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MUSAMMAT
INDRANI
v.
BABU BIMLA
PRASAD.

Hasan and
Srivastava
JJ.

that the rules of procedure do not entitle the appellant to question the propriety of the statement as to the value of the property which the court has directed to be made in the proclamation of sale by the order under appeal. It may be pointed out that the proviso added to rule 90 mentioned above by this Court will be no bar in the appellant's way to questioning the misstatement if any as to the value of the property after the sale has taken place because the proviso bars the objection only if it is taken for the first time after the sale.

Accordingly we dismiss this appeal with costs.

Appeal dismissed.

APPELLATE CIVIL.

*Before Sir Louis Stuart, Knight, Chief Judge and
Mr. Justice Wazir Hasan.*

ERNEST ARTHUR WYLIE (PLAINTIFF-APPELLANT) v.
MRS. RUTH SHANTI WYLIE (DEPENDANT-RESPONDENT).*

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*Indian Divorce Act (IV of 1869), section 19(1)—Impotence—
Venereal disease in a woman, if constitutes "impotence"
within the meaning of section 19(1) of the Divorce Act.*

The existence of venereal disease in a woman does not constitute impotence within the meaning of section 19, subsection (1) of the Indian Divorce Act, 1869. *Birendra Kumar Biswas v. Hemlata Biswas* (1), dissented from.

Messrs. *St. G. Jackson and Satya Nand Roy*, for the appellant.

Mr. Moti Lal Saxena, for the respondent.

STUART, C. J.:—This is an appeal against the decision of Mr. Justice PULLAN in which he refused to grant the petitioner Ernest Wylie either a decree for nullity of marriage or for a divorce against his wife.

*First Civil Appeal No. 25 of 1929, against the decree of the Hon'ble Mr. A. G. P. Pullan, Judge of the Chief Court of Oudh, dated the 15th of February, 1929.

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Ruth Wylie. The petitioner appeals. His allegations were that at the time of his marriage to his wife Ruth Wylie she was suffering from venereal disease and that in addition after her marriage she had committed adultery with a person unknown. In so far as the prayer for nullity is concerned the case is governed by section 19 of the Indian Divorce Act (IV of 1869). None of the last three clauses of the 19th section were pleaded. The plea was that the wife was impotent at the time of her marriage and at the time of the institution of the suit and there was an additional plea that the court might grant a decree for nullity on the ground that the consent of the husband to the marriage was obtained by fraud. It was suggested that the wife had wilfully kept from her husband the fact that she was suffering from venereal disease and that this was the fraud. In so far as the prayer for divorce was put forward that prayer was based upon the allegation of adultery. The learned trial Judge arrived at the following conclusion. He found that Ruth Wylie displayed symptoms of venereal disease immediately after her marriage, and that the disease had been acquired before marriage. He found that it was not established that the disease in question was syphilis. He found that the fact that she was suffering from venereal disease did not justify the finding that she was impotent at the time of her marriage, and that she is not impotent now as there is nothing to show that the disease is not curable. He further found that the petitioner did not know at the time of the marriage that his wife was suffering from venereal disease but that the wife did not know the fact herself, so that there was no fraud. He disbelieved the evidence as to adultery. On these findings he arrived at the conclusion that the respondent was not impotent at the time of her marriage, that there was no fraud and that she had not committed adultery. He, therefore dismissed the suit. In the appeal the learned Counsel representing the

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petitioner has not pressed the case in respect of adultery and I state shortly that the evidence does not justify any conclusion that the respondent Ruth Wylie had ever committed adultery. I accept the learned Judge's conclusions on the other two points as to absence of fraud and as to the fact that the respondent was not impotent at the time of her marriage. But I go further. On the evidence I find that there is no justification for the conclusion that Ruth Wylie was suffering from venereal disease. The evidence upon this point is that of her husband, his mother, a Sub-Assistant Surgeon called Padum Singh and a man called Amir Ali who lets out tents on hire but who deposes that he is an expert in the treatment of syphilis, gonorrhoea and cancer, he having acquired his knowledge in the cure of these diseases from verbal instructions given him by his deceased father. The evidence of the petitioner and his mother may be rejected at once. The learned Judge did not believe them and rightly did not believe them. The evidence of Dr. Padum Singh is certainly to the effect that in his opinion Ruth Wylie was suffering from venereal disease. The following facts are however important in this connection. As far as can be gathered Dr. Padum Singh, who has only taken the lesser qualification which is granted by the Agra Medical School for subordinates does not assert that he has any special knowledge in womens' diseases and he arrived at his confident conclusion that Ruth Wylie was suffering from venereal disease without examining her. He said that he was convinced that the girl must have venereal disease because she told him that she thought she had a sore (which he did not see), that she had a rash and that she had pain in micturition. I do not lay claim to great knowledge as to such symptoms but it is clear to me that the statement that a girl has a sore does not carry a medical man very far unless he has seen the sore. As to the pain in micturition and a rash

