

DATED: 23.06.2010

CORAM:

THE HON'BLE MRS.JUSTICE R.BANUMATHI

AND

THE HON'BLE MR.JUSTICE B.RAJENDRAN

C.M.A.NOS.3839 AND 3840 OF 2005

AND C.M.P.NOS.1043 AND 1044 OF 2008

Tmt.M.Sundari .... Appellant

Vs.

Dr.A.Chandrasekaran .... Respondent

Prayer: Civil Miscellaneous Appeals in C.M.A.Nos.3839 and 3840 of 2005 are filed under Section 19 of Family Courts Act against the Judgment and decree dated 18.10.2005 in I.D.O.P.Nos.235 of 2003 and 205 of 2004 respectively on the file of Family Court, Coimbatore.

For Appellant : Ms.R.Gowri

in both Appeals

For Respondent : Mr.P.K.Rajagopal

in both Appeals

COMMON JUDGMENT

R.BANUMATHI,J.

C.M.A.No.3839 of 2005 arises out of Judgment dated 18.10.2005 in I.D.O.P.No.235 of 2003, whereby, by a common judgment, the Family Court, Coimbatore has passed decree of divorce dissolving the marriage of Appellant/wife and Respondent/husband. C.M.A.No.3840 of 2005 arises out of the common judgment in I.D.O.P.No.205 of 2004 whereby Family Court dismissed the Petition for restitution of conjugal rights filed by the Appellant/wife.

2. The Respondent is an Anaesthetist and is a medical practitioner. He joined in Senthil Nursing Home, Coimbatore as Junior Doctor, where the Appellant was working as Nurse and both of them had fallen in love. The Appellant was a Roman Catholic Christian and Respondent was a Hindu, who got converted to Christianity. Their marriage was solemnised on 10.6.1983 at Saint Michael's Church, Big Bazaar Street, Coimbatore and both of them were living together. Out of lawful wedlock, a male child was born to them on 1.12.1984. After marriage, the Respondent pursued his higher studies at Stanley Medical College during the years 1984-1989. During that period, the Appellant and her son were taken care by her parents. After completing his Post Graduation, the Respondent joined the Government Hospital, Pandhalur. Later, the Respondent joined E.S.I.Hospital, Coimbatore, Papanayakanpalayam and then he was transferred to Coimbatore Government Medical College and Hospital. The spouses were living together in Coimbatore and

they also constructed a house at Sowripalayam, Coimbatore in 1998.

3. The case of Respondent is that his married life was happy only for a short span of time and that the Appellant is a person of suspicious character and that she would not tolerate his coming late night from the Hospital. According to the Respondent, being an Anaesthetist, he has to attend emergency cases in the Hospital in late hours and the Appellant would question him about the same and use abusive language alleging that he is having illicit intimacy with some other woman and that he was humiliated and insulted by the Appellant in public places. The Respondent further averred that the Appellant would visit the work place and tease him spoiling his reputation in public, which has caused him mental agony. In the Petition for divorce, the Respondent further alleged that the Appellant had also lodged a false complaint before All Women Police Station alleging that he is leading an adulterous life and that no action was initiated by the police and enraged by the same the Appellant sought assistance from an Organisation called Helpline, which threatened the life of Respondent which caused reasonable apprehension in the mind of the Respondent that his life is under threat and that it has become impossible for him to cohabit with the Appellant and on those averments the Respondent has sought for dissolution of marriage.

4. Resisting the petition, Appellant has filed counter alleging that when the Respondent was pursuing his higher studies, the Appellant sold all her jewels to enable the Respondent to pursue his higher studies and she was running her family and also supporting the Respondent to complete his education with the help of her parents' monetary assistance. According to the Appellant, after the Respondent became a leading Anaesthetist Doctor in the city, his behaviour completely changed and he developed illicit intimacy with a lady Doctor (Bhuvana), which was learnt by the Appellant from reliable sources. When being questioned about the same, the Respondent not only admitted the intimacy, but also insisted the Appellant to accept the same and demanding acceptance ill-treated the Appellant. Appellant averred that being a qualified nurse, she knows fully about the professional value of a Doctor and that she never questioned the Respondent and never used abusive languages as alleged by the Respondent. Appellant further averred that she was locked inside the house several times and even telephone was disconnected and to get the re-connection of phone for the house, she approached the Woman Police Station. Further case of Appellant is that he left the house in 2003 and after mediation the Respondent agreed to come over, but without even giving a notice, the Respondent straight away filed the Petition for divorce making all false allegations.

