Vincent Adolf Godinho Vs Jume Beatrice Rama Godinho

Court: Bombay High Court

Date of Decision: Sept. 5, 1984

Acts Referred: Divorce Act, 1869 â€" Section 19(1)

Citation: AIR 1985 Bom 103 : (1985) ILR (Bom) 498 : (1984) MhLj 926

Hon'ble Judges: Sawant, J; Kania, J

Bench: Division Bench

Advocate: George A. Rebello, for the Appellant; P. Vas, for the Respondent

Judgement

Kania, J.
This is an appeal against a judgment of Mehta J. delivered on 14th June 1984 dismissing a petition filed under the Divorce Act

1869 (referred to he rein after as ""the said Act"") for declaration of nullity of marriage filed by the appellant against the respondent on the ground of

impotence.

2. The facts necessary for the appreciation of the controversy raised before us can be shortly stated :

The appellant is the husband and the respondent is the wife. Both the parties are domiciled in India and practise the Roman Catholic faith. The

husband was employed with a private concern in Saudi Arabia and the wife was employed as a teacher at Malad in Bombay. The marriage

between the appellant and the respondent was solemnized in the Church of Our Lady of \ at Orlem, Malad in Bombay in accordance with Roman

Catholic rites and ceremonies. In para 6 of the petition, it is alleged by the appellant that after the marriage the appellant and the respondent went

to spend the wedding night at the Holiday Inn at Juhu. All efforts on the part of the appellant by way of endearment were thwarted by the

respondent stating that it was too early to indulge in any sexual acts. The appellant has gone on to state as follows :

.....In any event the respondent submitted herself most reluctantly and she was only a passive factor on the first night.....

He has averred that the said endeavour by him gave him an impression that the respondent was not capable of fulfilment of the sexual act and

physical union by coitus. The appellant has gone on to say in the petition that on the second day of the marriage they resided at the respondent''s

house at Orlem, Malad, where there was ample privacy for both the parties, but the respondent rejected all approaches on the part of the

appellant. They proceeded on their so-called honeymoon on 3-9-1980 to Goa. At Goa they resided at the residence of a friend of the respondent

at Santa Cruz in Goa for about four days. He has stated that at Goa any attempt on the part of the appellant to indicate intimacy was discarded by

the respondent with contempt. Accordingly, being totally frustrated, the appellant and the respondent returned to Bombay. After they returned to

Bombay, the appellant stayed at his own house at Byculla and the respondent stayed with her parents. The appellant then went away to Saudi

Arabia on account for his job. This was on or about 18th September 1980. He attempted reconciliation with the respondent by writing letters to

her and expressed the desire to return to India for Christmas holidays. However, he received a telegram from the respondent''s father stating ""Do

not come, you are not welcome"". The appellant returned to India in January 1981 and made attempts to persuade the respondent to live with him,

but those attempts were thwarted by the respondent who ultimately informed the appellant that she did not wish to continue the matrimonial

relationship with the appellant. In para 9 of the petition, the appellant has averred as follows :

.....The petitioner states that the said pretended marriage has not been consummated by carnal expiation (probably meaning "copulation") on

account of the refusal on the part of the respondent by virtue of impotency and/or frigidity.

There is no issue of the marriage between the appellant and the respondent. The petition for declaration of nullity of marriage was filed by the

appellant in or about the end of September 1983. The respondent has not filed any written statement. In fact in the trial Court as well as before us,

although the learned Advocate of the respondent was on record and was present, no arguments were advanced by him and he made it clear that

he was merely submitting to the orders of the Court.

3. In the evidence led before Mehta J., the petitioner after setting out some of the undisputed facts and deposing to the marriage stated as followed

:

After our marriage, we went to the Holiday Inn Hotel and spent the night there. I made attempts to consummate the marriage, but the respondent

was not willing to co-operate. The respondent permitted me to consummate the marriage unwillingly. The respondent permitted me to have sexual

relations with her unwillingly. I had sexual intercourse with the respondent by using force. This happened only once, just after the marriage.

Later on, Mr. Rebello, learned Advocate who also represented the appellant in the trial Court specifically put him the following question:

Q. When you stated that you had sexual intercourse with your wife with force, what did you mean?

A. I now say that I undressed the respondent by force, but she did not permit me to penetrate her.

4. The evidence of the appellant which is unchallenged by way of cross-examination shows that apart from what happened as aforesaid on the

wedding night, there was no sexual relationship at all between him and the respondent either during their stay at her parent"s place or at Goa or at

any other time after the marriage. In fact in his evidence he has stated that after the first night he got no opportunity to consummate the marriage

because the respondent refused to sleep in the same room in which he slept.

5. The learned trial Judge in his judgment and, in our view, rightly, declined to accept the evidence of the appellant to the effect that the respondent

did not allow him to penetrate her even on the first night. The learned trial Judge held that he was of the view that the appellant had failed to prove

that the respondent was impotent at the time of the marriage and also at the time of the institution of the suit. It is this judgment which is sought to

be challenged before us.

6. Before considering the arguments further, it might be useful to take note of the provisions of Ss. 18 and 19 of the said Act. Section 18 in

Chapter IV of the said Act provides that any husband or wife may present a petition to the District Court or to the High Court, praying that his or

her marriage may be declared null and void. Section 19 deals with the ground on which a decree for nullity can be passed. Sub-section (1) of S.

