

HON'BLE SRI JUSTICE R. SUBHASH REDDY

AND

HON'BLE Dr. JUSTICE B. SIVA SANKARA RAO

FAMILY COURT APPEAL No.164 of 2011

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JUDGMENT: (Per Justice R. Subhash Reddy)

This appeal, under Section 19 of the Family Courts Act, 1984 is filed by the petitioner in F.C.O.P.No.42 of 2009 on the file of the Family Court, SPSR Nellore District, aggrieved by the order and decree dated 15.04.2011, whereby the Family Court dismissed the aforesaid F.C.O.P., filed under Section 13(1) (ib) of the Hindu Marriage Act, 1955, seeking dissolution of marriage of the petitioner with the respondent, which was solemnized on 25.07.1971, on the ground of desertion.

2. For the sake of convenience, parties are referred to as they were arrayed before the Family Court.

3. The aforesaid F.C.O.P. is filed by the petitioner-husband seeking dissolution of marriage with the respondent with the following averments:

Marriage of the petitioner was solemnized with the respondent on 25.07.1971 according to Hindu rites and customs in Minagallu village of Nellore District. Out of their wedlock, they have two sons. Elder son by name Sunil was born in the year 1972 and younger son Nikhalesh was born in the year 1974. After the marriage, the respondent left him for about 4 years and lived with her parents. He filed O.P.No.65 of 1992 on the file of the Senior Civil Judge, Kovur seeking dissolution of marriage with the respondent. The same was dismissed for default by order dated 13.06.1997. Further pleading that the respondent remained at her parents' house continuously, thus deserted him continuously for more than three decades, F.C.O.P.No.47 of 2009 is

filed seeking dissolution of marriage. It is pleaded that as the respondent deserted him for a long period, i.e., more than three decades and there is no chance for their reunion. With the aforesaid pleas, petitioner sought relief of dissolution of marriage with the respondent.

4. Before the Family Court, respondent-wife filed counter-affidavit. In the counter-affidavit, while denying the various allegations made by the petitioner, she pleaded as under:

Her marriage with the petitioner was solemnized on 25.07.1971 as per Hindu rites and customs and at that point of time, petitioner was studying as House Surgeon in S.V. Medical College, Tirupathi. As the petitioner's parents had only four acres of land and had no sufficient means to educate the petitioner, her parents gave Rs.16,000/- as dowry to the petitioner and after marriage, in the year 1971, they have put up family at Tirupati, in a rented house and in the year 1972, petitioner went to Chandigarh to undergo Senior House Surgeon training, as such, she went to her parents house at Minagallu village and stayed there. After completion of studies at Chandigarh, petitioner left to Banaras to prosecute further studies and after completing his studies, he came back and they have put up family at Sangam village on 09.02.1974 where the petitioner started a private nursing home. While so, first son was born to them on 15.07.1972 and second son was born on 14.07.1974 who are aged about 37 and 35 years. After completing Engineering and Medical course, both sons are settled in the United States of America. With the money given by her parents, petitioner purchased 1 acre of land in Sangam village, constructed a building thereon and started nursing home in the name of Sreenivasa Nursing Home in the year 1974. In the said nursing home, one Dr. Jayalakshmi was working and a lady by name Pulimi Koteswaramma was staying with Dr. Jayalakshmi and assisting her in household work. The said Pulimi Koteswaramma is unmarried.

Dr. Jayalakshmi and Koteswaramma used to stay in the adjoining portion to the portion, where the petitioner and the respondent were

living. Thereafter, Dr. Jayalakshmi left to Delhi in view of her employment in the year 1978 and her assistant Koteswaramma also left to Budamgunta which is her native village in the year 1978. Later, petitioner brought Koteswaramma to Sangam village in the year 1979 for household assistance and she joined them in their house constructed in Sangam village where they lived till 15.10.1982; at that point of time, children of the petitioner and the respondent were studying at Trivendrum and Korukonda. During the said time, petitioner developed illegal intimacy with Koteswaramma and when the same was questioned by the respondent, she was necked out of the house on 15.10.1982. Under those circumstances, in a helpless situation, she was forced to stay with her parents in Minagallu village; several mediations held by elders were not fruitful, as such, she was forced to stay with her parents. Both their sons were controlled by the petitioner and in spite of the same, the elder son Sunil wrote number of letters to her which reveal his love and affection towards her. She visited her elder son in the United States of America in the year 1999 and stayed there for about 6 months; thereafter, she has been staying at Nellore. O.P.No.65 of 1992 filed by the petitioner earlier, with false allegations ended in dismissal and again by making allegations, F.C.O.P.No.42 of 1992 is filed by the petitioner seeking dissolution of marriage.

