

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	07.09.2020
Pronounced On	18.11.2020

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
AND
THE HON'BLE MR.JUSTICE C.SARAVANAN

C.M.A.No.163 of 2017

(Through Video Conferencing)

Bijay ... Appellant/Petitioner

Vs.

Ritu ... Respondent/Respondent

Civil Miscellaneous Appeals filed under Section 19 of the Family Court Act, 1984, to set aside the Fair and Decretal Order passed by the learned Principal Judge, Family Court, Chennai dated 12.09.2016 in O.P.No.2426 of 2011 and to allow the Civil Miscellaneous Appeal.

For Appellant : Mrs.Geeta Ramaseshan

For Respondent : Mrs.G.Saseedevi

J U D G M E N T

C.SARAVANAN, J.

The appellant (husband) has filed this Civil Miscellaneous Appeal to set aside the impugned Judgment and Decree dated 12.09.2016 passed by the learned Principal Judge, Family Court, Chennai in O.P.No.2426 of 2011.

2. By the impugned Judgment and Decree, the Family Court has dismissed the said petition filed under Section 10(1)(x) and (vii) of Indian Divorce Act, 1869, by the appellant to dissolve the marriage solemnized between the appellant and the respondent (wife). The marriage between the appellant and the respondent was solemnized at the Good Shepherd's CSI Church, Chennai on 07.01.2009. O.P.No.2426 of 2011 was filed on 14.07.2011.

3. O.P.No.2426 of 2011 was filed by the appellant to dissolve the marriage under Section 10(1)(x) and (vii) of Indian Divorce Act, 1869 on the grounds of cruelty and wilful

refusal by the respondent to consummate the marriage.

4. The brief facts of the case of the appellant before the Family Court in the said petition are as follows:-

- I. The marriage between the appellant and the respondent was solemnized on 07.01.2009 at the Good Shepherd's CSI Church, Mylapore, Chennai. It was an arranged marriage between them.
- II. At the time of the marriage the appellant was aged about 33 years and the respondent was aged about 27 years. It seems to indicate the marriage was slightly late for the both the appellant and the respondent.
- III. At the time of the Marriage the appellant was working as the 2nd Secretary at the Indian embassy at Cairo since August 2008. He had cleared the Civil Service Exam and was thus working under the Indian Foreign Services in Cairo, Egypt.
- IV. The respondent is also a well qualified. She had completed engineering with a Post Graduation in Business Administration. She was however not employed.
- V. The appellant's father was a retired lecturer in Mathematics from the Nesamony Memorial Christian College, Marthandam while his mother was a retired English Professor from the same college.
- VI. Respondent's father was a senior officer of the Customs Department, serving as the Additional Director General of Customs.
- VII. After the marriage, the nuptials were held in the respondent's parents' house.
- VIII. The appellant alleged that the respondent came to the room after a very long time and showed no interest on the appellant. When the respondent saw the appellant waiting for her, she asked him as to why he was still awake and promptly went off to sleep.
- IX. After the wedding, the appellant and the respondent left from Karungal, i.e. Appellant's home town where the reception was held for his relatives, friends and colleagues of his parents at Nagercoil.
- X. According to the appellant during their stay at Karungal, the respondent took every opportunity to avoid being with the appellant alone.
- XI. The appellant alleged that the respondent had complete disinclination and aversion towards any kind of sexual intimacy with him. Though they had been married for two and half years, as the respondent refused to consummate the marriage.

- XII.The appellant therefore stated that the respondent's disinclination to have any kind of sexual relationship with the appellant resulted in cruelty.
- XIII.In addition, the respondent also began to behave very strangely towards him. She refused to sit near the appellant for breakfast and she did not care for the appellant.
- XIV.At the time of marriage, the appellant was working in Cairo, Egypt and he had planned to leave India from New Delhi and therefore to get diplomatic passport and the Egyptian visa for the respondent, both had to travel to Delhi.
- XV.The respondent and her father however insisted that they should travel only from Chennai as her father wanted to escort her upto the plane. They left from Chennai for Delhi on 18.01.2009.
- XVI.The appellant further alleged that the respondent would put the pillows between them as a barrier and whenever the appellant tried to remove the pillows the respondent would turn away, be cold and get very angry at the appellant. The appellant was shocked at behaviour of the respondent.
- XVII.The appellant found that the respondent was unwilling to consummate the marriage and all efforts taken by the appellant were in vain.
- XVIII.The respondent refused to permit the appellant even to touch her and was unwilling to consummate the marriage. Later the appellant came to know that the respondent remained extremely indifferent to the appellant and to the institution of marriage.
- XIX.The respondent ridiculed the appellant's food habits of the appellant and forced the appellant to eat only vegetarian food and oats as breakfast continuously for more than six months.
- XX.The respondent criticised the appellant's professional work and showed extreme conservatism with her religious approach and outlook.
- XXI.The appellant further stated that he took the respondent out for several holiday trips while in Cairo. However, she made the trip miserable by leaving him alone and forced him to be with his friends for the evening.
- XXII.The respondent told the appellant that she did not like him and his family.
- XXIII.The respondent told the appellant that if attempted to get intimate with her physically, she would commit suicide.

- XXIV. The appellant also informed the respondent's father about the behaviour of the respondent and the non consummation of the marriage but did nothing to help them out.
- XXV. It was further alleged that the conversation between the appellant and the respondent were limited and reached a stage when she refused to communicate him.
- XXVI. Though they were living under the same roof, they lived as total strangers to each other. The respondent used lock the door after the appellant had left for work.
- XXVII. In August 2010, they came to India and stayed for about 20 days. The conduct of the respondent to wilfully not consummate the marriage, her refusal to permit the petitioner to even touch her amounted to cruelty.
- XXVIII. The respondent does not talk to the appellant and their marriage has broken down totally due to the respondent's cruel conduct.

