

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 15.02.2018

Pronounced on : 20-04-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

Civil Miscellaneous Appeal No. 963 of 2007

Reeta Appellant/Petitioner

Versus

E. Prem Kumar Respondent/Respondent

Appeal filed under Section 19 of The Family Courts Act against the Order and decree dated 18.10.2006 passed in I.D.O.P. No. 251 of 1997 on the file of Family Court Judge, Coimbatore.

For Appellant : Mrs. Chitra Sampath, Senior Advocate
for Mr. T.S. Baskaran

For Respondent : Mr. S. Sundaresan
for Ms. R. Sonia Glory

JUDGMENT

R. Subbiah, J

The appellant has come forward with this Civil Miscellaneous Appeal against the order dated 18.10.2006 passed in I.D.O.P. No. 251 of 1997 on the file of Principal Family Judge, Family Court, Coimbatore. By the said order dated 18.10.2006, the Family Court dismissed the IDOP No. 251 of 1997 filed by the appellant herein for dissolution of the marriage solemnised between her and the respondent herein.

2. The case of the appellant is that she was a native of Kangayam Town and her father retired as a Teacher. The respondent is a graduate and employed as a Clerk in Rajalakshmi Mills, Singanallur, Coimbatore. As per the wishes of the elders, the marriage between the appellant and the respondent was solemnised on 27.05.1996 at CSI Church, Kangayam in accordance with rights and customs governing Indian Protestant Christians. At the time of marriage, the appellant was

presented with 18 sovereigns of gold jewellery besides providing house hold articles worth Rs.15,000/-. After the marriage, the appellant and the respondent lived together at Varadharajapuram, Coimbatore in the house of the respondent along with the mother and brother of the respondent, as a joint family. The appellant and the respondent commenced their matrimonial life happily. While so, on 01.06.1996, within a week of the marriage, the respondent, without the knowledge of the appellant, got himself admitted as an in-patient in G.P. Hospital, Gandhipuram, Coimbatore and he was discharged on 05.06.1996. The appellant was not informed about the hospitalisation of the respondent and she was groping in the dark as to the whereabouts of the respondent. After several enquiry, the appellant came to know about the hospitalisation of the respondent in G.P. Hospital, Gandhipuram, Coimbatore. As the appellant was new to the area where the matrimonial home is situate, she could not even locate the hospital where the respondent was admitted and with great difficulty, she could locate the hospital by causing enquiries. Even though the appellant met the respondent in the hospital, she was not disclosed about the nature of illness or the treatment being given to the respondent. The appellant could not even get any information from the paramedical staff attached to the hospital. According to the appellant, the conduct of the respondent in getting hospitalised without the knowledge of the appellant is strange and mysterious by which the appellant was put to shock and mental stress. After discharge of the respondent, the appellant and the respondent lived together till August 1996. Even during this period, the appellant was not informed about the illness suffered by the respondent and the reason for his hospitalisation. It is the specific grievance of the appellant that the respondent avoided and evaded to share conjugal bliss with the appellant, as a result, even after three months of marriage, the marriage was not consummated. There was no physical contact or cohabitation between the appellant and the respondent. Even though the appellant was eager and anxious to have sexual intercourse with the respondent, the respondent was not ready to fulfil the sexual urges of the appellant. According to the appellant, the respondent has not only expressed his unwillingness to have physical relationship with the appellant but expressed his aversion to perform sexual intercourse with her. After a month of the marriage, the appellant came to know that the respondent was hospitalised for taking treatment for his sexual disability. Therefore, during the last week of August 1996, the appellant left the matrimonial home and stayed with her parents. From August 1996, the appellant is living with her parents and there is no cohabitation or consummation of the marriage solemnised between the appellant and the respondent. Above all, even during the stay of the appellant in the matrimonial home, the respondent treated the appellant cruelly, ill-treated her and physically

assaulted her. The respondent also demanded dowry in the form of jewels, cash and a car from her parents and when the appellant refused to ask her parents, the respondent threatened to send back the appellant to her parents house. In fact, the respondent behaved rudely towards the appellant only to cover his inability to perform sexual intercourse with her. Therefore, due to such uncooperative and unkind behaviour of the respondent, the appellant was constrained to leave the matrimonial company of the respondent. According to the appellant, the respondent is impotent and unable to fulfil the sexual desires of the appellant. The respondent suffers from a total incapacity to perform sexual intercourse with her. The hopes and aspirations of the appellant to get conjugal bliss after the marriage has been shattered into pieces due to the conduct and inability of the respondent to perform sexual intercourse. As the appellant could not realise the fruits of the marriage, no useful purpose would be achieved if the matrimonial tie is kept alive. Therefore, the appellant sent a notice dated 07.06.1997 specifically contending that the respondent is impotent and not capable of performing sexual intercourse with the appellant and by virtue of the same, marriage solemnised between the appellant and the respondent has become a nullity and that the marriage has to be annulled. According to the appellant, inspite of the receipt of the notice dated 07.06.1997, the respondent did not send any reply notice and therefore, the appellant has filed the Indian Divorce Original Petition No. 251 of 1997 under Section 18, 19 (1) and 10 (1) (x) of The Divorce Act praying to annul the marriage solemnised between the appellant and the respondent on 27.05.1996 on the grounds of impotency.