5. In the counter-affidavit, while stating that F.C.O.P., is filed only to give marital status to Koteswaramma, it is pleaded that petitioner has already committed the offence of bigamy and prayed for dismissal of F.C.O.P.

6. Before the Family Court, petitioner was examined as P.W.1 and Exs.A.1 and A.2 were filed. The respondent was examined as R.W.1, besides examining R.Ws.2 to 4 and Exs.B.1 to B.12 were filed.

7. Heard Sri K. Muralidhar Reddy, learned counsel for the petitioner-husband and Sri P. Sridhar Reddy, learned counsel for the respondent-wife.

8. It is submitted by the learned counsel for the petitioner that though

there is evidence on record to substantiate the allegations of the petitioner that respondent deserted him without any justifiable cause, the Family Court dismissed the F.C.O.P. It is further submitted that for the last more than 30 years, respondent is staying away from the petitioner and there is no point in continuing the marital tie between the petitioner and the respondent. In support of his submissions, learned counsel for the petitioner relied on the following decisions:

- *Suraj Rattan Thirani and others v. Azamabad Tea Co. Ltd., and others*
- *Asoka Mitra v. Swapan Kumar Mitra*
- *Hemwanti Tripathi v. Harish Narain Tripathi*

9. On the other hand, it is submitted by the learned counsel for the respondent that parents of the respondent supported the petitioner financially as he was poor and petitioner constructed a building on the land purchased by him with the money paid by the parents of the respondent. It is further submitted that petitioner developed illegal intimacy with Pulimi Koteswaramma and when respondent questioned the same, respondent was necked out on 15.10.1982; as such she was compelled to stay with her parents. It is further submitted that out of the illegal intimacy of the petitioner with the said Koteswaramma, female child by name Sirimanasa was born to them, who is studying in USA; to give marital status to the said Koteswaramma and to get good marriage alliance to their daughter Sirimanasa, petitioner filed the F.C.O.P., with false allegations. Finally, it is submitted that oral and documentary evidence on record clearly establish that there is justifiable cause for the respondent to leave the company of the petitioner in view of his illegal intimacy with the said Koteswaramma, as such, no case is made out by the petitioner for dissolution of marriage as prayed by him.

10. Having heard the learned counsel for the parties, we have perused the material on record and the evidence. The only ground on which relief of dissolution of marriage is sought by the petitioner is on

the ground of desertion. Petitioner himself is examined as P.W.1. Copy of the petition and counter-affidavit filed in O.P.No.65 of 1992 are marked as Exs.A.1 and A.2. Respondent herself is examined as R.W.1 and R.Ws.2 to 4 were examined on her behalf and Exs.B1 to B.12 are marked.

11. Whereas it is the case of the petitioner that the respondent left the company of the petitioner without his consent and any justifiable cause, it is the case of the respondent that when she questioned about the illegal intimacy developed by the petitioner with the said Koteswaramma, who was the assistant of Dr. Jayalakshmi, the respondent was necked out of the house, and, as such, she had no other option except to take shelter in her parents' house. From the evidence on record, it is clear that after completion of studies, petitioner put up family with the respondent at Sangam village where he constructed a nursing home and started medical practice. It is the version of the respondent that her parents helped the petitioner financially to meet the family expenditure and to set up family at Tirupati and Sangam and to establish medical practice. The evidence of R.Ws.1 to 4 is specific and their evidence is consistent and nothing is elicited to disbelieve the same. The petitioner and respondent were blessed with two children; elder son by name Sunil was born in the year 1972 and younger son Nikhalesh was born in the year 1974. Now they are aged about 43 and 41 years respectively. From the evidence of R.Ws.1 to 4, it is clear that one Dr. Jayalakshmi was working in the nursing home established by the petitioner at Sangam village, which was constructed by the petitioner on the land purchased by him with the financial assistance of the parents of the respondent. Along with Dr. Jayalakshmi, Pulimi Koteswaramma used to live with her and assist her with household work. It is further the deposition of R.Ws.1 to 4 that Dr. Jayalakshmi left to Delhi in view of her employment in the year 1978 while the said Koteswaramma left to her native village Budamgunta in the year 1978. It is the specific evidence of R.W.1 that petitioner brought the said Koteswaramma to their house in the year 1979 and he developed illegal intimacy with

