

IN THE HIGH COURT OF DELHI AT NEW DELHI

% *Judgment delivered on : November 1st, 2013*

+ **MAT.APP. 24/2004**

RAMAN AGGARWAL Appellant
Through: Ms. Veena Goswami, Advocate with
appellant in person.

versus

SHWETA AGGARWAL Respondent
Through: Mr. Vishesh Issar, Advocate

CORAM:
HON'BLE MS. JUSTICE VEENA BIRBAL

JUDGMENT

VEENA BIRBAL, J.

1. By way of this appeal under Section 28 of the Hindu Marriage Act, 1955 (in short referred to as 'the Act') appellant has challenged the impugned judgment and decree dated 15.03.2004 passed by learned Additional District Judge, Delhi, in HMA Case No.534/2001 whereby the petition of the respondent/wife under Section 12 of the said Act has been allowed and the marriage between the parties has been annulled by decree of nullity on the ground of impotency of the petitioner.

2. Briefly stated that factual background is as under:-

The respondent wife had filed a petition under Section 12 of the Act

against the appellant herein i.e. husband stating therein that her marriage with the appellant was solemnised on 09.07.2000 at Delhi according to Hindu rites and ceremonies. After the marriage she had lived in the matrimonial home with appellant. She had alleged that there was no successful consummation of marriage and no child was born from their wedlock. She had alleged that the appellant was not in a position to cohabit with her due to impotency. She was also not even taken for honeymoon. She had alleged that on the first night of marriage, initially appellant avoided to come in the room. However, he had come reluctantly and told that he had been advised rest as he had suffered from jaundice and on that pretext did not cohabit with her for couple of days. It was further alleged that after waiting for few days of the marriage when respondent/wife found that the appellant was doing his other jobs and was going to office also, she tried to come near him. The appellant did some other sexual acts but was unable to do the act of cohabitation. He had also started shouting on her as there was no successful consummation of marriage. She had also alleged that on 14.07.2000 she waited till midnight and appellant came in the bedroom most reluctantly and tried to cohabit with her. Despite efforts made by him, there was no cohabitation. Again on the night of 15.07.2000. appellant came in the room but was not interested in having cohabitation. The respondent made efforts to have sexual intercourse with the appellant but could not do so. She had alleged that there was no erection in the male organ of the appellant to the extent of cohabitation. Despite efforts made by her, there was no cohabitation. The respondent had alleged that despite efforts made by her as well as by the appellant, the appellant was unable to

do sexual intercourse with her. She had alleged that because of the frustration of his own potentiality, the appellant refused to have cohabitation with her. On being insisted for cohabitation, the appellant started abusing her as he was unable to do the sexual intercourse with her. The respondent told the appellant that it was not her fault and requested him to consult some of his married friends or in the alternative to consult some sexologist or physicians who could help the appellant in cohabitating with the respondent. However, the appellant did not respond to the request of the respondent. It is alleged that appellant became aggressive and told her not to interfere in his life. It was further alleged that on 20.07.2000 the respondent had gone to her parents house on the occasion of birthday of her maternal grand father. After few days she was brought back by the appellant to her matrimonial home. Further allegations are that on 31.07.2000 again an attempt was made for consummation of marriage. However, the appellant miserably failed to perform sexual intercourse with her. Out of frustration, appellant started giving beatings to her by kicks and blows and started making allegations that she was not cooperating with him to have sexual intercourse. On that very day, he also admitted before respondent that he was unable to perform his matrimonial obligation. The behaviour of appellant, his mother was also cruel towards her. On one occasion, she had to call her maternal grand father but she was insulted before her Nanaji. Her maternal grand father took her to his home where she lived upto 13.9.2000. Again she came back to matrimonial home and lived about 20 days. Even then the appellant could not perform sexual intercourse with her. On 5.11.2000, she went to the house of her maternal

grand father as she was preparing for M.com examination. Again she was brought to matrimonial home on 4.1.2001. She lived there upto 5.2.2001. There was no co-habitation between the parties due to impotency of the appellant. Finally she came back to the house of her maternal grand father. She had prayed that marriage between the parties being voidable, be annulled by a decree of nullity due to impotency of appellant.

