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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 26.02.2021

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THE HONOURABLE MR.JUSTICE T.RAJA
AND
THE HONOURABLE MR.JUSTICE P.RAJAMANICKAM

C.M.A. No.2811 of 2016

Madhalai Arokiyasamy

...Appellant

-vs-

Sesilirani

...Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 55 of the Indian Divorce Act to set aside the fair and decretal order dated 30.09.2016 in FC IDOP No.1 of 2016 on the file of the learned Judge, Family Court, Dharmapuri.

For Appellant : Mr.R.Selvakumar

For Respondent : No appearance

JUDGMENT

(Judgment of this Court was made by T.RAJA,J.)

This appeal has been directed against the impugned fair and decretal order dated 30.09.2016 passed by the learned Judge, Family Court, Dharmapuri in FC IDOP No.1 of 2016 dismissing the prayer of the appellant husband for grant of divorce under Section 10(1)(x) of the Indian Divorce Act 1869.

2.Mr.R.Selvakumar, learned counsel appearing for the appellant husband, assailing the impugned order, refusing to grant divorce, pleaded that after solemnisation of marriage between the appellant and the respondent on 18.10.1999 as per the Christian rites and customs, they were blessed with a male child namely, M.Infent Bosco. Due to difference of opinion arose between themselves, without even adjusting the family problems which are frivolous in nature, the respondent wife filed a petition in FC IDOP. No.1 of 2014 seeking divorce under Section 10(1)(ix) and (x) of the Indian Divorce Amendment Act citing two grounds namely, desertion that had occurred in the year 2011 and



cruelty, said to have caused to her by the husband appellant herein. However, the Family Court, Dharmapuri, finding no merits whatsoever, rejected the petition filed by the respondent wife for grant of divorce vide order dated 22.06.2015. After dismissal of the FC IDOP No.1 of 2014 filed by the respondent wife, she did not come back to the matrimonial home to lead a family life. Thereafter, though both of them filed petitions seeking restitution of conjugal rights, they have not come forward to prosecute their cases, as a result, both the petitions were dismissed for non prosecution. Since there was no compromise or re-union from the side of the respondent wife, the husband appellant has filed FC IDOP No.1 of 2016 under Section 10(1)(x) of Indian Divorce Act 1869 for dissolution of marriage before the Family Court, Dharmapuri and the respondent wife filed a counter affidavit, surprisingly, taking a stand that she agreed for divorce subject to condition that her jewellery and articles, lying at the hands of the appellant, have to be returned.

3.Learned counsel appearing for the appellant further submitted that when the respondent wife has approached the Family Court, Dharmapuri even in the year 2014, after giving birth to a male child on 16.10.2007, the appellant husband, by way of filing a written statement, contested the petition for grant of divorce. After dismissal, finding no response whatsoever from the respondent wife for re-union, the appellant husband has filed the FC IDOP No.1 of 2016 seeking divorce, in which, respondent wife has filed a counter affidavit stating that she was agreeable for divorce only on payment of Rs.20,00,000/- towards permanent alimony and also on return of 15 sovereigns of gold jewels belonging to her, Rs.1,00,000/- given towards marriage expenses and Rs.47,000/- given for purchase of bike. When there was no proof for giving such amount and jewellery, the question of return could not arise. Moreover, when the respondent wife has been living separately from the year 2011 that could be seen from the petition filed by the respondent in the FC IDOP No.1 of 2014 and also seen from the counter filed by the respondent wife in the FC IDOP No.1 of 2016 before the Family Court, Dharmapuri, it goes without saying that they were not living together for more than a decade. But the Family Court overlooking the above facts, has dismissed the petition filed by the appellant.

4.Learned counsel appearing for the appellant, by way of filing additional typed set, has placed on record salary certificates issued to the respondent wife for the months of November and December 2020 and January 2021 stating that she is working as a Secondary Grade Assistant in R.C.Fathima Primary School, Kethanahalli, Dharmapuri District and drawing a net salary of Rs.51,834/-.



5. Though notice has been served on the respondent and name of the respondent has been printed in the cause list, there is no appearance on her behalf, which shows that she is not willing to prosecute the case.

