

In The High Court At Calcutta

Civil Revisional Jurisdiction

Appellate side

Present :

The Hon'ble Justice Harish Tandon.

C.O. No. 40 of 2015

Kala Raman

-vs-

Ravi Ranganathan

For the petitioners : Mr. Aniruddha Chatterjee,
: Mr. Rahul Karmakar.

For the opposite party : Mr. Sonal Shah,
: Mr. Kushangra Shah.

Heard on : 09.01.2015

Judgment on : 21.01.2015

HARISH TANDON, J.:

At this stage of Order 7 Rule 11 of the Code, the suit is sought to be nipped in the bud as the plaint does not disclose the cause of action. The plaintiff/opposite party seeks a relief annulling the marriage between the parties to be void on the grounds of concealment of material facts, which constitutes fraud.

Admittedly the marriage between the parties was solemnized in accordance with Hindu Ritual and Rites on May 12, 2013 at Guruvayur in the State of Kerala. It is certainly not a chosen marriage where the parties have fallen in love and decided to marry but a negotiating one through the social contracts. Both the parties and their family members were interacting and in fact, have meet personally exchanging their views and aspirations in the life and ultimately agreed to marry. During the marriage ceremony, the plaintiff/opposite party experienced the smell of foul breath coming from the mouth of the petitioner which was explained being due to improper bowl movements as a result of anxiety. The petitioner was taken to the doctors and was opined to suffer from Chronic Periodontitis. According to the opposite party, even during the honeymoon, the consummation could not be done as the constant foul smell was coming from the mouth of the opposite party. In course of visit to several doctors, one of them reported that the bacteria presents in her gum can be transmitted to her partner through her mouth. The annulment of marriage is sought on the plea of concealment of such disease obstructing in consummation of the marriage under Section 12 (1) (c) of the Hindu Marriage Act.

The wife files an application under Order 7 Rule 11(d) of the Code praying for rejection of the plaint as the grounds stated in the plaint neither amounts to fraud nor a concealment envisaged under Section 12 (1) (c) of the Code. The Trial Court rejected the said application i.e. how the revisional application is filed before this Court.

Learned Advocate for the opposite party submits that if a party to marriage is suffering from some abhorrent disease which was not disclosed, it would amount to concealment by the Bombay High Court in case of **P. v. K.** reported in **AIR 1982 Bom 400**. It is strongly submitted that to bring an action under Section 12 (1) (c) of the Hindu Marriage Act on the ground of fraud, there must be some abuse of the evidential position, some intentional imposition or deliberate concealment of material facts. In support of the aforesaid contentions, the reliance is placed upon a judgment rendered by Madras High Court in case of **Sujatha -v- C.D. Hariharan** reported in **(1995) 2 Madras Law Journal 327**.

It is thus submitted that once the case of concealment amounting to fraud is made out, the plaint should not be rejected at its nascent stage, but the cause should be decided on full-fledged trial. In other words, it is stated that if the facts are required to be proved on evidence whether the

concealment as alleged amounts to a fraud under Section 12 (1) (c) of the Act, the plaint should not be rejected on the ground that it is barred by law.

The learned Advocate for the petitioner assailed the order on the ground that meaningful reading of the averments made in the plaint clearly suggest that it cannot be brought within the purview of Order 12 Rule 1 (c) of the Hindu Marriage Act, 1955. It is further submitted that apart from the said provision, none of the ingredients provided under Section 12 of the said Act is present in the plaint inviting the Court to annul the marriage void and, therefore, the plaint is liable to be rejected. It is, however, submitted that the concealment of the material facts or the fraud envisaged under Section 12 (1) (c) of the Act shall either be at the time of agreement to marry or at the time of solemnization of marriage as held in case of **Anath Nath De -v- Sm. Lajjabati Devi** reported in **AIR 1959 Cal 778**. It is vehemently submitted that the marriage was consummated between the parties and, therefore, even if, the allegation made out in the plaint is accepted, it amounts to condonation. It is thus submitted that the annulment of marriage being void can only be done if the provisions of Section 12 of the Act is pleaded in the plaint. Lastly it is submitted that the

fraud envisaged under Section 12 (1) (c) is relatable to the other grounds incorporated therein affecting the consummation and not otherwise.

