

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:16.11.2016

CORAM:

THE HONOURABLE MRS.JUSTICE PUSHPA SATHYANARAYANA
AND
THE HONOURABLE MR. JUSTICE R.SUBRAMANIAN

C.M.A.Nos.2941 and 2942 of 2004

D.Selvan alias Tamilselvan ... Appellant in both the appeals

Vs

Sudhabagyaseeli Respondent in both the appeals

C.M.A.No.2941 of 2004

This appeal is filed under Section 19 of the Family Courts Act to call for the records in I.D.O.P.No.227 of 1998 on the file of the Judge, Family Court, Coimbatore and set aside the decree and judgement dated 24.02.2004 .

C.M.A.No.2942 of 2004

This appeal is filed under Section 19 of the Family Courts Act to call for the records in I.D.O.P.No.111 of 2000 on the file of the Judge, Family Court, Coimbatore and set aside the decree and judgement dated 24.02.2004.

For Appellant : Mr.V.Bhiman
in both Appeals

For Respondent : Mr.D.Ashok Kumar
in both Appeals

C O M M O N J U D G E M E N T

R.Subramanian,J

C.M.A.No.2941 of 2004 has been filed challenging the judgement and decree in I.D.O.P.No.227 of 1998 on the file of the Family Court, Coimbatore. The said petition was filed by the husband seeking judicial separation under Sections 22 and 23 of Indian Divorce Act.

2. C.M.A.No.2942 of 2004 has been filed against I.D.O.P.No.111 of 2000 on the file of the Family Court, Coimbatore by the wife seeking restitution of conjugal rights

under Section 32 of the Indian Divorce Act.

3. The case of the husband in I.D.O.P.No.227 of 1998 is that the wife is guilty of adultery and cruelty, which entails him to a decree for judicial separation. The marriage between the spouses took place on 08.02.1998 at Arunagiriamman Kalyana Mandapam, Singanallur, Coimbatore and out of said wed lock a female child by name Priyanka, was born and she was said to be 7 years old at the time of filing of the petition in the year 1998.

4. The husband would claim that the respondent/wife had illicit intimacy with one Babu Narayanasamy of Masakalipalayam. Upon discovery of the said fact in 1995, the husband would claim that the respondent/wife admitted her guilt and apologized for her misconduct. The relationship between them became strained after discovery of the said illicit intimacy.

5. On 14.2.1998, according to the husband, respondent/wife consumed poison and attempted to commit suicide and she was treated as inpatient in K.G.Hospital, Coimbatore till 17.2.1998. After the said attempt of suicide, the petitioner husband had requested the parents of the respondent to take her back, since then she has been living with her parents. The petitioner/husband would further claim that the paramour namely, Babu had married another girl, but he had committed suicide subsequently. The petitioner/husband would further claim that the respondent is not in sound state of mind. Since the respondent/wife did not choose to reply to the legal notice issued by him on 5.6.1998, the husband has chosen to move the Family Court seeking judicial separation.

6. The said application was resisted by the wife. While denying the allegations made in the petition relating to her illicit intimacy with Babu and the fact that she had attempted to commit suicide on 14.02.1998, the respondent /wife claimed that the petitioner used to return home in mid night after consuming alcohol and beat her for no reason and she had to tolerate the ill treatment with great difficulties. She was also forced to get cash from her parents. In order to provide a decent living, the parents of the respondent/wife, set up a provision store for the petitioner spending nearly a sum of Rs.50,000/- at Seyoor near Avinashi and the couple were rehabilitated at Seyoor. The petitioner did not change his character and continued his drinking habits, which resulted in closure of the shop at Seyoor. Therefore, another provision store was set up at Avinashi for which, the parents of the respondent provided capital of Rs.50,000/-. The said business was also closed due to drinking habit of the husband/petitioner and the couple eventually shifted their residence to Masakalipalayam. The respondent would further claim that the petitioner had ill-treated her by claiming dowry

and the family itself was maintained out of the money provided by the parents of the wife/respondent.

