(9) It will also be relevant to notice clause (6) of Rule 3. It is clear from its reading that if the Court has allowed the defendant to defend the case without putting him to terms it can do so for substantial reasons at a later stage. The Legislature incorporated the provision so that the Court if during the trial forms an opinion, that the defence which appeared to be substantial when permission was granted to the defendant to defend the suit without security, is not so, may be able to direct him to furnish security at that stage. This has been done, so that the defendant by taking false pleas may not delay the proceedings and the Court may be able to do substantial justice.

(10) In the present case I have gone through the orders very carefully. No doubt the Court has observed that the defendants have substantial defence to raise and there are triable issues in the case but it has not said that the defence is genuine and *bona fide* or sham. It was necessary to go into this matter before ordering to furnish security. It will, therefore, be proper that the cases may be remanded to the Court, to decide the question afresh, after taking into consideration the observations made above.

(11) For the aforesaid reasons, I accept the revision petitions, set aside the order of the Court below and remand the cases to the trial Court to decide the matter afresh after taking into consideration the observations made above. The parties are directed to appear in the trial Court on 17th March, 1980.

No costs.

N. K. S.

Before M. M. Punchhi, J.

GURCHARAN KAUR *ALIAS* CHARNO,—*Appellant.*

versus

SHER SINGH,—*Respondent.*

First Appeal from Order No. 181-*M of* 1979.

February 23, 1980.

Hindu Marriage Act (XXV of 1955)—*Section* 25—*Marriage between the spouses annulled on the ground of impotency of the wife—Such wife—Whether entitled to alimony under section* 25—*Marriage not consummated—Such marriage—Whether void.*

Held, that annulment of marriage between the spouses on the ground of impotency of the wife does not have the effect of degrading the wife from her status as a wife or even from that of a woman, whatever may be its meaning in the biological sense. The status thus legally conferred on the spouse, whether as a wife or a husband, as the case may be, cannot be permitted to be withdrawn merely because the marriage has remained unconsummated on the ground of the impotency of the other. That status, despite the annulment of the marriage remains unaltered enjoining upon them to fulfil their post-annulment obligations towards each other; payment of alimony being one of them. The Legislature has taken care that the severed bond between the spouses does not have the effect of throwing them on the streets but they be provided for maintenance at the cost of the other (other conditions fulfilling) so that one is not compelled to adopt the life of a destitute. The Hindu Marriage Act being a legislation revolutionising the ancient Hindu concept of marriage has safeguarded that certain rights remain conferred on spouses under section 25 of the Act by adopting a progressive and liberal approach distinct from narrow and pe-dantic one. "Other circumstances of the case" which have to be borne in mind before passing an order of permanent alimony are those circumstances which would operate in the field after the passing of the decree for annulment. Precedent facts reach their finale in the form of a decree for annulment and deformity in the physical structure of the wife was taken note of by the matrimonial Court while granting the decree for annulment on that ground alone. Her pre-decree conduct or the circumstances of the case do not disentitle her to permanent alimony. Added to it is the reason that alimony flows from the status conferred on the spouses by the marriage which gets annulled and entitles "the wife or the husband. as the case may be" to approach the court for the purpose. The right is status-wise and not dependent upon any physiology.

(Para 6).

Held, that consummation of marriage is treated to be the penultimate of the union between the spouse, but at the same time it is emphatically provided that for non-consummation owing to the impotency of the respondent, the marriage is not void *ab initio* or *non est*. It is a marriage good and valid till avoided in a court of law by a decree of nullity on the establishment of the all important fact that the marriage was not consummated owing to the impotency of the respondent. An avoided marriage in these circumstances cannot be equated at the level of marriage *non est*: whatever may be the physical incapacity of the spouse which renders him or her impotent making consummation of marriage impossible under the Act. Under the Act, marriage is a bond established between the two Hindus. The annulment thereof would not wipe out the fact of the bond once existing. (Para 5).

First Appeal from the decree of the court of Shri Sarup Chand Gupta, Additional District Judge, Faridkot, dated 13th October, 1979,

dismissing the application of the petitioner wife Smt. Gurcharan Kaur leaving the parties to bear their own costs.

R. C. Puri, Advocate, *for the Petitioner.*

K. S. Doad, Advocate, *for the Respondent.*

JUDGMENT

Madan Mohan Punchhi, J.

