

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 22.06.2018

Pronounced on : 10.07.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH

and

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.1996 of 2015

HenryJohnson

... Appellant/Petitioner

Vs

M.GrenaJanet

... Respondent/Respondent

This Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act 1974 to set aside the fair and decretal order dated 28.08.2009 made in I.D.O.P.No.394 of 2006 on the file of the Judge, Family Court, Coimbatore.

For petitioner : Dr.P.Vasudevan

For Respondent : Mr.C.D.Sugumaran

JUDGMENT

C.SARAVANAN

This appeal arises out of the fair and decretal order dated 28.08.2009 passed by the learned Judge, Family Court, Coimbatore in I.D.O.P.No.394 of 2014 (referred to as the impugned order and Family Court respectively).

2. This is an unfortunate case where both the appellant-husband and the respondent-wife and the girl child born to them are the victims of the circumstances.

3. The respondent-wife has not only borne the ignominy and insults but was forced into a separation on 12.1.2003 when the appellant-husband decided to leave her at the doors of her parents even though she was pregnant. Thereafter, the parties have been away from each other.

4. Reason for abandoning the respondent-wife appears to be an anonymous phone call on 22.11.2002 wherein certain malicious and scandalous allegation were made against her by callers. At that time they were not in the house and had gone to attend a wedding function.

5. Therefore, the phone call was allegedly answered by the appellant-husband's mother. She is said to have communicated the troubling news to the appellant-husband fifteen days thereafter.

6. The long and short of the call was that the respondent-wife was in a relationship with another person and that she had lead a dis-reputable life prior to her marriage with the Appellant.

7. This communication troubled and anguished the appellant-husband. He is said to have confronted the respondent-wife about the same. The appellant-husband also alleged that the respondent-wife had confessed about her past and expressed her repentance.

8. The respondent-wife has denied the allegation regarding alleged pre-marital relationship or having confessed to the appellant-husband as alleged. These allegations remain unsubstantiated.

9. In the course of the proceeding below the respondent-wife has indicated that the appellant-husband was not comfortable with the respondent-wife interacting with her male colleague and was unnecessarily suspicious.

10. The appellant-husband claims to have developed aversion with the respondent-wife and has thereafter left her in her mother's house on 12.01.2003.

11. On 03.02.2003, the Appellant issued a legal notice to the Respondent wherein it was alleged that the Respondent was

guilty of desertion, cruelty and that she was adulterous with the person named therein. We have refrained from identifying the name of the person in this judgement as it is inconsequential.

12. The notice further called upon the respondent to agree for a divorce by a mutual consent. Pursuant to this, the respondent-wife appears to have given a complaint to the Commissioner of Police wherein she stated that the appellant had unfairly accused her of having illicit relationship and had demanded money if they were to live together.

13. In a representation dated 10.3.2003 addressed to the All Women Police Station, Gandhipuram, Coimbatore, the appellant-husband denied having demanded money from the respondent-wife and stated that he was willing to live with respondent-wife separately. However, there are no evidence on record to indicate that the appellant-husband took steps to set up an independent matrimonial house to live with the respondent-wife.

14. On 15.03.2006, the Respondent issued a notice and called upon the appellant-husband to pay a sum of Rs.5,000/- p.m. as maintenance for herself and the child born to them.

15. Thereafter, the Appellant filed a petition in I.D.O.P.No.394 of 2006 before the Family Court, Coimbatore for a decree of divorce under Section 10 of the Indian Divorce Act, 1969 on the allegations narrated above.

16. In the trial, the respondent-wife has admitted that the relationship soured between the parties after the content of the anonymous telephone call on 22.11.2002 was communicated.

17. The Family Court has dismissed the petition for divorce and has held that neither adultery was proved nor any ground was made out for cruelty for granting divorce.

18. Family Court also held that the marriage has not broken down irretrievably so as to divorce the parties in view of the undertaking dated 10.03.2003 given by the appellant-husband before the All Women Police Station, Coimbatore.

19. The appellant-husband seeks to reverse the impugned order of the Family court dismissing the divorce petition in this Appeal.

20. Heard the learned counsel for both the sides.

21. The learned counsel for the appellant-husband would submit that the parties lived together only for a brief period of four months between 11.09.2002 and 12.01.2013 and are thereafter living separately. He further submitted that since the respondent-wife has also not asked for restitution of conjugal rights, it is evident that the respondent also has no desire to continue with the relationship and there is a complete break down of marriage. Learned Counsel would therefore submit that on account of the above factor, the Family Court ought to have granted divorce as prayed for by the appellant in view of the settled position of law.

22. The learned counsel for the appellant-husband also relied upon the following decisions:

- i) V.Bhagat vs. D.Bhagat AIR 1994 SC 710;
- ii) Banchhandhi Das Vs. Kmala Devi and Another AIR 1980 ORISSA 171; and
- iii) Maheswari vs. M.Manoharan (2008) 5 MLJ 1153

23. The decision of the Hon'ble Supreme Court in V.Bhagat vs. D.Bhagat AIR 1994 SC 710 was drawn in support of the submission that when marriage was practically over, there is no point in continuing with the marriage. Our attention was drawn to the following passage from the said judgment:-

She has been dubbed as an incorrigible adulteress. She is fully aware that the marriage is long dead and over. It is her case that the petitioner is genetically insane. Despite all that, she says that she wants to live with the petitioner. The obvious conclusion is that she has resolved to live in agony only to make life a miserable hell for the petitioner as well. This type of callous attitude in the context of the facts of this case, leaves no manner of doubt in our mind that the respondent is bent upon treating the petitioner with mental cruelty. It is abundantly clear that the marriage between the parties has broken down irretrievably and there is no chance of their coming together, or living

together again. Having regard to the peculiar features of this case, we are of the opinion that the marriage between the parties should be dissolved under Section 13(1)(i-a) of Hindu Marriage Act and we do so accordingly. Having regard to the peculiar facts and circumstances of this case and its progress over the last eight years – detailed hereinbefore – we are of the opinion that it is a fit case for cutting across the procedural objections to give a quietus to the matter.

