



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:20.07.2015

CORAM:

THE HONOURABLE MS.JUSTICE **V.M.VELUMANI****CMA. (MD) Nos. 455 & 456 of 2014****and****M.P (MD) Nos. 2 & 3 of 2014**

Sahayaselvi : Appellant/1st Respondent/Appellant/
Petitioner /in both the CMA

Vs.

1.A.Nopel Arockiyaraj : 1st Respondent/Petitioner/
Respondent/Respondent

2.D.Joseph : 2nd Respondent/Respondent
in CMA 455/2014

A.Nopel Arockiyaraj : Respondent/Respondent
in C.M.A. (MD) No.456/2014

Appeal filed under Order 43 Rule 1 of Civil Procedure Code, against the Order dated 23.09.2013 in I.D.O.P.Nos.6 & 7 of 2002 on the file of the District Judge, Sivagangai.

For Appellant in both CMAs : Mr.G.Prabhu Rajadurai

For R-1 in : Mr.M.Subash Babu

CMA No.455/2014

and sole respondents

n CMA.No.456/2014

For R2 in

CMA No.455/14

: No appearance

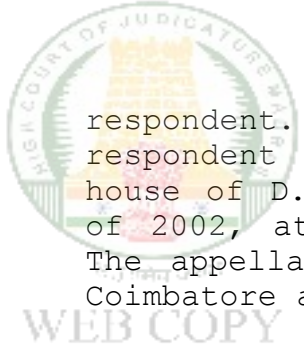
JUDGMENT

Both the appeals are filed by the appellant/wife against the common order, dated 23.09.2013 in I.D.O.P.Nos. 6 & 7 of 2002, on the file of the District Judge, Sivagangai.

2.I.D.O.P.No.6 of 2002 was filed by the respondent/husband for Dissolution of Marriage solemnized between the appellant and respondent. I.D.O.P.no.7 of 2002 was filed by the appellant/wife for Restitution of Conjugal Rights. The learned District Judge, Sivagangai allowed the I.D.O.P.No.6 of 2002 and dismissed the I.D.O.P.No.7 of 2002. Against the said common order, the appellant/wife filed these two appeals.

3.Necessary Facts:-

The appellant and respondent got married on 07.06.1998 at St. Therasal Church, Manamadurai as per Indian Christian Customs. They lived as husband and wife at Manamadurai. A male child was born on 08.09.1999 in the wedlock. According to the respondent, from the date of marriage, there was no cordial relationship between the appellant and the



respondent. The appellant behaved cruelly and she was quarreling with the respondent frequently. The appellant was in the habit of visiting the house of D.Joseph, who was arrayed as second respondent in I.D.O.P.No.6 of 2002, at Palani without permission and knowledge of the respondent. The appellant used to go with the said D.Joseph to Madurai, Dindigul, Coimbatore and Kodaikanal.

4.While appellant was 7 months pregnant, she went to her parents house and she refused to live with the respondent even after delivery of the child. After several mediations, she came to matrimonial home. They lived as husband and wife for some time. Even at the time, she was not having cordial relationship with respondent and ill-treated the respondent. Further, the appellant is leading an adulterous life with D.Joseph. On 30.04.2001 they were found in a compromising position. The appellant apologised for her behavior and promised not to repeat the said act.

5.Under these circumstances, the respondent filed I.D.O.P.No.6 of 2002 for dissolution of marriage solemnized between the appellant and respondent.

6. The appellant filed counter affidavit and denied all the allegations and filed I.D.O.P.No.7 of 2002 for Restitution of Conjugal Rights. According to the appellant, the said D.Joseph is her elder sister's husband. He is having two children. Appellant denied the allegations of adultery and denied that no such incident as alleged by the respondent occurred on 30.04.2001. The respondent only ill-treated her by demanding dowry. At the time of marriage 15 sovereign of gold jewels, household articles, 2 sovereign of gold ring were given to the respondent as Sridhana. Further, the respondent demanded two wheeler and separate house worth Rs.5,00,000/- as dowry. The respondent harassed the appellant demanding dowry, therefore, she gave a complaint on 11.07.1999 before the Thirupuvanam police station for re-union. On 08.09.1999 a child was born to them. The respondent did not come to see the Male child. Subsequently, the child was not well and was admitted in Jeevajothi Hospital. Even after the information given to the respondent, he did not even come and see the child when the child was sick and admitted in the hospital. The father of Manamadurai Church mediated and advised them to live together. But the respondent was not ready and willing to live with the appellant.

