BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 11.12.2023	Delivered on: 22.12.2023

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN
AND
THE HONOURABLE MR.JUSTICE P.B.BALAJI

C.M.A(MD)No.724 of 2021

Sankara Subramanian ... Appellant/Petitioner

Vs.

Sivalekshmi alias Sheela ... Respondent/Respondent

Prayer:- Civil Miscellaneous Appeal filed under Section 19(1) of the Family Courts Act, 1984, against the fair and decretal order, dated 19.02.2021 passed in H.M.O.P.No.5 of 2019 on the file of the Family Court, Tirunelveli.

For Appellant : Mr.M.P.Senthil
For Respondent : Mr.Aayiram K.Selvakumar

JUDGMENT

RMT.TEEKAA RAMAN,J.

The husband has filed this appeal challenging the order of rejection of the relief of dissolution of marriage on the ground of cruelty filed under Section 13(1)(ia)(ib) & 5(ii)(b) of the Hindu Marriage Act.

2. The marriage between the parties was solemnized on 09.02.2014 and the reception was held at Rajanathan Mahal, Santhinagar, Palayamkottai on behalf of the husband side.

3. For the sake of convenience, the parties are referred to according to their litigative status before the Family Court as petitioner/husband and respondent/wife.

4. The fact that are necessary for determination of this appeal shun unnecessary facts are as under:

(a) The marriage between the parties are admitted. Before the trial Court, the husband has filed the above H.M.O.P.No.5 of 2019 on the ground of cruelty, desertion and also included Section 5(ii)(b) of the Hindu Marriages Act for the wife is not competent to give progeny.

5. The petition proceeds on the basis that even before the marriage, the wife was suffering from Cancer and therefore, there is a suppression of material facts with regard to her competency to bear the

child and also on the ground of cruelty and desertion. There is no pre-suit notice between the parties.

6. The husband examined himself as P.W.1 and marked Ex.P1 to Ex.P12. The wife examined herself as R.W.1 no document has been produced.

7. On consideration of both oral and documentary evidence adduced before the Family Court, the Family Court Judge has come to the conclusion that there is no evidence of suppression of any material fact on the medical ground of the petitioner and prior to the marriage, there was no symptom of Cancer and the subsequent affliction of Cancer, which has resulted in removal of the Uterus, cannot be a ground to file a petition under section 5(ii)(b) of the Hindu Marriage Act and the alleged cruelty and desertion are not proved in the manner known to law, accordingly, dismissed the divorce petition. Hence, the husband has filed the present Civil Miscellaneous Appeal.

8. After admission of this case, it appears from the Court records that there was a counselling before the Mediation Centre twice and

thereafter, it appears that previous brother Judges of this Court have also made an attempt between the parties to settle the matter amicably. The wife has expressed her unwillingness to settle the matter and hence, again posted in the list. Subsequently, the husband was given counselling by the brother Judges, it also went in vain and hence, left with no other option, posted the case for judicial pronouncement. On 27.11.2023 we also had an interaction with the husband and wife separately as well as jointly and thereafter also, had an interaction in the presence of their advocates, we are unable to get the consent of either of the party and hence, we posted the matter for arguments.

9. After hearing the rival submissions and after perusing the evidence of P.W.1 (husband) and R.W.1 (wife) the point for consideration in the CMA are as under:

(i) Whether, the wife, who had during the subsistence of marriage, got afflicted with 'Ovarian Cancer' that resulted in Uterus removal and thereafter, can be termed as a cruelty to the husband:

(ii) Whether the period of treatment taken by the wife for fighting with Cancer and the treatment for it at the parental home can amount to

desertion.

(iii) Whether, after the removal of the Uterus, the husband is entitled to seek a dissolution of marriage on the ground of removal of the Uterus has resulted in mental cruelty as the chance of progeny of the husband has been lost?.

10. The marriage between the parties was solemnized on 09.02.2014. On 02.05.2014, the first pregnancy got aborted as admitted by P.W.1 and R.W.1. The abortion has taken place 4 times. From the admission of the parties in the cross-examination, which is discussed in detail infra, both the parties state that there were three pregnancies and all resulted in abortion. During the fourth pregnancy period, the doctor at Tirunelveli found that there is a malignancy in the Uterus and therefore, she was referred to Cancer Institute at Adayar, Chennai, wherein, she was diagnosed to have an Ovarian Cancer of third grade and after obtaining the necessary medical consent with regard to the side-effects and possibility of the unsuccessful result, if any, due to chemotherapy, the wife has underwent chemotherapy / radio-therapy / radiation.

