

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 05.07.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A. Nos.22 & 23 of 2007

K.Renuka

... Appellant in both cases

-vs-

S.P.Subramanian

... Respondent in both cases

Prayer in both appeals: Civil Miscellaneous Second Appeals filed under Order 43 Rule 1 read with Sections 100 and 151 of the Civil Procedure Code against the fair and decretal order of the Additional District Judge, (Fast Track Court-III), Vridhachalam dated 31.01.2006 passed in C.M.A. Nos.5 & 6 of 2005 dismissing the appeals confirming the fair and decretal order of the Principal Subordinate Judge, Vridhachalam in H.M.O.P. Nos.37 of 2000 & 76 of 2001 dated 22.02.2005.

For Appellant in both cases : Mr.R.Gururaj

For Respondent in both cases: Mrs.A.L.Ganthimathi

COMMON JUDGMENT

The appeals have been filed challenging the fair and decretal order dated 31.01.2006 passed in C.M.A. Nos.5 & 6 of 2005 by the Fast Track Judge-III, Vridhachalam dismissing the appeals confirming the fair and decretal order dated 22.02.2005 passed in H.M.O.P. Nos.37 of 2000 & 76 of 2001 by the Principal Subordinate Judge, Vridhachalam.

2.Learned counsel appearing for the appellant wife would submit that the appellant herein is the legally wedded wife of the respondent herein and they got married on 24.06.1993 as per Hindu rites and customs. At the time of marriage, the appellant was working in N.L.C. as an Assistant Engineer and the respondent was working as a Scientific Assistant 'C' in Karp Project Kalpakkam. As the appellant was provided with quarters, the matrimonial home was set up at Neyveli and the respondent has used to visit the appellant during the week ends. While so, the appellant gave birth to a male child, named Nishnath, on 27.03.1994. As the respondent was serving in Kalpakkam, the appellant was forced to manage the day to day life with her son. In the meantime, the respondent husband had started a School by

name Annai Indira Gandhi Matriculation School at Neyveli, Indira Nagar. Since the respondent was employed at Kalpakkam, one Lakshmikandhan had to meet the appellant with regard to affairs of the school. The frequent meeting between the appellant and Lakshmikandhan with regard to school affairs had paved the way for suspicion in the mind of the respondent over the conduct and character of the appellant and hence the respondent started abusing the appellant in filthy words. To avoid such an unpleasant happening and to avoid the said Lakshmikandan, the appellant requested the respondent to leave the school business. But he refused and was running the school with the help of his relatives and he has never changed his attitude. In view of the same, the appellant has filed H.M.O.P. No.37 of 2000 under Section 13(ia)(ib) of the Hindu Marriages Act, 1955 to dissolve the marriage solemnised on 24.06.1993.

3.Detailed counter affidavit has been filed by the respondent refuting the allegations by taking a stand that he was prepared to lead a cordial family life with the appellant ignoring her unreasonable and vindictive attitude in the larger interest of the family as a whole. He has filed a petition in H.M.O.P. No.76 of 2001 under Section 9 of the Hindu Marriages Act seeking restitution of conjugal rights. The Principal Subordinate Judge, Vridhachalam, taking up both the matters together, accepting the counter filed by the respondent husband that he was prepared to lead a cordial family life with the appellant ignoring her unreasonable and vindictive attitude in the larger interest of the family as a whole and considering the welfare of the son and also finding that the husband has filed a petition seeking restitution of conjugal rights, allowed the petition filed by the husband seeking restitution of conjugal rights, dismissing the petition filed by the wife seeking divorce. As against the same, the appellant has filed C.M.A. Nos.5 and 6 of 2005 holding that the appellant wife is entitled to the relief as prayed for. As against the dismissal of the same, the appellant is before this Court by way of filing the C.M.S.As. While admitting the C.M.S.As, the following substantial questions of law have been framed:

- 'a.Whether the Courts below are right in holding the suspicion raised about the wife's character does not amount to cruelty?
- b.Whether the Courts below are right in not discussing anything about the ground of desertion?
- c.Whether the Courts below are right in considering the removal of the child from the mother's custody is a cruelty?'

4.Heard the parties on both sides.

5.It is seen that the appellant wife has completely deserted the matrimonial home and ignored her own son and till date the son has also not come forward to see the mother. As the appellant till date has not come forward to live with her husband and son, who is aged about 25 years now, it would be painful for her to lead the rest of her life lonely. However, the appellant deserted the matrimonial house when her son was aged about 4 years.

6.Mr.R.Gururaj, learned counsel appearing for the appellant and Ms.AL.Ganthimathi, learned counsel appearing for the respondent argued that the appellant and the respondent were separated two decades ago and now they have been living lonely life from 02.04.1998, hence, no purpose would be served by bringing them to one home.

