

RAJASTHAN HIGH COURT

Kusum

Vs.

Om Prakash

Civil Misc. Appeal No. 22 of 2005

(Rajesh Balia and R.P. Vyas, JJ.)

30.01.2006

ORDER

Rajesh Balia and R. P. Vyas, JJ.

1. Heard the learned counsel for the parties.
2. The parties to this appeal were married on 3-6-1996. On 24-6-1998, the appellant-wife filed an application under Section 13 of the Hindu Marriage Act in the Court of Judge, Family Court, Jodhpur. The grounds for seeking dissolution of marriage were stated to be that the husband and his relatives (mother and sister) treated her with cruelty. One aspect of the cruelty pleaded was continuous demand of dowry and non-fulfillment of demand of dowry by her parents resulting in cruel treatment by her husband and members of her husband's family. The specific instances of demand of dowry were pleaded that in the year 1997, demand was made for motorcycle. Demand of buffalo was also made, which was given by her father after purchasing the same for a sum of Rs. 7700/-. She pleaded that her husband demanded a sum of Rs. 50,000/- *inter alia* on the ground that his father was buying a separate plot for him. In this connection she averred that dissatisfaction about dowry resulted in insulting her. She also pleaded that on one occasion her father-in-law brought five litres of petrol and her father-in-law and husband threatened her that if she did not come back from her father's place with motorcycle and Rs. 50,000/-, she will be put to fire and propagate to be a case of suicide. When this harsh treatment was not diminished, her father came and took her to her parents' house at village Heera Desar. In this connection, it was also pleaded by the applicant that on 3-3-1998 and 9-3-1998, her in-laws, which included her husband, father-in-law and other 5-7 persons whose names have been mentioned, came to her father's place in jeep and motorcycle and they tried to forcibly take her from that place. She declined to go with them.
3. The second ground of cruelty pleaded by the applicant was that since the date of

marriage, the respondent has not tried to consummate the marriage till filing of the application on the pretext that he will discharge marital obligation when the applicant brings Rs. 50,000/- from her father's house. She also pleaded in para 5 that when the marriage was not consummated by her husband, she advised her husband that if there is any problem, a doctor may be consulted for medical treatment, but he declined. In para 6, she alleged that her husband is impotent and her husband knew about this fact, still by marrying her, he has put her into continuous mental agony.

4. At the time of filing of the application under Section 13 of the Hindu Marriage Act, a case was pending against the respondent and members of his family under Sections 498-A, 406 and 323, IPC. A copy of FIR is on the record of family Court, from which it appears that FIR was lodged on 15-4-1998. The cause of action for filing petition was stated to be that the applicant has been time and again harassed and beaten for dowry and that the husband of the applicant and the applicant have not consummated the marriage since the date of marriage till the filing of the application.

5. The respondent denied the allegation about demand of dowry and asserted that the parents of the husband have kept the applicant very well in matrimonial home and the husband has not demanded at any time. In reply to the specific instance of demand of dowry, pleaded by the applicant in para 3 of her application, specific denial of claim of alleged demand on different time was not made, but it was stated that all the allegations are fabricated, false, and unfounded, but the fact is that the applicant herself does not want to stay with her husband and therefore, these allegations have been leveled.

6. In reply to para 4, the instance of forcibly taking away the applicant from her father's house was denied specifically. They have been leveled because the wife does not want to stay in matrimonial home.

7. In reply to para 5, after making general assertion of denial, no specific denial was given about allegation that he has not consummated marriage. The averment that since marriage he has not slept with his wife and that he has not even touched her were not traversed. Though in reply to the averment that when she had suggested her husband to consult a doctor if there is any problem, it was stated by counter-assertion that he asked wife to get herself medically examined. However, the averment that wife asked the husband to get himself examined was also not denied. It was stated that when the applicant was told that she should undergo medical check-up she left the matrimonial home on 11-12-1997 by taking away jewellery given by in-laws to her and thereafter after about 4 months, a false case under Section 498-A, Indian Penal Code was reported to S. P. Jodhpur. It was also stated that demand of Rs. 50,000/- has wrongly been stated.

8. In reply to para 6, it was stated that allegation that the respondent was impotent, was denied. He has undergone medical check-up and asked the wife also to undergo medical check-up, but she did not put herself to medical check-up.

9. In para 7 of the reply, the allegations stated to have been made in the FIR which was registered under Sections 498-A, 406 and 323, Indian Penal Code were denied. With these pleadings, the respondent asked for dismissal of application and expressed his desire to keep the applicant with him.

