1986 DMC 2 65 . 1986 ILR DEL 2 659 . 1986 DRJ 10 286 . 1986 AIR DEL 399 . 1986 SCC ONLINE DEL 42 . 1987 PLR DEL 91 12 . 1986 AIR DELHI 399 . 1986 ILR DELHI 2 659 .

Moina Khosla v. Amardeep Singh Khosla .

Delhi High Court (Jan 31, 1986)

CASE NO.

F.A.O (M) No. 62 of 1985

ADVOCATES

Mr. M.M Sudan, Advocate.

Nemo.

JUDGES

Mahinder Narain, J.

IMPORTANT PARAS

1. 13. It is well settled that strong proof is required for the purposes of establishing that the domicile of origin has been abandoned and a new one has been acquired. For this purpose, the best evidence, in fact the only evidence, during the life time of a person who is said to have abandoned his domicile of origin, would be the evidence of such person, the respondent husband. There was no evidence in this case before the Additional District Judge by the husband. The proceedings were ex parte. There was no suggestion and no question was put to the wife that the domicile of origin of the husband had been abandoned. Soon after the marriage the husband had declared his intention to the Registrar of Marriages that his intention was to retain D-249. Defence Colony, New Delhi, as his permanent home. In view of this declaration before an authority functioning under the Hindu Marriage Act, strong evidence was required from the husband to say that he had abandoned the Indian Domicile which is suggested by the name he bore, a name which would be borne by a person born in India. There was no evidence that a Canadian Passport had been acquired by the husband.

2. 21. As sexual intercourse essentially has two participants, it must be ordinary and complete for both the participants, individually, and together as a marital unit. For the man participant sexual intercourse is complete when he has an orgasm and for a woman participant sexual intercourse is complete when she has an orgasm (See Encyclopaedia

Brittanica: 15th Ed: 1968; Macropaedia, Vol. 16, p. 594: Sexual Response).

JUDGMENT

Mahinder Narain, J.:— This is a wife's appeal against the order passed by Shri K.S Gupta, Additional District Judge, Delhi, on 11.3.85

2. By this judgment, the wife's petition under Section 12(1)(a) of the Hindu Marriage Act, 1955 (hereinafter called 'the Act') was dismissed. The learned District Judge held that he had no jurisdiction because the respondent was not domiciled in India. He was not governed by the provisions of the Act.

3. The facts giving rise to this, as they emerge from the record of the case are that the appellant, Moina Khosla, (D/ o Wng Cdr. B.S Kalra) was married to the respondent Amardeep Singh Khosla at Delhi on 10th July, 1983. It is stated in the petition that soon after the marriage, on 12th July, 1983, the appellant petitioner left with the respondent husband for Srinagar and stayed at Srinagar till 17th July, 1983.

4. Paragraph 5 of the petition reads as under:—

"5. That the respondent, during that period twice tried but was unable to consumate the marriage and after they came back to Delhi, the Respondent explained to the Petitioner that since they did not know each other, it will take sometime before they can have sexual, intercourse with each other. The Respondent stayed in India till 22nd July, 1983 and, thereafter, went to Canada. The Petitioner went and joined him at Canada on 31st December, 1983. Even after reaching Canada, the Petitioner tried her best to attract the Respondent but inspite of best efforts, there was no response from the Respondent and there was no consumation of the marriage. The Respondent initially made one or two attempts but, thereafter, he did not even try to consumate the marriage. There was no penetration of the Petitioner. The Respondent was impotent at the time of marriage and continues to be the so till filing the petition."

5. It was asserted in the petition that the marriage was not consumated owing to impotence of the respondent husband. It was further stated that the efforts made by the wife to persuade the husband to see a marriage counsellor or psychiatrist failed. It is further asserted in the petition that while at Canada the wife appellant found some 'Homosexual literature', and an old diary written in the hand of the respondent wherein he stated that he was a homosexual. It stated that the respondent was unable to have any sexual intercourse with the appellant for the reason that he is a homosexual.

