

(2009) 10 CAL CK 0004
In the Calcutta High Court
Case No : F.A. No. 191 of 2006

Smt. Anju Kundu

APPELLANT

Vs

Sri Shyamal Kumar Kundu and Another

RESPONDENT

Date of Decision : 23-10-2009

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 24
Criminal Procedure Code, 1973 (CrPC) — Section 125
Evidence Act, 1872 — Section 3
Family Courts Act, 1984 — Section 14
Hindu Marriage Act, 1955 — Section 12, 12(1), 12(2), 13, 5

Citation : (2009) 4 CALLT 408 : (2010) 1 DMC 667

Hon'ble Judges : Prasenjit Mandal, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : Amal Kumar Ghosal and Malay Kumar Adhikari, for the Appellant;
Probal Mukherjee and Bikash Goswami, for the Respondent

Final Decision : Allowed

Judgement

Bhaskar Bhattacharya, J.—This first appeal is at the instance of a wife who was a defendant in a suit for declaration that the marriage was a nullity, and in the alternative, for divorce on the ground of cruelty and is directed against the judgment and decree dated 20th March, 2006 passed by the learned Additional District Judge, First Court, Murshidabad, in Matrimonial Suit No. 256 of 1996, thereby declaring the marriage to be nullity on the ground of suppression of material fact concerning the wife.

2. Being dissatisfied, the wife has come up with the present first appeal.

3. The husband-respondent filed in the Court of District Judge, Nadia a suit being Matrimonial Suit No. 77 of 1994 which was subsequently, on basis of an order passed by this Court on an application of the wife u/s 24 of the Code of Civil Procedure, transferred to the Court of Additional District Judge, First Court, Murshidabad at Berhampore and was renumbered as Matrimonial Suit No. 256 of

1996.

4. The case made out by the husband in the application u/s 12 of the Hindu Marriage Act and in the alternative, for divorce u/s 13 thereof, as it stands after the amendment of the application, may be summed up thus:

(a) The parties were married according to Hindu rites and ceremonies on 17th Falgoon 1399 B.S. corresponding to March 1, 1993 at the house of the wife in the District of Murshidabad. On the following morning, the wife was taken to the house of the husband at Ranjan Pally, P.S. Chakdah in the District of Nadia.

(b) On the night of Fulsajja, the wife refused to embrace the husband and did not allow him to even touch her body and also declined to share bed with him for which the husband became astonished but left the matter uncared for and did not give any importance.

(c) On the following nights till Astomangala, the same thing was repeated and the wife continuously refused to share bed with the husband.

(d) The father of the husband gave an advertisement in the "Ananda Bazar Patrika", a daily newspaper, for the marriage and on the basis of such advertisement, the father of the wife responded disclosing that the wife was then 24 years of age and had passed B.A. Examination and further informed that the wife had passed the diploma course of music up to fourth year. The husband also went to see the wife before marriage and all the times, the respondent disclosed that her educational qualification was B.A.

(e) Even after two months of the marriage, when the wife did not allow the husband to touch her or make advances to sexual intercourse, the husband became astonished.

(f) On 20th May, 1993, the wife reported to the husband that she had an abnormal pain in her left breast for which the husband took her to Dr. A.K. Ghosh, a gynaecologist, at the Jawaharlal Nehru Medical Hospital at Kalyani, who after examining the wife, opined that she had every doubt regarding existence of a tumour on the left side of the breast of the wife and suggested a thorough check up with proper examination through the medical expert.

(g) The parties came back to Chakdah on the same day from Kalyani when the wife for the first time disclosed that before her marriage, she had been suffering from pain on several occasions which was also known to her parents and for that reason, she did not want to marry any person; but she was practically forced to marry the respondent due to her father's continuous insistence. She also disclosed that she could not pass the B.A. Examination but it was due to her father that she was compelled to disclose a blatant lie that she had passed B.A. Examination. She also disclosed that her age was near about 30 years at the time of the marriage and she had no diploma in music.

(h) The husband was shocked to hear the aforesaid facts as the father of the wife

by suppression of those material facts obtained the consent of marriage from the husband.

(i) On the next morning, the husband reported such fact to the father of the wife who came on 28th May, 1993 and took her back and since then, the wife had been staying with her parents.

