

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 19.09.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.No.20 of 2011

M.Maruthamuthu

... Appellant/Petitioner

Vs.

Amsaveni

... Respondent/Respondent

Civil Miscellaneous Second Appeal is filed under Section 28 of Hindu Marriage Act r/w. u/s.13(1)2A of Hindu Marriage Act r/w u/s 100 of CPC to set aside the fair order and decretal order of the Hon'ble I Additional District Judge of Coimbatore in C.M.A.No.32 of 2008 dated 20.08.2010 and reversing the Judgment and Decree in H.M.O.P.No.17 of 2006 dated 5.12.07 passed by the Subordinate Court, Udumalpet.

For Appellant : Mr.V.Chinnasamy

For Respondent : No appearance

J U D G M E N T

The appellant has come forward with this appeal to set aside the order passed by the I Additional District Judge, Coimbatore in C.M.A.No.32 of 2008, dated 20.08.2010, reversing the Judgment and decree in H.M.O.P.No.17 of 2006, dated 05.12.2007 passed by the Subordinate Court, Udumalpet.

2.He raised the following substantial questions of law;

(a)Whether the appellate Court totally change at he factual circumstances relied on by the trial Court based on evidence?

(b)Whether it is essential to name the person whom the wife used to say that she was only interested in marry him for the purpose of establish cruelty?

(c)Whether the act of ore-union after filing a petition for restitution of conjugal rites will take away the right of filing a petition for divorce on the ground of past and subsequent cruelty under the Hindu Marriage Act?

(d) Will not any initial difference of opinion difference of opinion culminate into cruelty subsequently making the ground for divorce under the Hindu Marriage Act?

3. The case of the appellant is that he got married to the respondent on 19.02.1999 at Lakshmi Thirumana Mandapam, Udumalpet as per the Hindu Customs. Out of wedlock, a female baby named Latchana Devi was born to them and the girl child was 6 years old when the petition seeking divorce was filed. The appellant submitted that the respondent had no intention to get along with the married life and from day one she started telling that she was supposed to get married to another person from Tiruppur but, instead her parents made her to marry the appellant and that she used to scold the appellant in unparliamentary words. Further, the respondent has also averred that the respondent now and then, used to travel to Tiruppur and that neither did the respondent take care of the child nor did she do any household work.

4. While so, on 08.06.2005, when the appellant was away, the respondent along with the child left the matrimonial home and she took away with her a sum of Rs.20,000/-. Later, when the appellant went to mediate the matter, the respondent threatened that if he compels her to live with the appellant, she will give a police complaint and also insulted the appellant's family. Left with no other option, the appellant herein had filed an application in H.M.O.P.No.47 of 2005 for restitution of conjugal rights.

5. Thereafter, the appellant and the respondent joined together and they were living as husband and wife as earlier. However, after some time, the respondent started behaving in the same manner and on 10.02.2006, she along with her brother Kanagaraj threatened the appellant that if he does not part with Rs.1,00,000/-, she will give a complaint to the Police on false allegations and if he pays the same, she is willing to give him divorce. Thereafter, on 15.02.2006, the appellant requested the respondent to live with him, however, she threatened him that she will give a police complaint against him if he does not give the money demanded.

6. Thereafter, the Appellant had filed a petition for divorce on 20.02.2006. No counter affidavit has been filed, instead, the husband has filed an affidavit of undertaking given by the wife stating that she has received all the jewels which was in the possession of the appellant and she is in possession of 2 ½ sovereigns of gold, which was given by the appellant and she has also undertaken that she will not give any complaint before the Police regarding dowry or any other matter. The lower Court below has passed a Judgment and Decree on 05.12.2007 after considering all the aspects and gave a finding that the respondent without any reason had left the appellant herein and

is living separately and that the appellant has every right to seek for a divorce from the respondent and based on the Judgments cited and other materials and that the respondent as per Hindu Customs is not living with the husband and neither has tried to even live with the husband and she has been living on her own, passed a decree that the marriage held between the appellant and the respondent on 19.02.1999 has been dissolved.

7. Immediately thereafter, the wife filed an appeal before the I Additional District Judge at Coimbatore in C.M.A.No.32 of 2008 denying all the allegations and also pointed out the material and factual errors committed by the lower Court. The Appellate Court considered the said submissions made in the appeal filed by the respondent/wife and had reversed the Decree and Judgment of the lower Court and has held that except the vague and general allegations about the respondent going to Coimbatore and Tiruppur without informing the appellant/husband, no other allegation with specific instances of cruelty has been specifically spoken by the appellant. It has also held that when, H.M.O.P.No.47 of 2005 had been filed by the appellant for restitution of conjugal right, wherein after, both the appellant and the petitioner have agreed to live peacefully. This would show that the appellant had condoned the past events of alleged cruelty mentioned in the petition and had taken her back after filing a petition for restoration of conjugal rights and therefore, when there are no materials produced, the appellant cannot seek for divorce on the same grounds of cruelty as before. Further that, the lower Court has granted divorce based on two grounds; desertion and cruelty, which has not been proved by the appellant/husband and the Judgment and Decree in H.M.O.P.No.17 of 2006 was set aside by an Order dated 20.08.2010. Aggrieved by the said order, the appellant has come before this Court with the present appeal.

8. Notice was issued to the respondent/wife. However, the learned counsel for the respondent/wife had filed a memo stating he had sent a letter to the respondent to get instructions but, it was returned with an endorsement as "Not Known" and that they have also contacted the lower Court counsel who appeared for the respondent, but, he himself could not contact the respondent. Hence, the respondent's name was directed to be printed in the cause-list, but, the respondent did not appear through an advocate or in person and thereafter, the matter was taken up for final disposal.