6. What needs to be noticed as regards domicile is that, immediately after the marriage was solemnized, the parties to the marriage got the marriage registered under the provisions of the Hindu Marriage Act. A certificate, in form 'B' issued under rule 5, pertaining to the Register of Marraige under the Hindu Marriage Act, was filed in court by the appellant, and same was exhibited as Ex. PW-1/1. In a column thereof, which relates to the "permanent dwelling place of the husband", it is stated 'D-249, Defence Colony, New Delhi'. This certificate is certified to be a true extract from the Marriage Register

maintained in the office of the Registrar of Marriage under the Hindu Marriage Act, 1955. The certificate evidences signatures of Amardeep Singh Khosla in Col. 13 and the appellant wife Moina Khosla in Col. 14. The certificate prima facie goes to show that the husband has asserted that he was a permanent resident of D-249, Defence Colony, New Delhi.

7. In view of this certificate, in my view, the Additional District Judge was completely wrong in dismissing this petition on the ground that the respondent Amardeep Singh Khosla is not of Indian domicile, either on the date the marriage was solemnized or when this petition was filed. The Additional District Judge has further gone wrong in holding that “He will thus not be governed by the provisions contained in the Act”.

8 The learned Additional District Judge has construed the effect of sub- section (2) of section 1 of the Act. That sub- section deals with two matters. One, it deals with the territory to which the Act extends; and second, the persons to whom the Act is applicable. From a perusal of the record it will be seen that the marriage between the parties took place at Delhi. Delhi is within the territories of India. Both the parties at the time of the marriage were at Delhi. Both the parties declared before the Marriage Officer that they were permanent residents of Delhi.

9. The learned Additional District Judge has failed to appreciate that what is stated in para 2 of the petition is merely the place of residence. He has gone wrong in assuming that the place of residence by itself goes to establish the domicile of any individual.

10. As held by Supreme Court, in Central Bank Of India v. Ram Narain, AIR 1955 SC 36, domicile has two constituents:—

(1) a residence of a particular kind, and

(2) an intention of a particular kind. In a case like the present where both the parties bear Indian names, both have declared that they are permanent residents of India, it would be, unless there is evidence to the contrary, safe to assume that they were born in India and therefore had a domicile of origin in India. The domicile of origin stays with every individual, till such time has a domicile of origin is abandoned.

11. Learned District Judge also fails to appreciate that the domicile of origin can be abandoned by, among other things, by having a present intention of making a place other than the place of origin, a permanent home.

12. What seems to have influenced the Additional District Judge was a statement of appellant wife that the respondent was a permanent resident of Canada. The learned Judge ought to have appreciated that the wife's version of the intention of permanent residence in Canada cannot be the sole basis for wiping off the declared intention of the husband vide Ex. PW1/1 that his permanent home was D-249. Defence Colony, New Delhi.

13. It is well settled that strong proof is required for the purposes of establishing that the domicile of origin has been abandoned and a new one has been acquired. For this purpose, the best evidence, in fact the only evidence, during the life time of a person who is said to

have abandoned his domicile of origin, would be the evidence of such person, the respondent husband. There was no evidence in this case before the Additional District Judge by the husband. The proceedings were ex parte. There was no suggestion and no question was put to the wife that the domicile of origin of the husband had been abandoned. Soon after the marriage the husband had declared his intention to the Registrar of Marriages that his intention was to retain D-249. Defence Colony, New Delhi, as his permanent home. In view of this declaration before an authority functioning under the Hindu Marriage Act, strong evidence was required from the husband to say that he had abandoned the Indian Domicile which is suggested by the name he bore, a name which would be borne by a person born in India. There was no evidence that a Canadian Passport had been acquired by the husband.

14. In this view of the matter I set aside the finding of the Additional District Judge that the domicile of the respondent husband was not an Indian domicile, and therefore, the court had no jurisdiction to try this matter, in view of Section 1(2) of the Act.

15. Coming to the merits of this case, the deposition of the appellant has to be noticed. It reads as under:—

“I got married with the respondent on 10.7.1983 at Delhi according to Hindu rites. No children was born from the said wedlock. After the marriage we went to Srinagar on 12.7.1983 and stayed there till 17.7.1983 The respondent “was permanent resident of Canada.” The marriage was solemnized at Delhi and was got registered under Hindu Marriage Act. Certified copy of the same is Ex. PW 1/1. At Srinagar the respondent tried twice but was unable to consumate the marriage and we came back to Delhi. The respondent explained to me that since we did not know each other it would take some time for him to sexual intercourse. The respondent stayed in India till 22.7.1983 No intercourse could take place till then also. Thereafter the respondent went to Canada and I also went to Canada and joined on 31.12.1983 After reaching Canada also I tried my best to admit the respondent but there was no response from him and marriage was not consumated. Initially the respondent made one or two attempts but thereafter he stopped trying also. There was no penetration. The respondent was impotent at the time of marriage and he was continued to be so, till filing of this divorce petition.

