

Bikkar Singh v. Smt. Mohinder Kaur (S. S. Sandhawalia, C.J.)

above and the rules contained in Chapter 6-I, Volume V of the High Court Rules and Orders.

S. S. Sandhawalia, C.J.—I agree.

S. C. K.

Before S. S. Sandhawalia, C.J. and S. C. Mital, J.

BIKKAR SINGH,—Appellant.

versus

SMT. MOHINDER KAUR,—Respondent.

L.P.A. No. 146 of 1979.

June 2, 1981.

Hindu Marriage Act (XXV of 1955)—Section 12—Marriage solemnised by playing fraud on the husband—Husband claiming decree for nullity of marriage on the ground of fraud—Single act of sexual intercourse between the two spouses—Whether amounts to condonation—Husband—Whether disentitled to the decree.

Held, that condonation to be effective has both a factual and mental element. There is to be both a factum of reinstatement and a clear intention to forego and remit the wrong. Therefore, an effective and total condonation can arise only from a conscious and deliberate ratification of the marital status by the aggrieved spouse which may lead to a strong inference of a total wiping off a matrimonial offence. There is no inflexible rule that a solitary freakish act of sexual intercourse would raise an irrebutable presumption of total condonation or forgiveness of a gross matrimonial offence. The statute declares that it is no marriage in the eve of law where one of the parties was induced to enter into a matrimonial alliance under coercion, duress or fraud evidencing lack of free consent. Therefore, a marriage procured by force or fraud has no sanctity and is voidable at the election of the injured party. This being the substantive provision, the legislature, however, bars a decree of annulment of marriage as an exception if the specific conditions spelt out in sub-section (2) of Section 12 of the Hindu Marriage Act, 1955, are satisfied. An analysis of this provision relevant to

clause (c) of sub-section (1) would indicate that even after the discovery of fraud two other significant conditions have to be satisfied; firstly, the most significant one is the factum of the two spouses living together as husband and wife; secondly, that such living together must be with the full and free consent of the condoning spouse. The language used here is meaningful. It first pinpoints that one spouse must live with the other, but that by itself may not be sufficient. For instance, if both of them are merely living in the same premises, but not as husband and wife, the same may not be conclusive. The statute further requires that such a living must be a matrimonial living together as husband and wife even after a conscious discovery of the fraud and with a full and free consent. The import of the language used, therefore, is only a pointer to the fact that there has to be a conscious and deliberate condonation and a full ratification of the matrimonial status which alone would amount to a bar against challenging a marriage which otherwise is vitiated by force or fraud. In other words, both the physical and the mental requirements must concur to ratify a marriage which intrinsically is not valid, but is to be given *ex post facto* sanction by subsequent conduct of living together as husband and wife with free consent. These stringent conditions of the statute would not stand satisfied by a solitary act of sexual intercourse. (Paras 7 and 8).

Letters Patent Appeal under Clause X of the Letters Patent against the judgment of Hon'ble Mr. Justice R. N. Mittal in F.A.O. No. 133-M of 1978 dated 10th August, 1979.

Y. P. Gandhi, Advocate, for the Appellant.

Ujagar Singh, Advocate, for the Respondent.

JUDGMENT

S. S. Sandhawalia, C.J.

1. Whether a single act of sexual intercourse by a spouse who had been fraudulently inveigled into a marriage by fraud would amount to total condonation, so as to bar a petition for the annulment of such a voidable marriage under Section 12 of the Hindu Marriage Act — is the solitary though significant question which falls for determination in this appeal under Clause 10 of the Letters Patent.

2. The factual matrix is otherwise brief and further calls for notice only in so far as it is relevant for the aforesaid issue. The

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appellant-husband was married to the respondent on June 19, 1977. On October 22, 1977, the appellant presented an application under Section 12 of the Hindu Marriage Act (hereinafter called 'the Act'), seeking annulment of the marriage. Therein he alleged that prior to the marriage he and his mother were shown an altogether different girl who was both literate and beautiful and he had consequently given his consent to a marriage with her. However, when the respondent after the marital rites was brought to the husband's home, his mother discovered that the girl was a different one from that earlier shown to them. According to the petitioner-appellant, the respondent was illiterate, of ugly looks was aged about 40 years and of small stature, and had grey hair. Further she also had some artificial teeth and was suffering from venereal disease in a communicable form and both had weak eye-sight and certain defects in her eyes. According to the husband, the respondent-wife stayed in the house only for the night and was taken away in the morning by her brother. Thereafter, the parties never lived as husband and wife.

