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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 18.06.2018

Pronounced on : 11.07.2018

CORAM

THE HONOURABLE MR. JUSTICE M.V.MURALIDARAN

CMSA(MD)No.7 of 2018
and
CMP(MD)No.2895 of 2018

A.Sridevi .. Appellant/Respondent/Respondent

-Vs-

A.P.Arun Kumar @ Kannan .. Respondent/ Appellant/Petitioner

Prayer: This Appeal filed under Section 28 of Hindu Marriage Act r/w. Section 100 of C.P.C., against the fair and decreetal order dated 31.10.2017 made in H.M.C.M.A.No.6 of 2017 on the file of the Principal District Court, Thoothukudi, reversing the fair and decreetal order dated 10.11.2016 made in H.M.O.P.No.117 of 2011 on the file of the Sub Court, Kovilpatti.

For Appellant : Mr.R.Karunanidhi
For Respondent : Mr.R.Pon Karthikeyan

ORDER

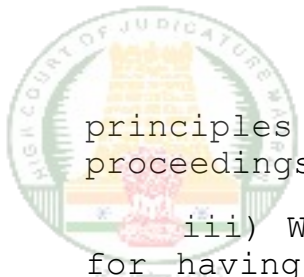
This Civil Miscellaneous Second Appeal arises out of the Judgment and Decree dated 31.08.2017 in H.M.C.M.A No 6 of 2017, passed by the learned Principal District Judge, Thoothukudi reversing the Judgment and Decree dated 10.11.2016 in H.M.O.P.No.117 of 2011 passed by the Learned Subordinate Judge, Kovilpatti.

2.The appeal was heard on the following substantial questions of law:-

"i) Whether the Lower Appellate court is right in reversing the well considered fair and decreetal order passed by the learned trial court and granting the relief in favour of the respondent herein as prayed for even though the respondent had failed to prove his case?

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ii) Whether the Lower Appellate Court applied the correct



principles of law relating to burden of proof in matrimonial proceedings?

iii) Whether findings of the lower Appellate Court are vitiated for having failed to follow the correct principles of law by not holding that the appellant herein is having no animus deserendi at the time of leaving the matrimonial home so as to make out the case for desertion?

iv) Whether the respondent has proved the allegation of cruelty by valid and substantial evidence?

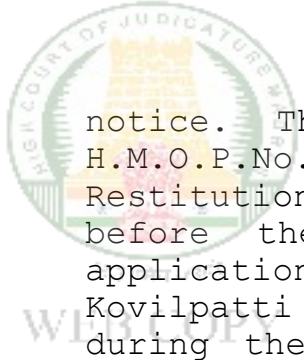
v) Whether the Lower Appellate Court is right in law in ignoring the evidence of PW2 an independent witness?

vi) Whether the Lower Appellate Court is erred in not framing the points for consideration as required under order 41 Rule 33 of C.P.C.?

vii) Whether the Learned Lower Appellate Court is right in holding that in the absence of prayer for restitution of conjugal rights on the part of the appellant is fatal, even though the appellant herein has specifically pleaded and prayed for the relief of restitution of conjugal rights by way of counter claim?

3. The brief facts, necessary for disposal of the appeal are as follows:

The Appellant is the wife and the respondent is the husband. The marriage between them was solemnized on 13.06.2008 at Kovilpatti. Subsequent to the marriage the couple were living in the respondent's house at Chennai. No issues were born out of their wedlock. It is the case of the Respondent/husband that within few days from the date of marriage the Appellant/wife was very indifferent towards him and other relatives in the matrimonial home. The appellant/wife had stayed hardly for eight days at the matrimonial home and, on 27.06.2008 the appellant/wife's father came to Chennai and took back her daughter on the pretext of her mother's illness. On 09.07.2008 she was brought back by her father to the matrimonial home. However, to the surprise of the husband within five days, again the wife's father and her brother came to Chennai and took her back to the parental home at Kovilpatti without any valid reason. Thereafter the respondent/husband went to Kovilpatti to bring back his wife to the matrimonial home. On 07.10.2008 the appellant/wife returned to the matrimonial home along with her husband. After staying for another 6 days, on 13.06.2008 once again the appellant/wife even without informing to the respondent/husband or anyone and without his consent, had left the matrimonial home without any reasonable cause and thereafter she never returned back to the matrimonial home. The respondent/husband took steps to bring the appellant/wife back to the matrimonial home and the same ended in vain. The respondent/husband issued legal notice under Ex-P 2 for reunion to his wife and the Appellant/wife refused to receive the



