

(1956) 08 MAD CK 0036
In the Madras High Court
Case No : A.A.O. No. 311 of 1955

T. Rangaswami	Vs	APPELLANT
T. Aravindammal		RESPONDENT

Date of Decision : 10-08-1956

Acts Referred:

Evidence Act, 1872 — Section 120
Hindu Marriage Act, 1955 — Section 12
Tamil Nadu Hindu (Bigamy Prevention and Divorce) Act, 1949 — Section 5

Citation : AIR 1957 Mad 243

Hon'ble Judges : Ramaswami, J

Bench : Single Bench

Advocate : K. Raman and R. Sitaram, for the Appellant;

Final Decision : Dismissed

Judgement

Ramaswami, J.—This is an appeal directed against the order and decree of the learned Subordinate Judge of Tiruchirapalli in O. P. No. 186 of 1952.

(1a) This O. P. was filed u/s 5 of the Madras Hindu (Bigamy Prevention and Divorce) Act VI of 1949 Clause (h) which provides that either party to a marriage solemnised before or after the commencement of this Act..... may pray that the marriage be dissolved on the ground that the other party was impotent at the time of marriage and continued to be so until the presentation of the petition. This Act has been repealed and replaced by the Hindu Marriage Act 1955, Section 12(a). The Clause (h) of Section 5 of Act VI of 1949 is identical in language with Clause (a) of Section 12 of the Hindu Marriage Act 1955. Therefore no vested right has been taken away and no new right has accrued.

2. The petitioner T. Rangaswami is seeking divorce" on the ground of alleged impotence and alleged desertion. He married the respondent Ara-

vindammal, who is his own niece on 13-9-1945. After living for sometime together, the respondent has been living before the presentation of the

petition with her parents for a considerable time. The case for the respondent is that she is not as alleged either on the date of the marriage or On

the date of the petition and that she is not the deserting party and that on the other hand she has been driven out of the house and that her husband

wants to get rid of her in order to re-marry.

In the course of the enquiry this respondent produced a certificate issued by Srimati G. Poriniah, Lady Doctor, regarding her potency and this

Lady Doctor has been examined also as R. W. 3. The medical evidence puts it beyond doubt that this respondent is suffering neither from organic

nor atonic impotence permanent or temporary. This evidence is corroborated by the respondent examined as R. W. 1 and her father examined as

R. W. 2.

This was not in any way displaced by the evidence of the petitioner examined as P. W. 1 and his mother as P. W. 3. Before the learned

Subordinate Judge the issue of desertion was not pressed with any seriousness as noted by him in paragraph 6 of his order and in fact there were

no materials to make out the ground of desertion put forward as a second string to the bow by the petitioner. This petition was therefore dismissed

with costs. Hence this appeal,

3. In appeal I am of the same opinion as the learned Subordinate Judge on both these issues and here are my reasons.

4. "Point I." Impotence as a ground for dissolution of marriage is a medico-legal problem and I shall consider it now under both these heads.

5. Impotence is defined as lack of ability to perform sexual act and sterility is defined as lack of ability to procreate children. Questions of

impotence and sterility arise when divorce is sought (a) because, marriage cannot be consummated (i.e., one of the parties is incapable of complete

sexual intercourse), (b) if incapacity for consummation cannot be surgically remedied, or, the defective party is unwilling to submit to a surgical

operation; or (c) if the incapacity existed before marriage. (Sterility, by itself, offers no ground for divorce). Impotence is attributed to injury to

head, neck, or loins.

6. Potence in case of males means power of erection of the male organ "plus" discharge of healthy semen containing living spermatozoa and in the case of females means (1) development of external and internal genitals and (2) ovulation and menstruation.

7. Causes of impotence: (*Apply to males only. --*Apply to females only; those unmarked, apply to both sexes):--

1. Organic: 1. "Nervous Lesions*": Diseases of, or injury to, brain or cord. 2. "Malformation or absence of parts* male organ may be absent,

non-developed, ill-developed, or two or more in number: adherent to scrotum or abdomen; fibrous or cartilaginous; hypospadias; congenital

phimosis, anorchidism, cryptorchidism; diseases of or accidents to or operations on the male organ, testicles or ducts (perinaeum).

