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C.M.A.Nos.671 and 673 of 2022



IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 30.11.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and
THE HONOURABLE MR.JUSTICE SUNDER MOHAN

C.M.A.Nos.671 and 673 of 2022
and C.M.P.No.4785 of 2022

J.Gomathi

...Appellant in both C.M.As

Vs.

V.Boopathi Raja @ Boopathi

...Respondent in both C.M.As

COMMON PRAYER : The Civil Miscellaneous Appeals are filed under Section 19 of Family Court Act, 1984 against the Order and Decree dated 18.02.2019 made in F.C.O.P.Nos.53 and 22 of 2018 on the file of learned Family Court, Namakkal.

For Appellant in both C.M.As : Mr.D.Kumaralingam

For Respondent in both C.M.As : No Appearance



J U D G M E N T

(Judgment of the Court was delivered by SUNDER MOHAN.J.)

The above appeals have been preferred by the wife challenging the dismissal of her petition filed for divorce in F.C.O.P.No.53 of 2018 (Old H.M.O.P.No.211 of 2015) and allowing the petition for restitution of conjugal rights filed by the husband/respondent herein in F.C.O.P.No.22 of 2018 (Old H.M.O.P.No.232 of 2014 dated 18.02.2019 by the Family Court, Namakkal.

2.The appellant filed a petition for divorce. The averments in the said petition are as follows:-

(a) The marriage between the appellant and the respondent took place on 10.03.2003 at Sangagiri; the appellant was provided with 15 sovereigns of gold jewellery at the time of marriage; and out of the wed lock a girl child was born to them. The appellant is a Lab Technician working in Dubai and the respondent is now working in Tamil Nadu Electricity Board. The respondent promised the appellant that he would allow her to continue her higher studies after the marriage. However, the respondent did not keep up his promise. Within a few months after the marriage respondent started showing his true colour. The respondent is a drunkard and addicted to bad habits and he is a spendthrift. Due to these habits, he committed misappropriation in a company



where he was employed and lost his job. He demanded jewels from the appellant for obtaining loan to start a business. The respondent did not do business properly and caused huge loss to the appellant. The appellant was therefore compelled to go for a job in Bangalore for the welfare of the family and the child. Even thereafter the respondent grabbed money from the appellant and spent for his drinking habits. On one occasion, the respondent came home in an inebriated condition and beat up the appellant. Though the appellant was advised to give a complaint she refrained from doing so, considering the family prestige. The respondent by his conduct forced the appellant to leave the matrimonial home and thereafter, he had not cared to support the appellant or the child. The respondent herein in order to cover up for his misdeeds filed H.M.O.P.No.232 of 2014 for restitution of conjugal rights before the Namakkal Sub Court which was later numbered as F.C.O.P.No.22 of 2018 after it was transferred to the Family Court, Namakkal.

3. The respondent filed a counter statement in the divorce petition denying the averments stated in the petition for divorce; including the averments that the appellant's father educated the respondent; and that he was a drunkard and pledged the jewels of the appellant. He had never misappropriated any money in any company. The respondent filed the petition



for restitution of conjugal rights in a genuine attempt to live with the appellant.

It was the appellant who ill-treated the respondent. She always wanted to separate him from his mother. She never did any domestic work and the respondent's mother was compelled to do all the domestic work at home. She humiliated and insulted the respondent stating that the respondent was earning a meagre amount of Rs.5000/- which was not enough to maintain the family. The respondent never took away the jewels of the appellant. It was the respondent who paid for the appellant's education. The appellant and the respondent were closely related to each other. The appellant was the respondent uncle's daughter and he took utmost care of the appellant. The appellant compelled the respondent to start an independent business and she volunteered to give five sovereigns of jewels. With the said money and his own funds, the respondent started a business of manufacture of distilled water and battery acid. The appellant never got along well with the respondent's parents. The respondent had tolerated the appellant's behaviour for the welfare of family. Since the respondent earned less than the appellant, she constantly humiliated him and made him to do domestic work. The other allegations of cruelty are false and he was genuinely interested in the matrimonial life and that is why, he had filed a petition for restitution of conjugal rights in H.M.O.P.No.232 of 2014.



4. Before the learned Judge the appellant examined two witnesses on her side and marked Ex.R1 and R2. The respondent examined two witnesses on his side and marked Ex.P.1.

5. The Family Court held that considering the nature of the allegations and the fact that a girl child was born out of the wedlock and considering the welfare of the girl child the marriage cannot be dissolved. The Family Court further found that it would be in the best interest of preserving the marriage to order the petition filed by the respondent for restitution of conjugal rights. Hence, the Court allowed the petition filed by the respondent for restitution of conjugal rights and dismissed the petition filed by the appellant for divorce.

6. The notice ordered to the respondent through court and also privately has been served on him. However there is no representation for the respondent. Hence we propose to decide the appeal in his absence.