notice. Therefore the respondent/husband filed a petition in H.M.O.P.No.1358 of 2010 before the Family Court, Chennai seeking Restitution of Conjugal Rights. The Appellant/wife did not appear before the Family Court, Chennai and she moved a transfer application and got transfer of the same to the file of Sub Court, Kovilpatti and it was renumbered as H.M.O.P.No.31 of 2011. Even during the hearing of the above petition before the Sub Court, Kovilpatti, the appellant/wife did not appear and not prepared to join with her husband. Therefore the respondent/husband was constrained to withdraw the petition filed in H.M.O.P.No.31 of 2011 and filed the petition in H.M.O.P.No.117 of 2011 before the Learned Subordinate Judge, Kovilpatti seeking divorce on the ground of cruelty and desertion.

4.The Appellant/wife resisted the petition by filing counter statement attributing fault on the part of her husband and in-laws and alleged harassment at the hands of her mother-in-law. The appellant/wife in her counter statement had justified her desertion by saying that the circumstances prevailed in her matrimonial home had warranted her to leave the matrimonial home. The Appellant/wife further stated in the counter that in the event of setting up of separate residence she would rejoin with her husband and she expressed her interest of reunion in the counter statement before the trial court.

5.In order to prove their respective case, the Appellant/wife got herself examined as R.W-1 and no exhibits were marked on her side. The respondent/husband was examined as P.W-1 and Ex.P1 and Ex.P2 were marked on the side of the respondent/Husband. The trial court after evaluation of the entire evidence adduced by both parties came to a conclusion that there was no wilful desertion and cruelty and on the said finding, dismissed the divorce petition. On Appeal, the Learned Principal District Judge, Thoothukudi, reversed the judgment and decree of the trial court and granted divorce on the ground of desertion and cruelty. As against the same, the appellant/wife has come forward with this appeal.

6.I heard Mr.R.Karunanidhi, learned counsel appearing for the appellant and Mr.R.Pon Karthikeyan, learned counsel for the respondent and perused the entire materials available on record.

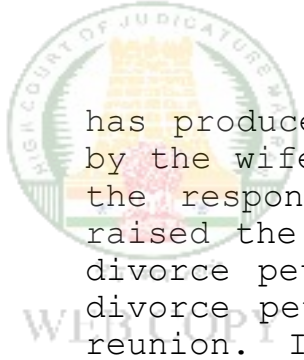
7.The learned Counsel for the Appellant/wife would contend that the lower appellate court has committed grave error in reversing the judgment and decree of the trial court. The learned counsel would further submit that due to the harassment and torture inflicted by the in-laws, the wife had left the matrimonial home and the same cannot be termed as desertion. Since reasonable cause has been established, the wife cannot be held guilty for desertion. He further submitted that the husband had initially filed a petition seeking restitution of conjugal rights at Chennai and the same was transferred at the instance of the Appellant/wife to the file of the Sub Court, Kovilpatti and after transfer of the earlier petition, the husband without prosecuting the same had withdrawn the same and



filed the present divorce petition seeking dissolution of marriage on the ground of cruelty and desertion. Such conduct of the husband is not permissible in law and the same would go to show that the husband was not interested in rejoining with his wife. It is the further contention by the learned counsel for the appellant that the appellant/wife is ready to live with her husband, if the husband sets up a separate residence and the learned counsel further submits that the counter claim of restitution of conjugal right sought for by the appellant/wife has not been considered by the lower appellate court. The learned counsel would further submit that after considering all those aspects only the trial court had rightly dismissed the petition filed by the Husband and therefore the judgment and decree of the lower appellate court is erroneous and liable to be set aside and he prays for allowing the appeal.

