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IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGEMENT RESERVED ON: 08.03.2022

JUDGEMENT PRONOUNCED ON : 30.03.2022

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM

AND

THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

C.M.A.NOS.2463 AND 2464 OF 2016

AND C.M.P.NO.17373 OF 2016

Major Frank Ralston Samuel Raj

.. Appellant in both Appeals

vs.

Kezia Padmini Swarna Pandian

...Respondent  
in both Appeals

Common Prayer:

Civil Miscellaneous Appeals filed under Section 28 of the Hindu Marriage Act, to set aside the judgment and decree dated 20.09.2016 in O.P.Nos.648 of 2009 and 3497 of 2015 on the file of the II Additional Family Court, Chennai.

For Appellant in both Appeals : Mr.Sanjay Ramasamy

For Respondent in both Appeals : Mr.V.J.Narendiran

COMMON J U D G M E N T

V.SIVAGNANAM, J.

The Appellant Major Frank Ralston Samuel Raj who is the husband of the respondent filed O.P.No.648 of 2009 for dissolution of marriage, whereas the respondent Kezia Padmini Swarna Pandian who is the wife of the appellant filed O.P.No.3497 of 2015 before the II Additional Family Court, for restitution of conjugal rights.



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2. After hearing both parties, the trial Court, by its common order dated 20.09.2016 had dismissed the petition filed by the husband/appellant herein and allowed the petition filed by the wife/respondent herein.

3. Challenging the common order passed by the learned II Additional Family Court, Chennai, the appellant has filed the Civil Miscellaneous Appeals to set aside the order of the Family Court rejecting the petition filed for dissolution of marriage and to set aside the order allowing the petition filed for the restitution of conjugal rights.

4. The learned counsel for the appellant submitted that the marriage of the appellant and the respondent was solemnized on 26.10.2007 at CSI St.George Cathedral Church, Chennai. The appellant is working as a Major in Indian Army and the respondent is a house wife. The appellant and respondent had the first night programmed at Hotel GRT Grand, Chennai. But, unfortunately, the respondent avoided the sexual act/coitus. On the next day, the appellant and the respondent went to the respondent's house, that night also she refused the coitus under the guise of tiredness and the next day they went to the appellant's house at Anna Nagar. But, that night also she refused on the same reason.

5. He further added that on 29.10.2007 the appellant took his wife to Andaman and Nicobar Island for honeymoon and stayed there for seven days. In all those days, the respondent refused to share the bed and avoided coitus with the appellant. The appellant and the respondent returned to Chennai on 04.07.2007 here also the respondent refused coitus with the appellant. It is further contended that from the date of marriage the respondent was not inclined to have conjugal relationship with the appellant and postponing their coitus for one reason or the other. It continued for about five months and then, the appellant advised the respondent to go for a medical check up, for which the respondent refused. Thereafter, the respondent intentionally avoided the appellant and stayed in her brother's place. Thereafter, the respondent refused to join matrimonial home. The appellant lastly approached the Family Court for divorce on the ground of willful refusal to consummate the marriage and cruelty. The respondent after appearance in the proceedings filed application seeking maintenance till the disposal of the petition and also filed O.P.No. 3497 of 2015. The respondent sent letters to Army Wives Welfare Association and other senior Army Officer to degrade the reputation of the



appellant. The activities of the respondent had created severe hardship and mental agony to the appellant.

6. According to the learned counsel, the acts would clearly amount to cruelty. The marital life of the appellant has been totally spoiled and the marriage has been irretrievably broken down between the appellant and the respondent. There is absolutely no emotional bond between the appellant and the respondent and no scope for reconciliation. But, the family Court failed to appreciate the evidence and the fact properly. He reiterated other grounds raised in the grounds of appeal and pleaded to set aside the order passed by the family Court for restitution of conjugal rights in O.P.No.3497 of 2015 and grant decree of divorce. By allowing both the appeals. The learned counsel for the appellant in support of his argument placed reliance on the following decisions reported in Naveen Kohli v. Neelu Kohli [(2006) 4 SCC 558] and Beena M.S. V.Shino G.Babu, [2022 SCC online Ker 778].

