

KARNATAKA HIGH COURT

Srikant

Vs.

Anuradha

Misc. First Appeal No. 12 of 1975

(K. Bhimiah and K.A. SWAMI, JJ.)

17.07.1979

JUDGEMENT

K.A. SWAMI, J.

1. The appellant was the petitioner before the trial Court.
2. This is an appeal by the unsuccessful husband who wanted to escape from the sacred bonds of marriage on the grounds which, unfortunately for the appellant, are held to be attributable to him and not to the respondent. The trial Court has dismissed the petition in pursuance of the findings recorded by it that the appellant has failed to establish that non-consummation of the marriage was due to the impotency of the respondent, further nor was it due to any repulsive and non-co-operative conduct on the part of the respondent to effectuate the sexual intercourse, by the decree dated 25th Sep. 1972 passed in Matrimonial Case No. 7 of 1972. Before the trial Court as well as before us, it was not disputed that there was no consummation of the marriage and it was also conceded in the trial Court that the character of the respondent was not at all assailed in the proceedings. Before us also, nothing was said about the character of the respondent. The trial Court, on appreciation of the evidence, has found that the non-consummation of the marriage was not due to any impotency or repulsive and non-co-operative conduct on the part of the respondent. It has also been found by the trial court that the appellant could not effectuate sexual intercourse even though he tried one or two times during the period prior to the filing of the petition. The appellant has also admitted in his evidence that in spite of there being several opportunities for him to have sexual intercourse with the respondent, he did not try to do so.
3. Fortunately for the respondent during the pendency of this appeal, the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) came to be amended by Act No. 68 of 1976 known as the Marriage Laws (Amendment) Act, 1976 (hereinafter referred to as Act No. 68 of 1976) which came into force on the 27th May, 1976, enabling her to seek relief of divorce even as a

respondent in the proceeding under the Act. Act No. 68 of 1976 has introduced several amendments to the Act. Clause (a) of Sub-section (1) of Section 12 of the Act, has been substituted by a new clause. Clause (a) as it stood prior to Act No. 68 of 1976 at the time of filing of the petition in question, was as follows :

"that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding; or".

The new Clause (a) of Section 12(1) of the Act, as substituted by Act No. 68 of 1976, reads as follows :

"(a) that the marriage has not been consummated owing to the impotence of the respondent."

Section 13 of the Act, also came to be amended by Act No. 68 of 1976. For clause (i) in Sub-section (1) of Section 13 of the Act, the following clauses came to be substituted;

"(i) has after the solemnization of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or
(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty; or
(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or"

Further, an explanation also came to be inserted to Section 13 which is as follows :

"Explanation. - In this Sub-Section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the willful neglect of the petitioner by the other party to the marriage, and its grammatical variations, and cognate expressions shall be construed accordingly".

Act No. 68 of 1976 has also inserted a new Section 23A providing relief for respondent in divorce and other proceedings. Section 39 of Act No. 68 of 1976, makes the provisions of the said Act applicable to the pending proceedings. The said Section reads as follows :

"(i) All petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the Marriage Laws (Amendment) Act, 1976, shall be dealt with and decided by such Court -

(i) if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be, as if it had been originally instituted therein under the Hindu Marriage Act, as amended by this Act;

(ii) if it is a petition or proceeding under the Special Marriage Act, then so far as may be,

as if it had been originally instituted therein under the Special Marriage Act, as amended by this Act.

(2) In every petition or proceeding to which Sub-section (1) applies, the Court in which the petition or proceeding is pending shall give, an opportunity to the parties to amend the pleadings, in so far as such amendment is necessary to give effect to the provisions of Sub-section (1), within such time as it may allow in this behalf and any such amendment may include an amendment for conversion of a petition or proceeding for judicial separation into a petition or proceeding as the case may be for divorce".

