

(1980) 12 KL CK 0027
High Court Of Kerala
Case No: O.P. No. 4033 of 1979-L

Mariamamma

APPELLANT

Vs

Kurien

RESPONDENT

Date of Decision: Dec. 18, 1980

Acts Referred:

- Divorce Act, 1869 - Section 17, 18, 19, 7

Hon'ble Judges: Balagangadharan Nair, J

Bench: Single Bench

Advocate: T.M. Cheriyan, for the Appellant; T.S. Venkiteswara Iyer and C.C. Thomas, for the Respondent

Final Decision: Allowed

Judgement

Balagangadharan Nair, J.

This is a petition u/s 18 read with Section 19 of the Indian Divorce Act, 1869 by a wife for a declaration that her marriage with the Respondent is null and void.

2. The parties are Jacobite Christians and they were married according to the rites of the community on 20th January 1974 at the St. George's Syrian Church in Kallumkathara, Kottayam. Ext. P-2 is the "Desakkuri" issued by the Parish Priest in connection with the marriage. From the date of the marriage till 24th January 1974 the Petitioner and the Respondent lived in the house of the Petitioner's parents at Mavelikara. From 24th January 1974 to the 2nd week of February 1974 the Petitioner lived in the Respondent's house at Kottayam with his parents, while the Respondent was at Ernakulam. About this time the Petitioner who held a degree in M. Com. got employment in the Transformers and Electricals Kerala Ltd., Angamali and from the 3rd week of February 1974 till the 2nd week of July 1974 she lived in the S.N.V. Sadanam, Alwaye. Thereafter she lived with the Respondent in his house in Cochin till 28th August 1978.

3. The Petitioner's case is that during all these years they were living together the Respondent never had sexual intercourse with her, that the marriage was not consummated and that this was due to his impotency. Her advances to the Respondent were repulsed by him under one pretext and or another and this the Petitioner attributes to his sexual impotency. She made frequent requests to the Respondent to undergo medical examination and treatment, if necessary but he refused these requests also. The Petitioner states that this reluctance of the Respondent was because his impotency was incurable. The Petitioner's hopes of a happy family life with children were shattered and she felt that consummation of the marriage and the procreation of children by the Respondent were impossible. In answer to the requests made by the Petitioner through others the respondent indicated his willingness to dissolve the marriage. He did not ultimately agree to it possibly because he was anxious to have at his disposal the Petitioner's salary also. Whatever inclinations the Respondent might have had to end the union, were foiled by the Respondent's elder brother and father by quoting the biblical maxim "what God then has joined let not man put as under." Ultimately on 28th August 1978 the Petitioner left the Respondent for her parent's home at Mavelikara. Thereafter they have not lived together. As there was no prospect of the marriage being dissolved otherwise, the Petitioner issued a notice of which Ext. P-1 is a copy to the Respondent on 29th September 1978 stating that if the marriage was not dissolved by executing a deed of separation proceedings for declaration of nullity of the marriage would be instituted in a court of law. The Respondent did not respond to this notice. Thereafter on 16th November 1979 the Petitioner filed this petition. [At the time of the petition she was staying in Cochin after she got employed as a postgraduate teacher (Commerce) in the Central School].

4. The Respondent accepted notice of the petition and entered appearance through counsel. On 10th June 1980 a learned Judge passed an order that he would file his counter-affidavit, if any, within three weeks. Neither on 14th July 1980 which was the next date of hearing nor at any subsequent hearing did the Respondent file his counter to the petition. The Respondent and his counsel were also absent at the hearings and I had therefore to proceed ex parte. On 17th September 1980 I allowed the Petitioner's application to hold the trial in camera. Thereafter from 7th October 1980 to 13th November 1980 I recorded the evidence of the Petitioner as P.W. 1 and her witnessess as P. Ws. 2 to 5. On 13th November 1980 when the Petitioner closed her evidence I thought that an opportunity might still be given to the Respondent to rebut the evidence if he so chose. I accordingly ordered, although he and his counsel were absent, that he would appear on 18th November 1980. At that hearing also he and his counsel were absent. On 27th November 1980 I heard the arguments on behalf of the Petitioner. At that date also the Respondent and his counsel were absent.