7.It is further seen that after the marriage was solemnised on 24.06.1993, a male child was born on 27.03.1994. At the time of marriage, the appellant/wife was working as Assistant Engineer in NLC and the respondent/husband was working as Scientific Assistant 'C' in Karp Project Kalpakkam. However, due to suspicion over fertility, they have separated and finally, the appellant/wife had filed H.M.O.P. No.37 of 2000 under Section 13(ia)(ib) of the Hindu Marriage Act, 1955, seeking to dissolve the marriage solemnised on 24.06.1993. On the other hand, when the respondent/husband had filed H.M.O.P. No.76 of 2001 under Section 9 of the Hindu Marriage Act seeking restitution of conjugal rights, the same was also allowed by the learned Trial Court. Aggrieved by the same, she had again filed an Appeal in CMA Nos.5 and 6 of 2005 opposing for reunion. It is to be noted that she did not even show any interest to see her child, who is now aged about 25 years. Such an attitude clearly shows that suspicion of the wife character does not amount to cruelty. Accordingly, the first and second substantial questions of law are answered against the appellant/wife.

8.Coming to the third substantial question of law, when the appellant/wife has not come forward to see the child for more than 21 years, in my considered view, removal of child from the mother's custody cannot be construed as cruelty, inasmuch as she was never ready for reunion nor moved any application for visitation rights, leave alone custody of child. Therefore, third substantial question of law is answered against the appellant/wife.

9.However, the Apex Court in the case of Samar Ghosh vs. Jaya Ghosh reported in 2007 (4) SCC 511, while holding that long period of continuous separation is a ground for divorce, has given certain instances as guidance for the Courts below to follow for granting divorce. The relevant guidelines are given

as under:

'(xii)Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii)Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv)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.'

10.In the light of the above said ratio of the Hon'ble Apex Court, if the case on hand is looked into, the appellant/wife has not taken any step to meet the child for the past 21 years. Secondly, even after the order was passed allowing the application filed by the respondent/ husband seeking restitution of conjugal rights, the appellant/wife has not come forward to accept the same, therefore, in my considered view, since the parties have been living separately for more than 21 years, 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. In such situations, it may lead to mental cruelty. Therefore, it is a clear case of irretrievable break down of marriage and it is impossible to preserve or save the marriage. Hence the H.M.O.P. No.37 of 2000 is decreed and the marriage is dissolved.

11.Thus, as the parties have been living separately for more than 21 years, no purpose would be served by dismissing the appeal and forcing them to go for restitution of conjugal rights. Hence, in such view of the matter, the appeal is allowed granting divorce to the parties. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vga

To

1.The Additional District Judge,
Fast Track Court-III,
Vridhachalam.

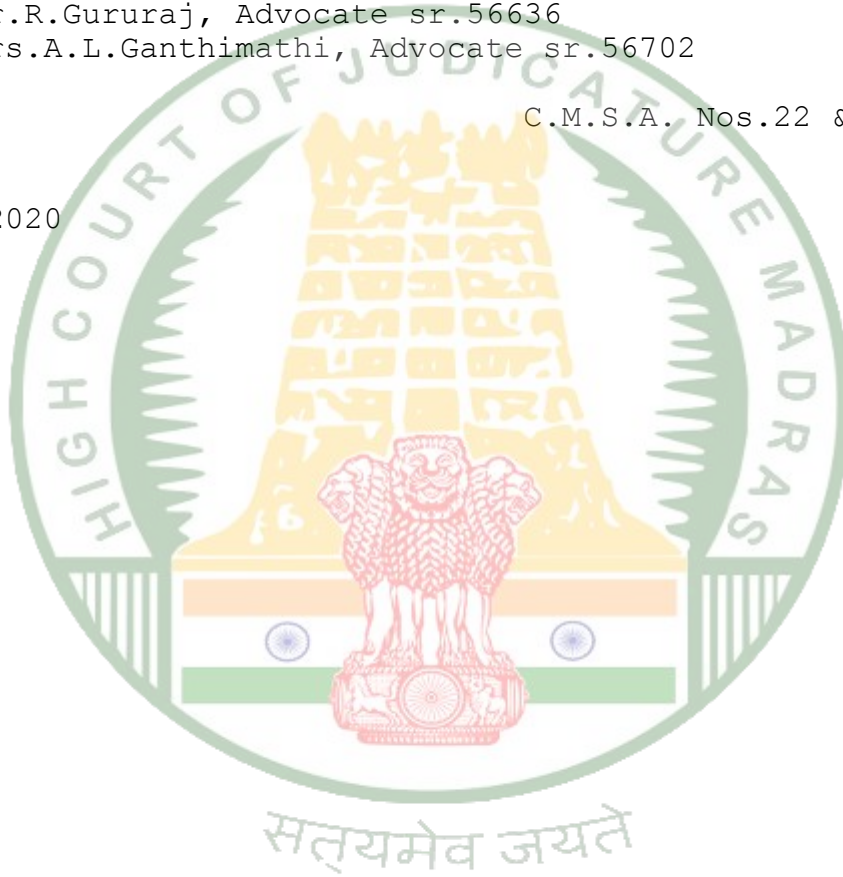
2.The Principal Subordinate Judge,
Vridhachalam.

+2cc to Mr.R.Gururaj, Advocate sr.56636

+1cc to Mrs.A.L.Ganthimathi, Advocate sr.56702

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