



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.04.2019

CORAM

THE HON'BLE MR.JUSTICE M.GOVINDARAJ

CMSA NO.27 OF 2013  
AND M.P.NO.1 OF 2013

Rajeswari

... Appellant/Petitioner

VS.

Kannan

...Respondent/Respondent

PRAYER: Civil Miscellaneous Second Appeal filed under Section 41 Rule 1 read with Section 100 of Civil Procedure Code read with Section 28 of the Hindu Marriage Act against the judgment and decree dated 18.10.2012 made in CMA No.9/2011 on the file of District Judge Tiruvarur confirming the order and decreetal order dated 20.09.2011 made in HMOP No.14/2010 on the file of Sub Court Tiruvarur.

For Appellant : Mr.J.Nandagopal  
For Respondent : Mr.P.Thiagarajan

#### J U D G M E N T

The appellant is the wife. She filed a petition for divorce on the grounds of cruelty and desertion. According to the appellant, she got married to the respondent on 02.09.1994 and started their life in the village itself. The respondent / husband was not employed and for his personal expenses, he borrowed all over the village and refused to heed the requirements of the appellant / wife with regard to discharge of his duties as husband / head of the family. In the meanwhile, on 31.12.1997 a male child was born to them. Since the respondent failed to maintain the family, the appellant borrowed money from her father to survive. She continued to live with the respondent with a fond hope that one day he will realise his mistakes and secure employment and maintain the family. On the other hand, the respondent used to consume liquor and suspected the fidelity of the appellant / wife. The creditors have demanded repayment of money and abused the appellant's father on several occasions. During January 2006, the respondent left home. The efforts taken by the appellant to contact him proved futile. Since the



respondent/husband was away from home without enquiring about the well being of the appellant and his son and also she felt ashamed, on hearing the abuses of his creditors, the appellant was constrained to file a petition for divorce on the grounds of cruelty and desertion.

2. The respondent / husband controverted the allegations made by the appellant / wife and would state that he decided to go out of the family for securing employment. He secured employment at Kangeyam and thereafter Erode and used to send money once in three months to his family. He sent money to his father-in-law's bank account and also sent through money order in favour of his father-in-law. The allegation that he did not send money to the family, but only to the creditors is utterly false. Since the petition for divorce was filed at the instigation of the appellant's father, the same is liable to be dismissed.

3. In support of the case, the appellant examined herself as P.W.1 and marked the marriage invitation and the lawyer's notice issued to the respondent with acknowledgement as exhibits. The respondent examined himself as R.W.1., appellant's father as R.W.2 and friend from his village as R.W.3 and marked money order receipts, SBI challans, passbook and letters sent by him as exhibits. The Trial Court dismissed the case holding that it was not proved by convincing evidence and the same was confirmed by the Lower Appellate Court.

4. Record of proceedings dated 17.11.2017 shows that since the matter pertains to the matrimonial issue, this Court has referred it for mediation. However, no amicable settlement was arrived at between the parties.

5. It has to be seen as to whether the decisions of the Courts below are correct and justified and whether cruelty and desertion as specified under Section 13 of the Hindu Marriage Act, 1955 is made out. The appellant has categorically stated that the respondent/husband left home in January 2006 and thereafter his whereabouts were not known for five years till the date of filing the petition. The lawyer notice sent by her on 04.01.2010 even though acknowledged by him, was not replied. He had never sent money to his wife or to his child for maintenance of the family. He sent money to repay the debts borrowed from her father and various creditors from 2009. She was not aware of those payments made to her father. In her evidence, it is categorically stated that she has not contacted her husband ever since 2006. It has to be seen as to whether the respondent has proved that he visited the village and that he has not deserted his wife.



6. During cross examination, the respondent would give vague answers that he used to visit the village, but he was not able to give the specific dates of his visit. The evidence of the respondent goes to show that he did not remember on which date and what time he went and/or he came to Ammaiappan. Further, in the cross examination, his admission that he has not filed any evidence as proof for sending money to his wife or payment of school fee to the son or for having met the wife and children between the stated period of desertion. He would admit that he sent money only to his father-in-law and not to his wife. Eventhough it is stated that the appellant/wife is aware of his whereabouts, no proof as such either by letter or some evidence or by independent witnesses was adduced.

7. Curiously, the appellant's father was examined as R.W.2, wherein he has categorically stated that he met the respondent only in 2008 or 2009 at Erode and that he demanded the loan amount given to him to the tune of Rs.1,30,000/-. Further, he denied receipt of money from the respondent for the family and reaffirmed the above version in his cross examination too. A friend of the respondent, who deposed as R.W.3, would give vague answers with respect to the visit of the respondent to the native village and all other incidents. All the answers given by R.W.3 appears to be a hearsay for the purpose of supporting the respondent. There is no categorical evidence that the respondent had visited the village and that he has not deserted the wife. But, elaborate examination of witnesses, which categorically shows that the respondent deserted his wife between 2006 and 2010. There is no proof on the side of the respondent for visiting the village and that the wife had knowledge about his whereabouts. Admittedly, the respondent has not paid even a single penny to the wife or his son towards maintenance. Eventhough it is stated by the respondent that he left the house for the purpose of earning money and maintain the family, there is no iota of evidence of having done such efforts for maintenance. The Trial Court has observed so many irrelevant facts, which are not found in evidence, for the sake of justifying its decision. In fact, the findings are without any legal evidence and the Lower Appellate Court has confirmed the same without application of mind. Therefore, the findings of the Courts below on the question of desertion are liable to be set aside. This Court is of the considered opinion that the question with regard to desertion is clearly proved and the judgment and decree passed by the Courts below are erroneous and contrary to Section 13 of the Hindu Marriage Act.

