

IN THE HIGH COURT OF JUDICATURE AT MADRAS

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THE HONOURABLE MR. JUSTICE R.SUBBIAH
AND
THE HONOURABLE MR. JUSTICE C.SARAVANAN

C.M.A.No.3006 of 2017

B.Ramesh Appellant/Petitioner

vs.

Amudha Respondent/Respondent

PRAYER: Appeal filed under Section 19 of the Family Courts Act, against the judgment and decree in F.C.H.M.O.P.No.136 of 2016, dated 11.09.2017, on the file of the Family Court, Dharmapuri.

For Appellant : Mr. V.Raghavachari

For Respondent : Mr.M.Suresh

JUDGMENT

(Judgment of the Court was delivered by C.SARAVANAN, J.)

The present appeal is directed against the impugned fair and decretal order dated 11.09.2017 in F.C.H.M.O.P.No.80 of 2015/136 of 2016 passed by the Family Court, Dharmapuri.

2. By the impugned fair and decretal order, the petition filed by the appellant-husband for dissolution of marriage under Section 13(1)(ia) and 1(b) and Section 3(1)(ii) of the Hindu Marriage Act, 1995 has been dismissed.

3. Issue that arises for consideration is whether the Family Court erred in not considering the content of Ex.P.9 filed by the appellant and whether the appellant is entitled for a decree of divorce based on the pleading and evidence on record?

4. The marriage between the appellant and the respondent was solemnized as per the Hindu marriage rites on 11.11.2002.

The respondent is appellant's aunt's daughter and the marriage was an arranged marriage between them.

5. The marriage was consummated and they have two children born to them in the year 2003 and 2006. Initially the appellant and the respondent set up their matrimonial home in the appellant's father's houses.

6. In the petition before the Family Court , the appellant claims that sometime about 10 years before the institution of the proceedings before the Family Court, he came to know that the respondent had a pre-marital affair.

7. The appellant claims to have questioned about the same which the respondent denied. This news according to him troubled him and disturbed marital harmony between the appellant and the respondent. He has stated that for the sake of peace and dignity of the family he however continued to live with the respondent and swallowed his pride.

8. The above allegation appears to have triggered future course of events, thoughts, imagination and confabulation and has pushed the parties to the corridors of the police station and eventually to the Family Court to dissolve the marital relationship.

9. In the petition before the Family Court, the appellant has alleged incestuous physical relationship between the respondent and her brother Parthiban and that they were caught red-handed. Despite the same, it is alleged that the appellant swallowed his pride and kept quiet for the sake of the reputation of the family in the society. There are however no direct, indirect or oblique or circumstantial evidence to substantiate it.

10. It was alleged that the respondent was disrespectful to the appellant's parents and would often quarrel with him and refused to shoulder her responsibilities and his aged mother shouldered all the domestic chores and that the respondent did not do her part of the duty as a wife as was expected of her.

11. In the petition before the Family Court , the appellant has further alleged that the respondent had illicit relationship with one Silambarasan and had given away jewels and cash stored in the cash bureau which led to quarrel between them. In this connection peace was allegedly brokered vide Ex.P.4 dated 15.09.2012 by the elders and family members of the respondent.

12. In the petition before the Family Court , this document is linked to respondent's alleged illicit relationship with strangers and a peace brokered assuring good behavior from the respondent in future by the family members of the respondent.

13. In the petition before the Family Court, it is stated after signing of the document vide Ex.P4, dated 15.09.2012, the appellant and the respondent started living separately with their children as a nuclear family in Krishnagiri near Hatsun Milk Factory.

14. It is submitted that though peace was brokered by the elders of the family, the respondent developed intimacy later with yet another person by name Sakthivel when they started living separately from appellant's parents house near Hatsun Milk Factory near Krishnagiri. It was alleged that the respondent did not change her ways of being.

15. In the proceedings before the Family Court, the appellant himself deposed as P.W.1 and along with his minor daughter P.W.2 , who was aged about 15 years. The respondent deposed as R.W.1.

16. The respondent has denied all the allegations in the counter including that of the cruelty. On the other hand, the respondent submitted that marital disharmony was on account of the fact that the respondent's brother Parthiban's refusal to marry the appellant's sister and therefore, slighted with his refusal, started torturing and punishing the respondent and made unsavory allegations against her. It has been further submitted that the appellant was suspicious by nature.

17. In the proceeding before the Family Court, the appellant had filed 9 different documents, out of which, the last document vide Ex.P9 a CD containing recording of alleged conversation between the respondent and her male companion was marked as evidence to prove that the respondent was in relationship with a stranger and was therefore cruel to the Appellant despite the appellant compromising with the respondent's past shenanigans and marital misadventure.