3. Repudiating the averments in the Original Petition, the respondent has filed a counter affidavit before the Family Court contending inter alia that the parents of the appellant did not present her 18 sovereigns of gold ornaments and house hold articles worth Rs.15,000/- at the time of marriage, as contended by the appellant. It was further stated that at the time when the appellant left the matrimonial home during the last week of August 1996, she had taken with her all the belongings including the gold ornaments. According to the respondent, it is not correct to state that the respondent was admitted in the hospital on 01.06.1996 without the knowledge of the appellant. On the other hand, the respondent got admitted in the hospital with the knowledge of the appellant as the respondent had pain in his private part at the time of having sexual intercourse with the appellant. Therefore, after discussion with the appellant, the respondent got admitted in the hospital and during the course of such hospitalisation, the respondent underwent a minor surgery called as circumcision by which the overgrown upper skin in his private part was removed by a

surgical procedure. Even during the course of hospitalisation of the respondent, the parents of the appellant also met the respondent in the hospital. Therefore, it cannot be gainsaid that the respondent was admitted in the hospital and taken treatment for his sexual inability. Further, soon after the marriage and after the discharge from the hospital, both the appellant and the respondent had sexual intercourse on several occasion. However, due to the ill-advise given by the parents of the appellant, the appellant left the matrimonial company of the respondent during the last week of August 1996. The respondent never demanded any dowry either in the form of cash or in kind, as alleged by the appellant. The respondent is earning substantially through his employment and therefore the question of demanding dowry and on refusal, the respondent harassed the appellant is without any basis. It was further stated that as the notice dated 07.06.1997 was sent by the appellant with false and untenable averments, he did not send any reply thereof. Above all, it was specifically stated that the respondent is not impotent, as alleged by the appellant and he is ready to subject himself to medical examination to prove his potency, if directed by the Court. The marriage was consummated and the desertion of the appellant from the matrimonial company of the respondent is voluntary and without any just or sufficient cause. The respondent is ready and willing to live with the appellant and therefore he prayed for dismissal of the Original Petition.

4. Before the Family Court, in order to prove the averments in the Original Petition, the appellant examined herself as PW1 and his mother was examined as PW2 besides Exs. P1 to P3 were marked. On behalf of the respondent, he examined himself as RW1 and three other witnesses as Rws 2 to 4 and marked Exs. R1 to R9. The Family Court, on analysing the oral and documentary evidence, held that the appellant has failed to establish that the respondent is impotent and unable to perform sexual intercourse with her. The Family Court also concluded that there was no evidence to hold that the appellant was subjected to matrimonial cruelty and accordingly the Original Petition was dismissed. Aggrieved by the same, the present Civil Miscellaneous Appeal is filed.

5. The learned Senior counsel appearing for the appellant would contend that the marriage between the appellant and the respondent was solemnised on 27.05.1996. Immediately, within a week of the marriage, the respondent suddenly disappeared from the matrimonial home and his whereabouts were not made known to the appellant thereby the appellant was made to grope in the dark and mystery had shrouded her. Ultimately, after enquiry, the appellant came to know that the respondent was hospitalised. Even though the appellant met the respondent in the hospital,

she was not disclosed about the reason for which the appellant was admitted in the hospital. The efforts made by the appellant to ascertain the cause of hospitalisation of the respondent with the paramedical staff attached to the hospital went in vain. Thus, the respondent was admitted in the hospital without the knowledge of the newly wedded wife/appellant thereby she was subjected to acute mental agony and trauma. Further, from the date of marriage, the respondent avoided the company of the appellant and refused to perform sexual intercourse with her, with the result, the marriage was not consummated. Even after discharge from the hospital, the respondent never had sexual intercourse with the appellant inspite of the appellant expressing her anxiety and the need to consummate the marriage. According to the learned Senior counsel for the appellant, the non-consummation of the marriage would amount to cruelty and on that ground, the appellant is entitled to a decree of divorce.