7.The respondent denied all the allegations made by the appellant in I.D.O.P.No.7 of 2002. He denied that he demanded dowry. He reiterated various allegations made by him in I.D.O.P.No.6 of 2002.

8.Based on the pleadings, the learned District Judge, Sivagangai framed necessary points for consideration. A joint trial was conducted. The respondent examined himself as P.W.1 and examined two other witnesses. Ex.P.1 and Ex.P.2 were marked.

9.The appellant examined herself as R.W.1 and examined her father as R.W.2. Ex.R1 and Ex.R2 were marked. The learned District Judge, Sivagangai considering the pleadings, evidence and arguments, allowed the I.D.O.P.No.6 of 2002 filed by the respondent and dismissed the I.D.O.P.No.7 of 2002. Against the said order, the appellant filed the above two appeals.



10. The learned counsel for the appellant contended that:

- i) the learned District Judge ought to have dismissed the I.D.O.P.No.6 of 2002 as respondent failed to prove his case.
- ii) ought to have rejected the evidence of P.W.2 and P.W.3 as they are interested witnesses.
- iii) Erred in holding that single act of adultery is sufficient for divorce, when act of adultery was not proved.
- iv) the learned Judge ought to have seen that respondent did not plead mental cruelty and that respondent only deserted the appellant.
- v) that living separately for more than 10 years is not a reason for dismissing the petition for restitution of conjugal rights and prayed for allowing both the appeals.

11. The learned counsel for the appellant relied on the following judgements:-

i) 1996(II) CTC -22 (Rajee vs. Babu Rao)

"The finding of adultery has necessarily to be based on some sort of positive evidence superior to suspicion. Paragraph 109 of Raydon on Divorce which is as follows:

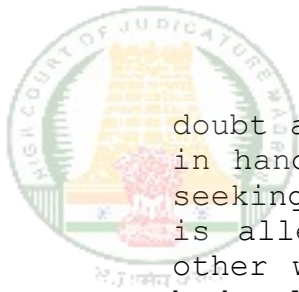
"The burden of proof is throughout on the person alleging adultery there being a presumption of innocence. Reference to the statute shows that the standard of proof is that the Court must be satisfied on the evidence. The act makes no distinction between the "standards of proof of adultery and that of any other ground of divorce but this has not in the past been reflected in the cases, which have required the same strict standard of proof in respect of adultery as is required in a criminal case before an accused person is found guilty, that is, that the Tribunal must be satisfied beyond all reasonable doubt. But it has been held that a suit for divorce is a civil and not a criminal proceeding and that the analogies and precedents of criminal law have no authority in the Divorce Court which is a civil Tribunal. It is wrong, therefore, to apply an analogy of criminal law and to say that adultery must be proved with same strictness as is required in a criminal case. As far as the standard of proof is concerned adultery like any other ground for divorce, may be proved by a preponderance of probability".

ii) AIR 1974 CALCUTTA 61 (V 61 C 12) Special Bench

25. Mr. Dutta in this connection has drawn our attention to the fact that there is no evidence to show that the respondent and the co-respondent lived together in the same room in the hotel. Neither owner of the hotel nor any employee of the same has been examined to show that those offending parties lived together in the same room or at least to show that both of them were found together in the closed room....."

iii) (2004) 138 PLR 537 (Kailash Devi Wife of Jai Kishnan vs. Jai Kishnan)

"16. It is appropriate to note that the standard of proof in respect of matrimonial conduct which constitutes cruelty as a ground for seeking a matrimonial relief of dissolution of matrimony may be established on the preponderance of probabilities as in civil cases and not beyond a reasonable



doubt as in criminal cases. However, the question in the case in hand, that is required to be considered is in relation to seeking matrimonial relief on the ground of adultery where it is alleged that the appellant is living, in adultery or in other words after the solemnization of the marriage, she has had voluntary sexual inter course with a person other than the respondent-husband. It is appropriate to note that the levelling of allegation of adultery is a more serious matter than of a case where matrimonial relief is sought on the ground of cruelty. Therefore, to prove the charge of adultery in a matrimonial cause the standard of proof would definitively be higher and a strict measure of proof is required, though it may not be beyond shadow of reasonable doubt as is required in a criminal case but at the same time it is also not on mere preponderance of probabilities in view of the dictum of the Hon'ble Supreme Court in *Earnest John Whit's case* (Supra). The proceedings for claiming divorce on ground of adultery partake a character of quasi criminal procedure.

