

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 07.09.2017

Pronounced on : 08-11-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Civil Miscellaneous Appeal No. 1299 of 2017

S. Govarthanan .. Appellant

Versus

M. Suji .. Respondent

Appeal filed under Section 19 (1) of The Family Courts Act, 1984 against the Fair and Decretal Order dated 21.03.2016 passed in F.C.H.M.O.P. No. 248 of 2014 on the file of Family Court, Dharmapuri.

For Appellant : Mr. M.E.V. Thulasi

For Respondent : Ms. R. Deepa

JUDGMENT

R. SUBBIAH, J

This appeal has been filed by the appellant, challenging the validity and correctness of the Order dated 21.03.2016 passed in F.C.H.M.O.P. No. 248 of 2014 on the file of Family Court, Dharmapuri, by which the Family Court allowed F.C.H.M.O.P. No. 248 of 2014 filed by the respondent herein under Section 13 (1) (i) (i-a) of The Hindu Marriage Act on the grounds of cruelty and granted a decree of divorce as prayed for by the respondent herein.

<http://www.judis.nic.in> 2. The appellant was the husband and the respondent was his wife. The marriage between the appellant and the respondent was solemnised on 18.11.2012

as per Hindu rites and customs at Thindalmalai Velayutha Swamy Temple, Erode followed by a marriage reception on the same day at D.N.C. Mahal, Nesavalur Colony, Dharmapuri. Due to the wedlock, a female child was born on 22.08.2013. At the time of marriage, the respondent was pursuing M.B.B.S. at Chennai and the appellant was working as a Doctor at Primary Health Centre, Avalpundurai, Erode District. According to the respondent, due to the ill-advice of his parents and sisters, the appellant subjected the respondent to physical and mental harassment even for trivial reasons. The appellant also demanded the respondent to bring money and more jewels from her mother to meet his expenses. When the respondent expressed the inability of her widowed mother to give money, she was treated very badly by the appellant and her in-laws. While so, the respondent came to know that the appellant was having extra marital relationship with one of the Staff Nurses working with him and she also came to know that they are moving very closely. When this was questioned by the respondent, the appellant not only confessed to having such a relationship but dared the respondent to do whatever she can. Further, during the third month of pregnancy of the respondent, the appellant compelled and coerced the respondent to abort the pregnancy but the respondent pleaded with the appellant not to compel her to abort the pregnancy. Thereafter, on 22.08.2013, a female child was born. It is the contention of the respondent that she had taken several steps to see that the appellant did not continue his illicit relationship with the staff nurse, but it went in vain. Even though the appellant was transferred to Bhavani, the appellant did not stop moving with the staff nurse and he continued his illicit relationship with the said staff nurse. According to the respondent, due to the illicit relationship the appellant had with the staff nurse, he did not take care of the respondent or the minor child and failed to

discharge his duties as a responsible husband. The respondent also intimated the illicit relationship of the appellant to her in-laws, but they have grossly ignored it and only supported the act and deeds of the appellant. While so, on 25.04.2014, when the respondent questioned the behaviour of the appellant in having illicit relationship with the staff nurse, she was physically assaulted and driven out of the matrimonial home at about 12.30 am in the midnight along with the 8 months old female child. On hearing the quarrel, the neighbour have come to the rescue of the respondent and the respondent was given shelter by her neighbours in their home till the dawn. On being intimated by the neighbour, the mother of the respondent came to the house of the neighbour and accompanied the respondent and the minor daughter to her home. It is specifically contended by the respondent that she had taken all earnest efforts for a re-union, but nothing has fructified. Several mediations have taken place in the presence of relatives and well-wishers, but the appellant refused to take back the respondent to the matrimonial home. While so, on 10.10.2014, highlighting the above facts, respondent, through her lawyer, had sent a notice to the appellant, but on receipt of the said notice, the appellant did not issue any reply. Thereafter, the respondent has filed the F.C.H.M.O.P No. 248 of 2014 before the Family Court for dissolution of the marriage on the grounds of cruelty.

3. Opposing the Petition filed by the respondent seeking dissolution of the marriage, the appellant herein has filed a counter affidavit before the Family Court contending *inter alia* that he had never subjected the respondent to matrimonial cruelty. The appellant also specifically denied that he is having illicit relationship with a staff nurse working with him in Avalpoondurai Primary Health

Centre, Erode District. The appellant also denied in the counter affidavit that he never demanded the respondent to bring more money and jewels from her mother. According to the appellant, the respondent was in the habit of staying with her mother very often and this had led to frequent quarrel between the appellant and the respondent. It was further contended by the appellant that he was denied access to see the minor female child and this has caused him enormous mental agony. The appellant therefore prayed for dismissal of the Original Petition for dissolution of the marriage.

