

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 11.07.2018

Pronounced on : 13.08.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH
and
THE HONOURABLE MR.JUSTICE C.SARAVANAN

Civil Miscellaneous Appeal Nos.420 and 421 of 2018
and CMP.No.3765 of 2018

M.Senthil Kumar ... Appellant/Petitioner
in both CMAs.

Vs.

K.S.Yasodha ... Respondent/Respondent
in both CMAs.

Common Prayer :

Civil Miscellaneous Appeals filed under Section 19 of Family Court Act 1984 to set aside the common fair and decretal orders dated 06.03.2015 passed in H.M.O.P.Nos.1000 of 2010 and 1055 of 2011 on the file of the learned Principal Judge, Family Court, Coimbatore.

For Appellant(in both CMAs.) : Mr.B.Kumarasamy for
Mr.B.Vijayakumar

For Respondents(in both CMAs.): Mr.N.Manokaran

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

C.SARAVANAN.J

Both these appeals arise out of a common fair and decretal orders dated 06.03.2015 passed by the learned Principal Judge, Family Court, Coimbatore in H.M.O.P.No.1000 of 2010 and H.M.O.P.No.1055 of 2011 (for brevity referred to as the impugned order and the Family Court respectively).

2. The husband, appellant- herein filed H.M.O.P.No.1000 of 2010 before the Family Court to dissolve the marriage solemnized with the respondent under Section 13(1)(i-a) of the Hindu Marriage Act, 1955.

3. In the aforesaid proceeding, the respondent-wife filed H.M.O.P.No.1055 of 2011 for the restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955.

4. The Family Court has dismissed the H.M.O.P.No.1000 of 2010 filed by the appellant-husband to dissolve the marriage and has allowed the H.M.O.P.No.1055 of 2011 for restitution of conjugal rights filed by the respondent-wife.

5. The brief facts of the case are as follows:

i. The marriage between the appellant and the respondent was solemnized on 01.09.2003 in Coimbatore, as per the Hindu Marriage customary rites followed by reception on 02.09.2003.

ii. The appellant was working as a Lab Assistant Grade-II while the respondent was working as a clerk in Bharathiyar University, Coimbatore at the time of the marriage.

iii. The appellant and the respondent stayed in Avinashi for few days at the appellant's parents house after the marriage.

iv. Thereafter, the appellant and the respondent lived together independently in Coimbatore for the respondent's convenience.

v. During 2004, the respondent obtained a Bank loan for the purpose of construction of a house on the land given to her by her father.

vi. The appellant claims that he was forced to be a co-signatory in the housing loan and that his salary was used for maintaining the respondent and for servicing the loan. This according to him was cruelty.

vii. In June 2005, the appellant was promoted as a Lab Assistant and therefore transferred to Salem.

viii. Therefore, the appellant used to visit the respondent and in 2006 the respondent also became

pregnant after under going DNC.

ix. However, the pregnancy was terminated on medical grounds during April, 2007.

x. The appellant alleged that the respondent neglected her health and therefore had to abort the foetus.

xi. The appellant left the respondent in June, 2008 to live with his mother due to alleged cruelty by the respondent.

xii. Ex.P.3 legal notice dated 07.06.2010 was issued by the appellant to the respondent.

xiii. By Ex.P.3 legal notice the appellant asked the respondent to come and live with him at Avinashi within a weeks time, failing which he asked the respondent to consent for divorce by mutual consent.

xiv. By Ex.P.4 dated 18.06.2010, the respondent replied to the appellant's counsel and stayed that she was not willing to rejoin the appellant.

xv. In her reply the respondent stated that during their first night the appellant had swelling in his private part and therefore they did not have sex.

xvi. She further alleged that his behaviour was very erratic and peculiar, as he would shout ghost and laugh out loud in the mid night and had tortured her by kicking and pushing her out of bed, by pricking her with needle and at times tortured her by putting hot iron box on her and when she complained about him to her in-laws about his behaviour, they told her to adjust and live with him.

xvii. She also alleged that the appellant and his family members tortured her and demand for dowry.

xviii. She therefore expressed her inability to live with the appellant due his history of mental illness.

6. In the above background, the appellant filed H.M.O.P.No.1000 of 2010 on 06.09.2010 under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 and alleged cruelty by the respondent.

7. After the respondent filed a counter in June 2011, in the above H.M.O.P, the respondent filed H.M.O.P.No.1055 of 2011 on 17.09.2011 under Section 9 of the Hindu Marriage Act for restitution of conjugal rights.

