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

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Date of Decision: 16.07.2015

% **MAT.APP. 6/2013**

REKHA MATHUR

..... Appellant

Through: Mr. Puneet Agarwal & Mr. Anshuman
Ashok, Advocates.

versus

MANISH KHANNA

..... Respondent

Through: Mr. Rajesh Khanna & Mr. Kushal Raj
Gupta, Advocates.

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

VIPIN SANGHI, J. (OPEN COURT)

1. With the consent of learned counsel, I have heard their respective submissions in this appeal and proceed to dispose of the same at this stage.
2. The present matrimonial appeal is directed against the judgment dated 24.08.2012 passed by the learned ADJ-01 (East), Karkardooma Courts, Delhi in HMA No.450/2010. The appellant has preferred the aforesaid composite petition invoking Section 13(1)(ia) and Section 12(1)(a) of the Hindu Marriage Act, 1955 (HMA) against the respondent. The learned ADJ passed a decree of divorce on the ground of cruelty under Section 13(1)(ia) of the HMA in favour of the appellant and, at the same time, the relief sought under Section 12(1)(a) of the HMA, on the ground of impotency of the husband, was rejected. The appellant wife is aggrieved, insofar as the

petition was dismissed on the ground of impotency under Section 12(1)(a) of the HMA.

3. Before proceeding further, I shall, at this stage itself, deal with the preliminary objection of the respondent with regard to the maintainability of the present appeal. The submission of the respondent is that the present appeal is not maintainable, as it is directed against a finding returned by the learned ADJ on the aspect of the respondent's impotence, and the appellant has already succeeded in the divorce petition under Section 13(1)(ia) of the HMA and the said decree has attained finality. It is argued that no appeal would lie against the said finding, as an appeal can be maintained only against the decree passed under HMA, as provided for under Section 28 of the HMA. The respondent has placed reliance on ***Ganga Bai Vs. Vijay Kumar***, 1974 AIR (SC) 1126, which has been followed by this Court in ***Sanjay Chahal Vs. Shri Narendra Singh***, (2007) 97 DRJ 91, in support of the submission that the appeal is not maintainable.

4. Learned counsel for the respondent has further submitted that a perusal of the original petition preferred by the appellant would show that she had only sought a decree of divorce, and she had not sought a decree of nullity. The title of the petition reads "*Petition under Section 13(1)(ia) read with Section 12(1)(a) of the Hindu Marriage Act for divorce on the ground of cruelty*". It is submitted that "*nullity*" was not mentioned as a ground in the heading of the petition.

5. It is further submitted that even the prayer made in the petition did not seek a decree of nullity on the ground that the marriage is voidable at the

instance of the petitioner, on account of the impotence of the respondent. The prayers made in the petition are as follows:

“In the light of the above facts and circumstances, it is most respectfully prayed that this Hon’ble may be pleased to:

- a) Pass a decree of divorce thereby dissolving the marriage of the petitioner and the respondent, in favour of the petitioner and against the respondent;*
- b) Pass a decree of divorce thereby dissolving the marriage of the petitioner and the respondent, on the ground of nullity of marriage and non consummation of marriage under Section 12(1)(a) of the Hindu Marriage Act;*
- c) Award the costs of the proceedings in favour of the petitioner and against the respondent;”*

6. It is argued that a prayer, which was not made before the learned ADJ, cannot now be sought before this Court in the first appeal.

7. Having heard learned counsel, I do not find merit in the aforesaid preliminary objection of the respondent. It is well-settled that the pleadings of the parties have to be read in their entirety, and cannot be read in parts. In ***Ponnala Lakshmaiah v. Kommuri Pratap Reddy and Ors.***, (2012) 7 SCC 788, the Supreme Court observed as follows:

“5. The averments made in the plaint or petition cannot be read out of context or in isolation. They must be taken in totality for a true and proper understanding of the case set up by the Plaintiff.

