

(1979) 10 DEL CK 0012

In the Delhi High Court

Case No : Matrimonial Reference Appeal No. 9 of 1978

Jecronimo Francisco Sacrafamilla Eric D"souza

APPELLANT

Vs

Florence Martha D"souza Nee Fernandes

RESPONDENT

Date of Decision : 12-10-1979

Acts Referred:

Citation : AIR 1980 Delhi 275 : (1979) 16 DLT 347

Hon'ble Judges : S.B. Wad, J;Prakash Narain, J;Leila Seth, J

Bench : Full Bench

Advocate : Rajeev Sawhney and M.C. Ramachandran, for the Appellant;

Judgement

Prakash Narain, J.

(1) The petitioner and the respondent are Christians professing the Roman Catholic Faith. They were married on February 20, 1971 in New Delhi. After marriage they resided together for a week in Delhi and then went to Goa to the house of the petitioner's parents. In Goa they stayed for about a month and then returned to Delhi. The petitioner had a house in Old Rajinder Nagar, New Delhi and the parties lived there.

(2) According to the petitioner the marriage was never consummated on account of a mental blockade which the respondent had. She allegedly told the petitioner that she cannot permit the petitioner to have sexual intercourse with her as she would suffer pain and was afraid of that. According to the petitioner he tried his best to persuade the respondent to have normal conjugal relations but failed in his attempts. The attitude of the respondent towards leading a normal married life was then allegedly discussed by the parties with the respondent's mother. She is also stated to have tried to pursued her daughter to lead normal life and consummate the marriage but in vain. The petitioner states that respondent's mother even took the respondent to consult a doctor but the respondent's attitude did not change. In consequence, differences arose between the parties leading to the respondent finally leaving the matrimonial home in September

1973 to live with her mother at Pusa Road, New Delhi. The petitioner further states that in May .1974 the respondent addressed a letter to his Holiness Pope Paul VI for grant of a dispensation dissolving the marriage on the ground of non-consummation. The Church ordered an investigation on the representation moved by the respondent. As a result of that investigation the Church granted the prayer of the respondent and the marriage was dissolved. A communication to this effect was received by the petitioner from the Chancellor of the Archdioceses of Delhi in March 1975.

(3) The petitioner contends that on account of the non-consummation of marriage due to the respondent's attitude and due to her admission that she did not want to have sexual intercourse with the petitioner as she had fear of pain as also be abuse she had no love for him the respondent should be held to be impotent qua the petitioner. The petitioner also relies on an admission by the respondent that the marriage could not be consummated on account of her frigidity. Thus the petitioner filed a petition under Sections 18 and 19 of the Indian Divorce Act, 1869 for a decree of dissolution of marriage. This petition was filed in March, 1978.

(4) In the District Judge's court the petition was heard ex parte as the respondent did not put in appearance despite service. In support of the contentions in the petition the petitioner only examined himself as a witness. He did not produce any other evidence. He deposed that he was married according to the Christian rites in New Delhi on February 20, 1971. The marriage was never consummated. Initially the respondent expressed a fear that she will have pain on account of sexual intercourse She would not even allow the petitioner to touch her. She had a mental blockade against sexual intercourse. The matter was discussed by the respondent with her mother in the petitioner's presence. Even the mother's persuasion had no effect. A doctor was consulted by the respondent Along with her mother but there was no change. The respondent remained frigid and cold and finally left the matrimonial home in September 1973. She refused to come back and discharge her matrimonial obligations. The Church dissolved the marriage on the ground of non-consummation after due investigation. The respondent had expressed herself to the effect that she did not love the petitioner and did not want to have sex with him. She had married the petitioner in deference to the wishes of her mother and in fact did not want to marry him.

(5) On the basis of the exparte evidence, Additional District Judge, Delhi, granted a decree nisi annulling the marriage and referred the matter to this court u/s 20 of the aforesaid Act for confirmation of the decree of nullity. That is how the matter has come up before us.

(6) In this court also the respondent is being proceeded ex parte as she has failed to put in appearance despite service. Mr. Rajiv Sawhney appearing for the petitioner urges that in the circumstances of the case the petitioner is entitled to confirmation of the decree of nullity granted by the Additional District Judge.

(7) Section 18 of the said Act lays down 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 of the Act sets out the only grounds on which a marriage covered by the Act can be declared null and void. The petitioner relies on and has invoked the provisions of clause (1) of Section 19. This clause postulates a decree of nullity of marriage if the respondent was impotent at the time of the marriage and at the time of the institution of the suit.