11. Though she survived the Cancer, due to the medical condition, the doctor, at Adayar Cancer Institute, has removed her Uterus and therefore she was taking further treatment from her mother's place.

12. At this juncture, the husband has filed the divorce petition as stated supra.

13.In ***Roopa Soni vs. Kamalnarayan Soni*** reported in ***2023(3) MWN (Civil) 677,*** the Hon'ble Supreme Court of India has held as follows:-

> *"Cruelty is subjective and differs with gender. Relatively elastic approach to be adopted, when Wife seeks divorce. Law of Divorce initially based on fault theory and built on conservative campus. Prevailing factor earlier was preservation of Marital sanctity. Now libertarian attitute to be adopted and grounds for Divorce/Separation to be construed with latitudinarianism. Courts to adopt 'social-context thinking', cognizant of social and economic realities as well as status and background of parties. Though burden of proof is on petitioner, degree of probability is not beyond reasonable doubt, but of preponderance.*
>
> *The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always*

dependent upon the social strata or the milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status.

What constitutes cruelty is objective. Therefore, what is cruelty for a woman in a given case may not be cruelty for a man, and a relatively more elastic and broad approach is required when we examine a case in which a wife seeks divorce. Section 13(1) of the Act of 1955 sets contours and rigours for grant of divorce at the instance of both the parties.

Even with such a liberal construction of Matrimonial legislations, the socio-economic stigma and issues attached to a woman due to divorce or separation are raised. Justice O.Chinnappa Reddy, in his concurring opinion in Reynold Rajamani and another vs. Union of India and another, 1982 (2) SCC 474 (see paragraph 14), took note of the position of women in a marital relationship and the consequent social and economic inequalities faced by the female spouse in view of divorce. The resultant stigmatization hinders societal reintegration, making a women divorcee socially and economically dependent. Courts must adopt a holistic approach and endeavor to secure some measure of socio-economic independence, considering the situation, case and persons involved. An empathetic and contextual construction of the facts may be adopted, to avert the possibilities of perpetuating trauma – mental and sometimes even physical – on the vulnerable party. It is needless to say

that the Courts will be guided by the principles of equity and may consider balancing the rights of the parties. The Court, while applying these provisions, must adopt 'social-context thinking', cognisant of the social and economic realities, as well as the status and background of the parties.

In such a situation, the Judge has to be not only sensitive to the inequalities of parties involved but also positively inclined to the weaker party if the imbalance were not to result in miscarriage of justice. This result is achieved by what we call social context judging or social justice adjudication.

The law regulates relationships between people. It prescribes patterns of behaviour. It reflects the values of society.

On the question of burden in a petition for divorce, burden of proof lies on the petitioner. However, the degree of probability is not one beyond reasonable doubt, but of preponderance."

14. The learned counsel for the appellant would state that after removal of the Uterus, the chances of getting progeny or child birth to the appellant/husband is impossible and therefore, he seeks divorce on the ground of cruelty, desertion and irretrievable breakdown of marriage. They have not been living together for the last 8 years and more from

2014, till today.

15. Per contra, the learned counsel for the respondent/wife would contend that the petition was filed on the premise that the wife was suffering from Cancer even prior to the marriage and the pre-existing medical condition of the wife having Cancer was suppressed at the time of marriage and thereafter, during the treatment for Cancer at Adayar Cancer Institute, Chennai, on an emergency medical condition, her Uterus was removed. It is an Act of God and fortunately, she was saved and she wants to live with her husband. During the period of treatment for few years, her father also died.

16. P.W.1 (husband) during the cross-examination had admitted that:

> "நான் எதிர்மனுதாரருடன் இருந்த காலத்தில் கூட்டுக்குடும்பமாகதான் இருந்தோம் என்றால் சரிதான். 09.02.2014ல் திருமணம் நடைபெற்றது என்றால் சரிதான். 23.01.2014ல் நிச்சியதார்த்தம் நடைபெற்றது என்றால் சரிதான். எதிர்மனுதாரர் எனக்கு திருமணத்திற்கு முன்பு உறவினர் இல்லை என்றால் சரிதான். எதிர்மனுதாரரை திருமணத்திற்கு முன்பு நான் என்னுடைய பெற்றோர் உறவினர் எல்லாம் போய் பார்த்து வந்தோம் என்றால் சரிதான்.

