
(2012) 07 BOM CK 0112

In the Bombay High Court

Case No : Family Court Appeal No. 100 of 1996

Sou. Pramila Shankar Ghante

APPELLANT

Vs

Shri Shankar Vishwanath Ghante

RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Hindu Marriage Act, 1955 — Section 12, 12(1)(a), 13, 13(1)(ia)(ib), 23

Citation : (2013) 3 ABR 1220 : (2013) 3 BomCR 280 : (2012) 114 BOMLR 3147

Hon'ble Judges : A.R. Joshi, J;A.M. Khanwilkar, J

Bench : Division Bench

Advocate : Y.S. Bhate, for the Appellant; M.S. Karnik, a/w. Dilip Bodake, for the Respondent

Final Decision : Allowed

Judgement

A.R. Joshi, J.—The appellant/wife challenged the judgment and decree passed by the Family Court, Pune allowing the M.J. Petition No. 565/1992 of the respondent/husband. The appellant/wife is the earlier respondent in the said M.J. Petition and present respondent/husband was the original petitioner who filed the petition for nullity of the marriage and alternatively for a decree of divorce on various grounds. For the sake of clarity, the parties are being referred to as the "wife and husband" while deciding the present Family Court Appeal preferred by the wife. Heard rival arguments canvassed on the earlier dates. Perused the record and proceedings including the depositions of the witnesses examined by the rival parties. This is an appeal filed by the wife challenging :

- the judgment and decree of nullity u/s 12 of the Hindu Marriage Act on the ground of impotency u/s 12(1)(a), and
- also the judgment and decree of divorce on the ground of cruelty and desertion u/s 13(1)(ia)(ib) of the Hindu Marriage Act.

2. M.J. Petition No. 565/1992 was filed by the husband for nullity and alternatively for divorce. M.J. Petition No. 272/1993 was filed by the wife for

restitution of conjugal rights. Both the petitions were jointly heard and decided by a common judgment and order dated 31.10.1994 passed by the Family Judge, Pune. By the said common judgment, the marriage between the parties was annulled and also alternatively divorce was granted to the husband. The petition for restitution of conjugal rights preferred by the wife was dismissed.

3. It is rather a disturbing state of affair that there is laws delay. This Family Court Appeal has reached final hearing after about 18 years of the dissolution of marriage. The spouses then in the year 1992 were 42 years (husband) and 45 years (wife), when the petitions were filed. However, presently both the parties have become or about to become senior citizens.

4. Coming to the arguments advanced on behalf of the wife, following points - as emphasized in the Family Court Appeal and during the arguments, are summarized to have proper perspective of the present matter. The said points are as under :

(i) there is an error committed by the trial Court in holding that the marriage between the spouses was not consummated due to impotency of the wife;

(ii) there is an error in holding that the wife treated the husband in cruel manner inasmuch as she denied her company to the husband and thereby caused desertion and separation from him by not cohabiting with him at his places of service;

(iii) it is erroneous for the trial Court to hold that the wife is impotent merely because she could not give birth to any child even after more than 16 years of wedlock;

(iv) it is erroneous on the part of the trial Court to hold that the wife had practiced mental cruelty on the husband by alleging that he was staying with another woman during the subsistence of his first marriage and out of such relations that another woman gave birth to a child, and subsequently wife took back the said allegations;

5. Prior to analyzing the material available before the Family Court for deciding the Petition of the husband and the petition of the wife, the relevant law under which the impugned judgment and decree was passed by the Family Court is mentioned and then the material available so also the findings of the Family Court will be critically examined.

6. The Family Court had annulled the marriage between the parties by decree of nullity on the ground of impotency of wife u/s 12 of the Hindu Marriage Act, 1955. Said section reads as under :-

12. 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)

(c)

(d)"

7. Strangely enough the alternate relief by way of decree of divorce was also granted by the Family Court on the ground of cruelty and desertion practiced by the wife, thus holding the material available sufficient to prove the requirements of Section 13 of the Hindu Marriage Act, 1955. The said relevant sections are as under :-

13. Divorce. -- (1) Any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) has, after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(i-a) has, after the solemnization of the marriage, treated the petitioner with cruelty; or

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

(ii) "

8. On going through the substantive evidence of the rival parties and their witnesses what is held by the Family Court so far as the prayer for nullity of the marriage is that the impotency of the wife has been proved by the husband, as she was incapable of procreation. What is held by the Family Court, is that, inability to give birth to a child presupposes that the woman is impotent and as such a valid ground as contemplated by Section 12 of the Hindu Marriage Act, 1955. Considering the catena of judgments, some of which are cited before us by the parties, it must be said that the view taken by the Family Court is erroneous and the Family Court guided itself by wrong principles in accepting infertility of a woman equivalent to her impotency.