7. After the receipt of the notice in I.D.O.P.No.227 of 1998 on the file of the Judge, Family Court, Coimbatore, the respondent/wife filed I.D.O.P.No.111 of 2000 on the file of the Family Court, Coimbatore seeking restitution of conjugal rights. After narrating the allegations in the counter in I.D.O.P.No.227 of 1998, in I.D.O.P.No.111 of 2000, respondent/wife claimed that attempts for reunion made by the family members did not fructify and hence she sought for an order of restitution of conjugal rights. The husband resisted the said application, repeating the allegations made in I.D.O.P.No.227 of 1998 filed by him for judicial separation. The wife also filed M.C.No.39 of 2000 seeking maintenance.

8. All the three proceedings were taken up together by the Family Court, Coimbatore and the learned Family Judge framed the following issues for determination:
IDOP.No.227/1998

1.Whether the petitioner/husband is entitled for a decree for judicial separation?

IDOP.No.111/2000

1.Whether the respondent/wife is entitled to decree for restitution of conjugal rights?

M.C.39/2000

1.Whether the respondent/wife is entitled to maintenance from her husband? If so what is the amount she is entitled to?

9. The petitioner examined himself as PW1 and the respondent/wife examined herself as DW1. No documentary evidence was produced on either side.

10. Upon a consideration of the oral evidence, the learned Family Judge, Coimbatore, came to the conclusion that the claim of the husband regarding adultery and cruelty has not been made out, in the absence of any independent testimony, other than the interested evidence of the husband. The learned Family Judge, came to the conclusion that serious allegations made against the wife, has not been made out. Upon such a finding, the learned Family Judge, Coimbatore rejected the claim of the appellant/husband and dismissed his petition for judicial separation in I.D.O.P.No.227 of 1998.

11. By a Common Order the learned Family Judge, Coimbatore allowed the application for restitution of conjugal rights filed by the wife. The learned Family Judge, Coimbatore also directed the appellant/husband to pay a sum of Rs.500/- each to the respondent/wife and the daughter in M.C.No.39 of 2000 on the file

of Family Court, Coimbatore. The appellant has not challenged the order directing payment of maintenance made in M.C.No.39 of 2000 on the file of the Family Court, Coimbatore.

12. It is claimed by Mr.D.Ashok Kumar, learned counsel appearing for the wife, that the appellant has not paid any money towards maintenance as per the order in M.C.No.39 of 2000 dated 24.02.2004. Aggrieved by the order of the Family Court, Coimbatore rejecting the claim for judicial separation and granting the relief to the wife for restitution of conjugal rights, the husband has preferred the above appeals.

13. We have heard Mr.V.Bhiman, learned counsel appearing for the appellant and Mr.D.Ashok kumar learned counsel appearing for the respondent. The following points emerge for consideration in the appeals:

- 1)Whether the appellant has established the claim of adultery and cruelty on the part of the respondent?
- 2)Whether the respondent is entitled to an order of restitution of conjugal rights?

Point No.1

14. Mr.V.Bhiman, learned counsel appearing for the appellant would invite our attention to the evidence on record and submit that the findings of the Family Court, Coimbatore, regarding adultery and cruelty are not based on evidence. He would also point out that the respondent had in fact had illicit relationship with one Babu and on being confronted she apologized to her husband. We have gone through the evidence as well as the findings of the learned Family Judge, Coimbatore. We find that the appellant/husband had during Chief examination claimed that he was informed about the illicit relationship between one Babu and the respondent/wife by Easwaran and Palanisamy. It would be pertinent to point out that the source of information regarding adultery is not revealed in the petition filed in I.D.O.P.No.227 of 1998 on the file of the Family Court, Coimbatore. However, the appellant/husband has not chosen to examine either the said Easwaran or Palanisamy. The appellant has chosen to examine one Aruchamy as PW2. Though the said Aruchamy tendered evidence in chief, he did not make himself available for cross-examination. Therefore, his evidence has been struck off.

15. From the records we find that except the interested testimony of the appellant/husband, there is no other evidence available to prove the serious allegation of adultery. Further the appellant/husband would claim that the said Babu had committed suicide. It is seen from the evidence on record that the appellant/husband had admitted that the police have registered a case regarding the said suicide of Babu and he will be able to produce documents relating to the same. But he has

not produced any document.

