

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :13.02.2017

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD No.230 of 2017

and

C.M.P.No.1027 of 2017

H.Gayathiri

.. Petitioner

vs

A.Hariprasad

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 04.10.2016 made in I.A.No.78 of 2016 in H.M.O.P.No.753 of 2015 on the file of the Court of the Principal Family Judge, Coimbatore.

For Petitioner : Mr.T.P.Manoharan,
Senior Counsel for
M/s.R.Nandhakumar

For Respondent : Mr.R.Bharath Kumar

ORDER

The revision petition is filed by the wife in a matrimonial dispute against an order dismissing the application under Order VII Rule 11 C.P.C refusing to reject H.M.O.P.No.753 of 2015 on the file of the Family Court, Coimbatore.

2. The respondent-Husband has filed the petition for divorce on the ground of cruelty in H.M.O.P.No.1027 of 2014. Pending the same, another petition in H.M.O.P.No.753 of 2015 was filed on the ground of willful desertion.

3. According to the petitioner, when the earlier O.P is already pending consideration for the same relief, a second petition for similar relief on a different ground, is not maintainable. It is the contention of the petitioner that he is not entitled to seek relief of divorce by way of two parallel proceedings. In fact, the petitioner-wife has also preferred H.M.O.P.No.281 of 2015 seeking restitution of conjugal rights, which is also pending. It is also stated that in M.C.No.3 of 2015 filed by the wife, she has expressed her willingness to join her husband. But however, only the respondent has been refusing to take her back to the matrimonial fold. Besides making the factual allegations, the petitioner has stated that there is no cause of action for the second O.P filed for divorce and hence, she sought for rejection of the plaint.

4. The said application was resisted by the respondent by contending that in H.M.O.P.No.1027 of 2014 was filed on the ground of

cruelty, which was only the ground available to him on the date of filing of the original petition. Since the petitioner had deserted the respondent and left for her parents house on 29.11.2012, the original petition could be filed only two years thereafter. Therefore, the present O.P has been filed by the respondent for divorce on the ground of willful desertion. It is therefore contended by the respondent that the cause of action in terms of time period for each of the ground to accrue, is different. When the statutes specifically prescribe two years period before the date of filing of the petition to raise the desertion as a ground on the date of filing of H.M.O.P.No.1027 of 2014, the respondent did not have a cause of action on the ground of desertion. However, subsequently when the two years period is over, that gives rise to the cause of action to seek divorce on the ground of desertion also. Hence, the second O.P. is filed. When the cause of action is different for the allegation of cruelty and desertion, the respondent/husband has filed separate petitions. Therefore, it cannot be stated that O.P has to be rejected under Order VII Rule 11 C.P.C. The Principal Family Court, Coimbatore, after consideration of the pleadings and the arguments, had dismissed the application under Order VII Rule 11 C.P.C as devoid of any merits. The said order is now under challenge.

5. When the petitioner / wife had expressed her willingness to resume the matrimonial life on 12.12.2015 during the National Mega Lok Adalat, the respondent was absent and deliberately stayed away. Therefore, the question of desertion by the wife does not arise. Hence, it is argued that there is no cause of action for filing of the O.P on the ground of desertion. The respondent had initially filed a divorce petition before the Family Court, Palacode, Kerala, which was transferred to the Family Court, Coimbatore, by virtue of the order of the Hon'ble Supreme Court, which is re-numbered as H.M.O.P.No.1027 of 2014 on the ground of cruelty. At the time of filing of the said O.P., there was a cause of action only for filing divorce on the ground of cruelty, as statutorily there should be two years of desertion before filing a petition for divorce on the said ground. The wife had left the matrimonial home on 29.11.2012 and after the statutory period of two years was over, H.M.O.P.No.753 of 2015 is filed on the ground of desertion. The cause of action for both the divorce petitions, is different, as they accrued at different point of time. The contention that there is no cause of action for the second petition and the same has to be rejected, is unacceptable. The revision petitioner has also

not specifically stated that under which sub-clause of Order VII Rule 11 C.P.C is invoked for rejecting the plaint. The revision petitioner has filed H.M.O.P.No.281 of 2015 for restitution of conjugal rights and also M.C.No.43 of 2015 claiming maintenance. As stated earlier, a perusal of H.M.O.P.No.753 of 2015, which is filed on the ground of desertion does disclose the cause of action by the petitioner, which states that from 29.11.2012, the petitioner had deserted and refused to return the matrimonial home.

6. The learned counsel for the petitioner has also placed his reliance on a decision of the Hon'ble Supreme Court reported in **2004 (2) L.W 800 (SOPAN SUKHDEO SABLE AND OTHERS AND ASSISTANT CHARITY COMMISSIONER AND OTHERS)** and in para 16, the Hon'ble Supreme Court held as follows:-

"16. There is distinction between 'material facts' and 'particulars'. The words 'material facts' show that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement or plaint becomes bad.

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Rule 11 of Order VII lays down an independent remedy made available to the defendant to challenge

the maintainability of the suit itself, irrespective of his right to contest the same on merits. The law ostensibly does not contemplate at any stage when the objections can be raised, and also does not say in express terms about the filing of a written statement. Instead, the word 'shall' is used clearly implying thereby that it casts a duty on the Court to perform its obligations in rejecting the plaint when the same is hit by any of the infirmities provided in the four clauses of Rule 11, even without intervention of the defendant. In any event, rejection of the plaint under Rule 11 does not preclude the plaintiffs from presenting a fresh plaint in terms of Rule 13."

7. As per the above decision, the real object of Order VII Rule 11 of the code is to keep out of Courts irresponsible law suits. Whenever the Court finds that or feels prima-facie of the view that a suit is an abuse of process of Court, it can invoke jurisdiction under Order VII Rule 11 C.P.C. In the case on hand, when it is specifically stated that the second O.P could be filed only after the statutory period was over and the same was not available at the time of filing of the first O.P on different ground, the same cannot be termed as unnecessary scandalous, frivolous or vexatious. It can also not be said that it prejudices or delays the fair trial of the other suit. Unless it is

manifestly vexatious and meritless, the suit cannot be rejected. In the peculiar situation of the instance case, the respondent could have even filed the amendment application, as the cause of action is only subsequent to the first O.P. Perhaps, an amendment based on the subsequent events could have also been filed, however, it does not bar the second suit, which can be tried along with first O.P. Hence, there is no merit in the revision and the revision deserves dismissal.

8. In the result, the revision fails and the same is dismissed.
No costs. Consequently, connected miscellaneous petition is closed.

13.02.2017

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Index: yes/No
Internet: yes

To

The Principal Family Judge,
Coimbatore.

PUSHPA SATHYANARAYANA,J.,

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