9. We have gone through the detailed analysis done by the Family Court while deciding point No. 1 on the point of impotency. Such discussion is appearing in paragraph Nos. 23 to 29 and in all these paras a great deal of effort has been made by the Family Court in coming to the conclusion that wife is impotent.

10. In para-25 the Family Court after quoting arguments on behalf of the husband observed that even after 16 years of the marriage, there was no issue out of the wedlock and this itself is sufficient to establish that the wife is impotent and unable to give satisfaction to the husband. This argument

advanced on behalf of the husband was accepted by the Family Court by specifically reiterating the same in para-26 of the judgment. In coming to this conclusion as to impotency of the wife, the Family Court has further observed, on the conduct of the wife not staying with her husband at his places of work, that otherwise she would have left her service and went to the service places of the husband and given him every satisfaction. But she refused to tender resignation of her service and go to her husband to give him full satisfaction as a wife." Even in same para-26 in the later part the trial Court has observed after discussing the evidence regarding the medical treatment given to the wife by Dr. Umranikar at Pune during the year 1984-1986, that the wife is unable to produce children even after 17 years of marriage and thus this fact itself is crystal clear that she is impotent. We must say that the Family Court had definitely committed an error in arriving at such a conclusion - thus treating impotency and infertility at par, ignoring various decisions on this aspect.

11. On the above aspect of impotency so also on the aspect of relative impotency, following decisions are cited before us by the learned Advocate Shri Y.S. Bhate appearing for the wife.

i. 1994 MLJ 1513 [V. (Wife) vs. S. (Husband)]

ii. AIR 2009 CALCUTTA 278 [Samir Adhikary vs. Krishna Adhikary]

12. In the case of V. v. S. (supra), the Division Bench of this Court has observed on the aspect of impotency and sterility by quoting the passage from Modi's Textbook on Medical Jurisprudence and Toxicology, Twenty-first Edition. The said observations are as under :

Impotence is defined as physical incapacity of accomplishing the sexual act, while sterility means inability for procreation of children. Impotence in males is the persistent inability to develop or maintain a penile erection sufficient to conclude coitus to orgasm and ejaculation. It should be remembered that the term impotence or sexual incapacity in forensic medicine connotes physical incapacity to accomplish the sex act.

Impotence has been described in Halsbury's Laws of England to be such a state of mental or physical condition which makes consummation of the marriage a practical impossibility.

An impotent individual need not necessarily be sterile, nor a sterile individual impotent, though both conditions may sometimes be combined in the same individual.

13. Placing reliance on the same authority V. v. S. (supra), the learned Advocate Mr. Karnik for the husband argued on the aspect of relative impotency. During the arguments, he submitted that the wife was suffering from relative impotency so far as the husband inasmuch as she refused cohabitation with him on the pretext of having another place of abode due to her service. During the arguments, learned Advocate Shri Karnik invited our attention to the

observations of the Division Bench of this Court in V. v. S. (supra). Said observations are reproduced with advantage as under :-

While dealing with cases of impotency the predominant consideration is not physical incapacity which courts are often guided by, but another all important angle, namely, the fact that non consummation of marriage, could be due to several circumstances which contribute to a situation whereby both the spouses, though physically and mentally potent in the normal sense, find it impossible to achieve a satisfactory sexual relationship. The concept of relative impotency which prescribes that a person suffering from no handicap whatever still feels inhibited or incompetent vis-a-vis the particular sexual partner is now an accepted ground for a decree in a matrimonial Court.

14. Though it is not specifically mentioned in the petition for nullity and divorce filed by the husband that it was ground of relative impotency of the wife, during arguments learned Advocate Shri Karnik for the husband took us through the pleadings in the Marriage Petition No. 565/1992 and appearing in para No. 6(b). The said pleadings are in vernacular Marathi and said contents are to the effect that after the marriage which was performed on 25.3.1976 when the wife came to reside with the petitioner/husband at his Pune residence, it was noticed by the petitioner/husband that she was not interested in giving physical satisfaction to the husband and as such it was perceived by the husband that she was incapable in giving such physical satisfaction.