*6. This Court has in ***Udhav Singh v. Madhav Rao Scindia***, (1977) 1 SCC 511 given a timely reminder of the principle in the following words:*

*“33. We are afraid, this ingenious method of construction after compartmentalisation, dissection, segregation and inversion of the language of the paragraph, suggested by Counsel, runs counter to the cardinal canon of interpretation, according to which, **a pleading has to be read as a whole to ascertain its true import. It is not permissible to cull out a sentence or a passage and to read it out of the context, in isolation. Although it is the substance and not merely the form that has to be looked into, the pleading has to be construed as it stands without addition or subtraction of words, or change of its apparent grammatical sense. The intention of the party concerned is to be gathered, primarily, from the tenor and terms of his pleading taken as a whole.**””*

(Emphasis supplied)

8. Merely because the heading of the petition does not use the words, such as, *“A petition to seek a decree of nullity”*, it does not mean that the petition had been preferred only under Section 13(1)(ia) to seek a decree of divorce. In the heading itself, the petitioner had invoked Section 12(1)(a) of the HMA. Not only that, a perusal of the petition shows that detailed averments were made by the petitioner/ appellant with regard to the alleged impotence of the respondent. I may extract hereinbelow some of these averments which touch upon the aspect of impotence of the respondent.

“15. That it is pertinent to mention that for almost 2 months of marriage the Petitioner was not allowed to stay with the Respondent as for nights together the Petitioner was forced to massage the legs of her mother-in-law and even sometimes of her sister-in-law who was quite younger to the Petitioner.

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18. That the respondent used to deliberately come late in the night from the office on the pretext that he was working in his office and used to close the door of his bedroom and did not allow the petitioner to enter the bedroom.

19. That in the night when the Petitioner and her husband first met in the privacy of their bed room after almost three months from the date of marriage, it was noticed by the Petitioner that her husband, the respondent, is not possessing the male organ at all and when she enquired about this from him, she was beaten by the respondent and was threatened of dire consequences if she opens her mouth about the same in front of anybody else. On hearing the loud voices, mother-in-law of the Petitioner also joined her son in beating and threatening the Petitioner.

20. That the Petitioner was completely shocked and was taken aback as on one hand the fact of the deformity of Respondent was not disclosed to her and her family and the marriage was solemnized fraudulently by cheating and misrepresentation, and on the other the accused persons started ill treating her when she came to know about the correct facts. All the above named persons also threatened the Petitioner to eliminate her and her family members, in order she dared to disclose this fact to her family members.

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27. That the Petitioner states that the marriage was not properly consummated because the Respondent never offered himself for a complete sexual intercourse with the Petitioner. It is stated that neither the Respondent nor his parents disclosed the actual physical condition of the Respondent prior to the marriage.

28. That the Petitioner was not aware that the Respondent was impotent to the extent that he did not possess the male organ to have sexual intercourse with the Petitioner and

therefore the very foundation of the marriage was based on false and incorrect information given by the Respondent. It is stated that after the marriage, the Petitioner was regularly beaten and threatened not to disclose this fact which was never disclosed to the Petitioner which caused mental torture to the Petitioner. Frequent verbal altercations led to the breakdown of the marriage.”

9. The aforesaid averments in clear terms allege impotence of the respondent, and allege that the male sex organ of the respondent was not developed – leading to the said state of affairs. Even the prayer clause, which has been extracted above, shows that under prayer (b) the petitioner appellant had sought nullity of the marriage on account of non-consummation of marriage under Section 12(1)(a) of the HMA. The use of the words “*a decree of divorce thereby dissolving the marriage of the petitioner and the respondent*” in prayer (b), can only be described as inept drafting of the petition by the counsel. However, the same does not take away from it, the substance of the prayer, which was to seek a decree of nullity of the marriage under Section 12(1)(a) of the HMA. It is, therefore, abundantly clear that the petitioner/ appellant instead of preferring two separate petitions – one under Section 12(1)(a) of the HMA, and the other under Section 13(1)(ia) of the HMA, preferred a composite petition for nullity on the ground of impotency of the respondent, as well as for divorce on the ground of the petitioner/ appellant being treated with cruelty by the respondent.

