

DELHI HIGH COURT

Rita Nijhawan

Vs.

Balkishan Nijhawan

L. P. A. 117 of 1970.

(T. V. R. Tatachari and Rajindar Sachar, JJ.)

21.2.1973

JUDGEMENT

Sachar, J.

1. This letters patent appeal is directed against the order of the learned single Judge dated May 14, 1970 affirming the order of the Additional District Judge, Delhi, dated May 15, 1969, by which the application of the petitioner/appellant wife under Section 12 (1) (a) of the Hindu Marriage Act, 1955, (hereinafter to be called the Act) for annulment of the marriage with the respondent husband by a decree of nullity on the ground of impotency or in the alternative for grant of a decree for judicial separation under Section 10 (1) (a) and (b) of the Act, on the ground of desertion and cruelty, was dismissed.

2. The marriage of the parties took place in Delhi on April, 14, 1954. At the time of the marriage the appellant was about 16 years and the respondent was about 30 years. It was alleged in the petition that after the marriage the parties stayed in Delhi for about 10 days and though the respondent tried for sexual intercourse with the appellant but could not consummate the marriage as he could not get proper erection and got discharged before he could perform the act. The respondent had some inferiority complex and could not perform the act. Thereafter the respondent was transferred to Gwalior and the parties lived there but the respondent was not capable of doing the act of sexual intercourse there also. After a year of stay in Gwalior, the respondent was transferred to *Dholpur* where they stayed for two years and there also the respondent was not able to perform the act of sexual intercourse. It was further alleged that the petitioner was at the time of her marriage unaware of the sex life and for that reason was not able to understand that the respondent was not able to do sexual intercourse because of his impotency. In 1957 the appellant's cousin sister Shashi came to stay with them at *Dholpur* and from her she came to know the facts about true married life. She complained to the husband who promised that he would get himself treated by some 'hakims' for this purpose and started taking some medicines. The respondent was thereafter transferred to Bhopal where the parties lived for three years. At Bhopal the respondent was getting

medicines from Delhi and he got somewhat better and the petitioner got pregnant although there was no normal and complete, sexual intercourse between the parties as there was some penetration. The petitioner bore a son from the husband who was born in February, 1959. It was maintained that this was only a temporary phase and the respondent was again not able to perform the act of sexual intercourse. By this time the appellant and her parents had also come to know and though the respondent was asked to get himself treated, he refused to do so and on the contrary started treating her with cruelty. The respondent was thereafter transferred to Rangat in Andaman where the parties stayed for about a year. Thereafter he was transferred to Port Blair and the parties stayed there up to 1962. It is alleged that it was only on the persuasion of the respondent and the assurance given by him that he will treat himself and become potent that the appellant went to Nasik in the end of 1962. Thereafter the respondent was transferred to Bombay in 1963 when she came to reside with her parents. It is alleged that in 1963 when the appellant was sure that it was impossible for her to live with the respondent and she could not tolerate the cruelty any more, she joined the Institute of Catering Technology, Bombay and passed her examination of Hotel Management in the year 1966. During this period the respondent was posted at Kanpur and the appellant went there and stayed for about 4 or 5 days but the respondent had become from bad to worse. Even in 1964 the appellant went and lived with the respondent but found that the position had not improved. Prayer was accordingly made for the necessary reliefs.

3. The respondent denied the allegations. It was denied that the respondent suffered from any complex much less inferiority complex. The allegations about the sexual inability of the respondent or there being incomplete intercourse/insufficient penetration were characterized as baseless and false. On the other hand, the parties enjoyed harmonious relations and led a very happy married life till the year 1965 when there was an abrupt and unfortunate turn at the instigation of her parents who were unduly flared up by the rightful demand of the respondent for the return of his loan with them. It was denied that there was any occasion or necessity for treatment for any sexual deficiency or disability as alleged in the petition. The allegations about the bearing being given by the respondent to the wife were also denied as being imaginary and baseless. The allegation of impotency was denied and so was the suggestion that the respondent had got himself treated for it. It was also maintained that the respondent had himself at his expense got the wife admitted in the Institute of Catering Technology at Bombay with a view to ameliorate the status and financial position of the family. It was maintained that it was during this period of 1964 to 1966 that some unfortunate circumstances/ influences have worked on her that have created a wedge between the two loving spouses for reasons best known to her. On the pleadings of the parties the following issues were

framed:-

1. Whether the respondent was impotent at the time of his marriage with the petitioner and continued to be so until the institution of this petition? Opp.
2. Whether the respondent has treated the petitioner with cruelty as alleged in the petition and if so with what effect? Opp.
3. Whether the respondent has deserted the petitioner for a continuous period of more than two years? Opp.
4. Whether there has been unnecessary and improper delay in instituting this petition? Opp.
5. Relief.

4. The Additional District Judge found that the evidence on record does not justify a finding that the respondent was impotent at the time of marriage and that he continued to be so until the institution of this petition and found issue No. 1 against the appellant.

Under issue No. 2 the Additional District Judge found that the allegation of cruelty has not been proved.

Issue No. 3 was not pressed by the appellant and was, therefore, found against her.

Under issue No. 4 the Additional District Judge took the view that the petition suffers from improper and unnecessary delay. In that view of the matter, he dismissed the petition by his order dated May 15, 1969.

The learned single Judge has affirmed the findings of the Additional District Judge on issues 1, 2 and 4 and dismissed the appeal. It is against this judgment that the present appeal has been filed.

5. Mr. Manchanda, the learned counsel for the petitioner has challenged the findings of the Courts below on all these issues. He has, however, conceded as was done before the learned single Judge that the plea of cruelty was not being urged on the ground of physical cruelty and the findings that physical beatings have not been proved are not challenged. His contention is that the present is a case of mental cruelty inasmuch as even if it were to be found the respondent is not impotent within the meaning of the Act, yet, if it is proved that the respondent was sexually weak and debilitated so much so that he was not able to perform normal sexual intercourse with the appellant for all these years, a finding of cruelty within the meaning of the Act would inevitably follow.