(1) This appeal raises rather an interesting question of law. Its ambit is confined within the scope and applicability of the alimony principle embodied in section 25 of the Hindu Marriage Act (hereinafter briefly referred to as the Act). It has been brought to this Court by the wife since her petition for alimony was rejected by the first matrimonial Court.

(2) The admitted case of the parties is that their marriage, which took place near about the year 1974, was annulled by a decree of nullity by the matrimonial Court at the instance of the husband on the success of his plea that the marriage had not been consummated owing to the impotence of the wife. That decree having become final gave rise to the present claim of the reputed wife against the reputed husband for alimony during her life-time. The claim met with resistance. The husband countered that he could not be held responsible for the payment of alimony as the reputed wife was neither a woman to whom alimony was admissible nor a person whose conduct or the circumstances of the case would justify the grant of alimony. Apart from the asserted right of the reputed wife, it was averred that he was unable to pay the sum of Rs. 400 per mensem as alimony because the wife was otherwise well provided for in the form of ornaments and precious clothes but also that he owned no land and was living with his father sharing mess with him. The first matrimonial Court framed the following two issues:—

1. Whether Gurcharan Kaur, petitioner is not entitled to maintenance as envisaged by section 25 of the Hindu Marriage Act, as alleged in the written statement?

2. If issue No. 1 is not proved, to what amount she is entitled as maintenance ?

(3) Under issue No. 1, the wife was held disentitled. To obviate the necessity of remand, issue No. 2 as well was answered and her supposed claim was assessed at Rs. 75 per mensem. On the rejection of the petition the matter is in appeal as said above.

(4) It was contended by the learned counsel for the appellant that the first matrimonial Court had fallen into a grave error in not holding the wife entitled to alimony. It would appear that the Court's attention was drawn to judicial precedents reported as *N. Waralakshmi* v. *N. V. Hanumantha Rao*, (1), *Govindrao Ranoji Musale* v. *Anandibai and another* (2), *Gurcharan Singh* v. *Amarjit Kaur* (3), and *Dyal Singh* v. *Bhajan Kaur* (4), but the Court after explaining them away came to the conclusion that the Court had to be influenced by consideration of the conduct of the parties and other circumstances of the case while dealing with an application for alimony moved under section 25 of the Act. The Court opined that the importency of the wife itself disentitled her to claim maintenance because strictly speaking she could not be termed to be a "woman". This alone was the foundation for the dismissal of the claim of the appellant-wife. Now it has to be seen as to whether the view taken by the Court stands the test of the scrutiny of the statute.

(5) Section 5 of the Act lays down conditions of a Hindu marriage. Non-fulfilment of some of the conditions makes a marriage *non est* or even void under section 11 thereof. Non-fulfilment of other conditions make a marriage voidable and may be annulled by a decree of nullity. Added to those classes of cases are marriages which become voidable by non-fulfilment or incapability of fulfilment of an important obligation of marriage. It is in this class of cases that the ground of non-consummation of the marriage owing to the impotence of the respondent belongs. Consummation of marriage is treated to be the penultimate of the union between the spouses, but at the same time it is emphatically provided that for non-consummation owing to the impotency of the respondent, the marriage is not void *ab initio* or *non est*. It is a marriage good

(1) 1978 Marriage Law Journal 21.
(2) 1977 Matrimonial Law Reporter 223.
(3) 1979 Marriage Law Journal 385.
(4) A.I.R. 1973 Punjab and Haryana 44.

and valid till avoided in a Court of law by a decree of nullity on the establishment of the all important facts that the marriage was not consummated owing to the impotence of the respondent. An avoided marriage in these circumstances cannot be equated at the level of marriage *non est*, whatever may be the physical incapacity of the spouse which renders him or her impotent making consummation of marriage impossible. Under the Act, marriage is a bond established between two Hindus. The annulment thereof would not wipe out the factum of the bond once existing.

