

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 16.12.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.NO.47 OF 2011

AND

M.P.NO.1 OF 2011

D.Babu Natarajan

... Appellant/Appellant/
Petitioner

Vs.

B.Jagatheeswari

... Respondent/Respondent/
Respondent

Civil Miscellaneous Appeal is filed under Section 9 of the Family Courts Act, r/w Section 100 of Civil Procedure Code to set aside the decree and Judgment passed in C.M.A.No.11 of 2010 dated 17.03.2011 by the learned Principal District Judge, Thiruvallur confirming the order in H.M.O.P.No.114 of 2009 dated 10.03.2010 by the Sub Court, Poonamalli.

For Appellant : Mr.V.S.Kesavan

For Respondent : No appearance.

J U D G M E N T

The appellant has filed the present Civil Miscellaneous Appeal under Section 9 r/w Section 100 of Civil Procedure Code to set aside the decree and Judgment passed in C.M.A.No.11 of 2010 dated 17.03.2011 by the learned Principal District Judge, Thiruvallur confirming the order in H.M.O.P.No.114 of 2009 dated 10.03.2010 by the Sub Court, Poonamalle.

2. The appellant herein, who is the husband of the respondent had filed a petition, viz., H.M.O.P.No.45 of 2008, under Sections 9 & 13(1)(ia) (ib) r/w 3A of Hindu Marriage Act with a prayer to pass a decree and Judgment ordering restitution of conjugal rights to the appellant or in alternate to grant divorce. The appellant had worked in Dena Bank and got voluntary retirement. After marriage, the appellant and the respondent had

lived in various places, due to his employment and for the past six years, they were living in Arani, which is the native place of the appellant. Out of the wed lock, two sons, namely, Gopikrishnan and Hariharan, were born and aged 27 years and 20 years respectively [at the time when the H.M.O.P was filed]. The respondent went to Chennai under the guise that her mother has to undergo a surgery and even after the operation was completed, the respondent did not return to Arani, but she has taken a rented house at Chennai and living there with her children without returning to Matrimonial house. In spite of repeated request made by the appellant through various letters and calling her in person, to come back to Arani and live with him, the respondent refused to comply with the said request of the without any valid reason.

3. It is the further case of the appellant that as a hindu wife, the respondent ought to live with her husband, but she had deserted without any reasonable cause. The respondent's attitude is against law, Manu Sasthra, Dharma and against Natural justice. The appellant had written four letters and the respondent sent a reply dated 02.04.2008 containing false allegations accusing the appellant, without any basis and she did not resume to matrimonial home. Due to the said act of the respondent's wife, the family is separated and the appellant had got a sorry figure in front of relatives and there was a mental agony even among the sons and the appellant had filed all the said letters to show that he has suffered mental agony because of the act of the respondent / wife.

4. Moreover, according to the appellant, he had issued a legal notice on 21.07.2008 stating that though he had written letters and sent the said notice, neither she had given reply nor she was willing to live with the appellant and she is very adamant. Hence the appellant had filed a petition seeking the aforementioned prayer.

5. In contrary, a counter was filed by the respondent / wife denying all the allegations and she has submitted that it is the appellant, who had invented all the problems in order to get rid of her company. The marriage was solemnised on 06.02.1981, they have got two sons, who are grown up and from the date of her marriage, the appellant was cruel and used to torture her mentally. Though the appellant was placed under transfer to several places, i.e., Mumbai, Thane, Nellore and Arai, due to his avocation, the respondent had discharged her duty as dutiful wife. The appellant had obtained voluntary retirement and all his service benefits were used for his own purpose and he has not given single pie to the respondent and her children. All the cruelty committed by the appellant were tolerated by the respondent in order to safeguard the marriage for the sake of

children. Further, their elder son got employment in Sriperumpudur and with the consent of the appellant only, the respondent came to Chennai for the sake of future career of her sons and the appellant had also agreed to come to Chennai, whereas, contrary to the same, the appellant has filed a petition to harass the respondent and whenever the appellant came to Chennai, he used to threaten the respondent to give consent for divorce and he also met the landlord with false allegations, which made the landlord to make them to vacate the said house. Though the appellant has given such sort of troubles to the respondent, she has tolerated everything for the sake of children and the appellant has raised the same allegation from the year 1985 onwards. The respondent is very much willing to join with the appellant and in the interest of children welfare and career, the appellant should give up his adamant attitude and join with the respondent.

6. Besides the above, it is stated in the counter affidavit that the 2nd son of the respondent has completed his B.E and he is in search of a good job and the same will be possible only in Chennai and after a settlement in the employment, the paramount duty of the parents is to make an arrangement for their children's marriage. The appellant instead of performing his duties as a father, is trying to escape from the responsibilities by filing this petition on the pretext of false and frivolous allegations.

7. A reply affidavit was filed by the appellant / husband denying all the allegations and the specific averments that she is taking care of the children for 27 years and her son has completed B.E is denied stating that he has got arrears papers. The appellant is owning a house at Arani, every person, who retired from service would have a wish and will to stay only at their own house in a peaceful atmosphere and his own house was mortgaged with the Bank for getting educational loan and the said loan has to be repaid after the completion of the course. If the appellant come down to Chennai, cost of living in Chennai is very high and he can live his retired life with minimum expenses at Arani, a small town and his 1st son is getting a sum of Rs.8,000/- as salary and the same will not be sufficient for him to get married.