7. The learned counsel for the respondent supported the order of the trial court. It is his submission that the respondent is willing to live with her husband. The appellant and the respondent tried to consummate the marriage, but could not do so due to premature ejaculation of her husband. The appellant, was unable to consummate the marriage There is no fault on the respondent. The respondent co-operated with her husband and consulted gynecologist available at the Army. The appellant intentionally deserted the respondent and left her in her brother's house. The respondent tried to contact him but she failed. Thereafter, she approached the Army Wives Welfare Association seeking their assistants for reunion. The appellant cannot be allowed to take advantage of his own wrong and it is not the case that the marriage is irretrievably broken down. The appellant alone without any reason separated from her and lived. Thus, he prayed to uphold the order of the Family Court. In support of his argument he placed reliance upon the judgement of the Hon'ble Supreme Court in the case of Chetan Dass Vs. Kamla Devi [2001 4 SCC 250].

8. We have considered the rival submissions made by the learned counsel for the parties and perused the available materials on record.

9. The fact that the marriage of the appellant and the respondent was solemnized on 26.10.2007 at CSI St.George Cathedral Church, Chennai is admitted. The parties celebrated



their first night function at Hotel GRT Grand Chennai. Thereafter, on 29.10.2007, the appellant and respondent went to Andaman Nicobar Island for honeymoon. Thereafter, they stayed at the respondent's house for some period.

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10. According to the appellant, the respondent willfully refused to cooperate with him and the marriage has not therefore been consummated and thereby, the respondent caused mental cruelty to the appellant. After the marriage, lived together for some days and thereafter they are living separately. The respondent wrote a letter to Army Wife's Welfare Association and other Army Officers with false and defamatory allegations. It also caused mental cruelty to the appellant.

11. Before the Family Court, the appellant examined himself as P.W.1 and marked 8 documents. The respondent examined herself as R.W.1 and produced 12 documents. The medical reports of the appellant and the respondent were marked as Ex.C.1 and C.2.

12. We have gone through the oral and documentary evidence. From a perusal of the same, the fact discloses that this substantial allegation by the appellant against the respondent is non consummation of marriage owing to the non co-operation to the respondent and her letter to the Army Officers and Army Wife Welfare Association defaming his reputation both these activities caused mental cruelty to the appellant.

13. The appellant deposed by filing affidavit in para Nos.7, 8 and 10, allegations of the appellant runs as follows:

''7. I state that the first night ceremony was organized by my parents at G.R.T.Grands Days, Chennai, and was so eagerly waiting for the happy moment of my life and to my anguish the marriage was not Consummated on the marriage day and on the 28.10.2009 also the respondent avoided saying that she is very tired and they have to catch the flight for Honey Moon to Andaman Nicobar Islands early in the morning.

8. I state with heavy heart that during Honey moon at Andaman Islands for seven days the respondent never showed any interest in matrimonial life and no cohabitation.

10. As my leave came to an end I took the



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respondent to Ahmed Nagar on 22.11.2001 the work place of mine and there also same excuse for sexual intercourse married for 26 days and the marriage was consummated so I, requested the respondent to get a medical check about her physical condition the respondent's reply was we will ADOPT A CHILD and that gave a great shock as I dreamed to have children of our own.

The appellant had reiterated the allegations in the petition by way of evidence.

14. The respondent denied the allegation of the appellant. The respondent gave evidence through proof affidavit. She deposed that the appellant tried to consummate the marriage but he could not successfully penetrate her though she was co-operative and further, she admitted that there was no communication between the appellant and the respondent since mid of December 2008 and she did not deny the coitus to the appellant and hence he cannot blame her. The evidence runs as follows:

'22. I state that the respondent did try to consummate the marriage but the respondent could not successfully penetrate her, though she was co-operative and she had asked him that they should consult a gynecologist or doctors as many are available in the army, but the respondent, for the reasons best known to him choose to keep the issue private or wantonly resisted from getting medical advise.