6. The first question, therefore, that has to be decided is whether the appellant has succeeded in proving that the respondent is impotent within the meaning of the Act. The appellant as P.W. 5, has stated that at Gwalior the respondent was not able to perform the act of coitus and that he used to get discharged before he could get his organ in contact with her organ. He used to play with her in the bed and get discharged in that manner. Same thing continued at *Dholpur*. She has also stated that when after Shashi had talked to her, she had mentioned that he was sexually weak and he told her that he would get himself treated. No

improvement, however, in the sexual condition of the respondent took place even at Bhopal. In about March or April, 1958, some improvement was noticed about the respondent that instead of getting discharged in the very beginning of his sexual advances, he could retain it for a minute or two but he would get discharged before coming near her. All that the respondent was however, able to do was to rub his organ on her organ and get discharged in the mouth of the vagina without any penetration, and this is how she conceived in May or June, 1958. During this period though he was getting erection of the organ but the difficulty was that he used to get discharged before being able to penetrate the organ. At Rangat also the same thing continued and the respondent would enjoy by rubbing his organ with her organ without being able to penetrate and thus making her feel miserable. Even in 1963 and 1964 when she stayed with the respondent at Kanpur for some days, she found his condition to be the same and no improvement.

7-9. Smt. Tara Rani, P.W. 3 is the mother of the appellant. According to her she talked to the appellant after coming to know from Shashi and it was confirmed and the appellant admitted that the respondent was impotent and he could not perform the act of coitus. She has also stated that when the respondent was posted at Nasik the appellant refused to go with him complaining that the respondent had made her life hell at Port Blair and that the respondent has not regained his potency. She is stated to have written to the respondent and in reply Ex. P.W. 3/1, a letter, dated 26-11-1962 written by the respondent was received by her in which he admitted his sexual impotency.

Shri Yudhistar Lal Bahal, P.W. 4, is the father of the appellant who has stated that he talked to the respondent who admitted that he was sexually weak.

10. Respondent as his own witness has deposed that they were having normal sexual relations and has denied the suggestion that he was not able to have sexual intercourse with the appellant at any time. Thus there is a total denial that the respondent is suffering from any sexual weakness. It is in this context that Ex. P.W. 3/1, a letter admittedly written by the respondent to the appellant's mother is of great significance. In this the respondent has written that he was fully convinced that after knowing everything he was the cause of Lily's (appellant's pet name) sufferings and miseries and also for having caused all the worries. He has also written that appellant's mother had written that due to respondent's weakness he had worsened the matter. He has insisted on writing about his own weakness, which matter was talked over about four years back, but due to his carelessness he did not pay any attention to the matter but that he had now decided that all this will be cured, no matter how much expenditure is incurred. He also informed her that treatment is proceeding regularly since 3-8-1962 and that he had full faith that all this will be set right. He has praised their forbearance and wisdom and has expressed regret that instead of giving them all comfort and peace he has been the cause of all

suffering and pains. The respondent has also referred to the hesitation of the mother in sending his wife i.e. the appellant to him and has stated that he understands this attitude of hesitation because she is Lily's mother and he could well understand the state of affairs of her mind. He has said that her patience was great and praiseworthy. He has also expressed his grievance that Lilly (appellant) should be hesitant to come to her own house. He has ended the letter with asking her not to be sorrowful and not to upset her mind and he assured her to have full faith and that everything would turn out to be all right. He has also written that if Lilly really wants to do some training or course and then join some service he was quite agreeable. He has again expressed his regret and apology that he should have been the cause of their pains. He has asked her to re-assure Lilly and calmly think over everything and whatever decision she would take he would be agreeable to it.

11. The contention of the counsel for the petitioner was that this letter which was admittedly written by the respondent is clearly a confession of the fact that he was having sexual difficulty and the allegation of the petitioner that the respondent suffered from sexual disability and was impotent was correct. The respondent in his evidence had tried to explain this letter by taking the plea that he fell ill sometime in October and November, 1958, at Bhopal from severe cough, pain in the left side of the abdomen and fever and the doctor had told him that the disease could develop into pleurisy. He also stated that he remained hospitalized for some time and was left very weak by the disease. In March, 1959, according to him, there was a recrudescence of his illness. In August, 1960 there was again an attack of the same old disease. In 1962 he states to have consulted a Hakim in Delhi in connection with his illness which had been troubling him recurrently since 1958. He has denied that the reference to weakness in Ex. P.W. 3/1 refers to the sexual weakness which had been complained to him by the letter written to him by his mother-in-law. This reference to weakness according to him is as a result of cough and fever from which he was suffering from 1958 onwards. It will thus be seen that the case of the respondent is that P.W. 3/1 only referred to his cough and pain in the chest which the doctors told him might lead to pleurisy. He would have us believe that he was referring to this illness and the same had nothing to do with the sexual disability or weakness. It is, however, relevant to note that in support of his allegation that this letter referred to his cough and pain, he has not produced any evidence. According to him, Dr. Kapur was one of the doctors who attended on him at Bhopal but he has not been produced. The respondent also stated that he had been *hospitalised* at main hospital at Bhopal for 2/3 weeks but no proof even of this has also been given. Even though he states to have remained on leave during the period he was in hospital, no evidence has been given with regard to that also. It is impossible to believe that the respondent who is a Government servant if he had been *hospitalised* and on