Before proceeding to deal with the respective submissions of the counsel, it would be apposite to state the relevant provisions which may assume some importance in addressing the issue. Section 5 of the Hindu Marriage Act contains the conditions for the valid marriage solemnized between any two Hindus. The said section is reproduced hereunder:

“5. Conditions for a Hindu Marriage.- A marriage may be solemnized between any two Hindus, if the following conditions are fulfilled, namely:

- (i) neither party has a spouse living at the time of the marriage;
- (ii) at the time of the marriage, neither party-
 - (a) is incapable of giving a valid consent to it in consequence of unsoundness of mind; or
 - (b) though capable of giving a valid consent, has been suffering from mental disorder of such a kind or to such an extent as to be unfit for marriage and the procreation of children; or
 - (c) has been subject to recurrent attacks of insanity
- (iii) the bridegroom has completed the age of twenty-one years and the bride, the age of eighteen years at the time of the marriage;
- (iv) the parties are not within the degree of prohibited relationship, unless the custom or usage governing each of them permits of a marriage between the two;
- (v) the parties are not sapindas of each other, unless the custom or usage governing each of them permits of a marriage between the two;”

Section 7 of the Act relates to the ceremonies for the Hindu Marriage to be performed with Customary Rites of either parties including

Saptopodi i.e. taking of seven steps by bridegroom and bride jointly before the sacred fire to complete the marriage. The marriage shall be declared null and void at the option of either of the parties if it contravenes any of the provisions specified in Clause (i), (iv) & (v) of Section 5 of the said Act. Section 12 of the Act, which is pertinent in the present case, can be resorted to either of the parties for annulling the marriage as nullity provided the grounds set fourth therein are satisfied. Section 12 of the Act is quoted below:

“12. Voidable marriages.- (1) Any marriage solemnized, 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) that the marriage has not been consummated owing to the impotence of the respondent; or
- (b) that the marriage is in contravention of the condition specified in clause (ii) of section 5; or
- (c) that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner was required under section 5 as it stood immediately before the commencement of the Child Marriage Restraint (Amendment) Act 1978 (2 of 1978), 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) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding any thing contained in sub-section (1), no petition for annulling a marriage:

- (a) on the ground specified in clause (c) of 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;
- (b) On the ground specified in clause (d) of sub-section (1) shall be entertained unless the Court is satisfied:
- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;
 - (ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within one year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and
 - (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the said ground.”

Section 13 contains the provision under which the marriage can be dissolved by a decree of divorce provided the ground enumerated therein are proved before the Court of competence jurisdiction.

Under the Hindu Law, a marriage is not a contract but sacrament. The Hindu Marriage Act has no doubt made an inroad into the close preserve of the ancient Hindu Law strongly suggesting the marriage as sacrament and not contract which still goes strong. The fraud contemplated by Section 12 (1) (c) of the said Act is not required to be interpreted in tune with the definition engrafted under Section 17 of the

Contract Act. Both the Hindu Marriage Act and Contract Act are not *pari materia* as the former deals with marriages and the other deals with contract and commerce. Therefore, the definition of fraud given under the Contract Act cannot be brought with lock, stock and barrel to a marriage which is sacrament. There are still strong reasons to hold that the Hindu Marriage is not a contract but sacrament, as the contract can at the will of the parties be dissolved but the parties who contract a marriage cannot except, of course, divorce by mutual consent as provided under Section 13B of the said Act. The parties married together according to Ritual and ceremonies and/or not within the embargo created under Section 5 of the said Act. Therefore, conditions of the valid Hindu Marriage as laid down in Section 5 of the Act are well met. Prior to the amendment having brought in clause (c) of Sub-Section 1 of Section 12 of the Act by the Amendment Act 1976, the applicability of fraud has been extended not only to the nature of the ceremony but also to any material facts and circumstances concerning to the respondent. The decision rendered prior to the said amendment disentitles the party to the contract to annul the marriage as nullity on the ground of the fraud if the consent to a solemnization of the marriage is freely given on the nature of the ceremony and not merely on the basis of the fraudulent statement relating to the family or fortune or otherwise. The operation of the clause is considerably extended so as to