10. A perusal of the impugned judgment shows that the learned ADJ was also conscious of the fact that two separate and independent causes of action, i.e. one under Section 12(1)(a), and the other under Section 13(1)(ia)

of the HMA had been clubbed in the same petition by the petitioner/ appellant. The learned ADJ has consciously dismissed the petition on the ground of impotence under Section 12(1)(a), while granting a decree of divorce under Section 13(1)(ia) of the HMA.

11. Reliance placed by learned counsel for the respondent in *Ganga Bai* (supra), which has been followed in *Sanjay Chahal* (supra), is misplaced. These are cases where some finding returned by the original Court was sought to be assailed in appeal, and the appeal was not directed against the judgment & decree deciding the proceeding one way or another. However, in the present case, the petition of the petitioner/ appellant under Section 12(1)(a) of the HMA has been rejected by the impugned judgment. Merely because the appellant/ petitioner sought to prefer a composite petition, and the petition for divorce has been allowed, it would not mean that so far as the dismissal of the petition under Section 12(1)(a) of the HMA is concerned, the appellant would be remediless.

12. Sections 12 and 13 of the HMA deal with distinct causes of action. The nature of the relief that can be sought under Section 12, and under Section 13, is also distinct and qualitatively different. Whereas, under Section 12 the petitioner is entitled to seek a decree of nullity of the marriage, that is to say, for a declaration that there was no marriage in the eyes of law, under Section 13, the decree seeks to dissolve a valid marriage on one of the grounds specified under that Section. The relief of annulment of the marriage impinges on the marital status of the petitioner. The decree of divorce merely grants the status of a divorcee to the petitioner, whereas a decree of nullity would mean that she/ he was never legally married to the

respondent. Alleged impotence of the respondent, which has led to alleged non-consummation of marriage, is a ground to seek a decree of nullity under Section 12, and not a ground to seek a decree of divorce under Section 13. Alleged non-consummation of marriage on account of the alleged impotence of respondent enables the petitioner to seek a decree of nullity, and not divorce. Thus, the decisions in **Ganga Bai** (supra) and **Sanjay Chahal** (supra) would have no application in the facts of the present case. The preliminary objection of the respondent with regard to the maintainability of this appeal is, therefore, rejected.

13. Learned counsel for the appellant has submitted that the respondent, apart from filing his written statement did not defend himself in the proceedings and he was proceeded ex-parte. Reference has also been made to the admissions made by the respondent in his written statement. In reply to paragraph 20 of the petition, the respondent had, *inter alia*, stated that:

“He has small testicles and small penis but is secondary sexual character are normal.”

14. Learned counsel for the appellant has drawn the attention of the Court to the fundamentally flawed approach of the learned ADJ on account of his misreading and misapplication of the judgment of the Calcutta High Court in **Bhaswati Sarkar (nee Mukhopadhyay) Vs. Angshuman Sarkar**, AIR 2000 Calcutta 210. It is submitted that while dealing with the case of the appellant/ petitioner under Section 12(1)(a), the learned ADJ has placed reliance on – what is purported to be, an extract from **Bhaswati Sarkar** (supra). It is pointed out that the said extract has wrongly been read and quoted, since in the very first sentence of the quoted text – which reads “I

am also inclined to hold in this case ” the word “not” before the word “inclined” has been omitted, thereby turning the decision of the Calcutta High Court on its head. In fact, the Calcutta High Court did not accept the submission, that to prove sexual impotency of the respondent husband, the wife should prove that she is virgin at the trial.

15. On the other hand, learned counsel for the respondent has submitted that the present is an academic exercise. He submits that since the appellant has already been granted divorce under Section 13(1)(ia) of the HMA, and the marriage already stands dissolved by decree of divorce, it cannot be annulled at this point of time. For a marriage to be annulled, there has to be a subsisting marriage, which is not the case.

