

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE

BEFORE:

The Hon'ble Justice Soumen Sen

and

The Hon'ble Justice Siddhartha Roy Chowdhury

FA 68 of 2022

CAN 1 of 2022

Smt. Dipanwita Dasgupta @ Dipanwita Chaudhuri

Vs.

Sandip Kumar Dasgupta

with

FAT 77 of 2022

Sandip Kumar Dasgupta

Vs.

Smt. Dipanwita Dasgupta @ Dipanwita Chaudhuri

Mr. Aniruddha Chatterjee, Adv.

Mr. Ankit Agarwala, Adv.

Ms. Alotriya Mukherjee, Adv.

Mr. Robin Basu, Adv.

...for the Appellant in FA 68 of
2022 & for Respondent in FAT 77
of 2022.

Mr. Dipanjan Datta, Adv.

Mr. Atanu Basu, Adv.

Ms. Reshma Chatterjee, Adv.

...for the Appellant in FAT 77 of
2022 & for the Respondent in
FA 68 of 2022.

Hearing concluded on : 18th July, 2022

Judgement on : 29th July, 2022

Siddhartha Roy Chowdhury, J.:- Smt. Dipanwita Dasgupta and Sri Sandip Kumar Dasgupta are the estranged couple, who at one point of time got struck by the arrow of cupid but unfortunately their compatibility, according

to Dipanwita Dasgupta, looked like a mirage, she filed a suit for annulment of marriage with alternative prayer for divorce and the suit was registered as Mat Suit No. 736 of 2008 while Sandip Kumar Dasgupta the husband filed a suit for restitution of conjugal rights, which was registered as Mat. Suit no.776 of 2011.

Learned Trial Judge was pleased to dismiss both the suits but without cost by a common judgement. Both the petitioners felt aggrieved and preferred appeals against the judgement and decree passed by learned Additional District Judge, Chandannagar, Hooghly, in the aforesaid suits, on 8th December, 2021.

We propose to dispose of the appeals by a common judgement.

Factual matrix of the Mat. Suit No. 736 of 2008

Fact of the case in short is that Dipanwita Dasgupta, resident of Haripal, after her graduation, bagged Master degree in music from Rabindra Bharati University. In early days of her career as singer she came across the respondent who appeared to be a smart and ambitious young man. They fell in love and decided to marry. On 30th November, 2006, the petitioner and the respondent got married under the Special Marriage Act, 1954, followed by social marriage. Furniture, bedding, garments, ornaments and other articles were given at the time of marriage by the father of the petitioner and on the following day of marriage the petitioner/wife went to her matrimonial home at Sinthi, on the northern fringe area of Kolkata. On 2nd December,

2006, the very night of Fulsojja, the petitioner found her husband to be sexually vulnerable. The petitioner however, throughout the year of 2007-2008, co-operated with the respondent so as to facilitate upon act of sexual intercourse by him, but in vain. According to the petitioner/wife, her husband willfully refused to consummate the marriage. When the respondent realized his worthlessness, he became arrogant, furious, hostile and he indulged in enormous physical and mental cruelty upon the petitioner. The respondent was interested in engaging the petitioner only to earn money and the major part of her income used to be appropriated by the respondent. The petitioner stated that her hard work to earn money was reciprocated by the respondent with torture, both physical and mental. The petitioner thereafter gave an account as to how she was tortured by the respondent/husband on different dates; on 22nd January, 2007 she was physically assaulted. On 8th June, 2007 the respondent abused by petitioner by calling her a cheap girl. In between 20th December, 2006 to 29th July, 2007 she was tortured by the respondent and his family members. Her movement was restricted by the respondent and it was relaxed at the time when she had to go out to earn money by taking part in musical programmes. On 18th April, 2008 in presence of her mother, the respondent humiliated the petitioner by calling her a whore and abused his mother-in-law.

According to the petitioner, the respondent made her father pay a sum of Rs. 2,20,000/- in the month of February, 2007 and Rs. 80,000/- in the

month of March, 2008. The respondent bought two old vehicles, TATA Sumo in 2007 and a Maruti Suzuki car in the year 2008. Sometime in the month of May, 2008 she got a chance to perform in a television reality show on Zee Bangla Channel which came her way as an oasis. However, when she came back after shooting, the respondent used to abuse her even physically on one pretext or the other. On 22nd August, 2008 the petitioner was compelled to leave her matrimonial home, keeping all her belongings including ornaments over there. The respondent however, kept on threatening the petitioner over telephone. He was trying to blackmail her by giving threat to commit suicide. The petitioner filed the suit seeking decree of nullity for non-consummation of marriage or alternatively decree for divorce, among other reliefs.