5. The respondent in her counter statement denied the allegation while admitting non-consummation of the marriage. She has blamed the appellant for non-consummation of the marriage. The respondent alleged that when they were living together in their matrimonial home at Cario in Egypt, the appellant showed no inclination in having to have any physical intimacy with her.

6. The respondent further stated that even on the first day of marriage, the appellant told the respondent that he was very tired and wanted to be left alone. The respondent thought that since the appellant was a Diplomat and working as a Second Secretary at the Embassy of India, Cario, he must have been tired and therefore, should not be disturbed. At no point of time, the respondent had shown any disinterest on the appellant.

7. The respondent denied the allegation that the respondent took every opportunity to avoid being with the appellant alone. The respondent submits that during one weeks stay at Karungal, the appellant was busy and had engagements and came to the room very late in the night and would immediately go to sleep expressing tiredness and back pain.

8. The respondent denied the allegation that she behaved strangely towards the appellant. The respondent denied that she deliberately insulted or humiliated the appellant.

9. The respondent denied the allegation that she never had any disinclination to have any kind of sexual relationship with the appellant and that it had resulted in a lot of

cruelty. On the other hand, the respondent submitted that it is only the appellant who had disinclination towards the respondent and refused to have sexual relationship with her which had resulted in cruelty to her.

10. It is further submitted that the allegation that the respondent's father wanted to escort the respondent upto plane was only an imagination of the appellant and same was not true.

11. The respondent proposed to the appellant that they could celebrate honeymoon by staying in the hotel at Delhi. However, they ended up staying in the appellant's relatives' house where there was no privacy for them. The respondent denied that she is unwilling to consummate the marriage and all efforts taken by her were met with rejection and rebuff.

12. The respondent submitted that it was not correct to state that during a trip to Saint Cathrine's monastery, Dahab Beach Resort, she did not communicate with the appellant.

13. The respondent further stated that the appellant had streak of arrogances as a diplomat and was acting on the advice of his mother and never touched the respondent. She submitted that he did not show any affection towards her, in spite of his duty to his wife to have conjugal relationship.

14. The respondent denied the allegation that she never cared for the appellant's need or insulted him. She was ready and willing to consummate the marriage.

15. The respondent denied the allegations that she took every opportunity to avoid being with the appellant alone. She denied that her initial shyness has been misinterpreted by the appellant.

16. The respondent denied the allegation that she began to behave very strangely towards him. It is not correct to state that she refused to sit near the appellant for breakfast in spite of her mother having told her to do so.

17. The respondent denied that she was unwilling to consummate the marriage and all efforts taken by him in this regard, met with rejection and rebuff. The respondent denied that she would put the pillows between us as barrier or she turned away cold and/or get very angry at the appellant when the appellant tried to remove the pillows.

18. The respondent submitted that she denied that the appellant tried his best to talk with her to understand her alleged reluctance for a physical relationship and that she simply avoided taking to him in this regard and would go away to another room.

19. The respondent stated that it was the appellant who was spending lot of time with this friends taking drinks, and came to the room only after 1.00 A.M., she therefore denied the allegation that she would not permit the appellant to have any kind of physical intimacy with her or had subjected the appellant to any cruelty.

20. The respondent further informed taking drug was wrong and it will not only affect the person taking the drug but the entire family and also the society.

21. The respondent further stated that she prepared both non vegetarian and vegetarian in the house and that the respondent was well-versed in cooking all kinds of dishes including chicken, mutton, fish, prawn, etc. and never forced vegetarian food on the appellant.

22. The respondent denied the allegation that she had no intention of talking to her mother in law. The respondent further stated that every alternate days phone call used to come from her mother in law through the land line and it is the respondent who used to pick up the calls and greet her and then hand over the phone to the appellant.

23. The respondent denied the allegation the respondent treated the appellant with cruelty. She denied that she was either indifferent and/or rude towards his work and embarrassed the appellant.

24. The respondent denied that the respondent never cared for the appellant's needs and/or never cared or had insulted the appellant.

25. The respondent denied the allegation that the respondent did not care for professional life and denied the appellant conjugal relationship is wrong and had the appellant shown interest in conjugal relationship, the respondent would never had objected to the same.

26. The respondent vehemently denied the allegation that if the appellant had talked about their family life to either of the parents. The respondent would commit suicide.

27. The respondent denied the allegation that the appellant stated that the respondent refused to cohabit with the appellant and stated that their marriage had not been consummated till date due to the conduct of the appellant.

28. The respondent never locked herself in separate rooms and had come out only to lock the door after the appellant left for work.

29. The Family Court framed the following points for consideration.

- consummate marriage?
- 2) Whether the respondent committed an act of cruelty?
- 3) Whether the petitioner is entitled for divorce?

30. Before the Family Court following documents were marked as exhibit.

By the Appellant	By the Respondent	By the Court
Ex.P1 Wedding Invitation	Ex.R1 Joint Photograph	Ex.C1 Medical Examination of the Appellant given by Apollo Hospital.
Ex.P2 Wedding Photograph	Ex.R2 Joint Photograph	Ex.C2 Medical Examination of the Appellant Respondent given by Apollo Hospitals.
Ex.P3 Wedding Certificate - True copy.	Ex.R3 Joint Photograph.	
Ex.P4 E-mail sent by the petitioner to the respondent's father.	Ex.R4 Copy of the Passport of the respondent.	
Ex.P5 E-mail sent by the respondent's father to the petitioner.	Ex.R5 Series Photograph along with CD.	
Ex.P6 Series of letters of Appreciation from persons rescued in Libya.		
Ex.P7 Series of Appreciation from persons rescued in Egypt.		

31. Before the Family Court appellant and the respondent deposed evidence as PW1 and RW1 respectively. They have not examined any other independent witnesses.

