

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.09.2020
PRONOUNCED ON : 25.09.2020

CORAM

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

C.M.A.No.2876 of 2018

(Through Video Conferencing)

M/s.N.Mani alias Philomenraj

...Appellant/Petitioner

vs.

Alphonsa

...Respondent/Respondent

PRAYER: Appeal filed under Section 19 of the Family Courts Act, 1984 to set aside the fair and decretal order in O.P.No.1977 of 2009, dated 10.10.2018, on the file of the IV Additional Principal Judge, Family Court, Chennai.

For Appellant : Mr.K.Raja
For Respondent : Mrs. A.Arulmozhi

J U D G M E N T

C.SARAVANAN, J.

The present Civil Miscellaneous Appeal is directed against the impugned Fair and Decretal Order dated 10.10.2018 in O.P.No.1977 of 2009 passed by the Family Court at Chennai presided over by the learned IV Additional Principal Judge.

2. By the impugned fair and decretal order, the Family Court has dismissed O.P.No.1977 of 2009 the petition filed by the appellant husband dissolve the marriage under Section 10(1)(x) of Indian Divorce Act, 1869. The operative portion of the impugned fair order reads as under:-

" 9. From the above discussion it is clear that the petitioner is making the averments that she abused him and also his mother and she was not used to cook food and she was arrogant and she used to lodge police complaint and also she used to threaten him that she would commit suicide and the same are all the act of cruelties committed by the respondent upon him.

10. As discussed above, the petitioner has not established the above contentions. The word cruelty has not been defined in the Act. Cruelty could be either physical or mental. The petitioner has not established any 'physical cruelty of the respondent against him. The above discussion would indicate that there is no specific pleading of cruelty said to have been committed by the respondent and even the above averments of the alleged cruelties are not established by the petitioner against the respondent. Cruelty should be of such nature that the act of the other spouse would make fear or apprehension in the mind of the complaining spouse that he or she may not be reasonably expected to live with the other spouse and the ordinary wear and tear of the happening in the marital life can not be termed as cruelty. In fine the petitioner has not established any cruelty and entitling him to grant the relief of divorce on the ground of cruelty as sought for by him. In the result, this petition is dismissed. "

3. At the time of filing of the aforesaid proceedings before the Family Court, the appellant (husband) was aged about 54 years while the respondent (wife) was aged about 43 years. As on the date, appellant is aged about 65 years while the respondent is aged about 54 years.

4. The above case was filed by the appellant on the ground of cruelty under Section 10(1)(x) of Indian Divorce Act, 1869. The marriage between the appellant and the respondent solemnized on 27.06.1996 at St.Antony's Church, Pudupet, Chennai - 600 002 as per Christian ritual and customs. The appellant (husband) was working as Senior Finger Print Officer in Railway Police while the respondent is a teacher in a private school.

5. The case of the appellant before the Family Court was that the respondent used to abuse the appellant and was not interested taking up her matrimonial responsibility. It was further alleged that the respondent used to frequently stay with her sister instead of taking care of the appellant and his mother as a doubtful wife. The further allegations of the appellant before the Family Court was that though the respondent wife used to receive a sum of Rs.20,000/- per month as salary, she used keep it with herself. It was further submitted that the respondent used to abuse the appellant and his mother in filthy language.

6. The further allegations against the respondent was that the respondent wife filed a complaint before the police station to remove the appellant from Government service and also threatened to commit suicide by pouring kerosene and/or consuming tablets.

7. Before the Family Court, the appellant stated that the respondent wife was sterile and was therefore frustrated and would take out her frustration and abuse the appellant.

8. The respondent in her counter denied the allegations. It is stated that she neither abused the appellant nor her mother-in-law. She further submitted that she never took her teaching profession as an excuse to avoid her matrimonial obligations. Further, the allegation that the respondent used to frequently visit her sisters' house without permission of the appellant was false.

