

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRONOUNCED ON : 10-01-2019

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH

AND

THE HONOURABLE MR. JUSTICE C. SARAVANAN

Civil Miscellaneous Appeal No. 1151 of 2014

K. Dhinesh Kumar

..Appellant/Petitioner

-Vs-

J.G. Aruna

..Respondent /Respondent

Appeal filed under Section 19 of Family Courts Act against the Judgment and Decree dated 11.12.2013 passed in F.C.O.P. No. 80 of 2008 on the file of Family Court, Salem

For Appellant : Mr. K. Moorthy

For Respondent : Mr. R. Jayaprakash

JUDGMENT

R. Subbiah, J

This appeal is filed by the appellant questioning the correctness and/or validity of the Judgment and Decree dated 11.12.2013 passed in F.C.O.P. No. 80 of 2008 on the file of Family Court, Salem. By the said Judgment dated 11.12.2013, the Family Court, Salem dismissed the Original Petition filed by the appellant seeking to dissolve the marriage solemnised between him and the respondent on 01.06.2006 on the ground of cruelty as contemplated under Section 13 (1) (i-a) of The Hindu Marriage Act, 1955.

2. The appellant herein has filed F.C.O.P. No. 80 of 2008 before the Family Court, Salem contending that he married the respondent on 01.06.2006 and the marriage was solemnised as per Hindu rites and customs at Balasubramania Swamy Temple, Oothumalai, Salem in the presence of friends and relatives of both sides. On the same day, a marriage reception was conducted in P.C.C. Marriage Hall, Jagiredipatti, Salem. At the time of marriage, the appellant presented six sovereign of thali chain, five sovereigns of dollar chain and two rings weighing 2 grams

each to the respondent. According to the appellant, the jewels presented to the respondent at the time of her marriage were kept in her parents house itself. It is the specific grievance of the appellant that from the date of marriage, the respondent refused to have conjugal relationship with him under one pretext or the other. The appellant had expressed his intention to have sexual intercourse with the respondent, however, by assigning one reason or the other, the respondent refused to have sexual intercourse with him and procrastinated it. Even after one week of the marriage when the appellant and respondent went to Cuddalore where the appellant is working, the respondent did not evince any interest to accede to the reasonable and legitimate desire of the appellant to have sexual intercourse with him. This has caused acute mental agony and disturbance to the appellant, whose expectation to consummate marriage could not be fulfilled by reason of the attitude of the respondent. While so, during June 2006, the appellant lost his employment and therefore he sent the respondent to her parents house to stay there for some time. At the same time, the respondent got employment in a College at Komarapalayam during August 2006 and she was attending to her employment. Since the respondent was staying at her parents house and was going for employment, the appellant went to the parents house of the respondent occasionally during which he informed the parents of the respondent about the reluctance of the respondent to consummate the marriage. The parents of the respondent also cited the physical weakness of the respondent as a reason for her reluctance to consummate the marriage and they assured the appellant that they will do all that is required to improve her health. While so, during the end of October 2006, the respondent resigned her employment on her own accord, purportedly due to her physical inability. At this stage, according to the appellant, in order to get more proximity in the relationship between him and the respondent, he had taken the respondent for a trip to Munaar and stayed there for three days between 21st October 2006 and 23rd October 2006 but even there, he could not succeed in convincing the respondent to have conjugal relationship with him. In the meantime, the appellant got employed as a Finance Consultant in a private firm at Pondicherry and therefore, he and the respondent had taken a house for rent at Pondicherry and stayed there from December 2006. Even during such stay, the respondent refused conjugal relationship with the appellant. As the respondent was physically not stable in her health, she was taken for treatment to a private hospital at Pondicherry. After examination, the Doctors have opined that the respondent is suffering from a dreaded disease called Rheumatoid Arthritis, coupled with Vascular disease and Systemic Lupus Erythematosus. The appellant was also informed by the Doctors that better treatment facilities are available at Chennai and directed him to take

respondent for further treatment there. Accordingly, the respondent went to Chennai where she was treated by the Doctors at Government General Hospital, Chennai. After medical examination, the Doctors at Chennai confirmed that the respondent is suffering from the above dreaded disease and also prescribed medicines to be taken on a daily basis. The respondent was thereafter sent to her parents house to take rest, as advised by the Doctors.