*Atresia or narrowness of vulva, absence of uterus, tough hymen or vagina. (Though according to law, a boy under 14 is impotent, in fact, he is

not always so). Also -- Obesity, 3. "Inflammations or Cicatricial" contractions*. "Vaginismus". Kraurosis vulvae; internal piles, tight stricture. 4.

Tumorous*:--Elephantiasis; "hernia", big hydrocele.

Psychical* 1. Absence of voluptuous thoughts. 2. "Repugnance" towards individuals, "fear", "timidity", "excessive passion". (For this reason, a

man may be potent towards one woman and impotent towards another.

Atonic.* (Therefore, often temporary impotence). 1. "From general diseases" and "conditions": -- Old age, too frequent coitus, wasting diseases

(diabetes); anaemia; uraemia, cholaemia, rheumatism, diphtheria, Heart diseases, chronic nephritis, acute fevers, parotitis. 2, "From Over-indulgence

in drugs": lead, potassium Iodide, opium, cannabis indica and other narcotics; alcohol, tobacco, thyrotoxin. 3. "From chronic irritation of genital

passages -- due to gonorrhoea, stricture, masturbation vaginismus.

8. This information can be gathered from standard text-books, English and Indian, on the subject like Glaister's Medical Jurisprudence and

Toxicology (1953), 9th Edn., Chapter XII, p. 358 ff; Taylor on Sexual Disorders (2nd Edn.), Chapter VIII, page 98ff, (atonic); Organic

impotence, Chapter IX, p. 105 ff; Forel's Sexual question and Psychic Impotence, pp. 85, 219; Mody's Medical Jurisprudence and Toxicology

(12th Edn.), Chapter XIII, p. 284ff; Ray's Medical Jurisprudence and Treatment

of poisoning (6th Edn.) page 231ff; Kanmth's Medical

Jurisprudence. (MLJ publication.)

9. In regard to the legal aspect it would be interesting to examine analogous laws. Under the Hindu Law concerning impotence as affecting the

status and continuance of marriage, the following extracts from the standard commentaries are sufficient;

Mayne's Hindu Law (11th Edition), para 105 (page 143):

As the great and primary object of marriage is the procuring of the male issue, physical capacity is an essential requisite so long as mere selection

of a bridegroom is concerned; but a marriage with an eunuch is not an absolute nullity.....It has now been held by the High Courts of Madras and

Allahabad "in decisions of questionable correctness the under the Hindu Law an impotent person can be lawfully married"" Amirthammal v.

Vallimayil Am-mal, ILR 1942 Mad 807: AIR 1942 Mad 693 (A); Mt. Kaura Devi Vs. Mt. Indra Devi, , Mt. Kaura Devi Vs. Mt. Indra Devi, .

The views expressed by the learned Editor of the 10th Edition of Mayne's Hindu Law have been dissented from in the Madras and Allahabad

decisions,

"Mulla's Hindu Law (11th Edition) page 537:"

It has been held by the Calcutta High Court that the marriage of a female with a male who is impotent and is not able to consummate the marriage

is nullity"" Ratan Moni v. Nagendra Narain, 48 CWN 689: AIR 1949 Cal 404 (D).

"Raghavachariar's Hindu Law" (3rd Edition) page 51:

Marriage does not exist solely for sexual intercourse and a marriage with an impotent person cannot be held invalid though one of the chief objects

of marriage, viz., begetting of children is defeated thereby"". Purushotam Das v. Bai Mani, ILR 21 Bom 610 (E). See also Kanahi Ram v. Biddya

Ram, ILR 1 All 549 (F). See contra 48 CWN 689: AIR 1949 Cal 404 (D).