I tried to persuade him to consult doctor, marriage counseler and Psychiatrist but he refused to see them. While in home in his Canada I found a box full of literature of homosexuality and when confronted “the respondent admitted that he was a homosexual and was unable to perform sexual intercourse with me and with females in general.” He also admitted that he enjoyed the company of males only and could not react with females. The respondent is impotent till today. In his papers I found a diary written by him in January, 1980. Photostat copy of the same is PW 1/2. I identify his handwriting and Ex. PW 1/2 is written by the respondent.

I finally had no option but to leave his house and I left on 9.10.1984 and came back to India due to impotent of the respondent. The marriage is not consumated till today. My petition is correct I have not filed it with the collusion of the respondent.

RO & ACSd/-

A.D.J Delhi

4.3.85”

16. The petition has been instituted under the provisions of Section 12(1) (a) of the Act, which reads as under:—

“12. Voidable marriages — (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be anulled 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

XXXXXX”.

17. This means that the reason for non-consummation of the marriage is the impotence of the respondent. Consumation of marriage, is said to take place, in law, when ‘ordinary and complete sexual intercourse’ takes place between the parties to the marriage. D-e v. A-o, 1845 Rob Eccl. 279 = 27 Digest 267, 2350 = **163 E.R 1039 at 1045**. The abovesaid dicta of Dr. Lushington has been followed in all subsequent cases, namely, W. v. W., (**1967) 3 All E.R 178**; Snowman v. Snowman, 1934, All ER 615; Cowen v. Cowen, (**1945) 2 All E.R 197**; Nijhawan v. Nijhawan, AIR 1973 Delhi 200; and Ved Parkash Sachdeva… v. Smt. Mohani Sachdeva…, ILR 1971 (2) Delhi 447, etc.

18. Under Section 12 (1) (a), therefore, the requisite is that ordinary and complete sexual intercourse has not taken place between the parties owing to the impotence of the respondent. The words ‘impotence of the respondent’ would, to my mind, mean incapacity of the respondent to have sexual intercourse. The Supreme Court has said in **Digvijay Singh v. Pratap Kumari**, AIR 1970 SC 137, that “A party is impotent if his or her mental or physical condition makes consummation of the marriage a practical impossibility”.

19. As stated above, consummation means capacity to have ‘ordinary and complete sexual intercourse’. The above stated observation of the Supreme Court in AIR 1970 SC 137, therefore, must mean that a party is impotent if his or her mental or physical condition is such, that practically speaking, it is impossible for him or her to have ordinary and complete sexual intercourse. In the instant case it is instant case it is stated by the appellant in her deposition that the respondent was unable to have any, even a partial or incipient, sexual intercourse with the appellant.

20. Respondent has himself written in his diary Ex. PW1/2, that the is a Homosexual. The appellant has stated in her deposition that the respondent told her that he was a homosexual, that he was unable “to perform sexual intercourse with me and with females in general”. In other words, the respondent was incapable of having Hetrosexual intercourse with any woman.

21. As sexual intercourse essentially has two participants, it must be ordinary and complete

for both the participants, individually, and together as a marital unit. For the man participant sexual intercourse is complete when he has an orgasm and for a woman participant sexual intercourse is complete when she has an orgasm (See Encyclopaedia Brittanica: 15th Ed: 1968; Macropaedia, Vol. 16, p. 594: Sexual Response).

22. No sexual intercourse has been taken place between the parties, there is no question is this case whether sexual intercourse was ordinary any complete.

23. In this case there is unrebutted evidence of the petitioner that no sexual intercourse has taken place between the parties. As no sexual intercourse has taken place between the parties, in this case, the requirements of Section 12(1) (a) of the Act are satisfied.

24. In the above view of the matter no purpose would be served by remitting the case back to the District Judge, as in my view, there is no reason why the statement given by the wife ought not to be accepted.

25. I am of the view that in view of her statement recorded in the court, the wife is entitled to a decree of nullity of marriage on the ground mentioned under Section 12(1)(a) of the Act and the judgment of the Additional District Judge needs to be set aside which is hereby set aside.

26. A decree of nullity of marriage is granted to the wife under **section 12(1)(a) of the Hindu Marriage Act.**