

Antony Vs Fransisca

Court: High Court Of Kerala

Date of Decision: July 6, 1988

Acts Referred: Divorce Act, 1869 & Section 19

Citation: (1988) 2 KLJ 122

Hon'ble Judges: V.S. Malimath, C.J; V. Bhaskaran Nambiar, J; K. Sukumaran, J

Bench: Full Bench

Advocate: E.R. Venkiteswaran, for the Appellant; K.N. Narayana Pillai, for the Respondent

Judgement

@JUDGMENTTAG-ORDER

V.S. Malimath, C.J.

This is the husband's petition for a declaration that his marriage with the respondent is a nullity, u/s 19 of the Indian

Divorce Act on the ground that the respondent was impotent at the time of the marriage and at the time of the institution of the suit. The parties are

Christians and their marriage was solemnised on 31-12-1985. It is the petitioner's case that inspite of his earnest efforts, he was unable to have

sexual intercourse with the respondent. It is his further case that whenever he approached the respondent for sexual intercourse, she used to get

disturbed and her mental balance appeared to be lost. According to her such things were in the nature of unpardonable sin and she used to say that

even to think about it was frightening to her. In spite of the several attempts made by the petitioner to impress her about the necessity for sexual

union in a marriage, she was unable to change her attitude. He has further stated that apart from his own attempts, attempts were made through the

members of both the families to persuade the respondent to change her attitude. But all these attempts have failed and it has thus become

impossible for the petitioner to have sexual intercourse with the respondent, as she is totally unwilling for it. It is in this background that the

petitioner has come up with the case that the respondent must be regarded as impotent both at the time of the marriage as also at the time of the

filing of the petition. In the counter statement filed by the respondent it is admitted that the marriage has not been consummated. She has further

taken the stand that her mental condition, is such that it is impossible for her to have sexual intercourse with the petitioner. She further states that

she does not believe that there is any possibility of her being able to attain such mental capacity or wish to have a sexual intercourse with him.

2. On behalf of the petitioner he has examined himself as PW. 1 and the respondent has examined herself as R. W. 1. Both the parties substantially

support what they have stated in the petition and the counter statement. The court below has rightly come to the conclusion after considering their

evidence that the marriage was not consummated and that it is impossible for the parties to have sexual intercourse. It is not the case of either of

the parties that the respondent is physically handicapped for sexual intercourse. The respondent herself has taken the stand that it is not possible for

her to have sexual intercourse with the petitioner. She has no inclination or interest for sex and is not agreeable for having sexual intercourse with

the petitioner. In other words, the respondent does not agree to have sexual intercourse not because of physical disability but because she abhors

the concept of sex itself. Can the wife who does not permit intercourse on the ground that she is totally against intercourse, be regarded as

impotent, though she does not have any physical problems for intercourse? We find answer to this question from the classic passage in ""Rayden on

Divorce"" - 14th Edn. at page 175, which we extract as follows:

Decisions under the corresponding provisions of the English Matrimonial Act have held that where a woman is shown to have had intercourse with

her husband after a reasonable time for consummation of the marriage and it appears that she has refused intercourse and resisted her husband's

attempts, the court, if satisfied that the refusal was not due to mere obstinacy or caprice, may draw the inference that K arose from some

incapacity proceeding from nervousness or hysteria or from an invincible repugnance to the act of consummation resulting in a paralysis of the will

which was consistent only with incapacity.

We agree with this statement of law which has been followed with approval by the Special Bench of the Madras High Court in Jayaraj Anthony

Vs. Mary Seeni Ammal, Reason for impotency may be physical or mental In this case refusal on the part of the respondent to have sex with the

petitioner was not due to mere obstinacy or caprice but because she hates sex and believes that it is sinful. Though there is no physical obstacle for

intercourse, she is mentally determined not to have sex. In other words, there is a paralysis of her will to have intercourse. This was her condition

right from the date of marriage. We, therefore, hold that she was impotent both on the date of the marriage as also on the date of the suit. The

marriage was, therefore, a nullity.

We are also satisfied that there is no collusion between the parties.

For the reasons stated above the decree of nullity of marriage made by the court below is hereby made absolute. No costs.