(8) The first question which arises for consideration is whether frigidity or aversion to sexual intercourse in a wife can be regarded as impotency in the female. The matter is not free from difficulty. The learned counsel for the petitioner has made commendable research and has submitted that frigidity or conscious opposition as pleaded on the part of the wife should be regarded as a case of impotency. He has relied on several precedents in support of the contention that in capacity of a spouse under normal conditions to consummate the marriage, whether on account of physical defects in the sex organs or due to mental or psychological reasons, would be impotency in such spouse. The learned counsel also contends that refusal to consummate the marriage and if the refusal continues for a period of time would lead to the presumption of impotency unless reasonable or plausible excuse can be given for such refusal. At this stage we would not like to comment upon either of these contentions though there is some authority to support it. In particular the decisions reported as *Birendra Kumar bids was v. Hemlata Biswas*, 1 Lr 1921(48) Cal 283. *Kisore Sahu v. Mrs. Shehprebha Sahu*, AIR 1943Nag 185 *Smt. Shantabai alias Gourabai Vs. Tarachand*, , (Staff Sergeant) *Homes Gray Wilson v. Mrs. Kathleen (Harriette) Wilson otherwise Latimar*, A.1..R. 1931 Lah 245 and *Yuvraj Digvijay Sinhji Vs. Yuvrani Pratap Kumari*, do tend to support the contention of the petitioner's counsel that given normal conditions if consummation of marriage is a practical impossibility, impotency must be presumed .The contention, however, requires further examination.

(9) Assuming, however, that the contention is to be accepted and impotency is held to exist at the time of the marriage and for sometime thereafter, there is still complete lack of evidence about the same state of affairs continuing at the time of the institution of the petition/suit under Sections 18 and 19 of the Act. On the petitioner's own showing the respondent left the matrimonial home in September 1973. She even moved the Church in May 1974 for dissolution of her marriage. The petitioner in his testimony in court is completely silent about the state of affairs vis-a-vis the requirement of clause (1) of Section 19 at the time of institution of the suit/ petition. As the impotency must exist not only at the time of the marriage but also at the time of the institution of the suit/petition, it is not possible to grant the petitioner any relief in the absence of evidence. There is obviously a lacuna. Perhaps this lacuna was on account of the subsequent development of the Church dissolving the marriage but nevertheless it is there. The petitioner has moved the District Court three years after a communication from the Archdiocese of Delhi informing him about the dissolution of the

marriage by the Church. Perhaps he was under an impression that since the Church had dissolved the marriage on the ground of nonconsummation nothing further was required to be done by him. The ecclesiastical law under which the marriage was dissolved by the Church which cannot, however, effect or govern the Civil Law. Therefore, we are unable, on the record as it stands, to confirm the decree of nullity as granted by the Additional District Judge.

(10) It was stated at the Bar that the respondent has since migrated from India and is probably settled in Australia and has remarried. The petitioner, an India citizen, finds himself in a strange position and predicament. Despite the dissolution of marriage granted by the Church in the eyes of the Civil Law he continues to be a married man. He cannot get married till his first marriage is dissolved or he is granted a divorce. The inadequacy of the provisions of the Act are patent. Perhaps when this Act was passed by the legislature in 1869 it was a progressive law. Today one can almost say that it is an archaic law requiring serious reconsideration by Parliament to bring it in line with others laws governing marriages, like the Hindu Marriage Act. We can only express the hope that the legislature would take note of this aspect and amend the law so as to make citizens of India, irrespective of the faith they profess, to lead a happy, full and useful life. Provisions like Section 17A permitting State intervention by an officer appointed by the Government who could exercise the same powers and duties as exercisable in England by the King's Proctor can hardly be regarded as an appropriate provision in a Secular Democratic Republic. Be it as it may the circumstances of the case warrant that the petitioner should be allowed to lead further evidence to bring his case, if possible within the ambit of clause (1) of Section 19 of the Act. This is necessary not only for the petitioner's well-being but in the interest of justice and the freedom guaranteed to every Indian citizen to lead a life in which he can expect fulfillment.

(11) We, accordingly, set aside the decree of nullity granted by the Additional District Judge and remand the case to the District Judge, Delhi, for further trial by allowing the petitioner to lead Additional evidence. After the petitioner has led the additional evidence, the case be decided in accordance with law afresh. The petitioner to appear before the District and Sessions Judge, Delhi, on November 1, 1979 for further directions.