

Delhi High Court

Anuradha Alias Chanchal Kumari vs Santoshnath Khanna on 27 September, 1977

Equivalent citations: ILR 1977 Delhi 739, 1978 RLR 111

Author: B Misra

Bench: B Misra

JUDGMENT B.C. Misra, J.

(1) This first appeal under section 28 of the Hindu Marriage Act, 25 of 1955 (hereinafter referred to as 'the Act') has been filed by the appellant wife against the order of Mr. S. C. Chaturvedi. Additional District Judge, dated 29th January, 1976, by which he has dismissed the petition of the wife for divorce on the ground of impotency mentioned in section 12(1)(a) of the Act. The ground of cruelty mentioned in section 10(1)(b) has also been alleged in the petition. The court below repelled both of them.

(2) The material facts of the case are that the appellant wife, who was a widow having lost her first husband, married the respondent husband, who had divorced his previous wife. The marriage took place on 23rd November, 1968. The parties lived together till 31st March, 1969 when they separated. No child was born out of the wedlock. The wife instituted the petition giving rise to this appeal on 12th June, 1969 and claimed dissolution of the marriage on the ground of impotency of the husband as well as a decree for judicial separation on the ground of cruelty. Both the grounds were denied by the husband. On the pleadings of the parties, the following three issues were framed :

"1. Whether the respondent was impotent at the time of the marriage and continued to be so until the institution of this petition ?

2. Whether the respondent has treated the petitioner with cruelty and if so with what effect ?

3. Relief."

(3) The court of first instance has disbelieved the evidence produced on behalf of the wife and placing reliance on the medical evidence held that the case of impotency of the husband had not been established. He also found that the cruelty had not been proved and that the burden of proof had not been discharged by the wife. As a result, the petition was dismissed.

(4) The Hindu Marriage Act has been amended by Act 68 of 1976 with effect from 27th May, 1976. By this amendment cruelty has also been made a ground on which a decree for divorce may be granted as is provided by clause (ia) of sub-section (1) of section 13 of the Act. Section 39 of the amending Act provides that all petitions and proceedings in causes and matters matrimonial which are pending in any court at the commencement of the amending Act shall be dealt with and decided by such court if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act as amended, and sub-section (2) provided that in every petition or proceeding to which sub-section (1) applies, the court in which the petition or proceeding is pending shall give an opportunity to the parties to amend the pleadings, in so far as such amendment is necessary to give effect to the provisions of

sub-section (1) within such time as it may allow in this behalf and any such amendment may include an amendment for conversion of a petition or proceeding for judicial separation into a petition or proceeding, as the case may be, for divorce.

(5) In view of the aforesaid provision of law, the appellant wife has filed an application (CM 1524/77). It is under Order 6 Rule 17 and section 151 of the Code of Civil Procedure for amendment of the petition. The amendment sought is that a decree of nullity of marriage may be granted on the ground of impotency or in the alternative a decree of divorce on the ground of physical and mental cruelty. The title of the petition is also sought to be corrected and amendment is sought to be made in paragraph 13 to state the fact that the respondent has made unfounded, groundless and un-substantiated allegations of adultery against the wife which amounted to mental cruelty and that there was sexual incompatibility between the parties in that, as admitted by the husband himself in the written statement it was not possible for him to satisfy the wife sexually and that the unsatisfaction in the matter of sex amounted to mental cruelty to the wife and also affected both her physical and mental health. Arguments on this application have been heard. The application is in order and conforms to the requirement of law. As such the application is allowed and the amended application is received on the file. The application as such does not involve any investigation of any new facts and so the appeal, which has been heard, will be disposed of.

