

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 28.08.2019

CORAM:

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.A.NO.24 OF 2012

G.Kabilan

... Appellant/Petitioner

Vs

Indirani

... Respondent/Respondent

PRAYER:

Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act read with Section 100 CPC against the judgment and decree dated 27.02.2012 and made in C.M.A. No.13 of 2011 on the file of the District Judge, Nagapattinam, confirming the Judgment and Decree dated 08.10.2010 made in H.M.O.P No.96 of 2008 on the file of Subordinate Court, Nagapattinam.

For Appellant : Mr.V.Kolandaivelu

For Respondent : Mr.S.Soundhar
Amicus Curiae

O R D E R

This present Civil Miscellaneous Second Appeal has been filed challenging the correctness of the orders of the Courts below refusing decree for resolution of marriage in favour of the appellant/husband.

2.Learned counsel for the appellant/husband assailing the impugned correctness and findings of the courts below raised the following substantial questions of law:

"1. Whether the Appellant has a right to seek dissolution of marriage with the respondent herein, when the unsound mind of the respondent was proved beyond doubt through the Exhibits X1 and X2 as well as through the deposition of PW2?

2. Whether it is mandate for the appellant to file an application for appointment of Guardian under Order XXXII Rule 3 of C.P.C. when the respondent had unsound mind prior to the date of marriage?"

3. In support of the above substantial questions of law, the learned counsel for the appellant has submitted that when the appellant/husband got married on 24.09.1998 at Puthur Arokiyamatha Samathuvakoodam, they started their marriage life in the house of the appellant at Sikkal village. From the date of marriage, the respondent did not behave normally. When the same was informed to respondent's mother, she did not take it seriously. In the meanwhile, the respondent/wife used to talk irrelevantly and behave disrespectfully not only to the appellant and his family members but also the appellant's mother. Thus, the behaviour of the respondent/wife appears to be different from the normal person. Therefore, he decided to take the respondent to doctor's advice and the behaviour of the respondent/wife was informed to her mother. The respondent sister was also aware of the problem. Even after several days, there was no change in the conduct of the respondent. When the respondent also refused for sexual relationship with the appellant, it was also informed to the respondent's mother. When the respondent's mother was also asked to give some psychological treatment to the respondent, both the respondent's brother and mother did not take any effort. Thereafter, the respondent was asked to stay at her mother's house for treatment, as that would take care of the ailment. After a few days, when the appellant visited the respondent's mother's house, the respondent was locked inside a room. Therefore, taking pity on her, the appellant himself has taken his wife/respondent herein to Dr. Sheik Dawood, Psychartist at Nagai, who in turn referred the respondent to take further treatment before the Dr. Kadhirkamar, who is working as Psychartist in Thanjavur Medical College. The said doctor also gave a report that the respondent has been suffering from psychological problem and that if not treated properly, it would aggravate the said disease. Thereafter, the appellant took the respondent before Nagapattinam Psychartist. The treatment given to the respondent was very costlier. But the respondent also did not take medicine as prescribed by the doctor and this was also informed to the respondent's parents. Therefore, he has requested the respondent's parents to keep her with them to provide treatment on the ground that the hospital is situated only at Nagapattinam. Adding further stated that after 3 1/2 months from the date of marriage till now, for a period of more than two decades, both of them are not living together. Moreover, there is no cohabitation between them. That itself is ground for divorce but this was not properly looked into by the trial court and the Appellate Court. When the respondent has been living with her parents all along, she has not even come forward to file restitution application under Section 9 of the Hindu Marriage Act, which shows that she is not completely recovered from mental illness.

