

In the High Court of Punjab and Haryana at Chandigarh

FAO-M-20-2016 (O&M)

Date of decision: 21.3.2018

Arun Kumar

.....*Appellant*

Versus

Rimpy Soi

.....*Respondent*

**CORAM: HON'BLE MR. JUSTICE M.M.S.BEDI
HON'BLE MR. JUSTICE GURVINDER SINGH GILL**

Present : Mr. Kunal Vinayak, Advocate for the appellant.

Mr. Vaibhav Narang, Advocate for the respondent.

Gurvinder Singh Gill J.

1. Arun Kumar-husband has filed this appeal challenging judgment and decree dated 14.8.2015 passed by the Court of District Judge, Amritsar whereby a petition under Section 12 of Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') filed by respondent-wife has been accepted and the marriage between the parties has been declared as nullity.
2. The case set up by the respondent-wife, as per her petition under Section 12 of the Act, is that marriage between the parties was solemnized at Amritsar on 15.12.2012 as per Hindu rites and traditions but the marriage was not consummated on account of physical disability of impotence of the appellant-husband. The respondent-wife averred that she is highly qualified, being M.A. in English and M.A. in Journalism and Mass Communication. When her parents were looking for a good match for her, they came across an

advertisement at '*Shaadi.com*' given by the respondent representing himself to be an unmarried person residing in Australia. Pursuant to conversation between the parties, the marriage ceremony took place on 15.12.2012. The respondent-wife asserted that the appellant was not at all interested in consummating the marriage and upon being asked about the reason for the same, he informed that he was undergoing some kind of medication and due to which he was not going to consummate the marriage at that point of time. The respondent averred that on 30.12.2012, the appellant went to Australia leaving her back at Amritsar. Subsequently, the respondent also went to Australia through family sponsored visitor visa on 29.7.2013 but she found that she was not welcome there as mother of the appellant started quarrelling with her. Even in Australia, the marriage was not consummated. The appellant's mother told the respondent that her son was not fit for consummating the marriage and when the respondent confronted the appellant about the said fact, the appellant started assaulting and beating the respondent and she was kept confined in four walls of the room and was threatened that in case she disclosed about the reality to anyone, she would be murdered. The respondent further alleged therein that all her money and gold ornaments were taken by appellant and his mother forcibly. The respondent-wife asserted that she was ultimately left at the police station by the appellant saying that it was not his responsibility to keep her and ultimately it was with great difficulty, with the help of her friend's husband that she managed to come back to India. The respondent, thus, prayed for dissolution of her marriage by passing decree of nullity on ground of impotency of the appellant-husband.

3. The appellant-husband in reply to the petition under Section 12 of the Act

denied all the material averments made therein and took a stand that the sole motive and purpose of filing the petition was to extort money from the appellant and that the appellant was a victim of fraud and cheating. The appellant further took a stand that in fact, it was later that he came to know that the respondent has married him to come to Australia as she was having a boyfriend in Melbourne whom she could not marry because her boyfriend's family was not consenting for the same. The appellant-husband while admitting the factum of marriage categorically denied the allegations of being impotent. The appellant-husband also took a stand that in fact the respondent-wife did not allow him to have any sexual relationship with her on one pretext or the other. It has also been stated therein that he had opened a joint account with the respondent in Amritsar and had deposited an amount of ₹ 50,000/-, ₹ 20,000/- and ₹ 35,000/- in the same, out of which the respondent withdrew ₹ 65,000/- before coming to Australia and that he had also deposited 8,000 Australian Dollars as 'security bond' for sponsoring visitor visa for his wife. It is further asserted by the appellant that since the respondent was having a boyfriend in Melbourne (Australia), therefore, immediately after reaching Australia, she made a complaint of domestic violence to the police authorities on 3.8.2013, barely after four days of her arrival. The appellant, thus, prayed for dismissal of the petition.

4. The parties were put to proof on the following issues :-

- “1) Whether the marriage was not consummated on account of physical disability/impotency of respondent? OPA
- 2) If issue no.1 is proved, then whether the petitioner is entitled to decree of nullity of marriage as provided u/s

12 of the HMA? OPA

- 3) Whether the petition is not maintainable? OPR
- 4) Whether the petitioner has not come to the court with clean hands and has suppressed material facts from the court? OPR
- 5) Relief.”

5. It may here be mentioned that since the appellant, during the course of proceedings before the lower Court failed to pay maintenance *pendente-lite* as awarded by the lower Court @ ₹ 50,000/- per month apart from litigation expenses to the tune of ₹ 22,000/-, the defence of the appellant was struck off vide order dated 27.11.2014. The respondent-wife in order to establish her case herself stepped into the witness box as PW-1 and also examined her father Jagdeep Chand Soi as PW-2. The learned lower Court, upon appraisal of evidence on record returned its findings on issues no. 1 and 2 in favour of the respondent-wife, holding therein that on account of impotency of the appellant the marriage had not been consummated and that the respondent-wife was entitled to a decree of nullity of marriage. The findings on issues no. 3 and 4 were returned against the appellant-husband and consequently petition under Section 12 of the Act filed by the respondent-wife was allowed and a decree of nullity of marriage was passed vide impugned judgment and decree dated 14.8.2015.
6. We have heard learned counsel for the parties and have also perused record of the case.
7. The learned counsel for the appellant while assailing the impugned judgment and decree has vehemently argued that since the respondent did not lead any

evidence to establish impotency of the appellant, therefore, the findings recorded by the learned lower Court to the effect that the marriage had not been consummated due to impotency of the appellant cannot sustain and are liable to be set aside. The learned counsel in order to hammer forth his aforesaid submission pressed into service the following judgments of this Court :-