(j) The wife underwent an operation at Berhampur of the tumour from her breast and getting such information, the husband went to see her at Berhampur only on humanitarian ground, but in fact, the husband could not condone the wrongdoing committed by the wife and her father of suppression regarding the age and qualification of the wife. Such act of suppression and conduct of the respondent and her father amounted to cruelty.

(k) During the pendency of the suit, the wife filed an application before the Superintendent of Police, Nadia on 21st September, 1993 making allegation against the husband to the effect that the husband tried to blackmail her parents for the purpose of taking dowry. On the basis of such allegation, the police officers from Chakdah Police Station came to the house of the husband on 10th November, 1995 for making enquiry and as such, due to such false allegation, the husband was humiliated before the neighbouring people. Such act on the part of the wife also amounted to cruelty. Thus, the husband was also entitled to get a decree for divorce in alternative on the ground of cruelty.

5. The suit was contested by the respondent by filing written statement thereby denying the material allegations made in the plaint.

6. According to the wife, the marriage was consummated on the night of the Fulsajja itself and as such, the allegation regarding non-consummation of marriage was absolutely false. As regards the allegation of suppression of the fact that the wife could not pass B.A. Examination, according to the wife, such fact was disclosed to the husband when they came to see her.

7. The further case of the wife is that after the marriage, the wife for the first time felt pain on her left breast at the time of sexual intercourse, as a result, she informed her difficulties to her husband when her husband took her to a doctor and after being examined by the doctor, she came to know that there was a tumour. Therefore, the allegation that knowing well that there existed a tumour in her breast, she was given in marriage was absolutely wrong. The suit was, thus, liable to be dismissed. The amended version of the plaint regarding making false allegations before the police was also denied.

8. At the time of hearing of the suit, the husband himself and his father gave evidence in support of the allegations made in the petition, while the wife herself, her father and one Bangshi Badan Roy gave evidence in opposing the prayer of the husband.

9. As indicated earlier, the learned Trial Judge by the judgment and decree impugned herein was of the view that concealment of the fact that the wife was

not a graduate amounted to suppression of material fact. The learned Trial Judge also found that it was the duty of the wife to disclose that she had a tumour in her breast at the time of the marriage and suppression of such fact also was a valid ground for annulment of the marriage. The learned Trial Judge also found that the wife made false allegation before the police against the husband and that fact constituted cruelty but having regard to the fact that there was suppression of material fact concerning the wife at the time of the marriage, the learned Trial Judge decided to pass the decree of nullity of the marriage instead of passing a decree for divorce.

10. Being dissatisfied, the wife has come up with the present appeal.

11. After hearing the learned Counsel for the parties and after going through the materials on record we find that it has been established from the evidence that the wife had a tumour in her left breast even before her marriage and this fact has been admitted in the letter being Exbt.3 written by her maternal uncle to her husband. Similarly, it has also been established from the evidence that the wife was not a graduate but she failed in one subject, as a result, got compartmental in B.A. Examination but according to her, this fact was disclosed at the time of negotiation. Regarding the age of the respondent, we, however, find that the actual age admitted by her in evidence is about one year more than the one disclosed in the letter written by her father in the postcard in answer to the advertisement of marriage.

12. Therefore, the first question that arises for determination in this appeal is whether concealment of the fact that there was a tumour in the left breast of the wife at the time of the marriage is fatal enabling the husband to get a declaration of nullity of the marriage in terms of Section 12 of the Act.

13. Similarly, the second question is whether the mere fact, that in the letter written in reply to the advertisement given by the father of the husband, the father of the wife disclosed that the wife was a graduate whereas she failed in B.A. Examination, is by itself sufficient for declaring the marriage to be a nullity on the ground of suppression of material fact concerning the wife and finally, whether suppression of the fact that the age of the wife at the time of the marriage was about one year more than what was disclosed in her Bio Data is a ground for declaring the marriage as a nullity.

14. In order to appreciate the aforesaid questions, it will be advantageous to refer to the provisions, contained in Section 12 of the Hindu Marriage Act, which are quoted below:

Voidable marriages.- (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:

(a) that the marriage has not been consummated owing to the impotence of the respondent; or

(b) that the marriage is in contravention of the condition specified in Clause (ii) of Section 5; or

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required u/s 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act, 1978 (2 of 1978) the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in Sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in Clause (c) of Sub-section (1), shall be entertained if-

(i) the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

(b) on the ground specified in Clause (d) of Sub-section (1) shall be entertained unless the court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.