3. According to the appellant, he went to the parents house of the respondent on the eve of Pongal festival during January 2007 and at that time, he was informed that the respondent will be sent to the matrimonial home within a week. It was also stated that presently the respondent is taking native treatment and she is not taking the medicines prescribed by the Government Hospital at Chennai. However, even after two weeks, the respondent did not join the matrimonial company of the appellant. Therefore, a mediation was convened at the instance of elders of both sides during which it was stated on behalf of the appellant that in view of the ailment suffered by the respondent, she may not be fit for engaging herself in marital life. Therefore, it was suggested that the matrimonial tie can be snapped by approaching the competent Court for getting a decree of divorce. Such a suggestion was not acceded to by the respondent and she threatened the appellant with dire consequences if he proceeded to dissolve the marriage through a competent Court of law. According to the appellant, the respondent and her parents have suppressed the dreaded disease suffered by the respondent prior to the marriage. The respondent and her parents, knowing fully well that the respondent is not fit enough to engage in marital life, have solemnised the marriage of the respondent with the appellant thereby the appellant was subjected to acute cruelty and hardship. It is the contention of the appellant that the respondent did not discharge her matrimonial obligations, particularly she did not engage in sexual intercourse with him from the date of marriage, thereby, the object with which the marriage has been solemnised itself has been defeated. Even the efforts taken by the appellant to cure the disease suffered by the respondent went in vain due to the refusal on the part of the respondent to follow the advise given by the Doctors at Government General Hospital, Chennai in taking the medicines prescribed. The appellant therefore would contend that the very purpose and object with which he married the respondent has been defeated by reason of the attitude of the respondent. The appellant had suffered enough at the hands of the respondent and he could not continue the matrimonial life with her. Therefore, the appellant has filed the Original Petition for dissolution of the marriage on the ground of cruelty.

4. Repudiating the averments made in the Original Petition, the respondent filed a counter statement contending that at the time of marriage, her parents have gifted 100 sovereigns of gold jewellery besides other household articles and performed the marriage well. After the marriage, the respondent was employed in a College at Komarapalayam with good physique and without any disability. At no point of time the respondent refused to have sexual intercourse with the appellant and it is a blatant lie. Since the appellant got an employment in Pondicherry, the respondent resigned her employment in the College at Komarapalayam and such resignation is not owing to the ill health of the respondent. After resigning her employment, the respondent joined the matrimonial company of the appellant and resided at Pondicherry. The appellant has filed the Original Petition with false and untenable averments as if the respondent is suffering from a dreaded disease and on that ground she allegedly refused conjugal relationship with him. The respondent is always ready and willing to lead a peaceful and blissful matrimonial life with the appellant, however, it is the appellant who is ignoring and neglecting the respondent from joining his matrimonial company. The intention of the appellant is to get the marriage dissolved and to re-marry another girl. The respondent is hale and healthy and she is not suffering from any disease, much less a dreaded disease as projected by the appellant. The respondent therefore prayed for dismissal of the Original Petition.

5. Before the Family Court, the appellant examined himself as PW1 and marked Exs. P1 to P7 on his side. On the side of the respondent, the respondent examined herself as RW1, one Mr. Kandasamy Ganesan, father of respondent, as RW2 and Dr. V. Rathinavel as RW3 and marked Exs. R1 to R4. The Family Court, upon analysing the oral and documentary evidence concluded that the appellant mainly contended that the respondent is suffering from a dreaded disease with the result, she could not engage herself in cohabitation with him, thereby he was subjected to acute mental pain and hardship. However, to prove the nature of disease said to have been suffered by the respondent, the appellant has not examined any Doctor on his side. Even though Exs. P1 to P4 were filed to show the treatment taken by the respondent, those documents disclose that the respondent has not taken treatment for Arthritis ailment and there is nothing to show the nature of treatment extended to her was particularly for Rheumatoid Arthritis, coupled with Vascular disease and Systemic Lupus Erythematosus. On the other hand, the respondent examined RW3, Doctor, who has given a Certificate under Ex.R4 stating that the respondent is not suffering from any dreaded disease and that she is fit enough to engage herself in marital life. Therefore, the Family Court concluded that the basis on

which the Original Petition has been filed by the appellant that the respondent is suffering from a dreaded disease has not been established by the appellant. The Family Court also concluded that there is nothing to show that the respondent is unfit to indulge herself in marital life and that the appellant has been subjected to matrimonial cruelty at the instance of the respondent. Therefore the Family Court dismissed the Original Petition filed by the appellant for dissolution of the marriage on the ground of cruelty. Aggrieved by the same, the present Civil Miscellaneous Appeal is filed by the appellant.

