

Andhra Pradesh High Court - Amravati

Murikinati Sahitya Reddy vs Sura Rajasekhara Reddy on 11 May, 2023

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO  
AND

THE HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO

F.C.A. No.27 OF 2022

JUDGMENT: (Per Hon'ble Sri Justice T. Mallikarjuna Rao)

1. The Family Court Appeal, under section 19 of the Family

Courts Act, 1984, is filed by the appellant/petitioner, challenging the Judgment dated 11.04.2022, passed in F.C.O.P. No.11 of 2022 by the learned Judge, Family Court-cum-VII Additional District & Sessions Court, Anantapur, dismissing the petition filed under Section 12(a) of Hindu Marriage Act, 1955 by the petitioner, seeking to declare the marriage dated 14.12.2018 between the petitioner and the respondent as null and void.

2. We will refer to the parties as they are arrayed in the original petition.

3. In a nutshell, the petitioner's case is as follows:

(a) The petitioner and the respondent are the wife and husband, and their marriage was performed on 14.12.2018 at Anantapur. At the nuptial night, the petitioner entered with utmost pleasure, but the respondent represented the petitioner that he was strained UDPR, J & TMR, J F.C.A.No.27 of 2022 and he wants some rest. Thus, the marriage was not consummated at that time.

(b) The petitioner further contends that the respondent stayed at her parents' house until 06.01.2019, during which time he denied the petitioner sexual intercourse. Subsequently, the respondent left for Germany, leading the petitioner to reside at her parents' house in Hyderabad. Later on, the petitioner herself travelled to Germany, where she secured employment. During this period, the respondent openly declared his impotence, asserting that his family members were aware of this even before the marriage took place.

(c) It is further stated in the petition that, upon her request, the respondent consulted a doctor in Germany on 14.05.2020 regarding a penetration problem. Following continuous observation, it was revealed that the respondent suffered from a penetration problem and hypo plastic testicles. Finally, the petitioner left the respondent's company on 05.12.2020 and returned to India, and the

respondent also returned to India on 19.12.2020. Numerous attempts at reconciliation took place between the petitioner and the respondent. The respondent openly admitted his impotence and declared himself unfit for married life. Consequently, both parties UDPR, J & TMR, J F.C.A.No.27 of 2022 mutually agreed to pursue a divorce without disclosing the reasons behind it. They jointly filed F.C.O.P.No.190 of 2020 before the competent court seeking mutual divorce. However, the petition was dismissed on the ground that both parties had hastily filed for divorce without adhering to the statutory requirement of a one-year separation period. Subsequently, the petitioner filed F.C.O.P. No.11 of 2022 under Section 12(a) of the Hindu Marriage Act, seeking a declaration that the marriage held on 14.12.2018 be declared null and void.

4. The averments in the petition have not been controverted by the respondent by pleadings as he has chosen to remain *ex parte* in F.C.O.P.

5. On behalf of the petitioner, PW.1 and 2 got examined and marked Ex.A.1 to Ex.A.7 were marked. No oral or documentary evidence was let in on behalf of the respondent.

6. After hearing the petitioner's counsel, the trial court dismissed the F.C.O.P. Aggrieved by the Judgment, and this appeal is filed.

7. A memo was filed on behalf of the petitioner/appellant stating that a notice had been served to the respondent in the appeal through E-Mail and registered post with acknowledgement; the respondent gave a response through E-mail on 06.12.2022 and UDPR, J & TMR, J F.C.A.No.27 of 2022 attached his response dated 13.12.2022 stating that he has no objection to granting a divorce. The respondent filed an affidavit along with a memo dated 25.04.2023, wherein he said that he received the notices in F.C.A. (Family Court Appeal) sent on behalf of the appellant and that he is not interested in the marriage with the appellant, he does not want to contest the appeal, and he has no objection for dissolution of their marriage.

8. We have heard arguments of Sri S.S. Prasad, learned Senior Counsel appearing Smt. C. Sindhu Kumari, learned counsel for the appellant.

9. We have given our thoughtful and anxious consideration to the submission made by the petitioner's counsel.

10. Learned counsel for the appellant/petitioner contends that the trial Court ought to have allowed the petition as the respondent remained *ex parte*, and the averments made in the petition and the evidence of the petitioner are un-rebutted. The trial Court failed to see that Ex.A3-Report of the Doctor establishes that the respondent is not fit for marital life.