leave, would not have been able to produce this evidence which was easily available and which would have supported his case beyond any doubt that the reference to the weakness in Ex. P.W. 3/1 was to a pleurisy or cough and not to sexual weakness. The evidence of R.W. 1 is worthless as he alleges to have treated the respondent for cough pain in 1960, but is not even in a position to indicate what medicine was supplied. It does not stand to reason that any mother-in-law or the wife will make any grievance or complaint to a man suffering from pain or cough which are normal ailments in any one's life. The manner of writing of Ex. P. W. 3/1 and the apologetic tone of it and the reference to the weakness clearly supports the case of the appellant that the reference was to nothing else but to sexual weakness of which complaint had been made by the petitioner as well as by her mother. As a matter of fact the Additional District Judge after referring to this letter was convinced and gave a finding that it can be safely concluded that both in 1958 and 1962, the respondent had suffered from some sort of sexual weakness and had been taking treatment to regain virility and that it is reasonable to believe that the appellant left the respondent in 1963 because she was not satisfied by his sexual performance and also that he was weak to such an extent that he would suffer emission quickly after penetration and thus leave her in the bed without her having ever enjoyed orgasm. The learned Single Judge did refer to this letter. He has not disagreed with the findings of the Additional District Judge but has taken the view that as this letter was written in 1962 after the son had been born and even if it be assumed that the respondent had become weak at some time, there was no warrant for assumption that he was impotent either at the time of the marriage or at the time of the presentation of the petition and therefore, the so-called admission of the facts do not help the appellant.

It will, thus be seen that both the courts below have accepted the plea of the appellant about the sexual weakness and disability of the respondent and have rejected the case of the respondent that the reference in the letter was to cough and chest pain. The learned Single Judge, however, observed that apart from the statement of the appellant there is no other evidence on record about this allegation of sexual weakness. With respect, we cannot agree. There is the evidence of the mother who has deposed that the appellant had talked to her in 1958 on which she had complained to the respondent and had also written a letter to him. Ex. P. W. 3/1 which is written by the respondent to the mother-in-law, also corroborates this version of the mother that this complaint of weakness of respondent had been mentioned to her by the appellant in 1958.

12. The counsel for the respondent, Mr. Tandon, however, contended that the story of sexual weakness of the respondent was a mere concoction. According to the learned counsel, the parties led a very happy and normal life right till April 7, 1965, when some disputes arose between the respondent and the father of the appellant on account of the money which had been lent by the

respondent to the father-in-law. The suggestion is that because the respondent demanded his loan back, the whole family including the appellant resented this with the result that the present petition has been filed. Great stress was laid by Mr. Tandon on the incident of April 7, 1965, which according to the evidence of respondent himself related to his asking back a loan of Rs. 10,000/- which he had advanced to the appellant's father in 1956. The respondent as R.W. 4 has deposed that when he was discussing his financial difficulties with the appellant, his mother-in-law came and told him to stop asking for the payment of money. As there was shouting, the grandmother of the appellant also reached there and this was not liked by the appellant and the parents and because of this incident there was a sudden change in the behavior of the appellant and her parents towards him. He has also produced a statement of account allegedly showing the interest which was paid by the appellant's father to him on account of the loan deposited with him. Shri Yudhistar Lal Bahal, P.W. 4, is the father of the appellant, who has denied that he had borrowed Rs. 10,000/- from the respondent. According to him, the amount which had been deposited with them had been deposited by the appellant out of her own savings. According to him, the interest which was paid on this amount to the respondent was due to the fact that the appellant had asked him to pay interest so that the respondent will leave this deposit un-disturbed. According to him the interest was paid out of capital. It is denied that the trouble had arisen because of any dispute on this money. According to the appellant, the dispute of April, 1965, arose because she protested to the respondent about the irregular remittance of money and his omission to send her railway fare. We were referred to Ex. R-24 dated April 4, 1964, written by the respondent to his father-in-law intimating to him that he would like to withdraw the amount in installments and letting him know as to how much time it will take. Ex R-18 dated May 19, 1966, is a letter written by the mother of the appellant to the respondent informing him that he had asked for the money but the same was required by the appellant and had been sent to her as he did not send her any money for maintenance. Ex. R-21 dated May 20, 1966, is from the respondent written to his father-in-law asking him if he could spare Rs. 1500/- as he needed it on account of the scooter, which he expected to be delivered soon. Another letter Ex. R-75 dated May, 20, 1966 written to the mother-in-law again complains that the respondent has not been sent Rs. 1500/-; it also repudiates the suggestion that he has not been sending money to the appellant for her requirement when studying at Bombay. The fact that the respondent was sending some money to the appellant when she was studying in Bombay has also been admitted by her though her complaint is that it was irregular and was not sufficient. We are not called upon in these proceedings to determine whether the deposit with the appellant's father was made by the respondent of his own money or whether the money had been deposited by the appellant. We referred to these letters only for the purpose of dealing with the

argument of Mr. Tandon that the whole controversy and dispute between the parties has arisen on account of the demand of money made by the respondent, Mr. Tandon also sought to make much of the fact that in the letters which were written by the appellant to respondent at the time when she was studying during her stay at Bombay. Exs. R-42 to R-74 show a distinct attitude and difference in the language of the letters written prior to April 7, 1965 and subsequent to April 7, 1965.

In this connection, he pointed out to us that the letters from Ex. R-63 which is dated April 25, 1965 to Ex. R-74 omit the words 'Dear Bali' at the heading of the letter while letters prior to this date start with 'Dear Bali'. The suggestion is that this shows that the whole trouble between the parties had arisen on account of the money demand made on April 7, 1965, and, therefore, the story of the appellant regarding the sexual impotency of the respondent is not believable. It is true that the letters subsequent to April 7, 1965 do not bear the words 'Dear Bali'. But we do not find that that by itself is in any way conclusive of the fact that the whole trouble between the parties had arisen on account of this demand made by the respondent for money. It is pertinent to note that Ex. R-24, a letter written by the respondent to the father-in-law dated April 4, 1964, had also asked that the respondent would like to withdraw the amount in installments. Now there are letters Exhibits R-45 to R-62 from July 7, 1964, written by the appellant which still continued to address the respondent as 'Dear Bali'. If the appellant was a person who would be prepared to break her marriage just because the respondent had demanded the money it is not understood why these letters written after January, 1964, when money had been demanded by the respondent still continued to be addressed as 'Dear Bali'. We are of the view that it is not correct to read any particular significance in the words 'Dear Bali' which are of a routine mode of addresses. A reference to the letters Exs. R-42 to R-74 would show that there is only a constant refrain about two things : (1) asking for money to be sent by the respondent and pointing her helplessness without the money being received; (2) there is a natural anxiety about the condition of the son who was living with the respondent. It may be that letters written after April 7, 1965, are more formal than the previous ones; but the earlier letters do not by any manner show such deep passionate affection as to indicate that the appellant and the respondent were a very happy couple having no sexual mal-adjustments between them. The appellant has tried to explain that she was writing these letters to ensure continued remittance from the respondent. Whatever the reason it would be straining the language to hold that any of these letters are in any way destructive of the version of the appellant about the sexual weakness of the respondent. The Additional District Judge was of the view that all these letters were written to the respondent only for money and for nothing else. The learned Single Judge has referred to Exs. R-42, R-43, R-46 and R-48 in which the appellant has at one time asked the

