within the meaning of Section 12(1)(c) of the Hindu Marriage Act. They were not obliged to disclose to the husband or his relations without any enquiry from them about the old unchastity of the girl, even if it was known to them. Merely keeping quiet about such past history would not amount to obtaining the consent of the husband to marriage by fraud. If the husband attached so much value to the past unchastity of his would-be wife, he should have made enquiries on his own or from the girl's relations at the time of the negotiation of the marriage. It is only then he should be able to show that though the relations of the girl were aware of her past unchastity, they misled him. In this case, Rattigan on Divorce was relied upon by the learned Judge and is quoted at page 173. It is in these words :-

"Generally speaking, concealment or deception by one of the parties in respect to traits or defects of character, habits, temper, reputation, bodily health, and the like, is not sufficient ground for avoiding a marriage. The parties must take the burden of informing themselves by acquaintance and satisfactory inequity before entering into a contract of the first importance to themselves and to

society in general....."

These decisions, therefore, before and after the Hindu Marriage Act, 1955, came into force, definitely show that the Indian Contract Act, 1872, does not apply to the marriage under the Hindu Marriage Act, 1955, and that the word "fraud" used in Section 12(1)(c) of the Hindu Marriage Act does not mean any fraudulent representation or concealment. The test to be applied is whether there is any real consent to the solemnization of the marriage.

14.The learned Counsel Mr. Paranjape has, however, relied upon Bimla Bai v. Shankerlal, . In that case, the alleged fraudulent misrepresentation was that the father of the bridegroom, who was his illegitimate son, represented that the bridegroom was his son meaning thereby a legitimate son. The Madhya Pradesh High Court held that there was misrepresentation which amounted to fraud and consequently the marriage which was induced by it was liable to be set aside. With respect, I am unable to agree with this view. In the first place, if the parties freely consented with knowledge of the nature of the marriage and with clear and distinct intention of entering into the marriage, the non-disclosure or concealment of case would not amount to fraud. Moreover, in my opinion, on general considerations of public policy, misrepresentation as to caste should not be held fatal to a marriage under the Hindu Law, much more so when the marriage is under the Hindu Marriage Act, 1955, which applies to any person who is a Hindu as defined under Section 2 of that Act.

15.I am, therefore, of the opinion that the Indian Contract Act, 1872, does not apply to a marriage under the Hindu Marriage Act, 1955. Section 12(1)(c) of the Hindu Marriage Act does not speak of fraud in any general way or of every misrepresentation or concealment which may be fraudulent. A person who freely consents to a solemnization of the marriage under the Hindu Marriage Act with the other party in accordance with customary ceremonie, that is, with knowledge of the nature of the ceremonies and intention to marry, cannot object to the validity of the marriage on the ground of fraudulent representation or concealment. Moreover, in the present case, the fraud alleged is non-disclosure or concealment of epilepsy from which the respondent was suffering since before her marriage, and false representation that she was healthy. I have found that the type of epilepsy she was suffering from is curable. I am also, therefore, of the opinion that non-disclosure or concealment of such curable epilepsy and false representation that the respondent was healthy does not amount to fraud within the meaning of that word used in Section 12(1)(c) of the Hindu Marriage Act, 1955. The petitioner, therefore, has failed to prove that his consent was obtained by the respondent or her relations by fraud.

16.In this view of the case, it is unnecessary to go into the questions whether fraud was discovered on 26th June 1962 or on 2nd July 1962 or thereabout and further whether after the discovery of the alleged fraud, the petitioner with full consent lived with the respondent as her husband. However, both these questions being argued before me, I would briefly discuss them.