3. The petition was opposed by the appellant by filing written statement denying all the allegations made by the respondent. According to him the marriage was not consummated due to non cooperation and refusal of the respondent to cohabit with him. Due to non cooperation and violent nature and refusal on the part of the respondent to cohabit with him, no child was born from their wedlock. The appellant has further denied the allegations of impotency levelled against him. It is alleged that there was lot of interference from the maternal grandparents of the respondent due to which disturbances had taken place. The respondent never wanted to be a part of the family of the appellant and wanted to make the life of the appellant miserable. She had no respect for his family members. She used to leave the matrimonial home without informing anyone. The appellant had alleged that he had suffered from Hepatitis A due to which he was not allowed to drink water from outside as such he did not go for honeymoon after the marriage. The appellant had further alleged that respondent used to leave the matrimonial home on one pretext or the other and used to stay for few days in a month with respondent. He has denied the allegation of impotency in the written statement. It is further alleged that respondent left the matrimonial home of her own on 5.2.2001 with mala fide intention. He had

prayed for dismissal of her petition.

4. The respondent had filed replication to the written statement filed by the appellant denying the allegations made by the appellant and reiterating the stand taken in the petition.

5. During the pendency of aforesaid petition, an application under Section 24 of the Act was also filed by the respondent/wife before the learned Additional District Judge which was disposed of vide order dated 08.05.2003 directing the appellant to pay a sum of Rs.3000/- p.m. to the respondent as maintenance pendente lite with effect from the date of filing of the said application and Rs.5500/- as litigation expenses. Perusal of record shows that the said order was not complied with by the appellant despite opportunities given. Ultimately, his defence was struck off vide order dated 15.12.2003. Thereafter on that day the court had adjourned the matter for respondent's evidence on 06.02.2004. The respondent had tendered her affidavit by way of evidence as Ex.P-1. On 06.2.2004 the appellant did not appear and was proceeded ex parte and the matter was adjourned to 19.02.2004 for final arguments. On the said date, counsel for the respondent had argued the matter. On 19.2.2004 also appellant did not appear and his father had appeared and sought adjournment for arguments. The trial court observed that since the appellant/husband was proceeded ex parte and his defence had already been struck down, as such, the trial court reserved the matter for orders for 08.3.2004 and gave opportunity to the appellant for addressing arguments before that date.

6. On 8.3.2004 when the matter was listed for orders, the appellant had moved one application and submitted the written arguments. The learned

trial court adjourned the matter to 15.03.2004 for orders. On 15.3.2004, the appellant had moved an application for grant of opportunity to him for cross-examination of respondent. The learned trial court dismissed the said application by passing a detailed speaking order and also observed that no payment towards arrears of maintenance was paid till 15.3.2004.

7. On that very day, the learned trial court after considering the ex parte evidence of the respondent and arguments of both the parties held that the marriage has not been consummated on account of impotency of the appellant and allowed the petition. Aggrieved with the same, present appeal is filed.

8. Ld. counsel appearing for the appellant has contended that even if the defence of the appellant was struck off, an opportunity to cross examine the respondent ought to have been given by the learned ADJ. In support of his contention, ld. counsel has relied upon Modula India v. Kamakshya Singh : AIR 1989 SC 162.

9. It is contended that the trial court ought to have sent both the parties for medical examination. It is further contended that the appellant was suffering from jaundice and due to that reason, the appellant was avoiding the respondent. The ld.counsel for the appellant has contended that an application for setting aside the ex parte order was also moved on 08.3.2004, however, the said application was never taken up by the trial court. In these circumstances, the impugned judgment/decreed passed by the ld.trial court is illegal and is liable to be set aside.

10. Ld.counsel for the respondent has argued that no such application was moved. Ld.counsel submits that in para 5 of the impugned judgment, it is

mentioned that no application for setting aside the ex parte order was moved. The counsel for respondent has further contended that the appellant in the written statement has admitted that the marriage was not consummated. It is stated that evidence on record clearly establishes that the marriage was not consummated. It is further contended that complete sexual intercourse should be there to consummate the marriage. In support of his contention, ld.counsel has relied upon **A.K.Ahluwalia vs. Smt.N.Kanta: 1978 RLR 36.** Ld. counsel has further submitted that the appellant did not avail the opportunity to cross examine the respondent when the matter was already listed for PE on 6.2.2004 when the respondent had tendered her affidavit ExP1 by way of evidence. It is contended that when the matter was finally heard and was reserved for orders, the appellant had moved an application to cross-examine the respondent/wife. It is contended that the said application was not legally maintainable and was rightly rejected by the ld. trial court, as such the judgments relied upon by the appellant are of no help to him.