32. The Family Court has dismissed the petition filed for divorce by the appellant on the ground that the appellant has not proved that the non-consummation of the marriage was because of the respondent or that the respondent committed an act of cruelty against the appellant. Operative portion of the Impugned Judgment and Decree are reproduced below:

17. Now, the petitioner has admitted that he used to teach English to the said Ramesh preparing to write Civil Service Examination. The behaviour of the petitioner in teaching in the midnight only strengthens the contention of the respondent that the petitioner used this as an excuse to avoid the respondent. Further, it is seen from the evidence on record that the petitioner and respondent had gone for a three days tour to Egypt. There the petitioner till midnight stayed in his friend Punith Sharma's room leaving the respondent alone in their room. The petitioner has also admitted in his cross examination that during the three days of the tour, one day he stayed with his friend, and another day he stayed with the respondent. Such unusual conduct of the petitioner again strengthens the case of the respondent that the petitioner avoided the respondent. It is the statement of the petitioner that the respondent never allowed him to touch her but during the cross-examination he admits that during the Egypt tour the respondent travelled in the bus with him all along put her head on his shoulder and this would show that the respondent did not have any reluctance for physical closeness, rather it reveals that the petitioner does not come out with true and correct statements.

18. In this case both parties subjected themselves for psychiatry examination and the report is marked as Ex.C1 and Ex.C2. The Medical Officer is not examined. In both reports in conclusion it is held that there is no evidence of mental illness or gross personality disorder. Therefore this report has not rendered any assistance to decide the case. Even though both are accusing each other for non consummation of marriage the evidence on record reveals that it is the petitioner who has avoided the respondent in fulfilling conjugal obligation also not understandable why he had waited long time and had not taken any steps for

early solution, even though he has stated that he informed the father of the respondent and has marked Ex.P4 in support of his version. In any case Ex.P4 cannot be relied upon since it has not fulfilled the condition laid down under section 65 B of the Indian Evidence Act. Further, while both are residing under the one roof in Egypt. The petitioner has filed this petition and the behaviour of the petitioner therefore appears strange.

19.Further, it appears that the respondent participated with the petitioner in social functions and parties arranged officially by the petitioner and also went on a tour with the petitioner to visit Egypt. She has deposed that she prepared both vegetarian and non-vegetarian food and was well-versed in cooking all kinds of dishes including chicken, mutton, fish, prawns etc., and that since the petitioner had like south Indian dishes and for preparing the same she had taken a grinder from India to make idly, dosai and vada. The respondent has deposed that she was open to her husband- petitioner in discussing daily issues and making comments and that it was the petitioner who did not accept her openness and boldness in expressing her mind and wanted to get rid of the respondent at some cost. Therefore in the light of the evidence on record it is very hard to conclude that the respondent avoided the petitioner and wilfully refused to fulfil conjugal obligations. On the other hand it appears that it the petitioner who avoided the respondent. The petitioner side has not carried out any medical test to prove the potency.

20.In this case, the petitioner has not let any convincing evidence which would prove his case and as such his accusation against the respondent remains only as a bare allegation. Further, in the matrimonial match, generally in the Indian Cultural Context, the male is in the initiative position and female is only on the recipient position. If so on the petitioner side it is not explained what initiative was taken by him to consummate the marriage. The statement of the petitioner that the respondent used to put pillow between them to avoid sex does not lend credence for the conclusion that the respondent was unwilling for sexual intimacy because as expressed on the respondent side it is not an iron barricade to remove this kind of hindrance. Even if the contention of the petitioner is accepted the non-action of the petitioner to get over this hurdle

for long time for about two years does not show his patience or magnanimity or tolerance or gentleness but it may exhibit his intent and interest in conjugal union with the petitioner. The inaction of the petitioner to take the respondent for medical test or inform his or her family members leads to believe there is some substance in the allegation levelled against him that he is the cause for non consummation of their marriage.

22. Further, what the Supreme Judiciary can do under Art 142 of the Constitution of India is not available to this court. Further more, if the relief is granted against the will of respondent inspite of not proving the case by the petitioner that the marriage was not consummated because of the respondent, it amounts to allowing the petitioner to take advantage of his own wrong/inability and this is not permissible in law. In respect of other cruelty allegations as already stated it is only subsidiary or incidental to the main ground of non consummation of marriage and it is right that it has no independent leg to stand in this case and falls to ground. In these circumstances it is answered that the petitioner has not proved that the marriage was not consummated because of the respondent much less that the respondent wilfully refused to consummate the marriage and that the respondent committed an act of cruelty. Point No 1 and 2 is answered accordingly.

33. Assailing the impugned Judgment and Decree, the learned counsel for the appellant submitted that the Family Court erred in holding that the appellant did not take any steps to consummate the marriage. In the cross examination of the respondent, she has herself admitted that the marriage was not consummated, despite both of them living together for two and a half years.

34. It was further submitted the learned Principal Judge of the Family Court ought to have considered that understanding cruelty depends upon the status of the parties and given the sensitive nature of the appellant's job as a diplomat, the respondent refused to treat him with respect and subjected him to cruelty by not attending to any of the duties as was expected from a wife of a diplomat. It was submitted that the respondent rarely mingled or participated in the dinners hosted by other diplomats as a result of which the appellant also felt humiliated. However, there is evidence to substantiate the same.

35. The learned Counsel for the appellant further submitted that the respondent took up private assignments which was not expected of a diplomat's wife considering the sensitive nature of the work of a diplomat.

36. Learned Counsel for the appellant further submitted that the evidence of the respondent has clearly showed that she merely wants to continue with this broken marriage with the appellant only because of her religious belief and compulsions and not out of any affection to the appellant.

37. It was further submitted that the family Court erred in ignoring the content of Exhibit P4, email sent by the appellant to the respondents father on 8.05.2010 wherein he has clearly stated that the respondent was uncommunicative and uncooperative and that the marriage had not consummated and that the respondent had threatened to commit suicide and refused to attend social gathering and would often shut herself and whenever parties were held at home, she would micro manage the kitchen and the supplies so that the party would get over. The respondent also had not visited the appellant's parents when she visited India for 20 days during August, 2010.

