

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.02.2019

CORAM:

THE HONOURABLE MR. JUSTICE M.M. SUNDRESH
AND
THE HONOURABLE MR. JUSTICE C.SARAVANAN

C.M.A. No. 1123 of 2016
and
C.M.P.Nos. 8537 and 8538 of 2016

R.Sudha Bakkiyalakshmi ... Appellant/Claimant

Vs.

R.Viswanath ... Respondent/Respondent

Prayer : Appeal filed under Section 19(1) of the Family Courts Act against the order of dismissal dated 09.01.2015 made in H.M.O.P.No.11 of 2013 by the Learned Sub-Ordinate Judge at Kanchipuram.

For Appellant : Mr.R.T.Arivu Kumar for
M/s.P.Wilson Associates

For Respondent : No appearance

JUDGMENT

(Delivered by M.M.Sundresh,J.)

The appellant is the wife of the respondent. She filed a petition in H.M.O.P.No.11 of 2013 on the ground of desertion and cruelty. It is her specific case that the respondent is incapable of consummation. A child was born due to the artificial insemination. The respondent was treating her cruelly. He has made a statement frequently that the relationship was one of brother and sister. He was suffering from Schizophrenia and therefore, there was mental illness resulted in cruel treatment meted out to her. He has also

deserted the appellant. Accordingly, on those grounds, the divorce was sought for.

2. The Court below declined to grant the divorce decree on the premise that the appellant has not marked the original document of Ex.P2, not examined the author of the said document and the said document having been given few weeks after the marriage, no steps have been taken to resolve it and Ex.P4 has not been proved by her. Inasmuch as a female child was born out of the wedlock the contention regarding the birth due to IVF cannot be accepted. Challenging the same, the present appeal has been filed.

3. Heard the learned counsel appearing for the appellant. Despite service of notice, none appears for the respondent.

4. Learned counsel appearing for the appellant submitted that Ex.P2 ought to have been accepted. It is a document in favour of the respondent and therefore, the appellant cannot have the original document. The fact that the respondent was suffering from Schizophrenia can be seen from the evidence as a whole. Merely because it was not questioned earlier, it cannot be said that it is not true. It is the case of the appellant that due to the aforesaid mental illness, cruelty was committed. The respondent also admitted about the birth of the child not by natural means. He also admitted Ex.P4. Therefore, the order passed by the Court below requires interference.

5. We have heard the learned counsel appearing for the appellant and also perused the documents. The respondent even in the chief examination has admitted the fact that he has executed Ex.P4. The said letter states that he has treated the appellant as a sister. Therefore, once the said document is admitted to have been executed, it is for the respondent to let in contra evidence to disprove it. In such view of the matter, the Court below has committed an error in placing the onus on the appellant along with other evidence.

6. In the cross-examination also, in clear terms, the respondent has admitted that a child was born through the I.V.F. treatment. He has further stated that the child did not born through the wedlock. It is the specific case of the appellant that the respondent was incapable of consummation. This aspect has not been taken note of by the Court below. We must keep in mind that the appellant being the wife has taken a specific plea in this regard. If the child was born through the medical effort and not by natural means, the respondent ought to have come forward with contra evidence. Here again, the Court below put onus entirely on the appellant. Further, the respondent has also accepted the fact that the sister was undergoing the similar

treatment. Ex.P2 is a document written by the Doctor evidencing the mental illness of the respondent. The Court below declined to accept it on the ground that only xerox copy has been produced and the Doctor has not been examined. The doctor is the one who examined the respondent and therefore it would not have been possible for the appellant to examine him. Similarly, Ex.P2 is the one which has been given in favour of the respondent and therefore, the appellant has sufficiently explained non-production of the original documents. Once we hold that Ex.P2 and P4 are proved, consequently the averments made will have to be accepted for the purpose of cruelty and desertion also.

7. Considering the above, we are of the view that the appellant has made out a case for divorce. Perhaps, that is the reason why the respondent has not chosen to come before us. We may also note that at the time of filing the petition, the appellant was about 44 years and the respondent was 47 years. Nearly more than six years have elapsed, since then. The petition has also been filed on the ground of desertion. Thus, looking from any perspective, we are of the view that the order of the Court below cannot be sustained. Accordingly, the order passed by the Court below is set aside and H.M.O.P.No. 11 of 2013 stands ordered.

8. In the result, the Civil Miscellaneous Appeal stands allowed. No costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True copy//

Sub Assistant Registrar

mmi/ssm

To

The Sub-Ordinate Judge, Kanchipuram.

+1cc to M/s.P.Wilson Associates, SR.No.15398

C.M.A. No. 1123 of 2016

CA(CO)
GMY(09/10/2019)