8. The grievance of the appellant is that the Family Court dismissed H.M.O.P.No.1000 of 2010 by not granting divorce even though a case for cruelty was established.

9. Heard learned counsel for the appellant and the respondent.

10. Appellant submitted that the respondent was cruel to him and did not respect him and was therefore forced to leave the matrimonial home in 2008 and that the respondent was unwilling to join him with his mother in Avinashi.

11. It was further submitted that after the Hindu marriage (Amendment) Act 1976, the appellants needs to only establish that the respondent treated him with cruelty. The appellant needs to only show that cruelty may be such nature which causes reasonable apprehension that it would be harmful or injurious to the appellant.

12. It was argued that the appellant has proved cruelty which satisfies the conscience of court that the relationship between the parties has deteriorated to such an extent that it has become impossible for them to live together without mental agony.

13. It was submitted that the parties have been living separately since 2008 for more than 10 years and the respondent made baseless and false allegations against appellant to that effect that he is afflicted with mental disorder and impotent in front of all the relatives and friends and that the respondent used to abuse the appellant in vulgar language and she openly expressed her dislike towards the appellant.

14. It was submitted that there was mental cruelty as she never showed any affection towards the appellant and made the appellant's life miserable and was responsible for breaking down his family life.

15. Per contra, the learned counsel for the respondent submitted that the allegation are vague and no evidence has been let into substantiate cruelty.

16. It was further argued that the appellant indeed had a history of mental illness even prior to the marriage and had undergone treatment, which was not brought to the knowledge of the respondent before the marriage.

17. We have considered the pleadings, depositions / oral evidence on record, documents marked as Exhibits and grounds of appeal.

18. The learned counsel for the appellant cited the following decisions in support of his plea regarding irretrievable breakdown of the marriage:

i. Durga Prasanna Tripathy vs. Arundhati Tripathy, CDH 2005 SC 608.

ii. AmarendranathSanyal vs. Krishna Sanyal, 1993(1) DMC 565.

iii. Oarunu Mehar Seshu vs. Parimi Nageswara Sastry, 1994(1) DMC 417.

iv. Vijayappan Nair Vs AmminiAmmma, 1997(2) HLR 114.

19. The learned counsel for the respondent relied upon the following decisions:

" i. Darshan Gupta vs. Radhika Gupta, 2013 (6) CTC 560

ii. Lakshmi Priya vs. K.V.Krishnamurthy, 2006 (1) CTC 367

iii. Vishnu Dutt Sharma vs. Manju Sharma, (2009) 6 SCC 379

iv. M.P.Nalini vs. R.Karthikeyan, 2013 (1) MWN (Civil) 742 " .

20. We are not convinced that the respondent was cruel to the appellant based on the evidence record. In fact, the pleading is also very vague for a court to grant a decree of divorce.

21. After the marriage, when the respondent found appellant's behaviour erratic she broached the topic with her in-laws who have advised her to adjust and live with the appellant.

22. The appellant has not produced any evidence to establish the allegation that the respondent had spoken ill about the appellant to third parties.

23. The fact, that the respondent spoken only to her in-laws about his erratic behaviour only shows that the respondent has been circumspect and discreet.

24. During cross examination, the appellant has admitted that he did not visit respondent after she lost her father and brother.

25. The appellant has also admitted that he did not contribute towards loan obtained by the respondent and that it is the respondent who diligently repaid the loan.

26. The fact that the respondent had to abort the foetus also does not mean it was done with an intention to be cruel to the appellant. The evidence suggests that it was on account of the lack of heart beat in the foetus and the respondent was bleeding internally.

27. If at all, it was the appellant who was cruel to the respondent for having left her in 2008 and for indulging in some of the activities narrated above by physically harming her.

28. Merely because the respondent has not taken steps for executing the order for restitution of conjugal rights cannot mean that the respondent was at fault and therefore the marriage is to be dissolved now.

29. In his cross-examination, the appellant also accepted that he was willing to live with the respondent. However, he is willing to live with the respondent only on the condition that the respondent would come and live in Avinashi with mother.

30. The parties have thus expressed their willingness to live together. The respondent had filed H.M.O.P No.1055 of 2011 which has been allowed while the appellant has admitted to his willingness to live with the respondent at his mother place.

31. Therefore, the difference is only in the venue where they wish to live i.e. whether at the wife's house or at the appellant's house with his mother. This can be worked out by them. It is for the appellant to comply with the impugned directions of the Court.