4. In the light of the amendment effected by Act No. 68 of 1976 to the Act, the respondent filed an application on 22-9-1978 seeking relief under Section 23A read with Section 13(1)(ia) and (ib) as introduced by Act No. 68 of 1976, on the ground that the marriage has not been consummated due to refusal and inability on the part of the appellant to have sexual intercourse with the respondent and also on the basis of the finding recorded by the trial Court that the appellant has failed to prove that the respondent was impotent at the time of the marriage and that she continued to be so till the institution of the proceedings and the refusal to consummate the marriage on the part of the appellant amounted to cruelty within the meaning of Section 13(1)(ia) of the Act; that the appellant having given the evidence to the effect that he is not prepared to stay with the respondent and her stay in the house of the appellant was detrimental to the physical condition of the appellant and as such, the appellant has deserted the respondent at least from the month of July 1972 and that both of them have not lived together from July 1972, therefore, the appellant has deserted her for a continuous period of more than two years and as such, the respondent be granted relief under Section 23A read with Section 13(1)(ib) of the Act. This application came to be allowed on 4-12-1978 and the respondent was allowed to raise the plea mentioned in the application and to claim the consequential relief. The appellant was permitted to file his objections if any, to the relief claimed by the respondent in the aforesaid application. The appellant has not filed any objection to the relief claimed by the respondent under Section 23A read with Section 13(1)(ia) and (ib) of the Act.

5. It was not contended before us that in the present proceeding, the respondent cannot be granted a decree of divorce under Section 23A of the Act, even on the establishment of the grounds falling under Section 13(1)(ia) and, (ib) of the Act. Therefore, it is not necessary for us to go into that question.

6. The trial Court took up the case for trial after the efforts for reconciliation met with failure. In this appeal also, the efforts for reconciliation were made, but the same were not fruitful as the, appellant did not appear before us and we were told that appellant's whereabouts were not known to his Counsel, therefore, the appeal was heard on merits. The trial Court, on consideration of pleadings and the evidence adduced in the case, has held that there was no collusion between the parties. We are also satisfied that there is no collusion between the parties.

7. At the outset, Sri S.G. Sundara Swamy, the learned Counsel appearing for the appellant, fairly

submitted that if this Court were to come to a conclusion that the ground under Section 13(1)(ia) and (ib) are established by the respondent, she will be entitled for a decree of divorce under Section 23A of the Act, and the same may be granted to her.

8. It was not shown before us that the finding recorded by the trial Court that the appellant has failed to establish that the non-consummation of the marriage was due to the alleged impotency and non-co-operative and repulsive conduct on the part of the respondent, is vitiated in any manner. Similarly, it was also not shown before us that the findings recorded by the trial Court that the appellant has tried twice to effectuate sexual intercourse with the respondent and could not do so and that thereafter, he did not make any attempt to have sexual intercourse with the respondent even though he had opportunities to do so, and that the health of the appellant was also not good, are vitiated in any manner. Therefore, for the purpose of finding out as to whether the respondent is entitled for a decree of divorce under Section 13(1)(ia) and (ib) read with Section 23A of the Act, we shall proceed on the basis of the findings recorded by the trial Court and accordingly, the following points arise for consideration :

(1) Whether the respondent has established cruelty and desertion as per the provisions contained in Section 13(1)(ia) and (ib) of the Act ?

(2) If so, whether the respondent is entitled for a decree of divorce under Section 23A read with Section 13(1)(ia) and (ib) of the Act ?

9. Point No. 1 : As already pointed out, it was not disputed before us as well as before the trial Court, that there was no consummation of the marriage between the appellant and the respondent till the institution of the proceedings under the Act, and also the finding of the trial Court that this failure to consummate the marriage was not owing to the alleged impotency, non-co-operation and repulsive conduct of the respondent as contended by the appellant.

