

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 16.02.2018

Pronounced on : 08-06-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

Civil Miscellaneous Appeal No. 4173 of 2008

S. Murugesan .. Appellant/Petitioner

Versus

Santhanalakshmi .. Respondent/Respondant

Appeal filed under Section 19 (1) of The Family Courts Act against the order and decretal order dated 31.07.2008 passed in F.C.O.P. No. 2157 of 2004 on the file of First Additional Family Court, Chennai.

For Appellant : Mr. V. Raghavachari
For Respondent : Mr. A.S. Narasimhan

JUDGMENT

R. Subbiah, J

This appeal is filed by the appellant aggrieved by the order dated 31.07.2008 passed in F.C.O.P. No. 2157 of 2004 on the file of the learned First Additional Family Court, Chennai, by which the Original Petition filed by the appellant under Section 13 (1) (i-b) of The Hindu Marriage Act for dissolution of the marriage on the ground of desertion was dismissed.

2. The averments made in the F.C.O.P. No. 2157 of 2004 filed by the appellant before the Family Court are to the effect that the marriage between the appellant and the respondent was solemnised on 09.11.1981 at Nataraja Kalvi Kazhaga Kalyana Mandapam at No.13, Mallan Ponnappa Mudali Street, Triplicane, Chennai as per Hindu rites and customs. Due to the wedlock, the respondent gave birth to a male child on 02.01.1983. According to the appellant, the marriage life was happy and blissful for a short period and thereafter, there were matrimonial disputes which cropped up between the appellant and the respondent due to the illicit intimacy the respondent had with a person namely

Mohankumar, who was running a provision store at John Johnkaran Street, Triplicane, Chennai. In this context, frequent quarrel emanated between the appellant and the respondent. The appellant and the respondent lived together only till 17.02.1986 and thereafter, the respondent deserted the matrimonial company of the appellant. After desertion, the appellant filed O.P. No. 1028 of 1988 for dissolution of the marriage on the ground of adultery and it was contested by the respondent. Ultimately, by an order dated 03.01.1992, the OP No. 1028 of 1988 was dismissed by the Family Court. As the appellant was out of the City in connection with his avocation, he could not file an appeal as against the order dated 03.01.1992 dismissing OP No. 1028 of 1988. As a sequel to the petition filed by the appellant for dissolution of the marriage, the respondent filed M.C. No. 32 of 1996 under Section 125 of the Code of Criminal Procedure in which the appellant was directed to pay maintenance to the respondent at the rate of Rs.100/- per month. Subsequently, the respondent filed another Petition in M.P. No. 845 of 2004 for enhancement of maintenance amount in which an order dated 20.09.2004 was passed directing the appellant to pay maintenance at the rate of Rs.1,000/- per month. It is also stated in the Original Petition that the appellant has filed a Petition seeking custody of the minor child and pursuant to the order passed by the Family Court, the custody of the minor child was given to the appellant and it is the appellant who is in custody of the child and providing him education befitting his status. After the male child become major, he went and stayed with the respondent. During the pendency of the above proceedings, the respondent failed and neglected to join the appellant to lead a happy matrimonial life. The appellant and the respondent are residing separately for about 18 years and there is no chance for reunion. Therefore, the appellant has filed the instant F.C.O.P. No. 2157 of 2004 for dissolution of the marriage on the ground of desertion.

3. The Original Petition was contested by the respondent by filing a counter affidavit stating that the averments made in the Original Petition are false and therefore they are not admitted. The averment that the respondent was living an adulterous relationship with one Mohankumar is denied as false and misleading. It is further stated that O.P. No. 1028 of 1988 was filed by the appellant for dissolution of marriage on the ground of adultery and it was contested by the respondent and ultimately it was dismissed on 03.01.1992. As against the order of dismissal, the appellant has not filed any appeal and it has become final. It was further stated that the appellant got married to another lady through whom a female child was born. Since the appellant was not willing to repent for the false allegation made against her in the Original Petition, she is residing separately. The allegations levelled against the

respondent as though she is living an adulterous relationship with one Mohankumar has caused her mental agony. The respondent never deserted the appellant voluntarily and the desertion has been necessitated due to the cruel attitude and harassment caused to her by the appellant. In any event, when once the Original Petition filed by the appellant for dissolution of marriage on the ground of adultery was dismissed, the instant Original Petition filed for the same relief of dissolution of the marriage on the ground of desertion is not maintainable. The very same averments made in the earlier Petition for dissolution of the marriage were made in the present Original Petition as well and therefore also the Original Petition is not maintainable. The present petition is filed only to harass the respondent. The respondent is ready and willing to live with the respondent and therefore, she prayed for dismissal of the Original Petition.