15. There is no doubt that even the relative impotency can be a ground for dissolution of marriage at the option of the aggrieved spouse. However, in the context of Section 12, the marriage should be voidable and can be annulled by a decree of nullity only if the petitioner-husband succeeds in proving that the marriage was not consummated at all owing to the impotency of the wife. Be that as it may, in the present case there is no pleading nor any proof that the marriage in fact has not been "consummated" much less owing to the impotency of the wife or for that matter her relative impotency. The pleading and evidence at best would support or substantiate the fact that the wife was incapable of giving birth to a child.

16. In the another case of Samir Adhikary Vs. Krishna Adhikary (supra), it is observed in para-20 as under :-

20. In other words, the legislature has not prescribed infertility of a spouse as a ground for annulling the marriage if such spouse is capable of being a party to normal coitus. Although according to some of the dictionaries, the allegation of impotence is attributable only to men, the Hindu Marriage Act has, however, adopted the broader view that even a wife can be impotent if she is unable to be a party to normal coitus. 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. In the case before us, normal sexual intercourse between the

parties having been admitted by the husband, the marriage should be held to have been duly consummated and thus, the cases cannot come within the purview of Section 12 of the Act, for the mere infertility of the wife.

17. Bearing in mind the ratio propounded by the above authorities and the admitted position as to infertility not mentioned as a ground for annulment of the marriage, it must be said that on the facts established before the Family Court, there was nothing brought on record by the husband that his wife was impotent inasmuch as incapable of consummation of the marriage and incapable of complete sexual intercourse. On this aspect, we have gone through the substantive evidence of the husband wherein he had admitted that during 4.9.1981 till 7.7.1982 he and his wife resided together on every Saturday, Sunday. He further deposed that from 4.9.1981 the wife was transferred to Loni Kalbhor at Pune and thereafter in the year 1984 she was transferred to Kalas and remained there till the filing of the petition by the husband. During that period the wife was residing at her place of service. Further in his evidence the respondent has stated that he started service in the year 1977 in State Excise Department, Bombay and after three months, he was transferred to Pune. On 7.7.1982 he was transferred to Rajguru Nagar. On 11.4.1986 he was transferred to Kherdi, Chiplun, District - Ratnagiri. On 3.7.1989 he was transferred to Kolhapur and thereafter he resided at Baramati and all along he was residing at his service places. According to him, only for few days he resided with his wife at Loni Kalbhor and thereafter there was no joint residence of the spouses. During the cross-examination, the husband answered that the wife was under medical treatment of Dr. Umranikar during 1984 to 1986 and in January 1986 she was operated and after operation she did not come back to him and continued staying at Kalamb. He also accepted the position during the cross-examination that he had not produced any document to show her medical treatment regarding "impotency". Further, he has accepted that he had no evidence to show her mental disorder. He had further accepted that at the time of marriage, his wife had already completed B.A. & B.Ed. Courses and after marriage she completed M.A. when she was at Satara and it happened after two years of the marriage. He denied the suggestion put to him that he took initiative for his wife's admission in Shivaji University for M.A. course and that he was present at the time of filling-up of the forms for the examination. However, the fact still remains that she had completed her M.A. after the marriage and definitely there was no quarrel or denial by the husband for his wife to continue her education for M.A.. In the later part of his cross-examination, the husband had also agreed that he has no medical evidence to show her infertility. Moreover, he had not produced the details as to cruelty caused by his wife.

18. In our view, this substantive evidence of the husband has not been appreciated by the Family Court in proper perspective and the Court had erred in holding that there was a valid ground available to the husband regarding impotency of the wife resulting in non-consummation of the marriage, in terms of Section 12 of the Act.

19. So far as the alternate relief of grant of decree of divorce on the ground of cruelty and desertion, broadly following points were raised on behalf of the husband :

[i.] the wife deceived the petitioner by not giving her real birth date at the time of marriage;

[ii.] the wife did not cohabit with the husband since immediately after the marriage and resided at the places of her service though allegedly she agreed to leave her job after the marriage and to stay with the husband. This has resulted in the desertion and consequentially amounts to mental cruelty due to withholding the cohabitation. In the alternatively it is the submission of the husband that the wife was not able to give sexual satisfaction to her husband inasmuch she was relatively impotent vis-a-vis the husband;

[iii.] the wife had made wild allegations that the husband has contracted second marriage and out of the said second marriage the second wife gave birth to a child. Subsequently, she withdrew the said allegations and as such this conduct of the wife amounts to mental cruelty on the husband;

[iv] the wife made complaint to the employer of the husband somewhere in late 1991 regarding conduct of the husband and thereafter withdrew the same thus causing mental harassment and cruelty to the husband.