11. It is further contended that no corroboration in the form of medical evidence was required in the present case as the testimony of respondent has gone unrebutted and unchallenged. The unrebutted clearly establishes the case of the respondent.

12. I have heard counsel for the parties and perused the record.

13. The material provisions of the Act under which petition was filed by the respondent is section 12(1)(a) of the Act which is as follows:-

“12(1) Any marriage solemnized, whether before or

come close to the appellant, there was no cohabitation between them. In the pleadings, she has given the specific dates when the appellant had tried to cohabit with her but there was no consummation of marriage. She has also stated in the petition that due to frustration, appellant even refused to cohabit with her. In support of the averments made in the petition, respondent/wife has filed her own affidavit Ex.P1 reiterating the averments made in the petition. Respondent/wife has categorically stated in the affidavit ExP1 that there was no successful consummation of marriage. Further, it has been stated that she has noticed that appellant was avoiding to come near to her. Sometimes, he used to tell her that he was not feeling well. The appellant had also told her that he was suffering from jaundice and was medically advised not to cohabit for few days. She has further stated in the affidavit Ex.P1 that even after living together for seven months with the appellant, there was no cohabitation between with them.

16. The affidavit of respondent/wife has gone un rebutted and unchallenged as on 6th February, 2004, no one appeared on behalf of the appellant/husband and was proceeded ex parte, as such, there was no cross-examination of respondent by the appellant. Prior to this i.e., on 15th December, 2003, the defence of appellant/husband was also struck down, as noted above, due to non payment of arrears of maintenance of ₹ 80000/- along with litigation expenses of ₹ 5500/-despite the opportunities given by the learned trial court. During the pendency of the aforesaid proceedings, nothing was paid to her.

17. Learned counsel for the appellant/husband has contended that even if appellant's defence was struck down, he ought to have been given

opportunity to cross-examine the respondent. In support of his contention, learned counsel for the appellant has relied upon **Modula India vs. Kamakshya Singh**(supra).

18. There is no dispute about the proposition of law laid down in the aforesaid judgment. The perusal of the trial court record shows that the defence of appellant was struck down on 15th December, 2003. Thereafter case was adjourned to 6th February, 2004 for PE. On that day, respondent/wife tendered her affidavit Ex.P1 in evidence. The ld.trial court awaited the matter upto 2.30 pm but there was no appearance on behalf of appellant, as such he was proceeded ex parte on that day and the case was adjourned to 19.2.2004 for final arguments. On the said date, the father of appellant had appeared and sought adjournment. The ld.trial court heard the arguments of respondent/wife on 19th February, 2004 and listed the case for orders on 8th March, 2004 and it was ordered that appellant was at liberty to argue before the said date. On 8th March, 2004, an application u/s 151 CPC and written arguments were filed by appellant. On the said date, case was adjourned to 15.3.2004 for orders. On 15th March, 2004, at 2.30 pm, an application was filed by the appellant wherein prayer was made to allow him to cross examine the respondent/wife. The said application was rejected by the ld.trial court by passing a detail speaking order noting the conduct of appellant and on that very date impugned judgment was passed whereby the petition was allowed and the marriage was annulled.

19. It may be noticed that the appellant had moved an application before the ld.trial court for cross-examination of respondent when the matter was finally heard and appellant had also furnished his written

arguments and case was adjourned for orders i.e., on 15.3.2004 at 2.30 pm. The appellant did not avail the opportunity of cross-examination when it was available to him i.e., on 6.2.2004 when the case was listed for PE. Thereafter the case was adjourned to 19.2.2004 and 8.3.2004. Even on these dates, no request was made for cross-examining the respondent. Rather written arguments were submitted by appellant on 8.3.2004 wherein also nothing was stated about opportunity to cross-examine the respondent meaning thereby he never wanted to cross-examine the respondent. The appellant did not avail the opportunity within the reasonable time. In these circumstances, it cannot be said that the opportunity to cross-examine has been denied to him. The contention of the appellant has no force and is rejected.