20.... As already noticed, the evidence of proving a charge of adultery in matrimonial cause requires a slightly higher standard of proof than mere preponderance of probabilities. Therefore, in this view of the matter the respondent No.1 husband has failed to fully discharge the burden of proving the said letter on the basis of the provisions of the Evidence Act.

21.The question that then requires to be considered is what is the evidentiary value of the statements of Mir Singh (PW-2) and Smt.Rissalo (PW-3). Mir Singh (PW-2), as already noticed above, had seen the appellant and respondent No.2 on two occasions at Jhajjar in January 1987 and December 1988. Smt. Rissalo (PW-3) states that she had seen the two in a compromising position.

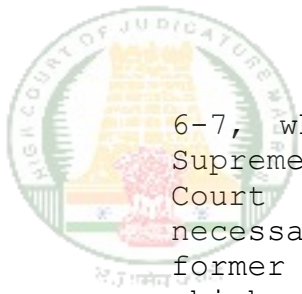
23..... This Court held that in such matters public interest requires that marriage bonds shall not be set aside lightly or without strict enquiry and proof and that the act of adultery in its nature is a very secret act and direct proof could not be available in all cases. It was held that proof of actual adultery is not necessary and circumstantial evidence which lends to an inference of adultery was sufficient and that the degree of proof need not reach certainty, but it must carry a high degree of probability. It was held that it required that appreciation of evidence in such cases must be careful and proper and only when evidence is cogent, consistent and reliable, the finding of adultery could be recorded but where the evidence was lacking in corroboration and inconsistent and unnatural, no finding of adultery could be recorded. "

iv) AIR 1989 CALCUTTA 128 SPECIAL BENCH (Ramish Francis Toppo v.

Violet Francis Toppo)

<https://hcservices.ecourts.gov.in/hcservices>

"11. As has been pointed out in a recent Special Bench decision of this Court in *Bholanath Karmakar* AIR 1988 Cal 1 at



6-7, while confronted with two conflicting decisions of the Supreme Court rendered by Benches of equal strength, the High Court would have to prefer one to the other and is not necessarily obliged as a matter of course to follow either the former or the latter in point of time, but must follow the one which, according to it, is better in point of law. Needless to say that it would be quite embarrassing for the High Court to declare one out of two decisions of the Supreme Court to be more reasonable or better in point of law, implying thereby that the other is less reasonable. But if such a task falls upon the High Court because of irreconcilable contrary decisions of the Supreme Court emanating from Benches of co-ordinate jurisdiction, the task, however unpleasant and uncomfortable, has to be performed. In the case at hand, however, we are relieved of such an exercise for more reasons than one. For we may hold that since *While v. While* (AIR 1958 SC 441) (supra) is a decision directly under the Divorce Act, which has been also followed by a Special Bench of this Court in *Agnes Cencilla v. Lancelot* AIR 1964 Cal 28 in a case under Divorce Act, which is also the statute governing us in this case, we should follow the same in preference to *Dastane v. Dastane* (AIR 1975 SC 1534), which is a decision under a different statute, namely, the Hindu Marriage Act. But, even otherwise, I am satisfied that even if we go by the *Dastane* standard and hold that the allegation of adultery need not be proved beyond reasonable doubt, it would be trite to say that the allegation must nevertheless be reasonably proved, for proof, in a Court of law, cannot but mean reasonable proof, or to borrow from S.3 of the Evidence Act, such proof which a prudent man ought to accept. No citation should be necessary for such obvious a proposition, but yet reference, if need be may be made to the Special Bench decision of this Court in *Susanta Kumar* (AIR 1964 Cal 33) (supra) at 34, where P.B.Mukharji, J. speaking for the Bench has observed that "adultery must at least be averred and alleged in the petition under S.10 of the Indian Divorce Act and reasonably proved".

v) AIR 2001 Kerala 195 (K.A.Philip v. Susan Jacob)

