(2000) 05 AHC CK 0078

Allahabad High Court (Lucknow Bench)

Case No: First Appeal No. 10 of 1993

Vinay Kumar Rastogi		APPELLANT
	Vs	
Nandita Rastogi		RESPONDENT

Date of Decision: May 18, 2000

Acts Referred:

- Family Courts Act, 1984 - Section 10
- Hindu Marriage Act, 1955 - Section 24

Hon'ble Judges: Ikram-Ul-Bari, J and A.A.Desai, J

Final Decision: Disposed Of

Judgement

IkramulBari, J.
In this appeal judgment and order dated 14193 passed by Principal Judge, Family Court, Lucknow is under challenge.

2. By judgment and order under appeal the marriage of the appellant with the respondent was annulled on the ground that the respondent is impotent and not able to consummate the marriage.

3. From reading of the judgment under appeal it is gathered that the marriage between the parties had taken place on 23290. The wife, the respondent had lived with the appellant for quite some time. The appellant during that period did not share the bed with the respondent and refused to cohabit with her on one or the other pretext. The marriage could not be consummated. The appellant admitted the fact of his impotence before the respondent and her brotherinlaw and her sister. The respondent to this appeal moved an application under Section 24 of the Hindu Marriage Act for alimony and litigation expenses and the litigation expenses of Rs. 500 are deposited the execution of order dated 19292 passed by the Family Court shall remain stayed. The Hon''ble Court had also directed that the petitioner may be represented through his attorney. Till 21292 neither interim alimony nor litigation expenses were paid and therefore, the defence of the appellant was struck off. On

14193 the attorney of the appellant moved an application intimating the Family Court that the alimony and litigation expenses had been deposited in the High Court on 13193 and requested for recall of the order dated 21292 striking off the defence of the appellant. The application was rejected on the same day. The respondent then expressed her desire of adducing evidence on affidavits and moved an application to that effect. She was permitted by the Court and she filed her own affidavit and the affidavits of her brotherinlaw and her sister. The affidavits were not controverted. The evidence so produced was relied upon by the Family Court and finding was recorded that the appellant was impotent and incapable of sexual inter course at the time of marriage and continues to be so and the marriage has not been consummated. The suit for annulment of marriage was decreed.

4. From the judgment and order under appeal it is evident that the appellant has been directed by the Family Court at some time to pay interim alimony to the respondent @ Rs. 500 per month and also to pay her Rs. 500 as litigation expenses. The appellant did not abide by that order and filed writ petition No. 2621 of 1992. This Court directed the appellant on 121192 to make the payment and only then the execution of order dated 19 292 will remain stayed. From the statements in the memo of appeal it appears that dates of hearing in the divorce petition were fixed and hearing was adjourned from time to time on the request of attorney of appellant. On 19992 such request for adjournment was refused and it was directed that the hearing shall proceed ex pane. This order was challenged in writ petition No. 2621 of 92. Thereafter 21292 was fixed for the hearing of the case on the adjourned date. The attorney of the appellant had requested for time to deposit the money. He had also moved for adjournment of the hearing. That prayer was rejected and an order striking off the defence for nonpayment of the interim alimony and the litigation expenses was passed and 141 93 was fixed for ex pane hearing. On 14193 application for recall of order dated 21292 was moved but it was dismissed on the ground that the payment had not been made to the respondent but had been deposited in the High Court and therefore, it will not be deemed to be a payment made to the respondent.

5. The appellant had not claimed that the deposit had been made within time. He has tried to explain the delay in deposit. The delay was however, explained only in the application for recalling the order dated 21292 by which appellant''s defence has been struck off. The Family Court did not find the explanation for the delay adequate and refused to recall the order dated 21292. The appellant has not prayed for setting aside of the order dated 2 1292 and has also not filed a copy thereof. The order dated 21292 has been mentioned in this appeal only as the ground that it was arbitrary, illegal and unjustified. When the order dated 21292 was passed, it was the date for final hearing in the case and the Court had before it only the circumstance that the amount of interim alimony and the expenses of litigation had not been deposited or paid in accordance with its own order as well as the order of this Court. An argument was raised that the Family Court had no jurisdiction to strike off the

defence of the appellant. This argument is misconceived for two reasons. The first reason is that Section 10 of the Family Court Act has made provisions of the Code of Civil Procedure, 1908 generally applicable to the proceedings before the Family Court. The Act and the rules do not prohibit the use of the provisions of Civil Procedure Code relating to striking off the defence. The second reason is that a Court has inherent jurisdiction to strike off the defence if its orders necessary for the progress of the case before it are not complied with by the defendant. It is, therefore, not acceptable that the Family Court had no jurisdiction to pass order dated 21292 whereby the appellant''s defence was struck off. No arbitrariness is reflected in the passing of the order dated 21292. The order cannot be said to be unjustified by any stretch of imagination. On 14193 the order dated 21292 striking off the defence of the appellant was in act and the Court had to proceed with the case before it accordingly. After the rejection of the application of the appellant for recall of the order dated 21292 the Court had to proceed to hear the case ex pane. On the request of the respondent the Court permitted the production of evidence by the respondent in the form of affidavits. The appellant or his attorney never made any request for permission to crossexamine the three witnesses whose evidence had been filed by the respondents on 14193, the date of. hearing. The appellant had a legal right to crossexamine the witnesses and to address the Court regarding the merit of the evidence of the respondent even though he was prevented from putting forth any defence and producing any evidence in support of the defence. Since the evidence of the respondent remained unrebutted and unquestioned, the Family Court was justified in evaluating it in isolation. The Court found the evidence sufficient to record the finding that the appellant was impotent and incapable of performing intercourse. No effort has been made on the part of the appellant to show that the statement in the affidavits were deficient with regard to the fact found by the Family Court.

6. Argument on behalf of the appellant is that the stay of the respondent with the appellant was only for a week and under these circumstances the Family Court should not have accepted the statement of the respondent and her witnesses with regard to the material fact. This argument is without any merit as the fact had to be found out on the basis of preponderance of evidence before the Family Court. No particular type of evidence was required by law to prove the fact.

7. Some of the grounds pleaded by the appellant are not of any consequence. The contention that his attorney was not permitted to conduct the case on his behalf is no more relevant since the attorney had been permitted by this Court and he had participated in the proceedings. Another ground was that that the Family Court committed an error in considering that this Court had directed payment of interim alimony of the respondent personally. This ground would have been relevant if deposit had been made in time and it was not accepted by the Family Court only because the money had not been paid to the respondent personally. In the present case, no deposit has been made before 13193 and the order directing of the

defence had been passed on 21292 because of the nondeposit.

8. The appellant''s learned Counsel relied on some decided cases and argued that mere noncompliance with the Court''s order on a single occasion does not justify the striking off of the defence and in case of insufficiency of evidence the proper course is to remand the case for retrial. In the present case nonpayment of interim alimony and the litigation expenses of the respondent, was persistent even after the disposal of the writ petition against the order for payment if interim alimony and the litigation expenses. As regards insufficiency of the evidence, no effort was made to establish it during the course of the arguments.

9. The annulment of the marriage was decreed on 14193. The parties lived together only for a week in February, 1990. For more than ten years the parties have been living separately and the efforts for settlement between them did not fructify. In view of the peculiar circumstances of the case also it does not appeal proper to interfere with the decree of annulment under appeal.

10. We, therefore, dismiss the appeal and make costs easy. Appeal dismissed.