



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 30.11.2017

CORAM :

WEB COPY

THE HONOURABLE MR.JUSTICE G.R.SWAMINATHAN

C.M.A.(MD)Nos.324 and 325 of 2017

T.Suresh Babu

... Appellant in both appeals

Vs.

Vijila

... Respondent in both appeals

Prayer: Civil Miscellaneous Appeals are filed under Section 55 of the Indian Divorce Act, 1869 against the judgment and decree passed in IDOP.No.376 of 2010 and 159 of 2011 dated 23.10.2013 on the file of the Principal District Judge of Kanyakumari District.

For Appellant : Mr.R.Vijayakumkar

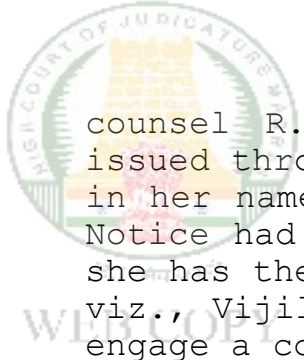
For Respondent : No Appearance

JUDGMENT

The appellant is the husband. The respondent is his wife. The marriage between them took place on 20.08.2008 as per Christian rites and customs. The appellant is employed as an Electrician. The respondent is working as a Nurse. It is the specific allegation of the appellant that the respondent did not come forward to consummate the marriage. He therefore filed I.D.O.P.No.159 of 2011 on the file of the District Court, Nagercoil under Section 10(1) (vii) of the Indian Divorce Act. In the meanwhile, the respondent herein filed I.D.O.P.No.376 of 2010 on the file of the District Court, Nagercoil seeking restitution of conjugal rights. The wife examined herself as P.W.1 in I.D.O.P.No.376 of 2010 and marked Ex.P1 to P5. The appellant herein examined himself as R.W.1 and also marked Ex.R1. In I.D.O.P.No.159 of 2011, the appellant examined himself as P.W.1 and his maternal uncle Johnson as P.W.2. He marked Ex.P1 to P6. The respondent herein examined herself as R.W.1. The learned trial Judge disposed of both the petitions on the same day, by orders dated 23.10.2013. I.D.O.P.No.376 of 2010 was allowed while I.D.O.P.No.159 of 2011 was dismissed. Challenging the dismissal of I.D.O.P.No.159 of 2011, the husband filed C.M.A.(MD) No.325 of 2017. He filed C.M.A.(MD) No.324 of 2016 against the allowing of I.D.O.P.No.176 of 2010.

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2.Both the C.M.As were taken up together. Heard the learned



counsel R.Vijayakumar, appearing for the appellant. Notice was issued through the Court to the respondent. Court notices were sent in her name to the address given by the respondent in her petition. Notice had been received by one Santhakumari, who has endorsed that she has the authority to receive the notice. Name of the respondent viz., Vijila is mentioned in the cause list. She has not chosen to engage a counsel.

3.The learned counsel appearing for the appellant would contend that the appellant husband had clearly established his case by applying the principle of preponderance of probability. The marriage took place on 20.08.2008. He left for Qatar in October 2008. He returned to India on 15.06.2009. The respondent lodged a police complaint against the appellant on 27.06.2009. Her complaint was registered as C.S.R.No.178 of 2009 and an enquiry into the same was held. The appellant was summoned by the police. In the said police complaint lodged before the Sub Inspector of Police, All Women Police Station, Kuzhithurai, the respondent had levelled an allegation that she was a victim of domestic violence. But, on the same day, she had given a handwritten letter dated 27.06.2009 informing the Inspector of All Women Police Station, Kuzhithurai that there was difference of opinion between her and her husband and that her husband left for Overseas employment two months after the marriage and that he returned to the native place only 15 days earlier and that since her husband did not come forward for amicable talks, she was constrained to lodge a police complaint. She further stated in the said letter that there was an enquiry in the matter. The husband had stated that he was not willing to live with her. The respondent wife specifically mentioned that an understanding had been arrived at for resolving the matter. A specific statement has been made to the effect that by 15.07.2009, all the transactions would be concluded. Significantly, she also stated that through Court they will obtain divorce.

4.This was followed by issuance of notice dated 27.10.2010 by the appellant. In the said notice, the appellant made a specific allegation that the respondent inspie of being a Nurse, behaved in a strange manner and refused to have sexual intercourse with him. In the said notice, the events that happened following the appellant's return to India on 15.06.2009 and the enquiry conducted in Kuzhithurai All Women Police Station are all referred to. It is further stated in the notice that the respondent was not acting in terms of the compromise arrived at. This notice was marked in I.D.O.P.No.159 of 2011 as Ex.P3. The respondent's wife issued a reply notice dated 02.11.2010. It was marked as Ex.P5. The said reply notice deserves a careful perusal. Though there is a formal denial of the allegations made by the husband in his notice dated 27.10.2010, there is a specific allegation that the appellant was willfully retaining the cash of Rs.2 lakhs.

<https://hcservices.ecourts.gov.in/hcservices/>

5.As already stated, the respondent in her letter dated



27.06.2009 addressed to the Inspector of Police, All women Police Station, Kuzhithurai, had agreed to receive a sum of Rs.2.00 lakhs apart from a few other jewellery items and articles. The appellant agreed to hand over the same to the respondent on the express understanding that it will be part of a mutual consent divorce package. Since the respondent did not come forward for amicably resolving the marriage by filing mutual consent divorce petition, he had not handed over the cash amount of Rs.2.00 lakhs and other articles as originally agreed. This reference to retention of a sum of Rs.2 lakhs in the reply notice dated 02.11.2010 issued by the respondent completely probablises the version projected by the appellant herein. The respondent lodged a complaint on 27.06.2009. The same was registered as C.S.R.No.178 of 2009. The appellant was examined. There was an enquiry in the police station. In the police station, the terms of understanding were reduced into writing and both the parties had separately affixed their signatures.