11. Now, the points for consideration are:

I. Whether the appellant has succeeded in proving that her marriage with the respondent is not consummated owing to the impotence of the respondent?

UDPR, J & TMR, J F.C.A.No.27 of 2022 II. Whether the Judgment of the Family Court needs any interference?

POINTS NO.I AND II:

12. There is an amendment effected to section 12(1)(a) of amending Act 68 of 1976 by virtue of which clause (a) of section 12(1) of the Hindu Marriage Act has been recast to the following effect:

"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".

By virtue of section 39 of the Amending Act, 68 of 1976, what should be examined by the Court is whether the petitioner has succeeded in showing that the marriage has not been consummated owing to the impotence of the respondent. Thus, two ingredients must be established in order to get a decree under cl.(a)., they are (1) the marriage has not been consummated, and (2) the absence of consummation is because of the impotence of the respondent.

13. Before advertng to the respective contentions put forward by the parties, it would be relevant to go through the settled case law relating to the impotency to appreciate the case facts.

UDPR, J & TMR, J F.C.A.No.27 of 2022

14. The Hon'ble Supreme Court in *Digvijay Sinhji v. Pratap Kumari*<sup>1</sup>, has held as follows:

"5. A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility. The condition must be one, according to the statute, which existed at the time of the marriage and continued to be so until the institution of the proceedings. In order to entitle the appellant to obtain a decree of nullity, establish that his wife, the respondent, was impotent at the time of the marriage and continued to be so until the institution of the proceedings."

15. The Division Bench of the Delhi High Court in *Rita Nijhawan v. Balkishan Nijhawan*<sup>2</sup> at para 22 observed as follows:

"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. It has been said that the sexual relations when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognised

that nothing is more fatal to marriage than disappointments in sexual intercourse."

16. The petitioner is examined as PW.1. In the deposition of PW.1, she set out on oath the case she had set out in the petition.

17. To prove her marriage with the respondent, she relied on Ex.A.1-wedding card and Ex.A.2-Marriage photograph of the petitioner and the respondent. Her evidence shows that their marriage was performed on 14.12.2018 at Police Convention 1 (1969) 2 SCC 279: A.I.R. 1970 SC 137 2 A.I.R. 1973 Del 200 UDPR, J & TMR,J F.C.A.No.27 of 2022 Hall, Anantapur and the respondent stayed at petitioner's parents house till 06.01.2019; the respondent did not allow the petitioner for sexual intercourse on the ground that they shall first complete devotional trip; later, the respondent left to Germany and the petitioner also left India and went to Germany on 01.04.2019; the petitioner got job at Germany and was working as Base QA Engineer; the respondent openly proclaimed that he is impotent and the same was suppressed and got married the petitioner; the marriage was not consummated, on the request of the petitioner, the respondent consulted a doctor at Germany on 14.05.2020 due to penetration problem; after continuous observation of the respondent; finally, the petitioner left the company of the respondent on 05.12.2020; the respondent also returned to India on 19.12.2020; several reconciliations took place between them; the respondent openly accepted his impotence and proclaimed that he is unfit for married life; thus, a conclusion was arrived to go for mutual divorce without disclosing anything; she and respondent filed F.C.O.P. No.190 of 2020 on the file of Family Court, Anantapur, seeking to grant divorce. To establish the fact, the petitioner relied on Ex.A.3-Office copy of the petition in F.C.O.P. No.190 of 2020; Ex.A.5-Terms and conditions filed in F.C.O.P. No.190 of 2020. She also relied on UDPR, J & TMR,J F.C.A.No.27 of 2022 Ex.A.6-Undertaking letter dated 05.07.2021 given by the respondent to the petitioner, stating that he is not fit for marital life. At the intervention of the elders, he and the petitioner concluded getting a divorce by mutual consent.

18. The petitioner got examined her mother as PW.2. She reiterated almost all the averments of the petition in her chief affidavit. As the respondent did not contest the matter, their evidence remained unchallenged.