38. It was submitted that the Family Court ought to have considered Ex.C2- Medical report, wherein it is stated that "within a few weeks of the marriage her husband began sleeping in a separate bedroom". However, in the evidence before the Family Court, she has stated that the appellant slept in the same bed for six months therefore there are several contradictions in the statements by the respondent.

39. Furthermore, Exhibit C2 "Neuro psychological evaluation" by the psychiatrist revealed that the projective tests show a tendency to Neurotic Constriction (Avoidance) and conflict relating to figures of authority. Her personality assessment revealed that low scores in domains of emotional and social expressivity. It is therefore submitted that the Family Court erred in dismissing the petition filed for divorce by the appellant.

40. The learned counsel for the appellant further submitted that the Family Court erred in concluding that since the respondent rested her head on the appellant's shoulder while travelling in Egypt tour together implied that she did not refuse to consummate the marriage.

41. The learned counsel for the appellant further submits that Ex.P.4 E-mail of the appellant to his father-in-law indicated the problems faced by him with the respondent that by Ex.P.5 e-mail his father-in-law responded. It is submitted that the Family Court has erred in rejecting Ex.P4 and Ex.P5

on the ground that Section 65 B of the Indian Evidence Act was not followed.

42. It is further submitted that the Family Court has erred in holding that placing of pillows between her and the appellant were not "iron barricades" and hence did not show that the respondent was unwilling to consummate the marriage.

43. The learned counsel for appellant further submitted that the respondent would put the pillows between them as a barrier and whenever the appellant tried to remove the pillow, the respondent would turn away and was cold and would get very angry at the appellant. On other occasions, the respondent would throw pillows at him and turned away. It thus proved that the appellant tried his best for six months to consummate the marriage and since there was no co-operation from the respondent, the marriage had irretrievably broken down.

44. The learned counsel for appellant further submitted that the respondent's character traits may overall however why she never told the fact of the non consummation of her marriage even to her parents for three years, until her husband filed a case for divorce. It was further stated that the respondent stated that the appellant has treated her with love and affection and it could be interpreted that it was the respondent who showed reluctance to mingle with the appellant and his family members and hence the respondent showed no sort of intimacy to the appellant.

45. It is proved that the marriage is not consummated and the appellant is deprived of his conjugal rights for the past eleven years which itself amounts to severe cruelty. It is submitted that the appellant based his case on his oral evidence to prove that he did not everything possible to have a conjugal relationship with the respondent but she refused.

46. The learned counsel for the appellant had relied on the following judgments:-

- i. Vidhya Viswanathan Vs. Kartik Balakrishnan, AIR 2015 SC 285.
- ii. Candida Justina Vs. Sunderbabu, Judgment of this Court in C.M.A.No.1372 of 2015 and M.P.Nos.1 and 2 of 2015.
- iii. Shakuntla Kumari Vs. Om Prakash Ghai, AIR 1983 Delhi 53.
- iv. Vinita Saxena Vs. Punkaj Pandit, Supreme Court Appeal (civil) 1687 of 2006.
- v. R. Srinivasa Kumar Vs. R. Shameetha, Supreme Court CIVIL APPEAL No.4696 of 2013.
- vi. Probhat Kumar Mitra Vs. Sukriti Mitra, AIR 1971 Calcutta 1.
- vii. Samar Ghosh Vs. Jaya Ghosh, (2007) 4 SCC 511.

47. Defending the impugned judgment and decree was well reasoned and that the present appeal was devoid of merits and therefore prayed for dismissal of the present appeal with a direction to the appellant to take the respondent back. The learned counsel for the respondent submitted the marriage was not consummated and it was the appellant who was responsible for non-consummation of the marriage.

48. The learned counsel for the respondent further submitted that during her stay at Karungal, the respondent was asked to stay in a room in the upstairs and most of the time she was left alone. The appellant used to call her for food and after having food and she was asked to go back the room.

49. She submitted that during the one week of stay at Karungal, the appellant appeared to be very busy and had lot of engagements and the appellant used to come very late to the room in the night and immediately go to sleep alleging that he was tired and with back pain.

50. The respondent denied she had disinclination to have any kind of sexual relationship with the appellant and that it had resulted in a lot of cruelty. She submitted that it is only the appellant who did not show inclination towards her and refused to have conjugal relationship with her which had resulted in cruelty to the respondent.

51. The learned counsel for the respondent submitted that evidence show that it was the appellant who have failed to co-habit with the respondent. The appellant though stayed in respondent's parents house, did not attempt to consummate the marriage. It is further submitted that the appellant stated in his cross examination that he stayed three days at respondent's parents house before leaving to Delhi and the appellant had back pain and visited a doctor.

52. The appellant and the respondent went to Cairo in January, 2009. The appellant avoided marital relationship and shifted his bedroom to the other room. When the respondent invited the appellant to sleep with her in the bed room allotted to the respondent, the appellant refused and locked himself in a separate room.

53. It was further submitted that the Family Court had held that the husband/appellant did not take any step to consummate the marriage, the finding is based on the evidence let in by the appellant and the evidence of the respondent.

54. The learned counsel for the respondent further submitted that though the appellant and the respondent were living together all alone in Cairo for two years clearly proves the appellant who did not want to consummate the marriage and instead has shifted the blame on the respondent.

the respondent was living alone with the appellant thousands of miles away from her home and was depended on the appellant and she never disrespected or subjected the appellant to cruelty. The respondent was a god fearing person and respected the appellant and wants to live with him.

56. It is further submitted that the Family Court held that the cruelty alleged by the appellant was only on account of non-consummation of marriage after assessing the evidence has held that the appellant was responsible for non-consummation of the marriage. The Family Court has also considered the cruelty suffered by the respondent due to non-consummation of the marriage.

57. The learned counsel for the respondent submitted that, though the appellant took the respondent out on many holidays did not make her happy and subjected to cruelty.