16. He has also submitted that the present appeal is not maintainable, as an appeal under Section 28 of the HMA would lie only against a decree. Section 28 (1) uses the expression: “**All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction**” (emphasis supplied). He submits that the dismissal of the petition under Section 12(1)(a) of the HMA does not tantamount to a decree. It is only when a petition is allowed, that it culminates into a decree. In this regard, he placed reliance on the judgment of this Court in *Jitan Bhalla Vs. Gayatri Bajaj*, II (2008) DMC 503, and in particular paragraphs 54 to 58.

17. Learned counsel submits that the case of the petitioner/ appellant in her replication was that even after she came to know of the fact that the respondent did not possess the male organ, she was still willing to stay with the respondent and his family. He submits that the parties – when they got married, were 38 and 39 years of age respectively. Both are *Sai* devotees and the purpose of marriage was not to procreate. A normal sexual life was never the basis of the marriage, and it was a marriage of adjustment. Learned counsel submits that the appellant was also not good looking and, therefore, she could not find a match. The respondent also had his physical limitation as he was overweight, and one of his legs is longer than the other. He submits that the petitioner has stated in paragraph 25 of the petition that the family members of the petitioner requested the family members of the respondent to meet and settle the dispute. He submits that if the marriage was voidable, there was no question of meeting and settling the dispute. He submits that the petitioner had, in fact, accepted the physical constraints of the respondent.

18. A perusal of the impugned judgment shows that the learned ADJ fell into patent error in his reading and understanding of the judgment of the Calcutta High Court in ***Bhaswati Sarkar*** (supra). From the extract of the said decision set up in the impugned judgment, it is clear that the learned ADJ missed out the crucial word “*not*” before the word “*inclined*” in the quotation, which has completely changed the meaning of the said decision on its head. Not only did the learned ADJ wrongly set out the said decision in ***Bhaswati Sarkar*** (supra), even the understanding of the learned ADJ proceeded on the wrong premise. This is evident on a reading of the

following extract from the impugned judgment:

“22. In the present case, the only thing i.e. in the name of evidence is the self serving statement of the petitioner. She has not filed or proved any medical evidence to prove that the marriage has not been consummated. Of course, it is not in her hand to bring the respondent to submit for medical examination but it was very much within her reach and power to furnish her own medical examination to prove that the marriage was not consummated or about her virginity which for the best reasons known to her, she has chosen not led evidence in this regard.

23. Ld. counsel for the petitioner has tried to bring the difference between primary and secondary sex characteristics of the male and female to bring home the ground of divorce under section 12(1a) of HMA. But before that the petitioner has to prove that the respondent does not have primary sex characteristics and have secondary sex characteristics, which he has failed to do so.

24. Charge of impotency is considered to be slur on the manhood or womanhood and should be strictly proved. Therefore, there ought to be cogent and convincing evidence on record to prove charge of impotency. There is nothing on record except the self serving statement of the petitioner as PW1. The evidence on record is not sufficient to prove the case under Section 12(1)(a) of the Hindu Marriage Act, 1955.

25. Corroboration is not a rule of law; it is only a rule of prudence, more particularly in the case of impotency.

26. Accordingly, I am of the opinion that ingredients of 12(1)(a) as contemplated by the law are not fulfilled in the present matter.”

(Emphasis supplied)

19. On the aforesaid short ground, the impugned judgment is liable to be set aside. However, that is not the end of the matter. The respondent, in

fact, did not seriously dispute the allegation of the appellant/ petitioner with regard to the impotence and incapacity of the respondent to have a normal sexual life with the appellant/ petitioner, so as to consummate the marriage. As noted hereinabove, he has admitted in reply to paragraph 20 of the petition in his written statement that he has small testicles and a small penis, while stating that his secondary sexual character are normal. The respondent has also sought to skirt this issue by claiming that the appellant was not attractive to look at and, therefore, was not married; both the appellant and the respondent were *Sai* devotees; both were 38 and 39 years of age respectively; they did not marry to procreate; that a normal sexual life was never the basis of the marriage; and, that it was the marriage of adjustment.

