

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved on :22.01.2018****Pronounced on :05.02.2018**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM

and

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN**Civil Miscellaneous Appeal No.2370 of 2016**

J.V.Jonadab

... Appellant

\versus\

V.Sugirtha

...Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 19 & Family Court, 1984 praying to set aside the fair orders decreetal order passed by the III Additional Family Court, Chennai in O.P.No.2718 of 2009, dated 29.04.2016.

For Appellant : Mrs.S.Jayakumari

For Respondent : No appearance

J U D G M E N T[Judgment of the Court was made by **Dr.G.JAYACHANDRAN. J.,**]

This Civil Miscellaneous Appeal is directed against the dismissal order passed in O.P.No.2718 of 2009 filed for divorce by the husband, who is the

2. The gist of the petition is that, the petitioner/Mr.J.V.Jonadah and the respondent/V.Sugirtha got married on 26.05.2007 according to Christian rites and customs. The matrimonial home was set up at Flat No.27/105 LIC Jeevan Bhima Nagar, Mogappair, Chennai-37 along with the mother of the petitioner. On the very first day of marriage, discord between them surfaced. The behaviour and activities of the respondent gave an impression to the petitioner that the respondent had married him under some kind of compulsion and she was really not interested in the marriage. The nuptial night was ordinary, the respondent did not cooperate for conjugate. For days to come, whenever he attempted to make physical contact with the respondent, she not only refused but also insulted the petitioner. The marriage was never consummated, the respondent is not inclined to have sexual life with her partner. The respondent had all complaints against the petitioner including affair with girls whom he was in friendly terms in connection with his profession. She started spying the petitioner to know to whom he is speaking in the office. She used to frequently call his colleagues and enquiry about him. She wrote a letter threatening to commit suicide and put the blame on the petitioner and his family members. Later, a false criminal complaint alleging dowry harassment was lodged by the respondent's father forcing the petitioner and his family members unnecessary harassment. The behaviour of the respondent has caused unbearable torture and humiliation leading to

breakdown of marriage. Hence, seek divorce on the ground of willful refusal to consummate and cruelty.

3. The respondent in her counter has contented that, the address given in the petition as their matrimonial home is wrong. She was never compelled by her family members to marry the petitioner. The impression of the petitioner entertained about her attitude towards him is borne out of baseless misunderstanding of the petitioner. On the nuptial night, the petitioner had oral sex with her. Always he preferred the unnatural form of sex and she did co-operate with him to have oral sex. For non-consummating of marriage, she is not responsible, it was the petitioner who choose to sleep in a separate room. Because, the petitioner was interested in other women, he did not show any interest on her and consequentially spoiled her marital life. She once saw the petitioner lying with his sister-in-law Mrs.Hanna Franklin. In fact,the suspicious nature of the petitioner due to his fragile mind, she had been subjected to cruelty. The hardship faced by her father due to demand of dowry by the petitioner and his family member led to lodging complaint before the All Women Police Station, Thirumangalam. The petitioner left the matrimonial home in December 2008 and absconded. The respondent was forced to take care of herself all alone in a portion of the premises taken on rent by the petitioner's aunt. When she was forced to vacate that portion, by the petitioner's family members, she sought the intervention of the All Women

Police, Thirumangalam to secure her residential right. Since the averments made in the petition are false, for want of cause of action the petition deserves to be dismissed.

4. Before the trial Court, the petitioner and the respondent have deposed to expose their respective case. 12 exhibits on behalf of the petitioner and 9 exhibits on behalf of the respondent are marked. No witness other than the litigating parties examined on either side. Considering the averments made in their respective pleadings and the exhibits, the trial Court has held that there was co-habitation between the parties and none of the misunderstanding and cruelty alleged in the petitioner are proved through satisfactory and reliable evidence. Therefore, dismissed the petition.

5. The aggrieved petitioner, in his appeal, had raised the following grounds challenging the reason stated in the order impugned:

(a)The trial Court has failed to note the evidence of the respondent that, "we had cohabitation, that was not normal, the appellant insisted her for oral sex, which was agreed by her but till her stay with the appellant, the appellant made attempts to have sex". This statement of the respondent clearly shows that they both never had any co-habitation.

(b)The evidence of the respondent, which is contradictory to her counter about the misunderstanding on the first night regarding sexual

relationship, is not taken note by the trial Court.

(c) In Ex.B-6 (Complaint to the All Women Police given by father of the respondent), the respondent's father had stated that the respondent and the appellant had no sexual relationship between them and the same was known to the sister-in-law of the appellant. This admission in Ex.B-6 is sufficient to show that the marriage was not consummated. The trial Court failed to take note of Ex. B-6.

(d) The trial Court has failed to take note of the fact that due to false complaint given by the respondent alleging dowry demand, has caused grave mental torture and cruelty.

(e) The serious allegation against the appellant that he is having illicit relationship with his brother's wife, has not been considered by the trial Court as mental cruelty sufficient to grant divorce.

6. Heard the learned counsel for the appellant. The learned counsel appearing for the respondent is absent in spite of matter is posted on 11.12.2017 and 11.12.2018 under the caption "For Final Hearing". Hence, after perusing the records and hearing the learned counsel for the appellant, this Court pass the following order:

The marriage between the appellant and the respondent on 26.05.2007 is admitted by both the parties. There is no significant dispute regarding their marital home set up at LIC Jeevan Bhima Nagar, Anna

Nagar West , Chennai. In the Original Petition filed by the appellant, the address of the respondent and the appellant are shown as one and the same. The dispute is whether the marriage was consummated and whether the allegation against the respondent amounts to cruelty.

