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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 30.06.2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBRAMANIAN

C.M.S.A. (MD) Nos. 21 and 22 of 2014

and

M.P (MD) No. 1 of 2014

C.M.S.A (MD) No. 21 of 2014:

R. Marisamy

... Appellant/Appellant/
Respondent

Vs.

Kuppu Rajeswari

... Respondent/Respondent/
Petitioner

Prayer: Appeal filed under Section 28 of the Hindu Marriage Act, against the judgment and decree dated 06.08.2013 passed in H.M.C.M.A.No.19 of 2011 on the file of the Principal District Court, Virudhunagar District at Srivilliputtur, in confirming the judgment and decree dated 10.06.2011 passed in H.M.O.P.No.142 of 2006 on the file of the Subordinate Court, Srivilliputtur.

For Appellant : Mr.J.Anandkumar

For Respondent : Mr.V.Janakiramulu

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C.M.S.A (MD) No. 22 of 2014:

R. Marisamy

... Appellant/Appellant/
Respondent

Vs.

Kuppu Rajeswari

... Respondent/Respondent/
Petitioner

Prayer: Appeal filed under Section 28 of the Hindu Marriage Act, against the judgment and decree dated 06.08.2013 passed in H.M.C.M.A.No.20 of 2011 on the file of the Principal District Court, Virudhunagar District at Srivilliputtur, in confirming the judgment and decree dated 10.06.2011 passed in H.M.O.P.No.45 of 2002 on the file of the Subordinate Court, Srivilliputtur.

For Appellant : Mr.J.Anandkumar

For Respondent : Mr.V.Janakiramulu

* * * * *

**COMMON JUDGMENT**

These appeals have been filed by the husband whose petition for divorce in H.M.O.P.No.45 of 2002 was dismissed and H.M.O.P.No.142 of 2006 filed by the wife seeking restitution of conjugal rights was allowed by the trial Court and the said orders having been confirmed by the lower appellate Court, the appellant is before this Court by way of these Civil Miscellaneous Second Appeals.

2. The case of the husband in H.M.O.P.No.45 of 2002, in short, is as follows:

2.1 The spouses got married on 17.02.2000 at Srivilliputtur. They were living as husband and wife in Srivilliputtur itself. According to the appellant/husband, he discovered that his wife is unable to have marital relationship since her vagina was contracted and it would not admit sexual intercourse. When it was known to the parents of the appellant/husband, she was taken to Dr.Jeyalakshmi at Madurai on 07.12.2000 and the Doctor also confirmed the fact that she cannot have sexual intercourse. The Doctor had suggested certain course of treatments, but the same did not yield any positive results. When the matter was brought upto the parents of the wife, they had said that they will try for treatment by an expert Doctor. Saying so, during April 2001, the wife was taken to their house by her parents. While so, the appellant came to know that the wife is pregnant during December 2001. When he made enquiries with the parents of the wife, they did not give proper answer. But, the appellant/husband came to know that the wife has been impregnated by artificial insemination. Therefore, the appellant/husband has come forward with the present petition for annulment of marriage under Section 12 of the Hindu Marriage Act. He would also aver that the inability of the wife to enable consummation of marriage would amount to cruelty.

2.2. The said application was resisted by the wife contending that the claim of the appellant/husband regarding her inability to cohabit is incorrect and they had marital relationship for several times before and during pregnancy. The wife also claimed that she had lived with the appellant/husband in the same house for nearly seven months during pregnancy.

2.3. It is further claimed that the wife delivered a male child who resembles the appellant/husband on 15.06.2002. The allegation regarding the congenital disorder of her vagina was denied by her. While admitting the fact that she was taken to the Doctor on 07.12.2000, she had contended that the Doctor never stated that she is unfit for marital life.

<https://hcservices.ecourts.gov.in/hcservices/>

2.4. On the above grounds, the wife sought for the dismissal of the application for divorce.



2.5. The wife also filed H.M.O.P.No.142 of 2006 seeking restitution of conjugal rights. The averments in the counter filed by her in H.M.O.P.No.45 of 2002 were incorporated in the petition filed by her in H.M.O.P.No.142 of 2006. The appellant/husband resisted the same on the grounds on which he had sought for divorce.