20. Firstly, apart from making the aforesaid averments in his written statement, the respondent did not lead any evidence to substantiate the same. Thus, there was no basis for the Court to accept the *ipsi dixit* of the respondent. Secondly, a reading of Section 12(1)(a) and Section 12(2) shows that the ground of impotence of the respondent, which has resulted in the marriage not being consummated, is an absolute ground, which enables the petitioner to avoid the marriage and seek a decree of nullity. Section 12(2) sets out circumstances in which a petition to seek nullity of marriage on grounds set up in Sections 12(1)(c) and 12(1)(d) would not be entertained. However, in relation to the grounds set up in clause (a) of Section 12(1) of the HMA, there are no such limitations. Pertinently, the respondent has not established, as a matter of fact, that his incapacity was known to the appellant/ petitioner even prior to the marriage. To say that a

normal sexual life was never the basis of marriage, is altogether against the very grain of a marriage.

21. The respondent failed to contest the petition seeking annulment of the marriage under Section 12(1)(a). He also avoided getting himself examined by a Medical Board to be constituted by the Medical Superintendent of Dr.Ram Manohar Lohia Hospital, as directed by this Court vide order dated 02.09.2014. The relevant extract from the said order reads as follows:

“1. The appellant instituted a petition for grant of divorce against the respondent on the grounds of cruelty and impotency under Sections 13(a)(ia) and 12(1)(a) of the Hindu Marriage Act. The learned Trial Court granted the decree of divorce to the appellant on the ground of cruelty but rejected the second ground of impotency. The appellant has challenged the judgment dated 24th August, 2012 insofar as the learned Trial Court has dismissed the additional ground of dissolution of marriage on the ground of impotency under Section 12(1)(a) of the Hindu Marriage Act.

2. Learned counsel for the appellant submits that the appellant led oral evidence to prove her contention that the respondent was impotent and therefore, the onus was on the respondent to rebut the same by leading medical evidence to the contrary. It is submitted that the respondent stopped appearing after filing the written statement and was proceeded ex-parte before the learned Trial Court and in that view of the matter, the oral evidence led by the appellant was sufficient to prove the contention of the appellant with respect to the impotency of the respondent.

3. Learned counsel for the appellant further submits that since the learned Trial Court did not consider the oral evidence

led by the appellant to be sufficient to prove the impotency, this Court may invoke the jurisdiction under Order 41 Rule 27(b) of the Code of Civil Procedure and direct the respondent to be examined by a medical expert to ascertain whether the respondent is impotent or not. The learned counsel further submits that the appellant has specifically made prayer (c) in the appeal for direction to the respondent to undergo medical examination with regard to the impotency of the respondent.

4. *This Court is of the view that the opinion of the medical expert is necessary to ascertain whether the respondent is impotent.*

5. *In the facts and circumstances of this case, this Court in exercise of power under Order 41 Rule 27(b) of the Code of the Civil Procedure directs the respondent to appear for medical examination before a medical board to be constituted by the Medical Superintendent of Dr. Ram Manohar Lohia Hospital on 1st October, 2014.*

6. *Copy of this order be sent to the respondent. Copy of this order be also sent to the Medical Superintendent of Dr. Ram Manohar Lohia Hospital who shall constitute a Board for examination of the respondent to ascertain whether respondent is impotent. The report of the medical board be placed before this Court in a sealed cover within three weeks of the medical examination of the respondent.”*

22. Even at the hearing of the appeal, no submission was advanced on behalf of the respondent that he is willing to undergo medical examination by the Medical Board. All these circumstances clearly raise an adverse inference against the respondent and lead to the conclusion, on the basis of preponderance of probabilities, that the allegations made by the appellant with regard to the non-consummation of marriage on account of impotence

of the respondent are true. Reliance may be placed on ***Renuka Vs. Rajendra Hada***, II (2007) DMC 153 DB (Raj.), wherein it was observed that if despite Court order the party refuses to undergo medical examination, the Court may draw adverse inference against him/ her.

23. In ***Venkateshwararao Vs. Nagamani***, AIR 1962 AP 151, it was observed that consummation of marriage requires an act of sexual intercourse which is natural and complete. It is presumed that the parties to a marriage have capacity for sexual intercourse, and impotency is the absence of such capacity. In the present case, while admitting that his primary male sex organs were not developed fully, the respondent did not defend himself at the trial and did not undergo medical examination, even after the direction of the Court.