4. Before the trial Court, the respondent examined herself as PW1, her mother was examined as PW2 and Exs. P1 to P5 were marked. On behalf of the appellant, he examined himself as RW1 but no document was marked. The Family Court, on analyzing the oral and documentary evidence concluded that Ex.P4, SMS (CD) sent by the appellant would only indicate that the appellant was in an adulterous relationship with another woman and therefore he requested the respondent to pardon him. The contents of Ex.P4 was fortified by Ex.P5, letter of apology written by the appellant himself in which he has categorically prayed for pardon for his acts and deeds, particularly for the illicit relationship he had with the staff nurse working in Primary Health Centre, Avalpoondurai, Erode District. On the basis of Exs. P3 and P4, as also the oral testimony of PW1, 2 and RW1, the Family Court concluded that the appellant herein was having illicit intimacy with the staff nurse working with him and thereby he had subjected the respondent to matrimonial cruelty. Therefore, the Family Court allowed the Original Petition filed by the respondent herein and dissolved the marriage solemnised between the appellant and the respondent on the ground of cruelty.

5. The learned counsel for appellant would contend that the Family Court placed heavy reliance on Ex.P4, SMS (CD) and Ex.P5, letter written by appellant. According to the counsel for the appellant, the said letter Ex.P5 was written by the appellant out of coercion and force with an assurance that if he admits his acts and deeds, even though he has not committed such acts, the respondent would join him in the matrimonial home. Therefore, only for the purpose of patching up the differences between the couple and to pave way for re-union, the appellant was compelled and made to write such a letter and it would not form the basis for granting a decree of divorce. Further, even though the respondent alleged that the appellant is having an extra marital relationship with a particular staff nurse, the said Staff nurse was not examined before the Court below. It is well settled that for proving adultery, the person with whom the spouse is having such an illicit relationship has to be either examined before the Court below or to impleaded in the proceedings before the Court. In the present case, neither the woman, with whom the appellant is said to be having an illicit relationship, has neither been examined nor arrayed as a party to the matrimonial proceedings and therefore, the Court below ought not to have placed reliance on Ex.P4 or P5 to grant a decree of divorce. The learned counsel for the appellant would further contend that even though the respondent alleged that she was driven out of the matrimonial home on 25.04.2014 at about 12.30 am in the midnight along with the 8 months old female child and she had taken shelter in the neighbour house, none of the neighbour was examined to prove such an incident. Except the interested witness in this case namely mother of the respondent, who was examined as PW2, no other independent witness was examined to substantiate the averments made in the

Original Petition. Further, the respondent has stated in the original Petition that several mediations had taken place before the Panchayatars to resolve the matrimonial dispute, however, no one, who participated in such mediation, was examined before the Family Court. In any event, it was the appellant who was subjected to matrimonial cruelty by the respondent by denying access even to see the minor female child. The Family Court, without considering the fact that the averments made by the respondent are unsubstantiated by any material evidence, has erroneously passed a decree of divorce and prayed for setting aside the same.

6. Per contra, the learned counsel for the respondent would contend that the respondent examined herself as PW1 and she has clearly narrated the matrimonial cruelty inflicted on her by the appellant. PW1 not only deposed about the demand made by the appellant for purchase of a Car by way of dowry, but also narrated the illicit relationship the appellant had with one staff Nurse. The respondent also clearly narrated in the original petition the efforts made by her to ensure that the appellant disband his relationship with the staff nurse, but it was not successful as the appellant failed to heed to such requests made by her. Further, PW2, mother of the respondent has spoken to about the manner in which the appellant treated the respondent with cruelty. Above all, the appellant admitted his illicit acts committed by him during the course of matrimonial relationship with the respondent by writing a letter of apology, Ex.P5. While considering the validity of Ex.P5 and the extent to which it can be relied, the Family Court has clearly stated that if really Ex.P5, letter dated 10.08.2014 was made to be written by the appellant by force or coercion, nothing prevented him to say so by sending a letter independently or to give a suitable reply to Ex.P2, legal notice dated 10.10.2014

sent by the respondent, however, inspite of receipt of the legal notice under Ex.P2, the appellant did not chose to send any reply notice. Therefore, the learned counsel for the respondent would contend that the Family Court had taken an adverse inference against the appellant and placed reliance on Ex.P5, letter of apology written by the appellant and Ex.P4 series, SMS sent by the appellant seeking pardon, to dissolve the marriage solemnised between the appellant and the respondent. In such circumstance, the learned counsel for the respondent would only pray for dismissal of the appeal filed by the appellant.