10. "Muslim Law:" Under Muslim law impo-tency as a ground for divorce was available even before the passing of the Dissolution of Muslim

Marriages Act VIII of 1939. Under the Act which has accepted all principles of Muslim Law with slight changes in the. procedure and conditions,

a Mahomedan wife --- in the converse case of the husband he being simply left to his -ordinary power of divorce is entitled to seek divorce on the

ground of impotency of the husband subject to the following conditions:

(i) that the impotence existed at the time of marriage; *Feroze-din v. Mt Wazir Eegam*, AIR 1926 Lah 218 (G); *Musammat Altafan Vs. Ibrahim*,

confirmed in *Mohd. Ibrahim Vs. Mt. Altafan and Others*, .

(ii) that the wife had no knowledge of it at the time of marriage; *Musammat Altafan Vs. Ibrahim*, .

(iii) that the defect had not since been removed, *Badardim v. Mt. Allah Rakhi*, AIR 1937 Lah 383 (J). According to the Act VIII of 1939 the

material date is the date of marriage and not the date of consummation. It would mean that if a husband is potent at the time of marriage but

becomes impotent before the date of consummation the wife will not be entitled to Judicial divorce. It was necessary even before the Act to prove

that the impotency existed all through the period of marriage and remained incurred since the time of marriage, *Pir Bakhsh Vs. Mt. Muhammad-Un-*

Nissa,

An impotent person is defined by the Mahomedan Law as one who is unable to have a connection with a woman, though he has the natural

organs; and a person who is able to have connection with an enjoyed woman, but not with a virgin, or with some women but not with others

whether the disability be by reason of disease, or weakness or original constitution, or advanced age or enchantment, is still to be accounted

impotent with respect to her with whom he cannot have connection. *Bailie's Mahomedan Law*, Vol. I, page 347; *Musammat Altafan Vs. Ibrahim*,

. This definition seems to hold good under the Act. Under Shia Law the wife was not entitled to separation if the impotency was only special in her

case or what is called "ad hoc" in English Law. The Act does not make any difference and its provisions of the Act would be applicable to

all schools of Muslim Law.

A man, may, however, be nominally or temporarily potent due for instance to the use of certain medical drugs or other cause; or he may be potent

as regards some women and not potent as regards his wife: *Musammat Altafan Vs. Ibrahim*, . For detailed exposition (see *R. B. Sethi Muslim*

marriage and its dissolution (1955) p. 97 and foll; *R. K. Wilson Anglo-Muhammadian Law Fifth Edn.* p. 145).

11. Section 30 of the Parsi Marriage and Divorce Act III of 1936, which has not

amended section 28 of Act XV of 1865, runs as follows:

In any case in which consummation of the marriage is from natural causes impossible, such marriage may, at the instance of either party thereto, be

declared to be null and void". It will be noticed that under this Act impotency is not a ground for divorce but for declaring the marriage null and

void (See Parsi Marriage and Divorce Act by Wadia and Katpitia, 1939 Edn. page 60).

12. Under the Special Marriage Act, 1954, impotency is not a ground for divorce, but only a ground for nullity of marriage. Section 24 states:

(1) Any marriage solemnized under this Act shall be null and void and may be declared by a decree of nullity; -

(2) If the respondent was impotent at the time of the institution of the suit". (see page 104 of D. H. Chaudhari's Special Marriage Act, 1954).

13. Under the Hindu Marriage Act, 1955, also, impotency is not a ground for divorce but a ground for nullity. Section 12 states:

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 respondent was impotent at the time of the marriage and continued to be so until the institution of the proceedings;

(See Commentaries of Hindu Marriage Act XXV of 1955 by K. P. Saxena, page 159).

14. Under the Indian Divorce Act IV of 1869, impotency is not a ground for divorce but a ground for nullity of marriage under sections 18 and 19

of that Act. -

Section 18 states:

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 states:

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

1. that the respondent was impotent at the time of the marriage and at that time of the institution of the suit;

15. The following case-law u/s 19 of the said Act is apposite:

Capacity for sexual intercourse must exist at-least "in posse" at the time of marriage. Permanent and incurable impotency such as to render

complete and natural sexual intercourse between parties practically impossible is a ground for annulment of marriage. Impotency means physical

and incurable incapacity to consummate marriage. Incapacity may result from loathsome and incurable syphilis: "Birendra Kumar v. Hemlata

Biswas", AIR 1921 Cal 459 (K).