6. The learned counsel for the appellant would submit that Ex.P5 is the Certificate issued by a Doctor to the respondent. As per Ex.P5 the respondent was diagnosed with Systemic Lupus Erythematosus and she was directed to consult a Rheumatologist in a higher medical institution for further management. Similarly, Ex.P6 is the Certificate issued by Apollo Hospitals, Chennai confirming that the respondent is suffering from Systemic Lupus Erythematosus. Therefore, it is clear that the respondent is suffering from a dreaded disease due to which she became unfit to engage herself in cohabitation. While so, the Family Court, without assigning any reason, has discarded Exs. P5 and P6, Certificates issued by the competent hospitals in favour of the respondent. The Family Court failed to consider that due to the disease suffered by the respondent, her health condition deteriorated and she could not lead a normal life, much less to indulge in sexual intercourse with the appellant and to fulfil her marital obligations. Even the respondent did not specifically deny that she is suffering from the aforesaid disease. The respondent also did not deny that she had taken treatment at Government General Hospital, Chennai and subsequently at Apollo Hospital, Chennai. Thus, the respondent is suffering from serious ailment owing to which she refused to have sexual intercourse with the appellant. In this context, the learned counsel for the appellant relied on the decision of the Division Bench of this Court in the case of (S. Indrakumari vs. S. Subbaiah) reported in 2003 (1) CTC 259 wherein it was held that wilful denial of sexual intercourse by one's spouse when other spouse is anxious for it would amount to cruelty and more particularly when couple are young and newly wed. Reliance was also placed on the decision of the Honourable Supreme Court in the case of Praveen Mehta vs. Inderjit Mehta reported in (2002) 5 SCC 706). In that case, it was held that the husband, who was enjoying normal health was likely to feel a sense of anguish and frustration in being deprived of normal cohabitation that every married person expects to enjoy. In such circumstances, it was held that denial by the wife to undergo proper medical treatment to improve her health and thereby depriving the husband to lead a normal sexual life would amount to cruelty.

7. For the same proposition, reliance was also placed on the decision of the Honourable Supreme Court in Samar Ghosh vs. Jaya Ghosh reported in 2007 (4) SCC 511 wherein it was held that wife's refusal to cohabit with her husband and her unilateral decision not to have any children for some time would cause mental cruelty on the husband.

8. The learned counsel for the appellant would further contend that in order to establish that the respondent is suffering from the disease called Systemic Lupus Erythematosus, before the Family Court, the appellant has taken out an application in I.A. No. 47 of 2011 praying to direct the respondent to undergo medical examination at Rheumatic Care Centre attached to Government General Hospital, Chennai and after her examination to submit a report by the hospital authorities to the Court. The said application was resisted by the respondent by stating she is hale and healthy and is in a position to lead a normal life, while so, the question of subjecting herself to any medical test is not warranted. It was further stated that the petition has been filed only to protract the Original Petition and prayed for dismissal of the same. It was further contended that the respondent has already filed a medical certificate obtained from a Doctor under Ex.R4 and she also examined the Doctor as RW3 before the Family Court, while so, the petition has been filed at the fag end of the proceedings. The Family Court allowed the application in I.A. No. 47 of 2011 and directed the respondent to undergo a medical examination, but she failed and neglected to undergo the test. In spite of the same, the Family Court, instead of taking an adverse inference against the respondent has dismissed the Original Petition by erroneously holding that the appellant has failed to establish the disease suffered by the respondent and that it was the cause for non-cohabitation between the spouse. The Family Court failed to take note of the fact that the appellant had taken all necessary steps to prove the ailment of the respondent, while so, the finding rendered by the Family Court that the appellant failed to prove the medical infirmities of the respondent is untenable. In this context, reliance was placed on the decision of the Division Bench of the Calcutta High Court in the case of Birendra Kumar Biswas vs. Hemlata Biswas reported in AIR 1921 Calcutta 459 wherein it was held that concealment of a loathsome and insurable form of syphilis is recognised as a fraud sufficient to warrant divorce or annulment, especially where the existence of the disease is discovered by the other party before the marriage is consummated. Such disease must be actually and probably incurable but annulment has been granted notwithstanding a mere remote possibility of a cure.

