

**(1938) 01 CAL CK 0033**  
**In the Calcutta High Court**

H.R.H. Bull

APPELLANT

Vs

Mrs. B.S. Bull

RESPONDENT

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**Date of Decision :** 31-01-1938

**Acts Referred:**

**Citation :** AIR 1938 Cal 684

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

**Bench :** Division Bench

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### Judgement

McNair, J.—This is a husband's suit for a declaration of nullity of marriage under the Divorce Act. Both the petitioner and the respondent are domiciled in India and profess the Christian religion. The ceremony of marriage was performed on 11th May 1928 in Darjeeling. The petition alleged that the marriage had never been consummated and that the respondent at the time of the said marriage and ever since has been incapable of consummating the same. In her answer the respondent alleged that she was at all times and is now capable of consummating the marriage and the marriage has in fact been consummated. The parties met at Kurseong through the petitioner's sister during the Pujas of 1926. In 1927 they met at the Jalpaiguri Camp on the footing of an engaged couple. They were married on 11th May 1928 at Darjeeling. They lived at Darjeeling for four or five days with her parents at Francis Villa, thereafter for a fortnight in Calcutta until they sailed for England from Bombay. They stayed in England for rather more than four months for the most part with the respondent's sister at Higham's Park. They left England by steamer on 18th October 1928 and arrived in Bombay and came by train to Calcutta on 11th November 1928. At one time they intended to go to Darjeeling together for a few days before the petitioner returned to his garden at Tele-para where he was the Assistant Manager of a tea estate. They had arranged that he should go back to the garden by himself in any event, because there was no bungalow to which the respondent could be taken. There was a quarrel of somewhat violent nature in the house of the petitioner's mother in Calcutta on 11th November, after which a reconciliation took place and the respondent went to Darjeeling to her people,

while the petitioner remained in Calcutta owing to ill-health and was treated at the Tropical School.

2. The parties then corresponded on amicable terms. But apparently they both harboured feelings of resentment, and towards the end of November, the petitioner wrote to say that he would not go up to Darjeeling but would return direct to his garden at Telepara. During the last week in November, the respondent came down to Calcutta bringing letters which had been readdressed to Darjeeling from the tea estate, and amongst these was a bill for the keep of an illegitimate child who had been born as the result of a connexion between the petitioner and one of his tea garden coolies in 1924, and who had been cared for and educated at the Kalimpong Homes. It is clear that the respondent first came to know at this time in Calcutta of the existence of the petitioner's illegitimate child whose name is Gilbert. There was again a reconciliation and the petitioner returned to his garden while the respondent went back to her people at Francis Villa, Darjeeling.

3. On 14th December 1928 the petitioner wrote to say that a separation was inevitable. The respondent then wrote to him for money which he refused on the ground that he had given her ₹200, which was said to be half of his capital, shortly before they left England. In February 1929 she instituted maintenance proceedings in the Sub-divisional Officer's Court at Jalpaiguri, which the petitioner did not contest although he was represented, and an order was made that the petitioner should pay to the respondent an allowance of Rs. 100 a month. At the end of 1929 the petitioner came to Calcutta and consulted a member of the Bar with regard to his matrimonial difficulties when he was advised that he could bring an action for nullity. In 1934 he again went on leave to England where he states that he met a girl whom he wished to marry, and, having consulted solicitors in London, in November 1935 he instituted these proceedings.

4. The petitioner's case is that from the time of his marriage in May 1928 and for four or five months at frequent intervals he attempted to have sexual relations with the respondent, but that although she submitted to intimate caresses and marital endearments she refused to allow the marriage to be consummated. To complete the chronological order of events, I may mention that on 7th January 1936 shortly after the petitioner had filed his petition the respondent went to Col. Gow, an eminent medical practitioner, and Professor of midwifery and gynaecology in Calcutta, and obtained from him a certificate that there was evidence that the marriage, of which the respondent had informed Col. Gow had been consummated. On 13th January the respondent filed her answer, and on 8th April the petitioner obtained an order from this Court calling upon her to give particulars of dates and places, so far as she can remember, at which she alleges that the marriage was consummated. In compliance with that order she filed an affidavit stating that the marriage had been consummated on 11th May 1928, the day of the wedding, on 11th June, and frequently during the journey

to and the sojourn in England between May and October 1928. The actual wording of this affidavit giving particulars has been subjected to adverse comment by the learned Counsel for the petitioner, and although the drafting is faulty the meaning, I think is as I have stated.

