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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.04.2018

C O R A M

THE HONOURABLE MR.JUSTICE M. GOVINDARAJ

C.M.S.A.NO.40 OF 2015

M.Kumar Sah

... Appellant

Vs.

M.J.Dhanalakshmi Bai

... Respondent

PRAYER: Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act read with Section 100 of Civil Procedure Code against the judgment and decree dated 02.09.2015 made in C.M.A.No.1 of 2014 on the file of District Court No.II, Kancheepuram, dismissing the appeal and confirming the judgment and decree dated 09.10.2013 made in H.M.O.P.No.77 of 2009 on the file of Sub Judge, Kancheepuram.

For Appellant : Mr.N.A.Nissar Ahmed
For Respondent : Mr.S.D.S.Philip

J U D G M E N T

The unsuccessful appellant before both the Courts below has filed the above Civil Miscellaneous Second Appeal.

2. The appellant filed a petition for dissolution of marriage which had taken place between him and the respondent on 23.08.2007 at Kancheepuram on the grounds of cruelty. Both the Courts below have concurrently found that the appellant failed to prove the cruelty caused by the wife / respondent and the appellant / husband wanted to get away from the company of the wife for an unsustainable reason and therefore, he is not entitled to any relief. Against which, the appellant preferred the above Civil Miscellaneous Second Appeal, on the following substantial questions of law:-

"a) Whether the lower appellate court was right in allowing IA.39/14 striking off the defense in CMA.1/14 and CMA 96/14 and deciding the case on merits.

b) Whether the courts below are right in



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holding that there was no physical cruelty on the appellant and thereby dismissing the divorce petition without seeing that the respondent had not only caused mental cruelty but also had committed physical assault as borne on court records."

3. The case of the appellant is that the marriage was solemnized in the presence of the relatives and friends of both the families on 23.08.2007 at Kancheepuram. At the time of marriage, he gifted gold jewels, silver ornaments, silk sarees and spent a sum of Rs.2,00,000/- towards marriage expenses. The respondent stayed with him for ten days and left the matrimonial home. Because of the efforts taken by him, she came back only after a lapse of four months. Thereafter, the respondent again left him within a week's time. During the period of short stay, she used to abuse and hit the appellant and his family members. On 28.07.2008, the respondent's father informed the appellant that the respondent gave birth to a female child. When he went to see the baby, he was forcibly chased away by the respondent's family members. After conciliation, the appellant brought the respondent and the female baby and performed the cradle function. Again after four days, the respondent left him saying that the child was not born to him. Further, the fact that the respondent had skin disease on her body and lips was not informed to him and therefore, there is no chance of re-union and he had undergone horrible experiences through the respondent.

4. But the respondent / wife would deny all the allegations and that the birth of the female child was not liked by the husband and his family members and she was chased out of the matrimonial home. The appellant's family members insisted on getting the property at her village, to be registered in the name of her husband or to bring Rs.2,00,000/- in cash in lieu of the same. In spite of serious efforts taken by the respondent family members, the appellant refused to take her back. The respondent is willing to join the appellant / husband considering the future of the child and sought dismissal of the case.

5. From the perusal of the materials available before this Court, the finding of both the Courts below that the appellant and respondent have lived together hardly for one month i.e., at the first instance for ten days; at the second instance for one week; and at the third instance after delivery of the baby for four days. Even though the appellant has claimed divorce on the grounds of physical and mental cruelty, he failed to prove the same. The statement is that from day one of the marriage, the respondent wife picked up quarrel and threatened



him that she will commit suicide, was not proved by any evidence, much less in his own evidence. The deposition of the appellant itself is very superficial. On the other hand, there is overwhelming evidence on the side of the respondent wife to prove the contrary. The courts below have rightly found that the appellant has failed to make out a case of cruelty.

6. Secondly, whether the lower appellate Court is right in striking off the defence is concerned, it is well settled by this Court in very many judgments that when more than one decree is passed in a common judgment, all the decrees have to be challenged independently. Failure to challenge one decree will operate as res-judicate against the appellant. In the present appeal, the appellant has failed to challenge the decree passed in I.A.No.39/2014 striking off the defence in C.M.A.No.1 of 2014. Having failed to challenge the striking off the defence, it is not open to him to raise a question of law on this issue.

7. Yet, when a person openly defies to comply with the directions issued by a competent Court, he is not entitled to maintain an appeal. The appellant filed an appeal in C.M.A.No.96 of 2014 against the order passed by the Trial Court. When the appeal is pending with respect to the payment of interim maintenance, he should, to show his bonafide and compliance of the decree, make payment as ordered. Failure to comply with the order during the pendency of the appeal preferred by him, will continue to affect the wife to contest the cases effectively for want of financial resources. In such cases adverse inference shall be drawn against the defaulting party. The Lower Appellate Court, has rightly struck off the defence for failure to make payment during the pendency of appeal against interim maintenance. Therefore, the questions of law are answered against the appellant and in the result the Civil Miscellaneous Second Appeal stands dismissed. No costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

TK/bkn

To

1.The District Court No.II, Kancheepuram.

2.The Sub Judge, Kancheepuram.

+1cc to Mr.N.A.Nissar Ahmed, Advocate, S.R.No.32187

+2cc to Mr.S.D.S.Philip, Advocate, S.R.No.32061

C.M.S.A.NO.40 OF 2015

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