32. The Court in Dharmendra Kumar v. Usha Kumar AIR 1977 SC 2218, has held that if once decree for restitution of conjugal rights is passed, it is for the other party against whom such a decree has been obtained to join in pursuance of such decree and if both parties did not resume marriage life the parties are at liberty to file an application for dissolving the marriage.

33. Thus, as per the decision of the above case, no cause of action existed before the Family Court for grant of divorce in

the present case.

34. Regarding the reply to the legal notice, it is also clear that the respondent has merely given reasons for her inability to comply with demand of the appellant. She has not given the information to spread canard. In fact, most of the information shared in the notice has also not been denied by the appellant. Therefore, they cannot tantamount to cruelty.

35. The decisions referred by the learned counsel for the appellant have been rendered in the facts peculiar to the case therein. They cannot be universally applied merely because the parties have been living away for the last 10 years.

36. The ground of irretrievable breakdown of the marriage is also not available as the High Court has no such power.

37. In Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC, the Hon'ble Supreme Court held that:

"On a bare reading of Section 13 of the Act, it is crystal clear that ground of irretrievable breakdown of the marriage is not provided by the legislature for granting a decree of divorce. The Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature."

38. In para 12, the Court held that:

"If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for Parliament to enact or amend the law and not for the courts. Hence, we do not find force in the submission of the learned counsel for the appellant."

39. The Court also recognised that if both the parties were willing for a divorce by mutual consent, it could have granted a

divorce as contemplated by Section 13-B of the Act.

40. However, the respondent (in the present case and in the above cited case) did not agree for a divorce on mutual consent. Thus, divorce on the ground of irretrievable breakdown cannot be granted.

41. In *Neelam Kumar v. Dayarani*, (2010) 13 SCC 298 : (2010) 4 SCC (Civ) 899 at page 302, the Hon'ble Supreme Court while considering a similar submission advanced on behalf of the appellant in the present case, held that:

"We are not impressed by this submission at all. There is nothing to indicate that the respondent has contributed in any way to the alleged breakdown of the marriage. If a party to a marriage, by his own conduct brings the relationship to a point of irretrievable breakdown, he/she cannot be allowed to seek divorce on the ground of breakdown of the marriage. That would simply mean giving someone the benefits of his/her own misdeeds."

42. The above passage is squarely applicable to the facts of the present case as the appellant himself left the matrimonial home.

43. The decision of this Court in *Lakshmi Priya vs. K.V.Krishnamurthy*, 2006 (1) CTC 367 is not relevant. The decision of the Hon'ble Supreme Court in *Darshan Gupta vs. Radhika Gupta*, 2013 (6) CTC 560 makes it clear that the parties, whose is in mistake cannot take advantage of the same to seek divorce.

44. In our view, the appellant has been at fault on several counts and therefore cannot victimize the respondent by taking advantage of his own mistakes.

45. In *Gurbux Singh v. Harminder Kaur*, (2010) 14 SCC 301 : (2012) 1 SCC (Civ) 437 at page 307, the Court further observed that a feeble argument that "since both the appellant and the respondent were living separately from 2002 and it would be impossible for their reunion, hence the Hon'ble Supreme Court while exercising its jurisdiction under Article 142 of the Constitution, the marriage may be dissolved in the interest of both parties was rejected."

46. The Hon'ble Supreme Court further held that if there is any change of law or additional ground included in Section 13 by the Act of Parliament, the appellant was free to avail the same at the appropriate time.

47. The above passage makes it clear that as on date divorce cannot be granted on the ground of irretrievable break down of marriage.

48. In our view, the appellant has not made out a case for dissolving the marriage on the ground of cruelty. It is our view that the respondent is not at fault. It is also our view that in the facts of the case the appellant cannot take advantage of his conduct. The appellant has forced the respondent to reply to the legal notice and cannot attempt to dissolve the marriage because of the content of the reply and the Family Court has correctly held that no case for cruelty has been established. Further, as the parties have expressed their willingness for restitution of conjugal rights, we do not deem it fit to disturb the conclusion in the impugned order.

49. In view of the above, we dismiss this Civil Miscellaneous Appeal. Consequently, connected Miscellaneous Petition is closed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

kkd

To

The Principal Judge,
Family Court, Coimbatore.

+2cc to Mr.N.Manokaran, Advocate, S.R.No.55858

+2cc to Mr.B.Vijayakumar, Advocate, S.R.No.55715

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NMI (Co)

CS/06/09/18