- (i) *FAO-M-200 of 2001 Suvin Kumari Vs. Sukhvir Singh*
(decided on 6.3.2014)
- (ii) *FAO-M-60 of 2013 Kulwinder Kaur Vs. Sukhchain Singh*
(decided on 9.7.2015)
- (iii) *FAO-M-286 of 2009 Sham Sunder Vs. Lovleen*
(decided on 12.9.2014)

8. We have gone through the judgments relied upon by the learned counsel for the appellant. A perusal of judgment in Suvin Kumari's case *supra* shows that the case was distinct on facts inasmuch as despite a direction for medical examination having been issued by the learned Court, the said test was not conducted as the appellant-wife had herself withdrawn her application in the said regard. The relevant extract from the judgment indicating the aforesaid position is reproduced below :-

“8.It has come on record that the Additional District Judge, Bhiwani, had directed the respondent to get his pipe test conducted from PGI, Chandigarh, but the said test was not performed on the respondent because the appellant had withdrawn her application in that regard. Earlier, a Medical Board, constituting of three doctors Dr. K.K.Girdhar, Dr. R.K.Gera and Dr. D.S.Nandal, examined the respondent and it was mentioned in their report dated 21.5.1998 sent to the court, that there was nothing to suggest that the respondent was incapable of performing sexual

intercourse. The result of all investigations revealed that everything was normal with the respondent.”

9. In the cited case, there was withdrawal of application by the wife on one hand and on the other hand there was medical evidence to the contrary to the effect that there was nothing to suggest that the husband-wife was incapable of performing sexual intercourse. In the present case, the defence of the appellant having been struck off, the learned lower Court chose to accept the oral evidence led by the respondent-wife to the effect that the marriage had not been consummated. In fact the factum of marriage not having been consummated is admitted by the appellant-husband in his written statement though he has taken a stand that the wife did not allow him to have sexual intercourse. Had this been the position that the wife was not permitting the appellant-husband to establish sexual relation with her, he would not have taken any step to call his wife to Australia. In view of the above stated distinct factual position, the cited judgment is not applicable to the facts of the present case.
10. In Kulwinder Kaur's case *supra* relied upon by the appellant, the wife had sought divorce on ground of impotency of her husband and also on ground of desertion. While the period of desertion was found to be less than 2 years, the ground of impotency was not said to be made out as wife had allegedly not taken any step to get her husband medically examined. In the present case, the defence of the husband having been struck off and the statement of the wife that marriage was not consummated having remained unrebutted and in fact the husband also admitting in his written statement that the marriage was not consummated, the cited judgment would not advance the cause of the

appellant in any manner.

11. In Sham Sunder's case, the learned lower Court had granted divorce to wife mainly on ground of irretrievable break down of marriage and the said judgment was set aside by this Court holding therein that neither the trial Court nor the High Court has authority to travel beyond the grounds adumbrated under Section 13 of the Act. Thus, even the said judgment is of no avail to the appellant.
12. In the present case, certainly there is no medical evidence to establish impotency of the appellant but as already stated above the fact that the marriage was not consummated is admitted by the husband himself in his written statement. This Court in a judgment reported as 2013 (33) RCR (Civil) 312 Anil Kumar vs. Raj Bala wherein also there was no medical evidence to establish impotency of the husband affirmed the findings of the learned lower Court as regards non-consummation of marriage owing to impotency of the husband. The relevant extract from the said judgment is reproduced below:-

“20. No doubt, there is no medical evidence showing the impotency of the appellant adduced by the respondent-wife. The second petition on the ground of impotency and cruelty was preferred by the respondent-wife on October 15, 2009 i.e. after about 9 years and the appellant-husband could not point out even a single instance of the consummation of marriage. No lady would come forward with such an allegation. At the same time, the appellant also did not make any effort to bring on record any medical evidence showing that he is potent. He could have produced the medical evidence by getting himself medically examined.

21. xxx xxx xxx

22. So considering over all evidence, we are of the considered view that the evidence of the respondent-wife is convincing and reliable and inspires confidence whereas the evidence of the appellant is vague. Mere denial of the version of the respondent-wife by the appellant-husband regarding impotency of the appellant is not sufficient.”

13. During the course of arguments, the learned counsel for the appellant has referred to some medical report/certificate annexed with his appeal as Annexure A-13. The said certificate issued by one Dr. S.K.Dan of Moree Medical Centre (Australia) is to the effect that the appellant-husband has no clinical problem like penile erection/ejaculation and that his sperm test results indicate that he is not infertile. However, the said medical report is from a medical laboratory in Australia and even the doctor who has given his opinion on the basis of the said report is based in Australia. The said evidence was never produced before the lower Court and nor is there any appropriate application for leading additional evidence in this Court. In any case, this Court does not find any reason to allow any kind of additional evidence or to look into the said document as no justifiable reason is forthcoming for the same. Further, relying upon the said document at this stage would virtually amount to setting at naught the order of the lower Court vide which the defence of the appellant had been struck off on account of non-payment of maintenance, especially when the said order has since attained finality.
14. In view of our aforesaid discussion, we do not find any infirmity in the findings of the learned lower Court as recorded on issue no. 1 to the effect that

the marriage had not been consummated owing to impotency of the appellant-husband and the same are hereby affirmed. The learned lower Court has correctly held that the wife is entitled to a decree of nullity of her marriage. Finding no merit in this appeal, the same is hereby dismissed. Parties are left to bear their own costs.

15. Decree sheet be drawn accordingly.

(M.M.S.Bedi)
Judge

(Gurvinder Singh Gill)
Judge

21.3.2018
Kamal

Whether speaking/reasoned

Yes/No

Whether reportable

Yes/No