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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 14.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

CMSA.No.14 of 2018

K.Subba Rao @ Kumar

...Appellant/Respondent/Petitioner

Vs.

S.Sudha

...Respondent/Appellant/Respondent

Civil Miscellaneous Second Appeal filed under section 28 of Hindu Marriage Act r/w section 100 of CPC against the judgment and decree dated 03.08.2012 passed in CMA.No.15/2008 on the file of the District Court, Tiruvarur, reversing the decreetal order dated 8.4.2004 in HMOP.No.34/2002 before the Sub-Court, Tiruvarur.

For Appellant : M/s.K.T.S.Sivakumar

For Respondent : Mrs.R.Ajitha

J U D G M E N T

The Civil Miscellaneous Second Appeal has been directed against the judgment and decree dated 03.08.2012 passed in CMA.No.15/2008 by the learned District and Sessions Judge, Tiruvarur, reversing the judgment and decree dated 8.4.2004 in HMOP.No.34/2002 passed by the learned Subordinate Judge, Tiruvarur, granting divorce in favour of the appellant-husband.

2. The following Substantial Questions of law have been raised in the affidavit filed in support of the appeal:

i. Whether the lower appellate court was right in reversing the well considered judgment of the trial court, when there was no oral or documentary evidence to counter the petition averments that the wife-respondent herein, who is sexually impotent from the date of marriage and not having the virginal part which indicate that she was invalid for marriage ; and



ii. Whether the lower appellate court was right in failing to see that the appellant had satisfied the conditions set out in Section 12 of the Hindu Marriage Act to get a divorce?

3. Learned Counsel for the appellant argued that the marriage between the parties was solemnized on 14.12.2001 at Cuddalore as per the rites and rituals of Madhwa Community and as the respondent was not related to the appellant before the marriage, the appellant husband had his name registered in Raghavendra Mutt at T.Nagar, Chennai, as a prospective eligible bachelor of Madhwa Community. The father of the respondent after coming to know about the appellant's entry in the register maintained by the Raghavendra Mutt, contacted the mother of the appellant and this is how the marriage alliance was fixed. On the date of marriage on 14.02.2001 during first night, the appellant husband was shocked to see that the respondent wife was not a fully developed woman, she had no breast, she could not respond to the sexual appeals made by the husband, she was frigid and she had no desire for sexual intercourse. She was not even able to embrace the husband and when the appellant husband tried to penetrate his male organ into the female organ of the respondent, she was not able to have sexual intercourse as a result, the appellant husband got frustrated and after reconciling himself for the non-co-operation of the respondent in having cohabitation on the ground that the respondent would take some more time to accommodate herself to the matrimonial life waited for days. But even after several days, he realised that the respondent-wife was not fit for marriage life because it has been proved that she was sexually impotent and she was also sterile and was not showing any interest to have cohabitation. Therefore after coming to know that the respondent will not be in a position to procreate any child and the marriage was also not consummated at all, the appellant husband could not continue his state of affairs.

4. Learned Counsel for the appellant further argued that the appellant-husband contacted his father-in-law through his mother and the respondent's father came to the appellant's house at Needamangalam in the month of December, 2001. In the said meeting, the appellant husband and his mother frankly told the respondent's father and other relatives who came with him that the respondent is not a fully developed woman and she has not attained puberty. Therefore, there is no possibility of attaining puberty and as she is unfit for marriage, they had also no explanation to offer. On the other hand, the respondent's father also had admitted about his daughter's inability to lead a married life and took her to Cuddalore on 14.12.2001. Thereafter, anticipating that the appellant husband would take legal action for dissolving the marriage, the respondent wife has addressed a letter dated 6.4.2002 to the



appellant husband. In the said letter, the respondent has given a twisted version of what actually happened on 14.02.2001 and she has made false allegations against the appellant and his mother as if they demanded dowry and she has also indicated the establishment of separate family. She has further stated that she had undergone a medical check up and proved her sexual potency. But she has not produced any certificate either to the appellant husband or before the trial court, when HMOP.No.34/2002 was filed before the learned Subordinate Judge, Tiruvarur on 05.06.2002.