23. I state that there was no communication between the petitioner and the respondent since mid of December 2008 and she did not deny sexual intercourse to the respondent and he cannot blame or accused her for his reluctance.'

15. From the above said evidence of the respondent, both the parties leveled reciprocal accusation for non consummation of the marriage.

16. We have gone through the Medical Evidence and Medical Report. Medical Report have filed as Ex.C1 and C.2. In the Medical Report of the C1 Doctor opined that the appellant has no abnormality of his potency state as per the clinical examination



and investigation his potency appears to be normal. However, selective impotence cannot be ruled out. It runs as follows:

''138,. He has no abnormality of his potency state. As per clinical examination and investigation his potency appears to be normal. However, selective impotence cannot be ruled out.''

17. On perusal of Ex.C.2 Medical Report of the respondent, the report says she is fit for marital life and further stated her vulvo normal, hymen does not appear to be torn. The report runs as follows:

''EXTERNAL GENITALIA - vulvo Normal, Hymen does not appear to be torn.''

18. On Perusal of the above said Medical Reports, the fact of non consummation of marriage between the parties is corroborated and supported.

19. From the above said oral and documentary evidence, it is clear that from the date of marriage viz., on 26.10.2007 till the filing of the petition for divorce in the year 2009, the marriage was not consummated. It is established through medical evidence of the respondent that she is still virgin. This conclusive fact would establish that the marriage of the appellant and respondent had not been consummated.

20. In this case, both the parties have made reciprocal accusations against each other. According to the appellant, non consummation of marriage was due to willful refusal of his wife. According to wife, it was owing to the incapacity of the appellant to penetrate. Under these circumstances, it is clear that these spouses are unable to consummate the marriage due to practical impossibility to perform sexual act in a complete and perfect manner. Thus, there is absolutely no emotional bond between the appellant and the respondent. As per Section 10 of Indian Divorce Act 1869, marriage can be dissolved by decree of divorce on a petition presented either by the husband or the wife on the ground that the other party as after the solemnization of the marriage not co-operated to consummate the marriage and the marriage has not therefore been consummate is entitled for divorce.



21. The Hon'ble Supreme Court in the case of Naveen Kohli Vs. Neelu Kolhi [(2006) 4 SCC 558], has held as follows:-

"83. Even at this stage, the respondent does not want divorce by mutual consent. From the analysis and evaluation of the entire evidence, it is clear that the respondent has resolved to live in agony only to make life a miserable hell for the appellant as well. This type of adamant and callous attitude, in the context of the facts of this case, leaves no manner of doubt in our minds that the respondent is bent upon treating the appellant with mental cruelty. It is abundantly clear that the marriage between the parties had broken down irretrievably and there is no chance of their coming together, or living together again.

84. The High Court ought to have appreciated that there is no acceptable way in which the parties can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

85. Undoubtedly, it is the obligation of the court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and



potentially more prejudicial to the public interest than a dissolution of the marriage bond.

87. The High Court ought to have visualised that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

88. The High Court ought to have considered that a human problem can be properly resolved by adopting a human approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life. "

22. The Division Bench of Kerala High Court in the case of Beena Vs. Shino G.Babu [2022 SCC online Ker 778], following the decisions of the Hon'ble Apex Court in the case of Naveen Kohli Vs. Neelu Kohli (supra) and in the case of Samar Ghosh Vs. Jaya Ghosh [(2007) 4 SCC 511], has held as follows:-

5. .... The Apex Court in Naveen Kohli v. Neelu Kohli [(2006) 4 SCC 558], opined that if the parties cannot live together on account of obvious differences, one of the parties is adamant and callous in attitude for having divorce on mutual consent, such attitude can be treated as the cause of mental cruelty to other spouses. The Apex Court in Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511] also considered such act as cruelty in the following words:

"Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."