"13. Apart from the interested testimony of the petitioner, there is no other reliable evidence to substantiate the contention of adultery. But he had not succeeded in proving the same. The chastity of the wife is questioned by the husband. The evidence reveals that both of them are educated. It is very hard to believe that an educated employed woman is living in adultery with so many person. It has come out in evidence that the parents of the petitioner were residing with the petitioner. If actually the respondents were the usual visitors of the house in his absence, naturally the father and mother of the petitioner would have witnessed the same. They are the most competent persons to swear about the incident. But they were not cited and examined. The neighbours were also not examined. Under Section 10 of the Indian Divorce Act, any husband may present a petition to the District Court or to the High Court, praying that his marriage may be dissolved on the ground that his wife has, since solemnization thereof, been guilty of adultery. Even though a wild allegation is raised by the petitioner against his wife, it was not proved. In the absence of any reliable evidence, no



decree for divorce can be passed.

16.... The most cruel thing that can be done against a woman is to question her chastity without any basis."

vi) 1922 43 MLJ 441 (Pendurti Joseph vs. Pendurti Ramamma and another)

"3... In this case there was no corroboration of any kind. I doubt if there was any evidence of adultery, because what the petitioner said was that he discovered that she was committing adultery. He says that she is living in the house with the name co-respondent. He does not say how he knows or whether it is hearsay, or give any facts. It must be understood that it is absolutely essential that there should be corroboration.

4. As regards the evidence in respect of Jeevaratnam, he not having been a party to the suit, that evidence ought not to have been admitted. As regards the evidence against the co-respondent there is no corroboration as I have pointed out. That corroboration in a case of this kind can in all probability easily be obtained. It is only necessary for some one who knows the respondent by sight to give evidence that he has been to the place where it is alleged that she is living in adultery with the co-respondent and that he has seen them living together under conditions that lead to presumption that they are guilty. If there is no person available such as a relative of the petitioner who knows her by sight, the petitioner himself, must go with somebody else e.g., the local police and identify the person living with the co-respondent as being his wife."

vii) AIR 2013 ORISSA 75 (Nirmal Chandra Dash v. Janaki Dash)

"13. In the instant case from the evidence as laid by the petitioner-husband (appellant) there is absolutely no evidence to show that the defendant No.1 wife was found in a compromising position with Santosh Kumar Das in her bed room or people of the locality or the village had seen them moving together on the night of 1.9.1999 and they were found living together in a house. The evidence of P.Ws.2 and 3 cannot be believed to draw presumption that the defendant No.1 was living in adultery. The Court cannot act on surmises or conjectures...."

12. Per contra, the learned counsel for the respondent contended that respondent proved the adulterous life of appellant and proved cruelty and desertion by appellant by oral and documentary evidence and there is no irregularity or illegality in the impugned order of District Judge and prayed for dismissal of both the appeals.

13. The learned counsel for the respondent relied on the following judgements:-

I) CDJ 1983 MPHC 039 (Alyson Versus Rodney Valentine D'bras)

"5..... There was no reason to disbelieve the un rebutted testimony of the petitioning wife and her witness Mobin D'Silva. It was satisfactorily established from the said evidence that the respondent-husband had been guilty of adultery coupled with such cruelty as without adultery would have entitled her to a divorce a mensa et thoro, We are



satisfied that there was no reason to believe that the application in question was presented or prosecuted by the petitioning wife in collusion with the respondent-husband.

ii) CDJ 1987 MPHC 080 (M.P.Badalkar versus Shanta Sarojini)

"4..... As has been held in Lalit v. Lavina, AIR Madh Pra 70 (FB) the only requirement to prove the case by the petitioner is by preponderance of probabilities and the decree of probability depends on the gravity of the offence. We are satisfied that the petitioner has been able to prove his case.

Iii) CDJ 1981 Kar HC 150 (Noreen Judith Sandhurst Versus Raymond Bernard Sandhurst)

"8. It is an established rule of evidence that adultery is not likely to be proved by direct evidence. Adultery has to be proved mainly by circumstantial evidence and the Court has to be satisfied that there is no collusion between the parties and the persons concerned had an opportunity to have guilty intercourse. At the same time, it is necessary to remember that the satisfaction established by the person must be such as would need the guarded discretion of a reasonable and just man to come to the conclusion of adultery.

iv) CDJ 2011 MHC 4183 (Malarvijy Versus Kanthan & another)

"24..... Whether the allegation of the husband that she was in the habit of associating with young boys and the findings recorded by the three Courts are correct or not but what is certain is that once such allegations are made by the husband and wife as have been made in this case then it is obvious that the marriage of the two cannot in any circumstance be continued any further. The marriage appears to be practically dead as from cruelty alleged by the husband it has turned out to be at least intimacy of the husband with a lady doctor and unbecoming conduct of a Hindu wife".