9. The learned counsel for the appellant would further contend that the Family Court considered Exs. P4 to P7 as genuine. Ex.P4 to P7 are medical records issued by the Rheumatology Care Centre attached to the Government General Hospital, Chennai to the respondent. However, the Family Court discarded Exs. P4 to P7 on the ground that it reveals that the respondent had only gone for a diagnosis and the result of the diagnosis is not reflected therein. The Family Court failed to note that the documentary evidence under Ex.P4 to P7 clearly reveals the nature of ailment suffered by the respondent and the treatment given to her. While so, the finding of the Family Court that the appellant has not examined the Doctor to establish the ailment suffered by the respondent is untenable. On the other hand, the Family Court carried on by the deposition of Doctor, RW3, examined on the side of the respondent, who in his deposition has admitted that he is not aware of the pathologist and scientific biochemist details and the nature of test done to the respondent. While so, the Family Court ought not to have relied on the deposition of RW3, Doctor or Ex.R4, Certificate issued by him to hold that the appellant did not prove the physical infirmities of the respondent. Further, the Family Court erred in considering the lab report under Ex.R4 to conclude that the respondent is hale and healthy. In effect, the learned counsel for the appellant would contend that the respondent had concealed the serious ailment suffered by her prior to the marriage and that the marriage was solemnised by fraud but this was not properly considered by the Family Court. The learned counsel appearing for the appellant would further contend that the Family Court failed to take into consideration the documentary evidence filed on behalf of the appellant to show the nature of disease suffered by the respondent. According to the counsel for the appellant, even prior to the institution of the Original Petition, on behalf of the appellant, a notice dated 25.02.2008, Ex.A-2 was sent to the respondent in which it was clearly stated that the respondent is suffering from Systemic Lupus Erythematosus even prior to the marriage, however, it was suppressed by the respondent at the time of marriage and thereafter. According to the counsel for the appellant, due to the serious ailment which the respondent suffers, she is not fit enough to engage herself in marital intercourse with the appellant. Even otherwise, from January 2007 to till date, the appellant and the respondent are residing separately without any physical contact and this long separation had rendered the marriage relationship between the appellant and the respondent an otiose. In this context, the learned counsel for the appellant relied on the decision of the Honourable Supreme Court in (Rishikesh Sharma vs. Saroj Sharma) reported in Case No. Appeal (Civil) 5129 of 2006 to contend that when the parties to the lis are living separately for a considerable length of time, compelling them to live together is not

warranted. In such circumstances the best course to be adopted is to dissolve the marriage solemnised between them so as to enable them to live peacefully in their remaining part of life.

10. The learned counsel for the appellant has also invited our attention to the deposition of the respondent, as RW1 and her father, as RW2. According to the counsel for the appellant, the respondent has admitted that she did not cooperate with the appellant to lead a normal life. At the same breadth, the respondent denied that she has taken any treatment in Pondicherry or at Chennai, which are contrary to the documentary evidence under Exs. P1 to P4. Further, RW2, father of the respondent has also admitted that he has not produced any documentary evidence to show that the respondent is not suffering from the diseases indicated in the Original Petition by the appellant. The learned counsel for the appellant would therefore contend that the appellant has clearly established the diseases for which the respondent had taken treatment, owing to which she could not lead a normal marital life with the appellant. In such circumstances, the Family Court ought to have allowed the original petition filed by the appellant instead of dismissing it.

11. Per contra, the learned counsel for the respondent would contend that soon after the marriage between the appellant and the respondent on 01.06.2006 at Salem, the couple have stayed at Cuddalore in a separate house where the appellant was employed. There was sexual intercourse between the appellant and the respondent which made their life peaceful and blissful. Thereafter, during December 2007 the appellant got an employment at Pondicherry and therefore, the couple have moved to Pondicherry where also they stayed in a separate house. However, the appellant has filed the Original Petition alleging that the respondent is suffering from a dreaded disease owing to which she could not indulge in normal sexual life. Thus, the principal contention of the appellant is that the respondent was inflicted with a dreaded disease and that is the reason for her disinclination to engage herself in sexual intercourse with the appellant, thereby, the appellant, a newly married youth, was deprived of giving vent to his feelings to have normal sexual intercourse. In such circumstances, the burden is heavy on the shoulders of the appellant to prove that the respondent is suffering from a dreaded disease or a communicable disease, which had adversely affected the normal marital life. According to the counsel for the respondent, section 13 (1) (v) of The Hindu Marriage Act contemplates that if one of the spouse suffers from a venereal disease in a communicable form and the existence of such disease is established, then the other spouse is entitled for a decree of divorce. In the present case, the appellant did not prove that the respondent is suffering from

any venereal disease in a communicable form, which deprived her of discharging her normal matrimonial obligations, as expected by the appellant. Even otherwise, the disease for which the respondent is said to have taken treatment will not fall within the ambit of Section 13 (1) (v) of The Hindu Marriage Act and therefore, the appellant is estopped from seeking a decree of divorce on this ground.

