

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 05.08.2016

DELIVERED ON : 23.12.2016

CORAM

THE HONOURABLE MR.JUSTICE C.T.SELVAM

Civil Miscellaneous Second Appeal No.32 of 2009

Geetha Muralidharan
W/o.Muralidharan

.... Petitioner/Appellant

vs.

Muralidharan
S/o.Boovaragavan

....Respondent/Respondent

Civil Miscellaneous Second Appeal filed under Section 100 of Code of Civil Procedure against the judgment of learned District Judge, Nagapattinam, passed in C.M.A.No.37 of 2007 on 17.07.2009 confirming the fair and decreetal order in I.A.No.2 of 2007 in H.M.O.P.No.67 of 2005 dated 30.03.2007 on the file of Subordinate Judge, Nagapattinam.

For Petitioner : Mr.J.R.K.Bhavanantham

For Respondent : Mr.P.K.Rajagopal
for Mrs.K.Shanthakumari

JUDGMENT

This revision arises against the judgment of learned District Judge, Nagapattinam, passed in C.M.A.No.37 of 2007 on 17.07.2009.

2. H.M.O.P.No.67 of 2005 on the file of learned Subordinate Judge, Nagapattinam, was filed by appellant/wife seeking dissolution of marriage. Therein, the following decree came to be passed on 19.01.2006:

“This petition coming on this day for final hearing before me in the presence of Thiru V.V.Pandian, Advocate for the petitioner and Tmt P.Bharathi, Advocate for the Respondent and both the parties filed a memo in this petition, this Court doth order and decree:-

- 1. that the petition be and the same is hereby allowed and in terms of the memo filed by the both parties; and*
- 2. that the marriage solemnized between the petitioner and Respondent on 30.8.1995 is hereby dissolved by granting a decree of divorce.*

MEMO FILED BY THE PETITIONER/RESPONDENT

The Respondent in the above H.M.O.P.67/05 is paid herewith a sum of Rs.2,00,000/- (Rupees Two lakhs only) by way of Demand Draft in favour of Geetha towards the maintenance and compensation in a full quit.

DETAILS OF DEMAND DRAFT

<i>D.D.No.038839 dated 17.1.2006 drawn</i>	
<i>at Canara Bank, Nagapattinam for</i>	<i>Rs.1,00,000/-</i>
<i>D.D.No.038838 dated 17.1.2006 drawn</i>	
<i>at Canara Bank, Nagapattinam for</i>	<i>Rs.1,00,000/-”</i>

3. Petitioner has moved I.A.No.2 of 2007 in H.M.O.P.No.67 of 2005 on 01.06.2006. contending that respondent/husband had acted with criminal

intention of cheating petitioner towards obtaining dissolution of marriage against law and without her knowledge or willingness. Informing that a decree obtained playing fraud upon the Court was not a decree in the eye of law and was incorrect, petitioner sought reopening of H.M.O.P.No.67 of 2005 towards contesting the same on merits. Under orders dated 30.03.2007, such interim application was dismissed. There against, petitioner has preferred C.M.A.No.37 of 2007 on the file of learned District Judge, Nagapattinam and on the dismissal thereof under orders dated 17.07.2009, the present Civil Miscellaneous Second Appeal has been filed.

4. In dismissing the appeal, Court below has reasoned that only with the consent of petitioner/wife and upon receipt of Rs.2,00,000/- by way of demand drafts by her, a decree of dissolution of marriage came to be passed. No witness has been examined to substantiate the allegation that a fraud upon Court has been committed by respondent/husband. It was also established that petitioner/wife has encashed the demand drafts and deposited the proceeds in a fixed deposit and she is also residing with her parents. The contention of petitioner/wife that in keeping with Section 13-B of the Hindu Marriage Act, divorce could be granted only after a lapse of six months of the application, has been negated by the appellate Court on the reasoning that the said provision would not apply in the case since the respondent/husband has already filed a petition seeking divorce as early as in 1997 and petitioner/wife has also filed a

petition seeking restitution of conjugal rights in 2005.

5. Heard learned counsel for petitioner and learned counsel for respondent.

6. Learned counsel for petitioner contended that respondent had earlier moved H.M.O.P.No.50 of 1997 seeking divorce while petitioner had moved H.M.O.P.No.83 of 1997 seeking restitution of conjugal rights. The petition for restitution of conjugal rights was allowed and that for divorce was dismissed. There against, respondent/husband moved A.S.Nos.112 and 113 of 1999 on the file of learned District Judge, Nagapattinam and both such appeals were dismissed. On respondent preferring Civil Miscellaneous Second Appeal Nos.9 and 10 of 2000 against such orders of dismissal, a compromise was effected by this Court and the couple lived happily as husband and wife for two years. Discord again arose as petitioner did not bear a child. Though medical examination revealed that the husband was the cause therefor, petitioner repeatedly was accused of being a barren woman. Learned counsel submits that petitioner/wife had no knowledge of preference of H.M.O.P.No.67 of 2005 and all of a sudden, she was, under threat of the respondent and his family members resorting to suicide, taken one fine day to Court and her signatures have been taken towards wrongfully obtaining a decree of divorce by consent. The case had been taken out of turn, the mandatory prescription of husband and wife staying apart for six months has not been complied with and even the

Demand Drafts towards payment of Rs.2,00,000/- to her had been purchased prior to the date of order. Even in obtaining the same, respondent had given a false address for the petitioner. Learned counsel contended that even during the pendency of the appeal, respondent had contracted a second marriage. Courts below have failed to see the fraud played upon the petitioner and the Court and merely gone by the evidence of the petitioner wherein consent to a decree of divorce on payment of Rs.2,00,000/- stood recorded, towards dismissing I.A.No.2 of 2007 and the appeal there against.