If a marriage is once consummated; nullity cannot be given on ground of subsequent impotency. Impotency must be present at time "Of marriage

and suit: AIR 1943 185 (Nagpur) .

Proof of impotence, that is physical unfitness for consummation, must be proved or there must be facts from which this can be inferred; Edward

Charles Dawson v. Matty Dawson, AIR 1916 Mad 675 . Non attainment of puberty by a woman is no ground as the fact does not in any manner

preclude the consummation of marriage: 29 MLJ 183: AIR 1916 Mad 675 . Loathsome and incurable syphilis of wife, resulting in her incapacity to

consummate marriage entitles husband to a decree for nullity on- ground of her impotency: Birendra Kumar v. Hemalata Biswas, AIR 1921 Cal

464 (N); AIR 1930 83 (Oudh) , Syphilis to amount to impotency must be incurable, even though the disease is not an absolute"bar to

compulation. But where woman is discharged from hospitals as cured, with a negative blood test, syphilis cannot be said to be incurable and the

marriage cannot be dissolved. But see AIR 1930 83 (Oudh) .

Wife's invincible repugnance to act of coitus rendering her incapable of sexual intercourse entitles husband for declaration of nullity of his marriage,

Burden of proof is on time and is increased by delay on his part. But delay by itself is not an absolute bar unless the respondent has thereby in any

way suffered: H.R.H. Bull Vs. Mrs. B.S. Bull, When husband is impotent as regards his wife only, decree for nullity can be granted H. Vs. H., ;

AIR 1943 185 (Nagpur) ; (Attempt to consummate, reducing wife to state of hysteria, making consummation impossible). See also Section v. B.

16 Bom 639 (S):

No presumption can be drawn from the fact that the wife was unwilling to live with husband that she was impotent; Emmanuel Singh v. Kamal

Saraswati, AIR 1934 Pat 870 .

Courts have wide discretion in ordering physical examination of the party suffering from the disease and always do so, subject to such conditions

as will afford protection from violence to natural delicacy and sensibility. Where a party refuses to attend for medical inspection, the court may

probably draw an unfavourable inference: *H. Vs. H.*, under the (U.K.) matrimonial causes Rules (of Rule 24) there is specific provision for medical inspection).

In regard to the nomination of doctors and their certificates -- See *Agnes Sumathi Ammal Vs. D. Paul*, , *Coral Indira Gonsalves*, falsely called

Iswariah Vs. Joseph Prabhakar Iswariah, .

The burden of proof is heavy on the petitioner as it involves a slur on the manhood or womanhood of the other party: 29 MLJ 183: 30 Ind Gas

565: AIR 1916 Mad 675 . Impotency means incapacity to consummate the marriage and that therefore in the circumstances the respondent must

be deemed to be impotent so far as the petitioner was concerned at the time of the marriage and at the time of the institution of the suit and the

marriage between the petitioner and the respondent must be declared null and void: *Kanthi Balavendram Vs. S. Harry*, (A case under Parsi

Divorce and Marriage Act): AIR 1931 Lah 245 ; AIR 1943 185 (Nagpur); *Ramesh Ramanlal Saraiya Vs. Kusum Madgaokar*, (See AIR Manual

Civil and Criminal Vol. IV (1947) p. 3488 and foil, and *Manchanda The Law and Practice of Divorce* (Eastern Law House (1945) p. 206 and

foil. In regard, to both these very useful publications, a new edition is long overdue. (16) In England impotence has always been a ground for

nullity only but not a ground for divorce. The law on the subject has been summed up by Tolstoy in his ""Law and Practice of Divorce and

Matrimonial Causes"" (Second Edition) at page 94 and following as follows:

Impotence is inability to consummate the marriage and to be a ground for nullity, such inability must exist at the time of marriage (Note one) and

continue to exist at the date of the petition. Sterility unaccompanied by impotence is no ground for nullity. (Note Two) if he or she be otherwise

"*apta viro*".

At one time it was necessary to wait three years before asking for relief and it was the practice of the Court to adjourn the case to give the parties

an opportunity for further attempts. If this failed, then impotence was presumed.

