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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.03.2021

CORAM :

THE HONOURABLE MR.JUSTICE N.KIRUBAKARAN
and
THE HONOURABLE MR.JUSTICE ABDUL QUDDHOSE

C.M.A.No.2192 of 2017

Settu
S/o. (Late) Muhmmmed Sayed
Muslim,
Aged about 47 years
Residing at D.No.25, Periyar Nagar
Harur Town & Taluk
Dharmapuri District ... Appellant/Petitioner

Vs

Reshma Sulthana
D/o.Late Basha Sahip
W/o.Settu
Muslim, Aged about 40 years
Residing at D.No.14, 3rd Cross, 1st Main
JJR Nagar,
Goripalayam, Bangalore - 18. ... Respondent/Respondent

PRAYER: Civil Miscellaneous Appeal filed against the order passed by the Family Court, Dharmapuri in F.C.MMOP.No.01/2017 dated 28.02.2017.

For Appellant : Mr.P.Paramasivadoss

For Respondent : No Appearance

Amicus Curiae : Mr.Ajmal Khan, Senior Counsel

J U D G M E N T

The appeal has been preferred by the Husband against the dismissal of his petition filed for dissolution of his marriage with the respondent under Section 2(8) of Dissolution of Muslim Marriage Act by the Family Court. The appellant got married the



respondent on 13.08.1998 at Bangalore and out of the wedlock, two children were born to the couple. The appellant was working at Qatar and out of his earnings, he had purchased a house property at Bangalore in which the respondent was living with their children. When things stand so, the appellant came to know through his daughter that the respondent was having many boyfriends and leading a wayward, illegal and immoral life. In spite of the warnings given by the appellant/husband, the respondent continued her relationship with her boyfriends. Left with no other option, the appellant returned to India. However, to his shock and surprise, the respondent got married their daughter, who was a minor then, to a person who was a tenant in the appellant's premises without the knowledge of the appellant. In this regard, a police complaint was also given.

2. Thereafter, the appellant brought his son to his native Harur and admitted him in the local school. As the best efforts taken by the appellant to get reunited with the respondent proved to be futile and the request made to the family members of the respondent did not yield expected results, the appellant issued a notice dated 22.04.2016 through the Government Khazi, Dharmapuri asking his wife to come and live with him.

3. In spite of receiving the said notice, neither the respondent got reunited with the appellant nor sent a reply to the said notice. Therefore, as per muslim religious customs, first talaq notice was issued on 05.05.2016. As no reply was received for the said notice from the side of the respondent, second and third talaq notices were issued 04.06.2016 and 12.07.2016 respectively calling for the respondent to appear before the Government Khazi, Dharmapuri. Since the respondent was able to evade receipt of notice, the Government Khazi, Dharmapuri issued the talaq certificate on 15.09.2016. On receipt of the said certificate, the appellant/husband approached the Family Court at Dharmapuri and filed a petition for divorce under Section 2(viii)(a) of Dissolution of Muslim Marriages Act, 1939. Though summons in the said OP was served on the respondent, she remained ex parte. After examining the appellant/husband and marking the documents Ex.P.1 to P.9, the learned Family Judge dismissed the petition on the ground that the petition is not maintainable by the Husband under the provisions of Dissolution of Muslim Marriages Act, 1939 and only the muslim women married under the muslim law is having the right to get the marriage dissolved under the said Act. The said dismissal of divorce petition filed by the appellant/husband is being challenged before this Court by way of this appeal.



4. Even though notices were sent to the respondent in this Appeal, the same were refused to be received by the respondent and therefore, this Court took the refusal as sufficient service of notice on the respondent. Since the issue regarding the right of the Husband to invoke the provisions of Dissolution of Muslim Marriages Act, 1939 to dissolve the marriage arose in this appeal, this Court requested Mr. Ajmal Khan, learned Senior Counsel to assist this Court as Amicus Curiae.