(6) The court below has found as a fact that the husband is not impotent generally and that cruelty has not been proved. The learned Judge has, however, failed to appreciate that there is a particular kind of impotency known as *Impotentia quoad hunc vel ham*. That is to say incapacity to perform coitus with a particular individual and this finding can be recorded if the circumstances of the case so justify even if the spouse may be generally potent. The learned Judge below has failed to draw the correct legal inference from the pleadings of the parties, the evidence recorded and the circumstances of the case. He has also not fully appreciated that the failure to perform sexual intercourse and making unfounded allegations either before or during the proceedings also amounts to mental cruelty constituting a matrimonial offence. The case, therefore, requires a closer examination.

(7) The petition as originally framed (even prior to amendment) stated in paragraph 3 that after the marriage the wife stayed with the husband at Saharanpur up to the last week of March, 1969 and during that period there was absolutely no consummation of the marriage as the respondent did not come near the wife nor did he show any inclination to cohabit with the wife, and the husband always avoided coming near the wife and slept away from her. It was also mentioned in paragraph 5 that the husband was impotent at the time of marriage and he continued to be so till the institution of the proceedings. In paragraph 8 it was mentioned that so much mental torture had been given to the wife by the husband and his parents and also due to the continuous impotency of the husband that it was not safe for the wife to live with the husband.

(8) In reply, the husband admitted the stay of the wife till March, 1969, but denied that there was no consummation of marriage and he asserted that the same had been consummated. In paragraph 5 the husband stated that it was wrong that he was impotent at the time of the marriage or continued to be so and it was asserted that the husband was fully potent and had been consummating the

marriage not only with the present wife (appellant), but also with the previous divorced wife and that he was a normally potent person-"on the other hand it was the wife who was excessively passionate and it was rather impossible for a normal human being to satisfy the excessive lust of the wife." In paragraph 6 at the bottom, it is asserted that it was the husband who had suffered mental torture and agony by the extremely passionate behavior of the wife. In paragraph 8 of the reply, it is asserted that as a matter of fact the wife had some other illicit connections in Delhi and that was the reason why she did not want to live with the husband.

(9) The respondent husband appeared as his own witness as RW5. In his statement recorded on 21st March, 1975 (on page 223 of the record) he admitted that the written statement filed by him in the case had been prepared under his instructions and was verified by him. He also stated that he had used the phrase that the wife was excessively passionate because the wife had been telling him that she had gone to Simla with her previous husband and he used to serve her liquor and he guessed from those facts that she was excessively passionate. He further stated that the wife never asked him to indulge repeatedly in sexual intercourse with her. He also stated that he started doubting the wife's character when she insisted upon his starting living in Delhi or Bombay and that he had no other definite information about her illicit connections with anybody. Apart from his relations with the present wife, the respondent husband also gave information in the same statement that he had filed a divorce case against his previous wife and he was granted a decree for divorce in that case against his previous wife on the ground of adultery.

(10) From the statement of the husband and the written statement, it is obvious that he finds that the wife is so excessively passionate that it is impossible for any normal human being to satisfy her excessive lust and that she was having illicit connection with other persons. This admission certainly leads to the inference that so far as the respondent husband is concerned who claims to be a normal human being, found it impossible to satisfy the passions and lust of the wife and he charged her as having illicit connections with other persons, although the same was, as admitted by him in evidence, without any foundation. Corroboration of this allegation is also found from the statement of Gambhir Narain Khanna, AW8, who is a relation of the husband, but not of the wife. He deposed that the parties were not on good terms during the period of stay for four or five months and he had on two occasions tried to patch up the difference between the parties and during those efforts of reconciliation the wife used to say that she had been maltreated by the husband not for himself but for the service of his parents and that he did not sleep in the same room in which the wife used to sleep and when the witness asked the husband the reason for the same he told the witness that he did not want to have any relation with the wife. The witness stated that on further probing the husband told him that the wife could live and eat in his house, but she could not have him and thereupon the wife said in the same sitting that she had not married him only for eating to which the husband had no answer. The witness further stated that the husband after the second marriage has been all along a sickly person. The evidence of this witness has been rejected by the court below only on the ground that he was a relation. But the relationship of the witness was with the husband and not with the wife and nothing has been brought out on the record to show why this witness must tell a lie against the respondent husband, who is his relation. The statement also appears to be in consonance with the circumstances set up by the wife.