7. We have considered the rival submissions and perused the materials placed on record. It is an admitted fact that the marriage between the appellant and the respondent was solemnised on 18.11.2012, as a result of which, a female child was born on 22.08.2013. It is alleged by the respondent that the appellant was in illicit relationship with a staff nurse working in Primary Health Centre, Avalpoondurai, Erode District and when it was questioned, the appellant not only confessed to have been in such illicit relationship but also subjected her to matrimonial cruelty. On 25.04.2014, at the height of matrimonial cruelty inflicted on her, she was driven out of the matrimonial home at about 12.30 am along with the 8 month old child and she was forced to take shelter in her neighbour house. According to the respondent, after many persuasion and mediation to rejoin the appellant, she sent a notice dated 10.10.2014, Ex.P2 highlighting the matrimonial cruelty inflicted on her by the appellant and her inclination to get the matrimonial tie snapped by resorting to matrimonial proceedings. As there was no reply sent by the appellant to the notice dated 10.10.2014, the respondent has filed the Original Petition before the Family Court for dissolution of the marriage solemnised between

her and the appellant.

8. With this factual background, it has to be seen as to whether the respondent has proved that she was subjected to matrimonial cruelty by reason of the fact that the appellant was leading an adulterous life with a staff nurse working with him. For the purpose of proving the adulterous conduct of the appellant, the respondent marked Ex.P4, series of SMS sent by the appellant and Ex.P5, letter of apology dated 10.08.2014 written by the appellant admitting his acts and deeds. On perusal of Exs. P4 and P5, the Family Court recorded a finding that in most of the messages sent by the appellant, he has admitted having treated the respondent, her mother and brother cruelly by abusing them with filthy languages. Even in Ex.P4, series of SMS sent by the appellant, it was stated that the appellant reformed himself and he is ready to seek apology to one and all. In Ex.P4, series of SMS, the appellant has also clearly said that he is even ready to write a letter of apology admitting his guilt. Similarly, in Ex.P5, letter of apology, the appellant has categorically stated that he had treated the respondent in a most unbecoming manner and subjected her to matrimonial cruelty. That apart, in Ex.P5, the appellant admitted that he was in an extra marital relationship with a staff nurse and vowed to discontinue such relationship in the interest of matrimonial life with the respondent. Thus, Ex.P5, letter of apology was written by the appellant as has been undertaken by him in the SMS series sent by him under Ex.P4. Even though it was contended on behalf of the appellant that such letter dated 10.08.2014, Ex.P5 was written by the appellant under compulsion, to prove such averment, no document was produced. In fact, the Family Court recorded a finding that even assuming that Ex.P5, letter dated 10.08.2014 was made to be written by the

appellant by coercion, nothing prevented him to disclose the manner in which he had written Ex.P5, letter dated 10.08.2014 by sending a reply to the notice dated 10.10.2014, Ex.P2 sent by the respondent through her advocate. Admittedly, the appellant had received the legal notice dated 10.10.2014, Ex.P2 which could be evident from the postal acknowledgment receipt filed as Ex.P3. The appellant having failed to send any reply to the notice dated 10.10.2014 cannot be heard to contend that Ex.P5, letter dated 10.08.2014 was made to be written by him out of coercion and duress. Thus, it is futile on the part of the appellant to contend that the letter under Ex.P5 was written by him out of coercion and duress. Above all, the appellant is not a layman and he is a Doctor by profession. The appellant, having written a letter under Ex.P5, admitting his guilt, is estopped from contending that Ex.P5 has emanated out of coercion and duress. Even though the appellant has contended that to prove the matrimonial cruelty inflicted on the respondent she has not examined any witness to substantiate her allegations, we are of the view that admitted facts need not be proved by the other side. When the appellant admitted that he is in an illicit relationship with another woman, other than the respondent and also treated the respondent, her mother and brother with cruelty, the ingredients to constitute matrimonial cruelty have been fulfilled and on that ground, the respondent is entitled for a decree of divorce. When it is proved beyond reasonable doubt that one of the spouse is leading an adulterous life with other woman, no prudent spouse would thereafter even think of continuing the matrimonial tie with the other spouse. In the present case, under Ex.P5, letter of apology, the appellant had admitted his guilt, particularly his illicit relationship with a staff nurse working with him. In such view of the matter, we are of the view that the Family Court is wholly justified in concluding that the respondent was subjected to

matrimonial cruelty inflicted on her by the appellant and therefore, we hesitate to interfere with such well considered order passed by the Family Court.

9. In the result, the Order dated 21.03.2016 passed in F.C.H.M.O.P. No. 248 of 2014 on the file of Family Court, Dharmapuri stands confirmed. The Civil Miscellaneous Appeal is dismissed. No costs.