5. Heard Mr. P. Paramasivadosh, learned counsel for the appellant and Mr. Ajmal Khan, learned Amicus Curiae.

6. Mr. P. Paramasivadosh, learned counsel for the appellant would submit that the petition is maintainable before the Family Court and the provisions of Dissolution of Muslim Marriages Act, 1939 can be invoked to dissolve the marriage. The right available to the Muslim women under the said Act is equally applicable to the Husband and hence, the learned counsel for the appellant would seek to allow the appeal.

7. Mr. Ajmal Khan, learned Senior Counsel and Amicus Curiae would submit that as per the provisions of the Dissolution of Muslim Marriages Act, 1939 only the wife alone can maintain the application as there is no right available for the Muslim women under any other Act to get the marriage dissolved in case she is subjected to cruelty or any other grounds. It is the right given to the Muslim women to safeguard their rights and also to get rid of failed marriage. The learned Amicus would rely on the judgment of the Kerala High Court in the case of K.C. Moyin v. Nafeesa and others reported in AIR 1973 Kerala 176. He would rely upon paragraphs 5 to 13 of the said decisions and much emphasis was placed on paragraph 13 wherein the judgment of the Hon'ble Apex Court was referred to in which it has been specifically stated that once an enactment comes into existence laying down the principles of law governing rights of parties, it is not permissible for Courts to travel behind it or for the parties to avoid it. The rights of Muslim women to obtain divorce from their husbands have been codified by the Act and it is not permissible to travel beyond it and decide the rights of parties.

8. The Amicus Curiae would submit as the law stands as on date, the Husband cannot invoke the provisions of Dissolution of Muslim Marriages Act, 1939 and therefore the order passed by the Family Court, Dharmapuri cannot be found fault with.

9. The facts of the case would reveal that the Husband has



categorically stated in his evidence as well as in the notices issued to the respondent that the respondent has been leading an immoral life and causing mental cruelty to the appellant. The respondent has neither replied nor contested the allegations made in the divorce petition. By the act of the respondent, the rights of the appellant/husband have been violated and the respondent has not acted as per the tenets of muslim religion. Further, the respondent had conducted the marriage of their daughter who was studying 11th standard at the time of marriage without the knowledge of the appellant. Keeping the appellant in dark and getting his daughter married really shocks the conscience of this Court. When the father is alive, he is bound to celebrate the marriage of his daughter or atleast he is entitled to be informed about the celebration of the marriage. This itself would prove the conduct of the respondent herein.

10. Though Ex.P.3/Notice was given giving the details which was acknowledged by the respondent, no reply was received from the respondent. The Ex.P5/First talaq Notice dated 05.05.2016, though was received by the respondent, she has not replied to the same. Ex.P.7/Second talaq Notice dated 04.06.2016 and Ex.P.8/Third talaq Notice dated 12.07.2016 have not been received by the respondent deliberately. In spite of receipt of summons in the divorce OP filed by the appellant before the Family Court, Dharmapuri, the respondent/wife remained exparte. Therefore, it is evident that the respondent has intentionally avoided to appear before the Government Khazi or Family Court or even before this Court. On the other hand, there is no contra evidence available to the case of the appellant. Therefore, it is deemed that the respondent had admitted the case of the appellant. In normal circumstances, the Family Court or Civil Court would pass exparte decree. In this case, even though the respondent remained exparte, the Court below dismissed the petition on the ground that the Husband cannot maintain the petition under the provisions of the Dissolution of Muslim Marriages Act, 1939.

11. As the Family Court dismissed the case on the ground that the husband cannot invoke the Act, it is appropriate to consider the object of the Act. The object of Dissolution of Muslim Marriages Act, 1939 is usefully extracted hereunder:-

"Statement of Objects and Reasons.-There is no proviso in the Hanafi Code of Muslim law enabling a married Muslim woman to obtain a decree from the Court dissolving her marriage in case the husband neglects to maintain her, makes her life miserable by deserting or persistently maltreating her or absconds leaving



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her unprovided for and under certain other circumstances. The absence of such a provision has entailed unspeakable misery to innumerable Muslim women in British India. The Hanafi Jurists, however, have clearly laid down that in cases in which the application of Hanafi law causes hardship, it is permissible to apply the provisions of the "Maliki, Shafi's or Hambali law". Acting on this principle the Ulemas have issued fatwas to the effect that in cases enumerated in clause 3, Part A of this Bill a married Muslim woman may obtain a decree dissolving her marriage. A lucid exposition of this principle can be found in the book called "Heelatum Najeza" published by Maulana Ashraf Ali Sahib who has made an exhaustive study of the provisions of Maliki law which under the circumstances prevailing in India may be applied to such cases. This has been approved by a large number of Ulemas who have put their seals of approval on the book."

