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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 10.03.2022

CORAM

THE HONOURABLE MR.JUSTICE K.KALYANASUNDARAM
and
THE HONOURABLE MR.JUSTICE V.SIVAGNANAM

C.M.A.No.500 of 2022

A.C.Sudhakar .. Appellant / Respondent

vs.

Vinaya ... Respondent / Petitioner

Prayer: Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act, to set aside the judgment and decree dated 17.12.2021 in H.M.O.P.No.1133 of 2015 on the file of the Principal Judge, Principal Family Court, Coimbatore, by allowing this Civil Miscellaneous Appeal.

For Appellant : Mr.N.Manoharan

J U D G M E N T

[Judgment of the Court was made by V.SIVAGNANAM, J.]

This Civil Miscellaneous Appeal arises against the order of the Family Court, Coimbatore, passed in H.M.O.P.No.1133 of 2015 on 17.12.2021.

2.The appellant/Husband is the respondent and respondent/Wife is the petitioner in H.M.O.P.No. 1133 of 2015 on the file of the family Court, Coimbatore.

3.The respondent/wife filed H.M.O.P.No.133 of 2015 for divorce against the appellant to dissolve the marriage held on 29.06.2014 on the ground of cruelty before the Family court, Coimbatore. She also filed a petition in M.C.No.187 of 2015 for maintenance. The Family Court allowed the divorce petition, aggrieved by this granting of divorce the appellant/husband filed this appeal.

4. The case of the respondent/wife is that the marriage between the appellant and the respondent was solemnized on 29.06.2014 at TRS Kalyanamandapam, Salem as per the Hindu



Customs. After the marriage they lived at Salem. According to the respondent/wife, the first night ceremony was not conducted. Subsequent days also the appellant/husband did not incline to consummate the marriage. After one week the respondent came to know that the appellant is impotent and he is unable to enjoy the sex pleasure and he had no normal genital organ and non co-operative in sexual intercourse. Therefore, the marriage could not be consummated. The respondent/wife decided to take him to the doctor for consultation of curing impotency. But, he refused. The appellant/husband frequently took the respondent to various high class bars and consumed alcohol in her presence. Whenever, she objected, he quarreled with her. The appellant's parents also encouraged the attitude of the husband and tried to convince her, as, it is only pressure in his life. Finally, she was driven out of the house on 23.01.2015. Therefore, filed the petition for divorce.

5.The appellant/husband filed counter and contested the case and denied the allegation made in the petition. But, any how in the counter he inclined to grant divorce to the petitioner/wife in H.M.O.P.No.113 of 2015.

6.In the Family Court, the respondent/wife examined herself as (P.W.1) and also examined one Rajkumar as (P.W.2) and filed eight documents which was marked as (Ex.P.1) to (Ex.P.8). The appellant/husband examined himself as (R.W.1) and one J.Kalaiyaran as (R.W.2) and filed ten documents which was marked as (Ex.R.1) to (Ex.R.10).

7.The Family Court considering the oral and documentary evidence, granted divorce and declared the marriage held on 29.06.2014 is dissolved. Another M.C.No.187 of 2015, the Tribunal awarded maintenance to the wife at the rate of Rs.30,000/- per month payable before the 7th day of every month by the appellant/husband. The appellant/husband aggrieved by the decree of divorce alone filed this appeal.

8.The learned counsel for the appellant submitted that the allegation of impotency is not proved before the Family Court. The wife did not plead any specific date of knowledge about the husband's impotency. The respondent/wife did not adduce any medical evidence or by examining doctor to prove the impotency of the husband. The allegation of non consummation of marriage is false. The respondent/wife specifically pleaded that the parents and sister of the husband were aware of his impotency but not examined them as witnesses. The trial Court failed to consider the evidence of R.W.1 and R.W.2 and reiterated the other grounds raised in the grounds of appeal and to set aside the order of the Family Court.

9.We have considered the matter in the light of the submissions made by the counsel for the appellant and perused the records.