18. Among the 9 documents marked on behalf of the appellant, only four documents were relied upon to establish cruelty two of which have been referred to above. They are Ex.P4 and Ex.P5, Ex.P6 and Ex.P.9. These were documents relied for establishing cruelty.

19. The respondent has stated that she is illiterate and does not know to read and write and the family members signed on

blank sheets, which was filled up and filed as Exhibit P.4.

20. We have considered the evidence on record and arguments advanced by the counsel for the respective parties.

21. The entire edifice of the case of the appellant before the Family Court was that the respondent not only had a pre-marital relationship but also with one Silambarasan and later with Sakthivel and few others, after the marriage. He also alleged that the respondent also had having incestuous relationship with her brother.

22. Though these allegations have been leveled against the respondent, none of the allegations have been proved. Therefore, cruelty based on the these allegations cannot be inferred by us.

23. Ex.P4 dated 15.09.2012, was allegedly signed by the respondent's father, brother and the respondent which states that the respondent was not behaving properly and that they assured good behavior from the respondent and took responsibility. The document does not exactly spell out what was nature of behavior.

24. Ex.P5 dated 09.07.2015, is a copy of the petition given to the Mathur Police Station by the appellant. In the said document, the appellant has submitted that during last week of April 2015, when the appellant and the respondent were living in Pochumpallli Village, Krishnagiri, he had left the respondent and the children with his in-laws and that when he went to pick them back, the respondent refused to return with him citing ill health and he therefore returned with the children alone and that despite the best of his efforts, the respondent refused to return with him. He therefore, requested the police to unite them.

25. However, in the petition, it is stated that the respondent was having illicit relationship with the Sakthivel. Ex.P.5 does not talk about the alleged illicit relationship between the respondent and the one Sakthivel named in the petition.

26. Ex.P6, C.S.R. dated 12.07.2015, acknowledges the receipt of a complaint from the appellant. However, in Ex.P6, CSR, the nature of complaint is titled as "LOVE AFFIAR". In the one line summary, it is stated that respondents therein viz., Sakthivel and Govindarajan have taken away the respondent.

27. The appellant has thus implied that the respondent was

living in adultery with Sakthivel to infer cruelty by the respondent for granting divorce.

28. The Family Court has refused to rely on Ex.P.9 on the ground that the same is contrary to Section 65 B read with Section 45 A of the Evidence Act.

29. The appellant himself gave statement as P.W.1 and the appellant's and the respondent's daughter was produced as P.W.2. Both have merely reiterated the allegations without any basis. None of their oral testimony establishes cruelty by the respondent.

30. In the oral evidence, the appellant has deposed that the respondent was cruel to him and was frequently seen her with male companions in public places to his embarrassment.

31. He had alleged that the respondent had illicit relationship earlier with Silambarasan and later with one Sakthivel when they stayed as a nuclear family with the children near Hatsun Milk Factory.

32. P.W.2, the daughter of the appellant and the respondent has deposed that she was not tutored by her father or elders and that she came to know that her mother the respondent herein was having illicit relationship with strangers particularly Sakthivel through an Aunt whose name she was not aware and that she had heard about the same when she gone to attend a programme.

33. The deposition of P.W.2, who was sought to be introduced as an independent witness, is based on hearsay information which she had learnt about respondent's alleged relationship with Sakthivel only from elders of the family. It is quite evident from the tenor of the deposition, the child has been tutored and has not deposed evidence as an independent witness. She also had not direct knowledge of the alleged extra-marital affairs of the respondent and her knowledge is based on the statements she heard from appellant's relatives.

34. The Family Court has dismissed the petition filed by the appellant on the ground that the appellant has not established cruelty.

35. The Family Court has held that out of desperation, the appellant has made unsavory allegations against the respondent of not only having incestuous physical relationship with her brother but also extra martial relationship with strangers with out evidence.

36. The learned counsel for the appellant submitted that the Family Court erred in ignoring Ex.P9 containing the alleged telephonic conversation recorded by the appellant using his friend's phone to capture the alleged conversation between the respondent and her male companions to prove extra marital relationship and thereby cruelty.

37.The learned counsel for the respondent, submitted that the impugned order of the Family Court was correct and cannot be interfered in the light of the following decisions of the Court:

(i)V.Bhagat Vs. D.Ghagat (Mrs) (1994)1SCC 337, wherein, the Hon'ble Supreme Court has held that merely because there are allegations and counter-allegations, a decree of divorce cannot follow. There must be really some extraordinary features to warrant grant of divorce on the basis of pleadings (and other admitted material) without a full trial.