5. Stating that the Respondent left the matrimonial house without any reasonable cause and that she and her son, who has been studying in B.,E., are longing for the love and affection of the Respondent, the Appellant has also filed I.D.O.P.No.205 of 2004 under Section 32 of Divorce Act seeking for restitution of conjugal rights.

6. In the Family Court, Coimbatore, Respondent examined himself as P.W.1 and one Jeeva was examined as P.W.2. Ex.P.1 was marked on the side of Respondent. Appellant examined herself as R.W.1 and Ex.R.1 was marked. Upon consideration of oral and documentary evidence, trial Court held that when Appellant has alleged illicit intimacy of Respondent, burden of proof lies upon her to prove alleged illicit intimacy of the Respondent and absolutely there is no evidence by the Appellant to substantiate the allegations. Referring to the evidence of P.W.1/Respondent and also the evidence of R.W.1/Appellant, trial Court held that the Appellant has lodged a police complaint and also sought the intervention of Helpline and that the Appellant scolded the Respondent in public places and such making of allegations of illicit intimacy has caused mental cruelty to the Respondent and on those findings the Family Court granted decree of divorce dissolving the marriage of the Appellant and Respondent. Insofar as Petition for restitution of conjugal rights, Family Court held that the Respondent has reasonable cause to live away from the house and dismissed the Petition filed by the Appellant for restitution of conjugal rights.

7. Challenging the findings of Family Court, learned counsel for Appellant/wife contended that when the respondent/husband has alleged mental cruelty burden of proof rest upon him to prove mental cruelty. It was further contended that when the Respondent/husband has developed illicit intimacy with another lady doctor

and left the matrimonial house, he cannot be allowed to take advantage of his own wrong. The learned counsel would further submit that merely because the grounds for restitution of conjugal rights is not proved it cannot be said that the grounds for divorce were established. The learned counsel would further contend that the evidence adduced by the Respondent would not be sufficient to establish cruelty as contemplated under Section 10(1)(x) of the Divorce Act that the Appellant has treated the Respondent with such cruelty as to cause a reasonable apprehension in the mind of the Respondent that it would be harmful or injurious for him to live with the Appellant.

8. Countering the arguments, learned counsel for the Respondent submitted that pleadings and evidence would amply substantiate the mental cruelty meted out to the Respondent and that the cruelty had gone to such an extent that the Respondent has to leave the matrimonial house to safeguard himself. It was further argued that making false accusations and abusing in public is of such magnitude, being a responsible doctor, it is impossible for the husband to live with the Appellant/wife and the family Court has rightly passed a decree of divorce.

9. We have carefully considered the contentions and analysed the pleadings and evidence and the judgment of the Family Court. Upon consideration of the submissions and materials on record, the following points arise for our consideration:

"1. Whether the Respondent/Husband has withdrawn from the matrimonial house and deserted the Appellant/wife without reasonable cause?

2. Whether the Appellant/wife is entitled to the relief of restitution of conjugal rights?

3. Whether the Respondent/husband has established that he was subjected to mental cruelty of such magnitude that it became impossible for the Respondent/husband to live with the Appellant?

4. To what relief?"

10. Point Nos.1 to 4:- The Respondent is a doctor by profession and while he was working as a Junior Doctor in Senthil Nursing Home, Coimbatore, where the Appellant was working as a nurse, both of them had fallen in love. The Respondent, who was a Hindu, got himself converted to Christianity and their marriage was solemnised in Saint Michael's Church, Coimbatore on 10.6.1983. Out of lawful wedlock, a male child was born on 1.12.1984. The son has now completed his B.E.Mechanical Engineering and said to be pursuing his higher studies in abroad. There is no dispute that only after marriage Respondent studied his Post Graduation in Stanley Medical College, Chennai during 1984-1989. After completion of his M.D. in 1989, the Respondent joined Government Hospital, Pandhalar and thereafter joined E.S.I.Hospital in Lakshmi Mills, Coimbatore, from where he was transferred to Government Medical College and Hospital, Coimbatore. After the Respondent completed M.D., and joined Government services, the Appellant has left the services. Both the spouses were living together in various places in Coimbatore till they constructed their own house in Sowripalayam, Coimbatore in 1998.