2.6. The learned Sub Judge, Srivilliputtur, who heard the applications, framed the following issues:

"Whether these petitions can be allowed or not?"

2.7. Both the Original Petitions were tried together and evidence was recorded in H.M.O.P.No.45 of 2002.

2.8. On consideration of the evidence, particularly, the report of the Dean, Government Rajaji Hospital, Madurai, marked as Ex.R.2 and the report of the Forensic Experts marked as Ex.R.1, the trial Court concluded that the claim of the appellant/husband is not correct. The trial Court also refused to believe the theory of artificial insemination pleaded by the appellant/husband. Though Dr.Jeyalakshmi who is said to have examined the wife on 07.12.2000 was examined as P.W.2, her evidence was not believed in view of the categorical findings given by the Dean, Government Rajaji Hospital, Madurai, marked as Ex.R.2.

2.9. The trial Court also held that the relief of annulment is barred by limitation. On the above findings, the trial Court dismissed the petition for divorce and allowed the petition for restitution of conjugal rights.

2.10. Aggrieved by the same, the appellant/husband preferred C.M.A.Nos.19 and 20 of 2011 before the learned Principal District Judge, Virudhunagar District at Srivilliputtur.

2.11. The learned Principal District Judge, Virudhunagar District at Srivilliputtur, framed the following points for determination in the appeals:

H.M.C.M.A.No.19 of 2011:

"1. Whether the order passed by the trial Court in H.M.O.P.No.142 of 2006 on 10.06.2011 is sustainable under law?

2. Whether H.M.C.M.A.No.19 of 2011 could be allowed?"

H.M.C.M.A.No.20 of 2011:

"1. Whether the order passed by the trial Court in H.M.O.P.No.45 of 2002 on 10.06.2011 is sustainable under law?

2. Whether the appellant is entitled to get the relief of decree of divorce?

3. Whether H.M.C.M.A.No.20 of 2011 could be



allowed?"

2.12. The lower appellate Court also agreed with the findings of the trial Court and dismissed the appeals. The lower appellate Court found that the appellant/husband has admitted certain facts in course of cross-examination and concluded that the admissions made by the appellant/husband would lead to the impression that he had sexual relationship with his wife and he had not denied that the child was born to him. It would suggest that the narrow vaginal passage would not get him sexually satisfied. According to the lower appellate Court, the very fact that he deposed that she became pregnant would belie that he did not have sexual intercourse even for once. The lower appellate Court also took note of the D.N.A. Test as well as the report of the Dean of Government Rajaji Hospital, Madurai, wherein it is clearly stated that she is fit for marital life as well as sexual intercourse. Based on the above said evidence, the lower appellate Court concluded that there is no ground for interference with the judgment and decree of the trial Court and dismissed both the appeals. Aggrieved by the same, the appellant/husband is before this Court by way of these Civil Miscellaneous Second Appeals.

3. I have heard Mr.J.Anandkumar, learned Counsel for the appellant/husband and Mr.V.Janakiramulu, learned Counsel for the respondent/wife.

4. Mr.J.Anandkumar, learned Counsel for the appellant/husband would vehemently contend that even assuming that he fails on the ground of nullity of marriage, he could succeed on the ground of cruelty. According to the learned Counsel for the appellant/husband, the very absence of conjugal life for a period of one year would amount to cruelty. He would invite my attention to the decision of the Honourable Supreme Court in **Vinita Saxena v. Pankaj Pandit** reported in **(2006) 3 Supreme Court Cases 778**, wherein the Honourable Supreme Court held that refusal of sexual life itself amounts to cruelty.

5. As an alternative, the learned Counsel for the appellant/husband contended that in the light of the fact that the appellant/husband and the respondent/wife have lived apart nearly for 15 years, divorce could be granted on the ground of irretrievable break down of marriage.

6. Considering the facts narrated above and the findings of the Courts below, the following substantial questions of law are framed in these appeals:

"(i) Whether the appellant/husband could be favoured with the decree of divorce on the ground of cruelty when he failed to establish his claim for annulment of marriage under Section 12 of the Hindu



Marriage Act?

