

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 01.08.2018

Judgment Pronounced on : 26.09.2018

CORAM:

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

C.M.A.Nos.1454 and 1455 of 2014

J.Ligorin .. Appellant in both the appeals

Verus

Gngnapragasi .. Respondent in both the appeals

Civil Miscellaneous Appeal No.1454 of 2014 filed under Section 19 of the Family Courts Act against the fair and decretal order dated 16.11.2009 made in M.O.P.No.102 of 2001 on the file of the Family Court, Pondicherry.

Civil Miscellaneous Appeal No.1455 of 2014 filed under Section 19 of the Family Courts Act against the fair and decretal order dated 16.11.2009 made in M.O.P.No.49 of 2002 on the file of the Family Court, Pondicherry.

For appellant : Mr.T.P.Manoharan, Senior Counsel
for Mr.K.P.Jotheeswaran
in both the appeals

For respondent : Mrs. Sudharshana Sundar
in both the appeals

COMMON JUDGMENT

R.SUBBIAH, J

These appeals are filed by the appellant-husband challenging the fair and decretal orders dated 16.11.2009 passed in M.O.P.Nos.102 of 2001 and M.O.P.No.49 of 2012 respectively, on the file of the Family Court, Pondicherry. By the said order dated 16.11.2009, the Family Court dismissed M.O.P.No.49 of 2002 filed by the appellant-husband under Article 242 of the French Civil Code, to dissolve the marriage solemnized between him and the respondent-wife on 21.06.1989. Consequently, the Family Court allowed M.O.P.No.102 of 2001 filed by the respondent-wife under Article 214 of the French Civil Code to direct the appellant-husband to live with her by restituting the conjugal rights.

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2. The Original Petition in M.O.P.No.49 of 2002 was filed by the appellant-husband contending that the marriage between

him and the respondent-was solemnized on 21.06.1989 at St. Joseph Church at Wellington as per the Christian customs and rites. After marriage, they started their conjugal home at Crushpet, Wellington, Nilgiris District. The respondent-wife lived with the appellant in the matrimonial home only for ten days and thereafter, she went back to Pondicherry. Subsequently, she did not return back to the matrimonial home. Even during the above period of ten days, when the respondent-wife was residing along with the appellant-husband in the matrimonial home, her conduct and behaviour were indifferent and quarrelsome. After she went to Pondicherry, she was working in a School. She was insisting the appellant-husband to come and live along with her at Pondicherry by leaving his ailing dependent mother and spinster sister at Ooty and by resigning his employment in the Government of Tamil Nadu. Since the appellant-husband was working in Fire Service Department of the Government of Tamil Nadu, he cannot get transfer to the Union Territory of Pondicherry. Hence, the appellant-husband was unable to accept her demand; on the other hand, as per the custom, she has to come and live along with him in the matrimonial home at Crushpet, Ooty. The appellant-husband also went to Pondicherry several times, persuaded and requested the respondent to come and live with him, but in vain. Even during such persuasion, the respondent reiterated her demand to leave his mother and sister and to come and live with her at Pondicherry. Thus, she refused to return back to matrimonial home to live with the appellant-husband. She deserted the appellant-husband and was living separately at Pondicherry without any justifiable reason for the past 29 years.

3. It is the further case of the appellant-husband that in order to cause mental agony and harassment and to spoil his reputation, the respondent gave a false complaint to the appellant-husband's senior officer on one occasion and on receiving such complaint, the senior officer called him over wireless and informed him that his wife has given a compliant and called him to appear before him. Since the appellant-husband was called over wireless, the news was also received by the employees at the Fire Station. The appellant-husband has got an age old mother and an unmarried sister and he has to take care of them, and therefore, the appellant-husband was not in a position to resign his job and go to Pondicherry. The respondent-wife deserted the appellant-husband and was living separately, which has caused mental pain and agony to the appellant-husband. Therefore, the appellant-husband has filed the Original Petition seeking to dissolve the marriage solemnized between him and the respondent on 21.06.1989.