4. Learned counsel for the appellant would further submit that when the enquiry was taken up before the trial Court, the Doctor was also produced and also deposed clearly and unequivocally that the respondent was admitted in his hospital as in patient from 20.10.1998 to 02.11.1998 for mental illness but he has not even deposed before the trial court that at any point of time, the respondent would get recovered from the said illness nor the doctor ever even deposed before the trial court that he had treated the respondent fully from the said mental illness. That goes without saying that the trial Court completely missed the point to answer whether the respondent is fit for matrimonial life,

5. When it is an admitted case for both parties that the respondent has been taking treatment for mental illness from 20.10.1998 to 02.11.1998, nowhere in the long deposition made by the doctor, who was giving treatment to the respondent deposed that the respondent has recovered fully from the said disease. Therefore, she is not fit for matrimonial life. Whereas, the trial court has completely misread the evidence and committed serious error refusing the prayer for grant of divorce. As a result, the appellant has been put to serious mental cruelty.

6. After the disposal of the HMOP, the matter was taken up to the District Judge, Nagapattinam by filing Civil Miscellaneous Appeal. It was reiterated therein that both the appellant and the respondent were living only for 3 1/2 months and after the said short period, when they were living separately from the year 1998, and when there is irretrievable break down of matrimonial life between them, there was no chance of reunion. This fact was also accepted by the Appellate Court in paragraph 10 of its order. Stating that though the marriage between the parties practically dead and there is no chance of reunion since they are not interested in living together, the learned Appellate Court has wrongly come to the conclusion that though the marriage between both the parties practically dead, it would not be a ground for divorce on the ground of mental disorder of wife.

7. Now the marriage law has come to favour the appellant ruling that when there has been a long period of continuous separation, the matrimonial bond is beyond repair. Taking reliance on the decision of the Hon'ble Supreme Court reported in 2007(4) SCC 511, Samar Ghosh vs Jaya Ghosh, referring to paragraph 101 clause (xii), learned counsel for the appellant would submit that unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty. It has been further stated therein that unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty. Finally, it has

been held categorically that when there has been a long period of separation, it may be fairly concluded that the matrimonial bond is beyond repair. On this basis, the learned counsel for the appellant prayed for allowing the appeal and setting aside the concurrent findings of the courts below.

8. In reply, Mr. Soundar, learned counsel who has been appointed by this Court as Amicus Curiae, taking effort in assisting the Court, argued that it is no doubt true that both the appellant and the respondent are not living happily except for a period of 3 1/2 months from the date of marriage. Citing a reason that the respondent was having mental illness, the appellant took her to the parental house and left her. It is admitted case that the appellant has taken the respondent to her parental house and left her citing a reason that she was suffering from mental illness, the Psychiatrist, who has been examined as PW2 also came to the witness box, deposed that she was taking treatment as inpatient from him from 20.10.1998 till 02.11.1998. The doctor has clearly mentioned that the so called psychiatric treatment given to the respondent was not given for any major problem and the disease for which the treatment given was curable. Therefore, when the doctor has rightly deposed before the trial court stating that the respondent was having ailment, which was curable, both the trial court and the appellate court has rightly come to the conclusion that the appellant has failed to establish the issue.

9. Learned Amicus Curiae, Mr. Soundar vehemently contended that the finding given by the learned trial court that if really, the respondent was of unsound mind, the appellant would have sought appointment of guardian to the respondent as contemplated under Order 32 Rule 3 of CPC but it has not been done so, which clearly shows that the respondent is of sound mind. The appellant without seeking appointment of guardian to the respondent cannot allow to canvass that the respondent has been suffering from mental disorder. Therefore, the petition for divorce should not be allowed.

10. Learned Amicus Curiae further stated that the trial Court, after seeing the conduct and demeanor of the respondent, has given one another finding that the answer given by the respondent in the cross-examination also very clearly shows that she is not suffering from any mental disorder, therefore, the allegation made by the appellant against the respondent that she was suffering from mental illness is proved, hence, the petition filed for divorce on the ground of mental disorder of the respondent deserves to be allowed, cannot be accepted.