6. The learned Senior counsel for the appellant would further contend that narrating the ordeal the appellant had confronted in the matrimonial home, she had sent a legal notice on 07.06.1997 inter alia contended that the marriage itself is a nullity by reason of the inability of the respondent to perform sexual intercourse with her. Even though the notice dated 07.06.1997 was received, the respondent has not chosen to send any reply. However, before the Family Court, a defence was taken by the respondent as if he was admitted in the hospital with the knowledge and consent of the appellant due to pain in his private part and he had underwent a minor surgery called circumcision for removal of overgrown upper skin in his private part. If it is so, the respondent would have produced medical records to prove the nature of treatment taken by him during the course of his hospitalisation from 01.06.1996 till his discharge on 05.06.1996, however, no such records has been produced by the respondent. This would only show that the respondent did not take treatment in the hospital and underwent a circumcision surgery, as alleged, rather, he had taken treatment for his inability to perform sexual intercourse, as pleaded by the appellant in the Original Petition. In any event, when a defence was taken by the respondent with respect to the nature of treatment taken by him and when it was not proved by any documentary evidence, the Family Court ought to have taken an adverse inference against the respondent.

7. The learned Senior counsel for the appellant brought to the notice of this Court that during the pendency of the Original Petition, the appellant had taken out an application in I.A. No. 1388 of 2003 praying to direct the respondent herein to undergo medical examination to prove his potency. The respondent also filed I.A. No. 65 of 2004 praying to direct the appellant to undergo medical examination to prove whether she

was virgin or not. The Family Court allowed both the applications. Thereafter, respondent had undergone medical test and a report thereof was issued. Since the report was not relevant for the purpose of adjudication of this case, the appellant did not mark the report before the Family Court. According to the learned Senior counsel for the appellant, at the time of marriage the respondent was impotent and therefore, the medical report obtained during the pendency of the matrimonial proceedings is not relevant and hence, it was not marked. In this context, the learned Senior counsel for the appellant relied on Section 19 (1) of The Divorce Act wherein it is stated "that the respondent was impotent at the time of the marriage and at the time of the institution of the suit" and contended that impotency of the respondent at the time of marriage or at the time of institution of the Original Petition alone is relevant and the subsequent report as regards the potency of the respondent is immaterial. In such circumstance, the appellant did not mark the report issued to the respondent as regards his potency and such report has no significance to this case. The Family Court, without considering the above facts has erroneously dismissed the Original Petition filed by the appellant for dissolution of the marriage on the ground that the appellant has failed to prove the impotency of the respondent by not filing the medical report issued in his favour.

8. The learned Senior counsel for the appellant would further contend that before the Family Court, the appellant examined herself as PW1 and her mother was examined as PW2 and Exs. P1 to P3 were marked. The witnesses on the side of the appellants were examined and cross-examined on 06.10.2003. Thereafter, after a period of three years from the date of completion of the evidence on the side of the appellant, on 09.06.2006, the respondent has filed a proof affidavit in which he has introduced a new case as if the appellant secretly married one Vijayakumar through whom she has given birth to a child. In order to substantiate the same, the respondent examined RW2, Reverend Pastor of CSI Church, Trichy. The respondent also examined one Krishnamurthy, Sanitary Supervisor working in the Kangeyam Panchayat Office as RW3. The respondent has further examined Dr. Malliga Chidambaram, a Doctor working in Divya Hospital as RW4. The respondent also marked Exs. R1 to R6, Birth Certificate of Baby Evangeline Janitha said to have born to the appellant and one Vijayakumar and other related documents through Rws 2 to 4. According to the learned Senior counsel for the respondent, the deposition of RW2, Reverend Pastor of the Church cannot be relied on for the reason that RW2 in his cross-examination has stated he did not know the age of the Child Evangeline Janitha. Above all, the respondent has given a complaint against RW2 alleging that he solemnised the marriage between the appellant and the said Vijayakumar during

the subsistence of the marriage between the respondent and the appellant and that is the reason why the evidence of RW2 cannot be relied on, because he deposed before the Family Court only under threat and coercion and his evidence was not voluntary. According to the learned Senior counsel for the appellant, the respondent is not a member of the Church where RW2 is performing the duties as a Priest and therefore, RW2 is not entitled to depose before the Family Court for the respondent. Similarly, RW3, who is working as Sanitary Supervisor has merely produced the birth certificate of a child by name Evangaline Jenitha, which was marked as EX.R7. But in the said Certificate produced by RW3 namely Ex.R7, the name of the mother was indicated as V. Reeta. On the contrary, the name of the appellant is C. Reeta, Daughter of Chandrasamy. Similarly, RW4 examined on behalf of the respondent has deposed in her evidence that she could not remember as to whether she attended on the delivery of the child of the appellant. Therefore, according to the learned Senior counsel appearing for the appellant, the evidence of RW2 to 4 relied on by the Family Court is legally not sustainable and based on their evidence, the Family Court ought not to have dismissed the original petition filed by the appellant for dissolution of the marriage. In any event, according to the learned Senior counsel appearing for the appellant, the deposition of RW2 to 4 does not prove the alleged marriage between the appellant and one Vijayakumar during the pendency of the Original Petition and therefore, the Family Court ought not to have relied on their evidence.

