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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 11.09.2024

CORAM:

**THE HONOURABLE MR.JUSTICE P.VELMURUGAN
AND
THE HON'BLE MR.JUSTICE K.K.RAMAKRISHNAN**

C.M.A(MD)No.1045 of 2018

~~Amirthan~~

... Appellant/Petitioner

.Vs.

~~Grasik Lebarathinan~~

... Respondent/Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 19(1) of the Family Courts Act, 1984 praying this Court to set aside the judgment and decree made in I.D.O.P.No.1 of 2016, dated 26.4.2018, on the file of Family Court, Srivilliputhur.

For Appellant : Mr.M.Mohamed Ibram Saibu

For Respondent : Mr.M.Thirunavukkarasu

JUDGMENT

(Order of the Court was made by **P.VELMURUGAN,J**)

This Civil Miscellaneous Appeal is directed against the judgment and



WEB COPY decree made in I.D.O.P.No.1 of 2016, dated 26.4.2018, on the file of Family Court, Srivilliputhur.

2.The husband had filed the above I.D.O.P for divorce under Sections 10(1)(i)(x) and 11(b) of the Indian Divorce Act on the ground of adultery and cruelty. The brief facts of the case is that the marriage between the appellant and respondent was solemnized on 18.10.2012 at C.S.I.Church, Rajapalayam and thereafter, they lived together as husband and wife at Watrap Village and whileso, the respondent left the matrimonial home without any information and that there was no contact from the respondent and thereafter the parents of the respondent has given an assurance that they would bring the respondent to the matrimonial home and as they have failed to do it, the appellant went to Kerala in the year 2014 to bring the respondent to matrimonial home. The parents of the respondent convince him and in the month of March 2014, the respondent voluntarily came to the house of the appellant and lived with him. Thereafter they lived as husband and wife and at that point of time, the respondent informed the appellant that she become pregnant and thereafter, on clinical test, it was found that she was pregnant and the respondent delivered a male child on



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26.9.2014. Thereafter, the sister of the appellant informed that the respondent admitted that she had sexual intercourse with another man when she was living with her parents at Kerala and therefore, the appellant was constrained to file a petition for divorce on the ground of adultery and cruelty.

3.The case of the respondent is that the marriage is admitted and since the respondent failed to arrange for jewels which was demanded by the appellant, the appellant refused to accept the respondent for marital life.

4.Before the Family Court, Tirunelveli, in order to substantiate their stand, on the side of the appellant, three witnesses were examined as P.W.1 to P.W.3 and six documents were marked as Ex.P1 to Ex.P6. On the side of the respondent, she himself was examined as R.W.1 and no document was marked on their side.

5.The Family Court, after considering the materials and appreciating the evidence adduced on either side, dismissed the Petition for divorce filed by the appellant husband. Aggrieved over the same, the appellant filed the present Civil Miscellaneous Appeal.



WEB COPY 6. The learned counsel for the appellant would submit that after marriage, without intimation, the respondent left the matrimonial home and went to Kerala and stayed with her parents. Thereafter, after some time, she voluntarily came to the matrimonial home and at that point of time, she informed the appellant that she was pregnant. When the sister of the appellant asked about the same, she informed that she had affairs with a third party and however, she did not reveal the name and particulars of the said person and therefore, the name of the adulterer was not mentioned in the divorce petition. Further the appellant, child and respondent were subjected to DNA test and DNA test would reveal that the appellant was not the biological father of the child born to the respondent. Though the Family Court admitted and observed the same, however, in the interest of the child, the Family Court refused to grant divorce. Once the appellant proves that the child born to the respondent was not that of the appellant and DNA test also prove that the appellant is not the biological father of the child and there is no other option except to grant divorce and placed reliance in the case of *Nandlal Wasudeo Badwaik .vs. Lata Nandlal Badwaik and another reported in (2014) 2 Supreme Court Cases 576*, wherein, the Honourable Apex Court held that the report of DNA test is a conclusive one, whereas, in this case,



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though the respondent undergone DNA Test and the expert was examined as P.W.3 and the DNA report was marked as Ex.P6, a combined reading of P.W.3 and also a perusal of Ex.P6 itself prove that the appellant is not the biological father of the child. Therefore, though there is no direct evidence for adultery, but however the respondent has not denied or challenged Ex.P6. Therefore once Ex.P6 reveals that the appellant is not the biological father of the child, presumption is that the respondent had intimacy with person other than the husband, the appellant herein. Therefore, it is presumed that the respondent was leading an adulterous life and however, the appellant was not able to find out the person with whom the respondent was leading an adulterous life. Therefore even though the name of the adulterer was not mentioned, it is only the respondent who alone knows about the same and it is exclusively with the personal knowledge of the respondent. It is not the case of the respondent that the appellant knows about the name and particulars of the adulterer. Therefore Section 11(b) is very clear that if the appellant who filed petition for divorce on the ground of adultery was not able to find out the person, there is no need to implead the adulterer as co-respondent. Further, it is not the case of the respondent that the appellant was aware of the adulterer and therefore in these



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circumstances, the finding rendered by the Family Court is perverse.