17.As regards the discovery of the fraud, the petitioner has said in his evidence that Dr. Otturkar told his father on 26th June 1962 that the respondent was suffering from epilepsy. Dr. Otturkar gave this opinion because the petitioner's father approached him with the prescription, Ex. 179, given by Dr. Sardesai. However, Dr. Otturkar also told the petitioner's father that he would get the opinion

confirmed by Dr. Sardesai who was treating the respondent. The evident of Dr. Otturkar shows that two or three days thereafter, that is to say, on or about 28th or 29th June 1962, Dr. Otturkar discussed the illness of the respondent with Dr. Sardesai, and the latter told him that the respondent was suffering from epilepsy since before her marriage. 2 or 3 days thereafter, Dr. Otturkar met the petitioner and his father in the latter's shop where he reported to them what Dr. Sardesai told him about the illness of the respondent. Thus, according to the petitioner, he discovered the alleged fraud on 1st or 2nd July 1962 when he came to know from Dr. Otturkar that the respondent was suffering from epilepsy since before her marriage. It is contended on behalf of the respondent that in fact the alleged fraud was discovered by the petitioner on 26th June 1962 when Dr. Otturkar went through the prescription, Ex. 179 issued by Dr. Sardesai, and on receiving the information from the petitioner's father that the respondent was getting fits since after the marriage. Dr. Otturkar told the petitioner and his father that it was a case of epilepsy. In my opinion, what was discovered by the petitioner on 26th June 1962 was that the respondent was suffering from epilepsy. Before Dr. Otturkar discussed the illness of the respondent with Dr. Sardesai and learnt from him that the respondent was suffering from epilepsy since before her marriage, there could be no discovery of fraud, because the fraud alleged is that the fact that the respondent was suffering from epilepsy even before her marriage with the petitioner was concealed from the petitioner and his relations at the time of the marriage. Obviously, therefore, the petitioner could come to know that the respondent was suffering from epilepsy since before her marriage only after Dr. Otturkar had a talk about it with Dr. Sardesai and reported the talk to the petitioner and his father on 1st or 2nd July 1962 and not on 26th June 1962. The petitioner has also stated in his evidence that he discovered the fraud on 2nd July 1962 after Dr. Otturkar reported the talk he had with Dr. Sardesai to him and his father, which he did on 1st or 2nd July 1962.

18.The question then arises whether after the fraud was discovered on 1st or 2nd July 1962, the petitioner lived with the respondent as her husband with free consent. In this connection, the learned Counsel Mr. Paranjape has drawn my attention to the evidence of the petitioner, where he has said that immediately after he came to know from Dr. Otturkar that the respondent was suffering from epilepsy since before her marriage, he straightway went home and on the very day told her to leave his house. The petitioner wants us to believe that at that time the respondent threatened him. But at the same time, he also says that she kept quiet. He further says that on that day he developed hate and aversion towards the respondent. Further, according to the petitioner, on the very day, that is to say, on 2nd July 1962, he also wrote a letter to the respondent's father accusing him of this fraud. The learned Counsel Mr. Paranjape says this letter is deliberately kept back by the respondent. It seems to me, however, that such a letter was never written by the petitioner to the respondent's father. In the first place, he could have retained a copy thereof as he retained the copy of the telegram which he sent to the respondent's father on 6th July 1962 immediately after he left the respondent at the house of the latter's sister. Secondly, we have on the record a very strong letter written by the respondent's father to the petitioner on 4th July 1962(Vide Ex.142). If the petitioner had written any letter on 2nd July 1962, surely the respondent's father would have received it on 4th July 1962. In fact, the grievance of the respondent's father in the letter, Ex. 142, is that he had written so many letter to the petitioner, but he did not give reply even to a single letter. The question, therefore, is whether the petitioner's evidence that he developed hatred and aversion towards the respondent since 1st or 2nd July 1962, and therefore, he did not

