

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ FAO 581/2002 & CM 1377/2002

% Date of Decision: May 7, 2013

RAVI LUTHRA Appellant
Through : Mr.I.P.Singh, Advocate

versus

REKHA Respondent
Through : Mr.S.K.Duggal, Advocate

CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. Present is an appeal under Section 28 of the Hindu Marriage Act (hereinafter referred to as 'the HMA') filed by the appellant/husband against the impugned judgment/decreed dated 9th September, 2002 by which the petition of the respondent/wife under section 12(1)(a) of the HMA has been decreed and the marriage between the parties has been annulled by a decree of nullity on the ground of impotency of the appellant/husband.

2. Briefly the facts relevant for the disposal of the appeal are as under:-

The marriage between the parties was solemnized on 11th February, 1997 at Delhi according to Hindu rites and ceremonies. At the time of marriage, respondent/wife was 23 years of age and appellant/husband was

34 years of age. Respondent/wife had alleged that her marriage was not consummated due to impotency of the appellant/husband. It was alleged that on the first night of marriage, respondent/wife fully cooperate with appellant but because of feeble erection in the male organ he could not consummate the marriage. Thereupon, appellant/husband started saying that he was feeling tired and then parties went to sleep. In the morning, the respondent/wife enquired from him as to why he could not do the sexual intercourse. The appellant/husband replied that it was a new experience for him and that everything would be all right in due course of time. The same thing was repeated for about a week and the appellant continued giving assurances to respondent/wife that everything would be alright in due course of time. For full one week, the appellant/husband could not consummate the marriage owing to his impotence. It was alleged that appellant/husband was able to produce only a very feeble erection and some little ejaculation without penetration and then it would be followed by complete collapse leaving behind a trail of agony and frustration for the respondent/wife. It was alleged that on 17th February, 1997, respondent/wife had told her elder sister Seema that appellant was not able to consummate the marriage who in turn had told the same to her mother. Both of them advised her to have patience and to wait for few more days.

3. On 14th March, 1997, appellant/husband went for tour and returned back on 30th March, 1997. Even thereafter there was no consummation of marriage and appellant/husband had assured that everything would be all right and he would get himself treated. She had further alleged that on 5th April, 1997, appellant/husband had picked up a quarrel with the respondent without any reason. On 8th April, 1997, respondent/wife was dropped at her

parental home. It was alleged that appellant/husband again went to tour and came back on 15th April, 1997. On 18th April, 1997, they had gone to Vaishno Devi. On 21st April, 1997, they had come down to Jammu where appellant had quarreled with her. On 23rd April, 1997, her parents had taken the respondent with them. It was alleged that during the period respondent had stayed in the matrimonial home, appellant was not able to consummate the marriage owing to impotency. The respondent/wife had prayed for annulment of marriage on the ground of impotency of appellant.

4. The appellant/husband had filed written statement admitting his marriage with respondent/wife. He had denied the allegations of impotency. According to him, parties to the marriage were having sexual intercourse regularly as long as they lived together and the allegations that he was undergoing treatment was baseless. The appellant had alleged that he had always been willing to live and stay with the respondent/wife but the respondent/wife was not willing due to the instigation of her brother-in-law and other family members.

5. On the pleadings of the parties, following issues were framed:-

- (i) Whether the marriage between the parties has not been consummated owing to the impotency of the respondent as alleged?
- (ii) Whether the petitioner is entitled to the relief claimed?
- (iii) Relief.

6. In support of her case, respondent/wife had examined herself as PW 1, her mother Smt.Ashok Kumari as PW 2 and Dr.Anil Mehta as PW 3. To substantiate his defence, appellant/husband had examined himself as RW-1

and his father Shri Tilak Raj Luthra as RW-2.

7. After considering the evidence of the parties and hearing learned counsel for the parties, the learned Additional District Judge has held that marriage between the parties was not consummated owing to impotency of the appellant/husband. Learned Additional District Judge has also observed that appellant/husband had refused to get himself medically examined and it was only at the instance of this court that he volunteered himself for medical examination. Even the medical report Ex.PW 3/1 was against the appellant/husband. The learned Additional District Judge decreed the petition under section 12(1)(a) of the HMA.