15. From a plain reading of the aforesaid Section it is clear that in order to maintain a suit for annulment of the marriage u/s 12(1)(c) of the Act, it must be established by the party applying for annulment that the suit was filed within one year from the date of discovery of the fraud and that after the discovery of the fraud, he or she had not lived with the other spouse as husband or wife, as the case may be.

16. We, therefore, first proceed to ascertain whether the husband in this case has complied with the aforesaid requirements of the law.

17. In this case, the marriage had taken place on March 1, 1993 and thus, the

Fulsajja ceremony had taken place on March 3, 1993. The suit has been filed on March 24, 1994.

18. According to the plaint case and the evidence of the husband in the examination-in-chief, on May 21, 1993 after the examination by the doctor in Kalyani, the wife for the first time confessed before him that the tumour in her left breast was already in existence before her marriage and that wrong statement regarding her age and educational qualification was given at the time of marriage. Such fact has been denied by the wife and according to her, on the night of Fulsajja, the marriage was consummated and she for the first time, at the time of sexual cohabitation felt pain on her breast and subsequently, they had regular cohabitations and on May 20, 1993 since the pain in the left breast aggravated, she was taken to the doctor on the next day. The husband, on the other hand, stated that although they lived together in the same room and in the same bed, the wife never permitted him to touch her body and the marriage was not even consummated and on May 20, 1993 she having complained pain in the left breast, on the next day she was taken to the doctor.

19. In our opinion, no "prudent man" within the meaning of the word "proved" as indicated in Section 3 of the Evidence Act will believe the version of the husband that the wife did not permit him to touch her for more than two months although they were staying in the same room and in the same bed till May 28, 1993 when her father took her back. That the story of the husband was untrue will appear from the deposition of his nonagenarian father who appearing as PW-2 admitted in his examination-in-chief that on the day following Fulsajja, his wife told him that Anju had breast tumour. If the wife did not permit the husband to touch her body on the Fulsajja or till her departure in the month of May, 1993 after more than two months from the date of marriage, the mother-in-law of the wife had no occasion to know on the day following Fulsajja that the wife had tumour in her breast and to communicate such fact to her husband. The PW-2 in cross-examination, tried to deviate from the said statement by making inconsistent statements. In one place, he stated that 7 to 8 days after marriage, his wife told him about the existence of the tumour. Subsequently, he further deviated by saying that before going to doctor, his son told him that there was pain on the breast of Anju and his son did not say such things to his mother. In the next sentence, he stated that his son told such things to his daughter who in her turn conveyed such fact to her mother. He, however, in answer to a question put to him in cross-examination made the following statements:

It is not a fact that I deposed falsely that my wife stated to me that Anju Kundu had a breast tumour and it was detected on that day of Fulsajja night.

20. It is, therefore, clear that on the very night of the Fulsajja, the marriage was consummated and the fact that the wife had tumour in her breast was known to all the persons of the family of the husband and the source of such information was definitely the husband and the husband could not get such information if the wife really did not permit him to touch her body.

21. We are, therefore, convinced that the marriage was consummated on the night of Fulsajja as alleged by the wife and in spite of discovery of tumour, they lived together as husband and wife, had regular cohabitations and ultimately, on May 20, 1993, when the pain in the breast was intensified, she was taken to the doctor on the next day. Therefore, the suppression of existence of a tumour in the left breast in this case cannot be put forward as a ground of nullity when in spite of knowledge of such tumour on March 3, 1993 the respondent lived with the appellant as husband and wife till May 28, 1993.

22. Over and above, the tumour in this case had already been operated even before the institution of the suit and thus, the wife was totally cured of such tumour. Even thereafter, there was no justification of filing the suit for declaration of nullity of the marriage on March 20, 1994 when the tumour was operated in the month of August 1993 and the husband was present at the time of operation on the alleged "humanitarian ground".

23. In his cross-examination resumed on March 21, 2001 the husband made the following statements quoted below:

After marriage we both the parties resided as husband and wife for two months. One month we both parties lived in the same bed. During this (sic) two months my wife visited her father's house for 3 to 4 times. During this (sic) two months I had no dispute with my wife.