11. Again referring to the findings given by the Courts below, it has been canvassed that the irretrievable break down

of marriage is not a ground for granting divorce by this court and also by subordinate courts, as it is exclusively meant for the Apex Court by exercising power under Article 142 of the Constitution of India. In support of his submissions, taking support from the judgment of the Apex Court in the case of Anil Kumar Jain vs Maya Jain, 2009(10) SCC 415, Mr.Soundhar, learned Amicus Curiae has stated that the doctrine of irretrievable break down of marriage is not available to the High Courts which do not have powers similar to those exercised by the Supreme Court under Article 142. Neither the Civil Court nor even the High Courts can pass orders before the periods prescribed under the relevant provisions of the Act or on the ground not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955. Therefore, when this Court has no power or jurisdiction to accept the case of the appellant on the ground that there has been irretrievable break down of the marriage, the question of granting divorce is far from acceptance. Therefore the concurrent findings of both the courts below deserve to be accepted, he pleaded.

12. Again, the learned Amicus Curiae has placed reliance on one another judgment of the Apex Court reported in (2009) 6 SCC 379, Vishnu Dutt Sharma vs Manju Sharma, to reinstate his arguments that no such ground of irretrievable breakdown of marriage is provided by the legislature for granting of divorce, hence, this Court also cannot grant divorce on that ground. Concluding his argument, the learned Amicus Curiae urged this Court to dismiss the appeal filed by the appellant, as the appellant has not made out a clear case for grant of divorce warranting interference with the concurrent findings of the courts below.

13. Heard the learned counsels appearing on both sides.

14. Although Mr.Soundar, learned Amicus Curiae has canvassed heavily that the appellant, while complaining that the respondent, who was suffering from mental illness, has not taken out an application under Order 32 Rule 3 of CPC for appointment of guardian to the respondent, nowhere either the trial court or the Appellate Court has referred to or dealt with the evidence adduced by P.W.2, Dr.Sheik Dawood. It is relevant to extract the relevant portion of the evidence of P.W.2, Dr.Sheik Dawood:

"எதிர்மனுதாரர் என் மருத்துவமனையில் உள்நோயாளியாக இருந்து சிகிச்சை பெற்றுள்ளார். எதிர்மனுதாரர் 20.10.98 முதல் 2.11.98 வரை என் மருத்துவமனையில் உள்நோயாளியாக இருந்து சிகிச்சை பெற்றுள்ளார். எதிர்மனுதாரரை வெளிநோயாளியாக முதன்முதலில் சிகிச்சை அளித்ததற்கான வெளிநோயாளி கேஸ் சீட்டு எக்சிபிட் எக்ஸ் 1. எதிர்மனுதாரர் 20.10.98 முதல் 2.11.98 வரை என் ஆஸ்பத்திரியில் உள் நோயாளியாக சிகிச்சை எடுத்ததற்கான கேஸ் சீட் எக்சிபிட் எக்ஸ் 2. எக்சிபிட் எக்ஸ் 1ல்

எதிர்மனுதாரர் வெளிப்படையாக பேசவில்லை மற்றும் என்றும் பால் உணர்விலும்
திருமண வாழ்க்கையிலும் விருப்பம் இல்லாமல் இருந்தார் என்று
குறிப்பிட்டுள்ளேன். "

15. When it is an admitted case that the doctor P.W.2 Dr.Sheik Dawood had given treatment to the respondent for mental illness from 20.10.1998 to 02.11.1998 in his hospital neither the said Doctor P.W.2 deposed on the date of enquiry before the trial Court that he has cured the illness of the respondent nor even the trial court has found out any reasonable answer from the parties that the respondent has been completely and perfectly recovered from the said illness. When the fact remains so, it is not known as to how both the courts below can disregard the mental illness suffered by the respondent/wife over the past 12 years, when the matter was taken up by the trial court and subsequently, when the Appellate Court has dealt with the case.

16. When it is admitted case of both parties that after 3 1/2 months of solemnization of marriage, the respondent has been taking treatment for mental illness from PW2 and has not even proved that the doctor had cured illness, that clearly goes without saying that the allegation made by the appellant that the respondent was suffering from mental illness should have been accepted, as that has caused continuous mental cruelty to him and his family members.

17. Secondly, it is not in dispute that the respondent at no point of time had moved restitution application under Section 9 of the Hindu Marriage Act. Because, if it were moved then, she would not be able to establish that she was fit for matrimonial life by producing any medical certificate fully proving the illness. As she had not moved any application before the trial court, Order 32 Rule 3 of CPC calling upon the appellant to appoint guardian to the respondent cannot be resorted to for any assistance.