4. The case of the appellant-husband was resisted by the respondent-wife by filing counter affidavit denying the allegations made in the Original Petition. It is the case of the respondent-wife that it is false to state that from the first day of the marriage, she behaved in an indifferent manner with the appellant-husband. She has denied that she has lived with the appellant-husband only for ten days at Wellington. She further stated that in the year 2001 itself, she has filed the

Original Petition in M.O.P.No.102 of 2001 for restitution of conjugal rights against the appellant-husband. Even from the date of marriage, the appellant-husband was insisting her to live with him in the cold climate at Ooty. The respondent-wife had a sinus and tonsil problems and due to the cold climate she suffered skin disease, and hence, she could not sustain the weather condition in Ooty. The respondent, therefore, was not in a position to stay with the appellant at Wellington, which was miserable. The respondent was working as Sewing Teacher in a School at Pondicherry. She used to go to Wellington in the week-ends, namely Saturdays and Sundays and other holidays. The respondent-wife even tried for a job in Wellington, but could not get any job there, and hence, she requested the appellant-husband to shift to Pondicherry or near-by place. The respondent-wife was staying in a hostel at Pondicherry and was working there. She had spent huge amount for travel itself and she was put to grave hardship and mental agony. Since the respondent-wife was an Orphan, she was staying in a hostel and her only well-wishers were nuns, priest and friends, who stayed with her in the hostel. Hence, she represented to Parish Priest at Wellington regarding her plight, who in turn advised the appellant-husband but in vain. The respondent-wife was also advised to make a representation to the Department where the appellant-husband was working, so that he could get transfer and live with her. It is in those circumstances, the respondent has given the complaint to the Senior officials where the appellant is employed. The respondent also sent a lawyer's notice on 02.04.2001, but the appellant-husband sent evasive reply on 28.05.2001. Hence, the respondent-wife filed petition for restitution of conjugal rights in M.O.P.No.102 of 2001. Though the appellant-husband filed counter stating that he is ready and willing to live the respondent-wife, he filed M.O.P.No.49 of 2002 for divorce. It is also stated by the respondent-wife that she is willing to live with the appellant-husband and prayed for dismissal of the divorce petition filed by the appellant-husband.

5. Before the Family Court, in M.O.P.No.102 of 2001 filed by the wife, she examined herself as P.W.1 and two other witnesses were examined as P.Ws.2 and 3 and Exs. P1 to P50 were marked. The husband examined himself as R.W.1, but no document was marked. In M.O.P.No.49 of 2002 filed by the husband, he examined himself as P.W.1 and two other witnesses were examined as P.Ws.2 and 3. The marriage invitation of the appellant and respondent was marked as Ex.P-1. The wife examined herself as R.W.1 and Exs.R-1 to R-11 were marked by the wife.

6. The Family Court on appreciation of the oral and documentary evidence in both the petitions concluded that the appellant-husband has miserably failed to prove that the respondent-wife subjected him to cruelty and voluntarily deserted him from the matrimonial home and thereby, the Family Court dismissed the petition filed by the husband for dissolution of marriage. Ultimately, the petition filed by the wife for restitution of conjugal rights, was allowed by the Family Court. Challenging the aforesaid orders, the husband has

filed the above Appeals.

7. Learned counsel appearing for the appellant-husband submitted that the Family Court has not considered the fact that the appellant is aged about 68 years and retired from service of the Fire Service Department. He is now in receipt of pension and he is virtually immobile and living at Crushpet, Wellington at Nilgiris. The appellant cannot sit continuously for more than few minutes due to his ailment. The appellant needs help and assistance of others even to get up and requires two persons to travel outside his abode. Moreover, he is spending most of the pension amount for his daily treatment. It is further contended by the learned counsel for the appellant-husband that the respondent-wife is aged about 64 years and she had also retired from service of the Union Territory of Pondicherry and is also receiving pension. Learned counsel for the appellant-husband further submitted that the respondent/wife lived with the appellant-husband only for ten days after marriage and she left the matrimonial home without any just or sufficient cause. The appellant and the respondent are residing separately for the past 29 years. Therefore, the matrimonial relationship between the appellant and the respondent has irretrievably broken down beyond repair. Therefore, the appellant is only intending to peacefully spend the rest of his life without being harassed by the respondent.