10. Cruelty and desertion were grounds provided for judicial separation under the Act as it stood prior to the Act No. 68 of 1976. Now, as a result of the 1976 Amendment (Act No. 68 of 1976), cruelty and desertion apart from being the grounds for judicial separation have also been made the grounds for divorce under Section 13 of the Act. The legal concept of cruelty in matrimonial offences is not confined to positive acts of causing physical injury by one spouse to another. Without there being a physical injury, there can be cruelty in a greater degree. 'Cruel' means, 'Cruel', in the ordinary sense of the term, it has no esoteric or artificial meaning. There may be cruelty without an intention to injure. Failure to comply with one of the essential obligations of the marital life by the husband would amount to subjecting the wife cruelty. It is one of the essential and principal obligations on the part of the husband to satisfy the sexual urge of his wife which is a natural instinct. Married life without a sexual life will be a curse to the wife. Thus, failure to or inability to or refusal to effectuate the sexual intercourse by the husband without any reason on the part of the wife, would amount to subjecting the wife to cruelty. Although the term "cruelty" is not defined by the Act and to define the said expression is to limit its application which is not advisable inasmuch as it is not at all possible to comprehend the human conduct and

behavior for all time to come; but it may safely be stated that any conduct of the husband which causes disgrace to the wife or subjects her to a course of annoyance and indignity amounts to legal cruelty. False accusation would also amount to cruelty as the same will lead to mental torture. In the instant case, the husband (appellant) came forward with a false plea of impotency, repulsive and non-co-operative conduct on the part of the respondent and he ultimately failed to prove the same. Thus, in the instant case, the husband (appellant) has not only come forward with false allegations against the respondent affecting her womanhood, but as per the evidence on record which establishes beyond doubt that the appellant has not been able to effectuate sexual intercourse because of his inability and incapacity to do so and as a result of this, the marriage has not been consummated so far. There is no remedy to this malady. If the marital tie is to continue, the wife has to suffer this throughout her life. This nothing but subjecting her to a constant mental torture, thereby affecting her health. The appellant has failed to discharge the essential marital obligation of providing a sexual union which is a foundation of the marriage. The respondent is just about 30 years old and to compel her to lead the marital life without sexual union is nothing but subjecting her to a cruelty. The respondent has been deprived of the sexual life which is one of the essential requirements to lead a happy married life. This was not due to any inhibition or repugnance shown by the respondent. On the contrary, the evidence in the case discloses that the respondent tried many a time to have sexual union and the appellant, though tried twice, could not effectuate the sexual union and thereafter, he did not respond to the several attempts made by the respondent to have sexual union. Therefore, it is established in this case that the failure to lead a sexual life was due to the inability and incapacity and the sexual weakness of the appellant. Whether it is by sexual weakness or by refusal on the part of the appellant to have sexual intercourse with the respondent, would not make any difference in law inasmuch as the result is that the respondent is deprived of the sexual life due to inability on the part of the appellant to effectuate the sexual union. The result is, there is nothing but frustration to the respondent and thus she has to suffer throughout her life if the marital tie is to continue. This is nothing but subjecting the respondent to disgrace and it will have adverse effect upon her mental condition and thereby it will adversely affect her health. Thus, we are of the opinion that the evidence in this case establishes that the appellant has treated the respondent after solemnization of the marriage, with cruelty. In this regard, the following passages from the decision of the Delhi High Court in the case of *Mrs. Rita Nijhawan v. Balkishan Nijhawan*, reported in¹ are very pertinent and do support our view, and the same are as follows :

"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 (HL) 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*², 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 pRegulation ncy 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

¹ AIR 1973 Del 200

²(1966) 2 All England Reporter 257

misery and frustration. In these days it would be an 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".