6.The reply notice issued by the respondent is a very brief in its contents. The respondent had described the appellant as a man having peculiar quality and with a malafide intention alone, he refrained from the respondent without any reason. One can infer from the use of the expression "refrained" that there was no consummation of marriage.

7.The petition for restitution of conjugal rights filed by the wife was allowed by the trial Court. Admittedly, the appellant was employed abroad. Knowing this fully well, the respondent herein chose to file E.P.No.12 of 2014 on the file of the District Court, Nagercoil. Strangely, she sought the arrest of the appellant and his detention in civil prison. Even more strangely, an order of arrest was made. Since the appellant was abroad, he did not receive notice in the execution petition. Therefore, publication in an international news edition was made and an order of arrest was issued by the executing Court on 22.12.2016. As per order 21 Rule 32 of C.P.C., a decree for restitution of conjugal rights can be enforced only by attachment of the properties of the respondent. This Court therefore stayed the operation of the said order of arrest in C.M.P(MD) No.1241 of 2017 in C.R.P.(MD) No.262 of 2017.

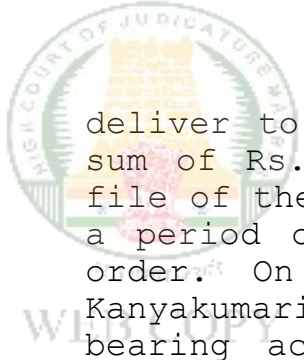
8.It is submitted by the learned counsel appearing for the appellant that even though notice has been served in the said CRP, the respondent herein has not chosen to enter appearance even in the said proceedings. The fact that the respondent herein wanted the arrest and detention of the appellant in civil prison clearly demonstrates her intention. The issue in this case is whether the marriage between the parties was consummated or not. The appellant herein has categorically deposed that the respondent was not willing to have conjugal relationship with him. In a case of this nature, one cannot obviously hope for any other corroborating circumstance. But, in the present case, after taking the stand that the allegations levelled by the appellant are false, it has been implicitly conceded that the marriage has not been consummated.



9. It is relevant to mention here that the reply notice dated 02.11.2010 has been signed by the respondent also. Sequence of events also probablises the case of the appellant. Admittedly, the appellant returned to India only on 15.06.2009. The respondent lodged the police complaint on 27.06.2009. The case of the appellant is that he attempted to have conjugal relationship with the respondent and that the same was resisted by her. Therefore one can come to the conclusion that this had led to the lodging of the police complaint. In the police complaint, the respondent has not made any reference to the appellant having been away from India. The marriage had taken place on 20.08.2008. If really, the respondent was a victim of domestic violence, she would have given a complaint immediately after the marriage took place.

10. The appellant had also examined his maternal uncle Johnson as P.W.2. The said Johnson had also attested the letter signed by the appellant before the All Women Police Station, Kuzhithurai. He is therefore a person, who appears to be acquainted with the facts and circumstances of the case. He is an appropriate person to be examined as a witness to speak about what happened between the parties.

11. The learned Judge had given a specific finding that the wife had agreed for filing of mutual consent divorce petition before the Inspector of All Women Police Station, Kuzhithurai. However, the trial Judge had focussed principally on the fact that the husband had not informed any person about the conduct of his wife. But, this finding is not correct. P.W.2, maternal uncle of the appellant was specifically informed about this and in fact, he has deposed before the trial Court that at the instance of the appellant, he attempted to compromise the matter. He was cross examined. He also deposed that during the police enquiry, the respondent wife unconditionally agreed to go for mutual consent divorce. The testimony of the said P.W.2 could not be shaken during the cross examination. On the other hand, a suggestion was put to the said P.W.2 that the respondent wife was "now" physically ready and willing for conjugal life and that she "is now" ready for re-union. One and only conclusion can flow from this, namely, that she was not originally fit or ready or willing for normal conjugal life. A cumulative appreciation of the evidentiary material on record can lead to only one conclusion viz., that the respondent was willfully not ready to discharge her conjugal obligations. Therefore, I come to the conclusion that the appellant has clearly made out his case by applying the principle of preponderance of probability. The orders dated 23.10.2013 in IDOP.No.376 of 2010 and 159 of 2011 on the file of the Principal District and Session Judge of Kanyakumari District are set aside. I.D.O.P.No.376 of 2010 is dismissed and I.D.O.P.No.159 of 2011 is allowed. But, this is not the end of the matter. The appellant had agreed to handover a sum of Rs.2 lakhs and 9-1/2 sovereign gold to the respondent herein. Since the respondent did not come forward to receive the same, he could not



deliver to her. The appellant is therefore directed to deposit a sum of Rs.5 lakhs to the credit of I.D.O.P.No.159 of 2011 on the file of the Principal District Judge of Kanyakumari District, within a period of 8 weeks from the date of receipt of a copy of this order. On such deposit, the Principal District and Session Judge of Kanyakumari District is directed to reinvest the same in an interest bearing account in any Nationalised Bank and as and when, the respondent takes out an application to withdraw the same, the same shall be allowed.

12.Both the appeals are allowed. No costs.

Sd/-
Assistant Registrar (CS-II)

/True Copy/

Sub Assistant Registrar

To

1. The Principal District Judge of Kanyakumari District.
2. The Record Keeper, V.R.Section,
Madurai Bench of Madras High Court,
Madurai. (2 Copies)

+ 1 CC TO Mr.S.GOKUL RAJ, ADVOCATE IN SR No. 90607

ARUL

TE/KKR/SAR-3 : 26/02/2018 : 5P/5C

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