This is no longer the practice and there is now no minimum period to get over prior to the presenting a petition for nullity.

To consummate a marriage, ordinary and complete sexual intercourse must take place. Partial intercourse or intercourse which, is so imperfect as scarcely to be natural is insufficient (Note Three). In determining whether intercourse is ordinary and complete the word "consummate" must be construed as it is understood in common parlance and in the light of social conditions known to exist. (Note Four).

The inability to consummate may be due to a physical defect which is incurable, or to one which is curable but which the respondent refuses to have cured, (Note Five) or to mental or moral disability, (Note Six). In the latter case, it sometimes happens that a person is capable of having intercourse, but incapable of performing it with the particular individual, i.e., impotent "quoad hunc" or "quoad hanc". This is sufficient to found a decree of nullity, as what matters is ability to have intercourse in general (Note seven).

Provided there are no circumstances which constitute a bar to relief, e.g., knowledge of the defect at the date of marriage, the impotent party can himself petition for nullity and his right to do so is not conditional on repudiation of the marriage by the other party.

Generally speaking, a spouse who does not attempt or fails in his attempts at sexual intercourse will have the burden of proving that he or she is capable and the burden is heavier in the case of a man. (Note eight). The Matrimonial Causes Rules 1950, Rule 24 provides for a medical inspection of the parties in the case of nullity for impotence or wilful refusal to consummate. (Rule 24), but the Court may grant a decree though the respondent refused to submit to the inspection (Note nine). In fact, the respondent's refusal may incline the court to draw the inference that the petitioner's allegations are true.

The birth of a child is not conclusive evidence that the marriage has been consummated as it is well established that fecundation "ab extra" can take place (Note ten).

In a proper case the court will order a petitioner who alleges that the respondent is incapable of consummating the marriage to give particulars of the nature of the incapacity alleged. (Note Eleven.) Evidence of non-access is

admissible, if given in nullity suits for incapacity.

(Note one) *Brown v. Brown*, (1828) 1 Hag ECC 523 (Z), (Respondent becoming impotent subsequently is no ground for nullity) *Napier v.*

Napier, (otherwise *Goodban*) 1915 P 184 (Z1). "Note two: *L. v. L.* (1922) 38 TLR 697 (Z2); so that voluntary sterilisation before marriage is no

ground for relief: *Baxter v. Baxter*, (1943) AC 274 (Z3); overruling *J. v. J.*, (1947) P158 (Z4); *R. v. R.* (otherwise *F*) 1952 1 All ER 1194 (Z5);

(penetration but no ejaculation). But see also *Grimes v. Grimes*, (1948) P. 323 (Z6); *White v. White*, (1948) P. 330 (Z7).

"Note Three": *D. v. A.*, (1845) 1 Rob ECC 279 (Z8); *Snowman v. Snowman*, (1934) P: 186 (Z9); *Clarke v. Clarke*, (1943) 112 LJ P. 1 (Z10);

B. v. B., (1955) P. 42 (Z11); *R. v. R.*, (1952) 1 All ER 1194 (Z12). "Note Four": (1948) AC 274 (Z3).

"Note Five": *L. v. L.* (1882) 7 PD 16 (Z13); *G. v. G.*, (1908) 25 TLR 328 (Z14); *S. v. S.* (otherwise *C*) (1954) 3 All ER 736 (Z15);

"Note Six": *G. v. G.*, (1871) 2 P and D 287 (Z16) (excessive sensibility); *P. v. L.*, (1873) 3 PD 73n (Z17) (hysteria); 1952 1 All ER 1194 (Z5);

(1954) 3 All ER 736 (Z15); *Lewis v. Hayward*, (1866) 35 LJ P & M 105 (Z18); *G. v. G.* (1924) AC 349 (Z19).

