

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 09.11.2016

PRONOUNCED ON : 11.11.2016

CORAM

THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN

C.M.S.A.No.42 of 1996

Gandhi

...Appellant

Vs

Hemalatha

... Respondent

Prayer:- Second Appeal has been filed under Section 100 of C.P.C., r/w Section 28 of Hindu Marriage Act, against the judgment and decree dated 27.06.1996 in A.S.No.200 of 1995 on the file of the Principal District Court, Nagapattinam confirming the judgment and decree dated 16.02.1995 made in H.M.O.P.No.216/1993 on the file of the Subordinate Court, Nagapattinam.

For Appellant : Ms.R.Anu
for Mr.Srinath Sridevan

For Respondent : Mr.A.Muthukumar

JUDGMENT

The appellant is the husband. On the ground of desertion, he has filed H.M.O.P.No.216/1993 for divorce and succeeded in the trial Court however, the First Appellate Court on re-appreciation of the evidence and additional documents let in on behalf of the parties, has reversed the finding of the trial Court. Aggrieved by the same, the present appeal has been filed by the appellant/husband.

2.This Court, at the time of admission, has formulated the following substantial question of law:-

“Whether the Court below was justified in rejecting the petition for divorce in the absence of just and reasonable cause for the respondent to abandon the marital home”

3.The admitted facts in this case are that the marriage between the appellant and the respondent was solemnized on 05.06.1989. The respondent went to her parents house to celebrate “Aadi Perukku” on 15.07.1989. Thereafter, they both never joined together. On

22.08.1989, the appellant herein has caused legal notice to the respondent and thereafter, he has filed O.P.No.8/1990 for restitution of conjugal rights. The respondent herein has filed an Interlocutory Application in that petition seeking Rs.500/- as interim maintenance and the same has been ordered. Immediately after that order, the appellant herein has filed a memo to withdraw his petition for restitution of conjugal rights with liberty to file a divorce petition. Based on the memo, his earlier O.P.No.8/1990, was disposed of on 27.02.1991 and thereafter, the appellant herein has filed the petition for divorce alleging that the respondent went to her parents house to celebrate "Aadi Perukku" on 15.07.1989 but, she did not return to the matrimonial home, inspite of the request made by him to come back. The trial Court alleging that there was no dowry demand on the part of the appellant, as alleged by the respondent, allowed the divorce petition filed by the appellant.

4. On appeal, the First Appellate Court has pointed out the error in the appreciation of evidence by the trial Court particularly, the omission to take the deposition of the respondent in full regarding the reason for not joining the appellant, has reversed the finding of the trial Court. This Court finds no reason to interfere in the finding of the

First Appellate Court which has dismissed the divorce petition filed by the appellant after proper and complete appreciation of evidence.

5.To seek divorce on the ground of desertion, the party should prove both 'actual desertion' and 'animus to desert'. The trial Court has miserably failed to appreciate the evidence in full and for the reason best known, the trial Court has picked up a single line from the deposition of the respondent to conclude that the respondent has voluntarily deserted the appellant and left the matrimonial home. Whereas the First Appellate Court has read through the entire portion of the deposition of the respondent and it has found that the respondent was not able to join the matrimonial home for substantive reason. Furthermore, the First Appellate Court, in the maintenance suit, filed by the respondent, the very same Presiding Officer who has granted divorce on the ground of desertion has held that the appellant has caused false notice alleging that non consummation of marriage and later, filed the petition for restitution of conjugal rights and withdrew it when there was an order to pay interim maintenance to the respondent, has found fault on the appellant's conduct as cause for desertion thus given, different finding on the same set of facts.

6.From the evidence let in by the parties, it is clear that the appellant herein has initially alleged non consummation of marriage in the suit notice later taken a different plea of willful desertion. When there is a specific allegation that the respondent being subjected to harassment by the appellant herein which is the cause for desertion, Ex.P.10 dated 24.10.1995 receipt for return of sridhana properties also throw some light that the appellant was holding the sridhana properties of the respondent, till the disposal of the divorce petition.

7.In **Ganesan, A. v. Gnanasoundari** (1995 (1) L.W 113) this Court has held as follows:-

“The expression “desertion” in the context of matrimonial law represents a legal conception and is one very difficulty to define. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. It is a well established principle that the spouse who withdraws from cohabitation for what is described as a good cause, such as cruelty, cannot be said to be guilty of desertion. For, in such a case, it is the conduct of the offending

spouse that is the cause of separation and the spouse who leave the matrimonial home cannot be said to have acted from any *animus deserendi* and it is also settled that the legal burden throughout the case is on the petitioner to prove that the wife deserted him without cause."

8.It is now well settled law that desertion should satisfy two conditions viz., factum of separation and the intention to bring cohabitation permanently to an end. In this case, from the facts, we have already seen that the fact of separation is admitted however, the desertion was not willful but forced on the respondent.

9.Through the evidence, it is found that the conduct of the appellant has forced the respondent to keep away from the matrimonial bond. The earliest document to show the discontent between the spouses is the notice issued by the appellant. This notice has been issued by the appellant, shortly after two months of the marriage. Whether a prudent person who is serious about saving his matrimonial bond will issue such legal notice with false averment to his wife within two months from the date of marriage is a question, for consideration.

10.The content of the notice alleging that marriage was not consummated and the respondent is not fit for marital life suffice to show that the cause for separation is the conduct of the appellant. Both the Courts below have found that it is a false allegation, because, in the cross examination, the appellant himself has admitted that the marriage was consummated and there is no evidence to show that the respondent is not fit for marital life. While so, after making such a grave allegation against his wife soon after the marriage the appellant now, try to project that the respondent has willfully, deliberately, without the consent, against his wish and without any reasonable cause, has deserted him.

11.For the foregoing reasons, this Court finds that there is no reason to interfere with the judgment of the First Appellate Court in dismissing the divorce petition filed by the appellant.

12.In the result, the Civil Miscellaneous Second Appeal is dismissed with costs thereby confirming the judgment and decree of the First Appellate Court.

11.11.2016

jbm

Index: Yes/No

To

1.The Principal District Court,
Nagapattinam.

2.The Subordinate Court,
Nagapattinam.

Dr.G.JAYACHANDRAN.J.,

jbm

**Pre Delivery Judgment made in
C.M.S.A.No.42 of 1996**

11.11.2016

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