19. The copy of the Judgment in F.C.O.P. No.190 of 2020 vide Ex.A.7 shows that the Family Court dismissed the F.C.O.P. by observing that the petition for mutual consent was filed on 23.12.2020 and both the petitioners lived together in Germany upto 05.12.2020. Both parties failed to observe the statutory mandate for one-year separate living, and both parties hurriedly filed the divorce petition. They are not entitled to divorce on mutual consent without a statutory requirement of separate living for one year as mandated in section 13B of the Hindu Marriage Act.

20. The Family Court dismissed F.C.O.P. No.11 of 2022 on the ground that the petitioner did not mention the ground of impotence in F.C.O.P.No.190 of 2020, and the ground mentioned in the petition appears to have been created for the present plea. The petitioner has explained why she has not UDPR, J & TMR,J F.C.A.No.27 of 2022 pleaded in F.C.O.P. No.190 of 2020 regarding the penetration problem of the respondent. It is argued on behalf of the petitioner that when such a plea is presented and not disputed by the respondent, the Family Court should not have doubted the

petitioner's case for not including that ground in F.C.O.P. No.190 of 2020. It is further contended that there was no need to create a ground of impotence, as after the expiration of the one-year period stipulated under Section 13B of the Hindu Marriage Act, they could approach the Family Court to seek a divorce.

21. It is evident from the records that the respondent was also willing to pursue a divorce, as both the petitioner and the respondent filed a petition for mutual divorce in F.C.O.P. No.190 of 2020. However, the Family Court seemingly overlooked the fact that the respondent did not contest F.C.O.P. No.11 of 2022, despite specific allegations being made against him. It is well to remember that ordinarily, no man admits his mental or physical incapacity unless it is a fact. Impotence is generally regarded as a stigma. It is a slur on manhood, masculinity, and virility. The Family Court has also not considered when there is no truth in the petitioner's contention, indeed, the respondent would have contested the UDPR, J & TMR, J F.C.A.No.27 of 2022 matter regarding the severe nature of the allegations in the petition.

22. The other ground taken by the Family Court to dismiss the petition is that the petitioner failed to prove the Ex.A.3 report, which shows that the respondent was examined on 26.09.2020 by Dr.Lakshman Bellamkonda. He observed that the respondent had a penetration problem.

23. No doubt, the petitioner has not examined the Doctor to prove the report. We don't think that the learned Family Court Judge was right in drawing an adverse inference because of the non-examination of the Doctor by the petitioner. The unchallenged evidence of PW.1 shows that the marriage is not consummated due to the impotence of the respondent. It is quite possible that the consummation between the spouses might not have been affected owing to several reasons and not necessarily due to the impotence of one spouse on the other. Impotence can be due to psychological inhibition or physical incapacity.

24. In some cases, a person may be capable to perform sexual intercourse but incapable of performing with a particular individual. In such a case, he must be regarded as impotent about the specific individual regardless of his potency in general. The petitioner has made allegations in accordance with section 12(1)(a) of the Hindu Marriage Act. An averment of UDPR, J & TMR, J F.C.A.No.27 of 2022 impotence not disputed by the other side is sufficient to support the decree of nullity. The Family Court ignored the fact that the petitioner's case was not disputed by the respondent. The petitioner stated in her petition that the petition had not been made in collusion. She also affirmed the same in her chief examination on oath. Collusion cannot be inferred merely from the fact that the respondent does not appear. In the present case, there are no circumstances giving rise to any suspicion or collusion. The unchallenged evidence of PW.1 remained that the marriage was not consummated. This admitted fact need not be further established.

25. The learned Family Judge entertained a doubt about the petitioner's plea regarding the impotence of her husband. The petitioner has specifically pleaded regarding Ex.A.6- undertaking letter dated 05.07.2021 given by the respondent stating that he is not fit for matrimonial life, and the said petitioner's case is not disputed by the respondent. It is settled law that the best evidence in a case is the admission of the opposite party. According to section 58 of the Evidence Act, admitted

facts need not be proved. There is no doubt that admission in pleadings or judicial admissions by themselves can be the foundation of the parties' rights, as held by the UDPR, J & TMR, J F.C.A.No.27 of 2022 Supreme Court in the case of Nagindas Ramdas Vs. Dalpatram Inchharam<sup>3</sup> in para No.26 as under:

"...Admissions, if true and clear are by far the best proof of the facts admitted. Admissions in pleadings or judicial admissions, admissible under section 58 of the Evidence Act, made by the parties or their agents at or before the hearing of the case, stand on a higher footing than evidentiary admissions. The former class of admissions are fully binding on the party that makes them and constitute a waiver of proof. They by themselves can be made the foundation of the rights of the parties. On the other hand, evidentiary admissions which are receivable at the trial as evidence, are by themselves, not conclusive. They can be shown to be wrong."