10. Admittedly, the marriage between the appellant and the respondent solemnized on 29.06.2014 at TRS Kalyanamandapam, Salem as per the Hindu Customs after that they living together in husband's house at Salem.

11. The contention of the respondent/wife is that the marriage was not consummated, the husband is physically incapable of having sexual relation with the respondent/wife and she found the appellant was impotent and unable to discharge his marital obligations. She could not persuade herself to live with him and thus inflict on herself a life of perpetual torture.

12. The respondent/wife before the Family Court deposed what she had stated in the petition. The appellant/husband denied the allegation attributed by the wife upon him. But, the undisputed fact is that the husband refused to go for medical test to prove his potentiality. The refusal of the husband to go for medical test to prove his potentiality lead to the inference of his impotence by the Family Court. Apart from this, the appellant in his counter expressed his willingness to dissolve the marriage. Under these circumstances, the Family Court granted divorce in favour of the respondent/wife.

13. In the above context, while dealing with the similar case, the observations of the Delhi High Court in Rita Nijhawan v. Balkishan Nijhawan case reported in [AIR 1973 Delhi 200] are to be noted, and in that case, the parties have been judicially separated by the Delhi High Court holding as follows :

22. In Rita Nijhawan V. Balkishan Nijhawan MANU/DE/0031/1973: AIR1973 Delhi2000(Sachar, J.) while dealing with a case of annulment of marriage under the Hindu Marriage Act on the ground of impotency very poignantly and pithily observed as follows:

Thus the law is well settled that if either of the parties to a marriage being a healthy physical capacity refuses to have sexual intercourse the same would amount to cruelty entitling the other party to a decree. In our opinion it would not make any difference in law whether denial of sexual intercourse is the result of sexual weakness of the respondent disabling him from having a sexual union with the appellant, or it is because of any willful refusal by the respondent.

Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and



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harmonious sexual activity it would be impossible for any marriage to continue for long. It cannot be denied that the sexual activity in marriage has an extremely favourable influence on a women's mind and body. The result being that if she does not get proper sexual satisfaction, it will lead to depression and frustration.

31.While dealing with a case under the Hindu Marriage Act, 1955, a Division Bench of the Karnataka high court in Dr.Srikant Rangacharya Adya V.Smt.Anuradha MANU/KA/0114/1980 dwelling on the aspect of impotency and its impact on the wife observed as follows:

In these days it would be an unthinkable proposition to suggest that the wife is not an active participant in the sexual life and therefore, the sexual pleasure to the wife is of no consequence and therefore cannot amount to cruelty. Marriage without sex is an anathema. Sex is the foundation of marriage and without a vigorous and harmonious sexual activity it would be impossible for any marriage has an extremely favourable influence on a women's mind and body. The result being that if she does not get proper sexual satisfaction it will lead to depression and frustration. It has been said that the sexual relation when happy and harmonious vivifies woman's brain, develops her character and trebles her vitality. It must be recognized that nothing is more fatal to marriage then disappointments in sexual intercourse.

From the evidence on record, it is evidenced by the respondent that the appellant had not discharged his marital obligation thus it is clear that the marriage has broken down beyond repaired. Refusal to have sexual intercourse due to physical incapacity may amount to mental cruelty. The concept of cruelty differs from person to person depending upon the cultural background. The prudent and appropriate way to adjudicate the case would be evaluate it on its peculiar facts and circumstances of the case on hand. In this case, from the evidence of the respondent, it is clear that the appellant/husband refused to have sexual intercourse due his physical incapability. Definitely, it will amount to mental cruelty of the respondent and granted divorce. We find no reason to interfere with the order of the trial Court. There is no merit in the appeal. Hence, dismissed the appeal.



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14. In the result, this Civil Miscellaneous Appeal stand dismissed as devoid of merits. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

vsn

To

The Principal Judge,
Principal Family Court, Coimbatore.

Copy to

The Section Officer,
VR Section,
High Court, Madras - 104.

+1cc to Mr.N.Manoharan, Advocate, S.R.No.16443

C.M.A.No.500 of 2022

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NSK/25/05/2022