16. The other limb of argument of Mr.V.Bhiman is that the respondent/wife had attempted suicide on 14.2.1998 and she was treated as inpatient in K.G.Hospital, Coimbatore till 17.02.1998. Though the respondent wife admitted the fact that she was treated as in-patient in K.G.Hospital, Coimbatore, during the relevant period, she had denied that it was due to consuming poison.

17. The appellant/husband would admit that the documents relating to the treatment given to the respondent/wife at K.G. Hospital, Coimbatore are available with him. However, he has not chosen to produce the said documents. In the absence of any evidence, learned Family Judge, Coimbatore had to reject the claim of the appellant/husband on both grounds namely, adultery and cruelty. The learned counsel appearing for the appellant is unable to point out any other material which would enable him to assail the findings of the learned Family Judge.

18. We are therefore, left with no other alternative except to confirm the findings of the learned Family Judge, Coimbatore on the question of adultery and cruelty. Point NO.2,

19. In so far as, the relief of restitution of conjugal rights sought by the wife in H.M.O.P. No.111/2000, the only contention of the learned Counsel for the appellant is that in spite of succeeding in the application for restitution of conjugal rights, the wife has not chosen to make any attempt to execute the said decree. That by itself would give him a cause of action to seek judicial separation under Section 10(1) (8) of the Indian Divorce Act 1869. We are unable to agree with the said contention of the learned counsel. Section 10(1) (viii) of the Divorce Act 1869 reads as follows:

"(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or"

From the language of the Section it is seen that the right to seek divorce accrues only to the person who has obtained a decree for restitution of conjugal rights on the ground that the respondent had failed to comply with the same. The appellant/husband, who had failed to comply with the decree obtained by the wife, cannot in our view seek judicial separation under Section 10 (1) (viii) of the Act.

20. Learned counsel would further rely upon the judgment in Sujatha Christiana vs. C.Thomas reported in AIR 2002 Madras 6 and contend that inasmuch as the relationship between the parties has deteriorated and there was no chance for the parties to reunite, the decree for restitution of conjugal rights will

have to be set aside. We are unable to agree. In the judgment referred to, this Court had held that the husband is not entitled to institute a case for restitution. The petition for restitution of conjugal rights was filed nearly five years after the separation and the wife in the said case, had claimed that she was treated with cruelty by her husband. Therefore, the husband is not entitled to restitution. The said judgment in our considered opinion does not improve the case of the appellant husband in any manner.

21. The learned Family Judge, Coimbatore had after rejecting the claim of judicial separation made by the husband found that wife is entitled to a decree for restitution of conjugal rights, taking into account the fact that the allegations made by the husband against wife for their living separately have not been established. Therefore, we do not find any merit in the submission of the learned counsel for the appellant and we are in agreement with the conclusion of the learned Family Judge, Coimbatore. The conclusion of the learned Family Judge, Coimbatore granting restitution of conjugal rights in favour of the respondent/wife does not need interference. In fine both the appeals are dismissed confirming the judgment and decree of the learned Family Judge, Coimbatore.

22. Taking note of the submission of Mr.D.Ashok Kumar the learned counsel for the respondent that the husband /appellant has not paid any maintenance as ordered in M.C.No.39 of 2000, we feel that it is a fit case where husband/appellant should be directed to pay compensatory costs for having attempted to malign the wife by making unsubstantiated allegations of adultery. We accordingly fix the cost of Rs.10000/-. The appeals are dismissed with cost of Rs.10000/- to be paid by the appellant/husband to the respondent/wife apart from the costs already awarded by the Family Judge, Coimbatore.

sd/

Assistant Registrar (CO)

/true copy/

Sub Assistant Registrar

vk

To

- 1.The Family Judge, Coimbatore.
- 2.The Section Officer, High Court, Madras.

C.M.A.Nos.2941 and 2942 of 2004

VSN(CO)

GN(27/02/2017)