12. The learned counsel for the respondent would contend that Exs. P1 to P7 were filed on behalf of the appellant to contend that the respondent is suffering from Systemic Lupus Erythematosus even prior to the marriage and that the existence of such disease was suppressed by her at the time of marriage. Ex.P4 is the blood test report and it did not reveal the existence of the aforesaid disease. Ex.P6 and P7 are the medical reports issued by Apollo Hospital at Chennai. However, the appellant did not prove by any documentary evidence that the respondent was subjected to such test in Apollo Hospital and based on such examination those documents have emanated. This is more so since the respondent denied having undergone any test at Apollo Hospital, Chennai. Therefore, it is doubtful as to whether the documents have emanated based on the physical medical test undergone by the respondent. According to the learned counsel for the respondent, Dr. Vasanthakumkar, who issued certificate under Exs. P6 and P7 as if he had examined the respondent is none other than the appellant's cousin and therefore it is highly doubtful as to the manner in which Exs. P6 to P7 have emanated. Moreover, the appellant did not examine any one else to prove the genuineness of the documents and that is the reason why the Family Court has rightly discarded Exs. P4 to P6 from consideration. On the other hand, the respondent examined RW3, Doctor who has examined the respondent and issued Exs. R4 which would clearly prove that the respondent is not suffering from any disease.

13. The learned counsel for the respondent submits that the appellant has contended that RW3, Doctor examined on the side of the respondent is not a competent person to depose on behalf of the respondent. It was also contended that RW3 is not specialised in Rheumatology and therefore his report cannot be considered. The fact remains that RW3 is highly qualified to examine the respondent to diagnose whether she is suffering from the so-called disease or not for which there is no requirement to examine a Doctor who is specialised in that particular field. When the appellant alleged that the respondent is suffering from a dreaded disease, the burden is heavy on his shoulder to prove the same to the satisfaction of this Court. Instead the appellant alleged that the Doctor who examined on the side of the respondent is not a specialist and therefore his deposition has to be discarded, without examining any Doctor on his side.

In this context, the learned counsel for the respondent placed reliance on the decision of the Division Bench of this Court in the case of (Lakshmi Priya vs. K.V. Krishnamoorthy) reported in 2007 (2) Law Weekly 261 wherein it was held that it is the settled proposition of law that the burden lies on the person who affirms a fact and not on the party who denies it.

14. The learned counsel for the respondent would further place reliance on the decision of the Division Bench of this Court in the case of R. Sivasubramanian vs. S. Krishnaveni reported in 2007 (1) CTC 198 wherein it was held that in para No.11 and 12 as follows:-

"11. On the other hand, it is evident from RW1 that she behaved like a dutiful wife and she is willing to live with the petitioner. In evidence she explained the circumstances which forced her to live away from the matrimonial home that when she was about to leave for her mother's house for first pongal festival, the petitioner asked her to bring Rs.5 lakhs from her parents, or otherwise he would kill her and when it became impossible for her to part with the sum demanded by the petitioner, the petitioner sent the divorce notice. She has further stated that she filed a petition for maintenance which is pending.

13. A conjoint reading of the evidence of PW1 and RW2 does not show that the petitioner suffered mental cruelty by means of non-consummation of the marriage or the respondent abused and treated the petitioner cruelly. Further, the petitioner in his evidence almost has spoken of the non-consummation of marriage, whereas he sought divorce on the ground of cruelty. It is a settled law that no evidence could be let in or looked into, without a pleading and hence, we hold that the petitioner has not proved his case of cruelty by way of acceptable evidence. The Trial Court has rightly appreciated the evidence available on record and come to the conclusion that the evidence of petitioner is highly unreliable and without any due corroboration, and dismissed the petition."

15. By placing reliance on the above decision, the learned counsel for the respondent would contend that the appellant, who is seeking a decree of divorce on the ground of cruelty, has a huge burden to establish that he was treated cruelly by the respondent, but in the present case, the appellant would only contend that he was refused sexual bliss by the respondent owing to her ill health. When the appellant could not establish that

the respondent is suffering from a dreaded disease, it cannot be said that the respondent is unfit to engage herself in sexual intercourse with the appellant. This is more so that the respondent has categorically stated that the appellant was not denied cohabitation and there was cohabitation between them. In such circumstances, the learned counsel for the respondent would pray for dismissal of this appeal by confirming the decree and judgment passed by the Family Court.