8. Also in the reply the appellant had submitted that he is demanding restitution of conjugal rights and the Court below has taken only Section 9 Petition and after perusing the averments, the court below had stated that the wife has to take care of children first and she wanted to get them in married and she is willing to go back to Arani was considered, since the children after three years, would settle their life, the court

below had directed the respondent / wife to live in Chennai for three years and later after three years, the wife has to stay with the appellant / husband either at Arani or at Place where the appellant / husband wants to live, thereby allowed the petition. Aggrieved by the said order, the appellant / husband filed a appeal reiterating what he had stated in the reply affidavit and also stated that the trial judge failed to see that the appellant is at the age of 59, who naturally requires the affection and personal care of his wife, which was totally ignored. While imposing a condition on the appellant to grant the order of restitution of conjugal rights, the trial court had erred in not considering the other Exhibits A.1 to A.9. The court below had ordered restitution on a condition that the appellant should come and live in Chennai for three years and later, she can join him after three years, is against law. In consequence, the appellate court has taken into account of all the evidences and considering the same, has confirmed the order passed by the trial Court. As against the same, the appellant has filed the present Civil Miscellaneous Second Appeal.

9. The learned counsel for the appellant submitted that the court below erred in holding that the appellant harassed the respondent based on two letters dated 15.03.1983 (Ex.B.1) and 11.05.1983 (Ex.B2) without considering the fact that the couple lived happily for more than 25 years and even those two letters do not contain anything so as to term as harassment, as decided by the courts below.

10. The learned counsel for the appellant contends that the court below erred that the said H.M.O.P. was filed under Section 13 of Hindu Marriage Act in order to threaten the respondent, whereas the fact remains that the petition was filed only under Section 9 of the Act alone and hence pleaded to set aside the order passed by the court below.

11. Though notice has been ordered as early as on 19.09.2011 by this Court through Court as well as privately and the same has been served on the respondent, there is no appearance on her behalf either-in-person or through counsel.

12. Heard the learned counsel for the petitioner and perused the documents placed on record.

13. Admittedly, the marriage between the appellant and the respondent had taken place on 06.02.1981. The lower court had passed an order in the year 2010 by directing that the respondent / wife to live with her children for three years and thereafter, with the appellant either at Arani or wherever the appellant is residing and the same was confirmed by the lower appellate court in the year 2011. From the year 2010 till now, 9

years have elapsed and hence the first part of the order has become infructuous.

14. With regard to the second part of the order, viz., the respondent / wife has to live with the appellant / husband at Arani or wherever the appellant is residing, is now being pressed by the learned counsel for the appellant. However, there is no appearance on the side of the respondent / wife. The learned counsel for the appellant contended that restitution of conjugal rights has to be ordered, as the appellant is suffering without wife companionship and from the averments in the H.M.O.P. and the evidence, it is clear that the appellant has given voluntary retirement and wants to settle at Arani and lead a happy life. On the other side, since the children are aged 27 and 20 years at that time and wanted to pursue their career in Chennai, where more companies are situated and they wanted to get a better life, therefore, in view of the children wish, the respondent/wife had shifted to Chennai for taking care of both her sons and that they are unmarried at the time of filing the petition. Hence the Court below had rejected the claim of the appellant/husband.

15. It is pertinent to note that the respondent/wife also needs some time for settling the children, who were 27 and 21 years respectively and wanted to pursue their career. Since the second son has completed B.E., it is possible for him to stay at Chennai rather than staying elsewhere. Hence the respondent/wife's contention is also to be looked.

16. It is to be noted that when the appellant/husband had worked in Bank, wherever the husband gets transferred, from the date of marriage, respondent/wife was with him and only after retirement, she wanted to take care of the children and in the counter affidavit, it is contended by the respondent that she had undergone all sorts of torture committed by the husband only for the sake of children.

17. The Restitution of Conjugal rights cannot be forced on a person to do so and it is not an order to be complied with mechanically. It is only a love and affection, which flows from one to another and without love and affection, there cannot be an compassion in life, as such, even if the petition is allowed, it will be only a decree written in paper and there cannot be any forceable execution of the same by the appellant / husband. It is to be handled in a careful manner, as such, since nearly 9 years have elapsed from the date of filing of H.M.O.P., no fresh material found to take a different view, hence this Court is not inclined to interfere with the 2nd part of the order passed by the courts below.

18. The appellant / husband's statement that he wanted to live with his mother can be viewed in either way, i.e., when the appellant intends to live with his mother and take care of her, the same applies to him, also, where the appellant's wife, viz., the respondent wants to take care of her children is to be decided in equal parameters. There is a mutual binding and reciprocation of love between husband and wife when they live together, here in this case, when the husband has not taken any steps with regard to the career of the children and simply insisted them to stay at Arani, as per his wish, the respondent/wife on the other side was on the point of settling the future life of their children, hence, she has taken a rented house and resided in Chennai, rather than that, nothing contrary has been produced to show that the respondent/wife is not willing to live with the appellant/husband at any other point of time. The counsel is also not in a position to inform whether there was any change of circumstances in the life between the parties.

19. The respondent/wife had only sought time for settling their sons and that she also insisted the appellant to come to Chennai and live with them till such time. That being the case, in the absence of any evidence/averment/explanation from the appellant that she has not obeyed the orders of the lower Court or lower appellate Court, this Court is not inclined to interfere with the second part of the order passed by the Courts below.

In the result, the Civil Miscellaneous Second Appeal is dismissed. Consequently, connected miscellaneous petition is closed. No costs.

Sd/-

Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

ssd

To

1. The Principal District Judge, Thiruvallur.
2. The Subordinate Judge, Poonamalli.

Copy To

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

C.M.S.A.No.47 of 2011 and
M.P.No.1 of 2011

RSK(CO)
CS/30/09/2020