24. After making such statement, he, however, swerved from the aforesaid statements by making the following statements:

During two months my wife did not allow me to cohabit with me. I had allegation that false information was given to us with regard to her age, educational qualification and other qualification i.e. music. There were my allegation (sic) against the wife during that two months.

25. From the evidence given by the husband and his father, it is, thus, apparent that the existence of tumour was known to the husband from the night of Fulsajja and in spite of such knowledge, they lived as husband and wife for more than the next two months and even after the operation of the tumour, the husband decided not to take back his wife on the ground of false information about the educational qualification and the age of the wife.

26. Since in this case, it has been proved from the materials on record that the parties had sexual intercourse even after discovery of the tumour, we do not intend to consider whether simply living as husband and wife without sexual intercourse even after discovery of fraud would amount of waiver of the right to annul the marriage in view of difference of language in Sections 12(2)(a)(ii) and 12(2)(b)(iii) as will appear from the fact that in Section 12(2)(b)(iii), the language used is "that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground" whereas in Section 12(2)(a)(iii), a case of the present nature, the

legislature in the same Section has used different language viz. "the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;"

27. The allegation of the husband that he came to know about the alleged false information about the educational qualification and the age on May 21, 1993 is also false as would appear from his statement in cross-examination that he had allegations as regards those misinformation even during the two months period of stay but in spite of such knowledge he lived as husband and wife during such period as admitted by him.

28. In paragraph 11 of the plaint, although the husband has stated that he went to the nursing home at the time of operation on humanitarian ground and did not condone the offence of the wife and her father of suppression of material fact regarding age and qualification, in cross-examination, a total different story that he went to her father-in-law's place to bring his wife back but the wife did not come back was made. He, however, could not disclose the dates when he went to bring her back; such case is inconsistency with the plaint case.

29. We, thus, find that the husband is an egregious liar and cannot be believed and in spite of full knowledge about the misinformation about age and educational qualification of the wife as reflected in the Bio Data given by the father of the appellant, within two months of the marriage as admitted by him in his cross-examination, he resided with her as husband and wife till May 28, 1993 and thus, cannot avail of those grounds even if we assume for the sake of argument that those were really any material misinformation.

30. We now proceed to consider whether the misinformation given as regards educational qualification and the age of the wife amounted to material suppression of fact concerning the wife so as to grant a decree of annulment of the marriage.

31. Regarding the misinformation about the age and educational qualification, we find that the husband has admitted in his cross-examination that he did not know the actual date of birth of his wife (page 50 of paper book). If he was unable to ascertain the actual date of birth of the wife, he cannot also allege that the age declared by the father of the wife to be 24 in the postcard written on 24th October 1992 was false. According to the wife, her date of birth is 5th December, 1967. Therefore, at the time of writing the letter, she was aged 24 years 10 months 19 days whereas her father described her as a lady of 24 years. This statement cannot be a material suppression in the absence of any convincing evidence given by the husband to the contrary particularly when he has admitted that he did not know the date of birth of the wife. Moreover, if one is so much concerned about the age of his spouse, it is one's duty to ascertain the age before fixation of marriage and demand production of necessary documents disclosing clearly that any suppression in that behalf should be treated to a

material fraud and after being fully satisfied on the basis of materials placed, one should marry. The wife having appeared at the B.A. examination, the husband could easily verify the date of birth appearing from University record but without verifying the age to his satisfaction and relying upon the statement of the father of the wife, he cannot after cohabiting with the wife for more than two months pray for annulment of the marriage. The position, however, would have been different if any forged Madhyamik certificate was given to him and on that basis, he gave his consent to marriage and immediately after the detection of such misinformation he stopped living with the appellant as husband and wife. The marriage in one's life, according to the Hindu Marriage Act, is, in our opinion, not such a brittle affair which can be annulled on the ground of mere suppression of age unless it is proved that the party applying for annulment did his best to ascertain the real age and could not know the real age for deliberate fraud practised on behalf of the other spouse by use of forged official documents and over and above, such suppression of fact is a substantial one causing prejudice to the party applying for annulment justifying grant of such decree; the law does not permit a party to the marriage to wriggle out a consummated marriage only on the allegation that within one year before the presentation of the petition that party has come to know that the age of the other party was different from the one disclosed at the time of marriage. Moreover, the husband has admitted in cross-examination (see page 48 of the paper book) that he also stated his age wrongly in the advertisement given on his behalf. Thus, he, himself having disclosed his wrong age in the advertisement cannot pray for annulment of the consummated marriage on the alleged ground of disclosure of wrong age at the instance of his wife.