5. On 5th May 1936 there was a medical inspection by two eminent doctors who certified that there was no physical defect or disease such as would render the petitioner incapable of performing the act of generation, that the respondent was not a virgin, and that there was no obstruction to the performance or completion of coitus. On 10th July 1936 the petitioner, in response to an order calling upon him to give particulars of para. 6 of his petition in which he had stated that the respondent was incapable of consummating the marriage, stated that the incapacity consisted of a nervous and/or psychic disorder and/or of an invincible repugnance in relation to the act of coitus, at all events in so far as the petitioner was concerned, which rendered her incapable of submitting to sexual intercourse with the petitioner. The following issues were framed:

(1) Was the respondent at the time of the marriage and is she still incapable of consummating the same for the reasons alleged in the particulars? (2) Was the marriage consummated? (3) Is the petitioner estopped from denying that there was a valid marriage by reason of the fact that the parties have lived together as husband and wife, though separated, since 1928, and by reason of the decision of the Jalpaiguri Court in the maintenance proceedings?

6. Mr. Isaacs for the petitioner objected to Issue 3 on the ground that it did not arise on the pleadings, and further that it is based on an allegation of fact, namely insincerity, which has never been pleaded. Section 18, Divorce Act, provides that any husband or wife may petition for a decree of nullity, and Section 19 sets out the grounds for such a decree. The first is, that the respondent was "impotent at the time of the marriage and at the time of the institution of the suit". It is argued that even if the petitioner has proved that the respondent was impotent at the time of the marriage, there is no evidence to show that she was impotent at the time when the suit was instituted. The petitioner on the other hand states that the invincible repugnance which he has alleged and which, he argued, that he has established is a psychic disorder which was permanent. If the petitioner establishes the form of repugnance which he alleges, that would in my view be sufficient to satisfy the requirements of Section 19, for, it would apparently constitute a permanent physical disability. In giving judgment in a case reported in C v. C (1921) LRP 399 Lord Birkenhead said:

It is not usual in these proceedings to meet with a contest of fact, but when such a contest does-arise the difficulty of arriving at a decision is extreme, for the chief actors are the only available witnesses on the most important issues. The petitioner must remove all reasonable doubt, for he has undertaken the burden of proof, and it is important in such a case that he should be compelled to discharge the burden.

7. If there be a direct conflict of testimony between the two parties who alone know the truth, the difficulties are much increased. "That", says Lord Birkenhead,

is good law and good sense. But the fact that the difficulties are increased does not make them insuperable in such a case, nor is the Court relieved from the duty of weighing the evidence merely because the parties who alone know the truth tell different stories one of which at least cannot be true.

8. For this reason a number of incidents have been introduced in evidence which either tend to show the general character of the principal parties or affect their credibility. The difficulties of coming to a decision are again increased because of the medical evidence which is to the effect that the respondent is not a virgin. Dr. McCay, who was one of the medical inspectors appointed by the Court, says that the genitalia bore the appearance of non-virginal type, the hymen had almost completely disappeared, and that what he saw was consistent with the case of a woman who had had sexual intercourse with a man. He admitted that there are causes of rupture of the hymen other than intercourse and that even normal virgin hymens are ruptured before coition. Col. Gow gives rather fuller details of the record of his examination, but although his eminence as a gynaecologist is conceded, it is suggested that his evidence may not have the same value because unconsciously he may be prejudiced in favour of the petitioner whom he had examined as a patient shortly after these proceedings were started. (His Lordship then discussed the evidence and proceeded.) The point which seems to me most important in deciding whether the petitioner's story is true is the delay in starting these proceedings. The petitioner has said that he realized his wife's impotence during the short stay in England in 1928. They had parted in November 1929 and in February 1929 the respondent instituted maintenance proceedings which the petitioner did not contest and she has received an allowance of Rs. 100 per month ever since. The petitioner says that he was unaware of the fact that he could institute nullity proceedings but he admits that he consulted legal authority in Calcutta at the end of 1929 and that he then became aware of the possibility. He has also stated that his financial condition did not allow him to institute proceedings then. His pay then was about Eg. 500 a month and his pay now and when these proceedings were instituted is only about Rs. 550 which he has been getting for the last six or seven years, so that there is little change in his actual income. Mr. Isaacs urges, on behalf of the petitioner, that it is not his income which was the stumbling block but the fact that during his stay in England in 1928 he had spent the whole of his capital. There is no evidence that he was in possession of any capital in 1935. In fact he had been on leave in 1934 and it is not improbable that again he had spent such capital as he possessed. The petitioner admits that during his leave in 1934 he had met a girl whom he wished to marry and in evidence he has stated very frankly that if these proceedings are successful he hopes to marry her.