20. So far as point No.(i) is concerned, reverting to the argument advanced on behalf of the husband about the false information given by the wife regarding her age, it is alleged on behalf of the husband that at the time of contracting of the marriage, the correct birth date of the wife was not disclosed to the husband and it was with intention and ulterior motive and thus amounts to deception. It is further submitted that only in May, 1992 he knew that his wife was three years elder than him and on that day he visited the place of service of his wife and found out her correct birth date from the entry in the service-book and knew that the date of birth of wife is 24.10.1947. Though, during the arguments much is argued by learned Advocate Shri Karnik as to this alleged deception, there is nothing brought on record as to any custom prevailing in the community to which spouses belong that the bride should necessarily be younger in age than the bride-groom. Moreover this aspect has been dealt with by the Family Court mentioning that such a plea of deception raised by the husband is barred due to laches on his part as raising this objection after about 16 years. At any rate this ground would be unavailable to dissolve the marriage, as having caused mental cruelty to the husband. We do not find any merit in the argument advanced on behalf of the husband as to alleged deception practiced by the wife by not giving her real birth date at the time of marriage.

21. So far as point No.[ii] is concerned, after going through the reasoning given by the Family Court in the impugned judgment, we find that the Family Court had lost sight of the factual position and the material brought on record by both the sides and especially by the wife that there was reasonable ground for her to

be at her place of service. In our considered view, though for most of the period after the marriage the spouses were staying at their respective places of service, they had a joint stay occasionally and had definitely cohabited / consummated the marriage though unfortunately the wife could not give birth to any child out of such cohabitation. In order to arrive at this conclusion, we have gone through the substantive evidence of the parties and as specifically mentioned earlier as to admissions on behalf of the husband that on every Saturday & Sunday during the period during September, 1981 to July, 1982 the husband and wife resided together. This admission is appearing in the notes of evidence in examination-in-chief itself in the middle of para no. 1.

22. At the cost of repetition, it must be mentioned that there are no specific pleadings in the divorce petition filed by the husband specifically mentioning the ground of relative impotency of the wife and as earlier mentioned there is only a mention that after the marriage when the wife came to reside with him, it was noticed by him that she was not interested in giving physical satisfaction to him and then it was perceived by him that she was incapable of giving such physical satisfaction. Moreover, it was tried to be argued on behalf of the husband that due to such alleged relative impotency of the wife for not giving physical satisfaction, cruelty was practiced on him, thus, attracting the provisions of Section 13 of the Hindu Marriage Act for dissolution of marriage. Notably, the evidence adduced by the husband is focused on the fact that the wife was not capable of procreating a child. The fact of relative impotency is the bare allegation of the husband, which has not been substantiated. Further, the evidence suggests that the wife was given treatment for giving birth to a child and not for curing the problem of relative impotency as such. Indisputably, even after the stated unsuccessful medical treatment given to the wife, the parties continued their relationship. That would mean the husband condoned the so called cruelty caused to him due to the relative impotency of the wife. Taking any view of the matter, therefore, the husband has not substantiated the ground of cruelty owing to the relative impotency of the wife.

23. So far as point No.[iii] is concerned, there is material on record produced by the wife by way of copy of the birth certificate of a child who was begotten by one Kalpana, with whom the husband has married during the subsistence of his first marriage with the appellant/wife. The said birth certificate was shown to the husband during his cross-examination and he admitted that the said certificate show the name - "Shankar Vishwanath Ghante" as father of the child. Significantly enough, the name of the present respondent/husband is "Shankar Vishwanath Ghante". Definitely this factual position is more than a sheer coincidence. Though, on this aspect it is argued on behalf of the husband that the said birth certificate has not been proved by the wife as per the Evidence Act, we are not impressed by this argument in view of the settled position of law that degree of proof in matrimonial matters is considerably diluted and general rule of corroboration and supportive evidence etc. are mellowed down. Further, section 14 of the Family Courts Act, 1984 is a complete answer to this argument and