9. The learned Senior counsel appearing for the appellant would further contend that it is a settled proposition of law that no amount of evidence can be looked into without any pleading. In the present case, in the counter affidavit filed by the respondent before the Family Court, there is no averment relating to the alleged marriage between the appellant and one Vijayakumar during the pendency of matrimonial proceedings. The respondent has examined RW2 to 4 only after three years after closure of the evidence on the side of the appellant. The documents relating to Baptism of the child, birth extract have been forged and fabricated by the respondent to make it appear as if the appellant is living in adultery with one Vijayakumar. Above all, when PW1 was questioned whether she is willing to subject the minor child Evangeline Janitha to DNA test, she replied in the affirmative by saying that if there exist such a child, as alleged by the respondent, she is ready and willing to subject the child to DNA test. The learned Senior counsel for the appellant therefore submits that neither there was a marriage solemnised between the appellant and one Vijayakumar nor a child born due to such wedlock. Further, for the first time, the respondent has alleged in his proof affidavit filed on 09.06.2006 that a child was born on 25.07.2002 through the

marriage conducted between the appellant and one Vijayakumar. However, there is no explanation forthcoming as to why the respondent did not furnish the said details at the time of filing his counter. Therefore, according to the learned Senior counsel appearing for the appellant, only to harass the appellant, the respondent has examined RW2 to 4 as an after-thought. In this context, the learned Senior counsel appearing for the appellant relied on the decision of the Honourable Supreme Court in the case of (Vijaykumar Ramachandra Bhate vs. Neela Vijaykumar Bhate) reported in (2003) 6 Supreme Court Cases 334 to contend that indulging in character assassination of the appellant during the pendency of divorce proceedings would amount to cruelty.

10. The learned Senior counsel for the appellant would vehemently contend that the respondent made wild allegation against the appellant as if she married one Vijayakumar, through whom she had begotten a child. However, PW1 was not cross-examined by the respondent specifically as regards the so-called re-marriage with one Vijayakumar or the child born thereof. In fact, the respondent had also given a Criminal complaint against the appellant as if she is living in adultery and the same was quashed by this Court in Crl. RC No. 938 of 2010. Thus, it is the contention of the learned Senior counsel for the appellant that the conduct of the respondent in raising unsubstantiated allegations as if the appellant is living in adultery has caused acute mental cruelty to the appellant and on that ground she is entitled for a decree of divorce. In this context, the learned Senior Counsel for the appellant relied on the decision of the Honourable Supreme Court in (V Bhagat vs. D. Bhagat (Mrs) reported in (1994) 1 Supreme Court Cases 337 to contend that by reason of the attempt on the part of the respondent to project as if the appellant is living an adulterous life, the appellant was subjected to matrimonial cruelty and she cannot be expected to live together with the respondent.

11. Above all, it is contended by the learned Senior counsel appearing for the appellant that after marriage, the appellant and the respondent lived together as husband and wife only for three months. Thereafter, from August 1996, nearly for 22 years, both of them are residing separately and such long separation has irretrievably broken down the matrimonial relationship between the parties. Therefore, according to the learned Senior counsel for the appellant, no useful purpose will be achieved by keeping the matrimonial tie alive, hence, the learned Senior counsel prayed for setting aside the decree and judgment passed by the Court below.

12. Countering the submissions of the learned Senior counsel for the appellant, the learned counsel for the

respondent would contend that the marriage between the appellant and the respondent was solemnised on 27.05.1996. After the marriage, the respondent had sexual intercourse with the appellant and at that time, he felt pain in his private parts. Therefore, with the knowledge of the appellant, he got himself admitted in the hospital and underwent a minor surgical procedure called Circumcision. The respondent did not take any treatment for his sexual inability as alleged by the appellant. The respondent did not suppress his ailment to the appellant as alleged by her and in fact her parents met the respondent in the hospital while he was taking treatment. Further, after discharge from the hospital, the respondent had sexual intercourse with the appellant and therefore, according to the learned counsel for the respondent, it cannot be said that the marriage was not consummated. In such circumstances, according to the learned counsel for the respondent, the desertion of the appellant from the matrimonial home is without any just and sufficient cause.