11. The Appellant has alleged that Respondent developed illicit intimacy with another lady Doctor Bhuvana and when she questioned about the same, Respondent beat her and ill-treated her. The Appellant has further stated that the illicit intimacy developed day by day and that they used to live as husband and wife at various places and the said Bhuvana has also sent rowdy elements to the house and when Appellant made complaint over phone, the phone connection was cut-off. The Appellant has further stated that the Respondent has also taken away the car with him and after mediation he had agreed to come and live, but thereafter again started quarrelling without any reasons and ill-treated the Appellant insisting to agree for a divorce.

12. Per contra, the Respondent/husband has alleged that the Appellant is a person of suspicious character and that she would not tolerate his coming late from the Hospital and as Anaesthetist he has to attend emergency

cases in the Hospital and that the Appellant would question him about the same and use abusive language and that Appellant used to visit the work place and publicly tease the Respondent spoiling his reputation in the public. In his evidence, Respondent has also stated that the Appellant has lodged police complaint containing false allegations alleging that he is leading an adulterous life and when no action was taken by the police, Appellant sought assistance from an Organisation called Helpline, who threatened the Respondent and that the conduct of the Appellant had caused reasonable apprehension in his mind and that it is impossible for him to live with the Appellant and that the marriage has irretrievably broken and it is no longer possible for him to live with the Appellant. In his evidence, the Respondent has also denied any relationship with another lady doctor Bhuvana.

13. Even though the Appellant has alleged that the Respondent was having illicit intimacy with another medical practitioner Bhuvana, both in the counter affidavit in I.D.O.P.No.235 of 2003 and her Petition in I.D.O.P.No.205 of 2004, the Appellant has not mentioned the name of the Doctor, but she has only alleged that the Respondent is having illicit intimacy with another lady doctor and when she questioned about the same, Respondent ill-treated her. In her chief examination, the Appellant has alleged that the said Bhuvana has been working as a medical practitioner in E.S.I.Hospital and the said Bhuvana developed intimacy with the Respondent and that the Respondent and the said Bhuvana are living as husband and wife at various places and that the said Bhuvana used to send rowdy elements to the house. It is pertinent to note that inspite of such serious allegations made, neither in the counter filed in I.D.O.P.No.235 of 2003 nor in the petition for restitution of conjugal rights, which was filed in April 2004, such averments were made. Though in her chief examination, the Appellant has alleged about the illicit intimacy, when being questioned in the cross examination, the Appellant has stated

VERNACULAR (TAMIL) PORTION DELETED

The averments in the counter in the petition in I.D.O.P.No.205 of 2004 are vague. Except to make allegation of illicit intimacy with another lady doctor, there are no other definite averments in her Petition as well as in the counter in the Divorce Petition. In such circumstances, the allegation of illicit intimacy levelled against the Respondent cannot be accepted as such.

14. Even though the Appellant has made serious allegations against the Respondent along with the said Bhuvana, apart from the evidence of Appellant/R.W.1, there is no other evidence to substantiate the same. In her evidence, the Appellant has stated that her brother and sisters used to frequently visit the matrimonial house. But the Appellant has not chosen to examine even her brother and sisters to substantiate the allegations of Respondent's intimacy with the said Bhuvana. Neither any independent witness nor appellant's family members were examined to substantiate the allegations. We are of the view that the Family Court rightly held that the allegations of illicit intimacy levelled against the Respondent are not substantiated.

15. We may recapitulate the background of Appellant and Respondent. As pointed out earlier, the Appellant was a Roman catholic and native of Coimbatore, whereas Respondent was a Hindu and he belonged to Jalagandapuram, Salem District. In his evidence, Respondent/P.W.1 has stated that his elder brother - Madesh, who has been working as a clerk in Panchayat Union Office, educated him and brought him up. The Respondent has further alleged that the Appellant was not interested in his family members and that his family members have been languishing without proper financial support from the respondent. During the cross examination of Appellant/R.W.1, it was suggested to her that when Respondent's brother and his wife visited their house in Coimbatore, the Appellant did not properly treat them and ill-treated them. The Appellant has denied the said suggestion. We may usefully refer to the relevant portion of the evidence, which reads as under:

VERNACULAR (TAMIL) PORTION DELETED

16. On the other hand, the brothers and sisters of the Appellant frequently visited the house. That respondent's family members were not well treated by the appellant, must have caused resentment in the mind of the Respondent, which resulted in strained relationship between the spouses. Insofar as the financial and money matters, it is brought on evidence that the Respondent/husband was taking care of the needs of family and also spent money for educating their son. Admittedly, the spouses have built their own house in Sowripalayam, Coimbatore in 1998. It is also brought on evidence that house warming ceremony was firstly held as per Hindu custom and later performed as per Christian rituals. The fact that the Respondent got himself converted to Christianity and that he was also attending Churches and that the house warming ceremony was also performed as per Christian rituals would show that the Respondent was giving due respect to the sentiments of the Appellant.