20. As noticed, the evidence of the respondent has gone unrebutted and unchallenged. Even in the written statement, respondent has also admitted that there was no consummation of marriage. However, stand taken in the written statement is that he was suffering from jaundice due to that he was avoiding respondent. However, there is no document on record about the alleged ailment. Further after marriage, respondent remained with appellant for about seven months. It is not believable that effect of alleged ailment continued for seven months.

21. The other contention of ld.counsel for the appellant is that respondent's evidence by way of affidavit ExP1 ought not have been believed by the learned trial court as there was no corroboration to the said evidence by way of medical evidence.

22. Learned counsel for the respondent has argued that medical examination of appellant was not required nor it was mandatory for obtaining a decree under section 12(1)(a) of the Act. It is contended that every case has to be judged on the basis of its facts and evidence on record. It is contended that it is a case of non consummation of marriage and there was no denial in the written statement that the marriage has not been consummated. In these circumstances, the trial court has rightly believed the evidence of respondent and passed the ex parte decree.

23. In **Suraj Prakash Sehgal Vs. Amrita Sehgal (Darnal): 1999(82)DLT 327**, a petition for annulment of marriage u/s 12(1)(a) of the Act by a decree of nullity on the ground of impotency of the wife therein was filed. The wife therein was proceeded ex parte. The trial court had dismissed the said petition on the ground that petitioner therein had not produced the medical examination report of the wife. This court after going through the evidence on record held that the decision of the Id.trial court was not appropriate in drawing an adverse inference against the wife as the same was not necessary due to credibility of the evidence produced by the petitioner therein. It was held that the un-rebutted and unchallenged testimony of the husband was sufficient and no corroboration was necessary in the form of medical examination report of the doctor. The relevant portion of the judgment is reproduced as under:-

“8. Here is a case where specific allegations have been made by the petitioner that there was non-consummation of marriage due to respondent's refusal arising from the incapacity due to impotency. He has also stated specifically

that the marriage between the parties here to could not be consummated owing to the impotency of the respondent. He has also categorically stated in his deposition that she has refused to be examined by a Doctor so that the real cause of impotency could be known. In support of his case, he has also produced a Doctor who, although his close relation, has deposed that she talked to the respondent who told her that she had problem in having sexual intercourse as she feels painful spasmodic contractions at the time of such sexual intercourse. She has also categorically stated that she talked to the respondent for taking treatment from her which was refused by the respondent.

9. The aforesaid evidence adduced by the petitioner goes unrebutted and unchallenged. In spite of service of summons the respondent did not appear in the trial court and Therefore, the matter had to be proceeded ex parte as against her, Thus, the opportunity which was available to the petitioner to request the court for sending the respondent for a medical examination also could not be exercised due to non appearance of the respondent in the case. Thus, there was no remedy or opportunity available to the petitioner by which he could sought for an order to from the court to have the respondent medically examined in order to find out the veracity of his statement.

10. In the case of **T.Rangaswamy v. T.Aravindammual reported in AIR 1957 Mad.243**, it was held that there is no minimum standard proof necessary and that even uncorroborated testimony of the petitioner is sufficient if it can be believed. It was further held that in cases of this nature, corroboration can only be obtained from the evidence of the other party to the marriage.”

24. In the case of **Moina Khosla vs. Amardeep Khosla: AIR 1986 Del. 399**, wherein a petition of wife for the grant of nullity u/s 12(1)(a) of

the Act, the husband did not appear to contest the petition and was proceeded ex parte. The trial court dismissed the petition. On being challenged before this court, it was held as under:-

“(18) Under Section 12(1)(a), the requisite is that ordinary and complete sexual intercourse has not taken place between the parties owing to the impotence of the respondent. The words 'impotence of the respondent' would, to my mind, mean incapacity of the respondent to have sexual intercourse) The Supreme Court has said in *Digvijay Singh v. Pratap Kumari*, MANU/SC/0300/1969 : [1970]1SCR559 , that "A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility".