live with the respondent as her husband with free consent, can be accepted. It is in evidence that since after the marriage the petitioner and the respondent were allotted a separate room in the house. Presumably, both of them used to sleep in that room even after 2nd July 1962. At any rate, the petitioner nowhere says that since 2nd July 1962 he and the respondent started sleeping separately in the same house and not in the same room. Thirdly, the evidence on the record definitely shows, and I agree with the learned Judge, that the petitioner took the respondent to the house of her sister on 6th July 1962 and left her there not because there was any discovery of the alleged fraud, but because the letter, Ex. 142, upset the petitioner. Now, a perusal of the letter would show that any young man in place of the petitioner would get exasperated on receipt of such a letter. Fourthly, it is significant that even the notice, Ex. 137, given by the petitioner to the respondent through his Advocate, shows that the grievance of the petitioner was that the respondent left him and was not prepared to live with him. Lastly, the respondent has said in her evidence that till 6th July 1962 the petitioner had sexual relations with her. It is true that the petitioner has denied this in his evidence and has alleged that since 2nd July 1962 he had no sexual relations with the respondent. However, considering all the facts and circumstances in this case, I am of the opinion that even after the discovery of the alleged fraud on 2nd July 1962, the petitioner lived with the respondent as her husband with full consent. I have no doubt in my mind that if the petitioner had not received the letter, Ex. 142 from the respondent's father, he would not have taken her to the house of her sister and would have continued to live with her as her husband, even though she was suffering from epilepsy. In this connection, the learned Counsel Mr. Paranjape, relying on Rajani Prabakar Lokur v. Prabakar Lokur, has argued that "living as husband" within the meaning of that expression used in Section 12(2)(a)(ii) of the Hindu Marriage Act, means living continuously for an appreciable period. He points out that the expression "living in adultery" is interpreted in the above case meaning a continuous course of adulterous life as distinguished from one or two lapses from virtue. I cannot agree. In the first place, the expression which the learned Judge were interpreting in the above case was "living in adultery", while the expression used in Section 12(2)(a)(ii) is "the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife." The observations, therefore, in the aforesaid case are of no assistance to us. It seems to me that the expression "the petitioner has, with his full consent, lived with the other party to the marriage as husband" emphasizes living as husband with full consent for whatever period it may be, provided the alleged fraud is condoned. If the husband or the wife as the case may be, overlooks the alleged fraud and condones it, with the result that there is a reconciliation, whatever may be the period, the petitioner can be said to have lived with full consent with the other party to the marriage as husband or wife as the case may be. In other words, the condition laid down in Section 12(2)(a)(ii) of the Hindu Marriage Act does not depend upon the lapse of any time after the discovery of the alleged fraud. In fact, if the fraud is condoned and there is a reconciliation, such a reconciliation may be called with full consent. If the evidence shows that the husband or the wife, as the case may be, after the fraud was discovered, lived together for whatever period as wife and husband with full consent, it would be sufficient for not entertaining the petition for annulling the marriage. I am, therefore, of the opinion that on this ground also, the petition was rightly dismissed by the lower courts.

19.The learned Counsel Mr. Paranjape also referred to the petitioner's claim for judicial separation on the ground of alleged cruelty. Now, in the first place, in the original petition, the ground of

cruelty was not taken by the petitioner. Even after the amendment by Ex. 101, what the petitioner alleged was that he was treated by the respondent with such cruelty as to cause a reasonable apprehension in his mind that it would be harmful or injurious for the petitioner to live with her. He did not allege in the petition any fact regarding the nature of the cruelty and how he could say that the respondent treated him with any such cruelty. Even in the lower appellate Court, the learned Judge has observed that this ground was not seriously pressed and rightly so, because there is absolutely no evidence in this case to prove any cruelty as required by Section 10(1)(b) of the Hindu Marriage Act. The learned Counsel Mr. Paranjape has argued that the fact that the respondent was suffering from epilepsy was sufficient to say that the petitioner was suffering from tremendous mental pain because of the illness of the respondent. Now, in every case when a wife suffers from any serious illness, the husband goes through mental agony, but can it be said that therefore the ailing wife treats her husband with cruelty within the meaning of that word used in Section 10(1)(b) of the Act ? The learned Counsel also pointed out that the allegations made by the father of the respondent in the letter, Ex. 142, also added to this cruelty. Now, I have already pointed out that the petitioner received the letter on 6th July 1962 and on the very day, he took the respondent to the house of her sister and left her there. It is , therefore, impossible to hold that the letter, Ex. 142, also added to the alleged cruelty. In fact, the requirement of Section 10(1)(b) is that the treatment given by husband or wife as the case may be, to the other party must amount to cruelty, and there is no evidence in this case that the respondent had treated the petitioner with such cruelty, much less can it be said that it caused a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for him to live with her. I, therefore, do not see any substance in this case either.

20.The result, therefore, is that the decree passed by the lower Court is confirmed and the appeal is dismissed. The appellant-petitioner to pay the costs of this appeal to the respondent and bear his own.

21. Appeal dismissed.