13. As regards the contention of the appellant that the respondent is not capable of performing sexual intercourse with the appellant, it is contended by the learned counsel for the respondent that during the pendency of the Original Petition, the appellant has filed I.A. No. 1388 of 2003 to subject the respondent to medical examination to prove his potency to perform sexual intercourse. The respondent also filed I.A. No. 65 of 2004 to direct the appellant to undergo medical examination to prove whether she was virgin or not. The Court below allowed both the applications, pursuant to which, the respondent appeared before the Medical Board, had undergone the medical examination and a report was sent to the Family Court. As per the report, the respondent is potent and capable of performing sexual intercourse. On the other hand, in spite of specific direction issued by the Court below, the appellant refused, failed and neglected to undergo medical examination and this itself will prove that the allegations made by the appellant in the Original Petition are not bonafide. Further, even though a report was submitted to the Court by the Medical Officer stating that the respondent is potent and capable of engaging himself in sexual intercourse, the appellant, who all along alleged that the respondent is impotent, has not chosen to file the report as a document. The medical report cannot be said to be an irrelevant document, as stated by the appellant, when the so-called impotency of the respondent was the foundation for the appellant to seek for a decree of divorce. Having regard to the above facts, the court below has rightly pointed out that the appellant failed to mark the medical report to prove the impotency of the respondent and refused to grant a decree of divorce.

14. The learned counsel for the respondent would further contend that RW2 to 4 were examined during the pendency of the Original Petition and it was not objected to by the appellant. Further, the deposition of RW2 to 4 and the documents marked as Exs. R1 to R7 would clinchingly prove that the appellant married one Vijayakumar during the subsistence of the matrimonial proceedings before the Court below and also had begotten a female child. In order to substantiate the same, the respondent has marked the Birth Certificate of the female child and the particulars relating to the solemnisation of Baptism for the minor child as documents. Thus, the defence raised by the respondent as regards the marriage of the appellant with one Vijayakumar and the child born thereof has been proved and thereby the respondent discharged his burden. On the other hand, it is the appellant who failed to discharge the allegations as regards impotency of the respondent. Therefore, for her own wrong, the appellant cannot seek to annul the matrimonial tie with the respondent.

15. As regards the contention of the learned Senior counsel for the appellant that the evidence of Rws 2 to 4 cannot be looked into in the absence of any pleading, it is contended by the learned counsel for the respondent that the respondent produced documentary evidence to show the subsequent marriage of the appellant with one Vijayakumar. The respondent also examined three witnesses through whom it was clearly brought out that the appellant has begotten a female child through her marriage with one Vijayakumar. The respondent came to know the marriage of the appellant with one Vijayakumar after closure of the evidence on his side and therefore, he sought the permission of the Court below to examine certain witness and also to mark documents. The Court below also granted such permission and the appellant was also given an opportunity of cross-examination. In such circumstances, the learned counsel for the respondent would contend that the subsequent events can very well be taken note of by the Court below for rendering a just and fair decision in the lis between the parties.

16. As regards the averments relating to matrimonial cruelty allegedly inflicted on the appellant, the learned counsel for the respondent would contend that the appellant and the respondent lived together for a period of three months and thereafter, the appellant, on her own, left the matrimonial company of the respondent during August 1996. If really the respondent, during the course of matrimonial relationship, demanded any dowry or subjected the appellant to any harassment, the appellant would have given a complaint to the Police, complaining matrimonial cruelty at the instance of the respondent. However, in this case, no such complaint was given by the appellant. Further, in the notice dated 07.06.1997 sent

by the appellant, there was no whisper as regards the cruelty or harassment caused to her. When the appellant did not prove the averments made in the Original Petition, the Family Court rightly dismissed the Original Petition filed by the appellant and such an order passed by the Court below need not be interfered with by this Court. The learned counsel for the respondent therefore prayed for dismissal of the appeal.

