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C.M.A. No.2536/2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on	Pronounced on
21.11.2024	18.12.2024

CORAM

THE HONOURABLE MR. JUSTICE M.DHANDAPANI

C.M.A. NO. 2536 OF 2017

Mrs. N.Jennifer Hephzibah @ Neela

.. Appellant

- Vs -

Mr. G.Jayaprakash

.. Respondent

Civil Miscellaneous Appeal filed u/s 55 of the Indian Divorce Act, 1869 praying to set aside the decree and judgment passed in I.D.O.P. No.02 of 2017 dated 10.02.2017 by the learned Principal District & Sessions Judge, Tiruvallur, insofar as grant of divorce on the ground of no co-habitation with the appellant and the respondent and dismiss the petition by allowing this appeal.

For Appellant : Mr. A.Ramaswamy

For Respondent : Mr. C.V.Kumar

JUDGMENT



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The present appeal has been directed against the grant of a decree of divorce passed by the learned Principal District & Sessions Judge, Tiruvallur in I.D.O.P. No.02/2017 dated 10.02.2017 on the ground that there exists no co-habitation between the appellant and the respondent.

2. For the sake of convenience, the appellant and respondent in the present appeal would be referred to as wife and husband.

3. The brief facts of the case are that the marriage between the appellant and the respondent was solemnized on 22.5.2009 at CSI Tamil Wesley Church as per Christian rites and customs and that after marriage, the appellant and respondent started living at the house of the respondent at St. Thomas Mount, Chennai. It is the case of the respondent in the divorce petition that the very next day, the wife took the respondent/husband for medical check up to check for AIDS and that till date the marriage between the appellant and the respondent had not consummated.



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4. It is the further case of the husband that two days after the marriage on 24.5.2009, the appellant left her matrimonial abode and left for her parental home and the emissaries sent by the husband to bring the appellant back on 31.6.2009 and 3.7.2009 did not yield the desired response, which prompted the husband to issue a notice dated 13.4.2011 to his wife to seek for consented divorce by filing appropriate petition, which was replied by the wife in the negative. In view of the above and inspite of passage of more than two years from the date of marriage, since the wife was not ready and willing to live with the husband, the marriage had stood irretrievably broken down and as the appellant refused and resisted the consummation of marriage, it amounted to cruelty and leaving the matrimonial abode amounted to desertion and, therefore, left with no other option, the husband had filed the petition for divorce before the court below.

5. Controverting the above stand, the appellant/wife submitted that during marriage, the parents of the wife had given 10 sovereigns in gold to their daughter and 3 ½ sovereigns gold to the groom along with Rs.25,000/- in cash and also other household articles. It is the further case of the wife that the stand



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of the husband that marriage was not consummated is false and that after marriage, the bride and the groom had stayed at the house of the bride for four days and due to monthly woman related issues, the wife had stayed back at her parental abode and the husband had told that he would come back and take her. The husband never came back to take his wife to her matrimonial home. It is further contended that inspite of the efforts taken by the wife and her parents for reunion with her husband, the husband as well as his relatives did not take proper steps for the union and, in fact, the husband as also his relatives castigated the wife. Since the husband did not cater to the needs of the wife, the appellant was constrained to file a petition for maintenance before the appropriate court. It was further contended that the wife is all along willing to live with the respondent and, therefore, vehemently opposed the divorce petition.

6. Before the trial court, the appellant examined herself as D.W.1, while the respondent examined himself as P.W.1. On the side of the respondent, Exs.P-1 to P-5 were marked. The trial court, considering the oral and documentary evidence, held that the respondent failed to prove that the marriage has



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consummated through proper evidence and further held that there was no co-habitation between the husband and wife since the time of marriage held that in the interest of both the parties, it is only equitable to dissolve the marriage between the parties and, accordingly, granted a decree of divorce aggrieved by which the present appeal has been preferred by the wife.