4. Before the Family Court, the appellant examined himself as PW1 and the respondent examined herself as RW1. There was no document marked by either side. The Family Court, on consideration of the oral evidence tendered by the appellant and the respondent, dismissed the Original Petition filed by the appellant on 31.07.2005 on the ground that the appellant has already filed Original Petition No. 1028 of 1988 for dissolution of the marriage on the ground of adultery and it was dismissed on 03.01.1992 and therefore, the present Original Petition for dissolution of the marriage on the ground of desertion is not maintainable.

5. The learned counsel for the appellant submitted that the Family Court was carried away by the allegations made by the respondent that the appellant got married to one Padmini and through whom a female child Gomathi was born. However, the Court below failed to take note of the fact that no documentary evidence has been filed to substantiate such an allegation. The Family Court, without any basis has concluded that the appellant is taking advantage of his own wrong and therefore he is not entitled to a decree of divorce. The Family Court also did not consider that RW1/respondent, in her evidence, would admit that she did not take any steps to join the matrimonial company of the appellant and that she is living separately from 17.02.1986. The Family Court also did not consider the fact that even though the respondent, in her counter affidavit, has merely stated that she is ready and willing to join the appellant notwithstanding her allegation that the appellant has got married to one Padmini, the respondent did not file any petition for restitution of conjugal right with the appellant. Further, from the date of desertion, the respondent also did not take any steps to see the minor son who is in custody of the appellant. In any event, from 17.02.1986, the appellant and the respondent

are residing separately for the past 32 years and therefore, no useful purpose could be achieved by keeping the matrimonial tie alive. The matrimonial relationship between the appellant and the respondent had irretrievably broken and therefore, the learned counsel for the appellant would pray for setting aside the Order passed by the Family Court.

6. In support of his contention, the learned counsel for the appellant relied on the Division Bench Judgment of this Court in the case of (R. Frederick vs. H. Malini) reported in (2018-1-Law Weekly 19) and in the case of (R. Seenu vs. N. Porkodi) reported in (2018) 1 MLJ 336 to drive home the point that the appellant and the respondent are residing separately for the past 32 years, the matrimonial life between them had irretrievably broken and therefore, no useful purpose could be achieved by keeping the matrimonial tie in tact.

7. Per contra, the learned counsel for the respondent would contend that the original petition has been filed for dissolution of the marriage on the ground of desertion. While so, a burden is cast on the appellant to prove that the respondent voluntarily deserted the matrimonial company of the appellant. However, there is no averment made in the Original Petition or in the deposition of the appellant, as PW1 that the respondent voluntarily deserted the matrimonial company. In fact, the respondent was subjected to harassment by alleging that she is having an illicit relationship with one Mohan Kumar and therefore, the respondent was constrained and compelled to leave the matrimonial company of the appellant. Further, the appellant earlier filed an Original Petition in OP No. 1028 of 1988 for dissolution of the marriage on the grounds of adultery and it was contested by the respondent. Ultimately, on 03.01.1992, OP No. 1028 of 1988 was dismissed against which the appellant has not filed any appeal. Thus, the allegations levelled against the respondent as though she is living in adultery could not be substantiated by the appellant. Therefore, as rightly pointed out by the Family Court, the present Original Petition for dissolution of the marriage on the ground of desertion is not maintainable. Above all, it was categorically brought by the respondent in her deposition as RW1 that the appellant married one Padmini during the subsistence of marriage with her, through whom a female child Gomathi was also born. In her deposition, the respondent has clearly pointed out that the name of the said Padmini is indicated in the Family Ration Card in which the name of the appellant was mentioned as the Head of the Family. In the cross-examination, the appellant admitted that the name of one Padmini was included in his family ration card and that the said Padmini is only a servant maid. In such circumstance, the Family Court, pointing out that the name of a servant maid will not be printed in the Family ration