British Regime passed "the Dissolution of Muslim Marriages Act, 1939" only to give relief to muslim women who are all undergoing untold misery and harassment in the hands of the Husband. As there was no other Act available for them, the above Act was passed. From the object of the Act, it is very clear that it is only intended for muslim women.

12.However, the instant case on hand would show as to how the Husband is being harassed by wife not only by her conduct but also by non-participation in the case. In spite of following the Muslim religious practices/methods by the appellant by giving Ex.P.3/Khazi Notice, Ex.P5/First talaq Notice dated 05.05.2016, Ex.P.7/Second talaq Notice dated 04.06.2016 and Ex.P.8/Third talaq Notice dated 12.07.2016, the respondent/wife never bothered to appear before the Khazi. Thereafter only, Ex.P.9/talaq certificate was issued by the Government Khazi, Dharmapuri on 15.09.2016.

13.Considering the present position of law that the certificate issued by the Government Khazi is only an opinion as held by the Hon'ble Apex Court in the decisions reported in (2014) 10 Supreme Court Cases 736, Juveria Abdul Majid Patni v. Atif Iqbal Mansoori and Another; (2014) 7 Supreme Court Cases 707, Vishwa Lochan Madan v. Union of India and others and he cannot assume the role of the Court, the appellant approached the Family Court at Dharmapuri. However, the Family Court, Dharmapuri dismissed the said petition on the ground that the



provisions under the Dissolution of Muslim Marriages Act, 1939 cannot be invoked by the Husband. No doubt as per Dissolution of Muslim Marriages Act, 1939 the Husband cannot invoke the provisions, but the facts of the case would reveal that inspite of making all sincere efforts to get the marriage dissolved, the same has failed only due to the absence of any provisions under the Act. Even if no provision is available under the Act, the Family Court should have decided the matter and granted the decree of Divorce by invoking Section 7(1)(b) of the Family Courts Act. Section 7 of the Family Courts Act, 1984 is usefully extracted hereunder:-

"Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall-

(a) have and exercise all the jurisdiction exercisable by any district Court or any subordinate civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred in the Explanation; and

(b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a district Court or, as the case may be, such subordinate civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

(a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;

(b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;

(c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;

(d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;

(e) a suit or proceeding for a declaration as to the legitimacy of any person;

(f) a suit or proceeding for maintenance;

(g) a suit or proceeding in relation to the guardianship of the person or the custody of,



or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

(a) the jurisdiction exercisable by a Magistrate of the first class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1972 (2 of 1974); and

(b) such other jurisdiction as may be conferred on it by any other enactment.

From the above, it is very clear that the Family Courts shall have jurisdiction for the purposes of exercising such jurisdiction under such law, to be a district Court or subordinate civil Court to which the jurisdiction of the Family Court extends. The suits and proceedings referred to under sub-section 7(1)(a)(b) includes all the suit or proceeding between the parties to a marriage for a decree of nullity of marriage or restitution of conjugal rights or judicial separation or dissolution of marriage. Explanation (a) to Section 7(1)(b) of the Family Courts Act categorically states that all cases seeking dissolution of marriages can be decided by the Family Courts Act. Therefore, the Family Court, Dharmapuri should have decided the matter under the Family Courts Act, 1984 especially in the light of Explanation to Section 7(1)(b) of the Act.

14. Mere absence of any provision in the Dissolution of Muslim Marriages Act, 1939 cannot dis-entitle the appellant from seeking dissolution of marriage under the common law or under the Special Act namely, The Family Courts Act, 1984.