9. The respondent further submitted that during her stay with the appellant and his mother-in-law, the respondent used to take care of her mother-in-law and laboured hard as a bonded labour to them.

10. The respondent specifically denied having attempted to commit suicide as was alleged by the appellant in the petition. On the other hand, the respondent submitted that she was tortured by the appellant who used to physically abuse the respondent without any provocation and she had accepted the same as her fate and tolerated the appellant. Further, the appellant was in the habit of demanding the entire salary received by the respondent and used to pay her pocket money and that the respondent had no freedom to spend the money earned by her from the teaching profession.

11. The respondent further submitted that the appellant wanted to get rid of the respondent and was easy-going with other women and was having an extramarital affair with other worker. The respondent further submitted that she advised the appellant to mend his ways as it was not only dangerous for his health but also risky to get involved in extramarital affairs as a government servant. The respondent submitted that irked by the advice of the respondent, the appellant turned violent and drove the respondent to the matrimonial and therefore she was compelled to stay with her sister.

12. The respondent further submitted that having driven by the respondent out of the matrimonial home, the appellant started pestering the respondent for a divorce. In this connection, he came to school where the respondent was working as a teacher and demanded her to consent for a divorce. Since the respondent refused to accede to the aforesaid demand of the

appellant, the appellant started abusing the respondent in public places.

13. As far as the complaint against the appellant to the police station was concerned, the respondent submitted that she was forced to give a police complaint as the appellant along with her sister and one Regina came to the school during working hours and created a ruckus and abused the respondent vulgarly in front of her students and colleagues.

14. She submitted that it was only under these circumstances she was forced to file a police complaint against them before W-3, All Women Police Station, Mylapore which was duly acknowledged in CSR No. 33/CSR/W3 AWPS/09 dated 8.4.2009.

15. The respondent further submitted that other than the said complaint, she made no other complaint against the appellant. The respondent further submitted that suppressing all these facts, the appellant filed the above petition before the Family Court. The respondent therefore submitted that the allegations in the petition were nothing but a figment of imagination of the appellant to obtain a divorce with an ulterior motive.

16. The appellant has filed 3 Exhibits while the respondent filed 5 Exhibits. The appellant examined himself as P.W.1 while the respondent examined himself as R.W.1. The details of the exhibits filed by both the appellant and the respondent are detailed below:-

Appellant	Respondent
Ex.P1 - Marriage Invitation	Ex.R1- Copy of ultra sonogram report of respondent dated 27.06.1997.
Ex.P2 - Marriage Photo	Ex.R2- Copy of ultra sonogram report of respondent dated 18.12.1997.
Ex.P3 - Copy of Family Card	Ex.R3 - Copy of medical report of respondent.
-	Ex.R4- Copy of salary details of respondent, signed by appellant.
-	Ex.R5- Copy of CSR for the complaint lodged by the respondent.

17. Assailing the impugned fair and decretal order, the learned counsel for the appellant submitted that the Family Court erred in dismissing the petition filed by the appellant for divorce. It is also submitted that more than 11 years have

lapsed since the appellant and the respondent parted with each other and have been living separately from each other. It was therefore submitted that this was a fit case for setting aside the impugned fair and decretal order passed by the Family Court and for dissolving the marriage. The learned counsel for the appellant relied on the following decisions of the Hon'ble Supreme Court:-

- i. Naveen Kohli Vs. Neelu Kohli, reported in (2006) 4 SCC 558.
- ii. Samar Ghosh Vs. Jaya Ghosh, reported in (2007) 4 SCC 511.
- iii. Pankaj Mahajan Vs. Dimple @ Kajal, reported in (2011) 12 SCC 1.

18. It is submitted that there is no scope the appellant and the respondent to live together any longer and the marital chord and irretrievably broken down as they are living apart from each other for 11 years and therefore, prayed for dissolution of the marriage by allowing the present appeal.