7. The learned counsel for the appellant submitted that the appellant and the respondent are living separately since January 2014. The marriage has now become dead. The matrimonial bond is beyond repair. Both the appellant and



the respondent have traded allegations against each other. The allegations made by the appellant and the respondent against each other would show that a peaceful matrimonial life is not possible in the circumstances of the case. The appellant had established the fact that the respondent had caused cruelty in several ways. He was a drunkard, and on one occasion he had beaten the appellant which compelled the appellant to leave the matrimonial home. He had taken away the jewels of the appellant and had caused enormous financial loss to her. The respondent was not in the habit of doing any job. In fact, he was dismissed from a job since he committed misappropriation. The incompatibility between appellant and the respondent has reached a stage where reunion is impossible. Since the appellant and the respondent are closely related, all efforts taken by the elders of the family also failed. In such circumstances, the marriage exists only on paper and if it is not severed it would cause mental cruelty to the appellant.

8.The points that arise for considerations in the above appeals are as follows:

- (a) Whether the appellant is entitled into decree of divorce?
- (b) Whether the Family Court was justified in ordering the respondent's petition for restitution of conjugal rights?



Points (i) and (ii)

9.The averments made in the petition for divorce would clearly indicate that there is a mismatch in the earning capacity of the appellant and the respondent. The appellant is more qualified than the respondent. The appellant has alleged that the respondent is a drunkard and was prone to several bad habits. He had misappropriated money in a company and also taken away the jewels belonging to the appellant . These allegations were reiterated during the appellant's cross examination during the trial. In the cross examination nothing was elicited to improbabilize the version of the appellant. The appellant and the respondent are close relatives and it is a matter of common knowledge that all efforts would have been taken by the family members to find an amicable solution. However, we find that inspite of the efforts taken by the family members, the appellant and respondent are living separately for more than eight years. The respondent had also made several allegations against the appellant in his petition for restitution of conjugal rights. The allegations suggest that the respondent also was not very comfortable and that he had suffered cruelty on account of the appellant's conduct. He had alleged that the appellant insulted him and humiliated him because she was more educated and was earning more than the respondent. The further allegations that the appellant did not do any



domestic work and she forced the respondent's mother to do all the work would go to show that they did not lead a peaceful matrimonial life.

10. That apart the conduct of the respondent in not participating in the instant proceedings is a factor which ought to be considered. The respondent is aware of the proceedings before this Court. The respondent has deliberately avoided the proceedings and has not appeared inspite of his knowledge of the proceedings and service of notice on him. This conduct is a relevant factor in a Petition for divorce. The Hon'ble Apex Court in ***Sukhendu Das v. Rita Mukherjee*** reported in **(2017) 9 SCC 632** has held as follows:

7. The respondent, who did not appear before the trial court after filing of written statement, did not respond to the request made by the High Court for personal appearance. In spite of service of notice, the respondent did not show any interest to appear in this Court also. This conduct of the respondent by itself would indicate that she is not interested in living with the appellant. Refusal to participate in proceeding for divorce and forcing the appellant to stay in a dead marriage would itself constitute mental cruelty (Samar Ghosh v. Jaya Ghosh [Samar Ghosh v. Jaya Ghosh, (2007) 4 SCC 511, p. 547, para 101(xiv)]). The High



Court observed that no attempt was made by either of the parties to be posted at the same place. Without entering into the disputed facts of the case, we are of the opinion that there is no likelihood of the appellant and the respondent living together and for all practical purposes there is an irretrievable breakdown of the marriage.

The Hon'ble Apex Court has held that this conduct itself would show that the marriage has become dead and any effort made to revive a dead marriage itself would cause mental cruelty.

11. The Honourable Apex Court in ***Samar Ghosh Vs. Jaya Ghosh*** reported in ***2007 (4) SCC 511*** while enumerating the factors to be considered while considering a petition for divorce held as follows:-

“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.



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(ii) *On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear 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.*

(iii) *Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.*

(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.*

(v) *A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.*

(vi) *Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.*

(vii) *Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.*

(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.*



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(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 sterilization 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.*

(xiv) *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*



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scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

12. The scope and meaning of the words “mental cruelty” in the context of divorce was considered by the Hon'ble Apex Court in “**Vinita Saxena vs. Pankaj Pandit** reported in **(2006) 3 SCC 378**” wherein the Hon'ble Apex court held as follows:

31. It is settled by a catena of decisions that mental cruelty can cause even more serious injury than the physical harm and create in the mind of the injured appellant such apprehension as is contemplated in the section. It is to be determined on whole facts of the case and the matrimonial relations between the spouses. To amount to cruelty, there must be such wilful treatment of the party which caused suffering in body or mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

32. The word “cruelty” has not been defined and it has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct and one which is adversely affecting the other. The cruelty may be mental or physical, intentional or



unintentional. There may be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

*33. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions, their culture and human values to which they attach importance. Judged by the standard of modern civilisation in the background of the cultural heritage and traditions of our society, a young and well-educated woman like the appellant herein is not expected to endure the harassment in domestic life whether mental, physical, intentional or unintentional. Her sentiments have to be respected, her ambition and aspiration taken into account in making adjustment and her basic needs provided, though grievances arising from temperamental disharmony are irrelevant. This view was taken by the Kerala High Court in *Rajani v. Subramonian* [AIR 1990 Ker 1 : (1990) 1 DMC 561]*

34. In (1993) 2 Hindu LR 637 (sic), the Court had gone to the further extent of observing as follows:

“Sometime even a gesture, the angry look, a sugar-coated joke, an ironic overlook may be more cruel than actual beating.”