The respondent/husband is contesting the petition by filing written statement denying all material allegations made against him. In his written statement the respondent has disclosed that the suit filed by petitioner/wife is but a counterblast to the suit filed by him for restitution of conjugal rights, which was registered as Matrimonial Suit no. 774 of 2008 before the Additional District Judge at Sealdah. The respondent denied the claim of the petitioner as to her residence at Chowdhury Para, Haripal or her educational qualification but admitting her aptitude towards singing, the respondent stated that before and after marriage he used to inspire the petitioner to participate in musical function including the programme of Zee Bangla television under the style SA-RE-GA-MA Biswasera. She was selected as the

best singer in the competition but all arrangements were made by the respondent. After such success the petitioner became famous and with fame came her aversion towards the respondent. She started neglecting the respondent. According to the respondent it was the petitioner who got impressed with the behavior of the respondent who was source of inspiration to her. She fell in love with the respondent and she started pushing the respondent for marriage. The marriage took place at Haripal. Father and mother of the petitioner visited the house of the respondent. The petitioner after marriage came to his house at Sinthi which is within greater Kolkata not a suburban area. The respondent denied the averment that he is sexually weak and incapable of sexual intercourse. According to him the petitioner has fabricated all these allegations which are far from being correct; only for the purpose of soaring high in her career as singer. The petitioner was never tortured either mentally or physically by the respondent at any point of time. The cars were purchased for the comfort of the petitioner but with his own fund. The petitioner left her matrimonial home with all her belongings for the reason best known to her. It is emphatically stated that respondent never inflicted torture upon the petitioner. The respondent prayed for dismissal of the suit filed by his wife.

Factual matrix of Mat. Suit. No. 776 of 2011

Sandip Kumar Dasgupta, respondent of Matrimonial Suit no. 736 of 2008 filed an application under Section 22 of the Special Marriage Act, 1954 for restitution of conjugal rights, initially before the Court of learned

Additional District Judge, Sealdah, which was registered as Mat. Suit No. 274 of 2008 and subsequently transferred to the Court of learned Additional District Judge, Chandannagar and registered as Mat. Suit no. 776 of 2008.

It is contended in the said suit that the marriage between the parties took place on 30th November, 2006, at Haripal, Hooghly under the Special Marriage Act, 1954. No child is born to them. Sometime in the month of August, 2006, the petitioner for the first time met the respondent, when she was trying to build her career in music. After marriage the petitioner used to take the respondent to various programmes where she participated and ultimately in the month of April, 2008 the respondent after successful audition took part in the Zee Bangla SA-RE-GA-MA-PA Biswasera programme. The petitioner groomed her and prepared her for the big show. After selection he took the respondent on 16th May to Lake Land Country Club where the participants stayed till the end of the competition. The petitioner not only encouraged the respondent but lent all support to her. He remained present during the shooting and after a month the respondent came back as winner, being inspired by the petitioner. On 25th September, 2008 the respondent told the petitioner that she was going with her parents to their house at Haripal for some days, she took all her belongings but did not come back. When the petitioner requested the respondent to come back, respondent told him that she wanted divorce from the petitioner. He was shocked and immediately went to meet the respondent to know the real issue, but he was abused by the respondent and her family members. The

petitioner requested the respondent to come back but she turned a deaf ear. On 28th October, 2008, the petitioner informed the local Police Station, Human Rights Commission in order to get his conjugal right restored. According to the petitioner, the respondent withdrew herself from the society of the petitioner with effect from 25th September, 2008 without any reasonable cause.

Dipanwita Dasgupta, the respondent in the suit for restitution of conjugal rights in her written statement denied all allegations made in the petition and stated inter alia that after marriage on the very night of Fulsojja she came to know for the first time that the petitioner is sexually vulnerable and incapable of having sexual intercourse but when the fact came to surface the respondent became arrogant, furious and hostile. He was averse to earn personally and interested to engage the respondent for the purpose of earning money and he used to appropriate major slice of her income. The respondent was physically tortured by the petitioner/husband who was suspicious in nature and who tried to restrict the movement of the petitioner. On 18th April, the petitioner abused the respondent by calling her a whore in front of her mother. The petitioner made his father-in-law pay Rs. 2,20,000/- in the month of February, 2007 and Rs. 80,000/- in the month of March, 2008 and the petitioner bought two cars. According to the respondent/wife she was tortured by the petitioner and his family members and she was forced to leave her matrimonial home on 22nd August, 2008, keeping all her belonging including the ornaments over there. She filed a

counter claim to have the marital knot, which replicated her original petition for annulment of marriage or divorce in the alternative.