"Note Seven": (1924) AC 349 (Z19). "Note eight": *Kay v. Kay*, (1934) 152 LT 264 (Z20); (1866) 35 LJ P & M 105 (Z18). "Note Nine":

(1933) P. 190 (U) where the authorities are dissented. (1908) 25 TLR 328 (Z14); *W. v. W.*, (1912) P. 78 (Z21); *S. v. S.*, (1908) 24 TLR 253

(Z22); *B. v. B.*, (1901) P. 39 (Z23); *W. v. S.*, (1905) P. 231 (Z24); *Section v. B.*, (1905) 21 TLR 219 (Z26). Note Ten: *Clarke v. Clarke*,

(1943) 112 LJ P. 41 (Z26); (Child born though marriage not consummated) (1934) P. 186 (Z9); *L. v. L.*, (1949) P. 211 (Z27); (artificial

insemination).

"Note Eleven": *Wise, v. Wise*, (1944) P. 56 (Z28). "Note Twelve": *Farnham v. Farnham*, (1937) P. 49 (Z29); *Burgess v. Burgess*, (1937) P 60

(Z30). For detailed discussion in standard commentaries see Vol. 12 Halsbury's Laws of England (1955); Simmonds Edn. Para 426 and foll, at

page 228 and foll; Latery on Divorce Fourteenth Edn. (1952) p. 194 and foll. Rayden on Divorce, Fifth Edn. (1949) p. 70 & foll. Phillips practice

of the Divorce Division Fourth Edn. (1951) p. 39 and foll; Jackson The Law

relating to the Formation and Annulment of Marriage pp. 69-73 and 103-108 and 203-315 Etc. (1951).

17. In America unless as in many states it is made so by Statute, ante-nuptial impotency is not a ground for divorce. The American law on the

subject is found in two authoritative publications. In 19 Corpus Juris, page 40, Section 71, it is stated thus:

"Impotency is an incurable incapacity that admits neither copulation nor procreation, the copulation contemplated being copula vera and not partial,

imperfect, or unnatural. It must be incurable and render complete sexual intercourse "practically impossible. Thus absence of conceptive power or

barrenness does not constitute impotency if there is complete power of copulation." ill. Griffeth v. Griffeth, 162 111 368 (Z31), J. G. v. H. G.

(1870) 33 Md. 401 (Z32); Minu Payne v. Payne, 46 Minn. 467 (Z33); PaLuckenbach v. Luckenbach, 39 Pa Co 520 (Z34); Tenn Williams v.

Williams, 1 Tenn. Civ A 538 (Z35); Alia - Anonymous 35 AL A 226 (Z36); Berdolt v. Berdolt, 56 Nebr. 792 (Z37); S. v. S., 1922 Mass 194 (Z

38); Grosvenor v. Grosvenor," 194 111 652 (Z39).

17a. American Jurisprudence, Sections 140 and 141, has the following to say:

Section 140. Capability of consummation is an implied term in every marriage contract. It is so essential that on discovery of the entire incapacity

of one of the parties for that duty of wedlock, the other may have a decree annulling the marriage. Under the canon law as administered in

England, impotency existing at the time of the marriage was ground a divorce a "vinculo matrimonii". In this country in the absence of a statute so

providing, impotency on the part of either spouse is not a ground for divorce, as the grounds for divorce are only those specified by the statutes.

Also, from the facts that impotence is canonical disability cognizable only the ecclesiastical courts and that we have no such courts, it follows and it

is generally so held, that in the absence of statute on the subject, our courts have no jurisdiction to grant a divorce on this ground. It is well settled

both in England and in this country that impotency does not render the marriage void but merely voidable, and the marriage is regarded as valid

unless avoided by some court having jurisdiction during the life of both parties.

At the present time statutes exist in the several States either authorizing divorces for impotency or conferring jurisdiction on some court to annul the

marriage therefor"".

Section 141....it is well settled that if, by reason of malformation or organic defect existing at the time of marriage, there cannot be natural and

perfect coition -- vera copula -- between the parties, the case comes within the legal definition of impotency. If, however, there is a probability of

capacity to accomplish the sexual act, no decree will be granted. (1870) 33 Md. 401 3 Am Ren & 183 (Z32).