The Judgment of the Family Court does not disclose the proper reasons why it had entertained doubt about the petitioner's case.

26. The learned Family Judge has failed to draw legitimate inferences from the facts on record and has not considered that the respondent had chosen not to appear. The family court failed to consider that there is no rule of law requiring that in a petition of this nature, the evidence of the spouse must receive independent corroboration before it can be accepted as sufficient to justify the passing of the decree. Section 134 of the Indian Evidence Act enshrines the well- settled and recognized maxim that evidence has to be weighed and not counted. The Hindu Marriage Act does not depart from this rule. It does not lay down, in respect of cases falling under 3 A.I.R. 1974 SC 471 UDPR, J & TMR, J F.C.A.No.27 of 2022 it, any standard of proof other than arising from the Evidence Act.

27. In T.Rangaswami Vs. T.Aravindammal<sup>4</sup>, the Madras High Court held that:

In regard to proof of impotency, the rules of evidence are not different in the case of impotency than elsewhere. Impotence is physical unfitness for consummation which must be proved, or there must be facts from which this can be inferred. There is no minimum standard of proof necessary. Even uncorroborated testimony of the petitioner is sufficient if it can be believed. Under section 120 of the Evidence Act, the other party of the case is a competent witness.

28. The sole testimony of the petitioner/wife, the only material evidence as to the incompetency of the respondent/husband, cannot be discarded when it inspires confidence and there is nothing to show that they were on bad terms. The evidence of the petitioner that the marriage was not consummated due to the husband's impotence was not refuted, and the impotence of the respondent was admitted in writing by him.

29. The Family Court observed that the conjoint reading of letters addressed by the respondent to the Court and notice copy of the respondent dated 12.02.2022 causes doubt in the mind of the Court about the service of notice to the respondent. We are of the view that when such a doubt is

entertained by the Family Court, it should have taken appropriate measures to 4 1956 S.C.C. OnLine Mad 223 UDPR, J & TMR,J F.C.A.No.27 of 2022 clarify its doubt instead of dismissing the petition by ignoring the fact that it has passed an ex parte order against the respondent.

30. On the facts of this case, we are unable to appreciate the finding of the Family Court that the petition is filed hurriedly with baseless grounds without any substantial material.

31. In these circumstances, to refuse the relief on the ground of non-examination of the Doctor would not be a practical and realistic approach, and it would be unreasonable and inhuman.

32. For the said reasons, in our opinion, the evidence of PW.1 should have been accepted by the Family Court in the facts and circumstances of the case. We are of the view that the petitioner's case, based on section 12(1)(a), as amended by the 1976 Act, has been clearly established. Accordingly, the points are answered.

33. As a result, the appeal is allowed by granting a decree for divorce in favour of the appellant-wife and against the respondent-husband. The Judgment passed in F.C.O.P. No.11 of 2022, dated 11.04.2022, on the file of the Judge, Family Court-cum-VII Additional District & Sessions Court, Anantapur, is set aside. In the facts and circumstances of the case, the parties will bear their own costs throughout.

UDPR, J & TMR,J F.C.A.No.27 of 2022

34. Consequently, miscellaneous petitions pending, if any, shall also stand closed.

----- U . D U R G A P R A S A D R A O , J  
T.MALLIKARJUNA RAO, J Dt.11.05.2023 MS/SAK UDPR,  
J & TMR,J F.C.A.No.27 of 2022 THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO AND THE  
HON'BLE SRI JUSTICE T.MALLIKARJUNA RAO F.C.A. No.27 OF 2022 Date:11.05.2023 MS/SAK