32. The same principle should be followed while dealing with a case of suppression of educational qualification. The party must in advance make it clear to the other party that any suppression in this behalf should be treated to be material suppression. In this case, there was definite suppression of the educational qualification of the wife in the postcard written by her father inasmuch as the bride was declared to be a graduate but in fact she plucked in B.A. examination. According to the wife, such fact was subsequently rectified at the time of negotiation. We find that the husband is a B. Com. It is not his case that he married the wife with the expectation that she will do some job for which he wanted a graduate wife. He has a business wholesale rice and is not connected in the field of education nor is he so highly educated that it will be beneath his dignity to have an undergraduate wife. In his family, only one of his sisters-in-law is a graduate and the other one is a matriculate. In such circumstances, even if there was suppression of the educational qualification of the wife, such suppression is not so material causing any prejudice to the husband in the facts of the present case so as to annul the consummated marriage. If the husband is so fond of a graduate wife, he can force the wife to reappear at the B.A. examination. Same thing can be said about the suppression of qualification in music. If the husband was fond of music, the talent of the wife

in music could be easily verified by asking her to sing or demanding production of the certificate of diploma in music before finalisation of the marriage. In cross-examination, at page 49 of the paper book he has made the following statements:

Prior to my marriage I visited the house of my wife for interview and at that time I had discussions with my wife. My intension was also to know the antecedent of my wife. I also put necessary questions to my wife and she also replied to my questions and after being satisfied with her reply I agreed to marry her. I also requested my wife to hear her song but she did not agree. I have no knowledge about the songs. I am commerce Graduate. It is not a fact that at the time of visit to my wife I had knowledge that she did not pass the B.A.

33. From the aforesaid statements, it is clear that the husband was not so much concerned about music so as to annul the consummated marriage on the ground of absence of diploma in music up to fourth year as wrongly stated in the Bio Data of the wife.

34. We now propose to deal with the decisions cited by Mr. Mukherjee.

35. In the case of Smt. Bindu Sharma Vs. Ram Prakash Sharma and others, the contention of the petitioner was that she would not have given consent to marry the respondent No. 1 if she had known the real fact that the respondent No. 1 did not have a secured job in the Sugar Factory. It was said that the petitioner expressed her willingness to marry with the respondent No. 1, because the latter represented to her before the marriage that he was employed in the Sugar Factory on a monthly salary of Rs. 1,700/-. In such a fact, the Division Bench of the Allahabad High Court was of the view that every girl before marriage, and more so, a well-educated girl like the petitioner in that case, would prefer to marry, a stably-employed person to secure her future and marriage with an unemployed person would be the last resort. According to the Division Bench, the petitioner, being a well-educated girl, having much higher academic standard than that of the husband, would have weighed pros and cons before giving consent if she knew the real fact. She had nodded for the marriage on the consideration that the respondent No. 1 was possessed of an attractive job; and therefore, the fact of employment was a material fact. In the case before us, the husband had failed to prove that the misstatement regarding qualification was a material fact; over and above, the tumour having already been removed, suppression of existence of tumour has lost its significance. We, thus, find that the said decision does not help the respondent in anyway.

36. In the case of Anurag Anand Vs. Sunita Anand, the question was whether giving wrong information as regards financial status of the husband amounted to suppression of material fact justifying annulment of marriage. In that context, it was held for a girl to give her consent to a marriage-proposal, unless it was a love marriage, the financial status of the other party was quite an important factor because everyone wants to have a comfortable living and for that, a level

of monthly income and of property-status of the other party are required. In addition to monthly income of the other party, the court proceeded, his property-status assumed considerable importance. According to the said decision, one needed financial security in the time of need to fall back upon and this level of monthly income and property-status would differ from case to case depending upon the status of the family of the girl. It was further pointed out that if the girl is herself working then it also becomes her aspiration to marry a boy who is earning more than her income and a girl would definitely prefer a boy in marriage whose parents have sufficient landed property so that she was not required to curtail her monthly expenditure for acquiring landed property to fall back in emergent needs. The court, therefore, held that in the facts of the said case, the misstatement about the the monthly income and the property-status of the appellant should be held to be material facts and circumstance concerning him as envisaged in Section 12 of the Hindu Marriage Act.