17. We have carefully gone through the pleadings of the parties, the order passed by the Family Court and the material evidence placed. The appellant herein has filed I.D.O.P. No. 251 of 1997 before the Family Court, Coimbatore for a decree of divorce on the ground of impotency of the respondent. The main ground on which the Original Petition was filed by the appellant is that within a week of the marriage, the respondent left the matrimonial home and admitted himself in a hospital purportedly for taking treatment for his inability to perform sexual intercourse. According to the appellant, she was groping in the dark as to the reason for the hospitalisation of the respondent and the treatment given to him. Even otherwise, soon after the marriage, the respondent refused to have sexual intercourse with her inspite of her anxiety to engage herself with the appellant to consummate the marriage. As the respondent did not discharge his matrimonial obligation, particularly to have sexual intercourse with her, she was subjected to mental agony and hardship and such an act on the part of the respondent is nothing short of cruelty. The appellant therefore left the matrimonial home and stayed with her parents. Thereafter, the appellant caused a notice dated 07.06.1997 to the respondent in which she has clearly indicated that the respondent is impotent and not capable of performing sexual intercourse with her and by virtue of the same, marriage solemnised between the appellant and the respondent has become a nullity and that the marriage has to be annulled. Even though such a notice was issued, for the reasons best known, the respondent did not issue any reply notice and this would abundantly makes it clear that the respondent is impotent and on that ground, the marriage solemnised between her and the respondent has to be annulled.

18. The respondent repudiated the averments contained in the Original Petition filed by the appellant by filing a counter affidavit. According to the respondent, he was admitted in the hospital for five days with the knowledge and consent of the appellant, for, he suffered acute pain in his private part owing to overgrown skin in his private part. For such ailment, he underwent a surgical procedure called Circumcision to remove such overgrown skin and it has nothing to do with his ability or inability to perform sexual intercourse with the appellant. According to the respondent, soon after the marriage and after discharge from the hospital, he had sexual intercourse with the

appellant and the averment that the marriage was not consummated is an utter false. It was also contended by the respondent that even during the pendency of the Original Petition, he subjected himself to medical examination and the Doctors who examined him had given a clean chit with respect to his ability to perform sexual intercourse. On the other hand, inspite of a direction issued by the Family Court, the appellant did not subject herself to medical examination to prove that she remains a virgin even after her marriage with the respondent. While so, the foundation on which the Original Petition has been filed by the respondent had fallen to ground. The Family Court, taking note of the above facts, has rightly refused to grant a decree of divorce.

19. When the appellant alleges that respondent is impotent and unable to perform sexual intercourse with her, a duty is cast upon her to prove the same to the satisfaction of the Court by adducing evidence. To prove whether respondent was impotent at the time of marriage or thereafter, medical evidence is imperative. In this context, the appellant has filed I.A. No. 1388 of 2003 seeking to direct the respondent to undergo medical examination to prove that he is potent enough to perform sexual intercourse. At the same time, the respondent also filed I.A. No. 65 of 2004 to direct the appellant to undergo a medical examination and to prove that she is still a virgin. Both the applications were allowed by the Family Court, Coimbatore, pursuant to which the respondent had undergone a potency test. After completion of such test, a report dated 18.05.2004 was sent to the Family Court, Coimbatore by Dr. R. Saraswathy, Dean, Coimbatore Medical College and Hospital, Coimbatore. Even though such a report was made available, it was not marked as a document by the appellant before the Family Court. On the other hand, though the appellant was directed to undergo a medical examination, she failed, refused and neglected to subject herself to a medical test. In the normal course, subjecting a woman to a virginity test against her wish and consent would cause slur and denigrate the dignity of women, but in the instant case, as a sequel to the demand made by the appellant, the respondent had undergone a potency test resulting in a similar request being made by the respondent to the appellant to undergo a virginity test. It is the assertive case of the appellant that the marriage has not been consummated, hence, definitely the burden rests on the shoulders of the appellant to prove that the respondent was unable to fulfil the matrimonial obligations. In those circumstances, we are of the opinion that only an adverse inference has to be drawn as against the appellant for not subjecting herself to medical examination inspite of the direction of the Family Court. As rightly pointed out by the leaned counsel for the respondent, when the appellant all along pleaded that it was the respondent who was impotent to

perform sexual intercourse with her, it is for her to prove the same. In this case, in the first instance, the appellant did not file the medical report dated 18.05.2004 given by the Medical Officer in favour of the respondent. On the other hand, the appellant did not subject herself to any medical examination inspite of the direction of the Family Court. Even though it was contended by the learned Senior counsel for the appellant that the report dated 18.05.2004 has no significance or relevance to this case and therefore it was not marked by the appellant, we are unable to appreciate such submission of the learned Senior counsel for the appellant. The Original Petition was filed by the appellant for dissolution of the marriage on the ground of impotency of the respondent and to prove the same, the medical report dated 18.05.2004 is very much essential and the appellant ought to have marked the same as a document. When such a document has not been marked by the appellant, an adverse inference has to be drawn against her and it has to be held that the appellant has failed to prove the averments made by her in the Original Petition.