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35. *Each case depends on its own facts and must be judged on these facts. The concept of cruelty has varied from time to time, from place to place and from individual to individual in its application according to social status of the persons involved and their economic conditions and other matters. The question whether the act complained of was a cruel act is to be determined from the whole facts and the matrimonial relations between the parties. In this connection, the culture, temperament and status in life and many other things are the factors which have to be considered.*

36. *The legal concept of cruelty which is not defined by the statute is generally described as conduct of such character as to have caused danger to life, limb or health (bodily and mental) or to give rise to reasonable apprehension of such danger. The general rule in all questions of cruelty is that the whole matrimonial relation must be considered, that rule is of a special value when the cruelty consists not of violent act but of injurious reproaches, complaints. accusations or taunts. It may be mental such as indifference and frigidity towards the wife, denial of a company to her, hatred and abhorrence for wife, or physical, like acts of violence and abstinence from sexual intercourse without reasonable cause. It must be proved that one partner in the marriage however mindless of the consequences has behaved in a way which the other spouse could not in the*



circumstances be called upon to endure, and that misconduct has caused injury to health or a reasonable apprehension of such injury. There are two sides to be considered in case of cruelty. From the appellant's side, ought this appellant to be called on to endure the conduct? From the respondent's side, was this conduct excusable? The court has then to decide whether the sum total of the reprehensible conduct was cruel. That depends on whether the cumulative conduct was sufficiently serious to say that from a reasonable person's point of view after a consideration of any excuse which the respondent might have in the circumstances, the conduct is such that the petitioner ought not be called upon to endure.

37. As to what constitutes the required mental cruelty for the purposes of the said provision, will not depend upon the numerical count of such incidents or only on the continuous course of such conduct but really go by the intensity, gravity and stigmatic impact of it when meted out even once and the deleterious effect of it on the mental attitude, necessary for maintaining a conducive matrimonial home.

38. If the taunts, complaints and reproaches are of ordinary nature only, the court perhaps need consider the further question as to whether their continuance or persistence over a period of time render, what normally would,



otherwise, not be so serious an act to be so injurious and painful as to make the spouse charged with them genuinely and reasonably conclude that the maintenance of matrimonial home is not possible any longer.

39. The modern view of cruelty of one spouse to another in the eye of the law has been summarised as follows in (1977) 42 DRJ 270 (sic) Halsbury's Laws of England, Vol. 12, 3rd Edn., pp. 270-71:

“The general rule in all questions of cruelty is that the whole matrimonial relations must be considered, and that rule is of special value when the cruelty consists not of violent acts, but of injurious reproaches, complaints, accusations or taunts. Before coming to a conclusion, the judge must consider the impact of the personality and conduct of one spouse on the mind of the other, and all incidents and quarrels between the spouses must be weighed from that point of view. In determining what constitutes cruelty regard must be had to the circumstances of each particular case, keeping always in view the physical and mental condition of the parties, and their character and social status.”

40. This Court in N.G. Dastane (Dr.) v. S. Dastane [(1975) 2 SCC 326 : AIR 1975 SC 1534] observed as under: (SCC p. 338, para 32)

“The Court has to deal, not with an ideal husband and an ideal wife (assuming any such exist) but with the particular man and woman before it. The ideal couple or



a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to drown their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures.”

13. In “ **Naveen Kohli v. Neelu Kohli** reported in “(2006) 4 SCC 558”

the Hon'ble Apex court held as follows:

“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 visualized 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.”



14. Applying the above principles to the facts of the instant case, we find that the appellant and respondent are living separately for more than 8 years.

The respondent had not participated in the proceedings inspite of knowledge of the proceedings. The allegations made by the appellant and respondent against each other establishes that the matrimonial bond is beyond repair. Further the allegations and the evidence adduced by the parties are such that one can conclude that the appellant has suffered mental cruelty. Therefore in such circumstances if the Court refuses to sever the tie, it would cause mental cruelty to the party seeking divorce.

15. Therefore, we are of the view that the appellant is entitled to decree of divorce. The respondent's petition for restitution of conjugal rights has no merits and has to be dismissed. The order of family Court allowing the petition for restitution of conjugal rights is set aside.

In nutshell

- a) The appeals in C.M.A.Nos.671 and 673 of 2022 are allowed
- b) The F.C.O.P.No: 53 of 2018 filed by the appellant for divorce is allowed.



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C.M.A.Nos.671 and 673 of 20



c) The F.C.O.P.No 23 of 2018 filed by the respondent for restitution of conjugal rights is dismissed.

d)No Costs. Consequently, the connected miscellaneous petition is closed.

(V.M.V.,J)

(S.M.,J)

30.11.2022

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Internet: Yes/No

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To

1.The Family Court
Namakkal.

2.The Section Officer
VR Section
High Court of Madras
Chennai – 600 104



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