37. We do not for a moment dispute the aforesaid proposition of law as regards the misstatement of the status of the bridegroom but the said decision, at any rate, is not applicable to the facts of a case of misstatement of age of a bride by less than one year where the bridegroom himself has given his wrong declaration of age, or the qualification of the bride where the petitioner himself is a B. Com. and the appellant had failed in one subject in B.A. examination and no evidence has been given to show that he wanted a graduate wife for any particular purpose. Similarly, the suppression of the existence of a tumour which has since been removed has lost its significance.

38. In the case of A. Premchand Vs. V. Padmapriya, , according to the appellant/ husband, the basic thing for filing the petition was that his consent was obtained by giving wrong date of birth of the respondent/wife prior to the date of marriage. He further contended that if the said fact was known, namely, the true date of birth as January 6, 1961, he could not have given consent because the difference of age of the parties was only of a few months. The date of birth of the husband in that case was April 24, 1960. The learned trial judge held that the husband came to know the real age of the wife before the marriage and thus, dismissed the petition. On appeal by the husband before the High Court, the said court was satisfied that in the light of the specific stand taken in the counter affidavit and in the absence of any reply, it was inclined to accept the case of the respondent that the appellant was aware of the correct date of birth prior to the date of marriage through the brother of the wife who met the appellant on February 15, 1987 in the matrimonial home at Vysarpadi, Madras-39. The High Court further held that on analysing the said evidence in the light of the provisions in the Family Courts Act, more particularly with reference to Section 14 thereof, as rightly observed by the court below, the conclusion reached by the court below could not be said to be either erroneous or improper. In the case before us, although the husband at the time of deposition in the month of August, 1999 has asserted his age to be 36 years meaning that he was thus born in the year 1963 whereas the wife was born in the month of December, 1967

more than four years after the birth of the husband, it appears from the affidavit affirmed on August 28, 2008 in connection with an application for expeditious disposal of this appeal that he declared his age to be 47 years which is inconsistent with the one given at the time of deposition before the trial court. Again, in his affidavit-in-opposition to the application for alimony pendente lite filed before this Court on July 17, 2006 he indicated his age to be 46 years which means he was born in the year 1960. Thus, there is sufficient difference of age between the parties in this case. If he was prepared to marry the appellant on the assumption that she was 10 months younger there is no reason why should he not marry her if found to be older by 10 months than the declared age of the wife. Moreover, he himself admitted that he did not disclose his correct age in his advertisement and we find that he is not consistent about his own age in different stages of the same matrimonial proceedings. Therefore, the said Madras decision where difference of age of the parties was just eight months does not help the respondent in anyway.

39. As regards the principles laid down in the two decisions of the Supreme Court, viz. *The State of Andhra Pradesh and Another Vs. T. Suryachandra Rao, and Deelip Singh @ Dilip Kumar Vs. State of Bihar*, relied upon by Mr. Mukherjee, the former dealt with the question of effect of fraud on the court and the latter, laying down the meaning of the word "consent" in the context of the offence of rape in connection with a criminal proceeding, in our opinion, have no application to the facts of the present case where we are required to consider whether misstatement of the educational qualification and knowledge of music, and suppression of the existence of a tumour in the breast of the wife which has since been removed by operation during the pendency of the matrimonial proceedings should be termed as fraud as to a "material fact concerning the respondent" so as to annul the marriage which had since been consummated. We have already pointed out that the husband is a B. Com. and deals in rice and had no intention of employing his wife to a job which required graduation as a qualification. Similarly, in his family, only one of his sisters-in-law is a graduate and the other one is a matriculate. His own educational qualification is not so high that he will feel ashamed to have an undergraduate wife. The husband had also no knowledge of music. The husband has admitted that he was satisfied with the answers given by his wife to the questions put to her when he interviewed her before the marriage and being satisfied, he decided to marry her. Thus, for those untrue statements concerning the wife, the husband has not been prejudicially affected so as to declare the marriage to be nullity on the ground of fraud.