நான் எதிர்மனுதாரரை மருத்துவ பரிசோதனைக்கு அழைத்து சென்ற போது எதிர்மனுதாரர் எந்த ஆட்சேபனையும் தெரிவிக்கவில்லை என்றால் சரிதான். நான் எந்த மருத்துவமனைக்கு அழைத்து சென்றேனோ அந்த மருத்துவமனைக்கு எதிர்மனுதாரர் வந்தார் என்றால் சரிதான். ஏதிர்மனுதாரர் நான் சொல்லிய அனைத்து பரிசோதனையும் செய்துகொண்டார் என்றால் சரிதான். ஏதிர்மனுதாரர் தாய்மை அடைந்த பிறகு ஓய்வு தேவை என்பதினால் எதிர்மனுதாரரை அவருடைய பெற்றோர் வீட்டிற்கு அழைத்து சென்றார்கள் என்றால் சரிதான். இரண்டு நாட்கள் கழித்து என்னுடைய வீட்டில் வந்து விட்டார்கள். அதன்பிறகும் நாங்கள் சந்தோசமாகதான் வாழ்ந்தோம் என்றால் சரிதான். அதன்பிறகுதான் கருகலைப்பு ஏற்பட்டது என்றால் எதிர்மனுதாரரை என்னுடைய வீட்டில் வந்துவிட்ட அன்றே கருகலைப்பு ஏற்பட்டது. அப்போது நான் அழைத்து சென்ற அதே மருத்துவமனைக்குதான் பரிசோதனைக்கு அழைத்து சென்றேன் என்றால் சரிதான். நான் தாக்கல் செய்துள்ள மருத்துவ அறிக்கையில் எதிர்மனுதாரருக்கு திருமணத்திற்கு முன்பாக புற்றுநோய் இருந்ததாக அந்த மருத்துவ அறிக்கையில் துலங்காது என்றால் சரிதான்.

21.04.2016 ல் எதிர்மனுதாரரை என்னுடைய வீட்டில் வந்துவிட்டனர் அதன்பிறகு எதிர்மனுதாரருக்கு நான்கு முறை கருக்கலைப்பு ஏற்பட்டது என்று சொன்னது சரிதான்.

என்னுடைய தொலைபேசி எண் அவரிடம் உள்ளது. அவருடைய தொலைபேசி எண் என்னிடம் உள்ளது என்றால் சரிதான்.

எதிர்மனுதாரர் சென்னையில் மருத்துவ சிகிச்சையில்

இருக்கும் போது 18.03.2017ல் எதிர்மனுதாரரிடம் பேசிவிட்டுதான் வந்தேன் என்றால் சரிதான்.

குடும்பத்திற்கு ஒரு வாரிசு வேண்டும் என்ற காரணத்திற்காகத்தான் இந்த மனு தாக்கல் செய்துள்ளேன் என்றால் சரிதான். என்னுடைய மனுவிலும், நிரூபணவாக்கு மூலத்திலும் எதிர்மனுதாரரிடம் வாடகைத்தாய் மூலமாகவோ, அல்லது குழந்தையை தத்து எடுப்பது மூலமாக எதிர்மனுதாரரிடம் கேட்டதாக குறிப்பிட்டு சொல்லவில்லை என்றால் சரிதான்.

சென்னையில் எதிர்மனுதாரா சிகிச்சை எடுத்த மருத்துவமனைக்கு நானும், எதிர்மனுதாரரும் சென்று எதிர்மனுதாரருக்கு இருக்கும் நோய் உயிர் ஆபத்தானது என்பதை பற்றி தெரிந்துகொள்ளவில்லை என்றால் சரிதான். (emphasis supplied)

17. The wife examined herself as R.W.1 and during her cross-examination she had admitted that:

□என்னுடைய கணவர் எனக்கு கர்ப்பபையை அகற்றிவிட்டதால் விவாகரத்து கோரி அசல் மனுவை தாக்கல் செய்துள்ளார் என்றால் சரிதான். திருமணம் செய்வதற்கு முக்கிய காரணம் குழந்தைகள் பெற்று வாழ்வதற்குதான் என்றால் சரிதான்.

02.05.2014ல் திருநெல்வேலி லட்சுமி மாதவன் மருத்துவமனைக்கு என்னுடைய கணவர் என்னை அழைத்து

சென்றார் என்றால் சரிதான். அங்கு நான் கருவுற்றிருப்பது உறுதி செய்யப்பட்டது என்றால் சரிதான்.

முதல் கர்ப்பம் சிதைந்துவிட்டது என்பதால் ஓய்விற்காக என்னுடைய பெற்றோர் என்னை திசையன்விளைக்கு அழைத்து சென்றார்கள் என்றால் சரிதான். 41 நாட்கள் நான் என்னுடைய பெற்றோர் வீட்டிலிருந்து ஓய்வு எடுத்துவிட்டுதான் மனுதாரர் வீட்டிற்கு திரும்ப வந்தேன்.

