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**(1921) 04 CAL CK 0002**

**Calcutta High Court**

**Case No:** None

Birendra Kumar Biswas

APPELLANT

Vs

Hemlata Biswas

RESPONDENT

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**Date of Decision:** April 26, 1921

**Acts Referred:**

- Divorce Act, 1869 - Section 19

**Citation:** 67 Ind. Cas. 949

**Hon'ble Judges:** Greaves, J

**Bench:** Single Bench

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### **Judgement**

Greaves, J.

The petitioner, Birendra Kumar Biswas, asks that his marriage with the respondent, Hemlata Biswas, may be declared null and void on the ground that the respondent had been from before the marriage suffering from a loathsome disease of syphilitic origin alleged to be incurable and contagious, in consequence whereof she is said to be unable to consummate the marriage, and the petitioner alleges that the marriage was brought about fraudulently and that all information with regard to the disease was concealed from him.

2. The suit was heard by Mr. Justice Fletcher on the 31st March 1919 and he dismissed it with costs; against the decree of the dismissal the plaintiff preferred an appeal and on the 31st May 1920 the case was remanded by the Appeal Court to this Court for re-trial.

3. It was suggested by Counsel for the parties before me that the evidence taken before Mr. Justice Fletcher should be treated as evidence before me and that the parties would submit themselves for further cross-examination if either Counsel desired to cross-examine further and that either side should be at liberty to adduce any additional evidence if they so desired. I agreed to this course having regard to the extreme poverty of the parties and the great hardship to which they have been

exposed by reason of the course which events have taken.

4. The defendant offered to submit herself to the examination of any Doctor named by the petitioner, the petitioner did not express himself as desirous of any such examination being held, but I thought that it was better that such examination should take place and the respondent was accordingly examined by Dr. Bissesswar Mitter on the morning of the 11th March last.

5. Two issues were raised before me:

(1) Is the petitioner entitled to have the marriage declared null and void on the ground that the respondent was suffering from syphilis prior to the marriage?

(2) Was the petitioner induced to marry the respondent by any fraudulent allegation or fraudulent concealment on the part of the respondent or on the part of any one on her behalf?

6. The parties are both Indian Christians and were married at the Baptist Church, Entally, on the 15th February 1918, the respondent then being of the age of 15 years or thereabouts.

7. The evidence before Mr. Justice Fletcher was to the following effect, Khamutulla Chaudhury, a medical practitioner of 20 years experience, stated that he saw the respondent on the 19th February 1918 and that she was suffering from tertiary syphilis and that if the petitioner had consummated the marriage he would have got the disease himself and that he was doubtful from her condition whether she could be cured. In cross-examination he stated that he only examined her nose and body and not to see if there was malformation or structural defect to prevent consummation. He stated to the Court that the disease might be cured but that it would take time. Dr. Bissesswar Mitter, a Fellow of the Royal College of Surgeons and an L.R.C.P. of London, stated that he examined the respondent on the 6th March 1918 and that she was suffering from a bad type of inherited syphilis, that the disease was in the tertiary stage and that the nasal discharge of which he spoke and from which she was Buffering was infectious and that any man living with her could be infected, and that so long as she was suffering from the disease it would not be safe for the husband to have intercourse with her. Asked if she could be cured, he stated that this was very controversial question and that after several years and after examining the blood he could say if she was safe but that there were several risks including that of the children getting the disease.

8. In cross-examination he stated that the girl was capable of sexual intercourse.

9. The petitioner stated that he never lived with the respondent as his wife, that he discovered she was suffering from this trouble on the 17th February 1918 and that he had never consummated the marriage and did not know before the marriage that she was troubled with the disease and that he never saw her before the marriage. The respondent swore that the petitioner had sexual connection with her

and that she slept with him for one week after the marriage.

10. Raj Krishna Mukerjee, an L.M.S. of Calcutta, stated that he examined the respondent on the 18th March 1918, that she was suffering from syphilis which he considered to be curable, that he examined her again on the 25th November 1918 and expected she would be thoroughly cured within three months and that she could consummate the marriage. In cross-examination he stated that he had been practising in Calcutta for three years, that on March 18th the respondent was suffering from tertiary syphilis and that it would not then have been safe to consummate the marriage.

11. At the retrial before me the following further evidence was called on behalf of the petitioner. Hridoy Gopal Banerjee, a Minister of the Baptist Chapel, who married the parties, stated that on the 6th March 1918 the father of the petitioner made a communication to him and that as a result he went to the house and had a talk with the defendant who admitted that before the marriage she was suffering from something which caused a hole in her palate, that her father had her treated for this before the marriage without effect and that it went on increasing. He stated that the respondent said that something happened to her nose and then to her palate.

12. In cross-examination he stated that the respondent did not say that she knew what the disease was. Dr. Bissesswar Mitter, who was examined in the first trial, stated that he examined the respondent on the morning of the 11th March 1921 and that there were signs of hereditary syphilis and he did not think it necessary to examine her private parts as in such cases private parts are never affected unless there was fresh infection during the last few weeks or months. In cross-examination he stated that sexual connection was not impossible, but that any children born of the union were likely to be infected, that if the petitioner had sexual intercourse with the respondent there was no chance of his being infected but that from kissing he might be infected and that the discharge from the nose and mouth was infections.

