



WEB COPY

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Date of Reserved : 13.07.2018

Date of Judgment : 17.09.2018

CORAM

THE HON'BLE MR. JUSTICE M.V.MURALIDARAN

C.M.S.A. (MD) No.16 of 2016
CMP (MD) .No.12223/16

D.Sundarajan ... Appellant/Appellant/Petitioner

vs

Chithra .. Respondent/Respondent/Respondent

Prayer: Appeal filed under Section 28 of the Hindu Marriage Act, 1985, against the Decree and Judgment dated 12.02.2016 made in CMA.No.5 of 2013 on the file of the Principal District Court, Pudukottai, confirming the Judgment and Decree dated 15.03.2013 made in HMOP.No.57 of 2012 on the file of the Sub-Court, Pudukottai.

For Appellant : Mr.M.Karunanithi
for Mr.D.Ramesh Kumar

For Respondent Mr.A.V.Rajasekaran
:

ORDER

This Civil Miscellaneous Second Appeal arises out of the Judgment and Decree dated 12.02.2016 made in H.M.C.M.A.No.5 of 2013, passed by the learned Principal District Judge, Pudukottai, confirming the Judgment and Decree dated 15.03.2013 made in H.M.O.P.No.57 of 2012 passed by the learned Subordinate Judge, Pudukottai.

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

"i) Whether the Lower Appellate Court being the last Court on facts has erred in dismissing the appeal without taking into consideration of the entire pleadings and the evidence available on record?

ii) Whether the Courts below have erred in non suiting



the Appellant on the ground of cruelty especially when the relief of divorce cannot be denied that there has been no deliberate or wilful illtreatment?

iii) Whether the Appellant is entitled to the relief of divorce based on the subsequent event as held by apex Court in the reported case in Dr. Mr. Malathi Rai MD Vs Dr B.V. Ram MD 2015(1) LW 775(SC)?

iv) Whether the Courts below have erred in dismissing the divorce petition on the ground the mental cruelty under section 13(1)(ia) irrespective of the filing false criminal complaint by the Respondent which would constitute mental cruelty entitling the other spouse to claim a divorce as held by Supreme Court in 2015(4) LW671?

v) Whether the Courts below have erred in dismissing the divorce petition especially when the appellant had pleaded the instances of the mental cruelty as contemplated under order 6 Rule 3 of CPC and proved in a manner known to law?

vi) Whether the Appellant is entitled to the relief of divorce on the ground of Cruelty and desertion taking into subsequent events and the concept of irretrievable break down of the marriage as held in 2014(3)LW 577?

vii) Whether the conduct of the wife in filing false case against the husband would amount to mental cruelty and whether the finding of the lower appellate Court that the dismissal of the criminal complaint under Domestic Violence Act for non appearance of the complainant under section 256 of Criminal Procedure code is valid in law?

viii) Whether the Lower appellate Court is correct in non considering the judgment dismissing the criminal complaint under section 256 of Criminal procedure code especially when law is well settled that acquittal of accused on the complainant's non appearance is valid?

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

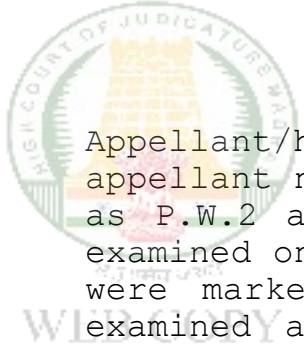
The Appellant is the husband and the Respondent is the wife. The marriage between them was solemnized on 13.05.1999 according to Hindu rites and Customs. After the marriage the couple started their matrimonial life at New Delhi. Due to their wedlock one male child was born on 01.12.2000 and female child was born on 05.07.2004. The appellant has stated that the respondent right from the date of marriage has shown indifferent attitude towards him and she never get mingled with her in-laws. Even for trivial reasons the respondent would raise quarrel with the appellant and she started suspecting the appellant in every occasion. During the year 2005, the son of the appellant was diagnosed for a skin disease namely Morphea and both the appellant and the respondent had taken their