include within its ambit, any material facts or circumstances concerning the respondent. The petitioner applying under Section 12 of the Act must show that for such false representation or statement or concealment, he or she would not have married the respondent. The decision rendered in **Anath Nath De (supra)** is one of such decision rendered prior to the amendment brought in the year 1976 wherein it is held that the fraud must be referable to a consent of the petitioner at the time of solemnization of marriage. The Bombay High Court in case of **P. V. Gopalkrishnan (supra)** took note of the changes having brought in Section 12 of the Act and held:

“This amendment clearly contemplates change in law and things into the ambit of fraud, misrepresentation or concealment of any material fact or circumstance concerning the respondent. Fraud must mean representing as existing what is not and concealing what is material. The misrepresentation or concealment necessarily presuppose that the respondent was aware of the facts and circumstance which were misrepresented or concealed. * * * * *

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Every fact and circumstance cannot be material. Therefore, concealment or misrepresentation of every fact and circumstances cannot be said to be fraud sufficient for annulment. It is difficult to define with any certainty what can be said to be material fact or circumstance but it may be safely said that the fact or circumstance which is of such a nature as would materially interfere with the material life and pleasure, including sexual pleasure will be a material fact or circumstance. The only limitation is that the material fact or circumstance must be concerning the respondent, meaning thereby that it must be in respect of the person or character of the respondent. It is immaterial whether such fact of circumstance is

curable or remediable. If a party to a marriage is suffering from some abhorrent disease such as leprosy or general disease and this is not disclosed it will be definitely concealment and consequently fraud as to material fact and circumstance.”

Therefore, it would not be a correct proposition of law to hold that the fraud contemplated under clause (c) of Sub-Section 1 of Section 12 of the Act is to be read in consonance with the other provision contained therein and not an independent one. Any concealment or misrepresentation affecting the sexual pleasure is the material fact and circumstance so as to imbibe within itself the aforesaid provisions. The concealment affecting the ordinary marital life of the parties including the consummation of marriage may be a circumstance thought off by the legislatures which prompted the amendments to be brought in the year 1976. The Madras High Court in case of **Sujatha (supra)** summarized the law as:

“To summarise the above case law, to have a cause of action for annulling a marriage under Section 12 (1) (c) of the Hindu Marriage Act, to constitute fraud there must be some abuse of confidential position, some intentional imposition or some deliberate concealment of material facts which are the fundamental basis of the marriage contract. (See Laws of Marriage & Divorce by H.K. Saharay, second edition at page 127). The above case law makes it clear that the concealment, even if any, must be of such nature which affects the ordinary marital life of the parties.”

The consummation of a marriage is one of the factors which may lead the condonation disentitling the either of the spouse to take recourse to Section 12 of the said Act. A careful reading of the said clause (c) clearly indicates that the expression fraud used in the said clause has a meaning in which such term is understood in legal parlance. Material facts and circumstances must be taken to mean such facts or circumstances concerning the respondent which if known to the petitioner might have dissuaded him from consenting to the marriage with the respondent.

Order 7 Rule 11 (d) of the Code can be pressed in action only when from the meaningful reading of the plaint and taken the statements to be correct, the suit does not disclose any cause of action. It is the plaint and only the plaint which should be looked into to find out that it would be a futile exercise if such suit is allowed to continue.

In view of the discussion made herein above, it cannot be said with reasonably certainty that the suit is hit by the provision of Section 12 (1) (c) of the Act.

This Court, therefore, does not find that the Trial Court has committed any wrong in dismissing the said application.

The revisional application is thus dismissed.

However, there shall be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Harish Tandon, J.)

After the judgment is delivered, on the consent of the parties, the time to file the written objection is extended till February 7, 2015.

(Harish Tandon, J.)