25. In the light of the law laid down in the aforesaid decisions, if the facts of the present case are considered, it could be seen that when serious allegations of adultery is made by the wife against the husband and the same stands unsubstantiated that will definitely amount to mental cruelty as far as the husband is concerned. The unfounded allegations made by the wife against her husband by itself shows the prima facie failure of the marriage. "

14.Heard the learned counsel appearing for the appellant and respondent and I have carefully perused materials on record, the common order passed by the District Judge and considered the rival submissions of the counsel for the appellant and respondent.

15. The respondent has filed I.D.O.P.No.6 of 2002 for divorce. His specific case is that appellant was having illicit relationship with one D.Joseph, who was second respondent in I.D.O.P.No.6 of 2002 in C.M.A.No.455 of 2014. He has alleged that appellant stayed with D.Joseph in Palani and visited many places namely Dindigul, Coimbatore, Kodaikanal with said D.Joseph. On 30.04.2011 he found appellant and D.Joseph in compromising position. He also examined P.Ws.2 & 3 to prove that appellant visited several places along with D.Joseph. The learned counsel



for the appellant argued that P.Ws.2 & 3 are interested persons and hence their evidence must be rejected. He also argued that conclusion of lower Court that single act of adultery is sufficient grounds for divorce is contrary to law. Both these contentions are untenable. The act of adultery can be proved only by circumstantial evidence. Only known persons can be in a position to speak about the circumstances leading to adultery. P.W.3 a friend of D.Joseph had spoken about the D.Joseph borrowing his motorcycle and going with appellant to various places.

16.The standard of proof in a petition for divorce on the ground of adultery is higher than in a petition for divorce on other grounds. The proceedings in case of allegation of adultery is in the nature of Quasi Criminal proceedings. At the same time, the allegation of adultery need not be proved beyond reasonable doubt. The person alleging adultery must reasonably prove the same. The Court must be satisfied that the person has proved adultery. In the present case Respondent alleged and proved adultery by deposing as P.W.1 and corroborating the same by evidence of P.W.2 and 3. It is well settled that one act of adultery proved is sufficient to grant a decree of divorce and the act of adultery can be proved by circumstantial evidence.

17. Further respondent has alleged a specific act of adultery of appellant on 30.04.2001. The appellant denied these allegations. The said D.Joseph is none other than the husband of appellant's elder sister. When serious allegations are made against him and appellant he ought to have contested the said allegations and should have given evidence. On the other hand, he remained ex-parte.

18.In the circumstances, I hold that the respondent has proved the illicit relationship between the appellant and D.Joseph.

19. The learned District Judge also held that single act of adultery is sufficient for granting a decree of divorce. This conclusion is proper and is as per law.

20. The appellant initiated legal proceedings for maintenance. In the said proceedings she has received all her Sridhana articles from respondent. She had not taken any steps to reunion with appellant for 10 years. The learned District Judge considering these facts, concluded that the appellant's real intention is not to reunion with the respondent. There is no irregularity or illegality in the said conclusion.

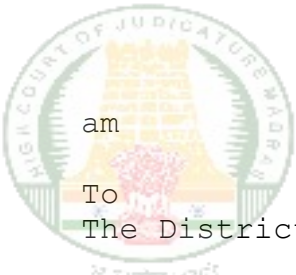
21. For the above reasons, both the CMA's are devoid of merits and dismissed. No costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar (Crl.Side)

/True Copy/

Sub Assistant Registrar



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To

The District Judge, Sivagangai.

+2CC's to Mr.G.Prabhu Rajendran Advocate Sr.No.39667

+2CC's to Mr.Subash Babu Advocate Sr.No.40118

Copy to :

The Section Officer, V.R.Section,

Madurai Bench of Madras High Court, Madruai.

GJM/DP/JGB/18.9.15-9P-7C

CMA. (MD) Nos.455 & 456 of 2014
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