9. He has on his own admission lived apart from the respondent for six years

after he knew that he could bring nullity proceedings, and there is no evidence that his financial condition has materially improved in the meantime. Moreover he had been paying during these six years nearly one fifth of his income to the respondent who was his wife in name, but with whom he was not living, and from whom he had been advised that he had grounds for being freed. Why then the delay? "The law would be very inhuman," says Sir Robert Phillimore in his judgment in *W. v. E.* (1876) LE 1 P 405,

if it allowed the husband after a long cohabitation without any satisfactory explanation of the delay, to throw his wife in her middle or old age, with ignominy, shame and poverty, upon the world because she had been originally, however innocently, by physical causes incapacitated from performing some of the duties of the married state. The law therefore has always required sincerity in the complainer, that is, a real sense of the grievance complained of unmixed with any other subsidiary motive, and, as a necessary proof of such sincerity, has also required all reasonable promptitude to be exhibited by the complainer in seeking legal redress. Perhaps there is no state of things to which the maxim, "*Vigilantibus non dormientibus subveniunt leges* is more directly applicable". . . .

10. It was at one time the view that delay was an absolute bar to success in a suit of this nature but although that view was negated at a later date, Lord Selborne in his speech in *G. v. M.* (1885) 10 AC 171 said:

Where there is a controversy of fact, delay in bringing forward the case increases, in proportion to the length of that delay, the burden of proof which is thrown upon the plaintiff. But that there is any definite or absolute bar arising from a certain amount of delay, is a proposition which I apprehend cannot be established either by any Scotch or by any English authorities.

11. The burden of proof in a case of this kind is always heavy. Even if there had been no unreasonable delay I would have had considerable difficulty in finding for the petitioner. In view of the length of time which elapsed before the petitioner instituted his suit, and of his failure to account satisfactorily for the delay, I have no hesitation in holding that he has failed to discharge the very heavy burden of proof which in the circumstances is laid upon him. This finding disposes of the suit; but an interesting argument has been addressed to me on Issue 3. Mr. Clough contends that the delay not only increases the burden of proof but also operates as an estoppel preventing the petitioner from denying the validity of the marriage, and he relies on the cases referred to by Sir Robert Phillimore in the case to which I have already referred and in particular to the sentence of Dr. Lushington in *B. v. B.* 1 Eccl & Adm 261 quoted at p. 408 of the report.

12. Mr. Isaacs argues that if reliance is placed on an estoppel it should have been expressly pleaded; but it is not a matter which can always be pleaded except as a general plea, and, in many cases, no particulars of such plea could be given, for the facts on which it is based are only ascertained during the evidence. The

one guiding principle which emerges is that " great delay in the institution of a suit of this description by the husband has always been considered an objection to be accounted for". In a case reported in Anonymous (1857) Deane 295, Dr. Lushington referred to the doctrine laid down in B. v. B. 1 Eccl & Adm 261 that though the wife may be incapable of sexual intercourse the husband's suit is barred by his delay or other conduct. One of the bars which is referred-to in B. v. B. 1 Eccl & Adm 261 is the " insincerity" of the suit. "I cannot attempt" says Dr. Lushington,

to define insincerity; it must be a combination of circumstances which show that the alleged grievance was not the motive which led to the commencement of the suit, but what would constitute such a case cannot be defined beforehand.

13. "Sincerity" says Lord Bramwell in G. v. M. 1885 10 AC 171 , "is a very important matter in ascertaining whether the spouse complained of is impotent or not" and his conclusion seems to be that the spouse whose impotence is alleged should not be allowed to object to the complaint unless in some way or another he or she can show that they have sustained some injury from the double matter of the complaint not having been made earlier, and of it being made now. There is no evidence in this case to show that the respondent has in any way suffered from the delay of the petitioner in bringing this suit and in my opinion such delay is not of itself a bar to relief, but it has an important bearing on the evidence by which the charge of impotency is sought to be established and upon the measure of proof required. As I have already stated the burden of proof in this case is heavier owing to the delay in bringing the suit and the petitioner has failed to discharge that burden. The petition is dismissed with costs including all reserved costs. The costs will be taxed as between party and party on the scale usually applied in matrimonial suits.