7.The learned counsel for the respondent would submit that there was access between the appellant and respondent and after marriage, they lived together as husband and wife and out of their wedlock, she gave birth to a male child and once the access between the appellant and respondent proved and the child was born to them, there is presumption that the child born to the respondent was only through the appellant. Even though their marriage is admitted and their living as husband and wife is also admitted, the appellant has not given the name and particulars of the adulterer and he was not impleaded as co-respondent and therefore, the petition filed by the appellant for divorce is not maintainable and further, the Family Court considering the future and interest of the child, refused to grant divorce and there is no merit in the appeal and the appeal has to be dismissed.

8.Heard the learned counsel appearing on either side and perused the materials placed before this Court.



WEB COPY 9. The point for determination arose for consideration in this appeal is:

1. Whether the Family Court was right in granting divorce on the ground of adultery?
2. Whether the non-joinder of adulterer is fatal to the case of the appellant?

Point No.1:-

10. The marriage between the appellant and respondent is admitted and however the appellant filed a petition for divorce against the respondent on the ground of adultery and cruelty. Further the appellant has not impleaded the adulterer as a co-respondent to the divorce proceedings. The specific case of the appellant is that he is not aware of the adulterer. The appellant has also stated that he came to know about the adultery through his sister that when the respondent went to Kerala to her parental home, she had illegal intimacy with another man, but however, there is no record to show that the respondent reveal the name of the adulterer. A reading of the entire materials show that in nowhere, there is a mention/reveal about the name and particulars of the adulterer, except the fact



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the respondent when she was in parental home at Kerala, she had illicit intimacy with other man. The DNA test also prove the same. The respondent also not disputed the DNA test and not challenged Ex.P6-Report of DNA test. Therefore, even though the marriage is admitted and there is no direct physical evidence for adultery, but however the expert's opinion and medical evidence clearly prove that after the marriage, the respondent had illegal intimacy with an other man. Further the Family Court also finds that DNA Test itself shows that the appellant is not the biological father of the child but in the interest of the child, the Family Court dismissed the divorce petition. Once the appellant proved that the respondent/wife was leading an adulterous life, the appellant is entitled to get divorce on that ground. Therefore, this Court finds that the order passed by the Family Court, Tirunelveli is perverse and therefore, the finding rendered by the Family Court is set aside.

Point No.2:-

11. Admittedly, the appellant filed petition for divorce on the ground of adultery also and the adulterer was also not impleaded as co-respondent. On a perusal of the Petition and proof affidavit, the appellant has stated in para 12 of



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the Petition that he was not aware of the adulterer and he belongs to Kerala. P.W.

2 has also spoken about the same. However, Ex.P6 and the evidence of P.W.3 proved that the appellant is not the biological father of the child. Section 11(b) of the Indian Divorce Act reads as follows:

“11. Adulterer or adulteress to be co-respondent:-- On a petition for dissolution of marriage presented by a husband or wife on the ground of adultery, the Petitioner shall made the alleged adulterer or adulteress a co-respondent, unless the Petitioner is excused by the Court from so doing on any of the following grounds, namely:--

(a).....

(b) that the name of the alleged adulterer or adulteress is unknown to the Petitioner although the Petitioner has made due efforts to discover it;

(c).....”

Once Ex.P6 is not challenged and the same was also proved by examining P.W.3, mere the access between the appellant and respondent will not be helpful and Section 112 of the Indian Divorce Act is not applicable to the present case on hand. Under the above said circumstances, mere non impleading of adulterer as co-respondent is not fatal to the case of the appellant. This point is answered accordingly.



WEB COPY 12. In the result, the Civil Miscellaneous Appeal is allowed by setting aside the order of the Family Court, Tirunelveli made in I.D.O.P.No.1 of 2016, dated 26.04.2018 and the marriage solemnized between the appellant and respondent on 18.10.2012 at CSI Church, Rajapalayam according to Christian rites and customs is dissolved by a decree of divorce. No costs.

(P.V.,J.) (K.K.R.K.,J.)
11.09.2024

NCS : Yes/No
Index : Yes / No
Internet : Yes / No
vsn

To

The Judge,
Family Court,
Tirunelveli.

Copy to

The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.

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P.VELMURUGAN,J.
and
K.K.RAMAKRISHNAN,J.

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JUDGMENT MADE IN
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