more so when the respondent/husband did not object to exhibition of this certificate by the Family Court. Similar view has been taken in the case of V. vs. S (supra) by the Division Bench of this Court. Moreover, though subsequently the wife withdrew the said allegations and even offered the husband to have liberty to stay with said second wife - Kalpana and also to have marital relations with the appellant, this conduct in itself cannot be treated as a mental cruelty caused to the husband. In other words, withdrawal of the allegations as to contracting second marriage with another woman cannot be taken as false and frivolous allegation made by the wife and on this aspect the Family Court had erred in appreciating the substantive evidence of the wife and her witnesses as to under what circumstances she withdrew the allegations. Admittedly, as per the evidence of the wife as there were talks of amicable settlement such step of withdrawal of the complaint was taken by the wife. That version seems to be probable one. However, this fact has been over-looked by the Family Court.

24. So far as point No.[iv] is concerned, it has come on record that after mutual understanding and after the assurance was given by the husband that he will give back the ornaments (stridhan) of the wife and arrange for residential accommodation to her, she withdrew the said complaint. Moreover during the cross-examination the husband has agreed to behave cordially with the wife and such statement he made before Mr. Shingare and as such wife took her complaint back in September, 1991. This substantive evidence of husband dilutes this second argument as to wife practiced mental cruelty by making allegedly false allegations against him. Apparently, according to the wife, knowing serious consequences of her complaint as to possibility of her husband losing Government service, she withdrew the complaint. As such, it cannot be said that she had made false and fictitious complaint with the office of the husband. Considering the evidence of the rival parties, the argument on behalf of the husband that such withdrawal of the complaint by the wife amounts to false allegation made without any basis or substance and thus causing mental harassment and cruelty, cannot be sustained.

25. Now, we will discuss as to the effect of the authorities cited on behalf of the husband. Our attention is drawn towards the ratios propounded by the following authorities, as to on the point of impotency of the spouse being a ground for divorce and third one on the point of non-cohabitation amounting to cruelty :

i. P. Vs. K.,

ii. Yuvraj Digvijay Sinhji Vs. Yuvrani Pratap Kumari,

iii. 2002(3) ALL MR 945 (S.C.) [Praveen Mehta v. Inderjit Mehta]

26. So far as the first two authorities are concerned, at the cost of repetition, we must say that impotency is one of the grounds for nullity of the marriage in view of Section 12 of the Hindu Marriage Act, 1955. However, there is a marked distinction between infertility and impotency. In the absence of any material on record showing the impotency, or to be more specific, frigidity of the wife so as

to render the consummation of the marriage impossible, it cannot be said that the provisions of Section 12 of the Hindu Marriage Act are attracted.

27. So far as the ratio of the authority *Praveen Mehta v. Inderjit Mehta* (supra) is concerned, it must be said that on distinct facts in the present matter at hand, it cannot be said that non-cohabitation of a spouse will always amount to cruelty contemplated by Section 13 of the Hindu Marriage Act, 1955. The substantive evidence brought before the Family Court clearly establishes that there was consummation of marriage; and at least for some period immediately after the marriage and even within the span of two years prior to the alleged separation of the spouses there was cohabitation between the parties. In that view of the matter, even the ground of desertion u/s 13 is not available.

28. We shall now revert to the argument of the wife that keeping in mind the purport of Section 23 of the Hindu Marriage Act, in the facts of the present case the husband has disentitled himself for grant of any relief. Section 23 envisages that if the petitioner has taken advantage of his own wrong, no relief should be granted to him. In the present case, having found that the husband has failed to substantiate any of the grounds - be it for annulment of the marriage u/s 12 or u/s 13 or (i-b) - it is not necessary to dilate on the basis of effect of Section 23 of the Act.

29. In spite of above legal factual position, the Family Court had not appreciated the evidence in proper perspective and had committed an error in accepting the case on both the grounds for nullity and dissolution of marriage by divorce. Considering the material on record and the grounds invoked for nullity or dissolution of marriage, it has become necessary to interfere with the impugned judgment and decree of nullity of marriage and alternatively dissolution by decree of divorce. Said impugned judgment and decree is accordingly set aside with following order :

ORDER ::

(i) Family Court Appeal No. 100 of 1996 is allowed.

(ii) The impugned judgment and decree dated 31st October, 1994 in Petition No. 565 of 1992 passed by the Judge, Family Court, Pune is quashed and set aside. Instead, the Petition No. 565 of 1992 filed by the husband is dismissed with costs quantified at Rs. 10,000/- to be paid to the wife forthwith.

(iii) Decree be drawn up accordingly.