8. The learned counsel for the Respondent/husband would submit that the appellant/wife had left the matrimonial home without any reasonable cause and she left the matrimonial home without the consent of the Respondent/husband. The learned counsel for the Respondent/husband would submit that all his efforts for reunion has ended up in vain due to the adamant attitude of the wife and he would further submit that only after exhausting all the possible efforts for reunion, the husband was constrained to file the petition seeking divorce. The husband has been denied conjugal pleasure by the wife and the same has created severe mental agony and cruelty to the husband. Further the learned counsel drew the attention of this court to the evidence adduced by the wife during her cross examination. The Appellant/wife during her cross examination has admitted that she had stayed at Chennai only for 25 days and during that period she had gone to her parental home twice and on the third time, she never returned back to the matrimonial home. The learned counsel would further contend that the appellant/wife in her cross examination has categorically admitted that at the time of leaving the matrimonial home she had not informed her husband and even she was not sure whether she had informed it to other persons in the home. Therefore the conduct of the wife in deserting the husband without reasonable cause has been clearly established and she has not interested in cohabiting with the husband.

9. The learned counsel would further submit that the appellant/wife had never prayed for any counter claim as stated in the grounds of appeal. The learned counsel further contend that though a counter claim was filed before the trial court, the same was not taken on file and the said counter styled as counter claim was returned by the trial court even without numbering and thereafter the appellant/wife filed the counter statement in which there was no prayer for counter claim. In fact the appellant/wife had never persuaded the relief of counter claim of restitution of conjugal rights before the trial court as well as before the lower appellate court. This would be evident from the written arguments filed by the wife before the trial court and in the judgment and decree of the trial court. The learned counsel for the respondent



has produced the counter statement and the written arguments filed by the wife by way of typed set of papers. The learned counsel for the respondent would further submit that the respondent/wife has raised the plea of separate residence only after the filing of the divorce petition for the first time and even before filing of the divorce petition, the respondent/wife had not taken any steps for reunion. It is the specific case of the appellant/wife in the counter statement that she would be in a position to live with her husband, only if he provides for her a separate residence. Since these aspects were not properly appreciated and considered by the trial court, the lower appellate court after proper appreciation of the evidence has come to a conclusion that the wife was not interested in cohabiting with her husband and allowed the appeal. Hence he prays for dismissal of this appeal.

10. The point for determination arises in the appeal is:

"Whether the respondent/husband is entitled for divorce on the ground of cruelty and desertion under section 13(1)(ia) & (ib) of the Hindu Marriage Act, 1955?"

11. The learned counsel for the Respondent/husband contended that the very conduct of the wife in deserting him and denial of conjugal pleasure amounts to mental cruelty. The learned counsel for the Respondent relied upon the following decisions in order to support his contention that the Husband is entitled to a decree of divorce on the ground of cruelty and desertion:-

- (1) I (2015) DMC 685 (DB) (Mad) (K.Kuppuraj Vs M.Rajasulochana)
- (2) 2016(6) CTC 440 (Narendra Vs K.Meena)

12. This court in the case of K.Kuppuraj Vs M.Rajasulochana reported in I (2015) DMC 685 (DB) (Mad), has dealt with the ground of Desertion and observed as follows:

"13. As regards the ground of desertion, under Section 13(1)(i-b) of Hindu Marriage Act, the appellant/husband has to prove (i) that there was desertion for a continuous period of two years immediately preceding the presentation of the petition, (ii) the desertion was without reasonable cause and without the consent or against the wish of the appellant herein. The desertion requires four important elements, viz., (i) factum of separation (ii) necessary intention to put an end to matrimonial consortium and cohabitation permanently, (iii) want of reasonable cause and (iv) want of consent or against the wish of the other spouse.



14. The trial Court rendered a finding that the husband/appellant was having illicit relationship with one Subha and in view of the same, the respondent/wife was justified in living separately. The respondent/wife was examined as RW.1 and she deposed that she is aware of the relationship of her husband with one Subha and knowing this fact, she is ready and willing to live with her husband. It is to be noted that when she had no objection to live with her husband though he was having illicit relationship with another lady, the reason given by the Tribunal for separate living by the wife due to her husband's illicit intimacy with another lady, cannot be accepted. It is not in dispute that the respondent/wife had left matrimonial home and living separately for more than seven years.

15. This Court, in a decision reported in *P.Manimekalai versus R.Kothandaraman*, II (2010) DMC638 = 2010 (6) CTC80 (DB) ", has considered the issue of 'desertion' in para 31 which is extracted hereunder:

"31. "Desertion" for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things,. Desertion, therefore, means withdrawing from the matrimonial obligations i.e., not permitting or allowing and facilitating cohabitation between the parties. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. The party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong. (vide *SAVITRI PANDEY VS. PREM CHANDRA PANDEY* ((2002) 2 SCC 73))."