20. The learned Senior counsel for the appellant would contend that as per Section 19 (1) of The Divorce Act, impotency on the part of any of the spouse has to be proved at the time of marriage and institution of the suit and not during the pendency of the matrimonial proceedings. In the present case, in the Original Petition, it was specifically averred by the appellant that soon after the marriage, the respondent admitted himself in the hospital to take treatment for his inability to perform sexual intercourse. When such an averment was raised in the Original Petition, the respondent is bound to disprove the same by producing medical records to substantiate the same. However, for the reasons best known, the respondent did not produce the medical records relating to his admission in the hospital from 01.06.1996 to 05.06.1996. Even the respondent did not issue any reply to the notice dated 07.06.1997 sent by the appellant.

21. This averment of the appellant was denied by the respondent in his counter by stating that he was admitted in the hospital to remove the over grown upper skin on his private part and a minor surgery was performed to the respondent. It was also contended that even during his hospitalisation, the appellant and her parents have met the respondent and they were fully aware of the treatment given to the respondent. Further, the notice dated 07.06.1997 was sent only by the father of the appellant and not by the appellant and therefore, the respondent thought it unnecessary to send a reply thereof.

22. On perusal of the evidence adduced before the Family Court, Coimbatore, we find that the a specific question was posed to the appellant as to whether she is ready to live with

the respondent if it is proved he is not impotent. It was deposed by the appellant that she is not prepared to live with the respondent. To a further question as to whether the appellant is prepared to prove her virginity as she alleges that the marriage was not consummated, she deposed that she is not ready and willing to undergo such a test to prove her virginity. Therefore, it is evident that except the oral testimony of the appellant, there is no medical evidence made available to show that the respondent is impotent. In a case of this nature, the mere assertion or averments are not sufficient to hold that one of the spouse is impotent or virgin and the medical evidence alone would prove the physical ability or inability of one of the spouses. In the absence of such medical evidence forthcoming, we are of the view that the appellant failed to prove the impotency of the respondent and hence, Section 19 (1) of The Indian Divorce Act cannot be made applicable to this case.

23. Next it has to be examined as to whether the appellant was subjected to matrimonial cruelty at the instance of the respondent. Even though the appellant has filed the Original Petition only on the ground of impotency, the appellant has also contended inter alia that she was subjected to matrimonial cruelty during her short stay in the matrimonial home. Admittedly, the appellant and the respondent lived together as husband and wife for a period of three months only. As rightly pointed out by the learned counsel for the respondent, if really the appellant suffered cruelty at the instance of the respondent or his parents, she could have very well stated so in the notice dated 07.06.1997 sent by her. On perusal of the notice dated 07.06.1997, we find that the appellant, while justifying her withdrawal from the matrimonial company of the respondent owing to his alleged impotency, also made certain allegations as regards the alleged demand of dowry in the form purchase of a car and a house in his name. However, on careful reading of the entire contents of the notice dated 07.06.1997, we find that the allegations with respect to demand of dowry were made like a passing remark besides that such alleged demand made by the respondent were not the sole reason for the withdrawal of the appellant from the matrimonial company of the respondent. In any event, the appellant has filed the Original Petition only on the ground of impotency of the respondent, while so, much significance could not be attached to the averments made by the appellant as regards the alleged matrimonial cruelty inflicted on her by demand of dowry by the respondent.

24. As regards the averments of the respondent that the appellant married one Vijayakumar during the subsistence of the Original Petition and through such marriage, she has begotten a female child, it is contended by the learned Senior counsel for the appellant that the evidence of RW2 to 4 and the documents

filed thereof by the respondent are not trustworthy and they cannot be relied on to conclude that the respondent had married another person during the pendency of the Original Petition. It is further stated that the respondent has examined Rws 2 to 4 without any pleadings to substantiate the same in the reply statement filed by him, while so, the Family Court ought not to have relied on the deposition of RW2 to 4 and the documents filed through them.