8. Aggrieved with the same, present appeal is filed.

9. Learned counsel for the appellant/husband has contended that burden was on the respondent/wife to prove that appellant/husband was impotent. It is contended that the respondent has failed to discharge the burden. The stand of the appellant/husband is that their marriage was consummated on the first night and thereafter it had been consummated so long as respondent/wife had lived with him. It is contended that respondent/wife has also filed a criminal case against the appellant/husband on account of harassment for dowry. It is contended that had the allegations about impotency been true, she ought to have filed petition under section 12(1)(a) of the HMA first instead of dowry harassment case. It is contended that present case is an afterthought. The medical evidence relied upon by the trial court Ex.PW 3/1 is not proper. It is contended that the method adopted by the Medical Board of LNJP hospital is not fool proof. It is further contended that a person's penile erection is affected by his being in tension as well and that appellant/husband had told at the time of his medical

examination that he was in tension. It is further contended that appellant/husband was not given enough privacy to demonstrate sustained penile erection. It is contended that 'pipe test' was not conducted upon him. It is contended that the said test is the sure test to ascertain impotency. It is contended that the only evidence on the point is the testimony of respondent/wife and her mother which cannot be believed being the interested witnesses.

10. On the other hand, the contention of learned counsel for the respondent/wife is that respondent/wife in her evidence has narrated in detail how her marriage had not been consummated. Her evidence on material points is not shaken in the cross-examination. It is contended that respondent/wife as well as her mother PW-2 have stated that on 6th May, 1997 a meeting had taken place where mother of appellant/husband was also present and in the said meeting, appellant/husband had admitted before them that he was impotent. It is contended that appellant/husband has not denied that no meeting had taken place. It is contended that 'pipe test' as is alleged is not the sure test. It is further contended that in any event no contention was ever raised by the appellant/husband at appropriate stage that 'Pipe Test' is a sure test to ascertain impotency. It is contended that appellant/husband had refused for medical examination before the trial court. It is contended that evidence of respondent clearly establishes her case. There is no perversity/illegality in the impugned judgment/decreed.

11. The material provision of the Act under which the wife had filed the application is Section 12(1)(a) of the Act which is as follows:-

“12(1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be

annulled by a decree of nullity on any of the following grounds, namely:-

(a) that the respondent was impotent at the time of the marriage and continued to be so until the institution of the proceeding:

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12. The Supreme Court in **Digvijay Singh Vs. Pratap Umari: (1970)1 SCR 559**, while deciding the issue of ‘Impotency’ has observed as under:-

“A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, as prayed for by him, he will have to establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings.”

13. A three Judge Bench of this court in **Manjula and S. Deshmukh Vs. Sijresh Deshmukh : AIR 1979 Delhi 93**, while deciding matrimonial reference has discussed the ‘impotency’ as under:-

“19. Impotence is inability to consummate the marriage and to be a ground for nullity, such inability must exist at the time of marriage and continue to exist at the time of the institution of the suit. For this purpose sexual intercourse has been defined as ordinary and complete intercourse, not partial and imperfect intercourse. If so imperfect as scarcely to be natural, it is no intercourse at all, but recent cases suggest that modern surgery has introduced the need of further scrutiny. Though it has been held that full penetration without ejaculation on at least one occasion amounts to consummation, but more recently another

judge decided that penetration for a short time. without any ejaculation, did not amount to consummation. See R.v.R. (otherwise F) (1952) 1 All. E.R. 1194 and W(orsc K) v. W; (1967) 1 W.L.R. 1554 See Latey on Divorce (1973) 15th ed. p. 225.

20. Impotency means incapacity to consummate she marriage. and not merely incapacity for procreation. The test is consummation and capacity to consummate.”