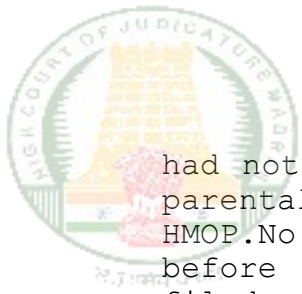
5. Learned Counsel for the appellant also argued that when the appellant husband has raised serious allegation that the respondent wife was unfit for marriage and concealing that fact they had arranged the marriage of the respondent with the appellant and after seeing the reality in the first night and on subsequent days that the respondent has not even attained puberty and she is not ready and fit for marital life and incapable of procreating any child and it is an admitted fact that she has not come forward to file an application under Section 9 of the Hindu Marriage Act, seeking restitution of conjugal rights, the prayer for dissolution of the marriage to be granted, the reason being that once she filed an application under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights, she has to disprove the allegation made against her by the appellant that she was unfit for marriage and she has not even attained puberty. In order to avoid such difficult situation she has deliberately chosen not to file any such application that itself goes to show that the respondent has accepted the allegation made against her that she was unfit for marriage because she has not attained puberty and she is not able to procreate any child as she is sexually impotent. This aspect was rightly considered by the trial Court. Though a detailed counter affidavit has been filed before the trial court by the respondent wife denying all the allegations, nowhere she has produced any certificate of any Government Hospital or any Private Doctor to show that the allegation made against her by her husband that she is sexually impotent was incorrect. Even today, when this Court has directed the learned District Court, Tiruvarur to arrange potential test for both the parties, the learned Principal District and Sessions Judge, Tiruvarur wrote a letter to the Dean, Government Medical College Hospital, Tiruvarur, to conduct a medical examination showing that the husband was fit for marital life. When the Government Medical College Hospital, Tiruvarur has certified that there is nothing to suggest from the above test that the individual is not capable of performing sexual act at the age of 60 years, there is no evidence produced by the respondent that she was fit for marital life at the relevant point of time. But without considering all these things, the learned Appellate Court



interfering with the well reasoned finding of the trial court came to the conclusion not to grant divorce which is unacceptable and unjustifiable. Therefore, it was pleaded that the judgment and decree interfering with the dissolution of the marriage between the appellant and the respondent is legally unacceptable. There is no legal evidence produced on the side of the respondent-wife to show that she was at any point of time fit for marital life, fit for procreation of children and fit for cohabitation.

6. Learned Counsel appearing for the respondent in reply argued that when the appellant husband filed Divorce Petition in HMOP.No.34/2002 before the Sub-Court, Tiruvarur, under Section 12(1)(a) of the Hindu Marriage Act for dissolution of the marriage, a detailed counter affidavit has been filed by the respondent wife denying all the allegations put against her. When she has filed a detailed counter affidavit before the trial court, agreeing to undergo medical test, the appellant only refused to undergo medical check up. Only due to inferiority complex, the appellant did not agree for medical examination. Secondly, the respondent wife tried her level best on the first night and all the subsequent occasions to have cohabitation, but it was found that the appellant husband being impotent did not have requisite erection of male organ to have cohabitation, therefore, the duty is cast upon the appellant-husband to undergo the medical examination and the onus and burden of proof are not on the respondent-wife. However, she is ready to undergo any medical examination. Adding further, it is argued that when the appellant husband was not able to show through medical examination that he was fit for marital life, he cannot put the blame on the respondent wife. On this basis, the first appellate court has rightly reversed the judgment and decree of the trial court which does not warrant any interference by this Court. Therefore, the present Civil Miscellaneous Second Appeal is liable to be dismissed, he pleaded.

7. But this Court is unable to find any merit on the submissions made by the learned Counsel for the respondent-wife. The reason being that firstly, when the marriage between the parties was solemnized on 14.02.2001, the appellant had serious complaint against the respondent for the reason that she was not able to have cohabitation on the first night itself, it was found that she was not showing any interest in the sexual life, that was informed to her father who also came to meet the appellant as well as his mother. In the said meeting, it appears that he has also admitted his daughter's inability to lead a marital life. Consequently he has taken her back to Cuddalore on 14.12.2001. So when the marriage took place on 14.02.2001 in December, 2001, after several rounds of compromise for reunion, the appellant did not agree for reunion because she