16. This Court has also relied upon the decisions of the Hon'ble Supreme Court, wherein, it has been specifically observed that the wife was forced to live because of ill-treatment, it cannot amount to desertion. In this case, the respondent/wife had been living separately for more than seven years. So, the factum of separation is proved. Necessary intention to put an end to matrimonial relationship was that there should be no cohabitation and there is no direct evidence on this aspect. But the wife has stated that she is willing to live with the appellant/husband though she is knowing that her husband was having illicit relationship with one Subha. However, it is to be noted that she has not attempted or taken any steps to join her husband. Admittedly, she has not filed



any petition before the Family Court for restitution of conjugal rights even after lapse of years while she was in separation. There is a reasonable cause for the wife and it may be justified in living separately since her husband was alleged to have illicit relationship with another woman. But that cannot be quoted as a reasonable cause inasmuch as the respondent/wife was very much ready and willing to live with her husband knowing the fact that her husband was having illicit relationship with another woman.

17. In cross-examination, the respondent wife has admitted that there was a meeting to mediate and resolve the dispute between the wife and husband, namely, the appellant and respondent herein. She has stated that she had not disrespected her husband in the presence of his friends and that she did not refuse to participate in the panchayath meeting held for the settlement of differences between the wife and husband. Hence from the evidence, it is clear that there was a mediation, but it failed. The appellant has denied that he was having illicit relationship and he is not aware of one Subha.

18. From the aforesaid discussion, it is clear that the wife had not attempted or taken any steps to join her husband by filing a petition before the family Court for restitution of conjugal rights. If at all she is interested to live with her husband, she could have filed a petition for conjugal rights to establish her stand. Even assuming that her husband was having illicit relationship with one Subha, it is not a hurdle for her to live with her husband as she clearly deposed that she is willing to live with her husband despite knowing that he had illicit relationship with another woman. In cross-examination, the wife has stated that her husband character is good except the fact that he was living with one Subha. She has specifically stated that her husband was having very good character. Since the case squarely falls within the four corners mentioned supra (in para 13), we are of the view that it is a fit case for granting divorce on the ground of "desertion".

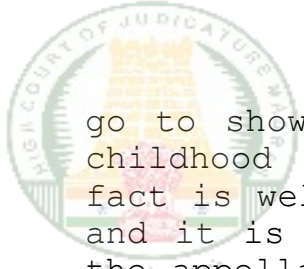
13. The Hon'ble Supreme Court in 2016 (6) CTC 440 (Narendra Vs K.Meena) (cited supra), has held that persistent effort of wife compelling husband to get separated from family would be torturous and constitute an act of Cruelty. The observation is extracted hereunder:-

"11. The Respondent wife wanted the Appellant to get separated from his family. The evidence shows that the family was virtually maintained from the income of the Appellant husband. It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife,



especially when the son is the only earning member in the family. A son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income. In India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her. In the instant case, upon appreciation of the evidence, the trial Court came to the conclusion that merely for monetary considerations, the Respondent wife wanted to get her husband separated from his family. The averment of the Respondent was to the effect that the income of the Appellant was also spent for maintaining his family. The said grievance of the Respondent is absolutely unjustified. A son maintaining his parents is absolutely normal in Indian culture and ethos. There is no other reason for which the Respondent wanted the Appellant to be separated from the family - the sole reason was to enjoy the income of the Appellant. Unfortunately, the High Court considered this to be a justifiable reason. In the opinion of the High Court, the wife had a legitimate expectation to see that the income of her husband is used for her and not for the family members of the Respondent husband. We do not see any reason to justify the said view of the High Court. As stated hereinabove, in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case, we do not find any justifiable reason, except monetary consideration of the Respondent wife. In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the Respondent wife to constrain the Appellant to be separated from the family would be torturous for the husband and in our opinion, the trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'."

14. Now let me analyze the case on hand on the basis of the above decisions and evidences. The foremost contention of the appellant/wife is that, she had left the matrimonial home only due to the harassment and there was no wilful desertion and she is advised to live with her husband, provided the husband sets up a separate residence. This contention of the wife cannot be countenanced for more than one reason. A perusal of records would



go to show that the father of the respondent was died during his childhood age. Only his mother had grown up the respondent. This fact is well known to the appellant/wife even prior to the marriage and it is an admitted fact. A specific question was posted before the appellant/wife during her cross examination as to whether there were any talks or agreement prior to her marriage with regard to the separate residence. For which the wife has deposed that no such arrangement was made. Therefore it is obvious that the appellant/wife had agreed to live with her husband along with her mother-in-law as joint family.

