BOMBEY HIGH COURT

Sadanand

Vs.

Sulochana

First Appeal No. 262 of 1985

(S.M. Daud, J.)

12.01.1989

JUDGEMENT

S.M. Daud, J.

1. This appeal impugns the dismissal of a petition seeking a decree of nullity for non-consummation of marriage or in the alternative a divorce on the ground of infidelity.

2. The admitted facts are that the parties are Hindus and were married at Bombay on 22 May 1979. In the Diwali of 1979, on the occasion of Bhaubeej Festival, there was some incident leading the husband/Appellant to snatch her Mangalsutra from the neck of the wife/Respondent and also to drive her out from the marital home. The intervention of relations and neighbors resulted in reconciliation - but not for long. This is because on 23 January 1980 the appellant petitioned the City Civil Court claiming a decree of nullity on the ground that the marriage had not been consummated owing to the impotence of the Respondent. Briefly, the case set out in the petition at that stage was that the Respondent did not have normal genital organs which incapacitated sexual intercourse or that she had so strong an aversion to such intercourse in general, and in particular with him that the marriage could not be consummated. After some 3 years, the husband perusing a medical certificate tendered by the wife showing that she had normal genital organs, and, in fact was accustomed to sexual intercourse, sought and was granted leave to plead that the wife had committed an act of infidelity which entitled him to a decree for divorce. This was on the allegation that until these spouses lived together, consummation of the marriage had been rendered physically impossible by the non-co-operation of the wife and subsequent to the filing of the petition, the husband had no access to the wife.

3. The Husband's petition was disputed by the Wife who claimed that she had normal genital organs. In fact the couple had sexual intercourse on a few occasions, but these were not happy occurrences. The unhappiness was on account of the shortcoming of premature ejaculation on the

part of the husband. It was false to say that she had sexual intercourse with a person other than the husband. Appellant in fact had forsaken her. His brother and sister-in-law had made determined efforts to evict her from matrimonial home. Despite the resistance put up by her, the brother had filed a suit to evict her. That suit failed and the wife continued to live in the matrimonial home. The husband was not entitled to either a decree of nullity or of divorce.

4. Appellant had filed an application for a direction to the wife to get herself examined by a medical practitioner so as to ascertain whether she had any physical or phychological incapacity for the performance of the sexual act. Judge Guttal (as he then was) who first dealt with the application rejected it and the same was challenged by means of an Appeal from order to this Court. This A.O. was allowed and the matter remanded to the trial Court. At this stage, the wife produced a certificate issued by a Lecturer in Obstetrics and Gynaecology, Dr. S.V. Pardekar. The husband was not satisfied with this certificate and in fact has gone to the extent of alleging that the certificate was the result of impersonation and by practice of deceit upon Dr. Pardekar who had been falsely induced to believe that the person in relation to whom he had issued the certificate, was the Respondent. This was the subject matter of a heated argument before Judge Deshmukh who rejected the contention advanced on behalf of the Appellant. Against that rejection, the Appellant moved this Court by means of an Appeal from Order. The limited relief then secured by the Appellant was a mandate to the wife to examine Dr. Pardekar as a witness.

5. At the trial, the parties examined themselves - the wife also examining Dr. Pardekar. The trial Judge - Judge Cazi - held the Appellant had failed to prove the alternative allegations of impotency or the infidelity of Respondent. Appellant was held not entitled to any relief and he was saddled with the liability to pay alimony at the rate of Rs. 500/- per month as from December 1984.

6. Mr. Karlekar appearing in support of the appeal contends that the Judges mentioned above have gone wrong on all material issues. First, the husband's application for a direction to the wife that she submit herself to a medical examination by a Doctor to be specified by the Court, should have been allowed. This was the only way to bring on record reliable evidence vis-a-vis the impotency ascribed by the husband to the wife. It was not enough that the wife got herself examined by Dr. Pardekar and Dr. Pardekar had issued a certificate testifying to her potency as also her being habituated to sexual intercourse. For all we know, a normal person had impersonated the wife and prevailed upon Dr. Pardekar to issue the certificate reciting her normality. This is a very unusual submission. The wife is a poor illiterate lady, determined to maintain the marital tie, come what may. It is not possible to believe that she had the guile and intelligence necessary to accomplish the task of deceiving a Doctor or somehow winning over that person to obtain a false certificate. All that we have in support of the alleged impotency of the wife, is the conviction of the husband and that entertained by him to somehow get rid of the marital tie. Of this, the Appellant makes no secret as is evident by the following answers given by him in response to questions put to him while under cross-examination :