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6. The law on divorce recognises both fault and consent as a cause for separation. When both the parties are unable to lead a meaningful matrimonial life due to inherent differences of opinion and one party is willing for separation and the other party is withholding consent for mutual separation, that itself would cause mental agony and cruelty to the spouse who demands separation. The purpose of marriage is to hold matrimonial ties lifelong, respecting mutual obligations and rights. The companionship of spouses creates oneness of the mind to walk together. It is through mutual respect and courtship, the companionship is built and fortified. The modern jurisprudence of irretrievable break down to allow divorce is premised on the fact that the spouses can never remain together on account of their differences. If the court is able to form an opinion that due to incompatibility, the marriage failed and one of the spouses was withholding consent for mutual separation, the court can very well treat that conduct itself as cruelty. If one of the spouses is refusing to accord divorce on mutual consent after having convinced of the fact that the marriage failed, it is nothing but cruelty to spite the other spouse. No one can force another to continue in a legal tie and relationship if the relationship deteriorated beyond repair. The portrayal of such conduct through manifest behaviour of the spouse in a manner understood by a prudent as 'cruelty' is the language of the lawyer for a cause before the court. This case is also not different. The behavioural disorder pointed out against the appellant in the petition for divorce was essentially reflection of incompatibility that existed between the parties. The husband wants to get out of the struggled relationship, on the projected cause of cruelty with reference to the incidents of misbehaviour. Incompatibility is a factor that can be reckoned while considering the ground for cruelty, if one of the spouses withholds the consent of mutual separation, though incompatibility is not recognised as ground for divorce.

7. The parties are young. They are living separately since 2017. We, in such circumstances, are of the view that for the reasons stated above, the order of the Family Court granting divorce has to be sustained."



23. In the decision cited by the learned counsel appearing for the respondent in Chetan Dass Vs. Kamala Devi (supra), the husband was found to be living in adulterous life and he sought for dissolution of marriage on the ground of desertion. In such fact situation, the Hon'ble Apex Court has held that where a party seeking divorce is found in the course of judicial proceedings to have committed matrimonial offences (adultery), and he failed to establish the allegations, a decree of divorce on the ground of irretrievable breakdown of marriage cannot be granted. It is further held that erring party cannot be permitted to break the marital bond by taking advantage of his own wrong. So, the decision has no relevance to the facts of this case and it won't advance the case of the respondent.

24. In the instant case, indisputably the parties are living apart for more than fifteen years. The endeavour to bring re-conciliation between the parties failed, resultantly, the marriage is dead, both emotionally and practically. Continuance of the relationship for namesake is prolonging the agony and affliction would be a cruelty to both the parties. Therefore, we are of the considered opinion that the marriage between the parties has broken down irretrievably and the parties could no longer live together as husband and wife.

25. It is well settled law that a spouse willfully avoiding the another spouse to have sexual intercourse without sufficient reason, the act would amount to mental cruelty to such spouse. The principle has been reiterated by the Hon'ble Apex Court in Vidhya Viswanathan Vs. Kartik Balakrishnan [2014 (15) SCC 21], which is extracted infra:-

"12. Undoubtedly, not allowing a spouse for a long time to have sexual intercourse by his or her partner, without sufficient reason, itself amounts to mental cruelty to such spouse. A Bench of three Judges of this Court in Samar Ghosh v. Jaya Ghosh [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511] has enumerated some of the illustrations of mental cruelty. Para 101 of the said case is being reproduced below: (SCC pp. 546-47)

"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





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(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty."

26. In the light of the decisions referred supra and considering the facts and circumstances of the case, we are of the opinion that the order of the Family Court could not be countenanced and they are liable to be set aside. Therefore, both the appeals are allowed and the marriage solemnized between



the appellant and the respondent on 26.10.2007 is hereby dissolved. No Costs. Consequently, connected miscellaneous petition is closed.

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Sd/-  
Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

vsn

To

The II Additional Family Court, Chennai.

+3ccs to Mr.Sanjay Ramasamy, Advocate, S.R.No.21541, 21241  
+2ccs to Mr.V.J.Narendiran, Advocate, S.R.No.21427, 21481

C.M.A.Nos.2463 and 2464 of 2016  
and C.M.P.No.17373 of 2016

SPD(CO)  
PM/13/04/2022