(ii) Whether the marriage could be dissolved on the ground of irretrievable break down of marriage?"

Substantial Questions of Law Nos.(i) and (ii):

7. As regards the claim of the appellant/husband that the respondent/wife is unfit for marital life, the same stands disproved by the medical evidence in the case on hand. During the pendency of the proceedings, it is seen that the respondent/wife was referred to Government Rajaji Hospital, Madurai, wherein the Dean of the said Hospital has given a clear report that the respondent/wife is fit for sexual intercourse.

8. It is relevant to extract hereunder the observations made by the Gynaecologist of the Government Rajaji Hospital, Madurai:

"PV. Vagina admit 2 fingers easily, uterus normal size. Fornices fr.

Impression: Mrs.Kuppu Rajeswari is fit for sexual intercourse."

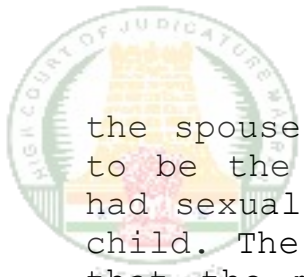
9. Though the appellant/husband had denied the paternity of the child and had claimed that the pregnancy has been created by artificial insemination, the D.N.A. Test reports given by the Government Forensic Sciences Department, would belie the claim of the appellant/husband. In fact, it has been found that the D.N.A of the male child born to the respondent/wife matches with that of the father and the conclusion arrived at by the Forensic Expert in his report marked as Ex.R.2 is as follows:

"Conclusion: From the DNA typing results, it is found that in the absence of identical twins, **Mr.N.Marichamy is the biological father** of the child **Denish Kumar.**"

10. Realising the difficulty in dislodging the concrete medical evidence against the appellant/husband, the learned Counsel for the appellant/husband seeks to shift the ground of divorce to cruelty or the irretrievable break down of marriage.

11. Insofar as the claim of the cruelty is concerned, I find that there is no pleading in the petition. All that has been stated is that the respondent/wife is unfit for marital life and therefore, he has sought for annulment of marriage on the ground of non-consummation of marriage. When that ground stands belied, the appellant/husband now wants to look for an alternative to claim divorce on the ground of cruelty.

12. I do not think that such a relief could be granted in the present application even though H.M.O.P.No.45 of 2002 is stated to have been filed under Sections 12(1-A) and 13(1)(1-A) of the Hindu Marriage Act. Even in the evidence, the appellant/husband has not ~~deposited any~~ ^{deposited any} evidence regarding cruelty. Of course, the Honourable Supreme Court has held that the denial of sexual relationship by



the spouses would amount to cruelty. But the same does not appear to be the case here. It is clear that the appellant/husband has had sexual intercourse with the respondent/wife and has begot the child. The reason for claiming annulment of marriage on the ground that the marriage has not been consummated, remains a suspense. Even though P.W.2 - Doctor who claims to have examined the respondent/wife sometime in 2001, had deposed that she found her unfit for marital life. The said evidence cannot be believed in view of substantial medical evidence that is available on record. Admittedly, the appellant/husband has not taken any step to examine the persons, namely, the Dean of Government Rajaji Hospital, Madurai and the Forensic Science Experts, who had issued the report of D.N.A. Test, to contradict the same.

13. Therefore, I do not see any reason to interfere with the factual findings of the Courts below. Accordingly, both the substantial questions of law are, answered against the appellant/husband.

14. In the result, both the Civil Miscellaneous Second Appeals are dismissed. However, there will be no order as to costs in the facts and circumstances of the case. Consequently, the connected miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar(CO)

/True copy/

sub Assistant Registrar

To

1.The Principal District Court,
Virudhunagar District at
Srivilliputtur.

2.The Subordinate Court,
Srivilliputtur.

3.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

+1cc to Mr.J.Anandkumar,Advocate,SR.62989

+2cc to Mr.V.Janakiramulu,Advocate,SR.63217,63218

C.M.S.A. (MD) Nos.21 and 22 of 2014
and

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