(6) Now in the instant case, it would be seen that the wife was proved to be impotent *vis-a-vis* the husband. Her body could not provide the necessary inlet for the husband to consummate the marriage. Her vagina was detected as only a small dimple about 0.7 cm. deep at the sight of the vaginal opening. Rest of the vagina was non-canalised. It was opined that normal sexual intercourse was not possible on account of such physical structure of the wife, but by plastic surgery, such intercourse could be rendered possible. It is the conceded case of the parties that soon after the marriage, the deformity in the wife was detected which caused cracks in the marriage, otherwise lawfully performed. Be that as it may, such misfortune does not have the effect of degrading the wife from her status as a wife or even from that of a woman, whatever may be its meaning in the biological sense. The status thus legally conferred on the spouse, whether as a wife or a husband, as the case may be, cannot be permitted to be withdrawn merely because the marriage has remained unconsummated on account of the impotency of the other. That status, despite the annulment of the marriage, remains unaltered enjoining upon them to fulfil their post-annulment obligations towards each other; payment of alimony being one of them. The Legislature has taken care that the severed bond between the spouses does not have the effect of throwing them on the streets but they be provided for maintenance at the cost of the other (other conditions fulfilling) so that one is not compelled to adopt the life of a destitute. The Hindu Marriage Act being a legislation revolutionising the ancient Hindu concept of marriage has safeguarded that certain rights remain conferred on spouses under section 25 of the Act by adopting a progressive and liberal approach distinct from the narrow and a pedantic one. "Other circumstances of the case" which have to be borne in mind before passing an order of permanent alimony are those circumstances which would operate in the field

after the passing of the decree for annulment. Precedent facts reach their finale in the form of decree for annulment. Though it is hardly an authority for the proposition in hand, yet light can be drawn from the dictum of the Full Bench of this Court in *Shrimati Bimla Devi* v. *Singh Raj* (5), in which the conduct of the parties prior to the decree of restitution of conjugal rights was not taken into account in the subsequent petition for divorce on the basis of the decree for restitution of conjugal rights having remained unexecuted. The deformity in the physical structure of the wife was taken note of by the matrimonial Court while granting the decree for annulment. It is conceded by both the parties that the divorce was granted only on that score and not on account of any force or fraud practised by the wife against the husband concerning her physical deformity, though that too was a ground available to be agitated and proved under section 12(1)(c) of the Act. On broader principles as aforesaid and also on the principles of constructive *res judicata*, the same cannot be permitted to be raised in this Court as was attempted to be done by the learned counsel for the husband in order to lend twist to "the conduct of the parties and other circumstances of the case". It might well be that the wife remained oblivious of her physical defect and being a rustic girl unawakened and unaware might have lacked the opportunity of detecting it premaritally. From either angle, her conduct or the circumstances of the case do not disentitle her to permanent alimony. Added to it is the reason that alimony flows from the status conferred on the spouses by the marriage which gets annulled and entitles "the wife or the husband, as the case may be" to approach the Court for the purpose. The right is status-wise and not dependant upon any physiology. The appellant is thus held entitled to permanent alimony.

(7) The next question which arises is the quantum of the alimony. Neither counsel addressed anything substantial towards disturbing the finding arrived at under issue No. 2 except that the appellant wanted the quantum to be raised at one-third of the earning capacity of the husband rating it at Rs. 100 per mensem and on the other hand, the counsel for the husband claimed a reduction on account of the uncertainty of labour opportunities available in the rural side. Somewhat the rule of thumb would govern the

(5) 1977 Hindu Law Reporter 272.

situation of the kind depicted. Keeping in view the overall circumstances of the case, the figure of Rs. 75 per mensem arrived at by the first matrimonial Court can safely be termed as reasonable and fair for the time being till altered for proper cause and in due course of time.

(8) As a sequel to the above, this appeal suceeds. The judgment and decree of the first matrimonial Court is modified and the claim of the wife-appellant for alimony is allowed to the extent of Rs. 75 per mensem. She would get it from 3rd November, 1978, the date of filing of the petition, with costs throughout.

S. C. K.

Before D. S. Tewatia and I. S. Tiwana, JJ.

MAN SINGH and others,—*Petitioners*

versus

STATE OF PUNJAB and another,—*Respondents.*

Civil Writ No. 3766 *of* 1979.

February 25, 1980.

Land Acquisition Act (1 *of* 1894)—*Sections* 4, 5-*A and* 6—*Notification acquiring land for a specified public purpose issued—Notification under section* 6 *issued few days before the expiry of three years therefrom—No steps taken for a long time to complete the acquisition and pay compensation—Acquisition in such circumstances—Whether can be held to be* bona fide—*Substance of the notification under section* 4 *not published in the locality—Such non-publication—Whether renders the acquisition proceedings invalid.*

Held, that the unconscionable non-action of the Government for the last several years in not taking any step to complete acquisition and payment of compensation to the landowners is only indicative of the fact that the notifications issued under sections 4 and 6 of the Land Acquisition Act, 1894 were in all probability issued with the only object of pegging down the price of the land to be acquired in future to the date on which the notification under section 4 was published and that there was no possible need of the land to be acquired. In such circumstances the landowners are well justified