18. Thirdly, the Apex Court also in the case of 2007(4) SCC 511, Samar Ghosh vs Jaya Ghosh, has ruled that where there has been a long period of continuous separation, it may be fairly concluded that the matrimonial bond is beyond repair. It is pertinent to extract the relevant portion of the judgment as follows:

"101.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may

lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may be fairly concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

19. In the light of above, considering the fact that both the parties are living separately for the past 20 long years, applying the ratio laid down by the Hon'ble Supreme Court that where there has been a long period of continuous separation, it may be fairly concluded that the matrimonial bond is beyond repair and secondly, the respondent has miserably failed to establish that she has been cured fully from mental illness to which, she was taken treatment from 20.10.1998 to 02.11.1998, this Court accepts the case of the appellant and accordingly, allows the Civil Miscellaneous Appeal. The correctness and findings of the Courts below are set aside. Accordingly, the marriage solemnised between the appellant and the respondent dated 24.09.1998 shall stand dissolved, by granting a decree of divorce. No order as to costs.

20. This Court appreciates the painful effort taken for his assistance rendering to this Court by Mr.S.Soundhar, learned Amicus Curiae. The Legal Aid Society is hereby directed to pay a sum of Rs.5000/- (Rupees Five Thousand only) to Mr.S.Soundhar, the learned Amicus Curiae as his remuneration.

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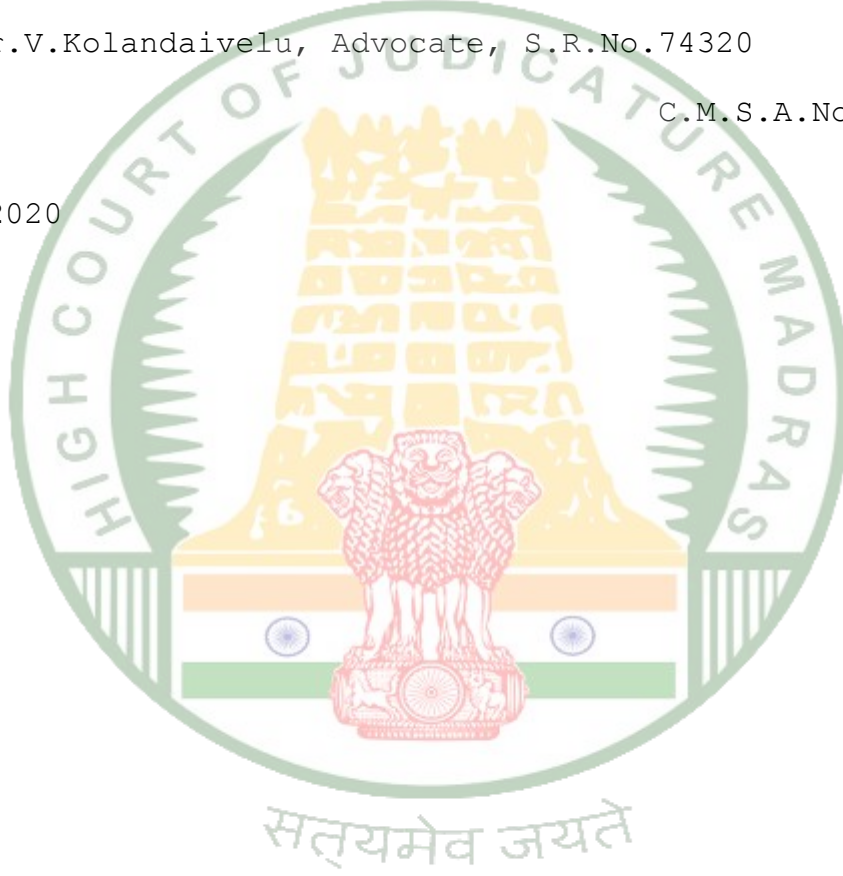
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