The origin of the incapacity is immaterial. It may proceed from malformation of the sexual parts or from absence of necessary organs. On the part

of the husband, it may arise from the excessive abnormal proportions of his sexual organs or from genital weakness produced by self-abuse. On

the part of the wife, it seems not essential that there be any structural defect. Excessive sensibility rendering sexual intercourse practically

impossible on account of the pain it would inflict or an invincible repugnance to sexual intercourse resulting in a paralysis of the will may be

sufficient: S. v. S., 192 Mass 194 (Z38).

Universal impotency does not seem to be essential. Impotency quoad hoc, as it is termed, is sufficient; that is, if the defendant is entirely incapable

of sexual intercourse with the plaintiff, though not with other persons, if such a thing is possible, a decree of nullity may be granted. This view is said

to be reasonable, for the marital relation is with the plaintiff; and if the defendant is incapable of consummation with the plaintiff, the incomplete

contract ought to be dissolved, whatever may be the defendant's powers with respect to other persons. On principle, therefore, relative and not

absolute Impotency would seem to be sufficient.....": Vandenberg v. Vandenberg, 197 N Y S 641 (Z40).

18. To sum up, a marriage will be avoided or dissolved on the ground of impotence, on the petition of either party if it is proved that at the time of

the marriage one of the parties is and continues to be Incapable of effecting or permitting its consummation either of some structural defect in the

organs of generation which is incurable and renders complete sexual intercourse impracticable or of some incurable mental or moral disability

resulting in the man inability to consummate the marriage with the particular woman or in the woman to an invincible repugnance to the act of

consummation with the particular man.

19. Though in practice the terms, "declare the marriage null and void" and "dissolution of marriage" are used interchangeably, in strict reality, it is

only voidable and void and non-existent marriages which can be declared null and void, and the contract of marriage made void ab initio; in regard

to a valid marriage, it can only be annulled or dissolved provided one or more-specified grounds for divorce have been made out.

While in the case of a void marriage the decree merely "declares" status, in the case of a voidable marriage the decree changes status. The children

of a void marriage for instance unless saved by legislation (e.g., Section 26, Special Marriage Act, 1954) are never legitimate (Jackson *ibid* 61),

But there is the further distinction between void and voidable marriages in that in the case of a voidable marriage till it is annulled by a decree

parties are husband and wife and children begotten of such marriages are legitimate and secondly whereas in the case of a voidable marriage it can

be avoided only on a presentation of a petition by either party thereto, a marriage which is null and void may be declared to be so even at the

instance of a stranger whose interest are affected by such a marriage.

20. In the case of dissolution of marriage on the ground of impotence, the following issues as pointed out in Chandhr's useful publication on the

Special Marriage Act, p. 108, arise for consideration:

(a) Was the respondent impotent at the time of the marriage?

(b) If so, what was the nature of impotency?

(c) Was she (or he) generally impotent or only impotent vis-a-vis. the petitioner?"

(d) What was the cause or what were the causes of this impotency?

2. (a) Was the respondent impotent on the date when the suit or petition was instituted?

(b) What was the nature of the impotency?

(c) Was she (or he) generally impotent or only impotent vis-a-vis the petitioner?

(d) What was the cause or what were the causes of such impotency?

3. Was the marriage ever consummated, either at the time of the marriage or thereafter?

4. Is there no collusion between the petitioner and the respondent?

5. Has the petition been brought in good faith and has there been full, free and frank disclosures of all material facts? Besides these, additional

issues arising out of the pleadings will have to be framed.

21. In regard to proof of impotency, the rules of evidence are not different in the case of impotency than elsewhere. Impotency that is physical unfit-

ness for consummation, must be proved or there must be facts from which this can be inferred. The proof must be, as used to be expressed in the

Eccelesiastical courts in England not *suspicio probabilis* but has to be *Vehemens proesumptio*.

22. There is no minimum standard of proof necessary. Even uncorroborated testimony of the petitioner is sufficient if it can be believed. In cases of

this nature, corroboration can only be obtained from the evidence of the other party to the marriage. u/s 120 of the Evidence Act, the other party to

the marriage is a competent witness.