Learned Trial Court having considered the pleadings of the parties framed the following issues:-

1. Is the suit maintainable in its present form?
2. Is the petitioner legally married wife of the respondent?
3. Whether the respondent/husband is physically potent to have sexual intercourse with the petitioner wife?
4. Whether the petitioner/wife was subjected to cruelty by physical and mental torture at her in-laws house at the instance of the respondent/husband or by his inmates?
5. Whether the petitioner/wife distressed by the respondent/husband?
6. Is the petitioner/wife entitled to the decree of divorce against the respondent/husband as prayed for?
7. To what other relief and/or relief, if any, the petitioner/wife is entitled to?

After taking into consideration the evidence, both oral and documentary, learned Trial Court was pleased to dismiss the Mat. Suit no. 736 of 2008 filed by the petitioner/wife for annulment and/or dissolution of marriage by decree of divorce. Mat. Suit No. 776 of 2011 filed by the petitioner/husband for the restitution of conjugal rights and the counter claim filed by the respondent/wife in that suit was also dismissed.

The impugned judgement and order dated 8th December, 2022 passed by learned Trial Court is assailed in the appeal no FA 68 of 2022 filed by the wife being petitioner of Matrimonial Suit no. 736 of 2008.

Assailing the impugned judgement, Mr. Aniruddha Chatterjee, learned Sr. Counsel for the appellant submits that learned Trial Court though held that the respondent/husband is incapable of sexual intercourse and marriage between the parties has not been consummated, yet could not tide over the barriers, caused by technicalities and refused grant relief as prayer is made seeking relief under Section 25(i) in place of Section 24(ii) of the Special Marriage Act.

Taking us through the oral testimony of the parties to the proceedings, Mr. Chatterjee, learned Counsel further adverted that learned Trial Court committed error in refusing the prayer for dissolution of marriage, holding inter alia, inability of the husband to perform sexual intercourse cannot be said to be an act of willful refusal to have sexual intercourse. Learned Trial Court should have considered the end result of both the situations that compels the wife to lead a life of celibacy, which on one hand is a sound reason for nullity and on other hand it is nothing but cruelty within the meaning of Section 27 of the Special Marriage Act, 1954.

Learned Advocate for the respondent, however, refuting such contention submits that the respondent being an event manager held the hand of the petitioner, when she was an unknown face in the realm of music and groomed her and after marriage prepared her for the big world. The petitioner/wife crowns success in the Television show, steals the lime light and in pursuit of her ambition to scale further height in career, she has decided to desert her husband. Marriage of the parties took place on 30th

November, 2006 and they stayed together till August, 2008 as claimed by the petitioner/wife. During this phase of their life, they went to different places for holidaying even with other family members. Parents of the petitioner/wife attended the marriage ceremony of the sister of the respondent/husband. There was no loss of rhythm in life. The allegation of inflicting physical torture upon the petitioner by her husband has not been proved.

Petitioner had no reason to leave her matrimonial home other than to run after her unbridled ambition, which requires another ladder to scale.

It is further argued by Mr. Dipanjan Datta, learned Counsel, that the respondent/husband took the first move to restore their conjugal life and he went to bring the petitioner back; having failed, he filed a suit for restitution of conjugal right. The petitioner filed the petition for dissolution of marriage and/or for annulment of marriage subsequent thereto.

The Trial Court failed to consider this aspect which stands admitted from the attending facts of the case while dismissing the suit for restitution of conjugal right.

According to Mr. Dipanjan Datta, learned Counsel, the respondent/husband was never shy to face medical examination; he went to Chinsurah Hospital, where adequate infrastructure was unavailable. Even he got his semen tested by Trivedi & Roy, well known Pathological Laboratory in the city. Therefore, there was no reason for the Court to draw adverse presumption against the respondent.

Upon perusal of the evidence on record we find from the attending facts enumerated in the pleadings that the parties to the proceeding got married under the Special Marriage Act on 30th November, 2006 and continued to stay together till 22nd August, 2008, when according to the petitioner/wife, she left her matrimonial home as it became difficult for her to endure the torture any more while according to the respondent/husband without any reasonable cause she left on 25th September, 2008.