(11) The appellant has herself been examined on 18th September, 1974. She stated that on the next day after the marriage her Doli was taken to Saharanpur by the husband in train and both of them travelled in second class and besides them there were only two or three other passengers in the compartment. During the journey the husband talked to her and told her that he had contracted this marriage with her only for the happiness and pleasure of his parents so that he could serve them in their old age and that he had complied with the insistence of his parents and that he had married to satisfy the society and further that he had to show to his previous divorced wife that he had married second time. The witness further deposed that after reaching Saharanpur, they had been given a room on the first floor of the house and that the husband would make her sleep all alone in the said room and would himself sleep on the ground floor and it was only on her insistence that the husband slept on the first floor in her room only on two/three times during nights on one and the same bed. But he could not do sexual intercourse with her any time for the reason that there used to be pain in his belly and also anguish and burning sensation in his belly and there used to be no erection whatever in the male organ of the husband. She further stated that till the time she lived with the husband there was no erection whatever in his male organ and he could not do sexual intercourse with her till the time she finally started living with her parents. She further deposed that she told all about these matters to her parents, brothers, sisters and mausi on coming to Delhi. The witness was cross-examined and during cross-examination she stated that from the talk in the train she got the impression that the husband was simply joking with her, but the train talk was then repeated by the husband on the first night after the marriage and the husband could not do the sexual intercourse with her even on that night and so an apprehension came to her mind that the husband was not a fit person and would not keep her : She further stated that she tried that the husband could have sexual intercourse with her, but even then he could not do it. After a week of the marriage, the wife states, she was fully convinced that the respondent was impotent. She further deposed about the treatment and other parts of the case of cruelty. She denied the suggestion that the allegation about the impotency of the husband was false or that the respondent was potent or that he had no trouble in his stomach or that neither he nor his mother ever beat her. The statement of the wife is natural and convincing.

(12) From the above evidence, I am satisfied that the husband has failed to consummate the marriage and to perform the sexual intercourse with the wife. In Halsbury's Laws of England, 3rd Edition, Vol. 12, para 228 it is mentioned a party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. In Rayden on Divorce, 8th Edition, para 62 on page 108, it is mentioned that if at the time of the marriage one of the parties is, and continues to be, incapable of effecting or permitting its consummation by reason either of some structural defect in the organs of generation, especially if this is incurable, which renders complete sexual intercourse impracticable, or of some incurable mental or moral disability resulting, in the man, in inability to consummate the marriage with the particular woman, or, 'n the woman, to an invincible repugnance to the act of consummation with the particular man, the marriage may, on the petition of either party, be declared null and void. It is further laid down in the footnote that where the marriage remains unconsummated, and both man and woman appear to be capable, there is a presumption that the incapacity must be imputed to the man. In Latey on Divorce, 14th Edition, page 196, it is stated that when the husband abstains from or fails to attempt intercourses with his wife the inference of incapacity is even stronger and the onus is on him to rebut the presumption.

Similarly, in Tolstoy on the Law and Practice of Divorce and Matrimonial Causes, 6th Edition, page 113, it is mentioned that impotence is inability to consummate the marriage and to be a ground for nullity, such inability must exist at the time of marriage and continue to exist at the date of the hearing and to consummate a marriage, ordinary and complete sexual intercourse must take place and partial intercourse or intercourse which is so imperfect .as scarcely to be natural is insufficient. The inability to consummate may be due to a physical defect which is incurable or to one which is curable but which the respondent refuses to have cured or to mental or moral disability. On the following page, it is stated that it sometimes happens that a person is capable of having intercourse, but incapable of performing it with the particular individual. This is sufficient to found a decree of nullity, as what matters is ability to consummate the marriage with the other spouse and not ability to have intercourse in general.