(R.P.S.J.,) (A.D.J.C.J.,)

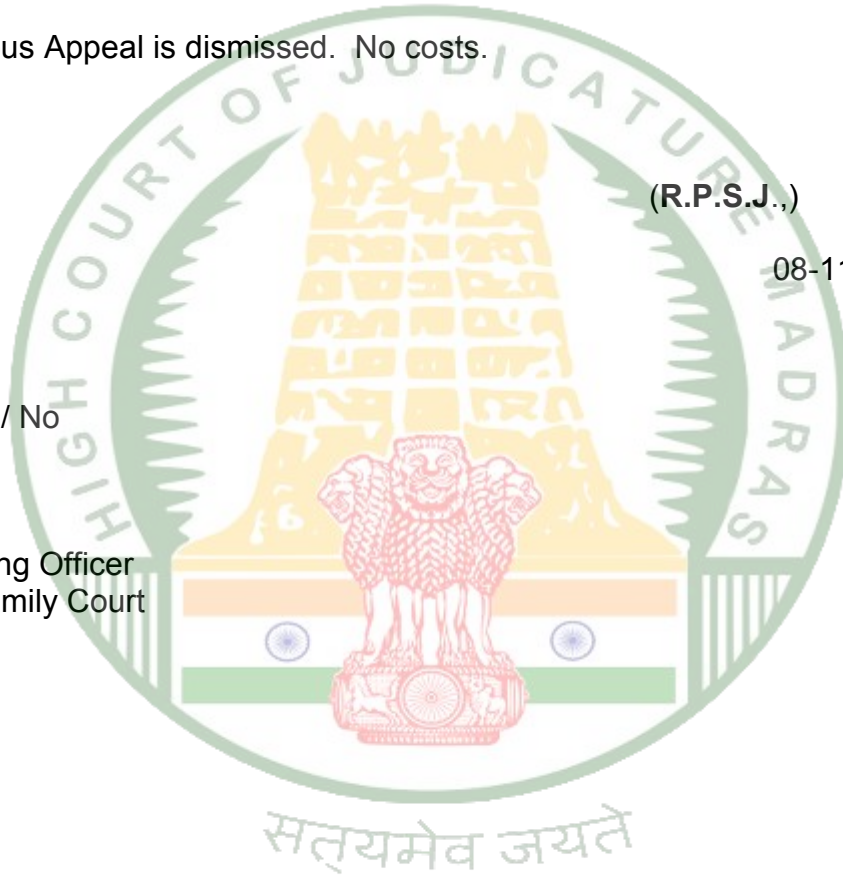
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Index : Yes / No

To

The Presiding Officer
Principal Family Court
Dharmapuri



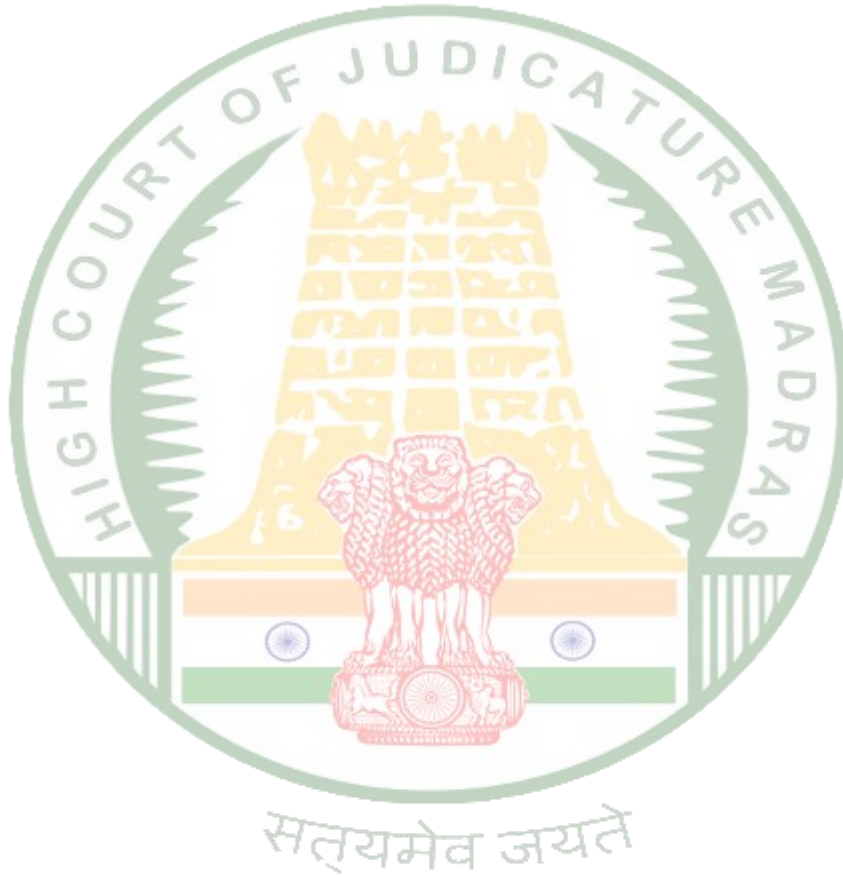
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R. SUBBIAH, J

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Pre-delivery Judgment in
CMA No. 1299 of 2017

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