

**HON'BLE SRI JUSTICE R. SUBHASH REDDY
AND
HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**

FAMILY COURT APPEAL No.136 of 2005

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JUDGMENT : (Per Justice R. Subhash Reddy)

This appeal is filed under Section 19 of the Family Courts Act, by the petitioner in O.P.No.118 of 2004, aggrieved by order dated 06.05.2005, passed in the said O.P., by the Family Court, Hyderabad.

2. For the purpose of disposal of this appeal, parties are referred to as arrayed before the trial Court.

3. By the aforesaid order, the Family Court has dismissed the petition filed by the petitioner under Section 9 of the Hindu Marriage Act seeking the relief of restitution of conjugal rights. The case of petitioner is that her marriage with respondent was solemnized on 25.08.1978 at Kakinada in East Godavari District as per Hindu rites and customs. After the marriage, they stayed for some time at Kothapeta and after respondent secured job at Hyderabad, they shifted to Vanastalipuram of Hyderabad. It is stated that the petitioner has purchased a plot at Vanastalipuram and they also built a house in the said plot in the year 1991. At that time, respondent was working in CDR hospitals and during the said time, there was constant bickering between the petitioner and respondent and the same was sorted out on the advice of

elders. Thereafter, they shifted to Sanjeeva Reddy Nagar and stayed there till 1994 and then the respondent left the company of petitioner in the year 1994, and since then, the petitioner was staying along with her son and during the said period, respondent used to visit her and their son at Sanjeeva Reddy Nagar. In the year 2000, respondent also took away the minor child informing that he would educate the child and thereafter, he will take the petitioner also. It is submitted that as the respondent is financially sound and as he is in a position to provide better education to their son, she allowed the respondent to take away the minor child, but as the respondent did not take her, she filed a petition in O.P.No.550 of 2001 before the Family Court, Secunderabad, for dissolution of marriage, but the said petition was returned with an endorsement for presenting the same before appropriate Court, but the same was not presented in any other Court. Pleading that the respondent is obliged to perform his marital obligations and is obliged to take back the petitioner, it is stated that the health of the minor child is also a concern, as he is badly suffered by the separation of petitioner and respondent. With the aforesaid pleadings, petitioner sought the relief of restitution of conjugal rights.

4. Respondent has filed counter affidavit. In the counter affidavit, while denying the various allegations made by the petitioner, it is stated that the respondent

alone purchased the plot at Vanastalipuram and constructed the house in the year 1991 and ever since the marriage of petitioner with the respondent, the respondent was under mental agony due to various acts committed by the petitioner, who is of suspicious nature and always used to abuse him in filthy language. Due to stress and strain, he suffered heart-attack in the year 1991 and petitioner has never had sympathy, regard or respect for the respondent. It is pleaded that when the petitioner approached the brother of respondent at Machilipatnam, a meeting was arranged and they entered into an agreement in the year 16.03.1992, and thereafter, the respondent and petitioner have never lived together even for a single day and are living separately in terms of the said agreement. When their son was with the petitioner, he was totally neglected by the petitioner and there were occasions when the petitioner used to go out locking the door, keeping their son in the corridors of the house, waiting for the mother. As the boy was affected mentally and physically, respondent had no option but to put him in the hostel in the year 1998 itself. It is further pleaded that as the petitioner has created lot of troubles to the respondent causing further damage to their relationship and as she has no affection towards respondent, she is not entitled for the relief of restitution of conjugal rights. It is pleaded that the petitioner and respondent are living separately for the last 12 years, and

as such, the petition filed by the petitioner deserves to be dismissed.

5. Before the Family Court, petitioner was examined as PW-1 and on her behalf, one more witness was examined as PW-2 and documentary evidence under Exs.P-1 to P-4 were marked. On behalf of respondent, the respondent himself was examined as RW-1 and documentary evidence under Exs.R-1 to R-15 were marked. The Family Court, mainly relying on the oral evidence and that no material is placed by the petitioner to show that she has signed Ex.R-2 agreement under duress, has dismissed the petition stating that they are living separately in terms of the agreement and there is no further evidence or material to show that the petitioner had to sign such agreement under duress.

6. Heard learned counsel for the parties and perused the material on record.

7. It is the specific case of petitioner that the respondent has withdrawn from the company of the petitioner without any reasonable cause. Marriage between petitioner and respondent is not in dispute. It is the case of petitioner that immediately after the marriage, they were staying at Kothapeta of East Godavari District and thereafter they have shifted to Hyderabad in view of the job secured by the respondent in CDR hospitals. It is

the case of petitioner that she alone purchased the site at Vanastalipuram and constructed the house therein, whereas, it is the case of respondent that he alone has purchased the site and constructed the house, but in view of the problems created by the petitioner, he had to leave his own house and the company of the petitioner. For the purpose of disposal of this appeal, it is not necessary to decide whether the petitioner has constructed the house at Vanastalipuram or not. As the petition is filed under Section 9 of the Hindu Marriage Act, for the purpose of deciding whether the petitioner is entitled for restitution of conjugal rights, the only question which falls for consideration is whether the respondent has withdrawn from the company of the petitioner without any justifiable reason or not. According to the case of petitioner, from Vanastalipuram, they have shifted to Sanjeevareddy Nagar and at that time, respondent left her company but the minor son was staying with her. It is further pleaded that subsequently, when the respondent approached the petitioner for giving custody of the minor boy, she had to give custody to the respondent voluntarily, keeping the boy's education in mind and the financial position of the respondent. It is her specific case that though respondent has assured to join the company of the petitioner afterwards, respondent has not obeyed his word and deprived the petitioner of the conjugal society, though their marriage is in tact. It is further pleaded that petitioner

though filed a petition, seeking dissolution of marriage, same was returned and was not represented in any other Court. From the perusal of the order under appeal, it is clear that only on the ground that the petitioner did not prove that her signature was obtained on Ex.R-2 by coercion, the petition is dismissed. When the marriage of petitioner and respondent is not in dispute, it is obligatory on the part of respondent to be in the company of petitioner to lead marital life. By obtaining agreement under Ex.R-2, respondent cannot deny conjugal society to the petitioner. In view of the provision under Section 9 of the Hindu Marriage Act, it is clear that when either the husband or wife has withdrawn from the society of the other without reasonable excuse, the aggrieved party may seek for restitution of conjugal rights. In that view of the matter, even if an agreement is entered into contrary to the statutory provision, such agreement cannot come in the way of the petitioner in seeking the relief of restitution of conjugal rights and such an agreement which runs contrary to the statute itself, is *per se* illegal. Further, it is the case of the petitioner that the recitals in the agreement to live separately, is unlawful and illegal and such agreement cannot come in the way of the petitioner in seeking the statutory relief available under Section 9 of the Hindu Marriage Act. As the Civil Court has considered the matter only with reference to agreement and in view of the aforesaid findings recorded in this order, we are of the

view that it is a fit case for reconsideration of the matter in the light of the provision under Section 9 of the Hindu Marriage Act, by the Family Court.

8. For the aforesaid reasons, the impugned order dated 06.05.2005, passed by the Family Court, Hyderabad, in O.P.No.118 of 2004, is set aside and the matter is remanded to the said Court for fresh consideration and for passing appropriate orders, as expeditiously as possible, preferably within a period of six months from the date of receipt of this order, by issuing fresh notices and after hearing the parties.

9. Subject to the aforesaid directions, this appeal is disposed of. No order as to costs.

Pending miscellaneous applications, if any, shall stand closed.

R. SUBHASH REDDY, J

DR.B.SIVA SANKARA RAO, J

February 2015

ajr