14. A Division Bench of Andhra Pradesh in **Smt.Suvarna vs. G.M.Achary: MANU/AP/0090/1979** held that impotency of spouse, husband, in particular case, vis-à-vis, the other spouse is sufficient. Total impotency need not be proved.

15. It is admitted position that marriage between the parties was solemnized on 11.2.1997. The petition for annulment of marriage was filed on 13.8.1997 i.e. immediately after six months of the marriage. It is also admitted position that parties are living separately for the past 16 years. The respondent/wife has categorically deposed that her marriage was never consummated despite the fact that she has stayed with the appellant for about 3 months i.e. upto 23.04.1997. She had spent certain nights exclusively with the appellant. She has deposed in detail in her evidence as to how she cooperated with the appellant for having sexual intercourse with him but the appellant was not in a position to consummate the marriage. She has also deposed having told the said fact to her sister as well as her mother few days after the marriage who assured her that everything would be alright with the passage of time. Her mother Smt. Ashok Kumari, PW-2,

has also deposed that the respondent had told her also that the marriage was not consummated as the appellant was not capable of consummating the marriage and she advised that she would wait and everything would be normal after some time. She has also specifically deposed that even on 08.04.1997 respondent had come to her and told that even after 2 months of marriage it has not been consummated. The respondent/wife in her evidence has categorically deposed that on 06.05.1997 she along with her mother and sister had gone to the matrimonial home and had a talk with the mother of the appellant where respondent was also present wherein the matter was discussed and appellant had admitted that whatever respondent was saying was correct. There is no cross-examination of the respondent on above deposition of respondent. Even her mother Smt. Ashok Kumar PW2 has also deposed about the meeting having held on 06.05.1997. Even she has not been cross-examined on the aforesaid aspect of the matter. The appellant examined himself as RW-1 and in his evidence has deposed that on 05.5.1997 the mother of the respondent had contacted him and they had come to his house on the next day. He has not explained in his evidence as to why the respondent's mother and brother-in-law had come on the next date of 05.5.97 or for what purpose they had visited his house. The father of the respondent that is PW-1 has denied any meeting taken place in his house on 06.5.97. In these circumstances it cannot be said that appellant and his father are speaking the truth.

16. The stand of the appellant and his father PW-2 is that the brother in law of the respondent was the main cause of separation of the parties. However, they have not given the details in what manner he was

responsible. No specific details have come in their evidence on these serious allegations. In the written statement it has been alleged that after marriage when the parties had visited the house of elder sister of the respondent, respondent had kissed the child of her sister and certain marks of lipstick had come on the face of the child and on that very place her brother in law had kissed the child. However, nothing is deposed by the appellant in his evidence. On the other hand respondent has categorically deposed that she had stayed with the appellant from 11.02.97 to 23.4.97 and thereafter she visited her matrimonial home on 06.5.97 where the meeting took place. In between the appellant had remained on tour also. During the period appellant had remained with her, despite efforts made their marriage was not consummated at all due to impotency of the appellant. Her evidence on material points is not shaken in cross-examination. It may be noticed that respondent is 10th pass and comes from middle class family. She is also not a earning woman. There is no reason why she would level false allegations against the appellant. In evidence, appellant and his father RW2 has tried to take a stand that brother-in-law of respondent is the main cause of separation. Except making bare allegations there is nothing on record to substantiate the same.

17. Considering the overall evidence, the evidence of the respondent is reliable and inspires confidence whereas the evidence of the appellant is vague. There is no impediment in law for acting upon the evidence of respondent and her mother though they are interested witnesses. The contention raised has no force.

Further the evidence of respondent stands corroborated with medical evidence Ex.PW 3/1 on record i.e. report of medical examination of appellant by the Medical Board of LNJP hospital which is proved on record by Dr. Anil Mehra PW3, Chairman of the Board. As per said report, appellant is not sexually potent.