son to various hospitals for the treatment. Though the appellant has put his utmost sincere and care towards the son during the treatment, the respondent would harass the appellant and used to fight everyday for no reasons. On several occasions the respondent was very careless towards her son during the treatment period. During the month of October 2006 the appellant shifted his job to Bangalore. In the 1st week of January 2007, the appellant went to United States for his official duty for two weeks and on his return, the respondent accused the appellant by saying that he was having illicit relationship with his brother's wife. Thereafter the respondent had left the matrimonial home voluntarily in the month of January, 2007 and had not returned to the matrimonial home till date. It is the further case of the appellant that during his absence in the month of May, 2007 the respondent who was having one set of house keys, entered into the residence at Bangalore and taken several valuables and gold articles. The appellant later found the same and gave a complaint under Ex.P3 before the Local Police. Even on one occasion the respondent accompanied with her father, brother and 4 unknown persons, went to the house of the appellant in his absence and threatened his parents with dire consequences. Thereafter the respondent instituted a criminal complaint against the appellant and his parents including his brother and his wife in Cr.M.P.No.2070 of 2010 before the Learned Judicial Magistrate, Pudukottai and subsequently the same was dismissed for non prosecution. Subsequently the respondent filed a maintenance case seeking maintenance for the children. The appellant has been paying maintenance at the rate of Rs7,000/- for his son and Rs.3,000/- for his daughter, till date without any fail. Since the respondent has caused mental cruelty to the appellant and left the matrimonial home voluntarily, he filed the HMOP seeking divorce on the ground of cruelty and desertion.

4.The respondent/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 in-laws. The appellant/wife in her counter statement stated that only her husband had deserted her and he had not taken any steps for reunion. The respondent accused her husband for not giving proper care and treatment to her son. Despite the harassment and desertion on the part of the husband, initially she had not chosen to give any criminal complaint. But due to the conduct of the husband she was constrained to lodge the complaint under the domestic violence Act. The respondent specifically denied all the allegations in her counter.

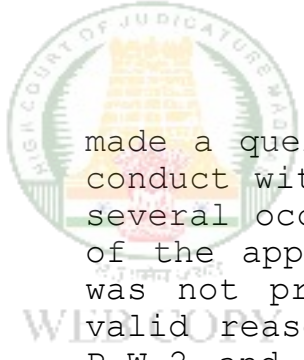
5.In order to prove their respective case, the



Appellant/husband was examined as P.W. 1. The sister of the appellant namely Mrs.Radha was examined on the side of the appellant as P.W.2 and friend of the Appellant namely Mr.Ashutosh Joshi was examined on the side of the appellant as P.W.3 and Exs.P.1 to Ex.P.3 were marked on the side of the appellant. The respondent/ wife examined as R.W 1 and her father was examined as R.W.2 and no exhibits were marked on the side of the respondent. The Trial Court after evaluation of entire evidence adduced by both parties dismissed the HMOP petition filed by the Appellant/husband on the ground that the husband has failed to prove that the conduct of the respondent/wife had inflicted mental cruelty and observed that in the interest of the Minor son, the couple should forego their egos and should rejoin. On appeal, the Lower Appellate Court has given a finding that the appellant/husband has not proved the case of mental cruelty and dismissed the Appeal. The lower Appellate Court has also given the similar observation made by the Trial Court. As against the dismissals suffered in the Courts below, the appellant/husband has come forward with this appeal.

6.I heard Mr.M.Karunanithi for Mr.D.Ramesh Kumar, learned counsel appearing for the appellant and Mr.A.V.Rajasekaran, learned counsel for the respondent and perused the entire materials available on record.

