

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 23..11..2016

CORAM

THE HON'BLE MRS.JUSTICE PUSHPA SATHYANARAYANA

AND

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
C.M.A.No.2710 of 2007

C.Govindaraj .. Appellant/Husband

vs

R.Vithya .. Respondent/Wife

Prayer: Civil Miscellaneous Appeal as against the judgment and decree dated 10.05.2007 passed by the learned Judge, Family Court, Coimbatore in in HMOP No.492 of 2005.

For Appellant : Mr.C.R.Prasanan

For Respondent : Mr.N.Vijayaraj

JUDGMENT

(Judgment of the Court was delivered
by Pushpa Sathyanarayana,J.)

The above appeal is directed against the judgment and decree dated 10.05.2007 passed by the learned Judge, Family Court, Coimbatore in HMOP No.492 of 2005, by the unsuccessful husband, who had filed petition under Section 13(1)(ia) of the Hindu Marriage Act, 1955, [in short, 'the Act'] for divorce.

2. For the sake of convenience, the parties are referred to here under according to their litigative status and ranking before the Court below.

3. The marriage between the appellant/petitioner/husband and the respondent/respondent/wife took place on 05.11.2001 at Pothanur in Coimbatore District. It is alleged in the petition that the respondent/wife openly declared that she did not like the petitioner and that she was forcibly married to him against her wishes. In spite of giving her full freedom and privileges, the respondent did not discharge the matrimonial obligation as a wife. The petitioner's mother, who was brought to the matrimonial home at

the request of the respondent was treated as a domestic servant and she was abused despite her age. A female child was born to them on 16.09.2002. The respondent went to her matrimonial home for the delivery and she returned only on 28.12.2002. Even after the delivery of the child, the behavior of the respondent was the same. She was abusive to the mother-in-law and was insulting the petitioner. In such a situation, it was agreed by both the parties together for divorce, by mutual consent. Accordingly, HMOP No.327 of 2003 was filed. However, the same was dismissed as the respondent did not turn up on the date of final hearing. Even thereafter, the respondent did not join the petitioner and openly declared that she was not interested in living with the petitioner any more on 03.01.2003. Therefore, the petitioner filed HMOP No.307 of 2004 on 02.07.2004 for divorce on the ground of desertion. The said petition was also dismissed as withdrawn as the respondent agreed to rejoin the petitioner. However, as usual, the respondent refused to go to the matrimonial home. It is further contended by the petitioner that they never lived together after that. Thereafter, the respondent filed HMOP No.523 of 2004 for restitution of conjugal rights as per the Act. The said petition was allowed on 20.12.2004 as the petitioner and the respondent had agreed to go together. Even after that, the respondent never returned to the matrimonial home. Hence the petitioner issued notice to the respondent on 11.02.2005 and the respondent also sent a reply. Therefore, the above petition has been filed on the ground of cruelty.

4. Resisting the case, the respondent/wife had filed the counter denying all the allegations excepting the factum of marriage and the birth of the child. It is admitted by the respondent that HMOP No.327 of 2003 was filed for consent divorce. She has alleged further that the respondent was compelled to bring money on and off by the petitioner's mother and her other in-laws. The respondent, who was employed as a lecturer in the private college heeded to the demands of the petitioner's family. Even the salary of the respondent was forcefully taken away by the mother-in-law of the respondent. It is alleged that the petitioner's mother and sister used to abuse the respondent with filthy language. After the delivery of the child, the respondent came to the matrimonial home on 29.12.2002 and stayed there till 03.01.2003, on which day, she was driven out of the house. Thereafter, the petitioner had filed a petition for divorce, which was dismissed as withdrawn. Thereafter, the respondent had filed a petition under Section 9 of the Act, in which the petitioner had agreed to live without any protest. Accordingly, on 20.12.2004, both the petitioner and the respondent have joined together. Even thereafter, the petitioner demanded a sum of Rs.10,000/- from the respondent and again they were living separately. As the petitioner was at

fault, in treating the respondent cruelly, it is submitted that he cannot take advantage of his own fault. Hence prayed for the dismissal of the petition.

5. After elaborate consideration of the facts and circumstances of the case, the learned Family Court Judge, dismissed the petition holding that the petitioner was not entitled to decree of divorce.

6. Aggrieved by the same the appellant/petitioner/husband has filed the above appeal.

7. The only point that arise for determination is whether the appellant/husband is entitled to a decree of divorce?

8. The marriage between the parties took place on 05.11.2001 in Coimbatore and that a female child was born on 16.09.2002 are the admitted facts. It is also admitted by both the parties that HMOP No.327 of 2003 was filed for mutual divorce, which could not be ordered as the respondent/wife had withdrawn her consent. Thereafter, HMOP No.307 of 2004 filed by the husband for divorce and HMOP No.523 of 2004 filed by the wife for restitution of conjugal rights were also admitted. The HMOP No.307 of 2004 filed by the husband was dismissed as withdrawn as he agreed to join the wife as demanded in a HMOP No.523 of 2004. According to the petitioner/husband, even after the order in the Section 9 petition, the respondent refused to rejoin. However, it the case of the wife that they both lived together thereafter.

