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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
AND
THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

C.M.A.NO.1042 OF 2018

AND

C.M.P.NO.8432 OF 2018

A.T.Balasubramani

... Appellant/Respondent

.Vs.

N.Vanitha

... Respondent/Petitioner

PRAYER:-

Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act 1984 to allow the above Civil Miscellaneous Appeal and set aside the order and decree dated 17.08.2017 made in H.M.O.P.No.1247 of 2013 on the file of the VII Additional Family Court at Chennai.

For Appellant : Ms.S.P.Arthi

For Respondent : Mr.M.Shankar

JUDGMENT

Judgment of this Court was delivered by T.RAJA,J.

The appeal has been directed against the fair and decretal order dated 17.08.2017 passed by the VII Additional Family Court, Chennai in H.M.O.P.No.1247 of 2013 dissolving the marriage solemnized between the appellant and the respondent on 16.03.2011.

2. Learned counsel appearing for the appellant/husband submitted that after the marriage solemnized between the



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appellant and the respondent on 16.03.2011 at Venkateswara Vivaha Mandir, No.73, Komathi Narayana Road, T.Nagar, Chennai-600 017 as per Hindu rites and customs, they lived together at the appellant's house. Learned counsel appearing for the appellant further submitted that when the respondent wife, being a B.Com. Degree holder, continued to take tuition to the students of the neighbouring houses, aged about 15 to 17 years, though the appellant husband insisted her not to take tuition and to take care of the family, without listening to the words of the appellant husband, she continued to take tuition and also started continuing her relationship with the past students and spoke with them over phone. When it was questioned by the appellant husband, she started criticising him. Moreover, when she became pregnant, she gone to her parents' house stating that she would return within 15 days, but, she failed to do so. After three months, when the appellant insisted her to come back to the matrimonial home, she refused to return. In the meantime, a male child was born on 09.06.2012, but, the same was not at all informed to the appellant husband. Taking into account the minor and trivial issues arose between themselves, the respondent wife filed the above petition in H.M.O.P. No.1247 of 2013 under Section 13(1)(ia)(iii)(b) of the Hindu Marriage Act 1956 seeking dissolution of marriage on the ground of cruelty and incurably of unsound mind. Opposing the above prayer, although the appellant has filed a counter affidavit stating the reasons that whenever the appellant approaches the respondent wife to come along with him, she refused to do so and when the appellant went to her place, she and her parents thrown him out by using filthy languages and that he is ready and willing to live with the respondent wife and he is also willing to give treatment for her mental illness and to take care of the child, without considering the plea made by the appellant husband, the VII Additional Family Court, Chennai, granted divorce on the ground of cruelty and adultery. Moreover, when the matter was taken up for trial, the appellant husband was unable to cross examine P.W.1. The Family Court, having found that the appellant husband, has not conducted cross examination of P.W.1, the respondent herein, ought to have provided an opportunity for conducting cross examination of P.W.1, which has not been done. When the appellant husband failed to cross examine P.W.1, the Family Court proceeded with the enquiry and granted the decree for dissolution of marriage without providing an opportunity to the appellant husband to disprove the case of the respondent wife.

3. Learned counsel appearing for the appellant husband, drawing our notice to the issue framed by the Family Court, argued that when there was no allegation of adultery by the respondent wife against the appellant husband and that the respondent wife has filed the above petition to dissolve their



7. It is also not in dispute that even before the marriage, she was taking tuition to the students and nowadays, the teacher talking to the students is need of the hour as they are bound to clear any doubt then and there so as to make them score higher marks in the public examination due to tough competition among the schools. Thus, the respondent wife talking to her won students cannot be mistaken or misconstrued by the appellant husband by making bald allegations about the character of his own wife. Therefore, although the issue framed by the Family Court with regard to the cruelty is sustainable, another issue relating to adultery cannot be sustained, for the reason that the dictionary meaning of "adultery" is that that voluntary sexual intercourse between the married person and somebody who is not his/her wife/husband. In the present case, the allegation of the husband is that his wife/respondent herein has been talking to her students frequently over phone. Although such an allegation cannot be construed as adultery, but, the same would amount to cruelty as he has been suspecting her character for talking to her own students.

8. Secondly, when the case was taken up for trial, it is not known as to why the appellant/husband has not chosen to cross examine the respondent/wife and therefore, the same shows that the appellant husband did not want the matter to be closed. Although many allegations were pleaded in his counter affidavit against the respondent wife, the appellant husband failed to enter into the witness box to prove the averments stated in the counter affidavit.

9. In an identical issue, we have held that a party to the suit who does not appear in the witness box to state his own case on oath and does not offer himself to be cross examined by the other side, would suffer a presumption under Section 114 of the Evidence Act. A reference can be had from Narayane @ Krithika Vs. S.Karthik (C.M.A.No.4247 of 2019, dated 24.03.2021). For better appreciation, relevant paragraphs thereof are extracted below:-

"8.....In this context, it is pertinent to refer to Order VIII, Rule 5(1) of the Code of Civil Procedure, which reads as follows:-

"Rule 5 of Order VIII of Code of Civil Procedure 1908 "Specific denial"

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be



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taken to be admitted except as against a person under disability."

9. A perusal of the above provision clearly shows that every allegation of fact in the plaint, if not denied specifically or by necessary implication, the same shall be taken to be admitted as against the person who failed to deny the same. It is also pertinent to extract Order XVI, Rule 20 of the Code of Civil Procedure, as follows:-

"Rule 20 of Order XVI of Code of Civil Procedure 1908 "Consequence of refusal of party to give evidence when called on by Court"

Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit."

10. Yet another similar provision in Order XV, Rule 4 of CPC also reiterating the same as found in Order XVI, Rule 20 of CPC, which is extracted below:-

4. Failure to produce evidence.----
Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

11. Besides, one another similar provision embedded in Order XXII, Rule 4 of CPC also speaks as found in Order XVI, Rule 20 and Order XV, Rule 4, which is also extracted hereunder:-

"4. Procedure in case of death of one of several defendants or of sole defendant.
--- (1) Where one of two or more defendants



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dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a part and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and (b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in



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the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."

A conjoint reading of the above said provisions would show that where any party to a suit pending in Court refuses to give evidence or to produce any document then and there in his/her possession or avoids the Court willfully, the Court can pronounce judgment or make such order against that party on the ground that he or she failed to prove the case in the manner known to law.

12. In this context, it is also pertinent to refer to the ratio laid down by the Apex Court on a similar issue in Mohinder Kaur v. Sant Paul Singh, (2019) 9 SCC 358, wherein the Apex Court has held that a party to the suit who does not appear in the witness box to state his own case on oath and does not offer himself to be cross examined by the other side, would suffer a presumption, because, the case set up by him would not be genuine, natural or honest and real one."

10. In the light of the above settled legal position, since the appellant/husband failed to enter into the witness box before the trial Court to prove the averments pleaded in the counter affidavit, we, in such case, legally presume under Section 114(g) of the Evidence Act that the case set up by the appellant/husband is untrue and unnatural. Therefore, for the reasons stated above, we are not inclined to interfere with the order passed by the VII Additional Family Court, Chennai. Accordingly, the appeal fails and the same is dismissed. Consequently, C.M.P.No.8432 of 2018 stands closed. No costs.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vga



To

1. The VII Additional Judge,
Family Court,
Chennai.

2. The Section Officer,
V.R. Section,
High Court, Madras.

+1cc to Mr.M.Anandraj, Advocate, S.R.No.21136

C.M.A.NO.1042 OF 2018 AND
C.M.P.NO.8432 OF 2018

RR(CO)
PBS/26/10/2021