respondent that he should write to her every week and has also offered at another place to come back and leave the studies if the respondent so desired and in Ex. R-43 she has acknowledged that the respondent loves her. But we cannot shut out eyes to the fact that the respondent was supporting her in her studies and it would be pointless and gratuitous for her to choose to completely break off with the respondent by not writing to him and thus dry up the source of the money with which she was able to continue her studies. In our opinion it is not correct to read these letters as showing that there was no sexual trouble at all between the parties and the whole thing was a mere made up story brought into existence for the purpose of this petition. It seems to us most unnatural and unimaginable to suggest that a wife anywhere in the world and more especially in India would be willing to wreck and ruin her married life simply because the husband had demanded back the money (even assuming that he had deposited it with the father-in-law). It passes one's comprehension to imagine that there would be parents so depraved and so indifferent to the happiness of their daughter that they would be a party to such a nefarious conspiracy. It could be that the incident of April 7, 1965, may have further accentuated and embittered the relations, which had already reached the breaking point.

But it is a very different argument to urge that the appellant and the respondent were a happily adjusted married couple up to April 7, 1965, when suddenly the relationship collapsed and broke down and all just because the respondent demanded his money back. We find this suggestion totally against normal human conduct and not worth credence. It is not understood, if according to the respondent the parties were a happy family prior to April 7, 1965 how this reference to weakness in 1958 and 1962 found mention and which he himself acknowledged in his own letter Ex. P.W. 3/1 written on November 26, 1962. In this connection we may refer to the letter written by the respondent to his mother-in-law Ex. R-21 dated May 20, 1966, where after referring to the incident of April 7, 1965, the respondent has written that if 'Lilly' could stay with him earlier to this date then why she could not stay with him now because (as he writes) he is now better than before. This letter was replied to by the appellant's mother by Ex. R-22 dated May 23, 1966. The mother-in-law of the respondent wrote in that letter that it was no use dragging them in between and putting blame on them as they do not figure anywhere as both the appellant and the respondent were adults and could understand their own good and evil. She has then complained to the respondent that in reality if he had been alright from the beginning all these troubles would not have arisen. She has also written that it is no use further worsening the situation and making Lilly (the appellant) miserable. The letter also carries a sentence that Lilly is miserable since years and had she been happy all these things would not have arisen. Possibly these miseries are due to deeds of the previous birth. It will thus be seen that the complaint about the unhappiness between the appellant and the

respondent due to sexual weakness of the respondent was again referred to. We thus see no reason not to believe the evidence given by the appellant with regard to sexual weakness of the respondent.

13. The question then arises whether this sexual weakness of the respondent can result in a finding of impotency. It is in this context that the appellant having borne a son to the respondent cannot be lightly brushed aside. No doubt the birth of a child is not a conclusive evidence that the marriage has been consummated, and as the House of Lords said *Russell v. Russell*,¹ that "Fecundation ab extra is admittedly, by the medical testimony, as vouched by the learned Judge in his summing-up a rare but not impossible, occurrence; but its accomplishment will depend, not only or exclusively on the proximity of the organs, but on certain other potential qualities of the particular man."

Similarly it was held in *Clarke (otherwise Talbott) v. Clarke*,² that the birth of a child was due to 'Fecundation ab extra and the marriage had never been consummated'. In that case the parties had been married in 1926 and a child had been born in 1930. The application was filed in 1942 when the husband took the plea that the marriage had not been consummated. There the learned Judge found that there had been no penetration and, therefore, it did not constitute consummation of marriage notwithstanding the birth of a child a decree of nullity was granted. That it is possible that fecundation may take place ab extra by semen encountering the vagina of the woman and causing a possible pregnancy without penetration or ordinary intercourse was accepted in *Snowman v. Snowman*,³

14. The difficulty, however, of accepting the argument of fecundation ab extra in the present case as noticed by the learned Single Judge is that this plea as such was not put forward in the pleading to explain the birth of the son. The case put forward in the pleadings was that on being confronted by the appellant as to why the respondent was not able to perform the act of sexual intercourse properly and completely, the latter undertook and promised to get himself treated and started getting some treatment. After getting some treatment he got somewhat better with those medicines and the appellant got pregnant although there was no normal and completed sexual intercourse between the parties as there was some penetration. The appellant became pregnant and the son was born in 1959. The appellant further alleged that the respondent was not cured and could not be cured and it was a temporary phase and after (that) he again could not perform the act of sexual intercourse. In evidence the appellant elaborated it by stating that she became pregnant because by the use of medicines the respondent was getting better and better but all that the respondent was then able to do was to rub his organ on her organ and get discharged in the mouth of the vagina without any penetration and that she conceived in May or June, 1958 in this manner, and not as a result of sexual intercourse. She has also stated that he had been rubbing his organ with her