13. I find the following facts on the evidence: (1) The marriage was never consummated; (2) that the respondent was at the date of the marriage suffering from hereditary tertiary syphilis; (3) that this was not known to the petitioner until after the marriage; (4) that the respondent was treated for syphilis prior to her marriage at the instance of her father who, I must assume in absence of evidence from him on this point and in view of Mr. Hridoy Gopal Banerjee's evidence, knew of the nature of the disease; (5) that sexual intercourse between the petitioner and the respondent is not physically impossible and that her private parts are not diseased; (6) that the disease has not yeilded to treatment, and that even if curable (as to which no positive conclusion is now possible) it could not be taken as cured until after the lapse of several years; (7) that from sexual intercourse alone the petitioner is not likely to become infected with the disease but that there is risk of such infection if the petitioner and respondent live together on ordinary terms as husband and wife; (8) that there is very grave risk that any offspring of the union

would be diseased.

14. I gather from the judgment of the Appeal Court that the case was remanded for re-trial on two points, (1) for investigation of the allegation of fraud, and (2) for consideration whether the rule of impotency said to be deduced from the American Authorities to which unfortunately I have no means of access namely, that the existence of incurable syphilis at the time of marriage in either party forming not an absolute bar to copulation but rendering the act impracticable as endangering both the health and life of the party not previously infected is such an incapacity as entitles the party not infected to a decree for annulment, is applicable to the facts of this case.

15. So far as the first of these questions is concerned, I have already stated my finding on the point, that is to say, that I find upon the evidence that the father of the respondent knew prior to the marriage that his daughter, the respondent, was suffering from syphilis, and that this fact was not known to the petitioner but was concealed from him. Whether the father knew or had reason to believe that the disease was incurable I do not know but even assuming that he did know this I do not think that this would be a good ground for annulling the marriage. The jurisdiction of the Court to annul the marriage is contained in Section 19 of the Indian Divorce Act (IV of 1869) and fraud, apart from fraud in obtaining the consent, is not a ground, and I do not conceive that fraud of the nature stated above amounts to fraud in obtaining the consent within the meaning of the words at the end of Section 19.

16. The law in England is sufficiently stated in Halsbury's Laws of England, Volume XVI, page 278 as follows: "Fraudulent misrepresentation or concealment does not, apart from duress or imbecility of mind amounting to insanity, attest the validity of a marriage to which the parties freely consented with a knowledge of the nature of the contract."

17. This being so, the only question which remains, apart from the question of the principle deduced by the Appeal Court from the American Authorities is whether on the facts here the respondent was impotent at the time of the marriage and at the time of the institution of the suit. It is said on behalf of the respondent that impotency means an impossibility of sexual intercourse from physical incapacity and that cases like *G. v. G.* (1871) 2 P. & D. 287 : 40. L.J. Mat. 83 : 25 L.T. 510: 20 W.R. 103 and *B. v. P.* falsely called *H.* (1873) 3 P. & D. 126 mark the extreme limit to which the Courts will go, that on the facts here there is no such incapacity and that the Court, has no jurisdiction to annul the marriage. On behalf of the petitioner it is said that impotency means anything which prevents cohabitation, a state of things said to exist here on the facts of this case.

18. The construction put on impotency by counsel for the respondent is, I think, clearly too narrow a construction. Lord Perzance in the case of *G. v. G.* (1871) 2 P. &

D. 287 : 40. L.J. Mat. 83 : 25 L.T. 510: 20 W.R. 103 says: "but the basis of the interference of the Court is not the structural defeat, but the impracticability of consummation. If, therefore, a Case presents itself involving the impracticability (although it may not arise from a structural defeat) the reason for the interference of the Court arises. The impossibility must be practical. It cannot be necessary to show that the woman is so formed that connection is physically impossible if it can be shown that...connection is practically impossible, or even if it be shown that it is only practicable after a remedy has been applied which the husband cannot enforce, and which the wife, whether wilfully or acting under the influence of hysteria, is determined not to submit to."

19. In that case the marriage could not be consummated owing to the hysteria or extreme sensibility of the wife, no question of any structural defect arising, and the Court on the facts come to the conclusion that this condition of things would be permanent. The passage which I have quoted from the judgment in *G. v. G.* (1871) 2 P. & D. 287 : 40. L.J. Mat. 83 : 25 L.T. 510: 20 W.R. 103 is quoted with approval in *Lickinson v. Dickinson* (1913) P.O. 198 82 L.J.P.C. 121 109 L.T. 408 : 58 8. J. 82 : 29 T.L.R. 765. There is no doubt that both in that case and in *G. v. G.* (1871) 2 P. & D. 287 : 40. L.J. Mat. 83 : 25 L.T. 510: 20 W.R. 103 the consummation of the marriage was physically possible if force or certain other measures had been used. In the present case consummation is no doubt physically possible and the wife is not unwilling but the question I have got to ask myself is not, I think, concluded by this. Can I say here that consummation is, under the circumstances, a practical impossibility? I think it is. Upon the evidence, having regard to the state of the wife's health, I think consummation is a practical impossibility. I think the husband could not consummate the marriage without the very gravest risk to his health and to that of any offspring who might be born of the connection and I think this state of things is likely to continue and be permanent and, in my opinion, this amounts to impotency on the part of the wife within the meaning of the decided cases. I accordingly declare the marriage null and void.