

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 13.07.2018

Pronounced on : 13.08.2018

CORAM

THE HONOURABLE MR.JUSTICE R.SUBBIAH

and

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.3545 of 2014

and CMP.No.16316 of 2017

E.Jayachandran @ Nadessin

.. Appellant/Petitioner

Vs

Navaneetham @ Sundaravadivu

.. 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 22.11.2013 made in M.O.P.No.21 of 2004 on the file of the Judge, Family Court, Puducherry.

For Appellant : Mr.G.Thangavel

For Respondent : Ms.Thulasi

JUDGMENT

C.SARAVANAN

The husband is the appellant before this Court and is aggrieved by the fair and decretal order dated 22.11.2013 passed by the Family Court, Puducherry in M.O.P.No.21 of 2004 (hereinafter referred to as the impugned order and the Family Court).

2. By the impugned order the Family Court has dismissed a petition to dissolve the marriage under section 13(1)(i-a) of the Hindu Marriage Act, 1955 at the instance of the appellant.

3. The Family Court has also closed I.A.No.230 of 2010 in M.O.P No. 21 of 2004 filed for an interim custody of the son in view of the order passed in M.O.P No. 21 of 2004.

4. The impugned order also allows the appellant to visit their minor son staying with the respondent every Sunday after prior information to the respondent about the visit.

5. The Family Court has also observed that this is a fit case for Judicial Separation even though no case has been made out for granting divorce on the ground of cruelty.

6. The order also directs the appellant to remit an amount of Rs.3,200/- per month towards the maintenance of the respondent and their minor son until further orders.

7. The parties have been at loggerheads with each other right after marriage. The appellant has resorted to judicial intervention to redress domestic grievance instead of mutually sorting out the differences. The petition to divorce was filed even before the parties could get to know each other to experience marital bliss or cruelty.

8. The parties have spent much of the time in litigation after the said M.O.P.No.21 of 2004 came to be filed by the appellant for dissolving the marriage on the ground of cruelty by the respondent.

9. After the case had been filed, several other developments have taken place. The learned counsel for the appellant has given a detail of the interlocutory application which came to be filed pending disposal of the O.P.No.21 of 2004. They are detailed as below:

i) On 22.11.2004, I.A. No.656 of 2004 was filed by the respondent for interim maintenance by the respondent. On 16.12.2006, order in I.A.No.656 of 2004 was passed and directed the appellant to pay a monthly maintenance of Rs.2,500/- to the respondent.

ii) I.A.No.722 of 2004 was filed by the respondent to injunct the appellant from disturbing the respondent from the matrimonial home.

iii) On 16.12.2006, filed I.A. No. 255 of 2009 for medical expense and the treatment of the child was dismissed by the Family Court

iv) I.A.No.256 of 2009 was filed on 25.06.2009 seeking enhancement of interim maintenance and same was ordered on 11.02.2010. The appellant was

directed to pay the monthly maintenance of Rs.5000/- to the respondent and the minor child and Rs.15,000/- every year towards education expenses of the minor child till disposal of the divorce petition.

v) The amount has been enhanced to Rs.3,200/- per month in the impugned order.

vi) I.A.No.257 of 2009 filed on 25.06.2009 for grant of litigation expenses of Rs.10,000/- and Rs.500/- per month pending further proceeding. On 20.12.2011 the said application was disposed directing the appellant to pay a sum of Rs.3000/- towards litigation expenses and Rs.100/- for every hearing for the respondent and a witness in order to proceed with the cross examination.

vii) I.A.No.230 of 2010 was filed by the appellant for interim custody of the child which has been disposed with the impugned order.

viii) I.A Nos.778 and 779 of 2012 were filed by the respondent to recall the appellant and witnesses for cross examination and to reopen the evidence. These applications were dismissed by the court on 21.02.2013.

ix) The respondent also filed C.R.P.Nos.1854 and 1855 of 2013 against the common order passed in I.A. Nos. 778 and 779 of 2012 in M.O.P. No. 21 of 2004.

x) The respondent also filed SLP before the Hon'ble Supreme Court against the order dismissing the Civil Revision Petition filed by the respondent. On 02.08.2013, the Hon'ble Supreme Court dismissed the SLP.

xi) It is after the culmination of the above proceedings the Family Court passed the impugned order.