23. The conduct of the parties subsequent to the marriage would be important. Did they speak of the impotency to anybody? Was it mentioned to

any friend or relation or to their parents? If, not, why not? Would it be natural not to do so? Or was there no opportunity? It would not be natural

for everybody to speak these matters to another. A reserved or shy or a reticent person would not. On the other hand, other types almost certainly

would. Whether the parties to the case fall within the one class or the other, it is for the trial judge to discover: (AIR 1943 Nag 185) (L).

24. Impotency may be established by medical examination of the parties. The doctor who examined either party or both the parties, may be

examined as witness.

Where the respondent relies on a doctor's certificate that he was able to have sexual intercourse and was potent that day, the certificate must be

strictly proved by examining the doctor who issued it. Certificates like these, do not prove themselves. The doctor giving the certificate has to state

what tests he carried out to arrive at his conclusions and must stand cross-examination and convince the Court that his conclusion about the

potency is correct. *Coral Indira Gonsalves, falsely called Iswariah Vs. Joseph Prabhakar Iswariah*, .

25. There is of course need of caution in dealing with the evidence of impotency to avoid such after events as in some of the old cases happened,

when the person pronounced impotent had issue in a later marriage: ILR 16 Bom 639 (S)

26. No presumption can be drawn from the fact that the wife was unwilling to live with her husband that she was impotent: AIR 1934 Pat 67a .

27. Bearing these principles in mind if we examine the facts of this case, we find that neither organic impotency nor atonic impotency quoad this

petitioner has been made out. Therefore this issue has been rightly decided by the learned Subordinate Judge.

28. Point 2: The five essential factors which must be established to succeed in a petition for divorce on the ground of desertion are as stated in

Phillip's Practice of the Divorce Division Fourth Edn. (1951) P 19 and foll, that

- (a) the spouses must have parted or terminated all joint life;
- (b) The deserting spouse must have an intention to desert the other spouse;
- (c) The deserted spouse must not have agreed to the separation;
- (d) the desertion must have been without cause;
- (e) this State of affairs must have continued for at least three years immediately preceding the presentation of the petition.

29. In certain circumstances the deserting spouse may not be the person who actually leaves the matrimonial home. The actual parting may be due

to the deserting spouse making continued joint life impossible and thus compelling the deserted spouse to leave the matrimonial home, In such

cases the actual abandoning of the matrimonial home is not the act of the person against whom the allegation of desertion is made, but the act of the

person making the allegation. The test by which the offence is judged is not the abandoning of the matrimonial home, but the fact that the other

party has caused such abandonment by his actions, since he must be taken to intend the consequence of such actions. If it is a natural consequence

of the behaviour of one spouse that the other will leave the matrimonial home, the offending spouse must be presumed to have intended that this

should happen. Cases in which the parting of the spouses has arisen in these circumstances are sometimes called ""constructive"" desertions".

30. This desertion may be terminated in the following ways;

- (i) By resumption of cohabitation between the spouses.
- (ii) By the desertion becoming a separation of the spouses by agreement.
- (iii) By the deserted spouse refusing a genuine offer made by the deserting spouse to resume cohabitation.

(iv) By the deserting spouse becoming insane.

31. Bearing these principles in mind if we examine the facts of this case, we find that though the wife is living now in her parents house, the

deserting spouse must be deemed to be the husband. The wife who is stated to be a sturdy and healthy person and who even before marriage is

closely related to the husband as his niece and who comes from a community where re-marriage is practically unknown and who would have had

no possible motive to live as a grass-widow, is extremely unlikely to persist in living separately but for the fact that her husband is refusing all

genuine efforts by her to resume cohabitation.

On the other hand, as pointed out by the learned Subordinate Judge, who had an opportunity of seeing the husband and the wife in the box, all the

evidence and the circumstances pointed out to the anxiety of the husband to get rid of the wife once for all and to re-marry. Therefore, the

desertion alleged has not been made out. This issue also has been rightly found by the learned Subordinate Judge against the petitioner.

32. In the result, this appeal is dismissed and on account of the fact that the wife has not appeared in this court, without costs.

33. I must express my appreciation of the presentation of the case by Mr. K. Raman, who on account of the fact that the respondent was not

appearing in this court, took the trouble to place the entire evidence and case, law before me, so that the respondent's case may not suffer by

default.