40. We, thus, find that the husband has even failed to prove that in this case there has been any material misstatement of fact on the part of the wife so as to bring the case within the meaning of Section 12(1)(c) of the Act.

41. Mr. Mukherjee, the learned advocate appearing on behalf of the respondent, after having failed to persuade us to agree with the reasons assigned by the

learned Trial Judge, however, tried to make out a new case before us by contending that in this case really the provision contained in Sub-section (a) of Section 12(1) has been attracted and we should maintain the decree on that ground.

42. We are unable to accept such contention on twofold ground.

43. First, the said Sub-section speaks of a situation where there is no consummation of marriage due to impotency of the respondent. In this case, we have found that the marriage was duly consummated and the allegation of the husband that the wife did not permit him to touch her body has been found to be false. Moreover, a tumour in a breast cannot make a wife impotent within the meaning of Sub-section (a) of Section 12(1) of the Act.

44. Secondly, as pointed out by the Supreme Court in the case of Yuvraj Digvijay Sinhji Vs. Yuvrani Pratap Kumari, , a party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility.

45. At this juncture, we may profitably refer to the Wharton's Law Lexicon, Fourteen Edition, which has defined the word "impotence" as follows:

Physical inability of a man or woman to perform the act of sexual intercourse. A marriage is void if, at the time of the celebration, either of the parties to it is incurably impotent, and may be declared void by a decree in a suit of nullity of marriage.

46. In this case, as indicated earlier, the tumour had already been removed in the month of August, 1993 and thus, after the removal of such tumour, there is even no impediment in enjoying full-fledged sexual intercourse and the husband had no justification of filing the suit even after the removal of the tumour on the ground of suppression of real educational qualification of the wife or her age which we have found against the husband.

47. We, therefore, find no substance in the aforesaid additional ground urged by Mr. Mukherjee before us.

48. At this stage, Mr. Mukherjee tried to convince us that we should at least grant the alternative remedy of divorce on the ground of cruelty of the wife as she made baseless allegation against the husband before the police during the pendency of the suit which was incorporated in the plaint by way of amendment.

49. According to the amended version of the plaint, the wife during the pendency of the suit in the year 1995, made false allegations against the husband before the police that the husband, in order to demand dowry, was harassing the father of the wife and had actually driven away the wife from the matrimonial home. The husband complained that in view of such false allegations, the police came to his residence and made enquiry for which he was humiliated before his neighbours. His father tried to make out a further case that due to such allegation, the respondent and her parents were taken to the police station

although no such case has been made out either in the amended plaint or in the evidence of the husband. The wife has in her cross-examination, admitted that she made allegation regarding demand of money and other valuable articles by threatening her parents.

50. The wife in her additional written statements has denied that she made any false statements.

51. Although a xerox copy of the said complaint made by the wife before the Superintendent of Police, Nadia was filed by the husband, for the reason best known to him, he did not ultimately try to prove the said document and as such, the same was not marked as Exhibit.

52. We have, however, gone through the said document as the wife has not disputed that she made a written complaint before the police as alleged by the husband but her defence was that the allegations were not false.

53. It appears from the said written complaint that she alleged that her husband by making false allegations against her with the intention of getting dowry from her parents drove her away from the matrimonial home. It is further alleged that during her stay at her husband's house, the members of the husband's family misbehaved with her by inflicting mental and physical torture and also instigated her to commit suicide. She tried her best to stay in her matrimonial home after bearing with those insults and misbehaviour but the husband had filed a Matrimonial suit with false allegations after driving her away. Even her ornaments and other articles given to her at the time of marriage were not allowed to be removed. It is further alleged that the husband was threatening her and her parents when she went to the Court at Krishnanagar to contest the Matrimonial Proceedings with dire consequences. According to the said complaint, her husband was an influential person of the locality having support of antisocial elements of the locality and in such circumstances, she prayed for protection of herself and her parents due the threats given to them.