"At present I do not have any affection for the respondent. I therefore want a divorce and that is also because there has been no consummation of the marriage.
Q : Do you intend to get re-married ?
A : Yes.
Q. Since you want to remarry, you want divorce from the respondent ?
A : Yes.
Q : I put it to you that therefore you have given a false ground for divorce ?
A : This is not true.
Q : What is the reason for your wanting to remarry ?
A : Because the respondent did not allow me to have sexual intercourse with her.
Q : If the respondent allows you to have sexual intercourse with her, are you agreeable to have it and continue having her as your wife ?
A : No."

Nothing could be more clear than this of the determination of the husband to somehow get rid of the marital tie. It is in this background that his uncorroborated version as to the alleged impotence of the wife has to be scrutinized. Now I agree that generally there can be no insistence upon corroboration in such cases. Nonetheless, where corroboration is possible and interested testimony of the party, insistent upon getting rid of the marital tie, cannot be accepted. The husband was living with his two brothers and one of the brother's wife and children. The third brother was a T.B. patient. The accommodation available to this large family was a 10' x 10' room. The same room had to make do for residence, sleeping and cooking. In the very nature of things, privacy was not possible. Privacy was the primary requirement for a couple to have pleasant sexual intercourse. That appears to have been the cause of the unhappiness of the husband. Admittedly, the husband had taken the offensive on the occasion of Bhaubeej and it was only the intervention of others that made him relent and get reconciled to the wife. The spouses have different explanations for this occurrence. But what is important in relation to that incident, is, the husband wanting to get rid of the wife and the wife accepting the humiliation of coming back to a husband who had not only snatched away her Mangalsutra but also driven her out of the matrimonial home. So desperate was the husband to get rid of the wife that he went out of his ancestral home. In spite of this walk out, the wife continued and continues to reside in the marital home and subject herself to the ridicule and humiliation of being a person forced upon the husband's brother and wife. It is not possible to believe that a woman so suffering would have any aversion to sexual intercourse with her husband. In fact she could not afford to have any such aversion. Both the spouses were fairly advanced in age when the marriage took place and this has been testified to by the husband himself. He says that he was 35 years of age and the wife 32 years old when the marriage took place. Even the husband does not dare to say that the wife was unchaste prior to the marriage. That she possessed normal genital organs has been testified to by Dr. Pardekar. All that the husband has to say to discredit Dr. Pardekar is, that he was chosen by the wife in order to flout the very reasonable requirement to get herself examined by a Doctor to

be specified by the Court. I do not see why such a direction should have been given by the Court. Judge Guttal in his order rejecting the application very properly described the application as an insult to the wife. Women are not chattels to be subjected to all manner of directions at the instance of a deluded and obsessed husband. Dr. Pardekar has identified the Respondent as the lady whom he had examined and in relation to whom he issued the certificate at Exh. B. Exh. B shows that a careful examination of the Respondent revealed that she possessed normal genital organs and that her private parts indicated acquaintance with the sexual act. Far from accepting this as proof that his apprehensions - if they were such - were baseless, the Appellant has seized upon the document to level a charge of unfaithfulness against his blameless wife. He now came out with the allegation that she had been unfaithful to him and this was evident from the certificate issued by Dr. Pardekar. If this argument was not acceptable to the Court, there was available the suggestion that the female examined by Dr. Pardekar was not the Respondent, but someone with normal organs to deceive Dr. Pardekar. This is evidence of the husband's desperation to somehow get rid of his wife. The petition speaks of Appellant having physically examined the wife to ascertain whether she had normal genital organs. Lest it be said this is misreading the petition, I will quote the exact words therefrom:

> "The Petitioner's suspicion was thus confirmed when he himself with great persuasion examined the Respondent he was struck to find that there was malformation and structural defect in the genital organ and it was practically impossible to have any sexual intercourse with the Respondent."

That this is a falsehood is clear from the Appellant's version in his examination-in-chief, where he says : -

> "I therefore concluded that either she did not have proper vagina or that she did not have any desire to have sexual intercourse with me. However, I did not physically examine her to determine whether she had vagina or not."