19 which is the only relevant part of S. 19 for our purposes runs as follows :--

19. Such decree may be made on any of the following grounds :-

(1) that the respondent was impotent at the time of the marriage and at the time of the institution of the suits;

7. It may be observed straightway that it is well settled in law that for the purposes of Ss. 18 and sub-s. (1) of S. 19 of the said Act the impotence

alleged may not be general or total. It is not necessary in order to obtain a decree for nullity that it must be established that the party against whom

the decree is sought is impotent with all members of the other sex. It is sufficient if it is established in a petition on this ground that the respondent

was incapable of performing the sexual act with the petitioner that is that the respondent was at the time of marriage and at the time of the institution

ofthe petition relatively impotent the petitioner or suffered from impotentia quoad hunk vel hunk (see Latey on Divorce, 15th Edn. P. 226). It is

also well settled in law that it is not necessary that the impotence alleged must be in the sense of physical impotence, but it may comprise in

invincible repugnance to the sexual act either generally or with the spouse filing the petition and this relative impotence may be caused by factors

such as hysteria or resistance or psychological or mental block against the act of sexual intercourse or invincible repugnance. Now, the evidence of

the appellant, which has remained uncontroverted, shows that the only occasion on which he was able to make an attempt to have sexual

intercourse with the respondent was on the wedding night and on that night he could have sexual intercourse or sexual relation with the respondent

only by using force. It is true that the appellant has, later on, stated in answer to a question put by his advocate Mr. Rebello that even on that night

the respondent did not permit the appellant to penetrate her as set out earlier. That part of the evidence seems to be more a mere gloss as

observed by the learned trial Judge and cannot be accepted, even though there was no cross-examination. However, taking into account the earlier

part of the evidence regarding which there is no dispute, the question which arises is :

Can a woman who submits only on one occasion to sexual intercourse with her husband and that only by the husband using force and on all other

occasions resists successfully the attempts of the husband to have sexual relations with her be said to be impotent relatively to him?

In our opinion, the answer to that question should be in the affirmative particularly in a case like this where the wife has on several other occasion

showed complete reluctance to any sexual intercourse with the husband and, in fact consistently rebutted all his advances with contempt. The

evidence clearly shows that the respondent had complete aversion to any sexual relationship with the appellant and it was only once that the

appellant could have such relationship and that too by use of force.

8. We now propose to refer to some of the cases cited by Mr. Rebello. In Kanthy Balavendram Vs. S. Harry, it was held by a Full Bench of the

Madras High Court that in order to constitute marriage bond between two persons, there must be power, present or to come, of sexual

intercourse, which in its ordinary sense, means ordinary and complete intercourse; it does not mean partial and imperfect intercourse, though every

degree of imperfection would not deprive it of its essential character. There must be degrees difficult to deal with and if it is so imperfect as

scarcely to be natural, legally speaking, it is no intercourse at all. In the course of the judgment, the Full Bench considered the approach which

should be adopted by the Court in considering the validity or invalidity of a marriage and the Full Bench has referred with approval to the

observations of Dr. Lushington, whose authority was recognised in matrimonial matters, to the effect that in considering the question of validity of

marriage the interference of the Court should be based on the impracticability of consummation and not merely structural difficulty in intercourse. In

connection with this, the Full Bench has cited with approval the following passage from the decision of Dr. Lushington in G. v. G. (1871) LR 2 P &

D 287 (B) which runs as follows :

..... and I cannot help asking myself what is the husband to do in the event of being obliged to return to cohabitation in order to effect

consummation of the marriage? Is he by mere brute force to oblige his wife to submit to connection? Every one must reject such an idea.

9. We find that William Latey in his book on Divorce (14th Edn. at P. 225 para 2.428) has considered the question of incapacity of either the

party to a marriage. In this connection, Latey has pointed out that where, after a reasonable time it is shown that threre has been no sexual

intercourse and that the wife has resisted all attempts, the court, if satisfied on the bona fides of the suit, will now usually infer (unless it is merely a

case of wilful and knowing refusal) that the refusal arises from incapacity, caused by nervousness or hysteria, or from an invincible repugnance to

the act of consummation resulting in a paralysis of the will, and pronounce a decree. In discussing where men petitioners were granted decrees of

nullity, Latey has referred (at P.229 para 2.440) to the decision in F. v. P. (orse F) (1911) 27 TLR 429 where it appears that a decree was

granted in a case where there was cohabitation for one day only and there was resistance and hysteria on the part of the wife to the act of

intercourse with the husband. Unfortunately the full report of this case is not available. We have, however, referred to the reference made to it in

Latey"s aforesaid commentary.

10. The discussion set out earlier clearly supports the conclusion that in a case like this, a decree should be pronounced in favour of the husband.

We may point out that it is well settled law that the husband may obtain a decree on the ground of nullity of marriage where the wife is impotent

qua him. It is not necessary to establish that the wife is impotent generally or physically incapable of the act of sexual intercourse. If that is the

position, in a case like this where the evidence shows that the wife could submit to sexual intercourse with the husband only when the husband used

force, it must be held that the wife was impotent relatively to the husband.

11. In the result we are of the view that the learned trial Judge was in error in coming to the conclusion that merely because of the single act of

intercourse which took place on the wedding night as a result of the use of force by the husband it could not be said that the wife was not impotent

qua the husband.

12. We set aside the order passed by the learned trial Judge and pronounce a decree for nullity of marriage in favour of the appellant and against

the respondent.

13. Appeal allowed. There will be no order as to costs.

14. Appeal allowed.