7. Learned counsel placed reliance on the judgment of Supreme Court in ***Chetan Dass v. Kamla Devi [2001 (4) SCC 250]***, in which it had been observed thus:

“17. ... The husband did not obey the decree of restitution of conjugal rights obtained by his wife to which he had not objected but later on, he filed a petition for divorce under Section 13(1-A)(ii) on the ground that one year had passed from the date of decree of restitution of conjugal rights but no actual cohabitation had taken place between the parties. A plea was raised that the husband was taking advantage of his own wrong as he had not resumed his matrimonial relationship even after the decree of restitution of conjugal rights, instead filed a petition for divorce, that the parties had not cohabited even after one year of passing of the decree. This Court observed that a decree of restitution of conjugal rights was executable and further observed (at SCC p.95, para 5) that

“the expression ‘in order to be a “wrong” within the

meaning of Section 23(1)(a) the conduct alleged has to be something more than mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled to”.

On facts also, it was found that such a plea was not entertainable since no new facts were brought on record even by means of an amendment that the husband had, by way of a scheme, agreed for passing of a decree of restitution of conjugal rights with a view to ultimately claim divorce by not resuming the matrimonial relationship. In the present case, the allegations of misconduct of adulterous behaviour have definitely been made by the wife which have been found to be correct. Hence, this case would also be of no help to the appellant.

18. Learned counsel for the respondent submits that in certain situations, relief would be denied to the petitioner where it is found that he is taking advantage of his own wrong for the purposes of making out a case to obtain the decree. ...”

Learned counsel also placed reliance on the judgment of Supreme Court in **Savitri Pandey v. Prem Chandra Pandey [2002 (2) SCC 73]**, to the following effect:

“13. In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the

court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.”

8. Learned counsel for respondent submitted that pursuant to compromise effected in C.M.S.A.Nos.9 and 10 of 2010 by this Court on 13.11.2003, parties had started living together. However, marital discord continued. It was the petitioner/wife who had preferred H.M.O.P.No.67 of 2005 on the file of learned Subordinate Judge, Nagapattinam, alleging cruelty and seeking divorce. Divorce had been granted pursuant to recording of the evidence of petitioner on 19.01.2006 informing her assent thereto. The evidence of petitioner before the Court is as follows :

“I have filed a petition seeking divorce. Respondent expressed his willingness towards allowing such petition and I also agree. I agreed to accept a sum of Rs.2,00,000/- from the respondent towards final settlement. I would not claim any amount from the respondent. I pray this Court to allow this petition as prayed for.”

After encashment of demand drafts 46 days thereafter, all belongings of petitioner had been returned to her. Thereafter, on the complaint of respondent/husband dated 13.03.2006, CSR No.78 of 2006 had been opened by the Inspector of Police, Aragandanallur Police Station. The return of belongings had been acknowledged by her and the memo there regards had been signed both by petitioner as also two independent witnesses. Merely to harass the respondent, petitioner had filed I.A.No.2 of 2007, which had been dismissed by

learned Subordinate Judge, Nagapattinam, on 30.03.2007. Thereafter, respondent had entered upon a second marriage on 20.04.2007. Petitioner has preferred C.M.A.No.37 of 2007 on the file of learned District Judge, Nagapattinam, against the order of dismissal in I.A.No.2 of 2007 only on 10.10.2007. Such appeal rightly had been dismissed by learned District Judge, Nagapattinam, on 17.07.2009. Learned counsel submits that delay in the petitioner leaving the respondent home and taking return of belongings was because petitioner's father would not accept her. Respondent was thus forced to prefer a complaint leading to the petitioner leaving his premises after taking all her belongings. Only after the dismissal of I.A.No.2 of 2007, had the respondent entered upon a further marriage. Petitioner had filed C.M.A.No.37 of 2007 before the Court below on 10.10.2007 i.e. after a period of seven months of dismissal of I.A.No.2 of 2007. The deposition of the petitioner in I.A.No.2 of 2007 was to the effect that there was marital discord, consent divorce was granted with her concurrence and she filed the petition as she wished to live with the husband since her parents insisted thereupon. She has also deposed to receiving two demand drafts for Rs.2,00,000/-, encashing the same and depositing the proceeds. The father of the petitioner had also been examined in I.A.No.2 of 2007. He has spoken to his daughter, the petitioner, having deposed to the fact of she having duly consented to the divorce. As per their evidence, petitioner was a graduate in B.A. English Literature while her father was a retired Court staff. Therefore, allegations of fraud having been

played upon the petitioner in obtaining a decree of divorce in H.M.O.P.No.67 of 2005 was totally false and Courts below rightly had rejected the petition and appeal preferred by petitioner.

9. On consideration of rival submissions and the facts of the case, this Court finds inapplicable the decisions relied upon by learned counsel for petitioner. This Court finds no reason to interfere with the judgment of learned District Judge, Nagapattinam, passed in C.M.A.No.37 of 2007 on 17.07.2009. I.A.No.2 of 2007 can only be seen as an afterthought and intended to harass the respondent.

The Civil Miscellaneous Second Appeal is dismissed. No costs.

23.12.2016

Index:yes
Internet:yes
gm

To
The District Judge,
Nagapattinam.

C.T.SELVAM, J

gm

Pre-delivery order
in
C.M.S.A.No.32 of 2009

23.12.2016