10. The appellant alleged that after the marriage on 1.5.2000 the respondent lived with the appellant intermittently and thereafter in December 2000 went back to her parent's house for the delivery/ impending child birth.

11. The appellant further alleged that he was informed about the birth of the male child on 31.1.2001 and he came to know only through friends and relatives about the same.

12. It was further alleged that the respondent did not return to the matrimonial home after the child birth and therefore the appellant was constrained to issue a legal notice on 3.10.2003 to the respondent and called upon her to return to

the matrimonial home for restitution of conjugal rights.

13. Thereafter, the Appellant also filed M.P.No.162 of 2003 on 6.10.2003 before the Family Court for restitution of the conjugal rights.

14. On 8.10.2003, the respondent returned to the matrimonial home later in the day with the child after sending a telegram regarding her proposed arrival with the child on the same day.

15. Even though the respondent had returned to the matrimonial home, the respondent sent a reply notice dated 14.10.2003 through her lawyer to the appellant in response to the legal notice dated 03.10.2003.

16. Altercation is said to have taken place between the appellant and the respondent some time between 3.11.2003 and 5.11.2003 and the appellant alleged that his mother was driven upstairs unable to tolerate the torture meted out by the respondent.

17. The appellant alleged that the respondent was not only cruel and abusive to the appellant but also to the appellant's aged mother who was his dependent while they lived with her briefly as a joint family after the marriage and therefore the marriage solemnized between them should be dissolved on the ground of cruelty.

18. On 22.12.2003, the appellant filed M.O.P No.21 of 2004 to dissolve the marriage by an order of the court under Section 13(1) (i-a) of the Hindu Marriage Act, 1955 for cruelty by the respondent.

19. The allegations in the petition for divorce is that the respondent was ill tempered, neglected to do her domestic duties and that the appellant had to attend office without food, bear insults and that the respondent would break bangles and throw household articles and threatened to set fire to her clothes and thereby endangering the safety of the appellant apart to insulting him and his mother.

20. These instances according to the appellant were the acts of cruelty by the respondent warranting dissolution of marriage between the appellant and the respondent.

21. Even after filing of the above divorce petition, the appellant and respondent continued to stay for some time together during which time there were further marital unrest and on 3.4.2004 the respondent had allegedly threatened to commit suicide. This has been denied by the respondent.

22. The appellant claims to have been forced to shift out of his house on 4.4.2004 leaving the respondent and the child alone and had to rent out a separate house for himself.

23. There are allegations regarding police complaint being filed by the respondent against the appellant before the appellant left the respondent with the child at the matrimonial home. However, no evidence to substantiate the same are on record.

24. The respondent on the other hand has denied the allegations. In the counter before the Family Court, the respondent stated that though the appellant got employed in the government after the marriage yet did not take care of the respondent and neglected the respondent. Instead, he was insensitive by frequently inviting his friends at home much to her discomfiture

25. The respondent further alleged that the appellant also did not visit her or supported her financially during her stay at her parents house after she shifted to her parents house for delivery of the child.

26. The respondent alleged that the appellant did not contribute for the expenses in connection with medical expenses during the pregnancy and childbirth and only her parents had borne the entire expense in connection with the pregnancy and childbirth.

27. The appellant has admitted to these allegations during cross examination.

28. The respondent further alleged that she suspected that the appellant continued having an affair with a person known to him previously before the marriage. This however, remains unsubstantiated.

29. The respondent also alleged that the appellant's mother sister and brother-in-law demanded dowry and therefore ill-treated her during her stay in the matrimonial home which again remains unsubstantiated.