17. Admittedly, the Respondent had spent money for the education of their son. Even in her evidence, Appellant/R.W.1 has admitted that for admitting their son in Medical College in Bangalore, the Respondent has paid capitation fee of Rs.15 lakhs, since the said Medical College in Bangalore was not an approved medical college, their son could not continue the medical course and the Respondent had got back the money paid by him as capitation fee. Admittedly the Respondent has paid capitation fee and other fees for their son to complete his engineering course. Ex.B.1 is the xerox copy of the tuition fee paid to Kumaraguru College of Technology, Coimbatore. Even the Appellant/R.W.1 admitted that only the Respondent has paid the fees for their son to the Engineering College and also paid capitation fee, education expenses and the tuition fee. The evidence would clearly show that the Respondent was taking care of the family as well as the education expenses of their son. Admittedly, after the Respondent left the house, the Appellant continues to be in occupation of the same house and the Appellant is also in possession of a car bearing Regn.No.37D 5936. The Respondent is continually paying the housing loan. From the evidence, the respondent appears to be a responsible person taking care of the family.

18. Now let us consider the allegations of the averments of illicit intimacy alleged by the Appellant. As we discussed earlier, the name of the doctor, with whom Respondent has adulterous conduct, has not been indicated either in the counter or in the petition in I.D.O.P.No.205 of 2004. Even though the Petition for restitution of conjugal rights was filed long after filing of the divorce petition, even in the said I.D.O.P.No.205 of 2004, the Appellant has not mentioned the name of the doctor. In her chief examination, the Appellant/R.W.1 has stated that the said Bhuvana used to send rowdy elements to the house and when he made a complaint over phone, the phone connection was cut off and the car was also taken away by the Respondent though he had a car for his own use and that she had lodged the complaint before All Women Police Station for getting re-connection of the telephone and that All Women Police Station directed her to go to Helpline and the Helpline persons advised the Respondent in a decent manner to restore the phone connection". Appellant/R.W.1 has denied having preferred any police complaint against the Respondent. Appellant/R.W.1 was questioned about lodging a complaint before the police, regarding disconnection of telephone. Appellant/R.W.1 evaded answering the questions stating "she does not remember having lodged any complaint with the police and also approaching Helpline." In the light of her categorical admission in the proof affidavit filed by her/chief examination, no weight could be attached to the evasive answer of the Appellant/R.W.1 in the cross examination. Lodging of police complaint against Respondent/husband and approaching Helpline would have certainly affected the Respondent/husband causing mental agony.

19. In his evidence, Respondent/P.W.1 has stated that the Appellant used to visit the work place and publicly tease him spoiling his reputation in public. To substantiate the same, the Respondent has examined one Jeeva(P.W.2), who has been doing tinkering work in Ambal Autos and also running an auto garage along with his partner Muthukrishnan in Saibaba Colony, Coimbatore. P.W.2 has stated that on 4.1.2003, for issuing the pamphlets for customer canvas, he went to Coimbatore Medical College Hospital and he saw gathering of people and when he went near the place, he saw the Appellant shouting at the Respondent alleging that the respondent is having illicit intimacy with another doctor and that he is sharing his bed with the said Doctor. P.W.2 has also stated that the Respondent tried to persuade the Appellant to go back to the house and that the problem could be sorted out after he returns home; But the Appellant did not heed to such persuasion.

20. The learned Judge of Family Court observed that P.W.2, who is running an auto garage, is not a probable and natural witness. The trial Court further observed that the name of P.W.2 was not mentioned in the affidavit filed by the Respondent. The learned Judge of Family Court, who had the opportunity of seeing and observing P.W.2, has discredited the evidence of P.W.2 and has chosen not to attach any weight to the evidence of P.W.2. We are also of the view that the name of P.W.2 was neither mentioned in the divorce petition filed by the Respondent nor in the proof affidavit filed by him. P.W.2, who is running an auto garage in Saibaba colony, cannot be a natural and probable witness to speak about the occurrence in the Coimbatore medical College hospital premises.