It is the specific case of the appellant/wife that the marriage has not been consummated as her husband is sexually weak.

Since, the petitioner wife asserts that her husband is sexually weak and incapable of sexual intercourse, obviously onus lies upon her to prove the same. Dipanwita Dasgupta as PW 1 in her affidavit under Order XVIII Rule 4 of the Civil Procedure Code stated that because of the inability of her husband to have sexual intercourse the marriage between the parties was not consummated. She was thoroughly cross-examined on this point but nothing has come out to disbelieve the testimony of PW 1. We may refer to the relevant portion of the cross examination hereunder:

As PW 1 during cross-examination she stated that-

“It is a fact for the first time I had experience of a male genitalia on 02.12.2006.

On that day I got the smell that my husband suffered from erectile dysfunction. On that day I did not think it was a disease.

I did everything as a female partner to arouse my husband.

On or around 10th December, 2006 I suspected that my husband suffered from a disease for which he could not cohabit.

On several occasions I suggested my husband to consult a doctor.

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My husband did not appear before the Medical Board. It is a fact as there was no adequate infrastructure in Chinsurah hospital necessary medical test could not be conducted there and again I made application in this learned Court to refer the matter to Medical College and Hospital and my prayer was allowed and this learned Court directed medical test of my husband at Calcutta Medical College and Hospital.

My husband did not appear before the Medical Board in the Medical College and Hospital.”

It is admitted that despite several directions given by the Trial Court he did not appear before the Medical Board, rather made all possible attempts to protract the litigation, which even did not escape the notice of the Hon’ble Supreme Court while passing order in S.L.P. (C) No. 3694/2021 on 22nd September, 2021, when Hon’ble Apex Court held :

“We are of the view that the respondent is prolonging the matrimonial proceedings on one pretext or the other which have been pending for the last 13 years.”

Their Lordships observed further:

“We are of the view that sufficient opportunities have already been granted to the respondent to appear before a Medical Board

and thus his failure to appear before the Medical Board has to necessarily result in the adverse consequence qua non appearance before the Medical Board.”

Learned Trial Court was absolutely right in drawing up adverse inference considering the conduct of the respondent/husband who refused to appear before the Medical Board, though given opportunity more than once, which led the Trial Court to hold that the respondent/husband is incapable of sexual intercourse. But learned Trial Court refused to pass a decree highlighting a technical issue like misquoting of the proper provisions of law in the petition filed by the petitioner/wife, though this issue is no longer a res-integra.

It is true, instead of seeking relief under Section 25(i) of the Special Marriage Act the prayer should have been made under Section 24(ii) of the Act but learned Trial Court had no reason to feel helpless in extending relief, as rightly argued by Mr. Chatterjee, learned Counsel for the petitioner placing his reliance upon the judgment of Hon’ble Apex Court pronounced in ***P.K. Palnisamy vs. N. Arunmugham & Anr.*** reported in **2009 (9) SCC 173** wherein Hon’ble Apex Court held :

“26. A contention has been raised that the applications filed by the appellant herein having regard to the decisions of the Madras High Court could not have been entertained which were filed under Section 148 of the Code.

27. Section 148 of the Code is a general provision and Section 149 thereof is special. The first application should have been filed in terms of Section 149 of the Code. Once the court

granted time for payment of deficit court fee within the period specified therefor, it would have been possible to extend the same by the court in exercise of its power under Section 148 of the Code. Only because a wrong provision was mentioned by the appellant, the same, in our opinion, by itself would not be a ground to hold that the application was not maintainable or that the order passed thereon would be a nullity. It is a well-settled principle of law that mentioning of a wrong provision or non-mentioning of a provision does not invalidate an order if the court and/or statutory authority had the requisite jurisdiction therefor.”

In this regard we can use with profit, the judgement of Hon’ble Supreme Court pronounced in **J. Kumaradasan Nair & Anr. vs. IRIC Sohan & Ors.** Reported in **2009 (12) SCC 175** wherein it is held :

“14. It is also now a well-settled principle of law that mentioning of a wrong provision or non-mentioning of any provision of law would, by itself, be not sufficient to take away the jurisdiction of a court if it is otherwise vested in it in law. While exercising its power, the court will merely consider whether it has the source to exercise such power or not.”