9. The present petition is filed on 04.03.2005 alleging cruelty. The petitioner has only stated that the respondent did not like the petitioner and that she was not interested in living with him and that the marriage was against her wishes. It is further stated that the respondent did not reciprocate her love and affection towards the petitioner. Whereas the respondent had stated that her in-laws had demanded money from her as she is employed as a lecturer in a private college. It is also alleged by the respondent/wife that she was compelled to resign her job, to mind the house hold duties. Other than the allegation that the respondent/wife did not discharge her duties and she did not like him, the petitioner/husband had not made out any ground for cruelty.

10. Be that as it may, admittedly, the parties have united, after the petition filed under Section 9 of the Act, by

the respondent/wife was allowed. Therefore, even, if any of the act of cruelty, alleged by the petitioner is deemed to have condoned on 20.12.2004 and any cruelty based on which, the petitioner can ask for relief of divorce, should be after 20.12.2004.

11. A perusal of the petition, does not disclose any act of cruelty, subsequent to 20.12.2004. The petition for restitution of conjugal rights filed by the wife was allowed as both the parties have reconciled to live together. Therefore, there was condonation of cruelty.

12. Condonation means, forgiveness of the matrimonial offence and restoration of the offending spouse to the same position as he or she occupied before the offence was committed. In other words, there should be forgiveness and restoration.

13. In AIR 1975 SC 1534 [Dr.N.G.Dastane vs. Mrs.S.Dastane], it is held that condonation is always subject to the implied condition, that the offending spouse will not commit a fresh matrimonial offence either of the same variety as the one condoned or of any other variety. The relevant paragraphs are usefully extracted as follows:

"54. Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of Section 23(1) (b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied "but not otherwise", that the petitioner has not in any manner condoned the cruelty. It is, of course, necessary that there should be evidence on the record of the case to show that the appellant had condoned the cruelty.

55. Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things : forgiveness and restoration: The Law and Practice of Divorce and Matrimonial Causes by D.Tolstoy, Sixth Ed., p.75. The evidence of condonation in this case is, in our opinion, as strong and satisfactory as the evidence of cruelty. But that evidence does not consist in the mere fact that the spouses continued to share a common home during or for some time after the spell of cruelty. Cruelty, generally, does not

consist of a single, isolated act but consists in most cases of a series of acts spread over a period of time. Law does not require that at the first appearance of a cruel act, the other spouse must leave the matrimonial home lest the continued cohabitation be construed as condonation. Such a construction will hinder reconciliation and thereby frustrate the benign purpose of marriage laws."

14. In the instant case, in our opinion, the condonation is strong. Though it is alleged by the petitioner/husband that the respondent/wife did not take any steps to join the matrimonial home, the respondent had stated that as per the direction of the Court on 20.12.2004, the petitioner and the respondent joined together and proceeded to the matrimonial house directly from the Court.

15. It is the further case of the respondent/wife that when the respondent returned to the matrimonial home from the Court, it was not well received by the mother and the sister of the petitioner and they walked out of the home. They had threatened the petitioner that they would not return to the house as long as the respondent was there. The petitioner, who had an emotional threat from his mother was abusing the respondent. He started demanding money once again and the respondent also had paid him a sum of of Rs.10,000/- during February 2005. It is stated in the counter further that the respondent had left the matrimonial home on 03.01.2003.

16. From the above conduct of the parties, from 20.12.2004, the spouses continue to share a common home for some time, after the spell of cruelty. Cruelty, generally, does not consist of a single isolated case, but consists in most cases of a series of acts spread over a period of time. It is not that every time even to a single act of cruelty, the spouse has to leave the matrimonial home or else the continued cohabitation would be deemed to be construed as condonation. If that be so, there cannot be any reconciliation and it will lead to frustration of the marriage. Therefore, condonation of any act of cruelty only implies that the offending spouse will not commit a fresh matrimonial offence, either of the same nature, which was condoned earlier or of a different nature.

17. In the case on hand, except alleging that the respondent/wife never liked the petitioner/husband from the date of the marriage, there are no specific instances of cruelty that had been proved by the petitioner/husband. The

petitioner/husband by conceding to the petition filed by the respondent/wife under Section 9 of the Act, had condoned the earlier alleged Acts of Cruelty of the respondent/wife. Condonation is basically a question of fact. Even presuming that the petitioner had not condoned the acts of cruelty prior to 20.12.2004, the burden is on the petitioner/husband to prove that he had made out a case of cruelty, to entitle him for a decree of divorce. There is no specific allegation or instances of cruelty against the wife excepting the vague allegation without specific particulars. Thus, the appellant/petitioner/husband having failed to establish the acts of cruelty as per Section 13(1)(ia) of the Act, is not entitled to a decree of divorce and the learned Family Judge has rightly come to the conclusion and dismissed the petition filed by the petitioner/husband. Therefore, we find no infirmities to interfere with the same.

18. Accordingly, this Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-

Asst.Registrar (CS IV)

/true copy/

Sub Asst. Registrar

vj2

To

1. The Judge, Family Court,
Coimbatore

2. The Section Officer
VR Section,
High Court, Madras

1 cc to M.s.,C.R. Prasanan, Advocate, Sr. 68464

1 cc to M/s.N. Vijayaraj, Advocate, Sr. 68230

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