10. Two issues were framed. The first issue was whether all the allegations made in the application about cruel treatment since marriage are true and if so whether on that basis, the applicant is entitled to decree for dissolution of marriage. The issue No. 2 was on the pleadings of the respondent whether the applicant has deserted her husband since 11-12-1997 without any reasonable cause and if so, what is its effect. The third issue related to relief.

11. After considering the material, the learned Judge, Family Court dismissed the application, finding that allegation about demand of dowry has not been proved by the appellant.

12. The other finding which was recorded by the learned Judge, Family Court was that the applicant's case is that her husband is impotent and is not fit for discharging marital obligation and by referring to the medical report submitted by the respondent came to the conclusion that the husband is not impotent. On these findings, the learned Judge, Family Court drew inference that if the applicant can allege the respondent to be impotent without any reasonable cause, it cannot be ruled out that the applicant's case about the demand of dowry may be wrong. This according to the learned Judge, Family Court was corroborated by the fact that there is no credible proof that for want of proper dowry, the applicant was harassed or tortured or given beating. Support was also drawn from the acquittal in criminal case of the respondent and his family members.

13. The issue No. 2 was decided against the applicant by holding that the applicant is living in her parents' house voluntarily without any reasonable cause. As a result of aforesaid finding, the application was dismissed vide judgment under appeal dated 22-9-2004.

14. Hence, this appeal.

15. However, the contention that was raised in support of appeal by the learned counsel is that the learned Judge, Family Court has erroneously assumed the application to be founded on the ground of impotency and incapability of her husband

to consummate marriage because of that it has resulted in mis-appreciation of material on record and mis-directing cause of application. He pointed out from the pleadings which have been referred to us in detail hereinabove it is apparent that the allegation of impotency has been referred to in the pleadings and inference has been drawn by her from the fact that the husband has not consummated marriage since the date of marriage principally on the ground that unless she brings demanded dowry or articles, he will not consummate the marriage. In other terms the state of impotency has been assumed as an inference from non-consummation of marriage since the date of marriage till the date of filing of petition.

16. The fact that the marriage was not consummated was not specifically denied by the respondent in his written statement and it has been stated in the written statement by the husband that he is not impotent and in support of this fact, he has also undergone medical treatment and is capable of consummating marriage. While making specific assertion of the fact about his potency, nothing has been stated in the written statement whether the marriage was ever consummated or he at all tried to consummate the marriage. Thus, according to the learned counsel for the appellant, one of the grounds for cruelty i.e. non-consummation of marriage must be deemed to have been admitted by the respondents. In this connection he also relied on the evidence which primarily consist of statement of herself and her husband that no effective evidence has been led by the husband to rebut the evidence led by her that marriage has not been consummated at all.

17. On the other hand, the learned counsel for the respondents while did not dispute that non-consummation of marriage amounts to causing mental cruelty on the basis of which decree for dissolution of marriage could be passed. But it was urged that in cross-examination, he has stated that he had marital relation with her wife and made statement on oath against oath and in view of surrounding circumstances, no credence can be given to the statement of applicant or at any rate, there is no re-examination on this point.

18. From the pleadings noticed by us, it is apparent that one of the grounds raised for seeking dissolution of marriage on the ground of cruelty was non- consummation of marriage by her husband. He having shown no interest to consummate the marriage, the cause of action as impotency of husband has not been pleaded as cause of action for seeking dissolution of marriage, but cause of action has been pleaded as demand of dowry, ill-treatment by her husband and in-laws on account of non-fulfillment of demand raised by her husband and her parents-in-law and non-consummation of marriage. The second cause of action specifically pleaded was non-consummation of marriage. The non- consummation of marriage is not founded on the allegation of impotency of husband and incapability to consummate the marriage. Impotency of the husband is only a fact stated in the application by way of inference drawn by the

applicant on account of non-consummation of marriage.

19. From the judgment under appeal, it is apparent that the learned Judge, Family Court has relied on the medical report submitted by the respondent to reach conclusion that husband has proved his potency, therefore, allegation of impotency is not founded.

20. In this approach, in light of the pleadings, the Judge, Family Court has, clearly erred. There is clear distinction between the allegation of impotency and conclusion drawn about impotency on the ground of alleged non-consummation of marriage at any time since marriage which was specifically stated to be on different pretext put forward by husband for refusing to discharge basic marital obligation.

21. In the former issue about existence of physical impotency takes importance. In the latter, it is consummation of marriage by the parties becomes relevant issue for enquiry, whether on the ground of impotency or otherwise. It is on the basis of this finding that further conclusion can be reached as to whether allegation drawn are groundless or whether inference drawn by the parties from the aforesaid conduct is justified.