16. We have heard the learned counsel for both sides and perused the materials placed on record. As we have dealt with the factual matrix of the case in detail, we refrain ourselves from dealing with the narration of the facts of the case any further. At the same time, certain facts, which are germane and necessary for disposal of this appeal alone are considered.

17. The marriage between the appellant and the respondent was solemnised on 01.06.2006 at Uthamalai, Salem. The marriage was arranged by the elders of both sides. Admittedly, after one week from the date of marriage, the appellant and the respondent went to Cuddalore where the appellant was employed and resided there. It is also an admitted fact that the appellant lost his employment and therefore, the respondent was sent to her parents house for some time. Subsequently, during December 2006, the appellant secured an employment at Puducherry and therefore, the appellant and respondent stayed at Puducherry from December 2006 in a separate house for rent.

18. The main grievance of the appellant is that the respondent did not cooperate with him in having sexual intercourse from the date of marriage and that the marriage was not consummated at all. In view of the non-consummation of the marriage, the appellant was subjected to acute mental agony and hardship. As a newly married man, he had lot of expectations and desires to lead a blissful marital life, but due to the refusal on the part of the respondent in having sexual intercourse with him, he was put to untold mental agony and pain. The appellant attributes such refusal on the part of the respondent to an incurable, rather dreaded disease suffered by her for which she was given treatment by him. It is also his contention that the respondent, knowing fully well about the disease which she suffered, did not reveal it to the appellant prior to the marriage and by suppressing the pre-existing disease, the respondent was given in marriage to him.

19. With this background, it has to be examined as to (i) whether the appellant has proved that the respondent is suffering from a dreaded disease which had resulted in non-consummation of the marriage (ii) whether the respondent suppressed the existence of any such disease prior to the

marriage and thereby committed a fraud on the appellant and (iii) whether the appellant had established that he was subjected to matrimonial cruelty by the respondent by refusing to confer the conjugal bliss to the appellant.

20. Before dealing with the rival contentions, it is necessary to point out that the appellant has come forward with the Original Petition complaining that the respondent refused him sexual bliss. It was also complained that by reason of such refusal on the part of the respondent, he was subjected to matrimonial cruelty and on that ground he seeks for a decree of divorce. The appellant went on to contend that the respondent is suffering from Rheumatoid Arthritis and therefore, she will not have the urge to engage in cohabitation as a normal woman. When such being the complaint, the burden is heavy on the shoulders of the appellant to prove his case. However, in order to prove the disease suffered by the respondent, the appellant did not examine any Doctor on his side. On the contrary, the respondent has examined a Doctor, as RW3 through whom a certificate was marked as Ex.R4 in which it was stated that the respondent will have no difficulty in leading a normal marital life.

21. As regards the allegation that the respondent has refused to cohabit with the appellant and the marriage has not been consummated, the respondent in her cross-examination has categorically deposed as follows:-

"எனக்கு எந்தவித உடல்பாதிப்பும் இல்லை. நன்றாக தான் இருக்கிறேன். உடல் ஆரோக்கியம் பாதித்த நிலையில் நான் தாம்பத்திய உறவு வைத்துக் கொள்ளாமல் தவிர்த்து வந்தேன் என்றால் சரியல்ல."

22. Thus, the respondent, without any inhibition has stated that there was no occasion for her to refuse sexual intercourse with the appellant and that she is hale and healthy. Further, on reading of the cross-examination of RW1 as a whole, it is seen that she has denied that she is suffering from any communicable disease which had resulted in her refusal to engage in sexual intercourse with the appellant. In the cross-examination, the respondent also made reference to the fact that when she was employed in a College at Komarapalayam during August to October 2016, it is the appellant who used to accompany her to the college in the morning and in the evening. The respondent also made reference to the fact that she accompanied the appellant to Munaar, a hill station for vacation thrice where they had good time, exchanged pleasantries and enjoyed the vacation, meaning thereby the marriage was consummated atleast when they had been to the hill station for vacation. Even the appellant admits that they had been to

Munaar once, but denied that they went to the said hill station thrice. Thus, it could be seen that both the appellant and the respondent went to a Hill station, where, according to the respondent, they spent a memorable time. When such being the case, it cannot be said that either the respondent refused to cohabit with the appellant or the marriage was not consummated.