58. The learned counsel for the respondent submitted that the statements of tendency to neurotic constriction (Avoidance) and conflict relating to figures of authority does not go against the respondent as she is an educated person and her readiness to undergo the medical test as suggested by the court itself proves the respondent was not at fault. The personality assessment reveals low scores of domains of emotion and social expressivity are opinion which have been stated but have not been proved.

59. The person who gave the opinion should have been examined as a witness and the respondent should have been allowed to cross examine. The non cross examination of the psychologist the appellant's case is fatal, the allegations cannot be said to be proved.

60. It is further submitted that the fact that the appellant stayed in his uncle and uncle's house during their visit to Delhi instead of a hotel shows apparent lack of interest in having conjugal relationships as a husband. It is submitted that the appellant used to coach his friend Ramesh via computer to assist latter to clear Civil Service examination late in night which was unusual and showed total disinclination on the part of the appellant to have any conjugal relationship with the appellant. It was submitted that the appellant cannot take advantage of his faults to dissolve the marriage.

61. The learned counsel for the respondent submitted that the allegation the respondent keeping pillows in between the appellant and the respondent shows that she was unwilling to consummate the marriage.

62. It is further submitted that the Family Court rightly held that it barely matters whether it was a barricade of

pillows or one made of iron, it was for the husband having the upper hand ought to have consummated the marriage and the same cannot be attributed against the respondent. The respondent was always willing or consummation of marriage.

63. The learned counsel further submitted that the Family Act is not required to comply strictly with the provisions of Evidence Act and can lay down its own proceedings. Hon'ble Supreme Court has held that Section 65B of Evidence Act must be viewed seriously it should be according to rules laid down. Further, Sections 65A & 65B of the Indian Evidence Act are said to be a complete code.

64. The learned counsel for the respondent submitted that the respondent ought to have been given opportunity to cross examine the doctors or psychologists who gave Exhibits C1 & C2. It is further submitted that any document will have to prove giving opportunity to other side to cross examine the author of the document more particularly when the document will have the effect of harming the other side. The failure of examining the authors of Exhibits C1&C2 cannot be said to be proper and thus cannot be considered by court.

65. The Family Court erred in holding Exhibits C1 & C2 were court documents marked with consent of parties and non examination of medical professionals is not fatal to the case.

66. The learned counsel for the respondent submits that the respondent and the appellant residing under the same roof and now the petition have been filed. The respondent never said the appellant is impotent. The Family Court has rightly rejected the petition as non-consummation being a ground for divorce.

67. The learned counsel for the respondent relied on the following judgments:- सत्यमेव जयते

- i. Lakshmi Priya Vs. K.V.Krishnamurthy, 2007 (1) CTC 367
- ii. Kulwinder Singh And Ors. Vs. State Of Punjab And Anr., 2007 (4) CTC 769
- iii. Bipin Chander Jaisinghbhai Shah Vs. Prabhawati, 1956 SCR 838 : AIR 1957 SC 176.

68. We invited the appellant and the respondent to see whether there was any scope for reconciliation. However, the parties were unable to arrive at any settlement. Under these circumstances, we took up the case for hearing and reserved the case for passing order.

69. We have considered the arguments advanced by the learned counsel for the appellant and learned counsel the respondent. We have also perused the impugned Judgment and

Decree passed by the Family Court and the evidence on record before the Family Court.

70. The marriage between the appellant and the respondent was celebrated on 07.01.2009. It was an arranged marriage arranged by the elders of their respective families in 2008. Both the families enjoy high status in the society. Both the appellant and the respondent and their parents are well educated.

71. The appellant himself is an accomplished officer in the Indian Foreign Service (IFS) who cleared tough competitive Civil Service Examination. The appellant was serving in Cairo at the time of the Marriage. The respondent is also well qualified. She has completed B.Tech and M.B.A. They appear to come from a devote and conservative Christian families.

72. Both the appellant and the respondent lived together in Cairo for two and half to three years from the date of marriage. Though the appellant and the respondent were married on 07.01.2009, the marriage was not consummated. The pleadings and documents filed by the either of the parties do not reveal much as to who was responsible for non-consummation of the marriage. Both have blamed each other.

73. More than 11 years have elapsed since the appellant and the respondent got married. They have lived apart for last 8 years during the pendency of the proceedings before the Family Court and before this Court. Even when they lived together under the same roof for a period of three years since their marriage, they lived as perfect strangers.

74. They slept in separate rooms though for the first nine months they did share the same bed and the bedroom in Cairo. There was however no physical intimacy between them even once. They also did not communicate with each other. The marriage thus never got consummated. This was unusual.

75. Neither the appellant initiated nor the respondent took any active steps to consummate the marriage. Possibly there were underlying physiological and psychological condition which came in the way of consummation of the marriage.

76. The Family Court has not probed on this aspect. Otherwise, there are no reasons for non -consummation of the marriage. For all practical purpose the marriage between the appellant and the respondent had irretrievably broken. It was broken from the very beginning. However, we are not in a position to sever the marital chord between the appellant and the respondent as the provisions of the Indian Divorce Act, 1869 does not allow us to do so.

Family Court is liable to be upheld though we do not fully agree with all the reasons given in the impugned order holding the appellant responsible for non consummation of the marriage. The evidence indicates that non consummation was on account of the appellant and the respondent.

78. However, it was not willful either by the appellant or the respondent. We shall give our reasons for coming to the above conclusion in the course of narration of this order. Before dealing with the discussion regarding the allegation and counter allegation, evidence on record, we deem it fit to refer to Exhibits C1 & C2.

79. The Family Court had earlier referred the appellant for a medical examination to Apollo Hospital, Chennai. A medical report dated 03.01.2012 was given to the Family Court by the said Hospital. This report was marked as Exhibit C1 by the Family Court.

80. As per Exhibit C1 Medical Examination Report, the appellant was a normal male and did not suffer from any Physical disability/inability and was capable of having sexual intercourse.

81. A similar reference was neither made nor asked for the respondent. It would have also cleared the doubts as to whether the respondent was healthy and a normal person and did not suffer from any physiological problem which may have hindered her from taking any steps to consummate the marriage.