22. In these circumstances, the material placed on record and the surrounding circumstances need to be re-appreciated in the context in which the averment of impotency has been made.

23. We have already noticed above that one of the grounds alleged against the husband was non-consummation of marriage by her husband since the date of marriage. It was not even the case of the wife that at any time, her husband wanted to consummate the marriage or parties wanted to consummate the marriage and the husband was not able to consummate. But specific plea was that the husband was not willing to discharge the marital obligation, primarily for the reason that he did not want to consummate the marriage unless demand for dowry is fulfilled. The factum of non-consummation of marriage was not specifically denied by the respondent in his written statement notwithstanding all other allegations were specifically denied. The fact that wife has voluntarily left her in-laws house was not at all an issue between the parties. In her application, the wife has clearly stated that she was fed up with maltreatment and cruelty meted out to her and her father came to fetch her and she went along with his father by her own volition. Therefore, nothing turns on the assertion made by the husband and the finding reached by the learned Judge, Family Court that the wife has voluntarily left the house of her husband. However, second part whether she has reasonable ground to leave her husband's house, as it emerges from ill-assumed pleadings of impotency, the finding thereon cannot be sustained without examining the matter further deeply.

24. Apart from specific averment about non-consummation of marriage since the date of marriage till the date of filing of the application, the respondent has at least admitted that the parties have not consummated the marriage inasmuch as from the pleadings, it is apparent that if it is to be believed in totality that this issue has arisen prior to March, 1997. The respondent himself has admitted that because of non-consummation of marriage, the wife was advised to go for medical checkup and in response, she left the marital home with her ornaments. The very fact that question about to medical examination of the wife has arisen goes to show first of all that the marriage was not consummated. In reply to this averment, the respondent has also submitted medical examination to prove that he is not impotent. The documents produced by the respondent show that on 15-4-1998, the alleged FIR was lodged against him and his parents about dowry demand for offence under Section 498-A and other provisions of Indian Penal Code and apart from alleging about dowry allegation, reference has been made that since the date of marriage, husband has not consummated the marriage and that prompted the procurement of documents Ex. 2, 3 and 4. Said reports of pathologist are dated 17-4-1998, 17-4-1998 and 15-4-1998 respectively and thereafter filing of the application for dissolution of marriage on 24-6-1998, on 17-8-1998, the respondent has approached the urologist for securing medical certificate. The promptness with which the respondent has submitted to the medical examination simultaneously with lodging of FIR in April, 1998 and then in August, 1998 after filing of the application under Section 13 of the Hindu Marriage Act goes to show that the respondent was more than keen to demonstrate that he is potent and fit for consummation of marriage, but at that stage, he has no courage to say that he has in fact consummated the marriage or tried to consummate the marriage after November, 1997. He has not responded to her wife's advice for seeking medical check up for any problem with him and made counter-advice to his wife, but has promptly come into action when complaint under Section 498-A was filed in April for proving himself potent by getting himself medically examined one after another, which could neither be subject-matter of criminal allegation nor any application under Section 13 was in existence at that time, supports the allegation of wife to the extent that the marriage was in fact not consummated.

25. The applicant in her cross-examination has repeatedly stated that the respondent-husband has not consummated the marriage and has avoided consummation of marriage on one pretext or another. However, no cross-examination was directed about the non-consummation of marriage asserted by the wife. The only cross-examination was directed against the reason why the wife has alleged her husband to be impotent, to which she clearly replied that the allegation of impotency has been made because the husband was not cohabiting with her and was himself telling about impotency and was telling that he is suffering from AIDS or like other excuses. Kind of excuses which the husband was making has been stated in the examination-in-chief, but on none of such assertion any cross-examination has been directed. This conduct

also shows that so far as non-consummation of marriage is concerned, it was not seriously disputed.

26. Much stress has been laid in one sentence coming in cross-examination of statement of husband as NAW1 stating that it is wrong to say that he was not treating his wife well and it is wrong that they are not living as husband and wife, but we had marital relationship, but at the same time notwithstanding this was main allegation in the application under Section 13 seeking dissolution of marriage was not replied to. No cross-examination of wife on that aspect was conducted and not a whisper about consummation of marriage is there in the examination-in-chief of the husband. This assertion at late stage appears to be only to retrieve the lost ground to which much importance cannot be given.