15. Having failed in his attempt to give talaq by following the procedures as per the muslim religious practices, the appellant rightly approached the Family Court. No doubt, the above Act cannot be invoked by the Husband. However, when the husband is left with no other option except to approach the Family court, the Court should have invoked and granted relief to the appellant in the light of Explanation to Section 7(1)(b) of the The Family Courts Act, 1984. No persons should go without any relief merely because the subject Act does not provide for seeking divorce by a Muslim husband though he is otherwise entitled to under personal laws for the very same reason. In those circumstances, only the provisions of the Family Courts Act, 1984 have to be invoked. The Family Court should have held that the Husband cannot invoke the provisions of Dissolution of Muslim Marriages Act, 1939 and further the Family Court should have considered the case of the appellant



based on evidence under Section 7(1)(b) of the Family Courts Act, 1984.

16. In this case, the appellant sought talaq for reasonable cause and he made genuine attempt through Government Khazi, Dharmapuri by issuing notice calling for the respondent for counseling. As the efforts failed, three talaq notices were issued as per the time prescribed under the muslim religious practices and as the same did not evoke any response, the appellant had rightly approached the Family Court at Dharmapuri. From the facts of the case, it is very clear that the appellant is entitled for dissolution of marriage with the respondent because of the immoral lifestyle of the respondent which has not been countered by her when it has been pointed out clearly in Ex.P.3/Khazi Notice and other notices. Furthermore, even the talaq pronounced by the appellant is in consonance with the provisions of the Muslim Women (Protection of Rights on Marriage) Ordinance, 2018, as the appellant has pronounced the talaq at right intervals after issuing notices, whereas only the pronouncement of talaq having the effect of instantaneous and irrevocable divorce pronounced by a Muslim husband is barred by law. Hence, the dismissal of divorce petition by the Family Court is set aside and the decree of dissolution of marriage is granted as prayed for by the Appellant.

17. Further, the invocation of incorrect provisions of law is not fatal to the proceedings and it is always open to the Court to invoke the Correct provisions of law and grant relief to the parties. Therefore, the prayer sought for by the appellant is granted and the appellant is entitled to get a decree of dissolution of marriage solemnized between the appellant and the respondent on 13.08.1998.

18. Due to the change in circumstances, the Government has come out with an Act called "The Muslim Women (Protection of Rights on Marriage) Ordinance, 2018". By the said Act, the pronouncement of triple talaq at a time has been prohibited and made criminal offence. The pronouncement of triple talaq should be as per the religious practices by giving notice and thereafter by arbitration by two persons in the presence of Khazi and on failure only, the talaq would take effect as per the muslim religious practices. The Dissolution of Muslim Marriages Act, 1939 was enacted by the British India regime as colonial legislation to safeguard the interest of the women. The perception of understanding of life and religious practices on personal laws got changed and many muslim men are approaching the Court for dissolution of marriage as in the present case on



hand. Therefore, apart from religious practices, people should have additional forum through Court.

19.If any muslim man wants to get a decree of divorce or dissolution of marriage by coming to the Court, he should have the support of the statute. The Government should encourage people coming to the Court for dissolution of marriage especially Muslim men. It should not be mistaken that the Courts are interfering with personal laws. Options should be available to the people to get relief either to follow religious practices or through Courts. Getting relief through Court is in addition to the procedure laid down as per religious practices. The traditional barriers can be broken only by allowing the muslim men to approach the Court

In fine, the Civil Miscellaneous Appeal stands allowed and the dismissal of divorce petition by the Family Court is set aside and the decree of dissolution of marriage is granted. No costs.

Sd/-
Assistant Registrar(AS)

//True Copy//

Sub Assistant Registrar

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TO

1.The Judge,
Family Court,
Dharmapuri.

2.The Section officer,
VR Section, High Court,
Madras.

+1cc to Mr.J.Pradeep, Advocate SR.No.21159

C.M.A.No.2192 of 2017

KK(CO)
GN(09/12/2021)