15. Now it has to be seen whether the reason adduced by the appellant/wife for leaving the matrimonial home is bonafide or not? The appellant/wife in her counter statement has made certain allegations against her mother-in-law and sister-in-law. A bare reading of the same would go to show that some of the normal happenings have been exaggerated and those incidences were trivial in nature and normal wear and tear situations of a matrimonial home. In fact those allegations were specifically denied by the husband before the trial court and the allegations were not at all proved by the wife through concrete evidence. Further the evidence of the wife would reveals that she had stayed hardly 25 days in the matrimonial home and even before understanding the values of the matrimonial home, she has left the matrimonial home. If at all she had faced harassment at the hands of her mother-in-law and sister-in-law, she would have at least caused a legal notice to her husband by narrating the events and could have asked for a separate residence. On the other hand, the wife has refused to receive the legal notice sent by her husband seeking re-union and she has admitted the same in her cross examination. The appellant has not taken any recourse under law for reunion and she had simply left the matrimonial home even without informing to her husband or anybody and she had not obtained his consent. There was no proper explanation from the wife as to why she had not instituted separate proceedings seeking the relief of Restitution of Conjugal Rights, when she really interested in rejoining with her husband. But she simply admitted in her evidence that she had not taken any steps for reunion. It really shows that she was not interested in cohabiting with her husband and she had voluntarily left the matrimonial home. The Factum of desertion as well as the Factum of Animus Deserendi is clearly established in the present case. Due to the conduct of the Appellant/wife the husband got dejected and withdrew his earlier application seeking restitution of conjugal rights and filed the present petition seeking divorce on the ground of cruelty and desertion. The act of the respondent/husband cannot be found at fault. The reason adduced by the wife in staying away from her husband is not bonafide and it appears to be an afterthought. As rightly pointed out by the learned counsel for the respondent, the desertion requires four important elements, viz., (i) Factum of Separation, (ii) necessary intention to put an end to matrimonial cohabitation permanently, (iii) want of reasonable cause, and (iv) want of consent or against the wish of the other spouse. The case on hand squarely falls within the four corners



mentioned supra, the wife is guilty of desertion.

16. The contention of the husband is that due to the wilful desertion he has been denied conjugal pleasure and the same amounts to cruelty. According to him, desertion also amounts to mental cruelty. The Hon'ble Supreme Court in Samar Ghosh Vs Jaya Ghosh, reported in 2007 4 SCC 511 has laid down certain instances wherefrom inference of mental cruelty can be drawn. The case on hand squarely fell under those instances laid down by the Hon'ble Supreme Court. The Hon'ble Supreme Court in the said case has held as follows:

"where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that time, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

17. It is an admitted fact that both the appellant and the respondent are living separately for nearly 10 years and no issues born of their wedlock. Normal wear and tear situations, trivial irritations in the matrimonial home are no ground for seeking Separate residence. No reasonable cause is established by the Appellant/wife to justify her desertion. From the evidence and the clear and candid admission made by the Appellant/wife during the trial, I hold that appellant/wife is found guilty of desertion and mental cruelty.

18. The Lower Appellate court has adverted to the entire evidence and has found that the Appellant/Wife's intention was not bonafide and she was not interested in continuing her matrimonial ties and her continuous refusal to join her husband, were taken as indicators of the fact that she does not interested in living with her husband. On the other hand, the respondent/husband had made several attempts to rejoin with his wife and all those attempts were consistently rebuked by the Appellant/wife. Hence I do not find any perversity in the appreciation of evidence and the finding rendered by the Lower Appellate Court.

19. In the result, this Civil Miscellaneous Second Appeal is dismissed. However, there shall be no order as to costs. Consequently, connected civil miscellaneous petition is also dismissed.

Sd/-

Assistant Registrar (WRITS)

/True Copy/

Sub Assistant Registrar



To

1.The Principal District Judge,
Thoothukudi.

2.The Subordinate Judge,
Kovilpatti.

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order made in
CMSA (MD) No.7 of 2018
and
CMP (MD) No.2895 of 2018
11.07.2018