30. The respondent further stated even though she was staying with the appellant after 8th October, 2003, the appellant proceeded to file divorce petition on 22.12.2003 behind her back which shows that the appellant did come out with clean hands before the Court.

31. The respondent also alleged certain acts of cruelty by the appellant, appellant's mother and sister including demand for dowry and physical assault resulting in filing of complaint before the Mudaliarpur Police Station on 5.4.2004. These allegation seem to be after the filing of the divorce petition and in any case remain unsubstantiated.

32. The impugned order was passed on 22.11.2003. Thereafter, the present appeal came to be filed on 26.02.2014. The case has been taken up for hearing now.

33. Before the Family Court, the appellant has examined himself, his office peon, friend and his brother-in-law as witnesses before the Family Court as P.W.1 to P.W.4. The respondent examined herself, her uncle and her brother as witnesses as R.W.1 to R.W.3.

34. P.W.2, the office peon who appeared as a appellant's witness has given statement regarding incidents that have allegedly taken place during March and April, 2004. These are events subsequent to the filing of the M.O.P.No.21 of 2004 in December, 2003.

35. Again the evidence of PW3, the brother-in-law of the appellant was not relied upon as they are not borne out in the pleading. The statement of PW4, a friend of the appellant also has not been corroborated. Thus, deposition of the appellant and the witnesses did establish cruelty by the respondent on the appellant.

36. During cross examination, the appellant has stated that his mother shifted upstairs in November, 2001 at the time when the respondent was not with them contradicting his allegation in the petition that his mother shifted upstairs in December 2003 because of the respondent's cruelty. Further, the mother was also not examined as witness. Thus, the basis of the allegation for cruelty against the mother has not been proved.

37. Heard the learned Counsel for the Appellant and the Respondent and perused the pleadings, evidence on record. The facts and evidence admitted before the Family Court has not been seriously contested before this Court.

38. After perusing the pleadings and evidence on record, it is noticed that the wife has also alleged cruelty meted out on her by the in-laws and the neglect by the appellant.

39. However, based on the evidence on record and the case laws cited, the counsel for the appellant submits this is a fit case for dissolution of the marriage while the counsel for the respondent submits that the impugned order is liable to be upheld except to the extent it directs judicial separation between the appellant and the respondent as no cruelty has been made out.

40. The parties have lived briefly together for a period of 7 months after marriage and a little over 5 months after their reunion on 8th October 2003.

41. It is in fact noticed that in the petition for dissolving the marriage and in the oral deposition, the appellant has not particularized any of alleged acts of cruelty. The appellant has merely made vague allegations of cruelty by the respondent.

42. Appellant has merely stated that the relatives have tried mediating between them but the respondent was unrelenting and that only after the issue of legal notice on 3.10.2003, the respondent returned to the matrimonial home with the child on 8.10.2003.

43. The allegations and counter allegations remain unsubstantiated except for the admission by the appellant during his cross examination.

44. While dealing with a similar case, the Hon'ble Supreme Court in *Gurbux Singh v. Harminder Kaur*, (2010) 14 SCC 301 : (2012) 1 SCC (Civ) 437 at page 307, held that;

" Cruelty has not been defined under the Act. It is quite possible that a particular conduct may amount to cruelty in one case but the same conduct necessarily may not amount to cruelty due to change of various factors, in different set of circumstances. Therefore, it is essential for the appellant, who claims relief, to prove that a particular/part of conduct or behaviour resulted in cruelty to him. No prior assumptions can be made in such matters. Meaning thereby that it cannot be assumed that a particular conduct will, under all circumstances, amount to cruelty, vis-à-vis the other party. The aggrieved party has to make a specific case that the conduct of which exception is taken amounts to cruelty"

45. The Hon'ble Supreme Court further held that even a single act of violence which is of grievous and inexcusable nature satisfies the test of cruelty.

46. Neither in the pleading nor during the cross examination the appellant has clearly spelt out as to what utterances of the appellant amounted to cruelty so as to warrant dissolution of the marriage. The acts of cruelty ought to have been particularized and established by way of oral and documentary evidences.