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6. In the normal course of hearing, though we could have refused to receive such documents, which are not produced before the Trial Court and the same are also not presented under Order XLI Rule 27 of C.P.C. which provides for Production of additional evidence in Appellate Court, we are inclined to receive the additional typed set filed by the appellant, since no purpose would be served by directing the appellant to move an application that would also cause further delay in disposing the matter and also in the absence of the respondent wife.

7. As rightly canvassed by the learned counsel for the appellant, even in the year 2014, the respondent wife had moved a petition in FC IDOP No.1 of 2014 for grant of divorce under Section 10(1)(ix) and (x) of the Indian Divorce Amendment Act before the Family Court, Dharmapuri. Secondly, before filing of the FC IDOP. No.1 of 2014 by the respondent wife, both the parties have independently moved applications seeking restitution of conjugal rights, but, for the reasons best known to them, they did not prosecute the matter and they are not willing to go for re-union. Thirdly, even after the dismissal of the FC IDOP No.1 of 2014 on 22.06.2015, they have not come forward to lead a fresh matrimonial life. Therefore, the husband appellant herein has moved before the Family Court, Dharmapuri in FC IDOP No.1 of 2016 seeking dissolution of marriage.

8. Learned counsel for the appellant substantiated his argument that after birth of their son on 16.10.2007, they were not living together and that the respondent wife is working as a Secondary Grade Assistant in R.C.Fathima Primary School, Kethanahalli, Dharmapuri District and drawing a net salary of Rs.51,834/-. Therefore, the conduct of the respondent clearly shows that she has deserted the matrimonial home even in the year 2011. The reason being that we are able to see from the records that both of them filed petitions seeking restitution of conjugal rights in FC IDOP Nos.3 and 4 of 2012 that goes without saying that when they were living separately, they approached the Court independently seeking restitution of conjugal rights. Subsequent to the dismissal of the FC IDOP No.1 of 2014, the appellant husband has filed FC IDOP No.1 of 2016, which clearly shows that they are not living together. Therefore, the learned counsel for the appellant argued that due to desertion, the appellant has been put to face mental cruelty, but, this has been overlooked by the Family Court, Dharmapuri.

9. When the marriage took place on 18.10.1999, after a gap



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of nearly 7 years, a male child was born on 16.10.2007. When the husband started showing his grievance that his wife declined to perform her conjugal rights, the respondent wife left the matrimonial home during the year 2011. Thereafter, even consistent efforts were taken by the husband for reunion, they went in vain and resultantly, he has been subjected to mental agony and torture. Again when he moved FC IDOP. No.4 of 2012 for restitution of conjugal rights, the same was dismissed for non prosecution, due to her assurance to rejoin the matrimonial life, but, she filed FC IDOP. No.1 of 2014 for dissolution of marriage. Due to refusal for performing her conjugal rights by leaving the matrimonial home in 2011, he has been put to mental cruelty.

10.The Apex Court, also, while defining as to what is 'mental cruelty', stated that the feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty. In the present case, we are able to see that from the year 2011 onwards, due to mental cruelty caused by the respondent wife in not performing the conjugal rights, the appellant was put to deep anguish, disappointment, frustration for a long time. Therefore, we are of the considered opinion that it is a fit case for grant of divorce on the ground of cruelty. In this regard, it is useful to refer the judgment of the Apex Court reported in (2007) 4 SCC 511 in the case of Samar Gosh vs. Jaya Gosh as under:

'101.No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i)On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii)On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clearly that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

..

(iv)Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.'



9.A perusal of the above judgment shows that the feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty. As rightly argued by the the learned counsel for the appellant that due to desertion, the appellant has been put to face mental cruelty. But such a vital aspect has been overlooked by the Family Court in not considering the petition filed by the appellant seeking dissolution of marriage. Therefore, we are inclined to dissolve the marriage solemnised on 18.10.1999 between the parties and the same is dissolved and the fair and decretal order dated 30.09.2016 passed by the Family Court, Dharmapuri is set aside. Accordingly, the appeal stands allowed. No costs.

Sd/-
Assistant Registrar(JJ Act)

//True Copy//

Sub Assistant Registrar

vga

To

1. The Judge,
The Family Court, Dharmapuri.
2. The Section Officer,
V.R.Section,
High Court, Madras.

+1cc to Mr.R.Selvakumar, Advocate, S.R.No.11775

C.M.A. No.2811 of 2016

AD(CO)
RGA(19/11/2021)