organ and getting discharged without being able to penetrate the organ. The evidence thus to some extent takes a different stand from that mentioned in the pleadings. In the pleadings it was mentioned that there was some penetration but the stand now taken in the evidence is that there was no penetration at all. The case put forward in the pleading, therefore, was not that the son was born from the respondent by rubbing of his organ with her organ without any penetration and somehow the semen got inside her vagina. The comment of the learned Single Judge, therefore, that there was a variation between the pleading and evidence in that plea of fecundation ab extra was not pleaded is justified and we are in agreement with it. There is then the other matter of the medical report. It appears that the appellant by her application, dated July 8, 1968, applied to the court that the respondent may be examined in order to prove that he was impotent and that the court may appoint a board of Doctors. The respondent raised no objection and the court by its order dated 27-8-1968 directed a report of board of three doctors to be appointed by the Medical Superintendent to find out whether the respondent is sexually impotent or not. In pursuance of the court's order the Chairman of the Board of Doctors, submitted their report to the effect that the respondent on being asked to masturbate and produce semen normal erection was obtained and he ejected semen which was confirmed by microscopic examination and that in their opinion he was not impotent. The Doctors who gave this opinion were not examined as witnesses by either of the parties and the report, therefore, remains unproved and is no evidence. We cannot agree with Mr. Tandon that the report of the doctors was admissible in evidence without the doctors having appeared as witnesses in court. A reference to Order 26, Rule 10, Civil Procedure Code is not relevant because this is not a case of Commissioner having been appointed to do local investigation. All that has happened is that the appellant had asked for the examination of the respondent and he not having objected the court directed that the respondent be examined by the doctors. Opinion of these doctors would only become admissible in evidence if they had deposed in court. In *State v. Bhausia Hanmantsa Pawar*, it was held that a certificate from a medical expert was nothing more than a mere opinion of the person who purports to have issued the certificate and opinion is not evidence until the person who has given the particular opinion is brought before the court and is subjected to the test of cross-examination and that unless it is done the certificate is not evidence. As the doctors have not appeared in court in the present case, their opinion cannot be accepted as admissible evidence.

The fact, however, remains that the appellant having herself asked for the examination of the respondent by the Doctors did not pursue this matter. Even if this report was not to be taken into account it would at least show that the appellant having asked for the medical examination of the respondent to show

that he was impotent did not proceed with the matter and the respondent is justified in stressing that one mode of proving impotency has not been followed through by the appellant and this makes the allegation of the impotency not proven.

15. Impotency is the lack of ability to perform full and complete sexual intercourse. It has been accepted that partial and imperfect intercourse is not consummation and if a party (husband) was incapable of performing the sexual intercourse fully he would be in law deemed to be impotent, vide *Snowman (otherwise Bensinger) v. Snowman*,⁵ Any penetration however transient cannot amount to consummation of marriage, vide *W (otherwise K) v. W*.⁶

16. Now Section 12 (1) (a) of the Act provides that a decree a nullity can be given on the ground that respondent was impotent at the time of marriage and continued to be so until the institution of the proceedings. The parties were married in 1954 and a son was admittedly born in 1959. We have already found that it is not possible for us to hold that the birth of a son can be said to be the result of fecundation a extra because apart from anything else, no such specific plea was put forward. We have also noticed that though in the evidence the appellant has stated that there was no penetration at all yet in the pleadings it has been stated that there was some penetration when pregnancy took place. It is apparent that in order to attract Section 12 (1) (a) of the Act it has to be positively proved that the husband respondent was impotent at all material times i. e. right from the time of the marriage i. e., in 1954 and continued to be so until the institution of proceedings in 1967. The requirement is so strict that even if it could be shown that the marriage was consummated just once during this period a decree of nullity cannot be granted in terms of Section 12 (1) (a) of the Act. The burden of proving that the respondent was impotent at all material times is on the appellant. We find that evidence on record falls short where a firm finding can be given that the respondent was impotent right from the time of marriage till the institution of the proceedings in spite of the birth of a son. We, therefore, feel that in this state of evidence it would be some what hazardous to come to a conclusion that the respondent is impotent. This is not to say that we are disbelieving the overall evidence of the appellant regarding the sexual weakness of the respondent or the sexual relations and performance as deposed to by her. All that we are indicating is that though we are inclined to believe overall evidence of the appellant in this regard it still leaves a doubt wherein we cannot with absolute certainty say that there was not even one occasion when proper penetration took place during all the period from 1954 to 1967, more especially when the appellant became pregnant in 1958. It is because of this peculiar nature and circumstances of the case that we find the evidence insufficient to come to a finding of impotency. We are, therefore, inclined to agree with the view taken by the Courts below that the appellant has failed to prove that the respondent was impotent at the time of marriage and

continued to be so, on the date of the presentation of the petition. We therefore affirm the finding of the Courts below on issue No. 1.

17. Now that brings us to the question whether the appellant has proved the alternative plea of cruelty so as to get relief under Section 10 (1) (b) of the Act. Section 10 (1) (b) of the Act also provides that a decree of judicial separation may be given on the ground that the other party has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party.

18. The legal conception of cruelty is generally described as conduct of such a character as to have caused danger of life, limb or health (bodily or mental) or as to give rise to a reasonable apprehension of such danger, vide Halsbury's Laws of England, Third Edition, Volume 12, para. 514, page 269.

In *Jamieson v. Jamieson*⁷ Lord Reid states the proposition thus. 'Once it is established that physical violence is not a necessary ingredient of cruelty - and I think that that has long been recognized by the law of Scotland - then I can see no justification in principle for requiring that the deliberate acts of the defender must be of a certain character and I know of no authority which requires me to make any such distinction.'