25. It is true that the respondent, until the closure of the evidence on his side, did not examine any witness on his side except examining himself as RW1. Thereafter, during the pendency of the Original Petition, the respondent came to know that the appellant had married one Vijayakumar and through whom, she has begotten a female child. After causing enquiries in that direction, the respondent sought for reopening the evidence on his side and with the permission of the Court, he examined Rws 2 to 4 and marked Exs. R1 to R7 to substantiate the marriage of the appellant with one Vijayakumar and the female child born out of such wedlock. Rws 2 to 4 were also cross-examined on behalf of the appellant. We notice that it is not as if the respondent merely asserted that the appellant had contracted a marriage with one Vijayakumar during the pendency of the Original Petition. To prove such averment, the respondent examined three witnesses and marked documentary evidence to show that the appellant, during the pendency of Original Petition, married one Vijayakumar and a child also born out of such wedlock. RW2 in his evidence has clearly stated that he knows the appellant and her family and that he had solemnised the Baptism for the daughter born to the appellant. On perusal of Ex.R3, particulars of Baptism of V. Evangeline Jenitha dated 22.06.2003, it is clearly stated that the name of the father is M. Vijayakumar and name of the mother is C. Reeta. This certificate was issued by the Presbyter of the CSI Church, Kangeyam on 22.06.2003. This certificate clearly indicates the name of the appellant as mother of a child by name V. Evangeline Jenitha. The initial of the child viz., 'V' co-relates with the name of the father Vijayakumar, with whom the appellant said to have contracted a marriage during the pendency of the matrimonial proceedings before the Family Court. Similarly, in the birth certificate of the child, marked as Ex.R4, the name of the father and mother are clearly indicated as Vijayakumar and Reeta, of course, the name of the mother is indicated therein as 'V. Reeta'. Based on this certificate, it is contended by the learned Senior counsel for the appellant that it was not the appellant whose name is mentioned in the birth Certificate dated 25.07.2002, Ex.R4. On perusal of Ex.R4, it is seen that the name of the hospital where the girl child was born is mentioned as Divya Hospital, Kangeyam. To substantiate this, the respondent examined Dr. Malliga attached to the said hospital as

RW4. Dr. Malliga, RW4, in her evidence has deposed that she is not sure as to whether she had looked after the maternity delivery of the appellant or not. In any event, the respondent need not prove the adulterous living of the respondent in the Petition filed by the appellant for dissolution of the marriage on the ground of impotency, however, he examined RW2 to 4 before the Family Court and substantiated the same. In such circumstances, it cannot be said that the deposition of RW2 to 4 and the documents marked through them are inadmissible in evidence in the absence of any pleadings to that effect. When the respondent makes some allegations as regards the adulterous living of the appellant, he is duty bound to prove the same, even in the absence of any averments in the counter statement filed before the Family Court. When the averments raised by the respondent has been proved before the Court below in a manner known to law, the same can be taken note of by the Family Court to arrive at a just decision. In this context, useful reference can be made to the decision of the Honourable Supreme Court in the case of (K. Srinivas vs. K. Sunita) reported in (2014) 16 Supreme Court Cases 34, which was relied on by the learned Senior counsel for the appellant, wherein, in identical case, the Honourable Supreme Court held that the respondent-wife in her cross-examination has admitted that she did not mention all the incidents on which her complaint is predicated in her statement under Section 161 of Cr.P.C and therefore the criminal complaint given by the respondent is an after-thought. In Para Nos. 5 to 7 of this decision, it was held as follows:-

6. Another argument which has been articulated on behalf of the learned counsel for the respondent is that the filing of the criminal complaint has not been pleaded in the petition itself. As we see it, the criminal complaint was filed by the wife after filing of the husband's divorce petition, and being subsequent events could have been looked into by the Court. In any event, both the parties were fully aware of this facet of cruelty which was allegedly suffered by the husband. When evidence was led, as also when arguments were addressed, objection had not been raised on behalf of the respondent wife that this aspect of cruelty was beyond the pleadings. We are, therefore, not impressed by this argument raised on her behalf.

7. In these circumstances, we find that the appeal is well founded and deserves to be allowed. We unequivocally find that the respondent wife had filed a false criminal complaint and even one such complaint is sufficient to constitute matrimonial cruelty."

26. In this case also, we find that the respondent did not stop with merely raising an averment with respect to adulterous living of the appellant, but substantiated it by examining witnesses and marking documentary evidence. In such circumstances, we are of the view that the Family Court is right in appreciating the witnesses examined by the respondent as RW2 to 4 and the evidence adduced thereon in the form of documentary evidence such as Exs. R1 to R7 and therefore, the argument of the learned Senior counsel for the appellant that the deposition of RW2 to 4 and the documents marked through them are inadmissible in evidence, deserves only to be rejected.

27. In the result, we confirm the Order dated 18.10.2000 passed in I.D.O.P. No. 251 of 1997 on the file of Family Court Judge, Coimbatore and the Civil Miscellaneous Appeal stands dismissed. No costs.

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

- 1.The Family Judge
Family Court
Coimbatore.
- 2.The Section Officer,
VR Section, High Court,
Madras.[2 copies]

+1cc to M/S.R.Sonia Glory, Advocate Sr.29843
+2cc to Mr.T.S.Baskaran, Advocate Sr.29341

sj[col
srg 18/05/2018

CMA No. 963 of 2007

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