23. The appellant relied on Ex.R4 series filed by the respondent herself to contend that the appellant had taken treatment as an Out patient in Government General Hospital, Chennai. These documents were marked to show that after the order passed by the Family Court directing the respondent to undergo medical test, the respondent went to Government General Hospital, Chennai and complied with the order passed by the Family Court. According to the appellant, the respondent has refused to admit herself as an in-patient in the said hospital as the disease suffered by her would be exposed. On the contrary, the respondent, as RW1 would depose that she went to Government General Hospital, Chennai where she was treated as an out-patient and was prescribed medicines and when she went for a review, the concerned Doctor was not available and therefore, she could not be subjected to any treatment and not otherwise. The respondent further deposed that she was never treated at Apollo Hospitals, Chennai and the documents filed by the appellant under Exs. P6 and P7 are forged. She would further depose that Ex.P4 series of Outpatient admission slip and other medical records were issued to her after she underwent a medical check up at Government General Hospital, Chennai as per the direction of the Family Court and it does not reflect the nature of ailment suffered by her or the treatment given to her. In such circumstances, the decisions relied on by the counsel for the appellant in Praveen Mehta vs. Inderjit Mehta reported in (2002) 5 SCC 706) and the decision in Samar Ghosh vs. Jaya Ghosh reported in 2007 (4) SCC 511 are factually distinguishable and they cannot be made applicable to the facts of the present case.

24. On perusal of the chief examination of the respondent as RW1, we could infer that the matrimonial rift was caused owing to the fact that the appellant and his parents have demanded a car as dowry to be purchased for the appellant at the time of marriage during June 2006, which demand they reiterated till January 2007. However, the parents of the respondent could not fulfil such promise due to want of funds and therefore, the respondent was not permitted to return back to the matrimonial home after the Pongal festival. Of course, this piece of deposition of the respondent has not been pleaded in the counter affidavit. At the same time, on behalf of the appellant, not a single question was posed to the respondent to the effect that the appellant and his parents have not demanded a car to be presented prior to the marriage and reiterated such demand after

the marriage and it assumes significance in this case.

25. The appellant has filed Exs. P4 to P7, Out patient admission slips issued by Rheumatology Care Centre attached to the Government General Hospital for treating Rheumatoid Arthritis. On perusal of Exs. P4 to P7, the Family Court rightly discarded them inasmuch as they did not reflect the exact nature of ailment suffered by the respondent or the treatment given to her. Such a conclusion arrived at by the Family Court, in our opinion, does not require any interference. There was no medical evidence made available to prove that the respondent is suffering from any chronic or communicable disease which rendered her incapable of cohabiting with the appellant in the normal matrimonial life. Moreover, RW1 has deposed that she had not taken treatment at Apollo Hospitals, Chennai and Exs. P6 and P7 are created by the appellant with the help of his cousin who is working as Doctor in Apollo Hospitals, Chennai. On this aspect, the appellant did not put any question to the respondent during her cross-examination.

26. The appellant would vehemently contend that the respondent is suffering from Rheumatoid Arthritis and therefore she is unfit to lead a normal life. However, this is not proved by the appellant in a manner required by law that the respondent is suffering from such disease. Notwithstanding the same, in order to understand the effect of the disease called Rheumatoid Arthritis, we have downloaded certain information from google, internet service provider, which reads as follows:-

Rheumatoid arthritis is the long-lasting, most common type of autoimmune disorder that causes chronic inflammation of the joints and other parts of the body and it had the effect of causing damages to skin, lungs, eyes, kidneys and blood vessels. A person who is inflicted with such a disease will suffer from the release of antibodies when a foreign material like bacteria and fungus enters the human body. This is the root cause of Rheumatoid Arthritis. The reason, why the immune system behaves like that is still unknown. This autoimmune disorder is observed more in women compared to men. Some evidence suggests that people who smoke have more chances of developing Rheumatoid Arthritis.

Diagnosis for Rheumatoid Arthritis

It is difficult to diagnose Rheumatoid Arthritis in the earlier stages because the symptoms might resemble the symptoms of other diseases. Blood tests, x rays, and imaging tests are used to diagnose this disorder. The symptoms can vary from mild to severe and occurs throughout the body, which includes Fever, Joint pains, Swollen joints, Less flexibility in the joints,

Morning stiffness or stiffness in joints. These symptoms usually begins from small joints and later spread to all joints. In the case of 15 to 20 percent of people, symptoms may be observed in body parts including the skin, lungs, kidneys, blood, liver etc.,

Rheumatoid Arthritis Treatment

There is no treatment in particular for Rheumatoid Arthritis. Treatment generally includes a combination of educating the patient, rest, exercise, medications and occasional surgeries. Such treatment will reduce the pain, swelling, help the patient to stay active and prevent joints from more damage. Rheumatoid Arthritis diet and exercise will go a long way in helps in coping the rheumatoid arthritis. Exercise can help reducing the pain, inflammation and stiffness of joints and provides more flexibility.