18. In cross-examination, Dr. Anil Mehra PW3 has stated that the appellant was given two chances to demonstrate. He has stated that the penile erection of a person is affected by psychogenic factors such as fear, anxiety, tension and unfavourable circumstances and lack of privacy. He has further stated that the appellant volunteered to get himself examined. He was not under fear. However, he stated that he was under tension. In further cross-examination, he stated that good privacy such as a room was provided by curtain partition and toilet was also there. He has further stated that the curtain partition was there in the room. He has further stated that it was not necessary to examine the female where male potency was concerned. He has also stated in the cross-examination that the method adopted was not the only method to ascertain the potency or impotency of the male. He has denied the suggestion that he was influenced by the parents of the respondent. In these circumstances, the contention of the appellant that the appellant was not given adequate privacy at the time of medical examination cannot be said to have any force.

19. The other contention of the appellant is that the 'pipe test' is the conclusive test and the said test was not conducted on him. In this regard it is noticed that the allegations are of 1997. The respondent had moved an application for medical-examination of appellant before the learned trial

court on 15.7.1999. Initially, the appellant had refused. His statement dated 27.4.2000 to that effect is there on trial court record. Thereafter, with the intervention of this court, the respondent had moved an application before the Id.trial court on 19.11.2001 for his medical examination by referring him to any hospital. Thereupon the aforesaid application was allowed on 21.12.2001 and the appellant was directed to approach the Medical Superintendent of L.N.J.P. Hospital for medical examination for his potency after completion of requisite formalities. It was also ordered that appellant would get himself identified from respondent after giving her a notice. In compliance of the said order, the appellant had undergone medical-examination by the Medical Board consisting of five doctors of aforesaid hospital vide report dated 2.2.2002. Perusal of trial court record shows that on 9.8.2002 an application under Order 13 Rule 2 CPC was filed by the appellant before the learned trial court for taking on record the “Penile Doppler Study” dated 22.7.2001 i.e. the report of his medical examination from Apollo Hospital. No explanation was given before the Id. trial court as to why the alleged report was being filed at belated stage. The said application was rejected by the trial court vide order dated 9.9.2002 by observing that no good cause was given for production of said report. In the present appeal an application under Order 41 Rule 27 of CPC has been filed for taking into consideration the said report dated 22.7.2001 of Apollo Hospital and for summoning of the doctor who had examined the petitioner to prove the said report. In the aforesaid application the reasons given are that the learned ADJ had taken the copy of report on record and appellant thought that it would be read in evidence. Later he learnt that report was to be filed in original and the concerned Doctor had to be summoned for

proving the said report as such the appellant could not do needful before learned trial court. The reasoning given is contrary to record. Further the appellant was represented in trial court through an advocate. The reasons given in the application are not justified one. Further the alleged report of Apollo Hospital is dated 22.7.2001 whereas the appellant had moved an application before the learned trial court for his medical examination from any hospital on 20.11.2001. There is no mention of report of Apollo Hospital therein. The order of his medical examination from LNJP Hospital was passed on 22.12.2001. The appellant never brought to the notice of court that he had already been examined by Apollo Hospital. The report from LNJP Hospital was received by the learned trial court on 5.2.2002. Even then he did not inform the court about his alleged medical examination from Apollo Hospital. No intimation was given to respondent prior to alleged examination. There is no identification of appellant before the concerned doctor of Apollo Hospital before his alleged examination. The appellant had been keeping the alleged report for about one year and thereafter had produced at the stage of final arguments by moving an application under Order 13 Rule 2 of CPC. In these circumstances, doubt is created about alleged report. Further, the provision of Order 41 Rule 27 CPC cannot be utilized for filling up lacunas.

20. Assuming the report dated 22.7.2001 of Apollo Hospital is taken into consideration, that by itself cannot prove that appellant is potent qua the respondent. It is well settled that a person may be potent in general but he may be impotent qua a particular woman. In the present case, evidence on

record clearly establishes that appellant has not been able to consummate the marriage with the respondent, as such, he is held to be impotent qua her.

In view of the above discussion, the appeal stands dismissed.

There is no order as to costs.

VEENA BIRBAL, J

May 7, 2013
ssb/kks