had not attained puberty. Therefore, she was taken back to her parental home. From 14.12.2001, till the filing of the HMOP.No.34/2002 by the appellant seeking dissolution of marriage before the Sub-Court, Tiruvarur, the respondent wife has not filed any application under Section 9 of the Hindu Marriage Act, seeking restitution of conjugal rights, hence, the trial court has rightly found that when serious allegation was made by the husband against his wife that she was sexually impotent, naturally, if an application is filed under Section 9 of the Hindu Marriage Act by the respondent wife, the same will be taken up for adjudication by the trial court and the trial court would not leave the wife scot free without undergoing potency test. It appears that to avoid that risk, the respondent wife has not moved any such application. Hence, the trial court has rightly held that when there is a serious allegation against the respondent that she was sexually impotent, considering the fact that she has not even produced any medical certificate, it is the bounden duty of her to produce the medical certificate showing her sexual potency which she has failed to do and even at the time of filing the appeal by her, she should have filed the medical certificate stating that she is potent, if she is really sexually potent. But, no such medical report has been filed by the respondent, therefore, when the appellant husband has filed HMOP.No.34/2002 before the learned Subordinate Judge, Tiruvarur on 05.06.2002 till the decree for dissolution of the marriage on 08.04.2004 she did not undergo any test or produce any medical certificate proving that she was sexually potent and capable of procreating any child.

8. Since the appellant/husband has filed a petition under Section 12(1)(a) of the Hindu Marriage Act, 1955, for annulling of marriage by a decree of nullity on the ground that the marriage has not been consummated owing to the impotence of the respondent-wife, it is relevant to extract below Section 12(1) (2) of the Act:

'12.Voidable marriages - (1) Any marriage solemnized, whether before or after the commencement of this Act, shall be voidable and may be annulled by a decree of nullity on any of the following grounds, namely:-

[(a)that the marriage has not been consummated owing to the impotence of the respondent; or]

(b)that the marriage is in contravention of the condition specified in clause (ii) of section 5; or

(c)that the consent of the petitioner, or where the consent of the guardian in marriage of the petitioner [was required under Section 5, as it stood immediately before the commencement of the Child



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Marriage Restraint (Amendment) Act, 1978], the consent of such guardian was obtained by force [or by fraud as to the nature of the ceremony or as to any material fact or circumstance concerning the respondent]; or

(d) that the respondent was at the time of the marriage pregnant by some person other than the petitioner.

(2) Notwithstanding anything contained in subsection (1), no petition for annulling a marriage -

(a) on the ground specified in clause (c) of subsection (1), shall be entertained if -

(i) the petition is presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) the petitioner has, with his or her full consent, lived with the other party to the marriage as husband or wife after the force had ceased to operate or, as the case may be, the fraud had been discovered;

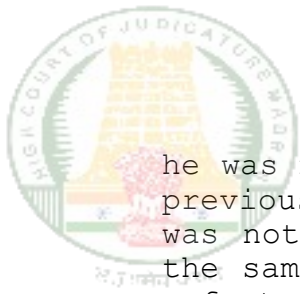
(b) on the ground specified in clause (d) of subsection (1), shall be entertained unless the Court is satisfied-

(i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

(ii) that proceedings have been instituted in the case of a marriage solemnized before the commencement of this Act within one year of such commencement and in the case of marriages solemnized after such commencement within one year from the date of the marriage; and

(iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of [the said ground].

A careful reading of Section 12(1)(a) vividly says that any marriage shall be voidable and may be annulled by a decree of nullity on the ground that the marriage has not been consummated owing to the impotence of the respondent. The core issue and grievance of the appellant husband is that after the marriage was solemnized on 14.02.2001 in accordance with Madhwa Community Rituals and Rites at Cuddalore, it is averred in the petition filed in HMOP.No.34/2002 before the learned Subordinate Judge, Tiruvarur that when the husband and wife were left alone in the bedroom attached to Murugalaya Thirumana Mandabam, the appellant-husband was shocked to know that the respondent-wife was not a fully developed woman, because she had no breast. Moreover, she was unable to respond to the sexual appeals of the husband, as a result, cohabitation could not take place. Again, on the next day, when he tried for cohabitation, to his dismay,



he was made to face the same disappointing experience as that of previous night. Thereafter, realizing that the respondent wife was not fit for marital life because she was sexually impotent, the same was brought to the notice of her family members. But, unfortunately, they had also no explanation thereon. Subsequently, she was taken to her parental home and thereafter, the appellant husband filed a petition on 05.06.2002 under Section 12(1)(a) of the Act taking a stand that they were living separately for more than one year due to which there was no cohabitation between them during the said period. Even Section 13(1-A)(i) also states that either party to the marriage may present a petition for dissolution of the marriage by a decree of divorce on the ground that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties. From the above provisions, the makers of law were very clear that if either of a party to the marriage is deprived of cohabitation for a period of one year or more, the decree for divorce can be granted.