8. The learned counsel for the appellant would further contend that the respondent-wife had gone to the extent of lodging complaint against him with his superior officer and on the basis of such complaint, he was called over wireless to appear before him. This message was received by all the Fire Stations, whereby, he was humiliated in the midst of his colleagues. Thus, it is the stand of the appellant-husband that the respondent-wife has caused mental cruelty to him, and therefore, it is practically impossible for him to live with her. In support of his submissions, learned counsel for the appellant-husband relied on the decisions of the Supreme Court in the case of (Naveen Kohli Vs. Neelu Kohli) reported in 2006 (4) SCC 558 and submitted that in the given facts and circumstances, refusing to grant a decree of divorce to the appellant-husband, would be disastrous to both of them and after undergoing mental and physical agony for the past 29 years, the appellant-husband could not continue to live with the same agony for the remaining short period of his life.

9. As regards the maintainability of the Original Petition filed under the French Code, the learned counsel for the appellant relied on the decision of the Honourable Supreme Court in (Mig Cricket Club Vs. Abhinav Sahakar Education Society) reported in 2011 (9) SCC 97 to contend that quoting wrong provision of law will not disentitle a litigant from getting relief, if such relief can be granted otherwise by the Court on merits under any other law. Therefore, the learned counsel for the appellant-husband sought for allowing the appeals.

10. Countering the above submissions of the learned counsel for the appellant-husband, the learned counsel for the respondent-wife submitted that the marriage between the appellant and respondent was solemnized on 21.06.1989 as per Christian customs and rites. Thereafter, both of them jointly lived in Wellington at Ooty. Since the respondent-wife was having certain ailments, she was not in a position to stay at Wellington, Ooty, due to the climatic condition and hence, she lived at Pondicherry. She used to come back to Wellington during the week-ends and stay with her husband. It is further contended by the learned counsel for the respondent-wife that right from day one, it is the appellant-husband who was causing cruelty and in spite of her repeated requests, he has not shown any interest to come and stay along with her at Pondicherry. In fact, except making bald and vague statements, absolutely no proof was produced by the appellant-husband to show that the respondent treated him cruelly and deserted him without any just or sufficient cause. The only allegation made against the respondent-wife is that she had given a complaint to the superior officer of the appellant-husband, which was only with the sole intention that his higher officials will advise him to join the respondent-wife and lead a peaceful matrimonial life. In support of her submissions, learned counsel for the respondent-wife relied on the decision of the Honourable Supreme Court in the case of (Savitri Pandey Vs. Prem Chandra Pandey) reported in 2002 (2) SCC 73 wherein it was held that when the Original Petition for dissolution of divorce on the grounds of cruelty is filed by a spouse, it is his or her duty to prove it to the satisfaction of the Court. It was further held that physical cruelty consists of acts which endanger the physical health of the other spouse and includes inflicting bodily injury or giving cause for apprehension for such injury. According to the counsel for the respondent, none of the parameters laid down by the Honourable Supreme Court in the aforesaid decision is attracted in this case. The Family Court, considering the above aspects has rightly refused to dissolve the marriage solemnised between the appellant and the respondent and therefore, she prayed for dismissal of the appeals.

11. Keeping in mind the pleadings and the submissions made by learned counsel on both sides, we have perused the records.

12. At the outset, we find that the Original petitions are filed by the parties before the Family Court under the French Civil Code, which will not be applicable to the parties. On that ground alone, we are of the opinion that the petitions filed by the parties before the Family Court, Pondicherry, are not maintainable. However, as the Family Court has entertained the Original Petitions and the maintainability of it was not questioned before us, we refrain from dealing with the maintainability or otherwise of the Original Petitions filed before the Family Court in these appeals.