82. The Family Court had also referred both the appellant and the respondent for a Psycho Diagnostic Evaluation. A Psychiatry Report dated 17.04.2013 was marked as Exhibit C2 before it. It was signed by a Psychiatrist from the same hospital. It was based on Neuro Psychological Evaluation by its Psychologist of both the appellant and the respondent.

83. The Family Court has however found Exhibits C1 & C2 of not much relevance. However, a reading of Exhibit C2 does indicate the underlying problem of the both the appellant and the respondent.

84. Though in the conclusion of Exhibit C2 it is stated that both appellant and the respondent did not show any evidence of mental illness, addiction or gross personality disorder, it does not indicate personality trait of the appellant and the respondent. In our view, the Family Court should have probed further and elicited the truth.

85. If the author of Exhibit C2 was summoned under Section 45 of the Indian Evidence Act, 1972 by the Family Court and asked to explain the content of Exhibit C2, the underlying truth hidden beneath the mass of pleadings and the oral evidences recorded by the Family may have surfaced before

it.

86. We are however refraining from remitting the case back to the Family Court for the same purpose as considerable time has lapsed and since neither the parties nor the Family Court found it useful when the case was argued before it. Further, with the efflux of time, we do not see any useful purpose in remitting the case back to the Family Court.

87. The reasons given in Exhibit C2 makes us believe that both the appellant and respondent had certain personality traits which may have come in the consummation of the marriage.

88. A cursory reading of Exhibit C2 indicates that both the appellant and the respondent exhibited certain personality traits which may have inhibited both the appellant and the respondent from going forward to consummate the marriage. These traits cannot be said to be willful. They were second nature of the appellant and the respondent.

89. Unfortunately, neither the appellant nor the respondent have also given much importance to the same before the Family Court though the learned Counsel for the appellant now relied certain portions from Exhibit C2 before us in support of the present appeal.

90. As per Exhibit C2, the Neuro Psychological Evaluation by the Psychologist who examined the appellant revealed that "significant emotional liability and reactivity, a tendency towards dominance, and low frustration tolerance". This aspect should have been examined by the Family Court.

91. Exhibit C2 also states that there may however be some character traits that contribute to his inability to solve the interpersonal issues that have resulted in his marital crisis. It explains the personality trait of the appellant.

92. Similarly, Exhibit C2 also states that the Neuropsychological Evaluation of the respondent by the Psychologist revealed that projective test showed a tendency to neurotic constriction (avoidance), and conflict relating to figure of authority and her personality assessment revealed low score in domains of emotional and social expressivity.

93. Thus, neither the appellant nor the respondent can be faulted for the non-consummation of the marriage as both required professional help to deal with the problem each of them were facing while being together as husband and wife.

94. Considering the fact that there was a late marriage since both the appellant and the respondent came from conservative and orthodox Christian family, makes us believe that these factors may have come in the way of consummation of

the marriage.

95. In our view, there is neither any element of willful refusal to consummate the marriage by the respondent nor the respondent has treated the appellant with cruelty which may have caused a reasonable apprehension in the mind of the appellant that it would be harmful or injurious to live with each other.

96. It appears both the appellant and the respondent were not interested in getting married to each other but were persuaded by their respective family to get married. After getting married, the respondent wants to sever the relationship while the appellant wants to continue with marriage for she believes in the following biblical sanction:-

97. The respondent appears to have a strong belief in the biblical sanction which reads as under:-

"So they are no longer two, but one flesh.
Therefore what God has joined together, let no one separate

-Matthew 19:6 "

98. Both the appellant and the respondent have remained indifferent to each other as is evident from reading of Exhibit C2. Respondent has shown tendency to Neurotic constriction (avoidance) and conflict relating to figures of authority.

99. The respondent appears to be a person who avoids conflict and is therefore perhaps docile while the appellant by nature is domineering with low tolerance.

100. Though the appellant and respondent are educationally accomplished persons, the appellant's and the respondent may also have come in the way of them consummating the marriage despite both sharing the same room for about three years. They are odd couples with compatibility issues and therefore their marriage was not consummated.

101. Therefore, the conclusion of the Family Court that the appellant alone was responsible for non-consummation of the marriage appears to be incorrect. In our view, both the appellant were equally responsible for non-consummation of the marriage. Consummation of the marriage was not willful. It was at best on account to pre-disposed conditions of the appellant and the respondent.

102. In our view, the respondent was also not cruel to the appellant for the same reasons. In any event, whether the appellant was cruel or not to the respondent was also not an issue as the respondent did not choose to initiate any

proceeding against the appellant for the same. The respondent has stated in her deposition that separating married couple was a sin. While the respondent wants to preserve the marriage even though it is empty and meaningless and has irretrievably broken long before.

103. In our view, pre-existing personality traits and the character of both the appellant and the respondent as is evident from a reading of Exhibit C2 do not satisfy the requirement of 10(1)(vii) and (x) of Indian Divorce Act, 1869.

104. In our view, the remedy by way of dissolution of marriage at the initial stage of the marriage was perhaps taken in a hurry as the parties did not try to work out the matrimony. However, with the efflux of time, both the appellant and the respondent have moved very far and no useful purpose will be served by preserving the marriage.

105. As mentioned in the beginning of the order, we are not in a position to give any relief to the appellant as we are bound by the express provision of the Statute.

106. In this appeal, we are concerned only with the correctness and the conclusion arrived in the impugned Judgment and Decree passed by the Family Court.

107. We shall therefore now give our reasons for upholding the impugned Judgment and Decree of the Family Court with reference to the basic facts pleaded and denied by the parties and the other evidences recorded and considered by the Family Court.

108. The cross examination of the appellant indicates that he had seen the respondent once or twice before the marriage, i.e., once in her house and the other time in a Church some time in 2007. However, he was not interested in getting married then and therefore, he had no interaction with the respondent thereafter until the marriage was fixed. After the marriage also, there was hardly any communication between them.