11. On the facts and circumstances of the case, it must also be held that the respondent, has established desertion as required by Section 13(1)(ib) of the Act. The explanation to Sub-section (1) of Section 13 as quoted above, makes it clear that the wilful neglect by one of the parties to the marriage to the other party would amount to desertion. In this case, it is not disputed that since the year 1972, the appellant and the respondent have not lived together and further even though the respondent submitted before the trial Court that she was ready and willing to go with the appellant and to lead a marital life with him, the appellant refused to take her back and live with her. Thus, it shows that the appellant has had no intention to live with the respondent and to lead a marital life and this state of affair has been continued for over a period of more than two

years prior to the filing of the application by the respondent seeking relief under Section 23A of the Act. The period of two years as mentioned in Section 13(1)(ib) of the Act, is to be counted from the date preceding the date of presentation of the application by the respondent seeking relief under Section 23A of the Act inasmuch as by introduction of Section 23A of the Act, the respondent for the first time has been enabled to claim relief of divorce in the proceeding under the Act. As such, the relevant date, for the purpose of computing the period of two years as per Section 23(1)(ib) of the Act, will be the date of presentation of the application by the respondent claiming relief under Section 23A of the Act. Further, for desertion, it is not necessary that one or the other parties should actually depart from the matrimonial home. If there is a complete abandonment of all matrimonial duties, desertion can be inferred. Desertion is not from a place but from a state of things. In the instant case, apart from the fact that or more than two years continuously prior to the filing of the application by the respondent seeking relief under Section 23A, the parties have not lived together, the appellant has not made any effort to take back the respondent and live with her and has even during the period when they lived together, failed to discharge the marital obligation as stated in the preceding paragraphs.

12. The evidence in this case discloses that the respondent has established all the essential ingredients of desertion. The factum of separation for a period of more than two years continuously from the year 1972 by the appellant has not been disputed. The intention to bring cohabitation permanently to an end (*animus deserandi*) has also been established inasmuch as the appellant, has, in unequivocal terms, refused to take back the respondent and to lead a married life with her even though the respondent unconditionally expressed her willingness to go with the appellant and to live with him and to lead a married life. The refusal on the part of the appellant to take back the respondent is without any reason and that being so, the appellant has no intention to continue the married life with the respondent. Further, as already pointed out, this State of affair has continued for over a period of two years. Thus, we hold that the respondent has established the desertion as required by Section 13(1)(ib) of the Act. Accordingly, point No. 1 is answered in favour of respondent.

POINT No. 2

Section 39 of Act No. 68 of 1976, which has already been quoted above, makes the provisions of Act No. 68 of 1978 applicable to the pending proceedings. Sub-section (2) of the said Section further provides that the parties should be given an opportunity to amend the pleadings to give effect to amended provisions. The appeal being the continuation of the original petition, the amendments effected to the Act by Act No. 68 of 1976 are applicable to the appeal also. Accordingly, the respondent was allowed to amend her pleas. Therefore, the respondent is entitled to invoke the provisions of Section 23A of the Act as introduced by Act No. 68 of 1976. Section 23A provides that the respondent, apart from contesting the petition, can also seek relief on the ground of petitioner's adultery, cruelty and desertion and if any one of those grounds is proved by the respondent he or she as the case may be will be entitled for the relief under the Act

to which he or she should have been entitled if he or she presented a petition seeking such relief on that ground. Section 23A of the Act, is a solid step taken by the Parliament in resolving the matrimonial causes by enabling both the parties to seek them in one and the same proceeding. In the instant case, the respondent has sought for relief of divorce on the ground of cruelty and desertion on the part of the appellant and as per the findings recorded by us in the preceding paragraphs, the respondent has established these two grounds. Therefore, we hold that the respondent is entitled for the relief under Section 23A of the Act. Thus, point No. 2 also is answered in favor of the respondent.

14. In view of the findings recorded by us on points Nos. 1 and 2, while dismissing the appeal filed by the appellant-husband, we grant a decree of divorce to the respondent under Section 13(1)(ia) and (ib) of the Act. Consequently, the marriage of the respondent with the appellant is hereby dissolved by a decree of divorce on the ground of cruelty and desertion.

15. In the result, there shall be a decree dismissing the appeal filed by the petitioner husband and further there shall also be a decree in favor of the respondent dissolving her marriage with the appellant by decree of divorce on the grounds of cruelty and desertion. The question of alimony is left open.

16. Having regard to the facts and circumstances of the case, we order that the parties should bear their own costs.

Order accordingly.