27. We have already noticed that non-consummation of marriage amounts to mental cruelty which affects mental health of the wife and furnish ground for dissolution of marriage is well settled. It is well settled principle that failure to comply with one of the essential obligation of marital life by the husband would amount to subjecting the wife to cruelty. It is one of the essential and principal obligation on the part of the husband to satisfy biological urge of his wife which is natural instinct. Married life without cohabitation will be a curse to the wife. Thus, failure to or inability of 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. Impotency of one spouse is not the only ground which may result in non- consummation. That may be case of voluntary abstinence by one spouse to discharge his or her matrimonial obligation. If one keeps oneself away from the basic fulfillment of marriage, it amounts to inflicting worse kind of cruelty affecting his/her mental health. Reference in this connection may be made to the case of *B. v. B. reported in* ¹ Lord Denning, M. R. in *Sheldon v. Sheldon, reported in* ² took a view that persistent refusal or failure or neglect to have marital intercourse would amount to cruelty. Sheldon's case was that the husband had marital intercourse with his wife for the first eight years of the marriage, but thereafter he refused to have it for six years and did not resume the same despite the warning by the wife and the doctor said that it was adversely affecting her health. The dissolution of marriage was granted that refusal to have marital intercourse for such long period would amount to cruelty. This principle has been adopted by all Courts in India. Reference in this connection may be made to the following decisions in the case of *Avinash Prasad v. Chandra Mohini*, ³ *Srikant v. Anuradha K. A. Swami*, ⁴ *Shakuntala v. Om Prakash*, ⁵ *Neelam v. Vinod*, ⁷

28. Very recently, Apex Court has occasion to consider this aspect of the matrimonial malalties (maladies). It was stated in the case of *Vinita Saxena v. Pankaj Pander* ⁸ that non-consummation of marriage by itself constitutes mental cruelty and good ground to grant divorce. In coming to its conclusion, the Court referred to *Sheldon v. Sheldon*

(supra) and approved the following observations from *Rita Nighawan v. Balkishan Nijhawan*,⁹

"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 disappointment in sexual intercourse."

29. The ratio emerging from all these cases is that failure or refusal to effectuate marital obligation without any reason amounts to cruelty.

30. As we have noticed above, the husband has refused to effectuate his marital obligations since the date of marriage without any reason is well established from the pleadings and surrounding circumstances and the case has been made out by the wife that she has been subjected to cruelty in legal sense by her husband by not consummating marital intercourse since the marriage on one or other pretext. Persistent refusal to discharge marital obligation by the husband amounts to cruelty in legal sense which provides a ground for dissolution of marriage. In our opinion this finding alone is sufficient to sustain the application under Section 13 of the Hindu Marriage Act for dissolution of marriage as claimed by the appellant-wife.

31. In view of that, we are not examining in detail the findings recorded about other instances of cruel treatment caused to the wife on account of unwarranted dowry demand. However, we take notice of the fact that the complaint lodged by the wife under Section 498-A, Indian Penal Code was *prima facie* found to be well founded after investigation and the husband and father-in-law were tried for offence under Section 498-A, IPC. The fact that ultimately they have been acquitted cannot be overemphasized for the purpose of discarding the evidence which was come on record in the application under Section 13 of the Hindu Marriage Act, therefore, the finding reached by giving undue emphasis to the fact of acquittal do not need closure scrutiny of evidence.

32. We have called the parties to the marriage in an effort to explore any possibility of reconciliation. After a great deal of conciliation proceedings, we recorded failure of reconciliation efforts on 26-9-2005. Since after about one and half year of the marriage, since December, 1997, the parties are living separately. The marriage was

not consummated when the applicant was with her husband. Since then parties are living separately for about 8 years. This shows that marriage has otherwise broken irretrievably.

33. Be that as it may in view of our finding about non-consummation of marriage by the husband without any reasonable cause having been proved and such abstinence amounts to cruelty, the application under Section 13 of the Hindu Marriage Act deserved to be allowed.

34. Consequently the appeal is allowed. The judgment under appeal is set aside and the application under Section 13 of the Hindu Marriage Act filed by the wife is allowed. It is declared that the marriage of the appellant-wife with the respondent stands dissolved and decree to that effect is passed. The appellant shall get cost of these proceedings throughout which we quantify at Rs. 10,000/-.
Appeal allowed.

Cases Referred.

1. (1965) 3 All England Reporter 263
2. (1966) 2 All England Reported 257
3. AIR 1964 All 486
4. AIR 1980 Kar 8
5. AIR 1981 Delhi 53
6. 1981 Raj LR 271
7. 1981 Raj LR 271
8. (2006 AIR SCW 1585)
9. AIR 1973 Delhi 200