54. It appears from records that on an application u/s 24 of the CPC filed by the wife, this High Court had transferred the Matrimonial proceedings from the Krishnanagar Court to the District Court of Murshidabad, her home district. The husband, although is aware of the fact that the wife made allegations of threat by him when she came to contest the proceedings before the Krishnanagar court, did not utter anything in her examination-in-chief denying such allegation nor did he assert that the articles presented to the wife at the time of marriage were returned to her and that he never instigated her to commit suicide. The chits of paper marked Exbt.1/2 and Exbt.1/3 in this suit containing the handwritten notes of the wife indicate that those were not letters sent by post but were forced to be written when she was in her matrimonial home before her departure on May 28, 1993 confessing her knowledge of existence of tumour in her breast. If a wife is forced to write such written notes, one within 10 days of marriage and the other, within three months before she was driven away, such behaviour on the part of

the husband cannot but be described as a "torture" upon a newly married wife staying separated from her parents in her matrimonial home and in such circumstances, the allegation of instigation of committing suicide cannot be ruled out particularly when the husband in spite of knowledge of the contents of the allegations of the wife before the police regarding instigation to commit suicide has not disputed the same in his evidence. In this case, the husband in his deposition has not explained how he got hold of those two chits of paper when the dates appearing on those documents show that those were written at a point of time when she was in her matrimonial home.

55. In this case, it appears from Exbt.6 series, the depositions of the parties in the criminal proceedings u/s 125 of the Code of Criminal Procedure which was marked as Exhibit at the instance of the husband that there was specific allegation of taking dowry of Rs. 40,000/- at the time of marriage which was of course denied by the husband. Thus, there was allegation on the part of the wife and denial on the part of the husband. The husband, in this case, made the following statements in his examination-in-chief in this regard:

My wife also lodged a complaint against me before S.P., Nadia and she alleged against me falsely alleging that I demanded more dowry from her father. On receiving the complaint police visited at our house and many neighbours arrived at my house and due to such act of my wife my prestige was lowered down before the public. I also received mental shock. The allegations against me proved false (after objection).

56. From the aforesaid statement, it will appear that the husband did not assert that he did not take any amount of dowry but simply stated that the allegation that he demanded "more dowry" from her father was wrong. If a husband after taking some amount of money as dowry drives away a wife after living as husband and wife for more than two months and even after removal of the tumour from the breast refuses to take her back on the allegation of suppression of age and educational qualification and stops making payment of maintenance by compelling the wife to lodge a successful proceeding u/s 125 of the Criminal Procedure Code, the allegation of the wife before the police complaining 1) misbehaviour while she was in her matrimonial home, 2) demand of dowry and 3) harassment to herself and her parents when they were required to attend the Krishnanagar Court and seeking protection while they would be visiting the Krishnanagar Court cannot be said to be unjustified. The demand of any amount of dowry is punishable under law. In this case, it cannot be definitely concluded that no amount of dowry was at all given to the husband at the time of marriage. The father of husband also did not assert that his son did not take any amount of dowry. Therefore, the learned Trial Judge had no justification of holding that deliberate false allegations had been levelled against the husband as regards the demand of dowry and harassment of the parents of the wife. The harassment of the wife and her parents at the instance of the husband has been definitely proved from the materials on record and thus, it is not a case of granting decree

for divorce on the ground of mental cruelty at the instance of the wife simply because she being frustrated by the torture of the husband ultimately lodged a complaint before the police alleging harassment. It is the husband who has inflicted immense amount of mental cruelty upon the wife and thus, he cannot take advantage of his own wrong by alleging cruelty with an idea that the wife should not have made any complaint before the police alleging harassment and demand of dowry but ought to have silently put up with such humiliation in spite of his definite false allegation in regarding consummation and his cruel act of driving out the wife without justified ground.

57. We, therefore, find that in this case, the allegations of the wife before the police have not been proved to be false so as to enable a Court to grant a decree for divorce on the ground of mental cruelty.

58. We, consequently, find that the learned Trial Judge erred in declaring the marriage as a nullity although the ingredients of Section 12 of the Act were absent. Similarly, there is no scope of granting a decree of divorce against the wife on the alleged ground of mental cruelty.

59. The appeal is, thus, allowed. The judgement and decree passed by the learned Trial Judge are set aside and the suit filed by the husband is dismissed.

60. In the facts and circumstances, there will be, however, no order as to costs.

Bhaskar Bhattacharya, J.

61. I agree.