எனக்கு 3 முறை கருச்சிதைவு ஏற்பட்டுள்ளது.

நான் சென்னை அடையாறு கேன்சர் சென்டரில் சிகிச்சை எடுத்ததற்கான சிகிச்சை கோப்புதான் என்னிடம் காட்டப்படுவது என்றால் சரிதான். அது ம.சா.ஆ.12 ஆகும்.

09.07.2014 அன்று எனக்கு கருகலைப்பு ஆனது என்றால் சரிதான்.

எனக்கு நான்கு முறை கருகலைப்பு ஏற்பட்டது என்றால் சரிதான்.

கட்டி இருப்பதாக சொன்னார்கள்.

நான் சென்னை கேன்சர் இன்ஸ்டியூட்டில் என்னுடைய பெற்றோருடன் சென்று சிகிச்சைக்காக சேர்ந்தேன் என்றால் சரிதான். அந்த சமயத்தில் எனக்கு புற்றுநோய் ஸ்டேஜ்-3யை தாண்டிவிட்டது என்றால் சரிதான். அந்த சமயத்தில் என்னுடைய கருப்பை அகற்றவில்லையென்றால் உயிருக்கு ஆபத்து என்ற நிலையில் கருப்பை அகற்றப்பட்டது என்றால் சரிதான்.

எனக்கு தற்போது குழந்தை பெறும் தகுதி இல்லாத காரணத்தினால் அவர் விவாகரத்து கோருகிறார் என்றால் சரிதான். ஆனால் நீ எனக்கு குழந்தையாக இரு, நான் உனக்கு குழந்தையாக இருக்கிறேன் என்று சொன்னார்.

தற்போது மாறிவிட்டார்.

மனுதாரர் குழந்தை பெறவேண்டிதான் என்னிடம் விவாகரத்து கோருகிறார் என்றால் வாடகை தாய் மூலமாகவோ, அல்லது குழந்தையை தத்து எடுத்தும் வளர்க்கலாம்.

(emphasis supplied)

18(a). From the admissions made by the respective parties, this Court finds that the findings rendered by the Family Court that there is no symptom or any legally acceptable evidence to show and demonstrate that even prior to the marriage, the wife had symptoms of Cancer and hence, the plea raised by the husband that Cancer is a pre-existing disease, that is even prior to the marriage, is rightly negatived by the Family Court.

18(b).As admitted by the husband (P.W.1) only after the marriage, three pregnancies, resulted in three abortions. During the fourth abortion only, it was suspected by the Doctor at Tirunelveli, leading to the screening of the Cancer in the body of the wife and due to the medical condition alone, as suggested by Adayar Cancer Institute, the Uterus was removed and she was subjected to chemotherapy, whereby, the Act of God she survived from the killer disease of Cancer.

19. The wife is a Cancer survivor. She has survived the brutal attempts made by the dangerous disease of Cancer. However, during the treatment to fight against the Cancer, on medical grounds and due to emergency and life threatening situation the doctor has removed her Uterus and the same was intimated to the husband. In such a circumstance, we find that only during the subsistence of marriage, wife was afflicted with Cancer which resulted in removal of the Uterus, cannot be termed as a ground of mental cruelty warranting dissolution of marriage.

20. In this regard, the Division Bench of this Court in ***C.M.A.No.1905 of 2002, dated 26.07.2006*** between ***P.Devaraj vs. V.Geetha*** at paragraph 15 & 16, held as under:

> "15. It cannot be disputed that a woman without a uterus in 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. (emphasis supplied)
>
> 16. 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 by appellant-husband 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 appellant 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 respondent."

21(a). We find that the marriage was solemnized between the parties on 09.02.2014. The marriage was consummated, resulted in four pregnancies and three pregnancies ended in abortion, while the 4th pregnancy was in progress, the wife was diagnosed of having been affected with 'Ovarian Cancer", when she was referred for further treatment at Adayar Cancer Institute at Chennai, where, she was fighting for life, as there was a life threatening situation and due to medical emergency, her Uterus was removed. Thereafter, she was living with her parents for treatment. During the process, she also underwent chemotherapy to get

over of the Cancer and now, the respondent/wife is a Cancer Survivor, without Uterus.