Now the evidence of the appellant is that the respondent was quite content and enjoyed by merely rubbing his organ with her organ without being able to penetrate and thus making her miserable. We have already held that because of the birth of a child and because of variation between the pleadings and evidence on record is insufficient to hold that there was not even a single instance when any penetration took place including the time when the appellant became pregnant. But even if there may have been a couple of times when proper penetration had taken place in 1958 when the appellant became pregnant, the evidence on record nevertheless quite unmistakably proves that ever since 1958-59 and even in earlier years the respondent was so sexually debilitated that he has never been able to have proper sexual intercourse and has always left the appellant unsatisfied and miserable. As a matter of fact the appellant has stated that even in 1963 and 1964 when the respondent tried to have the sexual intercourse with her he could not do so because there was no improvement in his condition. The question, therefore, that arises is whether in view of the statement of the appellant which we find no reason not to believe that the respondent has been unable to have proper intercourse for all these years because of his inherent sexual debility the appellant is entitled to claim judicial separation under Section 10 (1) (b) of the Act. It is true that there is no suggestion that the respondent is deliberately or wantonly acting in such a manner as not to give sexual satisfaction to the appellant. It may also be accepted that the respondent has tried his best. But the fact nevertheless remains that because of his inherent physical weakness he is not able to have proper sexual relations with the appellant; the result being that every time the

marriage bed instead of being a source of pleasure and fulfillment becomes a source of misery and frustration to the appellant.

19. 'An intention on the part of one spouse to injure the other is not a necessary element of cruelty as a matrimonial offence; accordingly, in cases where the two spouses are of normal, physical and mental health, and the conduct of the respondent spouse, so considered, is so bad that the other should not be called on to endure it, cruelty is established, and then it does not matter what was the respondent's state of mind, e. g. it is immaterial whether the respondent's conduct was 'aimed at' the other spouse or due to unwarranted indifference, attributable, perhaps, to selfishness or laziness' vide *Gollins v. Gollins* ⁸ In that case what was found was that the husband did little or nothing to help the wife and though he was incorrigibly and inexcusably lazy, the evidence did not show any wish on his part to harm the wife nor was he aggressively unkind to her, and yet the House of Lords held that the wife was entitled to a decree on the ground of cruelty even if the husband may not have intended to be cruel. Same proposition was reiterated in another case of *House of Lords Williams v. Williams* ⁹ In that case Lord Pearce observed as follows :-

"The dissolution or permanent interruption of a union which is in theory life-long and indissoluble, cannot be justified by any way logic. But the frailties of humanity produce various situations which demand practical relief and the Divorce Acts owe their origin to a merciful appreciation of that demand. Any extension of the area of relief has always been advocated on the ground that there are situations of hardship that must be alleviated. But in the Divorce Acts there is nothing that suggests an intention to punish."

In that case wife was granted a divorce on the ground of cruelty and it was held:

"Insanity of a respondent spouse (in terms of the M'Naughten rules, proof that he or she, owing to disease of the mind, was unaware of the nature and quality of his or her acts, or if aware of that, did not know the acts to be wrong) is not necessarily a defence to a suit for divorce on the ground that the respondent treated the petitioning spouse with cruelty'.

20. In *P. (D) v. P. (J)* ¹⁰ It has been held that:

'the fact that the wife could not control her psychological inhibition did not in law negative the fact that her conduct in consistently depriving the husband of normal sexual intercourse and the opportunity of becoming a father was unendurable and, as it seriously affected his health, constituted cruelty.'

In *Evans v. Evans* ¹¹ husband was granted a decree on the ground of cruelty on the finding that the conduct of the wife in refusing to have intercourse was grave and weighty matter and did have an adverse effect on the husband's health, and consequently amounted to cruelty.

In *White (otherwise Berry) v. White*, ¹² though practice of coitus interruptus by the husband was not held to entitle the wife to a decree of nullity she was

nevertheless held entitled to a decree of dissolution on the ground that this practice constituted cruelty in law as it was undermining the health of wife.

21. Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any willful refusal by the respondent; this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty. Prior to Gollin's case 1963-2 All England Reporter 966 in 1963 the Courts in England had been taking the view that unless cruelty was aimed at by either of the parties the same would not amount to cruelty. But that is no longer a correct view and therefore, subsequently the Courts have proceeded on the basis that it is not necessary to prove the culpability of the respondent in order to hold him guilty of cruelty. What has to be found in each case is whether the act is such which the complaining partner should not be asked to endure. The Court of appeal in *Sheldon v. Sheldon*,¹³ granted a decree to the wife on the finding that the husband's persistent refusal of sexual intercourse over a long period without excuse, caused a grave injury to the wife's health and amounted to cruelty on his part. Lord Denning observing that:

'the categories of cruelty are not closed. The persistent refusal of sexual intercourse is not excluded.'

22. In the present case the marriage took place in 1954. Barring the pregnancy in 1958 which according to the appellant was the result of part improvement, right from the day of marriage till 1964, there has never been any normal sexual life, and the respondent has failed to give sexual satisfaction. The marriage has really been reduced to a shadow and a shell and the appellant has been suffering misery and frustration. In these days it would be unthinkable proposition to suggest that the wife is not an active participant in the sexual life and, therefore, the sexual weakness of the husband which denied normal sexual pleasure to the wife is of no consequence and therefore, cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favorable influence on a woman's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage than disappointments in sexual intercourse.