109. This may indicate that perhaps the appellant was not interested in getting marriage at all. He appears to have got married to the respondent owing to family and societal pressure and considering the fact that he was holding a high position as the Third Secretary in the Indian Embassy at Cairo at the time of the marriage. However, the respondent has not put any questions to that effect to the appellant, perhaps to preserve the marriage.

110. The evidence also suggest that after the marriage on 07.01.2009, the appellant and the respondent stayed in the respondent's father's house after the reception which was hosted earlier in the evening after the marriage. About 2000 cards had been printed and distributed and approximately 5000

guests attended reception to bless and wish them.

111. According to the appellant, he was waiting in the bedroom after the reception for the first night in the respondent's parents' house. However, the respondent came to the room late and merely asked him why he was awake and promptly went off to sleep.

112. On the other hand, the respondent in her deposition has stated that the appellant said he was tired and wanted to sleep. It is likely that both the appellant and the respondent were tired due to hectic programme in the evening. Therefore, they may not have had the inclination to get physically intimate on 07.01.2009.

113. Soon thereafter, they left for appellant's home town in Karungal in Kanyakumari District for 3 to 4 days for a second reception for the relatives and friends of the appellant's family. They travelled in a night Train in a 1st class coupe with few relatives of the appellant in the other coaches of the same train. Again, they hardly spoke to each other during the journey. Both the appellant and the respondent promptly went to sleep.

114. During the cross examination of the appellant, it also emerged that the respondent's paternal grandfather had passed away when they were in Karungal. However, this information was not shared with the respondent and was suppressed both by the appellant and her family.

115. According to the appellant, the respondent's father had dissuaded him from informing the respondent about the death of the respondent's grandfather. The respondent later come to know about the same when her father informed her about the same.

116. Oral evidence of the appellant also suggests that the appellant asked his mother to console the respondent. During the course of stay in Karungal, they appear to have visited the appellant's elder aunt (mother's elder sister) who was hospitalized and was undergoing treatment.

117. The appellant also appears to have taken the respondent to a dam in Kanyakumari District. Thereafter, they did not go out anywhere. Even according to the appellant, they were mourning due to the death of the respondent's grandfather.

118. In his cross examination, the appellant has also stated that while in Karungal, the appellant attempted to physically get intimate with the appellant. However, the respondent did not reciprocate. The appellant has also stated that though he tried to touch the respondent however she turned and slept on the other side and was shocked by the behaviour of the respondent.

119. However, according to the respondent, the appellant neglected her and spent most of the time with his family members. It is unlikely, the appellant would have made any attempts to get physically intimate with the respondent during this period considering the fact that there was a bereavement in the family of the respondent and considering the fact that their marriage was followed by a hectic travel itinerary and programme, a reception in Chennai, a second reception in Kanyakumari, visit to an ailing aunt in a hospital and the distressing news regarding the death of the paternal grandfather of the respondent.

120. Therefore, we are not in a position to accept the contention that the appellant attempted to get physically intimate with the respondent and that the respondent did not reciprocate in Karungal. Even if the appellant did attempt to get physically intimate with the respondent, it is unlikely the respondent would have reciprocated in the same manner as she was grieving due to the bereavement in the family.

121. That apart, the underlying problem each had as was pointed out by us from a reading of Exhibit C2 may also have contributed to lack of any sexual intimacy between them.

122. After their stay in Karungal, the appellant and respondent came back to Chennai before proceeding to New Delhi for obtaining a Diplomatic Passport and Visa for the respondent to travel to Cairo with the appellant. They stayed in New Delhi for about 5 days in his aunt and uncle's house.

123. Though the appellant and the respondent had the choice of staying either in a hotel or in a guest house of the Customs Department (the respondent's father being a Senior Officer), the appellant chose to stay in his uncle's house with the respondent.

124. In his evidence, the appellant deposed that the house consisted of three bed rooms with six members, i.e., the aged father and the mother of his aunt, two young children of his aunt and his aunt and uncle. The evidence also suggest that the appellant and the respondent were made to stay in the children's room during their stay in Delhi and that the father of his aunt had certain medical condition and had the propensity of walking out of the room without dressing properly and therefore their room was always closed.

125. It is not clear why the appellant chose to stay with his newly married wife (the respondent) in his aunt's house instead of taking time to stay in a luxury hotel to break the ice with the respondent by spending quality time with her. He further appears to have unilaterally decided to stay there. During cross-examination has indicated it was his personal choice and had no specific reasons.

126. During their stay in New Delhi, the appellant used to visit his office and used to leave the respondent with his aunt. Respondent appears to have been uncomfortable in appellant's aunt's house. Evidence also indicates that the appellant wanted the respondent to stay in his aunt's house in Delhi during the daytime but she would go to her aunt's house without informing him and return in the evening.

127. During this visit he appears to have spent few evenings with his friend and left the respondent alone with her aunt or his aunt. These factors indicate that the appellant did nothing to make the first few days of this marriage memorable or comfortable for the respondent. During cross examination, the appellant was asked why he chose to stay in his aunt's house, to which, he curtly replied that it was his choice.

128. The respondent also appears to have meekly accepted and did not protest with the arrangements made by the appellant perhaps fearing rebuke from her family and considering the fact that she has strong religious belief.

129. According to the appellant, the respondent carried her heavy suitcase to Delhi and in Delhi, the respondent used to go to her aunt's house for bathing, for changing clothe and for washing clothes. The appellant further stated that because he carried her heavy suitcase, he developed back pain and had to consult a doctor on his return to Chennai before flying to Cairo on 18.01.2009 to start their matrimonial journey there. This may also have come in the way of the appellant getting intimate with the respondent.

130. Since marriage was an arranged marriage, the parents of the appellant and the respondent assumed that after marriage, the appellant and the respondent would settle down like every other normal married couple. It appears that the appellant and the respondent also assumed the same and that the providence will show the way to them in their matrimonial journey.