8. Learned counsel for the respondent relied on a judgment of this Court in K.KANNUSAMY VS. T.SUMATHI [2017 SCC ONLINE MAD 5811] wherein it is held as under:





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in the suit notice later taken a different plea of willful desertion. When there is a specific allegation that the respondent being subjected to harassment by the appellant herein which is the cause for desertion, Ex.P.10 dated 24.10.1995 receipt for return of sridhana properties also throw some light that the appellant was holding the sridhana properties of the respondent, till the disposal of the divorce petition.

7. In Ganesan, A. v. Gnanasoundari (1995 (1) L.W 113) this Court has held as follows:-

"The expression "desertion" in the context of matrimonial law represents a legal conception and is one very difficulty to define. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. It is a well established principle that the spouse who withdraws from cohabitation for what is described as a good cause, such as cruelty, cannot be said to be guilty of desertion. For, in such a case, it is the conduct of the offending spouse that is the cause of separation and the spouse who leave the matrimonial home cannot be said to have acted from any animus deserendi and it is also settled that the legal burden throughout the case is on the petitioner to prove that the wife deserted him without cause."

8. It is now well settled law that desertion should satisfy two conditions viz., factum of separation and the intention to bring cohabitation permanently to an end. In this case, from the facts, we have already seen that the fact of separation is admitted however, the desertion was not willful but forced on the respondent."

10. He would also rely on a judgment of the Hon'ble Supreme Court in SUSHMA SUBHAS KOSHE VS. SUBHASH DATTATRAYA KOSHE [2005 (12) SCC 204] wherein it is observed as under:

"2. The respondent husband filed a petition



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for divorce before the Family Court, Pune for granting a decree of divorce on the ground of cruelty as well as wilful desertion, which was dismissed after recording the finding that none of the two grounds was proved. Against the said order, an appeal was preferred before the High Court of Bombay by the husband, which has allowed the appeal and granted decree for divorce as there was no chance of reunion between the parties without going into the merits of the grounds for divorce alleged by the husband. In our view, the procedure adopted by the High Court is wholly unknown to law. When an appeal was preferred by the husband, it was incumbent upon the appellate court to discuss the evidence adduced on behalf of the parties in relation to the grounds for divorce and thereafter only the High Court should have decided the appeal. The said procedure having not been adopted, the impugned order suffers from serious legal infirmity and is liable to be set aside alone. "

11. The judgment of this Court in K.Kannusamy's case (cited supra) clearly states that the principles for the relief in matrimonial cases should be strictly adhered to. But in the instant case, the question of desertion has been categorically proved by the wife and her evidence was not discredited. Secondly, the judgment in Gandhi's case (cited supra) relied on by the learned counsel for the respondent supports the case of the appellant. It is not the case of the respondent that he abandoned her wife with her consent and with reasonable cause. The desertion shall be proved that it was without cause. If the desertion by the respondent was due to cruelty or due to the conduct of the appellant/wife, one can understand that the same is not without cause. Here, the desertion was proved on account of indebtedness of the husband. Even on such occasion, the husband could have contacted the wife and informed about his whereabouts and protected himself from the clutches of his creditors. In the instant case, there is no evidence to show that the respondent/husband got separated from the appellant / wife for that cause with her consent. On the other hand, it is well proved that he left the home without informing his wife and the wife was living without knowing his whereabouts. Even the legal notice sent by her was not received by the husband, but was not replied. Had he set out the reasons or denied the contentions at the first instance by replying the same, this Court can consider his submissions. On the other hand, the judgment relied on by the learned counsel for the respondent



supports the case of the appellant. He also relied on the judgment of this Court in P.PREMAVATHY VS. J.VENKATESAN [2012 (2) MWN (CIVIL) 265] which also does not come into the rescue of the respondent. Therefore, this Court is of the considered opinion that the appellant has made out a case for divorce on the grounds of desertion. It is well settled that denial of matrimonial bliss itself will amount to cruelty. The respondent had denied the same to the wife and the child grown up in a fatherless atmosphere. Denial of love and affection, parental care and thereby the mental agony suffered by the wife will amount to cruelty. On these counts, wife has made out a case for cruelty also.

12. Accordingly, the judgment and decree dated 18.10.2012 passed in CMA No.9/2011 by the learned District Judge, Tiruvarur confirming the order and decreetal order dated 20.09.2011 passed in in HMOP No.14/2010 by the learned Sub Judge, Tiruvarur, is set aside and the Civil Miscellaneous Second Appeal is allowed. No costs. Consequently, connected miscellaneous petition is closed.

13. Registry is directed to issue a decree and judgment in favour of the appellant.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

TK  
To

1.The District Judge  
Tiruvarur.

2.The Subordinate Judge  
Tiruvarur.

+1 CC to Mr.J.Nandagopal, Advocate sr 42469.

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VD(CO)  
SP(19/09/2019)