24. The decision of this Court in Maheswari vs. M.Manoharan (2008)5 MLJ1153 was drawn in support of the submission that a decree of divorce can be granted when the marriage has broken down and the parties are living separately for years and there is no possibility of bringing the parties together.

25. The decision of the Orissa Court in Banchhandhi Das Vs. Kmala Devi referred to supra was relied in support of the plea that though adultery is rarely capable of being proved by direct evidence, yet overall circumstances indicate that there was adultery.

26. The learned counsel for the respondent-wife submitted that the order of the family court is well reasoned and therefore calls for no interference at the instance of the appellant-husband and therefore the present appeal is liable to be dismissed.

27. We have considered the rival submissions advanced on behalf of the respective parties and have perused the evidence on record and the pleadings.

28. The allegation regarding the alleged relationship prior to the marriage has neither been substantiated nor is a ground to infer adultery in legal parlance.

29. The decision of the Orissa Court in Banchhandhi Das Vs. Kmala Devi referred to supra is of no assistance to the appellant-husband. The Court in that case held that though direct evidence for proof of adultery may not be available as rarely the parties are caught in the act of adultery, yet circumstances must however be sufficiently strong and conclusive.

30. In the present case, there are no circumstances on record to infer adultery barring creeping suspicion entertained by the appellant-husband regarding the alleged pre-marital relationship.

31. The appellant-husband has confused the alleged pre-marital affair of the respondent-wife as adultery. In any event, these allegations have not been proved by the appellant-husband. Therefore, the said decision is of no assistance.

32. The husband-appellant has not produced any evidence to make out a case for granting divorce on the ground of adultery. Therefore, in absence of any materials on record, the decision of the Family Court cannot be interfered.

33. There is also no case made for cruelty by the respondent wife. Cruelty if any, was self-inflicted by the appellant-husband on himself while the respondent-wife was a hapless victim of such cruelty.

34. Further, the parties have hardly lived for a period of four months before the relationship soured within 15 days of the telephone call on 22.11.2002 and 72 days of their marriage. The appellant-husband has not produced any evidence to prove cruelty by the respondent-wife.

35. The appellant- husband has tortured himself by imagining that the respondent-wife was not of good character and has thereafter left in her mother's house. If at all, it was the appellant-husband who was cruel to the respondent-wife and not vice-versa.

36. The decision of this Hon'ble Court cited supra in Maheswari case where the parties were living separately for more than 16 years and the matrimonial tie had ruptured beyond repair and that there was no possibility of bringing the couple together cannot be applied to the facts and circumstances of the present case.

37. In the facts of the aforesaid case divorce was granted by the Family Court based on the evidence on record and taking into the totality of the facts and circumstances. Therefore, this Court had refused to interfere with the divorce granted by the Family Court in that case.

38. The facts are different in the present case from the decision cited supra on behalf of the Appellant-husband. In the present case, we are not convinced that the judgment and decree of the Family Court has to be interfered at the instance of the Appellant, as none of the grounds for grant of divorce has been proved. It is therefore, not proper to grant divorce at the instance of the Appellant.

39. The decision of the Hon'ble Supreme Court in V.Bhagat vs. D.Bhagat, AIR 1994 SC 710 is also irrelevant to further the case of the appellant-husband. The Hon'ble Supreme Court thought it fit to grant divorce in the peculiar facts of the said case it was concerned with.

40. It is also quite clear that the respondent-wife cannot be expected to apply for the restitution of conjugal rights in view of the allegations made by the appellant-husband. Therefore, we cannot draw any inference against the respondent-wife.

41. On the other hand, the appellant-husband has not taken any steps to bring the respondent-wife despite giving an undertaking on 10.3.2003 that he would take back the respondent-wife and set up a separate matrimonial home for them to live together. However, he has not taken any steps in that direction.

42. Divorce cannot be granted based on imagined and self-inflicted cruelty. The appellant-husband also cannot take advantage of the long separation from the respondent-wife. He was responsible for abandoning his pregnant wife. Therefore, it is not open for him to plead irretrievable breakdown of the marriage and walk away from the responsibility he owed to his family.

43. The Learned judge of the Family Court has also considered all the above circumstances while dismissing the case filed by the appellant-husband. It is therefore our view also that the appellant-husband has no case to ask for a decree of divorce in the facts and circumstances of the present case.

44. In the light of the above, we are of the view that the civil miscellaneous appeal deserves to be dismissed with costs and is accordingly dismissed.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

kkd

To

The Judge, Family Court,
Coimbatore.

+1cc to Mr.D.Ramesh Raj, Advocate Sr.45155

+1cc to Mr.C.D.Sugumar, Advocate Sr.45021

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CMA.No.1996 of 2015

srg 28/08/2018

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