7.The contention of the learned counsel for the Appellant/husband is that the Courts below did not consider the allegation of cruelty raised by the Husband on proper factual matrix and legal perspective. Though the learned counsel has cited several events for making out a case of cruelty, he mainly argued on two contentions. Firstly, the learned counsel contended that the character assassination done by the wife to the husband by making accusation that the husband was having illicit relationship with his brother's wife, so as to destroy not only her matrimonial life but also of the brother of her husband amounts to mental cruelty. Apart from this the husband contended that his wife had gone to the extent of insisting for DNA test for him and the child born to his brother. It is the further contention that in the presence of several members of the family the respondent has defamed him by suspecting his character. The learned counsel would draw the attention of this Court through the evidence of the P.W.2 and P.W.3. The P.W.2 in her evidence has deposed that several times the respondent/wife had abused the appellant by saying that he is having illicit conduct with his brother's wife and she insisted for DNA test. Further the learned counsel would draw the attention of the Court through the evidence of P.W.3. The P.W.3, who is a friend of the Appellant has deposed that after the marriage he had invited the couple for dinner at his residence and at that time the respondent



made a query with him as to whether her husband was having illicit conduct with any other women. Further the P.W.3 has deposed that on several occasion he had seen respondent talking about the character of the appellant. The learned counsel contended that this evidence was not properly appreciated by the Courts below and without any valid reason the Courts below have ignored the statements of the P.W.2 and P.W.3. Secondly, the learned counsel would contend that the Courts below have also failed to consider the fact that the respondent has lodged a criminal complaint under domestic violence Act against her husband, his parents, brother and his wife. However the respondent has not prosecute the same and left it for dismissal for non prosecution. Further the learned counsel of the appellant strenuously contended that despite proper treatment given to his minor son, due to the attitude of the respondent the appellant had been put to severe mental agony and trauma. Therefore he prays for allowing the appeal.

8.The learned counsel for Respondent/wife has contended that both the Courts below have properly appreciated the oral and documentary evidence and rightly rejected the claim of the Appellant/husband seeking divorce. The learned counsel further contended that since there was no cruelty on the part of the wife, the appellant/ husband was not able to prove the same. Normal wear and tear situations of married life and trivial irritations cannot be termed as Mental Cruelty. The learned counsel would further submit that the husband was not interested in giving better treatment of his son. That is the reason why there was a frequent quarrel among the couples. Since the respondent was very much worried about her son, she insisted her husband to give a proper treatment, but there was no co-operation from her husband. Though she had left the matrimonial home, subsequently she had went to her husband home several times and both of them jointly went to the hospitals on several occasions. Since there is no Animus deserendi, the wife cannot be charged for desertion. The learned counsel would draw the attention of this Court through the evidence of the P.W.1. The P.W.1 had deposed that there were several meetings after the alleged desertion. The learned counsel would draw the attention of this Court to the order obtained by the respondent seeking restitution of conjugal rights. However the learned counsel fairly concedes that the order is under appeal before the lower appellate Court. Therefore the learned counsel contended that there is no necessity arose for this Hon'ble Court to interfere with the concurrent findings of the Trial Court as well as the Lower Appellate Court and he prays dismissal of this Appeal.

9.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 Hindu Marriage Act, 1955?"

10. The foremost contention of the appellant/husband is that, the respondent had been suspecting his character by saying that he was having illicit intimacy with his brother's wife. The P.W.2 namely Mrs. Radha has specifically deposed that the respondent in front of other relatives has poured allegation of illegal intimacy connecting her brother and the wife of her other brother. This evidence cannot be disbelieved. No woman would come forward to tarnish the image/reputation of a woman of her own family. This Court could understand the plight of the husband and the gamut of emotions faced by the other family members due to the false accusations. Further the evidence of P.W.3 would also substantiate the fact that the respondent was having a habit of suspecting the character of her husband. Therefore the evidence of P.W.2 coupled with the statement of the P.W.3 would fortify that the respondent was in the habit of suspecting the character of her husband. Now it has to be seen whether the act of levelling unfounded allegation of illegal intimacy would constitute cruelty. The character assassination has been taken as a major ground by the appellant/husband for seeking divorce on the ground of cruelty. The Hon'ble Supreme Court in plethora of cases has held that Character assassination by either spouse would constitute mental cruelty. Therefore the issue is no longer res integra.