13. It is the case of the appellant-husband that after marriage, the wife lived with him only for ten days and thereafter, she left the matrimonial home and went to Pondicherry and started living there and was also working there. She has refused to come and join her husband (appellant) at Ooty inspite of repeated demands. It is also the case of the appellant that the respondent has given a complaint to his superior officer and thereby subjected him to shame and degradation in the midst of his colleagues. Further it is contended that the respondent, after marriage, unjustly demanded the appellant to come and settle down at Pondicherry with her by leaving not only his family but also his employment. Such an action of the respondent would definitely fall within the scope and ambit of the definition 'cruelty' and therefore he is entitled for a decree of divorce. Above all, it is submitted that both the appellant and the respondent have retired from service and they have accustomed themselves to lead a separate life for the past more than 29 years and therefore, the appellant and the respondent have reached a point of no return and that their marriage life has been irretrievably broken.

14. In reply, learned counsel for the respondent-wife submitted that since the respondent-wife was suffering from certain ailments, she was not in a position to stay with her husband at Ooty, where cold climate prevails and that is the reason why she came back to Pondicherry and stayed there. However, every week-end, she used to travel from Pondicherry to Wellington and stayed with her husband intermittently. She was continuously pleading with him to get a transfer to Pondicherry and come and stay with her, while so, it cannot be said that she subjected the appellant to matrimonial cruelty. Further, the long and continued separation of the appellant and the respondent, cannot be a ground for dissolving the marriage solemnised between the appellant and the respondent and it is not a straight-jacket formula to be applied in all cases.

15. From the averments and counter-averments, we find that absolutely there are no grounds made out to hold that the respondent had subjected the appellant to matrimonial cruelty and that the desertion of the respondent from the matrimonial company of the appellant is without any just or sufficient cause. On a perusal of both the petitions filed before the Court below, we find that the petition filed by the husband for dissolution of marriage contain bald and vague statements without giving any specific incident, the date and time of occurrence, etc. to prove that he was subjected to cruelty at the instance of the respondent. It is well settled legal principle that cruelty postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for a spouse to live with the other party and it cannot be decided on the basis of the sensitivity of the petitioner and it has to be adjudged on the basis of the course of conduct, which would, in general, be dangerous for a spouse to live with the other. In the present case, what is termed as cruelty by the husband is

that the respondent has given a complaint to his superior officer and thereby, he was put to shame and degradation. We are not inclined to accept the same. Even as admitted by the respondent, she has given a complaint with the intention to join the appellant to lead a peaceful marital life and not otherwise. Thus, the intention with which the respondent had given the complaint to the superior officer of the appellant to ensure that the appellant get transfer of his employment, cannot be construed as an act on the part of the respondent to inflict matrimonial cruelty on the appellant. Therefore, keeping the abovesaid principle in mind, we find that absolutely there is no case made out under the ground "cruelty".

16. The appellant-husband has come forward with this appeal by mainly contending that both the appellant and the respondent are living separately for the past 29 years, and therefore, on the ground of irretrievable break down of marriage due to long separation, he prayed that the matrimonial relationship between the appellant has to be untied by granting a decree of divorce. But we are of the opinion that long and continued separation itself cannot be a ground for granting a decree of divorce and it will be considered only if any one of the ground of cruelty or desertion is proved. Hence, long separation alone cannot be always regarded as a ground for divorce. Moreover, in the instant case, the respondent-wife is claiming that she has been staying all along with the appellant, of course, intermittently besides she made attempts to join the appellant-husband permanently, who is evading her request. This could be evident that the respondent has also filed a Petition for restitution of conjugal rights by expressly stating that she is ready and willing to join the matrimonial company of the appellant. When such being the position, coupled with the fact that bald and vague statements are made out in the petition for granting a decree of divorce, this Court is of the view that this is not a fit case for dissolving the matrimonial tie between the appellant and the respondent. The Family Court is therefore justified in dismissing the petition filed by the appellant-husband for divorce and allowing the petition filed by the respondent-wife for restitution of conjugal rights.

17. In the result, both the Civil Miscellaneous Appeals fails and they are dismissed. No costs.

Sd/-

Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To
The Judge,
Family Court,
Pondicherry.

+2cc to Mr.K.P.Jotheeswaran, Advocate SR.NO.66938, 66939
+1cc to Mr.Sudharshana Sundar, Advocate SR.NO.67600

JP (CO)
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CMA.Nos.1454 & 1455 of 2014



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