24. Reliance placed by learned counsel for the respondent on ***Jitan Bhalla*** (supra), and in particular paragraphs 54 to 58 thereof, is misplaced for the simple reason that these paragraphs do not contain the finding and decision of the Court but only the submissions advanced by the counsel. A perusal of the judgment shows that the said submissions were not deliberated upon, or accepted by the Court. Consequently, reliance placed on the said decision is of no avail.

25. The expression “*decree*” is defined in Section 2(2) of the Code of Civil Procedure, 1908 to mean the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard of all or any of the matters in controversy in the suit and may be either preliminary or final. It is deemed to include the

rejection of a plaint. Pertinently, it does not include, *inter alia*, “any order of dismissal in default”. Thus, the expression “decree” encompasses within itself not only the formal expression of the adjudication when it allows the suit but also when the suit is disallowed, or dismissed. The only limitation is that it should not be an order of dismissal for default. The Andhra Pradesh High Court in ***Silla Jagannadha Prasad Vs. Silla Lalitha Kumari***, AIR 1989 AP 8, *inter alia*, held:

“8. The word 'decree' is not defined under the Hindu Marriage Act. Therefore, we can borrow the definition under the Civil P.C. In fact, under Section 25-A of the Act, the provisions of the Civil P.C. are made applicable for enforcement of decrees and orders under the Hindu Marriage Act. S. 2(2) of C.P.C. defines a "decree" as a formal expression of an adjudication which conclusively determine the rights of parties with regard to all or any of the matters' in controversy in the suit and may be either preliminary or final". Thus **a decree means the expression of an adjudication. The suit or petition may either be dismissed or allowed. A relief may be given or refused. In either case, it is a decree. There is no reason to give a restricted meaning to the expression "decree". In this connection the word "any" is also significant. It indicates either allowing or rejecting. Under S.28 of the Act all decrees are made appealable. If the contention of the learned Counsel that a decree means only granting a relief, then no appeal would lie against an order dismissing the petition as the word used in S.28, the appeal section, is decree.**”

(Emphasis supplied)

26. The submission of learned counsel for the respondent that the judgment dismissing the petition under Section 12(1)(a) of the HMA does not amount to a decree, is completely misplaced and is rejected.

27. There is no merit in this submission of learned counsel for the respondent that the present is an academic exercise. Merely because the appellant has already been granted divorce under Section 13(1)(ia) of the HMA and the marriage stands dissolved by a decree of divorce, it cannot be said that the marriage could not be annulled on the grounds given under Section 12(1)(a) of the HMA. As noticed hereinabove, the two provisions deal with separate causes of action, and are premised upon qualitatively and materially different fact situations. Even the relief granted is qualitatively and materially different inasmuch, as, by a decree of divorce, a valid marriage is dissolved; whereas a decree under Section 12(1)(a) declares the marriage to be a nullity, i.e. there was no marriage in the eyes of law. The status of the petitioner in the first case – post the decree, is that of a divorcee, whereas in the second case, it is that of an unmarried person. The said status has different connotations for the petitioner in the society, and the future marriage prospects of the petitioner hinge on the nature of relief granted by the Court, in case he/ she wishes to re-marry. A decree of annulment of the marriage under Section 12(1)(a) relates back to the date of marriage, since the marriage is held to be a nullity. On the other hand, the decree of divorce operates only prospectively. Thus, it is not merely an academic exercise when the petitioner/ appellant seeks a decree of nullity of marriage under Section 12(1)(a), even though a decree of divorce under Section 13(1)(ia) has already been granted.

28. For all the aforesaid reasons, the appeal is allowed with Costs quantified at Rs.25,000/-. The Costs be paid within four weeks. A decree of nullity of the marriage between the appellant and the respondent is passed

under Section 12(1)(a) of the HMA on the ground that the marriage has not been consummated on account of the impotence of the respondent.

VIPIN SANGHI, J

JULY 16, 2015

B.S. Rohella