

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 26/07/2006

CORAM

THE HON'BLE MR.JUSTICE P.D.DINAKARAN

and

THE HON'BLE MR.JUSTICE P.P.S.JANARTHANA RAJA

C.M.A.No.1905 of 2002

P.Devaraj .. Appellant

-Vs-

V.Geetha .. Respondent

PRAYER: Appeal against the order dated 13.9.2000 made in H.M.O.P.No.308 of 1995 on the file of the Family Court, Coimbatore.

!For Appellant : Mr.K.Kalyanasundaram

^For Respondent : Mr.A.S.Vijayaraghavan

:JUDGMENT

(Delivered by P.D.DINAKARAN,J.)

As the dispute between the parties is very narrow, the parties were directed to appear in person to sort out their differences as requested by their respective counsel. Accordingly, both the parties appeared before this Court on 14.07.2006. All st were initiated by their respective counsel to sort out differences and to bring the parties together for amicable settlement. But, unfortunately, learned counsel for both the parties could not succeed in their efforts to bring the appellant/husband and the respondent/wife together. Hence the matter stood adjourned today.

2. When the matter was taken up for hearing today (26.7.2006), at the outset, this Court opined that the submissions may be made before some other Bench as the efforts made by the learned counsel for both sides before this Bench ended in vain. Howe the learned counsel appearing for both sides expressed their view that there is no need to post this case before any other Bench and requested us to dispose of the matter on merits. Hence, the matter is heard and disposed of on merits as hereunder:-

3. Alleging cruelty and desertion against the respondent/wife, the appellant-husband approached the Family Court, Coimbatore under Section 13 of the Hindu Marriage Act (hereinafter referred to as the Act) by way of a petition in H.M.O.P.No.308 of , praying for dissolution of their marriage solemnized on 10.6.1988 by a decree of divorce. The Family Judge dismissed the petition by an order dated 13.9.2000. Hence, the present appeal.

4.1. The facts of the case giving rise to the filing of the present appeals are that marriage between the parties was solemnised on 10.6.1988. After the marriage the appellant and the respondent lived at Coimbatore. The

respondent avoided the appeal from consummating the marriage, however with great difficulty the marriage was consummated. The respondent complained abdominal pain and it was suspected that she might be suffering from cancer in the uterus. It was alleged that the appellant was not informed about the details of ailment and the material facts were suppressed by the respondent. Without the knowledge of the appellant, the respondent consented for operation and her uterus was removed on 31.10.1988. After the operation, the respondent/ wife was not interested in the matrimonial life, and when the appellant tried to have sexual intercourse with the respondent, the respondent ill-treated the appellant and refused to sleep along with him. The petitioner, thus, was put to physical and mental agony in view of the non-cooperative attitude of the respondent. The respondent also quarreled with the appellant on one ground or the other. The respondent/wife deserted the petitioner from 25.12.1989 and there was no cohabitation since then.

4.2. Based on the said allegations the appellant filed H.M.O.P.No.308 of 1995 praying for dissolution of their marriage by a decree of divorce.

4.3. The said petition was resisted by the respondent/wife by taking the stand that the appellant and she had sexual intercourse, she also became pregnant and when the appellant took the respondent to the Doctor, the Doctor informed her that she should undergo an operation and with the consent of the appellant, the operation was performed and uterus was removed. After the operation, when the respondent went to her marital house the appellant and his mother subjected her to cruelty and drove her away from their house. It is submitted that she is not impotent, she never deserted the appellant and she did not ill-treat the appellant.

4.4. The trial Court, after considering the submissions of both sides and the evidence adduced, came to the conclusion that (i) the respondent/wife is not impotent; (ii) the respondent/wife never refused to have sexual intercourse with the appellant she never treated the appellant with cruelty; (iii) the respondent/wife never deserted the appellant, and refused to grant the relief of divorce. Hence, the present appeal.

5. Mr.K.Kalyanasundaram, learned counsel for the appellant contends that:

(a) the respondent/wife never had any interest to have sexual intercourse, she was non co-operative, the marriage was not consummated for considerable time and she deserted appellant from 25.12.1989;

(b) the above said non-cooperative and rigid attitude of the respondent/wife amounts to physical and mental cruelty; and

(c) the respondent/wife underwent surgery of removal of uterus without the knowledge of the appellant/husband.

6. In opposition, Mr.A.S.Vijayarghavan, learned counsel for the respondent made submissions supporting the impugned order for the very reasons stated in it. In his argument, he reiterated the submissions that were made before the trial Court.

7.1. Even though treating the spouse with cruelty is a ground for divorce under Section 13(1)(i-a) of the Hindu Marriage Act, cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such kind which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. Cruelty, therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be

adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

7.2. In the instant case, the trial court, after considering the averments made in this regard and the evidence led in support of thereof, found on facts that the appellant failed to prove the allegations of cruelty attributed to the respondent, and same in our considered opinion, needs no reconsideration.

8.1. It is well settled that no decree of divorce could be granted on the ground of desertion in the absence of proof. Desertion, for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one se by the other without that others consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withd rawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties.

8.2. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in p on to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. If a spouse abandons the other in a sta te of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the fa cts and circumstances of each case.

8.3. In the instant case, when the respondent/wife, after the operation, went to her marital house, it is the appellant and her mother, who subjected her to cruelty and sent her out. Moreover, the appellant/husband, after the above dispute with the pondent/wife, married one Priyalakshmi and has two children through her. It is also not disputed that on a report by the respondent/wife, the police prosecuted the appellant and convicted him under Section 494 of the Indian Penal Code and sentenced him and the same was confirmed by the lower Appellate Court and now, an appeal is pending before the High Court. Under such circumstances, the ground of desertion, the aid of which is sought by the appellant for seeking divorce, also deserves no consideration.

9.1. It cannot be disputed that a woman without a uterus is quite fit for sexual intercourse. Impotency is incapacity for sexual intercourse or when coition is difficult or painful. The presence or absence of uterus is quite immaterial to the ques whether a woman is impotent or not. Merely because the uterus of a woman is removed, she could not be held to be impotent and that could not be a ground to declare the marriage void, vide Samar Som v. Sadhana Som, AIR 1975 Calcutta 413.

9.2. In the case on hand, the marriage was consummated, the respondent/wife also became pregnant, and only to save her from the impending danger of escalation of uterus cancer, she was operated and her uterus was removed. Even though it is alleged he appellant that the removal of uterus was done without his knowledge, the trial Court recorded that the appellant during his cross-examination, admitted that the respondent was admitted in Ramakrishna Hospital for the purpose of operation and the appel lant was in the hospital and according to R.W.2, Dr.Tmt.Mrudubashini, who performed surgery, consent was obtained from the appellant for operation, and these facts substantially establish that the appellant was aware of the removal of the uterus of the r espondent.

For the reasons aforesaid, we dismiss this appeal and affirm the order of the Family Court. No costs. Considering the trauma and agony suffered by the respondent/ wife, who appeared before us, and her request for maintenance and return of ornament we make it clear that she is always at liberty to approach the Court concerned by filing necessary petition for maintenance and the same shall be considered on merits as and when filed.

sasi

To:

The Family Court

Coimbatore.