(ii) Tamizh Selvi V. Arumugam (C.M.A.No.788 of 1983) of this Court, wherein it was held that in a Hindu society, if an allegation of unchastity is made against a woman falsely, it would certainly amount to cruelty on the part of the husband. But, the converse will not be correct. The Court can certainly take judicial notice of the fact that even though bigamy is made an offence under the Penal Code and bigamy is prevented by legislation from 1949 onwards, there are numerous instances where men are living with more than one woman in extra-marital relationship. If an allegation is made against a man that he is living with an other woman in illicit intimacy, that will not by itself amount to cruelty.

(iii) Anvar P.V. Vs. P.K.Basheer and others (2014)10SCC473. wherein it was held as follows:

14.Any documentary evidence by way of an electronic record under the Evidence Act, in view of Sections 59 and 65A, can be proved only in accordance with the procedure prescribed under Section 65B. Section 65B deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the Evidence Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer shall be deemed to be a document only if the

conditions mentioned under sub- Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under Section 65B(2). Following are the specified conditions under Section 65B(2) of the Evidence Act:

(i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;

(ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;

(iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and

(iv) The information contained in the record should be a reproduction or derivation from the information fed into the computer in the ordinary course of the said activity.

15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

a. There must be a certificate which identifies the electronic record containing the statement;

b. The certificate must describe the manner in which the electronic record was produced;

c. The certificate must furnish the particulars of the device involved in the production of that record;

d. The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and

e. The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.

16.

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18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India.

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22. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under Section 65-B are satisfied."

38. Neither the exhibits nor the oral evidence produced by the appellant prove cruelty nor extra marital relations of the respondent.

39. On the other hand, it appears the appellant was suspicious of the respondent after he allegedly came to know that the respondent had pre-marital relationship. The respondent has not only denied having pre-marital relationship but also of the alleged extra marital affairs.

40. The appellant has either imagined pre-marital relationship of the respondent or was unhappy with the respondent's brother refusal to marry his sister and therefore, to hurt her, has leveled irresponsible allegations questioning her chastity and has sullied her character by making it impossible for the respondent to live with him.

41. Neither the oral evidence nor the Exhibit filed in support of the petitioner establishes the cruelty or lend credence to the allegations of pre-marital affairs and alleged extra-martial affairs of the respondent.

42. They appear to be concocted and confabulated to frustrate the relationship and to irretrievably break the marital chord between them. Needless to state, the appellant behaved in an uncivilized manner by making reckless allegation against the respondent without realizing the drastic consequence on the minds of his young children by denying them the security of their mother.

43. Ex.P9, which is a recording of C.D. of alleged telephonic conversation between the respondent and the strangers to establish the alleged extra marital affair was not admitted in evidence as the appellant has not complied with the

requirement of Section 65B of Indian Evidence Act.

44. The appellant has also not produced his friend from whose mobile phone alleged conversation was recorded nor has produced the said mobile phone as a material object and subjected the same to forensic examination. Without taking any of these steps, the evidence contained therein are inadmissible even otherwise apart from violation of the requirement of Section 65B of the Indian Evidence Act.

45. In our view, the Family Court has rightly refused to take cognizance of the content of Ex.P9 on the ground that the same cannot be admitted contrary to Section 65 B of the Evidence Act.

46. The learned counsel for the appellant submitted that there has been irretrievable break down of marriage and there is no way the appellant and the respondent will live together, even if the present appeal is dismissed and therefore, requested for dissolution of marriage on the ground of irretrievable break down of marriage.

47. Though, we agree that the marriage has suffered on account of the conduct of the appellant and possibly there is an irretrievable breakdown of marriage, we cannot grant divorce.

48. In Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC 379 : (2009) 2 SCC (Civ) 897, the Hon'ble Supreme Court held that "irretrievable breakdown of the marriage is not a ground in the specified in the Act and the Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature."

49. The Court further held that "If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for Parliament to enact or amend the law and not for the courts."

50. Hence, we are not inclined to entertain the request of the learned counsel for the appellant to grant a decree of divorce in this appeal.

51. In this case, even if the respondent had prayed for divorce on account of the conduct of the appellant we would have been helpless to dissolve the marriage on the ground of irretrievable breakdown of the marriage.

52. We are of the view that Family Court's order is well reasoned and does not warrant interference by us in this appeal. We are not convinced that the appellant had made out any case for granting divorce based on the evidence on record.

53. Accordingly, this appeal is dismissed. The fair and decretal of the Family Court in F.C.H.M.O.P.No.136 of 2016, dated 11.09.2017, is therefore confirmed. No costs.

Sd/-
Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

Arul

To
The Family Court, Dharmapuri.

+1cc to Mr.V.Raghavachari, Advocate SR.No.2622

C.M.A.No.3006 of 2017

SAI(CO)
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