23. The appellant is only in mid thirties. To force the appellant to this life of

frustrating and unsatisfied sexual life which would inevitably damage her health both mental and physical, is nothing but cruelty. The Additional District Judge found that the respondent in 1958/1962 had suffered some sort of sexual weakness, the appellant was not satisfied by his sexual performance and that he was weak to such an extent that he would suffer emission quickly after penetration and thus leave her in the bed without her having ever enjoyed orgasm and that perhaps the desired result could be achieved by mutual understanding and necessary encouragement and stimulus to the respondent and he went on to hold that from this appellant developed extreme hatred against the respondent though the respondent's own weakness was partly responsible for it and that is why she did not care to provide any stimulation to the respondent. He then took the view that the marriage bed could perhaps be a happy bed if instead of putting the respondent to shame and telling him after his failure as to why he had harassed her, she had used language of love and encouragement. It is a little difficult to appreciate what exactly the Additional District Judge was suggesting. If as he found that the respondent was sexually weak and was not able to satisfy the appellant in the normal way it is difficult to appreciate the suggestion that appellant should have given necessary stimulation. It is nobody's case that the respondent was not able to have sexual intercourse with the appellant because of any inhibition or repugnance shown by the appellant. On the contrary it is the case of the appellant, which we are accepting that it was because of sexual weakness of the respondent that he was not able to have normal sexual intercourse. In that view the suggestion of the Additional District Judge that even though the husband was sexually weak she should have provided stimulation to the respondent can be answered best in the words of Pearce, J. in *L. v. L*¹⁴ wherein it was held that in most nullity cases there comes a moment when the most forbearing wife becomes sickened by the role, so unnatural to a sensitive woman of trying to stimulate an impotent spouse sufficiently to enable him to achieve penetration. The learned single Judge referred to the letters Exs. R-42, R-43, R-46 and R-48 written by the appellant from Bombay to the respondent to hold that there was no love lost between the two till that stage which would not have been the case if the appellant had developed dislike for the respondent which is sought to be made out as a mental torture of the magnitude that should be held to amount to cruelty. With respect, it seems to us that the finding of mental cruelty on the ground that the respondent was not able to have proper sexual intercourse with the appellant is not rebutted by a reference to these letters. Those letters at the most show that the appellant was writing in a routine and polite manner. It does not follow that since no complaint was made in the letters about the sexual weakness of the respondent it must be taken that there was no mental torture and that the version of the appellant is an afterthought. Ex. P. W. 3/1 clearly negatives that assumption. It is also relevant to note that even during the time

when the appellant was at Bombay she had gone and stayed in holidays with the respondent in 1963 as well as 1964 in the hope that the respondent might have improved but had unfortunately found the respondent sexually weak as before. As the respondent because of his sexual weakness remained unable to have normal sexual intercourse, the mental torture and danger and apprehension to the health of the appellant was inevitable and the finding of cruelty inevitably follows. Learned single Judge has also opined that social disparity between the two is the root cause of trouble. We cannot agree. The mere fact that the appellant has now got an independent job does not mean that she would want to break her marriage without any reason. The job (though paying her somewhat more than the respondent) is an ordinary kind of job which does not in any manner add to her social status or standing in society. The respondent holds a reasonably good job and is better qualified than the appellant.

Had there been no such sexual weakness of the respondent we cannot believe that the wife would have gone to a Court of law simply because she has now got an independent job. There is no material on record to so hold and we feel that this finding of the learned Judge cannot be sustained on the material on record. We are therefore, constrained to hold that the courts below were not right in holding that the appellant has failed to prove the plea of cruelty. We are of the view that the appellant has successfully proved that the respondent has treated her with such cruelty as to cause a reasonable apprehension in the mind of the appellant that it would be harmful and injurious for the appellant to live with the respondent. The appellant would, therefore, be entitled to a decree of judicial separation under Section 10 (1) (b) of the Act. Issue No. 2 is, therefore, decided in favor of the appellant.

24. On issue No. 4 the Courts below have held that the petition filed by the appellant in 1967 is belated because according to her she had come to know in 1957 that the respondent was impotent and that there is no satisfactory explanation for the delay in filing the petition. The Courts below have taken the year 1957 because according to the appellant it was in that year when Shashi her cousin sister came and stayed with her and that she came to know that the husband was not able to have proper sexual intercourse with her because of sexual weakness. Her evidence is that her relations were against the filing of this petition in a Court of law. Her mother who has appeared as P. W. 3 had also stated that the appellant had been mentioning sometime to file the petition but she had been dissuading her for a variety of reasons but now when the appellant has become independent she had taken her own decision. It is also stated that it was on account of the fear of bad name to the family that the appellant refrained from taking any action against the respondent earlier. One of the factors mentioned in this connection was that there were two sisters of marriageable age of the appellant and hence the reluctance to move in this

matter earlier. This evidence was given in September, 1968 and it was admitted that the second sister was married only four months back i. e. after the filing of the present petition in 1967. From this the Courts below have held that as the application was moved in 1967 the explanation in filing the application late is totally insufficient and, therefore, the petition was liable to be rejected on ground of delay. We are unable to agree. It should be noticed that it is not as if from 1957 when the appellant came to know of the sexual weakness of the respondent there has been a normal ordinary kind of life lived by the parties without any complaint and that the application filed in November, 1967, is so sudden and unexplained that delay should bar the relief. It is to be noticed that the appellant got a child on February, 1959. Thereafter the respondent was transferred to Andaman at Port Blair from where he came back in July, 1962. The appellant was married at the age of 16 years. A child having been born in 1959 it would be unnatural to have expected the appellant to have rushed in for judicial proceedings immediately thereafter even though she found that the sexual weakness and inability of the respondent continued during all these years. We also cannot shut our eyes to the practical difficulties and problems faced by an Indian girl when faced with the decision to break her marriage. Instances are numerous where Indian women have gone through a literal misery of marriage for years rather than go to a court of law and expose themselves to a public gaze. The attitude of the parents and relations in most of these cases is also unsympathetic. It is only when driven to extreme frustration and desperation that resort to courts is taken. In this connection reference may be made to observations in *S. v. R.*,¹⁵ (Division Bench consisting of K. S. Hegde C. J. (as he then was) and Jagit Singh J.) where an application by the wife on the ground of impotency of the husband was moved, six years after they have started living separately. The argument of delay for refusing relief to the wife was not accepted and it was observed :-

'In considering whether there was unnecessary or unreasonable delay in seeking the relief we cannot ignore the conditions of the society in which the parties lived and traditions of the families to which they belong. The Hindu society looked with disfavor dissolution of marriage. It was considered as something sinful. It requires courage to face the public odium. We can take judicial notice of the fact that even today considerable sections of the Hindu society look with disfavor the idea of dissolving a marriage.'