9. The learned counsel for the appellant submitted that due to the cruelty committed by the respondent, the appellant had to file the petition for divorce. He further submitted that from the day one of the marriage, the respondent tortured the appellant and that she had the habit of going away without informing the appellant to Tiruppur and she was also taking away the money which was kept at home. All these things had caused a

mental agony to the appellant and hence, he had filed H.M.O.P.No.47/2005 for restitution of conjugal rights. In spite of the above facts, the appellant condoned the acts of the respondent and they lived together for some time. But, on 10.02.2006, the respondent along with her brother Kanagaraj threatened the appellant to part away with Rs.1,00,000/- otherwise, that she will give a police complaint against him on false allegations and caused mental agony.

10.At the time of cross-examination it was brought to the knowledge of the Court that certain materials such as gold ornaments have been taken by the wife and the lower Court has come to the conclusion that when the wife has taken the belongings of her from the husband, when the matter is pending, it would clearly establish that the wife had no intention to live with the husband/appellant and even though the appellant was ready to accept the respondent and tried to live with her, in spite of the mental torcher, was accepted as a valid reason and the lower the Court passed a decree granting divorce.

11.The Appellate Court, without appreciating the factual evidences produced, allowed the Civil Miscellaneous Appeal when the respondent/wife has committed cruelty which was not considered by the lower Court. When the wife wanted to marry another person in Tirupattur District, it was not considered by the appellate Court and stating that no materials has been produced by the appellant to prove that the respondent wanted to marry another person and that there was no specific pleadings by the appellant regarding the unparliamentary words used by the respondent, the Appellate Court reversed the order passed by the lower Court. The Appellate Court has wrongly come to the conclusion that the Act of cruelty has been condoned by the husband and set aside the lower Court decree that when the plea of cruelty is not established by the husband, the respondent is entitled for restitution of conjugal rights. The Appellate Court has wrongly come to the conclusion that there was only a difference of opinion between the husband and the wife and there is no such evidence that there was an act of cruelty committed by the wife. Hence, he prays that the appeal should be allowed on the above cited questions of law.

12.It is seen from the appeal grounds filed by the respondent that it is the appellant who had sent the respondent and the her child without maintaining them and the respondent is working for her livelihood and to take care of the child. In the appeal she has stated that as per Section 13(1)(b) of the Hindu Marriage Act, there should be separation not less than two years and only then, a desertion ground can be raised but, as per the appellant she left the husband only on 08.06.2005 and he immediately filed a petition within 10 days of her separation on 20.02.2006. This would not establish that the wife had deserted the husband and a valid ground for desertion.

13.It is also stated that cruelty defined as per Section 13(1)(a) of the Hindu Marriage Act, was not established and that the respondent has caused mental agony to the appellant as that apart the statement given by the appellant that the wife informed that she did not like the appellant and she would have been married to another person at Tiruppur, instead she has married the appellant and she has been travelling to Tiruppur without doing any duties as a wife and has not properly maintained the child and on 08.06.2005, the wife has left the matrimonial house along with Rs.50,000/- , there is no evidence to prove the said allegation.

14.Further that he has also admitted that she has not scolded his parents in unparliamentary words and she has also called from Coimbatore and informed her husband from Coimbatore and therefore, the statement made by him that she had gone to Tiruppur without informing has to be rejected. He had not established the fact that she went to Tiruppur or to Coimbatore along with a person who was having an affair with her. That being the case, he has to establish the said allegations as true by examining witnesses or proving the same with some material evidence. While filing H.M.O.P.No.47 of 2005, these allegations were made and later, assuming even if the wife has committed the same, he has condoned the said acts and has taken her back and started living together. When the appellant was not able to prove any mental agony was caused by the wife, the said submissions and the pleadings cannot be accepted.

15.All these factors would show that the appellant has not proved that there was a cruelty caused by the wife without any doubt. In the cross-examination of P.W.1 the appellant herein has deposed that he was depending on his brother's salary and admitted that the respondent has not threatened him. When that being the case, the pleadings of the appellant that the respondent demanded Rs.1,00,000/- and has threatened him that she will give a police complaint is found to be false.

16.Based on the materials available, this Court is not agreeing with the arguments of the appellant counsel. Even though the wife had not appeared before this Court, this Court has considered the appeal grounds filed in the appeal by the wife and has come to the conclusion that the appellant himself who was waiting for a chance to leave the wife and the child, had filed a petition seeking divorce, that too within 10 days from the date of wife leaving from the matrimonial home.

17.It is stated by the appellant that the wife informed that she did not like the appellant and she would have been married to another person at Tiruppur, instead she has married the appellant and she has been travelling to Tiruppur without doing any duties as a wife and has not properly maintained the child and on 08.06.2005, the wife has left the matrimonial house along with Rs.50,000/- and thereby, caused cruelty, but, there is no evidence produced to prove the same.

18.In the absence of any material to show that the respondent/wife has caused mental agony or deserted the appellant, this Court is of the view that the Civil Miscellaneous Second Appeal has to be dismissed. Consequently, the order passed by the I Additional District Judge, Coimbatore in C.M.A.No.32 of 2008, dated 20.08.2010, reversing the Judgment and Decree passed in H.M.O.P.No.17 of 2006, dated 05.12.07, passed by the Subordinate Court, Udumalpet is upheld. No costs.

-s/d-  
Assistant Registrar

True Copy

Sub-Assistant Registrar

tsg  
To

1.The I Additional District Judge,  
Coimbatore

2.The Subordinate Judge,  
Udumalpet.

3. The Section Officer,  
VR Section,  
Madras High Court,  
Chennai

+1 cc to Mr.V.Chinnasamy Advocate sr81502

C.M.S.A.No.20 of 2011

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