7. Learned counsel appearing for the appellant/wife submits that though there is no material with regard to the allegations levelled by the respondent/husband, the court below has tilted the scales in favour of the respondent merely on the ground that the appellant/wife has not placed any relevant materials to disprove the allegations. It is the further submission of the learned counsel that when it is the specific case of the wife that the marriage stood consummated, it is for the husband to prove the contrary, yet the court below had held that wife had not proved that the marriage had been consummated.

8. It is the further submission of the learned counsel that no medical evidence has been submitted by the husband to establish that marriage was not



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consummated and the mere allegations that the appellant had taken him for testing for AIDS is wholly unsustainable. However, the trial court had erroneously held that the husband has proved that the marriage had not consummated, inspite of the fact that there is no material evidencing the same.

9. It is the further submission of the learned counsel that immediately succeeding four days of marriage, the wife had been at her parental abode and that no maintenance was paid by the husband nor the husband had taken any steps to take back his wife and M.C. No.39/2015 filed by the wife seeking maintenance had been ordered in her favour, which has also been confirmed in the appeal in C.A. No.24/2019, which clearly show that it is only the respondent/husband, who was not willing to live along with his wife. However, without adverting to any of the above materials, the court below had erroneously fastened the liability to prove on the wife, which is perverse, arbitrary and illegal and, therefore, the same needs to be interfered with.

10. It is further pointed out by the learned counsel that inspite of the order of maintenance, which has been upheld in appeal, no maintenance amount



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has been paid by the husband till date to his wife and the wife is literally thrown to the streets by the husband without taking care of her and, therefore, this Court, may pass appropriate orders with regard to maintenance as well.

11. Per contra, learned counsel appearing for the respondent/husband submitted that Ex.P-5, the reply notice of the wife itself would clearly show that the wife was willing for divorce if permanent alimony was granted and also the articles which were given at the time of marriage were returned, which has been recorded by the court below. Further, it is submitted that the court below had clearly held that the wife, in her deposition had clearly spoken about the fact that for the first two days of the marriage she was residing with her husband at her matrimonial home and, thereafter, for the next four days she was residing at her parental home, and, thereafter, she was suffering the monthly women's problem, which prompted the husband to leave her at her parents place. However, the wife did not return back and till that time, due to the monthly woman's problem, the marriage had not consummated, which was accepted by the court below for the reason that there was no material placed before the court to show that the marriage was consummated.



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12. It is the further submission of the learned counsel that the appellant, in her deposition, had accepted that at the time of blood test, test was taken for confirming AIDS, which is nothing but a form of cruelty on the husband, which no male would accept. When the appellant has not placed any material and had refused to come and live with the husband and had caused much mental cruelty to the husband in the form of taking test for AIDS, which had prevailed upon the court below to hold that the marriage had broken down and that there was no co-habitation and, therefore, granted divorce, which is based on proper reasoning and, therefore, the same does not require any interference at the hands of this Court.

13. This Court gave its careful consideration to the submissions advanced by the learned counsel appearing on either side and perused the materials available on record.

14. When the matter was taken up for hearing this Court called upon the parties to find a solution to the stalemate by suggesting that if some permanent



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alimony is given along with return of the articles given to the wife, this Court may consider the same while passing the order. However, inspite of the suggestion from the Court and also the order passed in M.C.No.39/2015 in and by which maintenance at Rs.4,000/- per month was ordered to the wife, till date, no amount has been paid by the respondent/husband to the wife by way of maintenance. Though this Court called upon the husband to pay the maintenance and adjourned the matter, the husband had not adhered to the directions issued by this Court and a memo in with regard to the maintenance that is to be paid to the wife had been filed, which shows that a sum of about Rs.3,30,000/- is due and payable as maintenance to the wife.

15. In view of the above stated position, this Court had taken up the issue on merits and analysed the materials placed before it. A careful perusal of the materials which are available on record reveal that except for bald allegations relating to the marriage not having been consummated, there are no materials placed by the respondent/husband to establish that the marriage had not consummated. However, based on the allegation, the court below had imposed upon the wife to prove that marriage had, in fact, been consummated. When the



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case for divorce has been filed by the husband, a duty is cast on the husband to prove that the marriage has not consummated whereinafter alone, the wife has to establish the contra. However, the court below had imposed upon the wife the onerous duty of proving that the marriage had been consummated.