card, has rightly held that the appellant cannot be permitted to take advantage of his own wrong. In any event, the appellant failed to establish that the desertion of the respondent was voluntary and it was rightly appreciated by the Family Court while dismissing the original Petition filed by the appellant. The learned counsel for the respondent therefore prayed for confirming the order passed by the Family Court by dismissing this Original Petition.

8. Keeping the submissions of the counsel for both sides, we have carefully considered the materials placed on record, including the order passed by the Family Court, which is impugned in this appeal. The marriage between the appellant and the respondent was solemnised on 09.11.1981, due to which a male child was born on 02.01.1983. The appellant appears to have suspected the fidelity of the respondent and it led to frequent quarrel among the couple. It is the specific case of the appellant that the respondent is having an illicit relationship with one Mohan Kumar which has ruined the matrimonial life. In this context, there were simmering matrimonial disputes and differences cropped up between the appellant and the respondent and ultimately, the respondent deserted the matrimonial company of the appellant on 17.02.1986. Thereafter, the appellant has unsuccessfully filed O.P. No. 1028 of 1988 for dissolution of the marriage on the ground of adultery and after contest, the said Petition was dismissed on 03.01.1992. Admittedly, as against the order dated 03.01.1992, the appellant did not prefer any appeal and the order dated 03.01.1992 attained a finality. After 12 years of dismissal of the Original Petition No. 1028 of 1988, the appellant has filed the instant Original Petition No. 2157 of 2004 for dissolution of the marriage on the ground of desertion. While so, the subsequent O.P. No. 2157 of 2004 filed by the appellant for dissolution of marriage on the ground of desertion is only an after-thought.

9. Before the Family Court, the appellant examined himself as PW1 and the respondent was examined as RW1. In the counter affidavit filed in O.P. No. 2157 of 2004, it was alleged by the respondent that the appellant contracted a second marriage with one Padmini during the subsistence of the marriage with her and it was also reiterated in her deposition before the Family Court. The respondent further deposed that the name of the said Padmini was indicated in the Family Card in which the name of the appellant is mentioned as the head of the Family. During the course of cross-examination, the appellant denied having married one Padmini but admitted that the said Padmini is working as servant maid and/or cook in his house. On appreciation of the above deposition of the appellant and the respondent, the Family Court has rendered a specific finding that in Family Card, there is no scope for printing the name of

the servant maid or cook in a family. It is in these circumstances, the Family Court has rightly held that the appellant cannot be permitted to take advantage of his own wrong as has been enumerated under Section 23 of The Hindu Marriage Act. We are in complete agreement with such a finding rendered by the Family Court. Even though the learned counsel for the appellant would contend that both the appellant and the respondent are residing separately for more than three decades, in the given facts and circumstances of this case, we are not impressed upon that fact to dissolve the marriage solemnised between the appellant and the respondent. We have also noted that the Family Court has rendered a specific finding that the appellant, who has filed the Petition for desertion, is bound to prove the same to the satisfaction of the Court that such desertion of the respondent is voluntary, but he has not substantiated the same with any acceptable evidence. This finding of the Family Court merits only acceptance. In any event, we do not see any reason to interfere with the well considered order passed by the Family Court dismissing FCOP No. 2157 of 2004 filed by the appellant.

10. In the result, we confirm the order dated 31.07.2008 passed in F.C.O.P. No. 2157 of 2004 on the file of First Additional Family Court, Chennai. The Civil Miscellaneous Appeal is dismissed. No costs.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rsh

To

1.The I Additional Family Court
Chennai

2.The Record Keeper
VR, Section
High Court, Madras.

+1cc to Mr.V. Raghavachari, Advocate, S.R.No.35658

CMA No. 4173 of 2008

AK(CO)
GSP(02/07/2018)