In the aforesaid case, on the basis of un-rebutted evidence of wife, it was held as under:-

“(23) In this case there is unrebutted evidence of the petitioner that no sexual intercourse has taken place between the parties. As no sexual intercourse has taken place between the parties, in this case, the requirements of Section 12(1)(a) of the Act are satisfied.

(24) In the above view of the matter no purpose would be served by remitting the case back to the District Judge, as in my view, there is no reason why the statement given by the wife ought not to be accepted.

(25) I am of the view that in view of her statement recorded in the court, the wife is entitled to a decree of nullity of marriage on the ground mentioned under Section 12(1)(a) of the Act and the judgment of the Additional District Judge needs to be set aside which is hereby set aside.”

25. In **A.K.Ahluwalia vs. Smt.N.Kanta: :1978 RLR 36**, this court has held that if a husband is impotent qua his wife and is unable to consummate

marriage, then the wife is entitled to annulment of marriage.

26. In the present case, respondent has categorically stated in the affidavit Ex.P1 that her marriage with appellant was performed on 9.7.2000. Thereafter there was no successful consummation of marriage between the parties. Respondent has stated that on the second day of marriage she had noticed that appellant was avoiding coming near her and told her that he was not feeling well as earlier he had suffered from jaundice and has been advised not to cohabit for a couple of days. She has stated that after waiting for three days and finding that appellant was doing other jobs and attending other works, she tried to consummate the marriage but appellant avoided to cohabit with her. In her affidavit Ex.P1 she has given details as to when she tried to cohabit with appellant but there was no consummation of marriage between them due to impotency of the appellant. She has deposed that she had stayed in the matrimonial home up to 5th February, 2001 and her marriage could not be consummated due to impotency of appellant. The evidence of the respondent has gone unrebutted.

27. The appellant did not cross-examine her and rather stopped appearing and was proceeded ex parte on 6.2.2004. Even prior to that appellant did not appear on 24.11.2003 (after lunch), 12.12.2003 and 15.12.2003. Even though ld.counsel for the appellant has contended that he had moved an application for setting the ex parte order, however, no such application is there on the trial court record. Even ld.trial court has noted so in the impugned judgment. Even before this court, counsel for the appellant also could not show from the record that any such application was filed or any request was made in this regard before the ld.trial court. The stand of the

appellant in the written statement was that he had suffered jaundice prior to marriage due to which he could not perform the act of sexual intercourse. However, he could not substantiate the same as his defence was also struck down. Further there is no document on record also about the alleged ailment. Even if he could have been given opportunity to cross-examine the respondent/wife, the same would have permitted only to point out the falsity or weakness of respondent's case. He would not have been allowed to lead any evidence of his own. Further, as noted above it is the appellant who did not avail the opportunity of cross-examination within the reasonable time.

28. As regards contention of medical examination raised by Id.counsel for the appellant, perusal of the record shows that application for medical examination of the parties was filed by the appellant on 11th February, 2003 but the said application was never pressed by him. On 8th May, 2003, an application u/s 24 of the Act for grant of interim maintenance was disposed of. Thereafter matter was listed for making payment to the respondent. Initially appellant sought adjournments for making payments and thereafter he stopped appearing. Ultimately he had appeared on 8th March, 2004 and filed written arguments wherein also he did not mention about the pendency of aforesaid application. In the above background, no corroboration in the form of medical examination was required. The contention raised by the appellant in this regard is rejected

The unrebutted evidence of the respondent clearly establishes that marriage between the parties was not consummated due to impotency of the appellant. The requirement u/s 12(1)(a) of the Act are fulfilled. The appellant is therefore held impotent qua respondent.

29. The conduct of the appellant/husband is also to be noted in the present case. The maintenance order was passed on 8th May, 2003. Number of opportunities were given to him to clear arrears which had accrued to the tune of ₹ 80,000/- The appellant had offered only ₹ 500/- on 12th November, 2003. Thereafter, appellant had stopped appearing and did not make any payment and his defence was struck down. He never made any effort to clear arrears of interim maintenance before the trial court. Learned counsel for respondent has also stated that after the passing of impugned decree, the respondent/wife has re-married and has children from the second marriage.

In view of the above discussion, no illegality or perversity is seen in the judgment of the learned trial court. Appeal stands dismissed.

There is no order as to costs.

VEENA BIRBAL, J.

November 1, 2013

ssb/srb