3. The respondent-wife contested the aforesaid application on the ground that there was no fraud played upon the petitioner and sought to allege that she had stayed with the appellant-husband for nearly 20 days. She alleged that thereafter the husband started demanding Rs. 5,000 and a motor-cycle from her parents and when they could not meet the demand, she was turned out of the house. Later, her parents approached the appellant-husband but he refused to keep her unless the aforementioned demand was satisfied.

4. On the pleadings of the parties, the following issues were framed :—

- (1) Whether respondent has been married by fraud ?
- (2) Whether the petitioner is entitled to a decree as prayed for ?
- (3) Relief.

The trial court came to the categorical finding that a fraud had been played upon the appellant-husband and therefore, he was entitled to a decree of nullity of marriage which was granted.

5. The respondent-wife appealed. The factual finding of fraud arrived at by the court below was not challenged on her behalf and the solitary argument raised by her counsel before the learned Single Judge was that the appellant-husband having admitted that after the fraud he had cohabited with the wife, he was consequently barred from seeking relief under Section 12 of the Act. This contention found favour with the learned Single Judge and accepting the appeal, he dismissed the petition of the appellant-husband.

6. Now to clear the deck for a closer examination of the solitary legal issue which arises herein it may first be noticed that the sole contention on behalf of the respondent-wife before the learned Single Judge was that the appellant even after getting some wind of the fraud and impersonation practised on him, nevertheless admitted to having cohabited with the wife once for the solitary night during which she stayed at his house. It calls for pointed notice that both in the petition itself and also in the examination-in-chief of the appellant-husband, the firm stand taken was that on the very next day, following the wedding, the brother of the respondent-wife had come and taken her away. Significantly this position was not even sought to be assailed by a single specific question by way of cross-examination. The trial court though slightly ambivalent had itself come to a clear finding that the wife had lived in the house only for one night and the allegations made on her behalf of having stayed in her husband's house for 20 days was not at all established. The learned Single Judge himself noticed that the counsel for the appellant had not challenged the finding of the trial court that the fraud had been played on the husband. Consequent on these virtually accepted facts, the pristine legal issue was raised before the learned Single Judge—whether a solitary act of sexual intercourse was tantamount to a total condonation of the fraud and impersonation by which the voidable marriage had been brought about. On this issue, the learned Single Judge took a rather stringent view in the following words :—

“...In my view even a single act of cohabitation after the discovery of fraud would be a good ground for dismissal of the petition for nullity of marriage. The principle underlying it is that of condonation.....”

It is the aforesaid dictum which calls for examination in the present case.

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7. Now the principle of a total condonation of a matrimonial offence and the results flowing therefrom are both subtle and profound. Though well understood it does not admit of an all comprehensive definition. Nevertheless, the authoritative formulation of the concept in 'Rayden on Divorce' XI-Edition, may be noticed instructively :—

“Condonation is the reinstatement in his or her former marital position of a spouse who has committed a matrimonial wrong of which all material facts are known to the other spouse, with the intention of forgiving and remitting the wrong, on condition that the spouse whose wrong is so condoned does not thenceforward (a) commit any further matrimonial offence (b). Condonation, therefore, consists of a factum of reinstatement and an *animus remittendi*..”

Coming nearer home, an authoritative view of the concept of condonation has been spelt out by Chandrachud, J. (as his Lordship then was), in the undermentioned observations in the well-known case of *Dt. N. G. Dastane v. Mrs. S. Dastane* (1).

“Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things; forgiveness and restoration: The Law and Practice of Divorce and Matrimonial Causes by D. Tolstoy, Sixth Ed. p. 75....”

From the aforesaid enunciation, it would be plain that condonation to be effective has both a factual and mental element. There is to be both a factum of reinstatement and a clear intention to forego and remit the wrong. Therefore, an effective and total condonation can arise only from a conscious and deliberate ratification of the marital status by the aggrieved spouse which may lead to a strong inference of a total wiping off a matrimonial offence. There is no inflexible rule that a solitary freakish act of sexual intercourse would raise an irrebutable presumption of total condonation or forgiveness of a gross matrimonial offence.