25. There is then the further fact that the appellant had joined Bombay school in 1963 where she was up to 1966. During that time she was obviously trying to equip herself so as to be able to face the world subsequently and be in a position to stand on her own. It would have been unnatural for her to have taken up a matrimonial battle during the time when she was without any resources. Even during this period she did make an effort if it was possible to save marriage because we have it on record that in October, 1963 and April,

1964 she had gone and stayed with the respondent but as she did not find any improvement and as the respondent continued to be sexually weak the decision to go to the Court of law was inevitably made.

26. Mr. Tandon had also sought to urge that under Section 23 of the Act even if any of the grounds exists for granting relief the Court has still to be satisfied that the petitioner has not in any manner condoned the cruelty and it is only then and in such a case but not otherwise that the Court can decree such a relief. The argument is that as the appellant came to know in 1957 onward that the respondent was sexually not able to perform proper sexual intercourse and as the ground of cruelty is based on that the application which is now brought in 1967 would show that the appellant had condoned the cruelty. In our view this ground has no force. The cruelty that may be a matter of being condoned within Section 23 may be the acts of the physical cruelty which after their occurrence may be condoned by the parties living together from which an inference may be drawn that that particular act of cruelty had been condoned and, therefore, if subsequently an application is brought on the ground of that act of cruelty the Court will have to see whether the cruelty which has taken place earlier and which is now made the basis of the petition has not been condoned by the subsequent act of the parties. In the present case the cruelty that is the basis of the petition is based on sexual weakness of the husband and his inability to have sexual intercourse with the appellant. This kind of mental cruelty is a recurring and ever present one. On our finding that the respondent is sexually weak to an extent where there is no normal sexual intercourse it is apparent that cruelty is persisting for all these years and the grievance of the appellant is not based on something in the remote past but is based right upto the time in 1964 when the respondent was found in the same unsatisfactory condition. Condo nation must mean cohabitation under one roof but as by the very nature of plea that there is no normal sex life between the parties no question of condo nation can arise.

27. Mr. Tandon had referred to *H. v. H.*,¹⁶ for the proposition that a party cannot approbate or reprobate and we have held that he would be entitled to relief for approbate in marriage. The Division Bench in AIR 1968 Delhi 79 has not accepted that the proposition of approbate and reprobate is applicable under Hindu Marriage Act. Even otherwise this case is distinguishable. In that case what had happened was that the wife brought her application for nullity on the ground that the husband was impotent but that application was compromised and the application was got dismissed? She subsequently brought another application on the same ground. It was in these circumstances that it was held that having regard to the dismissal of the former petition she was not competent to maintain the petition again. It is apparent that that case has no relevancy to the present case.

28. Delay in order to defeat a party must be such a delay which will operate as

bar to the ground of relief under Section 23 of the Act, that is, the delay which could be described as either unnecessary or improper or as culpable delay. It really means the delay for which some blame can be attached to the party guilty of delay, vide *Smt. Laliyamma v. R. Kannan*,¹⁷

In *Dr. Niranjan Dass Mohan v. Mrs. Ena Mohan*,¹⁸ it was held that the delay by itself is no bar to the grant of relief.

In dealing with the question of delay in England, Lord Selborne in *G. v. M.*,¹⁹ spoke as follows :-

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

In (*L. otherwise*) *B. v. B.*,²⁰ a decree of nullity was granted after a period of 7 years of marriage by the learned Judge finding that the wife wishes to escape from a state of things which the impossibility of sexual intercourse has rendered intolerable.

In *Clifford v. Clifford*,²¹ the husband was allowed a decree of nullity on the ground of wife's incapacity 27 years after marriage.

In the present case we find that at no time has there been normal married life between the parties. The appellant has never accepted the situation of remaining married but without having normal sexual relations. She has throughout put up with this mental torture, hoping that things might improve but finding that things remain the same, and a time had reached when she could not put up with it any longer without danger to her health both physical and mental. It appears to us that the appellant has tried over a number of years genuinely though under very difficult circumstances to make the success of the marriage but as the sexual weakness of the respondent has persisted it has obviously caused great strain and frustration to her. We have already found that sexual weakness of the husband has persisted all these years. Once that finding is given, to insist on both the parties living together would be nothing but sheer misery endangering the physical and mental health of the appellant.

29. In the present case there is no question of any culpable delay. Parties have now reached a stage where their living together would be nothing but cruelty to the appellant. In these circumstances to refuse relief on the ground of alleged delay would not be a practical and realistic approach and indeed it would be unreasonable and inhuman.

30. As a result of the above, we would set aside the judgments of the courts below and hold that the respondent has treated the appellant with such cruelty as to cause a reasonable apprehension in the mind of the appellant that it will be harmful and injurious for the appellant to live with the respondent. Thus the appellant is entitled to and we hereby grant a decree for judicial separation

under Section 10 (1) (b) of the Act in favor of the appellant and against the respondent. In view of the circumstances of the case the parties will bear their own costs throughout.

Appeal allowed.

Cases Referred.

1. (1924 AC 687 (722))
2. 1943-2 All England Reporter 540
3. (1934 PD 186).
4. AIR 1962 Bombay 229
5. 1934 PD 186.
6. 1967-3 All England Reporter 178.
7. 1952-1 All England Reporter 875 at 886
8. 1963-2 All E. R. 966.
9. 1963-2 All England Reporter 994.
10. 1965-2 All England Reporter 456.
11. 1965-2 All England Reporter 789
12. (1948-2 All England Reporter 151)
13. 1966-2 All England Reporter 257
14. ., 1949-1 All England Reporter 141
15. AIR 1968 Delhi 79
16. AIR 1928 Bombay 279
17. (AIR 1966 Mysore 178).
- 18 (AIR 1943 Calcutta 146)
19. 1885-10 AC 171 at p. 189
20. 1895 PD 275
21. 1948 PD 187