7. Under Section 10 (vii) of the Divorce Act, 1869, wilful refusal to consummate the marriage and the marriage not therefore been consummated is one of the ground for divorce. In the case in hand, while the petitioner/husband pleads and had deposed that the marriage was not consummated and the respondent willfully refused to co-habitate with him, the respondent/wife pleads and had deposed that, her husband was only interested in oral sex, and always he preferred this way. She has also deposed that the appellant attempted to have normal sex with her, which according to the appellant, this proves non-consummation of marriage.

8. As per Wharton's Law Lexicon, 'Consummation' means completion of marriage by co-habitation by spouses. In this case, the appellant has not denied the averment made by the respondent that she co-operated with the appellant when he insisted to have oral sex. Further, her averment that appellant was oriented to unnatural sex has also not been refuted. To attract Section 10 (vii), non-consummation should be due to wilful refusal.

marriage or it was due to wilful refusal of the respondent. Contrarily, the physical intimacy between the spouse is not denied. The manner in which they had sexual relation is a private affair which cannot be proved through third parties. Therefore, Court has to necessarily rely either the version of the husband or the wife, by applying the preponderance of probability. In this case, the averment of the respondent is more probable for the reasons stated above. While so, the divorce sought by the appellant on the ground of wilful refusal to consummate, has no material to stand.

9. As far as the averment regarding cruelty, the trial Court has observed that it was the appellant and his family members, who had behaved cruelly with the respondent by demanding dowry. This Court find that the said observation is not without merit, besides the police complaint for dowry demand and harassment, evidence before this Court reveals that, the petitioner has left the matrimonial home without caring the respondent. He has not disclosed his whereabouts to his wife. When the respondent was in need of care during her ailment, she had been forced to write letter to the appellant and his relatives. The letter which is marked as Ex.R-2 dated 29.08.2009 and the response of appellant's brother and maternal aunty, which are marked as Ex.R-5 and Ex.R-4 reveals, neither the appellant nor his relatives showed any concern for her, when she expected a shoulder to lean. Though the respondent has made some allegation

about, illegal intimacy of the appellant with his brother's wife, it appears to be a counter attack to the appellant's allegation of infidelity made against the respondent connecting her with one Arshad. For either of the allegations, there is no proof.

10. In the result, the Civil Miscellaneous Appeal being bereft of merits, liable to be dismissed. **Accordingly, the Civil Miscellaneous Appeal is dismissed. No Costs.**

[A.S.,J.] [Dr.G.J.,J.]

05.02.2018

speaking/non speaking

Index:Yes/No

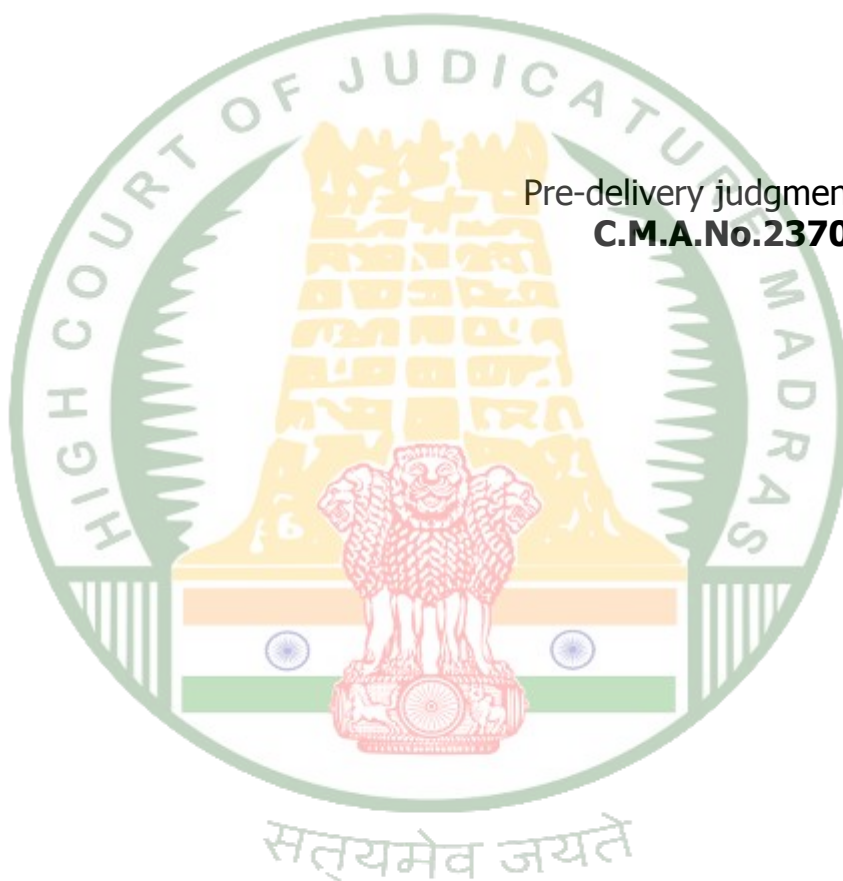
Internet:Yes/No

To

The III Additional Family Court, Chennai.

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A.SELVAM.J,
&
Dr.G.JAYACHANDRAN.J,



Pre-delivery judgment made in
C.M.A.No.2370 of 2016

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