(1) AIR 1975 S.C. 1534.

8. Now apart from larger principle, the matter here has necessarily to be construed in the light of the language of the statute. Relevant parts of Section 12 are as follows :—

“... (1) Any marriage solemnised, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely,—

(a) XX XX XX

(b) XX XX XX

(c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner is required under section 5, the consent of such guardian was obtained by force or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent; or,

(d) XX XX XX

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage—

(a) on the ground specified in clause (c) of the sub-section (1), shall be entertained if—

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered; ”

Now it is the plain language of the aforesaid provisions which calls for a close analysis here. The statute declares that it is no marriage in the eye of law where one of the parties was induced to enter into a matrimonial alliance under coercion, duress or fraud evidencing lack of free consent. Therefore, a marriage procured by force or

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fraud has no sanctity and is voidable at the election of the injured party. This being the substantive provision, the legislature, however, bars a decree of annulment of marriage as an exception if the specific conditions spelt out in sub-section (2) of Section 12 are satisfied. An analysis of this provision relevant to clause (c) of sub-section (1) would indicate that even after the discovery of fraud two other significant conditions have to be satisfied; firstly, the most significant one is the factum of the two spouses living together as husband and wife; secondly, that such living together must be with the full and free consent of the condoning spouse. The language used here is meaningful. It first pin-points that one spouse must live with the other, but that by itself may not be sufficient. For instance, if both of them are merely living in the same premises but not as husband and wife, the same may not be conclusive. The statute further requires that such a living must be a matrimonial living together as husband and wife even after a conscious discovery of the fraud and with a full and free consent. The import of the language used, therefore, is only a pointer to the fact that there has to be a conscious and deliberate condonation and a full ratification of the matrimonial status which alone would amount to a bar against challenging a marriage which otherwise is vitiated by force or fraud. In other words, both the physical and the mental requirements must concur to ratify a marriage which intrinsically is not valid, but is to be given *ex post facto* 'sanction' by subsequent conduct of living together as husband and wife with free consent. I do not think that these stringent conditions of the statute would stand satisfied by a solitary act of sexual intercourse and the present case is a patent example of the inequity which would result from a contrary construction.

9. A close analysis of the judgment under appeal would show that the larger principle and the concept of condonation of matrimonial offence was not adequately canvassed before the learned Single Judge. In particular pointed attention was apparently not drawn to the provisions of sub-section 2 (a) (i) and (ii) which were the most relevant and material ones and called for specific interpretation. With the greatest respect to the learned Single Judge, we are inclined to hold that keeping the specific language of the statute in mind as also the larger principle of condonation, it would be an overly strict and if we may so, a hypertechnical construction to lay down that a marriage otherwise patently voidable and

fit for annulment would become sanctified beyond challenge and be rendered irrevocable by a solitary act of sexual intercourse without more.

10. The learned Single Judge had attempted to draw some inspiration from a passing observation in *Kunta Devi v. Siri Ram Kalu Ram* (2). The point before us did not directly arise in the said case. Indeed, the issue therein had arisen from a petition for restitution of conjugal rights only under Section 9 of the Act. The learned Judge therein indeed held that no valid marriage had been performed between the parties. The observation that in the said case the marriage had not been ratified by voluntary cohabitation which might have neutralised the effect of earlier coercive and fraudulent acts, in our view, does not aid the case of the respondent-wife.

11. To conclude, we would render the answer to the question posed at the outset in the negative and with the greatest respect hold that the finding of the learned Single Judge is not sustainable. The appeal is, therefore, allowed and the judgment under appeal is set aside and that of the trial-court restored. There will be no order as to costs.

S. C. Mittal, J.—I agree.

S.C.K.

Before Ajit Singh Bains, J.

BUDHI PARKASH YADAV,—*Petitioner*

versus

K. C. SHARMA and another,—*Respondents.*

Criminal Revision No. 147 of 1981.

June 4, 1981.

Code of Criminal Procedure (II of 1974)—Sections 197 (2), 200 and 202—Complaint against public servants—Process to the accused not yet issued—Such accused—Whether have a right to participate in the enquiry proceedings—Serious allegations of having

(2) AIR 1963 Punjab 235.