16. When such a treatment had been meted out to the wife, curiously, on the question of incapacity for leading a matrimonial life, the court below had noted that ordinarily and also as a matter of precedence, the court will insist on proof of incapacity to consummate by medical evidence. However, when the case is filed by the respondent for divorce, a duty is cast on the respondent to prove that consummation had not taken place and it cannot be put on the head of the wife to establish that the marriage had been consummated.

17. The whole order of the court below is merely based on the evidence of the respondent and the rebuttal by the wife and barring the same, there is no material, which establish the case of the respondent with regard to irretrievable breaking down of marriage and the act of the wife in not getting along to live with the husband. It is the specific case of the parties that for the first two days,



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both the spouses were at the matrimonial home and, thereafter, they went to the parental home of the bride and stayed there for four days and leaving the bride at her parental home, the groom returned home with the promise of coming back and taking his wife. However, there is no reason attributed by the husband for not going back to bring back his wife except stating that his wife was not willing to come back to his house.

18. True it is that the appellant had not taken any steps seeking restitution of conjugal rights, but she has filed a petition claiming maintenance, which has been ordered in her favour, which has been confirmed in appeal as well. Further, the respondent/husband had not taken any steps to call upon his wife to come and stay along with him; rather, claiming that the appellant is not coming to stay along with him, a notice for divorce had been issued on the appellant by the respondent. When the court below had accepted the view of the husband, merely, giving evidence without proving the same through any other material, the court below had shunned the evidence of the appellant/wife as not acceptable and not proved by adopting different yardstick in respect of the two warring parties.



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19. It is to be pointed out that in matrimonial cases, there is a likelihood of some skirmish all through the life between the spouses, which, if magnified out of proportion, either by the parties, relatives or the court, lead to irreversible changes in life and only to safeguard the matrimonial life, reference to mediation is always taken out. However, the court below, on the basis of the evidence of the parties, had not thought it to mediate between the parties; rather had taken sides and held the divorce in favour of the husband merely on the strength of his oral testimony. The reason for discarding the oral testimony of the appellant/wife is not evident from the order of the court below. The court below had dealt with the whole case on the ground of consummation of marriage and not on any other proper fronts and held in favour of the husband, which is grossly perverse, unreasonable and unsustainable.

20. Further, the court below had failed to notice the attitude of the husband towards his wife. In spite of the order of maintenance passed in favour of the wife, which has since been confirmed in appeal, the court below has not gone into the same while dealing with the case of divorce. When there is a clear



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order in favour of the wife with regard to maintenance, it is incumbent on the court below to see that the said order is complied with before passing an order in favour of either party. However, without putting the parties on terms, the court below had ordered the divorce petition in favour of the husband, which is perverse and unsustainable.

21. The attitude of the husband towards his wife before this Court also does speaks volumes about the husband. No steps have been taken by the husband to pay the maintenance to his wife since passing of the order in M.C. No.39/2015. This Court is ordained with the task of balancing the scales and not to favour one of the parties to the *lis*. When there is no material placed to establish a case for divorce, equally and there being an order of maintenance, the court below ought to have held the scales in favour of the wife. However, erroneously the court below had ordered the divorce petition in favour of the husband, which requires interference at the hands of this Court.

22. Accordingly, for the reasons aforesaid, this appeal is allowed setting aside the order of divorce passed by the learned District & Sessions Judge,



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Tiruvallur, in I.D.O.P. No.2/2017 vide order dated 10.2.2017. It is further made clear that insofar as the order of maintenance passed in M.C. No.39/2015 as confirmed in C.A. No.24/2019 by the Addl. District & Sessions Judge, Poonamallee, is concerned, it is open to the appellant/wife to work out her remedies in the manner known to law to realise the maintenance amount due to her from the respondent. There shall be no order as to costs in this appeal.

18.12.2024

Index : Yes / No

GLN

To

The Principal District & Sessions Judge
Tiruvallur.



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M.DHANDAPANI, J.

GLN

**PRE-DELIVERY JUDGMENT IN
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