5. In a petition for declaration that the marriage is null and void the Petitioner has to prove u/s 19(1) that the Respondent was impotent at the time of the marriage and

at the time of the institution of the suit. The burden of proof is undoubtedly upon the Petitioner in this proceeding and the primary evidence consists in the testimony of the Petitioner.

6. As P.W. 1 the Petitioner has spoken to all the facts narrated earlier on which her petition is based. She has clearly stated that during their stay together she had tried her best to stimulate the Respondent into sexual intercourse with her, that she failed in those attempts, and that whenever she made advances he used to evade her under one pretext or another. She has illustrated this by saying that while they were staying in Ernakulam he used to come home once or twice a week and that too very late at night, that when she made advances he used to avoid her saying that he had very strenuous days and was tired and that sometimes he used to get irritated at her and to ask her to get out of the room. Once he told her that his elder brother was still a bachelor and that they should have no intercourse until that brother also married. All this behaviour and unresponsiveness and coldness convinced her that he was impotent and incapable of sexual intercourse with her. In the hope that medical treatment might cure him of the impotency if it was amenable to treatment she pressed him to undergo medical examination, but this too he refused, and when she pressed him, he retorted that she could divorce him if she wanted.

7. The rest of the evidence in the case consists of the statements of persons who were close to the Petitioner to whom she had conveyed her sad plight. P.W. 2 is the Petitioner's mother who came to know about the unhappy marriage from her eldest daughter, who herself had learnt about it from a friend of the Petitioner. P.W. 2 asked the Petitioner and the latter told her that the Respondent was impotent and incapable of sexual intercourse. P.W. 3 is a priest who has married the Petitioner's younger sister. After his marriage the witness had occasion to go to the residence of the Petitioner and the Respondent at Ernakulam for a reception. He noticed that the Petitioner's life was miserable and that she was being treated more like a servant. After the Petitioner returned to her parent's house at Mavelikara, P.W. 3 and his wife once asked the Petitioner sometime in September 1978 how her marriage had ended in unhappiness and the Petitioner told them that the marriage had never been consummated. P.W. 4 is a sweeper woman in the office of the Kerala Shipping Corporation in the Wellington Island where the Petitioner had worked as an accountant from the middle of 1974 to the middle of 1978. The witness had gone to the residence of the Petitioner and the Respondent at Kadavanthra (Ernakulam) 3 to 4 times. On these occasions she found the Respondent's sister running the entire household and the Petitioner looking more like a servant with torn clothes and nobody to talk to her. The Petitioner used to offer the witness the lunch which she was bringing to the office but finding it awful to eat she used to throw it away on the sly. The Petitioner always looked gloomy and unhappy and when asked about it she was reluctant to say anything but finally under pressure she told the witness, on promise of secrecy, that she never had any sexual intercourse with the Respondent and that the latter was incapable of performing the sexual act. The last witness is

P.W. 5 who is the first cousin of the Petitioner's father. He also came to know about the unhappy marriage of the Petitioner and once he asked the Petitioner while she was in her parent's house at Mavelikara what had happened to her. After some reluctance the Petitioner told him how she had no married life with the Respondent owing to his impotency. Subsequently he tries to find out whether the marriage could be dissolved by some settlement but the efforts failed, owing to the opposition of the Respondent's father and brother.

8. The direct evidence about the Respondent's alleged impotency and inability to have sexual intercourse with the Petitioner thus consists of her sole testimony. In the normal course that can only be the direct evidence, but if the Respondent had appeared and was willing to undergo medical examination it would have been possible to obtain expert evidence on his sexual potency. He has however not chosen to appear. In the circumstances of the case I have no difficulty in accepting the testimony of the Petitioner. Her evidence has a ring of truth. She and the Respondent were comparatively young at the time of her evidence in 1980 she was 32 which means that she was about 25 in January 1974 when they married. They had lived together at Mavelikara, Kottayam and later at Ernakulam with some intervals of separate residence for over 4 years. In the normal and usual course there should have been sexual intercourse between them and the Petitioner's positive evidence is that despite her advances and even attempts to excite him, he remained cold and indifferent, avoiding sexual intercourse under various pretexts. In this situation the only reasonable inference possible is that, as the Petitioner avers, he was impotent and incapable of sexual intercourse with her. The broad circumstances of the case also lend support to the Petitioner's testimony. In the notice Ext. P-1 itself, her case as now presented had been broadly set out. To this the Respondent cared to send no reply nor has he cared to contest the petition, where the grounds have been set out at greater length. Despite appearance by counsel he made no attempts to instruct them to cross-examine the Petitioner or her witnesses. He did not even choose to appear in court despite an order to that effect. These various circumstances support the unchallenged evidence of the Petitioner. I believe the Petitioner and hold that at the time of the marriage the Respondent was impotent and thus incapable of consummating the marriage by sexual intercourse with the Petitioner.