27. Thus, it could be seen that Rheumatoid Arthritis is only a disorder and it cannot be construed as a dreaded or communicable disease. A patient who suffered such a disease is only required to follow a strict diet pattern and to indulge in regular exercise to overcome the body pain suffered due to such disease. In the present case, at the first blush, there is no evidence to suggest that the respondent is suffering from Rheumatoid Arthritis. Even if she suffers from such a disease, it will not be a ground to dissolve the marriage solemnised between her and the appellant. It is not a communicable disease, as contemplated under Section 13 (v) of The Hindu Marriage Act. Even assuming that the respondent suffers from such a disease, the appellant ought to have treated her well and educated her to indulge in regular diet pattern and exercising which would have helped the respondent overcome the disorder she suffers. Love and compassion are the first best medicine required for any person who suffers from any disease and it will cure a major portion of the ailment. Medial treatment, administration of pills and drugs will come next in an attempt to cure the disease. In the present case, even assuming that the respondent suffers from any disease, we feel that the appellant ought to have taken care of the respondent and supported her in overcoming it instead of finding fault with her. After all, after marriage, a wife is part of the family of the husband and one among the family members and she deserves more care and support by the appellant as her husband. It is to be mentioned that even though science has advanced in leaps and bounds, nobody will predict as to what may befall him or her the next day or what disease one will suffer in future. In this case, merely because the respondent allegedly suffered some ailment either before or after marriage, she cannot be complained of for having contracted such disease when it cannot

be attributed against her.

28. To crown all the above, we are of the view that the appellant has come forward with the present Original Petition seeking to dissolve the marriage on the ground that the respondent is suffering from such disease, but he has miserably failed to prove the nature of disease allegedly suffered by the respondent. Above all, there is nothing to show that because of such a disease suffered by the respondent, she could not engage herself in normal sexual intercourse. In fact, the respondent, in para Nos.14 and 15 of the proof affidavit, in lieu of her chief examination, has stated that the intention of the appellant is to marry some other girl who would bring more money and jewels. At the same time, the respondent, more than twice, has asserted that she is only intending to live with the appellant and to continue the matrimonial life. The respondent has also further stated that since she intended to live with the appellant, she has not given any complaint to any police authority or filed a petition for restitution of conjugal rights. The Family Court, taking note of the deposition of PW1 and RW1 to 3 has rightly come to the conclusion that the basis on which the Original Petition was filed by the appellant has been found to be untenable and therefore, dismissed the Original Petition. We find no reason to interfere with such a finding of fact rendered by the Family Court.

29. The counsel for the appellant finally made a submission that the appellant and the respondent are living separately from 2007 and therefore, the long and separate living of the appellant and the respondent had rendered the matrimonial life meaningless and that the matrimonial life has been broken irretrievably beyond repair. We are not inclined to consider this contention of the counsel for the appellant for the reason that it is not the case of the appellant that the respondent deserted his matrimonial company without any just or sufficient cause. On the other hand, according to the respondent, the appellant and his family members have demanded a car to be presented to the appellant and owing to non-fulfilment of the same, the respondent was not taken back to the matrimonial home. At the same time, the appellant also did not take any steps to rejoin the respondent. Rather, in the Original Petition reference was made to a meeting arranged among the elders of the family members of both sides in which on behalf of the appellant it was only suggested that the matrimonial relationship can be dissolved by approaching the competent Court. To this the respondent asserted that she is only inclined to live with the appellant and if any steps are taken in that direction, she threatened the appellant and his family members with dire consequences. This piece of the averment made by the appellant in the Original Petition would fortify and strengthen the fact

that the respondent is always ready and willing to live with the appellant and her intention is not to reside separately. In such view of the matter, we reject the argument of the counsel for the appellant.

30. In the light of the above, we confirm the Judgment and Decree dated 11.12.2013 passed in F.C.O.P. No. 80 of 2008 on the file of Family Court, Salem. The Civil Miscellaneous Appeal is dismissed. No costs.

rsh

Sd/-

Assistant Registrar (CS VI)

//True Copy//

Sub Assistant Registrar

To
The Judge,
Family Court,
Salem

+2ccs to Mr.K.Moorthy, Advocate, SR.No. 2872

CMA No. 1151 of 2014

Kak (28/03/2019)



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