21(b)Now, the husband appears to have filed the divorce petition on the ground of progeny. After going through the evidence, we find that at the instigation of some of the family members on the ground of, to have a child for the line of progeny, he appears to have filed this application. Certain allegations and counter allegations have been made between the parties regarding giving in marriage of one of the sisters of husband to the brother of the wife, who is employed abroad, was denied by both the parties.

22. Considering the materials placed before us, we are not desirous of getting into these allegations as they appear to be irrelevant for the issue involved in this case.

23(a). It remains to be stated that during the cross-examination, the husband (P.W.1) admitted that there is a possibility of progeny of getting children by surrogacy method and he is willing for the said surrogacy. So also the wife, during her cross-examination as R.W.1, as

extracted supra, has expressed that the husband has no objection either for adoption of a child or to go for a surrogacy through surrogate mother

23(b) Hence, taking into entirety of the circumstances, we have no hesitation to hold that during the subsistence of marriage, when the wife was diagnosed with 'Ovarian Cancer' and during the treatment, her Uterus was removed, the same cannot be treated as a cruelty to the husband much less 'mental cruelty' since it is not 'Act of the wife' but only as 'Act of FATE or DESTINY'.

23(c) The period of treatment she has taken from the parental home also cannot be termed as desertion. With regard to Section 5(ii)(b) of the Hindu Marriage Act, since we have already found that is not a pre-existing disease at the time of marriage and on that ground also the husband is not entitled for divorce.

24. After perusing the oral evidence of R.W.1 and her connected medical records, we find that the wife is a Cancer survivor. Destiny struck her in the form of the killer disease of humanity (viz., Cancer) and she was diagnosed as being in the third stage of Cancer and however, was saved by

Adayar Cancer Institute, who does Yeoman service to the Society.

(I) Though she was saved, due to the medical condition, the doctors at Cancer Institute could not save her Uterus and the same was removed.

(ii) Some of the evil-eyed relatives appear to have injected inhuman feeling in the mind of the husband to seek for divorce, citing progeny being lost. The wife pleads to save the matrimonial tie for the rest of her life.

(iii). As stated supra, Cancer, in the form of a killer disease made an attempt on her to separate her permanently from her husband and it was saved by Act of God and by doctors at Adayar Cancer Institute. In the above factual matrix, we are not inclined to severe the matrimonial tie that has been saved by Act of God.

25. We thought it fit to reproduce the words of her husband to the wife before surgery " You be my child, I be yours". Such a golden hearted husband was poisoned by some vested interest relatives, to file the

divorce petition. Thus, we find that seeking divorce has not stemmed from the heart of the husband but only appears to have surfaced from a communicable disease, viz., ill-effects of some relatives who wanted to exploit the pitiable and pathetic situation, by raising the plea of progeny.

26. The human relation itself is fragile, but human mind is more fragile and it will break in a split second and hence, the case should be assessed in entirety but not in isolation. Hence, in view of the factual matrix of the cases as analysed earlier and in view of the decision of this Court in **P.Devaraj's** case as stated supra, we find no merits in this appeal.

(i) Before departing, in view of the answer in the form of the admission by both the parties as extracted supra, in the event of husband opting for adoption, the wife shall give her consent to do so from the concerned NGO.

27. In the event of the husband opting to surrogate a child, through a surrogate mother, considering the special circumstances of this case, we recommend to the NGO's and Corporate having CSR funds to

render financial and medical assistance to fulfill the wish of the husband. In this regard, we recommend the case of the petitioner / appellant to the Managing Director of Sakthi Charitable Trust run by the Sakthi Masala Group at Erode to render financial aid for the parties to support surrogacy. It is open to the said Trust to render necessary help to the extent possible subject to their financial ceiling limit and conditions stipulated in their Trust Deed and the said Trust can either, singularly or collectively, in association with any other NGOs, provide financial assistance to the Cancer survivor of the family to the extent possible.

28. For the reasoning stated supra, the order of dismissal of the dissolution of marriage at the instance of the husband, as rejected by the Family Court, appears to be just and fair and for reasoning, the same is hereby confirmed.

29. Accordingly, this Civil Miscellaneous Appeal is dismissed. No costs.

(T.K.R.J.) & (P.B.B.J)

22.12.2023

Internet : Yes
Index :Yes/No
Neutral Citation:Yes/No

am

To

1.The Family Court, Tirunelveli.

2.The Section Officer,

VR Section, Madurai Bench of Madras High Court,

Madurai.

RMT.TEEKAA RAMAN, J.,
and
P.B.BALAJI,J

am

judgment in

C.M.A(MD)No.724 of 2021

22.12.2023