To lend some plausibility to this tale, the Appellant says that Dr. Mrs. Ghanekar told him of the wife not having a proper vagina and that she had a very small hole. The Doctor has not been examined and no papers showing any examination carried out by her have been placed on record. Far from this unnerving the Appellant, his allegation is that the wife was in custody of these documents and that she has deliberately withheld them. This allegation is made on the basis of the Respondent having filed a list of documents on which she was to rely. The documents relied upon by her included blood and urine report and a prescription of Dr. Ghanekar. This does not mean that the documents relied upon by the Respondent were in her custody. If they were in her custody, she would have filed them along with the list of documents and/or produced the same. At the stage of argument it is said that Dr. Ghanekar handed over the case papers to the wife. That is not what the husband has said in his deposition before the Court. In any case Dr. Ghanekar was and I suppose is still alive. The husband's failure to examine her is crucial for

according to him she had supported his theory of there being some malformation which made the wife incapable of participating in sexual intercourse with him. It was argued, and, with some fervor, that the Appellant had married the Respondent willingly and unless there was something wrong, he would not have petitioned for the dissolution of the marriage with his wife within 8 months of the marriage. Speculation is uncalled for when the evidence shows that the sought for disruption is not attributable to any lapse on the part of the wife. Her genital organs are normal. There is no credible proof that she was averse to sexual intercourse in general or with the Appellant. As against this, the Appellant makes no secret of his wanting to get rid of his wife. He has done everything that could have been done to get rid of the wife. It is the wife who has somehow borne the humiliation inflicted upon her and refused to leave the matrimonial home. As to the allegation of infidelity, the best guarantee against the wife being unfaithful is the admitted fact of her staying in the matrimonial home, though the husband has moved out there from. Being constantly before the brother of the Appellant or members of his family, the Respondent could not have been in a position to develop any illicit connections. It was contended that the petition was filed way back in 1980, that there had been no reconciliation and there was no possibility of a re- conciliation ever taking place. Therefore, the Court should have granted a decree for divorce. Decrees for divorce cannot be granted because one party makes up his mind to blot out the marriage. Such decrees can be granted only for reasons sanctioned by the law. The husband's determination to get rid of the wife is not a ground entitling the husband to either a decree for nullity or divorce. Having regard to all these circumstances, I hold that the Court below was right in rejecting the petition.

7. This takes me to the contention that the trial Court should not have granted the relief of alimony to the wife. The argument is that this could be done only upon an application moved by the wife. The application had to be in writing and the record did not reveal the existence of any application by the wife seeking an alimony before the dismissal of the husband's petition. Section 25 of the Hindu Marriage Act, 1955, to the extent relevant reads thus : -

> "Any Court exercising jurisdiction under this Act may, at the time of passing any decree or at any time subsequent thereto, upon an application made to it for the purpose of either the wife or the husband, as the case may be, order that the respondent shall, pay to the applicant for her or his maintenance and support such gross sum or such monthly or periodical sum for a term not exceeding the life of the applicant as, having regard to the respondent's own income and other property, if any, the income and other property of the applicant, the conduct of the parties and other circumstances of the case it may seem to the Court to be just....."

The section when it speaks of an application does not specify that the same has to be in writing. An application can be in writing as also by word of mouth. The fact that the trial Court passed an order for alimony would imply that an oral application had been made to it.

8. The next contention advanced by Mr. Karlekar is that unless there be a decree in the sense of a decree for nullity of marriage or dissolution of marriage by divorce of some decree in the affirmative sense, the Court cannot grant future alimony. In support of this submission Counsel relies upon Shantaram Narkar, 63 Bom LR 676 and Shantaram Karnik, 65 Bom LR 441 . Insofar as the Narkar case is concerned, it arose out of peculiar circumstances referred to by Mr. Justice Vaze in Manilal's case (1987) 1 DMC 205 (FAO No. 612 of 1982 decided on 3 July 1986). The circumstances in Narkar's case were that the husband had made an application under Section 10(1)(b) of the Act asking for judicial separation from his wife on the ground of cruelty and desertion. Notice of the application was served on the wife and she put in an appearance. But before thy husband could lead evidence in support of judicial separation, he applied to the Court for permission to withdraw his petition, which permission, after hearing the wife was granted. The order was made on 10 August 1959 and the wife thereafter made an application under Section 25 asking for provisions for maintenance of herself and the couple's children. The trial Court having acceded to the application, the husband came in appeal to the High Court. Patwardhan, J. held that the existence of a decree was a condition precedent to the exercise of jurisdiction under Section 25(1) of the Act. If there was no decree, then the ancillary relief for permanent alimony and maintenance under Section 25 of the Act could not be available to the wife. But as Vaze, J. explains, the decree was held non-existent in the background of the fact that the very application for judicial separation had been allowed to be withdrawn and therefore, nothing remained which could be said to have been dealt with under Section 25. Therefore, Shantaram Narkar's case is distinguishable from the case here. Shantaram Karnik's case does support the view canvassed by Mr. Karlekar. There it has been held that where the petition for a decree of the nature, viz. under Sections 9 to 13 of the Act has been dismissed on merits, the opponent spouse could not be granted future alimony. Vaze, J. has taken a contrary view in Manilal's case. Mr. Karlekar submits that Shantaram Karnik's case was not brought to the notice of Vaze, J. and therefore, the decision in Manilal's case is per incuriam. Technically, that may be so. But it is not correct to say, as Mr. Karlekar says, that no reasons have been given by Vaze, J. for taking a view contrary to Shantaram Karnik's case. The learned Judge says : -