46. Barring vague allegations which have remained unsubstantiated, the appellant has not established cruelty.

47. The appellant has vaguely stated that the utterance of the respondent were so grave and it would be awkward for him to repeat them. Even at the time of the cross examination appellant has not spelt them out. Therefore, cruelty cannot be

inferred based on unspecified abusive utterance of the respondent.

48. The family Court has therefore rightly dismissed the divorce petition as there are no evidence on record to establish cruelty by the respondent on the appellant or on his mother.

49. It our view also that unless cruelty pleaded is established by way of evidence, a decree of divorce cannot be granted.

50. The alternate arguments advanced on behalf of the appellant that since the parties have stayed away from each other all through the course of litigation, there was irretrievable break down of the marriage. Hence the appellant claimed that it can be concluded that the matrimonial bond was beyond repair and therefore the marriage deserves to be dissolved.

51. In the present case, the parties have been away for more than 15 years after initial patch up after two and half years of initial separation.

52. The counsel for the appellant relied upon the following decisions of the Courts in support of the plea for divorce on the ground of irretrievable breakdown of the marriage:-

- i) Praveen Mehta vs Inderjit Mehta Civil Appeal No. 3930 of 2002
- ii) A.Jayachandra vs. Aneel Kaur, Appeal No.7763and 7764 of 2004;
- iii) Vishwanathvs.Sau.SsarlaViswhwanathAgrawal,Civil Appeal No.4905 of 2012;
- iv) Naveen Kohil vs. Neelu Kohli,Appeal No.812 of 2004 ;
- v) A.Viswanathan vs G.Lakshmi @ seetha CMA.No.1558 of 2000
- vi) Sujata Uday Patil vs. Uday Madhukar Patil,Appeal No.5779 of 2006 ;
- vii) Samar Ghosh vs. Jaya Ghosh, Appeal No.151 of 2004
- viii) R.Natarajan vs. Sujatha Vasudevan, C.M.A.Nos.3769 and 1775 of 2010;
- ix) Pankaj Mahajan vs. Dimple @ Kajal, Civil Appeal No.8402 of 2011

53. The learned counsel for the respondent also relied upon the decision of the Hon'ble Supreme Court in *Trupti Das vs. Rabindranath Mohapatra*, (2005) 11 SCC 553.

54. We have gone through the above decisions. We are of the view that none of the decisions are relevant to the facts of the present case.

55. The marital chord can be severed only in the manner specified in the Act after the party specifically pleads the grounds for divorce also establishes the same before the Court.

56. Courts also cannot grant divorce on the ground of irretrievable breakdown of the marriage merely because the parties have lived away from each other for a considerably long period, in view of the law settled by the Hon'ble Supreme Court.

57. In our view, pendency of the legal proceeding and long separation is not a fait accompli to infer of irretrievable break down of the marriage to dissolve the marriage.

58. If the divorce is granted on the basis of the above submission, it would mean a defaulting party can prolong the litigation and delay the outcome before the courts and later plead irretrievable breakdown of the marriage. Further, it would also amount to rewriting the statute as a grant divorce on such a ground which does not exist in the Hindu Marriage Act, 1955.

59. A party who has already settled down in a relationship with another person or intends to settle down with another person may spur the divorce proceeding and may use the grounds in Section 13 to frustrate the marriage and thereafter take advantage of the time spent in litigation to dissolve the marriage. However, intention of the law is not to dissolve the marriage unless the party initiating it has made out a legitimate case for grant of divorce and the other spouse is at fault. In this case, the appellant is at fault and not the respondent.

60. It was also not the intention of the Hon'ble Supreme Court in few cases wherever divorce was granted on the ground of irretrievable breakdown of marriage in some of the cases cited by the counsel for appellant. Even otherwise facts and circumstances before the Hon'ble Supreme Court were different from the one under consideration before us.