11. The second contention of the learned counsel of the appellant is that lodging of false complaint also amounts to mental cruelty. It is seen from the records that though the respondent had chosen to lodge a complaint before the learned Judicial Magistrate, Pudukottai, she had not prosecute the same and left it dismissed for non prosecution. The respondent has given no explanation for not prosecuting the criminal complaint. Therefore it has to be presumed that the respondent has lodged the complaint only to harass her husband's family. The Courts below have not even discussed this aspect elaborately and simply rejected the contention put forth by the husband. The learned counsel for the appellant would contend that the respondent in her evidence has admitted that she had left the matrimonial home in the month of January 2007 and she had met her husband at Ramachandra Hospital, Porur, Chennai only in the month of May, 2009 for the treatment of their son. Therefore he argued that the desertion is also clearly established.

12. Further the respondent had categorically given the statement that she had not taken any steps for reunion. Though petition seeking restitution of conjugal rights was filed after the dismissal of the divorce petition, the respondent fairly admitted



that no steps for reunion was taken on her side for several years. Therefore the respondent has voluntarily left the matrimonial home and had not returned till date. Therefore the respondent has committed desertion. A perusal of the judgments of the Courts below would go to show that the Courts below have completely ignored the evidences of P.W.2 and P.W.3. The finding rendered by the Courts below to disbelieve the statements of P.W.2 and P.W.3 is not well founded. The reasons assigned by the Courts below in disbelieving the version of the husband without considering the evidences on records are not sustainable. Therefore compelling necessity is arisen to interfere with the findings of the Courts below. Therefore I have no hesitation to hold that the respondent is guilty of mental cruelty and desertion.

13.It was palpably clear that making allegation of illicit relationship without any basis or foundation itself was sufficient ground to pass a decree of divorce. The husband, therefore, established his case of mental cruelty by sufficient and cogent evidence. On careful examination of the statements and evidences it could be found that the wife made some statements, which assassinated the character of the husband and the husband and his family members were put to extreme humiliation. In the said circumstances, the husband was entitled to get a decree for divorce on the ground of cruelty and desertion.

14.The learned counsel of the respondent would strenuously contend that the minor son has to be given appropriate treatment. For which the support of the appellant is required. The learned counsel of the appellant/husband would submit that the husband has been paying the monthly maintenance to his children, till date without fail and he would continue the payments, apart from the educational and other expenses. Further the learned counsel for the appellant/husband would submit that the Appellant/ husband being a dutiful father would render all monetary support for the medical treatment of his son, as and when necessary and he further submit that he has mentioned the same in his written submission also. The said submission is placed on record.

15.It is an admitted fact that both the appellant and the respondent are living separately for more than 10 years. 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 tie, 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."

16. In the light of the above ratio and also by considering the oral and documentary evidences of the parties, this Court has no hesitation to hold that the Appellant/husband is entitled to decree of divorce on the ground of cruelty and desertion.

17. In the result, the appeal is allowed. The Judgment and decree in H.M.C.M.A.No.5 of 2013, dated 12.02.2016 passed by the learned Principal District Judge, Pudukottai, confirming the Judgment and Decree dated 15.03.2013 in H.M.O.P.No.57 of 2012 is set aside. The judgment and decree passed in H.M.O.P.No.57 of 2012 dismissing the petition for divorce is set aside and the petition stands allowed. No costs. Consequently connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar (CS-IV)

To

1. The Principal District Judge,
Pudukottai.

2. The Subordinate Judge,
Pudukottai.

COPY TO :

The Record Keeper, V.R. Section,
Madurai Bench of Madras High Court,
Madurai. (2 COPIES)

+1 CC To MR.A.V.RAJA SEKARAN, Advocate SR. NO.85021

+1 CC To MR.D.RAMESH KUMAR, Advocate SR. NO. 84651

Pre-delivery order made in
C.M.S.A. (MD) No.16 of 2016
17.09.2018

VSV

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