> "In contradistinction (here), there has been no withdrawal of the petition by the husband in the facts of the present case. Rather the petition of the husband was very much pending before the trial Judge and he was very much in seisin of the matter when he framed an issue about cruelty as alleged by the husband and cruelty and desertion as alleged by the wife as on today a decree has been drawn by the trial Court dismissing the claim of the petitioner and granting alimony to the wife and her daughter Teena and also granting custody of the daughter to the respondent though a claim to that effect was made by the husband. It is this decree against which the present appeal has been filed by the husband and hence I find that the ratio of the Shantaram Narkar's case would not apply to the facts of the present case."

Vaze, J. has given reasons, and, with respect, good reasons, for holding that even the dismissal of

a petition claiming relief under any of the sections from Sections 9 to 13, would constitute a decree as contemplated by Section 25 of the Act. Therefore, the fact that the petition of the petitioner spouse was dismissed would not be a bar to the granting of maintenance to the successful spouse. Mr. Karlekar says that having regard to the irreconcilable conflict between Shantaram Karnik's case and Manilal's case, I should direct a reference to a Division Bench to resolve the conflict. That is not necessary. Because there are two conflicting decisions it is the settled practice to permit the Court faced with such a conflict, to choose that what agrees with its sense of fairness. The view taken in Shantaram Karnik's case is too technical and having regard to the felt necessities of the times, I do not think that technicality should be allowed to sway any Court unless the language of the statute be such as to compel adherence to the strict letter of the law, however unfortunate the result may be. Here, depriving the respondent of the alimony granted to her would be to leave her destitute, for she certainly does not have the means to live. The only relation she has in the world is a brother who is not in a position to give her succour which I infer from the fact that she has put up with all manner of humiliation rather than take refuge with her brother. Where a woman is so defenseless, it would be a travesty of justice if technicalities prevail and deprive her of the small consolation which she has got by way of future alimony.

9. Last, Mr. Karlekar argues for reduction of the quantum of alimony. The husband has admitted that his salary is in the region of Rs. 1300/- to Rs. 1400/- per month, in addition to which he gets a yearly bonus of about Rs. 1400/- to Rs. 1500/-. This means that his earnings come to Rs. 1500/- a month. On the basis thereof, the respondent has been granted alimony at the rate of Rs. 500/- per month. I see no error in allowing the wife one-third of the husband's earnings by way of alimony. It is argued that the concern in which the appellant is working, viz. the Hindustan Lever, is under a lock-out for which reason the appellant is out of work. But this lock-out is not going to be permanent and some day the appellant will have to opt for other employment, assuming that the Hindustan Lever's lock-out is permanent. There is a no knowing the income which the appellant is earning at present. His stand will be that he is out of work and cannot get alternative employment, which is impossible to believe as he must be earning something and could not be existing on air and water. As an interim measure, he has been directed to pay maintenance at the rate of Rs. 250/- per month to the wife. This will continue until the lockout in the Hindustan Lever continues or the appellant gets alternative employment whichever event first occurs. Thereafter, i.e. once lock-out is lifted, or the appellant gets alternative employment, he will be liable to pay the difference between Rs. 250/- and Rs. 500/- and shall resume paying alimony at the rate of Rs. 500/- per month. Subject to this facility granted to the appellant, the appeal is dismissed with costs.
Order accordingly.