9. This inability continued until August 1978 when the parties separated for ever. The natural inference, there being no material to negative that inference, is that the impotency continued at the date of the petition as well. As noted above, he did not also repudiate the allegations of impotency made in the notice Ext. P-1 or in the petition filed nearly one and half months later.

10. In view of this conclusion it is unnecessary to draw support from the testimony of the other witnesses or discuss its probative value. On the materials there is no ground to suspect collusion between the Petitioner and the Respondent.

11. On the evidence of the Petitioner and in the light of the circumstances I am satisfied that the marriage between the Petitioner and the Respondent has not been consummated, that the non-consummation was due to the incapacity of the Respondent to consummate it, that this arose out of the Respondent's impotency and that he was impotent at the time of the marriage and at the time of the petition. The Petitioner is entitled to a decree.

12. The question however arises, whether the decree to be passed should be a decree nisi in the first instance or whether it could be a simple absolute decree. The act makes no express provision on the form of the decree where the court declares a marriage null and void u/s 19, in contrast to the decree for dissolution of marriage where Section 17 directs that the decree passed by a High Court should be, in the first instance, a decree nisi. One should therefore be inclined to think that a decree declaring a marriage null and void should or could be an absolute decree, but the presence of Section 7 which lays down that:

Subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said courts, are as nearly as may be conformable, to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief:

Provided that nothing in this Section shall deprive the said courts of jurisdiction in a case where the parties to a marriage professed the Christian religion at the time of the occurrence of the facts on which the claim to relief is founded

has led to a divergence of judicial opinion on the point. It is needless to refer to all the reported cases; it suffices to point out, as representative of the two views, that [Grace Isabel Stuedman Vs. Anneley Eliardo Beresford de Courey Wheeler](#), holds that a simple absolute decree should be passed while [Agnes Sumathi Ammal Vs. D. Paul](#), which has been followed in [George Swamidoss Joseph Vs. Miss Harriett Sundari Edward](#), holds that a decree for nullity should in the first instance be a decree nisi. After going through these and the other cases which take one or the other of the two views, I am inclined to follow the law as laid down in [Grace Isabel Stuedman Vs. Anneley Eliardo Beresford de Courey Wheeler](#), . In that decision S. R. Das, J. (as the learned Judge then was) discussed the question fully on the relevant decisions, provisions of law and the case law including AIR 1936 Mad 324 and held:

The decree to be passed by this High Court in Exercise of its matrimonial jurisdiction in a suit for nullity of marriage filed under the Divorce Act must be one plain, simple absolute decree as would be passed in a suit for declaration of nullity of marriage between non-Christians u/s 45, Specific Relief Act. The practice of passing a decree nisi is not the correct practice under the law prevailing in India.

13. The only relevant decision of this Court is the Bench Decision *Rathi Varghese v. Ponnen* 1967 KLT 965. That was an appeal from the dismissal of a petition seeking a

declaration that the marriage between the Appellant and Respondent was null and void u/s 19. This Court reversed the dismissal and allowing the petition, passed a decree declaring the marriage to be null and void. The question of the form of the decree in such a case was not considered or decided and the decision is relevant only in that a simple and absolute decree of nullity was passed.

14. I hold that it is not necessary to pass a decree nisi in the case.

15. I allow the petition and declare the marriage between the Petitioner and the Respondent null and void. There will a decree to that effect. In the circumstances parties will bear their costs.