

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.11.2016

C O R A M

THE HONOURABLE Mrs.JUSTICE PUSHPA SATHYANARAYANA

AND

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN

C.M.A .No.2744 of 2006

M.S.Kalaikumar .. Appellant /Petitioner

-Vs.-

C.Banurekha .. Respondent/Respondent

Civil Miscellaneous Appeal against the order and decree dated 25.02.2005 passed by the learned II Additional Principal Family Judge, Family Court, Chennai in FCOP No.1196 of 2001.

For appellant No appearance

For respondent No Appearance

J U D G M E N T

(Judgment of the Court was delivered by R.Subramanian,J.)

The husband, who has filed a petition for divorce on the ground that the wife has not complied with the decree of restitution of conjugal rights granted in O.P.No.680 of 2000, is the appellant.

2. When the matter is taken up today for hearing, there is no representation on behalf of the appellant/husband. Though notice was served on the respondent/wife, she has also not chosen to appear either in person or through a counsel. Hence, we decided to proceed to dispose of the matter on merits.

3. The brief facts of the case would run thus:

(i) According to the appellant/husband, the marriage between him and the respondent/wife took place on 04.09.1997 and a girl child was born to them on 07.10.1998. According to the husband, the wife did not return to the matrimonial home, after the birth of their child, which forced him to file a petition for restitution of conjugal rights in O.P.No.680 of 2000, which

came to be decreed exparte on 07.08.2000. Since the wife did not come forward to live with him, even after the said exparte decree, he has filed the present petition for divorce under Section 13(1A)(ii) of the Hindu Marriage Act, 1955.

(ii) The respondent/wife resisted the petition contending that after receipt of the notice in O.P.No.680 of 2000 filed by the husband seeking restitution of conjugal rights, she expressed her desire to live with him. He also agreed to withdraw the said petition. He also stated that, it was because of his mother's compulsion, he filed the said petition. Believing the words of the husband, the wife did not chose to defend the said original petition for restitution of conjugal rights. It is the case of the wife that she has been living with her husband, even after the exparte decree for restitution of conjugal rights, till July 2001. Since the child's health deteriorated, she was forced to go to her parents house at Chingleput for treatment of the child. Taking advantage of her absence, the husband has chosen to file this petition seeking divorce on the ground that the wife has not complied with the decree for restitution of conjugal rights.

(iii) On the above pleadings, the learned Family Court Judge, raised the following issues:

(i) Whether the respondent/wife wilfully abstained from resuming cohabitation with the petitioner/husband for a continuous period of one year after passing of the decree for restitution of conjugal rights?

(ii) If so, whether the petitioner/husband is entitled to a decree of divorce?

The appellant/husband examined himself as P.W.1 and marked Exs.P1 to P10. The respondent/wife examined herself as R.W.1 and marked Exs.R1 and R2.

(iv) On the consideration of the evidence on record, the learned Family Court Judge, came to the conclusion that the husband had not chosen to take any steps to enforce the decree for restitution. The learned Family Court Judge also, as of fact, found that the wife had in fact lived with her husband, after the decree for restitution. The learned Family Court Judge, had found that the husband's petition lacked bona fide and the fact that he had issued a notice calling for divorce by mutual consent immediately, after the expiry of the one year period would show that his intention was to get a decree for divorce using the exparte decree granted to him in O.P.No.680 of 2000. On the above conclusion, the Family Court Judge, dismissed the petition for divorce.

4. In this factual background, the following point arises for determination in this appeal:

"Whether the conclusion arrived at by the learned Family Court Judge that the husband is not entitled to a decree of divorce, merely on the ground that the exparte decree for restitution of conjugal rights had been passed in his favour, is correct?"

5. We have gone through the evidence and we find that the claim of the husband that the wife did not choose to live with him despite the decree for restitution granted in O.P.No.680 of 2000 is unfounded. Having obtained an exparte decree on 07.08.2000, the husband chose to keep quiet till 08.08.2001, i.e., exactly for a period of one year and one day. Thereafter, chose to issue notice to his wife calling for divorce by mutual consent. This conduct of the husband, in our considered opinion, will lead to an inference, that the aim of the husband was to use the exparte order for restitution of conjugal rights as a tool to obtain the decree of divorce. The documents filed by the wife in the form of medical prescriptions issued by one Dr.R.K.Sekar under Ex.R1 series for the treatment given to the child and insurance receipt, viz., Ex.R2, would conclusively establish that she has not lived away from her husband on her own and she was compelled to live at Chingleput for continuing the treatment for the child. It is also not the case of the husband that he attempted to enforce the decree for restitution of conjugal rights either by calling upon the wife to live with him or by seeking execution of the same under Order XXI Rule 32 of the Code of Civil Procedure.

6. Therefore, in view of the above documents as well as the conclusion reached by the learned Family Court Judge, we do not see any reason to interfere with the judgment and decree passed by the learned Judge.

7. In the result, this Civil Miscellaneous Appeal fails and the same is dismissed. The judgment and the decree passed by the learned Family Court is confirmed. However, there shall be no order as to costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

To

The II Additional Principal Family Judge
Family Court, Chennai.

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The Section Officer VR Section
High Court Madras

C.M.A.No.2744 of 2006

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