19. Defending the impugned fair and decretal order of the Family Court and the learned counsel for the respondent submits that though the appellant husband had alleged cruelty by the respondent there are no evidence to substantiate the same.

20. Learned counsel for the respondent submits that no witnesses have been produced by the appellant before the Family Court to substantiate the allegations in the O.P. It is further submitted that the appellant was abusive and a short tempered person and the respondent had accepted the same as her fate. She further submitted that the appellant had apparently developed intimacy with another lady and coming to know of the same, the respondent advised him. However, the appellant attacked the respondent brutally, forcing the respondent to leave the matrimonial home and take shelter with her sister. The learned counsel for the respondent further submitted that the respondent was not sterile and sterility cannot be considered as a ground for dissolving the marriage.

21. The learned counsel for the respondent further submitted that the respondent was infact not sterile as was alleged by the appellant. It was further submitted that the respondent became pregnant twice but the pregnancy had to be aborted due to medical reasons. The appellant was also asked to undergo medical tests to which he did not co-operate.

22. It was further submitted that the appellant was cruel to the respondent. The appellant used to demand the salary of the respondent and insisted that the respondent should hand over the

salary to him without even opening the cover and the respondent had to freedom to spend her salary without the appellant's permission. She further submitted that the appellant used to pay the respondent pocket money out of the salary earned by the respondent.

23. It was further submitted that on 08.04.2009, the appellant came to the school along with his sister and one Regina and abused the respondent in front of her students and colleagues. Under these circumstances, the respondent was constrained to lodge a complaint against the appellant before N3, All Women Police Station, Mylapore and therefore, Ex.R5, CSR was issued by the said police station.

24. We have considered the arguments advanced by the learned counsel for the appellant and the learned counsel for the respondent. We have also perused the impugned fair and decretal order passed by the Family Court.

25. Though the appellant alleged that there was cruelty by the respondent, he has not produced any evidence to demonstrate that the respondent wife was cruel to him. The appellant has failed to establish cruelty by the respondent before the Family Court. In the petition filed by the appellant before the Family Court also the appellant has not made out a case for cruelty. On merits also be find no reasons to dissolve the marriage solemnised between the appellant and the respondent on 27.6.1996.

26 . Though the appellant and the respondent have been living apart from each other for over a period of 11 years and the marital chord may have weakened at this point of time with the efflux of time, we cannot grant divorce. Even if the marriage may have irretrievably broken down due to the pendency of the proceedings before the Family Court, it was at the behest of the appellant and therefore appellant cannot take advantage of his own mistakes. Further, irretrievably breakdown of marriage is not a ground for granting divorce under the provisions of the Indian Divorce Act, 1869.

27. The Hon'ble Supreme Court has granted divorce under specific instances on the ground of irretrievable break down of marriage in the exercise of its powers under Article 142 of the Constitution of India. However, the High Courts, while exercising appellate jurisdiction are not empowered to dissolve the marriage on such grounds of irretrievable breakdown of marriage even though for all practical purpose, the marriage between the appellant and the respondent may have broken irretrievably and they may not choose to live together any longer and no useful purpose would be served even after dismissal of this appeal.

28. We therefore do not find any reasons to interfere with the order of the Family Court dismissing the order of the petition filed by the appellant to dissolve the marriage on the ground of cruelty. The fair and decratal of the Family Court in O.P.No.1977 of 2009, dated 10.10.2018 is therefore confirmed.

29. Accordingly, this Civil Miscellaneous Appeal is dismissed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

kkd

Notes:-In view of the present lock down owing to COVID-19 pandemic, a web copy of the order may be utilized for official purposes, but, ensuring that the copy of the order that is presented is the correct copy, shall be the responsibility of the advocate / litigant concerned.

To

IV Additional Principal Judge,
Family Court, Chennai.

Copy to

The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.K.Raja, Advocate sr 31796.

C.M.A.No.2876 of 2018

NRL (CO)
SP (24/03/2021)

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