9. In the present case, although there is no order passed for judicial separation, admittedly, when the marriage was solemnized on 14.02.2001, she was taken back to her parental home on 17.02.2001 and thereafter for about 19 years, they have neither resided together or met face to face. A Full Bench of the Apex Court in the case of Naveen Kohli vs. Neelu Kohli [(2006) 4 SCC 558] has ruled that where there has been a long period of continuous separation, the marriage becomes a fiction and such useless marriage can be dissolved. Therefore, any refusal to sever the empty marriage tie the law in such cases do not serve the sanctity of marriage and on the contrary, it shows scant regard for the feelings and emotions of the parties. But the learned I Appellate Court, without taking note of any of the aforesaid vital facts, has simply reversed the judgment and decree passed by the learned trial court.

10. Secondly, when this Court by order dated 28.08.2020 issued a direction to the Principal District and Sessions Judge, Tiruvarur, to arrange for a Potency Test to both the parties in Tiruvarur Medical College and Hospital, on receipt of the order of this Court, the learned Principal District and Sessions Judge, Tiruvarur directed the Dean, Government Medical College and Hospital, Tiruvarur, to allow both the appellant and respondent to undergo the potency test. Accordingly, Test reports have been obtained. The relevant portion in respect of the appellant in the report is extracted here under:



'CERTIFICATE OF POTENCY

Certified that I examined K.SUBBARAO @ KUMAR, S/o.N.S.Krishnamoorthy, male bearing the identification marks of

1. An elevated mole over top of left shoulder.
2. A black mole over back of left shoulder.
3. A black mole over front of right side of the abdomen.

That from all the above mentioned signs it can be concluded that there is 'nothing to suggest that the individual is not capable of performing sexual act'. However opinion about erection of penis and able to procreate children need urologist opinion. And regarding fertility, need semen analysis report and opinion from pathologist.'

11. Now coming to the respondent wife, Dr.K.Kousilia, M.B.B.S., D.G.O., Assistant Surgeon, Government Tiruvarur Medical College, Tiruvarur, after examination of the respondent wife has given her opinion as follows:

'As Mrs.Sudha, 54 years, W/o.Subbarao @ Kumar attained menopause before 4 years, as of now, she has crossed her reproductive age and she will be unable to become pregnant and deliver children currently.

Hence, when Dr.R.Sivakumar, MD (FM)., Assistant Professor, Department of Forensic Medicine, Government Thiruvavur Medical College and Hospital, Tiruvarur, has given a sexual potency certificate in favour of the husband, it goes without saying that in the absence of any specific medical report from the respondent that she is capable enough to procure children, she is proved to be sexually impotent and unfit for marital life because she will not be in a position to procreate children. Thirdly, when the wife was put to face humiliation, without waiting further, she should have undergone potency test to prove that she was potent enough to lead matrimonial life and she is capable of procreating child/children at the relevant point of time. When the respondent wife has failed to discharge the basic duty to save herself from humiliation, in my considered opinion, the trial court is right in granting divorce which does not require any interference by this Court. Therefore, the judgment and decree of the trial court is in order. Accordingly, while answering the substantial question of law in favour of the appellant, this Court is of the view that the judgment of the first appellant court suffers from infirmities and therefore, the same is liable to be set aside.



12. In the result, the Civil Miscellaneous Second Appeal is allowed thereby setting aside the judgment and decree of the lower appellate Court, namely, District and Sessions Judge, Tiruvarur, in CMA.No.15/2008 dated 03.08.2012 thereby restoring the judgment and decree of the trial court, namely, learned Subordinate Judge, Tiruvalur in HMOP.No.34/2002 dated 8.4.2004 granting decree of divorce. No costs.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

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To

1.The District and Sessions Judge,
Tiruvarur.

2.The Subordinate Judge,
Tiruvarur.

3.The Section Officer,
V.R.Section, High Court.

+1cc to M/s.K.T.S.Sivakumar, Advocate Sr No.40823

CMSA.No.14 of 2018

CNR (CO)
PR (07/09/2021)