Therefore, in our considered opinion, learned Trial Court had no reason to take pedantic view rather he ought to have granted relief as prayed for considering the evidence on record and more particularly considering the fact that the respondent/husband was impotent at the time of marriage and it existed at the time of institution of the suit, to meet the ends of justice.

That apart learned Trial Court was of the view that “Petitioner/wife cannot have the relief under Section 25(i) of the Special Marriage Act, as an

impotent person has no option to refuse willfully. The refusal to consummate the marriage is applicable to the person who is found to be potent and have the capacity to commit sexual intercourse with his wife. An impotent person cannot refuse to commit sexual intercourse as he has no capacity to commit the sexual intercourse.”

This view so expressed by learned Trial Court is far from being correct. The law is well settled that if either of the parties to a marriage refuses to have sexual intercourse, same would amount to cruelty entitling the other party to a decree. Whether such denial of sexual intercourse is the result of sexual weakness of the respondent/husband or his willful refusal is of no consequence in a case like this.

In this regard we can profitably rely upon the judgement of Division Bench of Delhi High Court pronounced in the case of **Rita Nijhawan vs. Balakishan Nijhawan** reported in **AIR 1973 Del. 200** :

“21. Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual weakness of the respondent disabling him from having a sexual union with the appellant. or it is because of any willful refusal by the respondent; this is because in either case the result is the same namely frustration and misery to the appellant due to denial of normal sexual life and hence cruelty.

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22. 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 favourable 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."

Learned Trial Court refused to hold that the petitioner was even treated with cruelty and while doing so learned Trial Court laid much stress on physical torture and on correctness of claim regarding payment of Rs. 2,20,000/- and Rs. 80,000/- but in doing so learned Trial Court missed the wood for the tree.

Denial of sexual union, because of inability of the husband is the prime source of frustration and misery to the petitioner/wife and such a fact can certainly be considered as cruelty in matrimonial dispute.

Learned Trial Court failed to appreciate feeling of anguish, disappointment and frustration caused to the petitioner/wife, because of the deficiency in her husband. Mental cruelty is necessarily a matter of inference to be derived from the facts and circumstances of a particular case. There can be cruelty without any physical violence; non- consummation of marriage because of inability on the part of the husband is one of the facets of mental cruelty.

Learned Counsel for the petitioner/wife adverted further that mental cruelty can cause even more serious injury than physical harm in the mind

of the injured wife, such apprehension is contemplated in this suit. To buttress his argument, Mr. Chatterjee relied upon the decision of Hon'ble Apex Court pronounced in the case of **Sirajmohmed Khan Janmohamad Khan vs. Hafizunnisa Yasinkhan and Anr.** reported in **1981 (4) SCC 250** wherein Their Lordships held that :

“Where it is proved to the satisfaction of the court that a husband is impotent and is unable to discharge his marital obligations, this would amount to both legal and mental cruelty. The concept of cruelty remains the same whether it is a civil case or a criminal case or a case under any other similar Act. Whether it is civil case or a criminal case or a case under any other similar law and judgment undoubtedly be a just grant for wife's refusal to life with her husband.”

Learned Counsel, Mr. Chatterjee also placed his reliance upon the decision of Hon'ble Supreme Court given in the case of **Vinita Saxena vs. Pankaj Pandit** reported in **2006 (3) SCC 778** to argue that the situation between the parties would lead to an irrefutable conclusion that the appellant and the respondent can never ever stay as husband and wife and the wife's stay with the respondent is injurious to her health.

When it is found that the wife was subjected to cruelty because of inability of husband to have sexual union with her, the appellant, Dipanwita Dasgupta, can be said to have every reason to withdraw herself from the society of her husband on that ground alone, even if we ignore the other

allegations of physical torture and/or mental torture allegedly perpetrated upon her.

In our considered opinion, the appeal preferred by the wife Dipanwita Dasgupta being FA 68 of 2022 should be allowed and the impugned judgment and decree passed by learned Trial Court in Mat. Suit No. 736 of 2008, should be set aside; which we accordingly do. Under such circumstances the dismissal of appeal being FAT 77 of 2022, preferred by the respondent/husband Sandip Kumar Dasgupta is fait-accompli and is hereby dismissed.

In fine, the judgement and decree passed by learned Trial Court in Mat. Suit No. 736 of 2008 is set aside. Consequently, the marriage between the parties solemnized under the Special Marriage Act, 1954 is annulled by a decree of nullity.

Thus both the appeals are disposed of but without cost.

I agree

(Siddhartha Roy Chowdhury, J.)

(Soumen Sen, J.)