both these symptoms may be caused from many other causes than venereal disease. The evidence of the hirer of tents can really hardly be taken seriously and it would be worthless, even if believed. Thus if this evidence stood unrebutted there would in my opinion be no justification for the finding that Ruth Wylie had ever had venereal disease. But it does not stand unrebutted. It is rebutted and strongly rebutted by the evidence of a Lady Specialist Dr. Lowther who was in charge of the Gynaecological Department of King George's Medical Hospital. Dr. Lowther had Ruth Wylie under her charge as an in-patient for nearly a month. She examined her. She found that she was suffering not from syphilis but from chronic vaginitis, that is to say inflammation of the vagina and also from cervicitis which I understand to be the inflammation of cervix a portion of a woman's internal generative organs. She had a discharge. The disease was chronic. The disease might have been communicated by a man or it might not have been. An examination of her blood did not show that she had syphilis. In these circumstances I arrive at the conclusion that it is not proved that the girl had venereal disease. So the case there failed *in limine*. I however do not accept the view that the existence of venereal disease in a woman constitutes impotence within the meaning of section 19. I have been referred to a decision of a Bench of the Calcutta High Court in *Birendra Kumar Biswas v. Hemlata Biswas* (1) but I cannot accept this decision as authoritative. With the greatest respect to the learned Judges who decided it I find that they have laid down much which is not authorised by the law of England or the law of India. I say the law of England advisedly as our matrimonial practice under the Indian Divorce Act is based upon the matrimonial practice in England. There is no authority in English law for the proposition

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(1) (1920) I. L. R., 48 Cal., 293.

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that a woman, who is suffering from venereal disease, is considered to be impotent within the meaning of that word in English law. The learned Judges who decided that case based their decision upon various decisions of courts in America. I do not consider that there is anything of value likely to be derived from the discussion of American decisions under the numerous divorce laws which exist in the United States as both the law and the methods of applying the law there differ so very greatly from English law and English practice. I therefore would dismiss this appeal with costs.

HASAN, J. :—I propose to say a few words on the petitioner's case as to whether the respondent was impotent at the time of the marriage within the meaning of sub-section (1) of section 19 of the Indian Divorce Act, 1869. The petitioner was married to the respondent on the 9th July, 1928 and on the 24th of October of the same year the latter was admitted into King George's Medical College, Ladies Ward, for treatment. The only reliable evidence on this part of the case is the statement of Dr. Miss Lowther to which reference has been made by the learned CHIEF JUDGE in his judgment just now delivered. Dr. Lowther says :—

“She (that is the respondent) was suffering from vaginitis and cervicitis. Her blood was tested for syphilis and the test was negative. She was suffering from a woman's disease but not in my opinion syphilis. The blood test was negative so it is possible that she may have been suffering from syphilis but that was not my opinion. The disease was chronic . . . She was discharged cured . . . Cure merely means that the symptoms she had been suffering from had been removed . . . The two diseases from which the girl was suffering may be the result of venereal disease. All

these diseases are to some extent venereal diseases.”

To my mind on the evidence quoted above it is impossible to hold that the petitioner has succeeded in proving the case which the law requires him to prove, that is, that the respondent was impotent at the time of the marriage. A question of law may arise which will have to be decided on a future occasion as to whether, when a wife suffers from a disease which might or might not be venereal and the husband has reasonable and well founded apprehension of infection in case he has sexual intercourse with such a wife, in those circumstances the court would be justified to record a finding that the wife was impotent. I agree in the order that the appeal be dismissed with costs.

By THE COURT:—The appeal is dismissed with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Wazir Hasan.

PANDIT JANG BAHADUR AND ANOTHER (PLAINTIFFS-APPELLANTS) v. WAZIR KHAN AND OTHERS (DEFENDANTS-RESPONDENTS).*

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Easement—Graveyard—Burial right is a civil right—Land used for long long years for burying the dead—Customary rights, if acquired in the land—Proprietor of the land, whether can stop the practice and take away the right.

The right of a burial is a civil right and where the right has been exercised for long long years a customary right in law is acquired which cannot be taken away by the proprietor of the land. *Kuer Sen v. Mamman* (1), *Mohidin v. Shivlingappa* (2) and *Kooni Meera v. Mahomed Meera* (3), relied on.

*Second Civil Appeal No. 481 of 1928, against the decree of Pandit Shyam Manohar Nath Shargha, First Subordinate Judge of Kheri, dated the 25th of August, 1928, reversing the decree of Babu Tribeni Prasad, Additional Munsif of Kheri at Lakhimpur, dated the 22nd of December, 1927.

(1) (1895) I. L. R., 17 All., 87. (2) (1899) I. L. R., 23 Bom., 666.

(3) (1906) I. L. R., 30 Mad., 15.