her and when she questioned the same, she was necked out of the house on 15.10.1979. Apart from the deposition of respondent as R.W.1, R.W.2, who is the younger brother of the petitioner, was examined. He substantiated the evidence of R.W.1 regarding financial assistance by the father of the respondent to the petitioner, about working of Dr. Jayalakshmi in the nursing home of the petitioner and the illegal intimacy of the petitioner with Koteswaramma. R.W.3 has deposed that respondent is no other than the daughter of his junior paternal uncle. He deposed that one Dr. Jayalakshmi was working as Doctor in the nursing home of the petitioner and the petitioner has developed illegal intimacy with the said Koteswaramma. P.W.4 is no other than the nephew of the petitioner. He too deposed against the petitioner. He stated that after establishing nursing home at Sangam village, petitioner developed illegal intimacy with the said Koteswaramma. Exs.B.1 to B.10 are the letters written by the elder son of the petitioner which clearly demonstrate the illegal intimacy of the petitioner with Koteswaramma and about Sirimanasa who is the illegitimate child of the petitioner with Koteswaramma. All these letters are written during the years 1985 to 1992. There is no reason to disbelieve the same. Further, Ex.B.11 is the registered sale deed dated 07.05.2008 in the name of Koteswaramma and her surname is shown as "Ippagunta", i.e. the surname of the petitioner and she is described therein as the wife of the petitioner and petitioner is signatory to the said document as witness. Ex.B.12 is the Vartha newspaper's district edition dated 18.07.2006 in which it is published that Koteswaramma submitted nomination in Sangam mandal to contest as Sarpanch in the elections and even there she is shown as the wife of the petitioner.

12. From the oral and documentary evidence on record, particularly, R.Ws.1 to 4 and Exs.B.1 to B.12, the illegal intimacy of the petitioner with the said Koteswaramma is clearly established and it is clear that petitioner procreated a female child out of the said illegal intimacy who is named as Sirimanasa. It is the specific plea of the respondent

that only to give marital status to Koteswaramma, F.C.O.P., is filed by making false allegations. Having regard to the evidence on record, there is justifiable reason for the respondent to stay with her parents. There is sufficient evidence on record to substantiate the allegation of the petitioner that she was necked out of the house as she had questioned the petitioner about his illegal intimacy with Koteswaramma. Having developed illegal intimacy with another lady and having necked out the respondent, who is the legally wedded wife of the petitioner, it is not open for the petitioner to plead desertion on the ground that respondent deserted him for long time without any justifiable cause. The petitioner has two sons with the respondent, who are now aged about 43 and 41 years. Having developed illegal intimacy with another lady, petitioner cannot expect the company of the respondent. Therefore, it cannot be said that respondent has deserted the petitioner without any justifiable cause.

13. Further, it is to be noticed that O.P.No.65 of 1992 which is filed on same set of grounds as F.C.O.P.No.42 of 2009, is dismissed for non-prosecution and the same has become final. Learned counsel for the petitioner relied on the decision in *Suraj Rattan Thirani and others* (1 supra) wherein the Hon'ble Supreme Court has held that, to consider whether cause of action in the subsequent suit is same or not as the cause of action in the previous suit, the test to be applied is, are the causes of action in two suits in substance are identical. The said decision cannot be applied to the case on hand for the reason that after the petitioner claimed desertion and dismissal of O.P.No.65 of 1992 there was no reunion at all. As such, there cannot be any different cause of action for filing F.C.O.P.No.42 of 2009 in view of attainment of finality of the order passed in O.P.No.65 of 1992 dismissing the same for non-prosecution. Thus, it is clear that there is no new cause of action. Apart from the merits of the matter, petitioner is not entitled for any relief in view of dismissal of O.P.No.65 of 1992 which was filed seeking same relief as sought in F.C.O.P.No.42 of 2009. Though learned counsel for the petitioner further relied on the decisions in *Asoka Mitra* (2 supra) and *Hemwanti Tripathi* (3 supra),

in support of his argument that respondent has made wild allegations against the petitioner; however she could not prove the same, as such, petitioner is entitled for decree of divorce, the ratio laid down in the said decisions cannot be applied to the case on hand. In this case, there is justifiable reason on the part of the respondent in leaving the company of the petitioner and further the allegation of the respondent that petitioner is maintaining illegal intimacy with another lady, Koteswaramma, is well established by oral and documentary evidence on record.

14. For the foregoing reasons, we are of the considered view that the findings recorded by the Family Court in rejecting the relief sought by the petitioner for grant of divorce on the ground of desertion are in consonance with the evidence on record and we do not find any reason to interfere with the impugned order and decree.

15. The appeal is accordingly dismissed. No order as to costs.

As a sequel, miscellaneous petitions if any pending in the appeal stand closed.

R. SUBHASH REDDY, J

Dr. B. SIVA SANKARA RAO, J

29th September, 2015

MRR