61. In the present case, the appellant has avoided the respondent later has filed the case on the ground of cruelty without any proper pleading and evidence. Therefore, the marital ties cannot be severed merely because a party tries to renege from matrimony and pleads flimsy grounds of helplessness and cruelty and tries to take advantage of the delay and the grounds of irretrievable break down of marriage which the

Hon'ble Supreme Court has granted in specific cases under its wide powers.

62. In Vishnu Dutt Sharma v. Manju Sharma, (2009) 6 SCC 379 : (2009) 2 SCC (Civ) 897 at page 384, 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.

63. 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."

64. 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.

65. 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.

66. 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."

The above passage is squarely applicable to the facts of the present case.

67. 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.

68. The Court 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.

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

70. In our view, the appellant has not made out a case for dissolving the marriage on the ground of cruelty. It is also our view that in the facts of the case that the appellant cannot take advantage of his conduct to plead irretrievable break down of marriage. The appellant has pushed the respondent to the corridors of the court and is now trying to dissolve the marriage. It is also our view that there is no case made out for judicial separation as cruelty has not been established.

71. In the light of the above discussions, we are constrained to dismiss the appeal with the above observation and it is accordingly dismissed with costs. Consequently connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CS V)

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Sub Assistant Registrar

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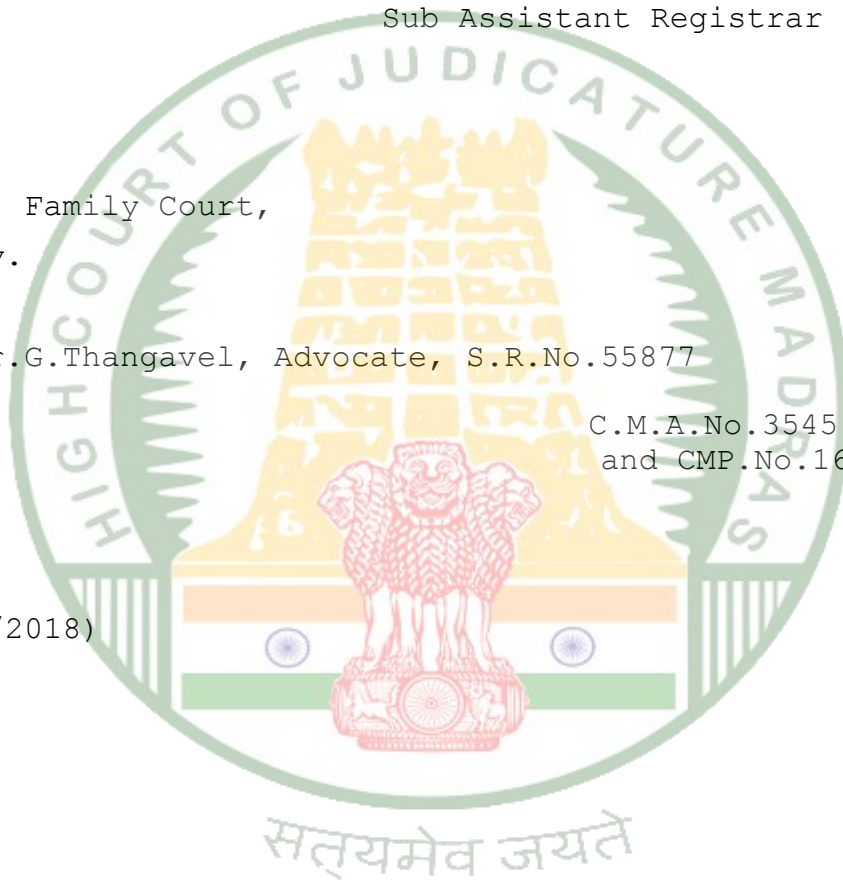
To

The Judge, Family Court,
Puducherry.

+1cc to Mr.G.Thangavel, Advocate, S.R.No.55877

C.M.A.No.3545 of 2014
and CMP.No.16316 of 2017

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