21. Even de hors the evidence of P.W.2, by his own evidence, Respondent/P.W.1 has categorically alleged that he has been publicly abused by the Appellant. His version is strengthened by the case of Appellant herself by her admission that she lodged a police complaint before All Women Police Station and also admitted in her chief examination about approaching of Help Line in seeking their intervention.

22. It was suggested to Appellant/R.W.1 that when there were differences between the spouses, she had made an attempt to commit suicide by taking sleeping pills. Though in cross examination, the Appellant denied the suggestion in the proof affidavit, in the chief examination, the Appellant has admitted that the Respondent has harassed her and driven her to the extent of committing suicide.

23. The concept of cruelty encompasses mental cruelty also. Mental cruelty means mental pain, agony or suffering caused by either spouse. Where the wife makes accusations of illicit intimacy of the Respondent/husband by publicly abusing, it certainly amounts to cruelty. From the evidence, it is established or an inference can legitimately and reasonably be drawn that the conduct of the Appellant has caused mental cruelty in the mind of the Respondent. The question of cruelty must be considered in the light of the matrimonial relationship and regard must be had to the physical and mental conditions of the parties, social status, impact of the personality and conduct of the spouses and their mind set up. All incidents and quarrels of the spouses must be weighed from that point of view. We are of the view that a case of cruelty is made out justifying the conduct of the Respondent to leave the matrimonial house and live separately.

24. The point falling for our consideration is, whether such conduct of the Appellant/wife seeking help from Helpline in trying to bring about the reconciliation is of such magnitude to cause such apprehension in the mind of the Respondent that it would be harmful or unsafe to live with the other party.

25. Helpline is a non-governmental organisation espousing the cause of women. Even according to the Appellant, Helpline only made persuasive efforts by advising the Respondent. Even though the Respondent has alleged that the Helpline people threatened him, there was no contemporaneous complaint lodged by him. In such circumstances, it cannot be said that the conduct of the wife has caused reasonable apprehension in the mind of the Respondent that it will be harmful or unsafe for the Respondent/husband to live with her.

26. The mere allegations of illicit intimacy coupled with other acts might have caused feeling of anguish, disappointment, frustration and public embarrassment. Such disappointment and incompatibility of temperament between the spouses cannot be held to be cruelty within the meaning of Section 10(1)(x) of the Divorce Act. We are of the considered view that the Family Court was not right in holding that the conduct of the appellant was such so as to cause reasonable apprehension in the mind of the respondent that it would be harmful or dangerous for him to live with the appellant.

27. Though the conduct of the wife is proved to have caused mental cruelty to the husband, it was not a persistent unkindness or persisting cruelty so as to cause reasonable apprehension in the mind of the Respondent that it will be harmful or unsafe for him to live with the Appellant. In our considered view, the ingredients of Section 10(x)(x) of Divorce Act has not been established, whereas the case of cruelty is made out to grant decree of judicial separation under Section 22 of Divorce Act. When the Respondent has prayed for a decree of divorce, the Court is competent to pass a decree for judicial separation on the grounds

mentioned in Section 22 of the Divorce Act. (vide DORIS PADMAVATHY v. V.CHRISTODASS, (AIR 1970 Madras 188 FB)).

28. For the foregoing reasons, the decree of divorce passed by the Family Court, Coimbatore in I.D.O.P.No.235 of 2003 under Section 10(1)(x) of the Divorce Act has to be modified as that of Judicial Separation under Section 22 of the Divorce Act.

29. In the result, the decree of divorce passed in I.D.O.P.No.235 of 2003 on the file of Family Court, Coimbatore is modified as judicial separation under Section 22 of Divorce Act and C.M.A.No.3839 of 2005 is partly allowed. The order in I.D.O.P.No.205 of 2004 dismissing the petition for restitution of conjugal rights is confirmed and C.M.A.No.3840 of 2005 is dismissed. In the circumstances of the case and relationship of the parties, both parties are directed to bear their respective costs. Consequently, the connected miscellaneous petitions are closed.

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The Family Court

Coimbatore