(13) In Jagdish Kumar v. Smt. Sita Devi, , a learned single Judge held that where the husband was wholly unable to perform the act of sexual intercourse with his wife for which he had full opportunity, having lived in the same room for two .or three days and nights immediately after the marriage, it was a fair inference that the non-consummation of the marriage was due to the husband's knowing refusal arising from incapacity, nervousness or hysteria and that he demonstrated his impotency qua his wife, and even after a fair trial had been given by the wife if the husband utterly failed in his primary marital duty, he should be regarded as impotent under section 12(1)(a) right from the time of his marriage till the institution of the proceedings for annulment of marriage. The same view has been taken by Avadh Behari, J. in Suchitra Kalsie vs. Rajinder K. Kalsie, 1975 PLR(D.S.) page 79(2).

(14) In Mrs. Rita Nijhawan v. Mr. Bal Krishan Nijhawan, 1973 Dlt 222(3), a Division Bench of this court held that the law is well settled that if either of the party to a marriage being a healthy, physical capacity refused to have sexual intercourse the same would amount to cruelty entitling the other party to a decree and it would not make any difference in law whether denial of sexual intercourse was the result of sexual weakness of the respondent disabling him from having sexual union with the wife, or it was because of any willful refusal by the husband; this was because in either case the result was the same namely frustration and misery to the wife due to denial of normal sexual life and hence cruelty. I agree that marriage without sex was an anathema. Sex was the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It could not be denied that the sexual activity in marriage had an extremely favorable influence on a women's mind and body. The result being that if she did not get proper sexual satisfaction it would lead to depression and frustration. It had been said that the sexual relations when happy and harmonious vivifies women's brain, develops her character and trebles her vitality. It must be recognised that nothing was more fatal to marriage than disappointments in sexual intercourse.

(15) In A. Kuppuswami Gounder v. Alagammal, , it was held that making of unfounded allegations of adultery against a chaste wife would amount to cruelty (also see Smt. Sushil K.' Dang v. P. K. Dang, . In Dr. N.G. Dastane v. Mrs. S. Dastane, , the Supreme Court has held that the standard of proof required in trying the matrimonial case was as in civil case based on probabilities and proof required is not beyond reasonable doubt as in criminal cases. So, on the probabilities of the case, there is no

doubt that the appellant has established her case.

(16) The facts and circumstances of the case are that the respondent husband specifically admits that the wife was excessively passionate and it was impossible for a normal human being to satisfy the excessive lust of the wife. This would show that the husband was unable to satisfy the sexual desire of the wife in a normal way. The husband has charged the wife of having illicit connection with some other persons. This would indicate that the husband has not been able to have any sexual intercourse with the wife, admittedly to her satisfaction, while the same is absolutely denied by the wife. The talk: that took place in the train is so natural and shows an attempt to prepare the wife for the fate that was to follow, that is to say lack of sexual intercourse. Even otherwise, it is impossible to believe that the wife will make unfounded charge against her husband on the ground of lack of sexual intercourse. In the instant case, the wife had earlier been married to a man, who had died and so she was not a virgin. The husband, on the other hand, had divorced his previous wife on the ground of adultery. One of the causes for adultery, which frequently occurs is lack of sexual satisfaction from the lawful husband, although this is not the only cause. But, this is certainly a circumstance relevant in the circumstances of the case in assessing the evidence. These facts point to the inference that the husband is impotent qua the wife. The very said circumstance also amounts to cruelty on the part of the husband, which is of such a nature that it is impossible for the wife to live with him. The charge of mental cruelty is also established.

(17) In the view I am taking it is not necessary to discuss the other evidence produced on the record, which pertain to the general impotency or otherwise of the husband as well as other items of cruelty, like beating, etc., which has been alleged in the case. Which I am not finding.

(18) As a result, I reverse the findings and order of the court below, and allowing the appeal grant a decree for divorce dissolving the marriage between the parties on the ground mentioned in clause (a) of subsection (1) of section 12, as well as clause (ia) of sub-section (1) of section 13 of the Act. The respondent will pay costs of the appeal.