131. Evidence tendered by the appellant and the respondent also indicates that when the appellant and the respondent were staying together in Cairo, he used to return home in the evening at about 6.30 p.m after attending the Arabic language Class.

132. However, over a period of time, the appellant started withdrawing from the company of the respondent and started coming late and even if he happened to come home early, he would go to a separate room.

133. Even according to the appellant for the first six months the appellant and the respondent stayed together in the middle bedroom of the house in Cairo they hardly interacted

with each other.

134. During this period and the appellant was coaching the some of his friends through online who were attempting Civil Service. According to the respondent, the appellant would not come to the bed room until she slept and she would see the appellant sleeping next to her only in the morning. It shows that the appellant took no initiative to get physically intimate with the appellant.

135. The appellant on the other deposed that he used to finish the online coaching and came back to the bed room but the respondent was not interested in getting physically intimate with him and blamed her. Eventually, the appellant started sleeping separately in another room and continued till they parted.

136. The appellant has informed the respondent's father about the problem and about the non-consummation of the marriage and had earlier sent an email on 08.05.2010 to him vide Exhibit P4. In Exhibit P4, the appellant brought to the knowledge of his father-in-law the issue regarding non-consummation of the marriage and alleged non-cooperation and unresponsive nature of the respondent and has blamed him for not doing anything to ameliorate the situation.

137. Appellant's father-in-law also replied to Exhibit P4 on the same day vide Exhibit P5 and had promised to visit them despite personal setbacks and professional challenges he faced as a senior officer of the Customs Department as the Additional Director General of Customs. The Family Court has declined to consider it as Exhibits P4 and P5 were not produced in accordance with Section 65B of the Indian Evidence Act, 1872. In our view, nothing much turns from a reading of Exhibits P4 and 5. It is only appellants version of the problem.

138. Oral evidence also suggests that the respondent's father had also arranged for counselling between the appellant and the respondent through his friend in Cairo. However, nothing comes out of it. According to the appellant, he had also taken help of a priest of All Saints Church in Cairo where they used to attend Sunday Mass.

139. The respondent however denied receiving any advice from the Priest or any attempt of the appellant to go for counselling. However, the appellant neither summoned nor produced the priest to give evidence. He has also not given the dates except stating that he took steps to address the issue. During the cross examination, the appellant stated that if required, he would produce the priest.

140. It appears that the respondent was in an alien country and silently suffered and accepted the appellant for who he was and who he was not while the high position of the

appellant may have discouraged him from taking any professional help or help of the elders and priest of the church to which they visited.

141. He did ask some of his friends and their spouse to speak to the respondent. However, this was after he had filed O.P.No.2426 of 2011 and after the respondent was served with the summons while in Cairo. Even as per the appellant's own deposition, he ended up having a difference of opinion with some of them and therefore, did nothing to solve the issue with the appellant.

142. According to the appellant, he took the respondent for three outstation trips while in Cairo. These trips were perhaps in the first six month of their stay in Cairo. In one of the trip, they went in the morning and returned in the evening. During the third trip, the appellant spent time in evening with his friend, named Puneet Sharma and left the respondent alone though according to the appellant he stayed only for the evening. According the respondent, he spent time with his friends to avoid the company of the respondent.

143. The evidence also indicates due to the war between Egypt and Libya from 25.01.2011 till the end of March, 2011, the appellant was under severe stress and used to return home late in the night. Oral evidence of the appellant and the respondent also indicates that they both the appellant and the respondent have also visited both together and separately India. However, neither of them took any steps to take any professional help.

144. It is during the last trip, the appellant appears to have filed the O.P.No.2426 of 2011 before the Family Court. It was surreptitiously filed even though the respondent was still living with him. The respondent was thus caught unaware of the same when she received the summon from Family Court while in Cairo with the appellant.

145. Right from the beginning of the marriage both the appellant and the respondent have been uncommunicative with each other. Even the attempt to break the marriage by the appellant was without the knowledge of the respondent. They have not consulted any psychologist and/or a family therapist and/or a psychiatrist to deal with the problem they were facing as newly married couples.

146. Before the Family Court, both have blamed each other for non consummation of the marriage though they lived together for over two years in Cairo where the appellant was posted at the time of the marriage.

147. However, the appellant and the respondent continued to live in a rut before the appellant took the drastic steps

to loosen their weak marital bond and relationship cemented by marriage by filing O.P.No.2426 of 2011 for dissolving it during the month of July 2011.

148. Had they given a chance by seeking professional help early, perhaps they would have decided either to live together or would have parted from each other without any regrets. Neither the appellant nor the respondent took up the responsibility to nurture the relationship to build a lasting bond between them.

149. They appear to have lived under the same roof for about 2 years as perfect strangers without much interaction before the appellant decided to file O.P.No.2426 of 2011 before the Family Court.

150. Overall reading of the evidence on record indicates that both the appellant and the respondent were equally responsible for non-consummation of the marriage. The facts do not indicate cruelty by the respondent on the appellant. Therefore, the decisions cited by the learned counsel appellant and the respondent are of no relevance.

151. In our view, the appellant has not made out any case for dissolving the marriage solemnized between the appellant and the respondent on the ground specified in section 10(1) (vii) and (x) of Indian Divorce Act, 1869. Therefore, the impugned Judgment and Decree is liable to be upheld.

152. Under these circumstances, while upholding the impugned Judgment and decree passed by the Family Court we set aside the finding and conclusion in the impugned Judgment and Decree finding fault with the appellant for non consummation of the marriage.

153. In the result, this Civil Miscellaneous Appeal is dismissed. No cost.

Sd/-

Assistant Registrar(CS-VIII)

//True copy//

Sub Assistant Registrar

jen
To:

The Principal Judge,
Family Court, Chennai.

+3cc to Mr.Mrs.Geeta Ramaseshan, Advocate SR.No.37028

C.M.A.No.163 of 2017

KJ(CO)

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