

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 25.01.2019

DELIVERED ON : 20.02.2019

CORAM

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

C.M.S.A.No.32 of 2016

Srinivasan

... Appellant

-Vs-

Tharangini

.. Respondent

Civil Miscellaneous Second Appeal filed under Section 13(1) (ia) of the Hindu Marriage Act read with Section 100 of C.P.C. against the judgment dated 05.04.2016 in H.M.C.M.A.No.1 of 2014 on the file of the learned I Additional District and Sessions Judge, Vellore reversing the order dated 08.08.2012 passed in H.M.O.P.No.96 of 2008 on the file of the Sub-Court, Vellore.

For Appellant : Mr.E.Kannadasan

For Respondent : Mr.T.Dhanya Kumar

JUDGMENT

This Civil Miscellaneous Second Appeal has been filed by the appellant against the judgment dated 05.04.2016 passed in H.M.C.M.A.No.1 of 2014 on the file of the learned I Additional District and Sessions Judge, Vellore, reversing the order dated 08.08.2012 passed in H.M.O.P.No.96 of 2008 on the file of the learned Sub-Court, Vellore.

2. The appellant is the husband and the respondent is the wife. The appellant had filed H.M.O.P.No.96 of 2008 under Section 13(1)(ia) of the Hindu Marriage Act, 1955 against the respondent wife for divorce.

3. It is an admitted fact that the marriage between the appellant and the respondent was solemnized on 29.04.2007 at

Ambal Thirumana Mandapam, R.S. Road, Gudiyatham, Gudiyatham Taluk, Vellore District according to the Hindu religious rites and caste customs. The marriage was not consummated.

4. The case of the appellant is that the marriage between the appellant and the respondent was an arranged one and the appellant had expended around Rs.1,50,000/- towards the marriage expenses. Apart from the marriage expenses, he had offered 4 sovereign gold chain to the respondent. After the marriage, both of them lived in the appellant's house for two days and in the respondent's house for 3 days. Both the appellant and the respondent and family members of the respondent decided to set up a separate family and accordingly, the respondent's family members went to Kolkata and stayed there along with spouse for about 10 days and thereafter, they returned back. After their departure, the respondent behaved in an abnormal manner and she has failed to co-operate with the appellant in each and every small matter. The respondent failed to do day-to-day house hold work. Due to her indifferent attitude, the appellant suffered mental agony/mental worries. It is averred that the respondent has refused to cohabit with the appellant daily and she had openly told that she has no interest to have sex with the appellant.

5. According to the appellant, during August 2007, the respondent was very much adamant to go to her parents house. The appellant had no other option except to bring her to his house. In Chennai Railway Station, she rang up to her parents and threatened them if they would not take back her from Katpadi Railway Station, she would commit suicide. The respondent's father told that as per the advise of the astrologist, both of them should live separately at least for three months and directed the appellant not to disturb the respondent nearly for three months. Whenever, the appellant requested the respondent to resume matrimonial life with him, she had simply told that she is not willing to live with him and want to live along with her parents. On 5.2.2008, the appellant issued a notice to the respondent calling upon her to resume matrimonial life. On 8.3.2008, the respondent replied the notice. Due to indifferent attitude of the respondent, the appellant finds very difficult to run the family. Hence, the appellant filed the petition seeking divorce on the ground of cruelty.

6. Denying the allegations set out in the petition, the respondent filed counter stating that at the time of marriage, the respondent completed 26 years and she married the appellant with lot of dreams, but the appellant betrayed the respondent and he is not having any affection towards the respondent. Even during the bed time, the appellant compelled the respondent for unnatural co-habitation. For the sake of her future life, the

respondent tolerated all the cruel behaviour of the appellant. The appellant without any rhyme or reason used to pick up quarrels with the respondent and used to find fault with each and every move of the respondent. According to the respondent, it is the appellant who forcibly sent the respondent to her parents house. The appellant wanted the respondent to behave like a slave and for the sake of her future, the respondent is not willing to state all the cruel acts subjected by the appellant. Hence, she prayed for dismissal of the petition.

7. Before the trial Court, the appellant examined himself as P.W.1 and one Darvin was examined as P.W.2 and Exs.P1 to P5 were marked. The respondent examined herself as R.W.1 and Exs.R1 and R2 were marked.

8. Upon consideration of the oral and documentary evidence, the trial Court came to the conclusion that the appellant had established his case under Section 13(1)(ia) of the Act and passed decree for divorce on the ground of cruelty. Aggrieved by the same, the respondent filed H.M.C.M.A.No.1 of 2014 before the I Additional District Court, Vellore. By the judgment dated 05.4.2016, the first appellate Court allowed the appeal filed by the respondent, thereby setting aside the decree for divorce granted by the trial Court. Challenging the reversal finding, the appellant has preferred the present appeal raising the following questions of law:

- (1) Whether or not the appellant prove that the respondent/wife had treated him with most cruelty by way of valid and convincing evidence?
- (2) Whether the Lower Appellate Court right in holding that the respondent/wife is not guilty of cruelty?
- (3) In as much as the appellant had married another woman after the divorce decree was granted by the trial court, whether or not the appellate entitled to get a decree for divorce on that ground also?

9. I heard Mr.E.Kannadasan, learned counsel for the appellant and Mr.T.Dhanyakumar, learned counsel for the respondent.

10. The learned counsel for the appellant submitted that from the date of marriage, the respondent never cooperated with the appellant and deprived the appellant of the normal cohabitation and she had picked up frequent quarrels with him and also threatened him by saying that she would commit suicide. He would submit that the respondent wants to live separately without any valid reason and she is guilty of cruelty.

11. The learned counsel further submitted that the marriage between the appellant and the respondent has become almost irretrievably broken and there is no chance of reunion among the couple. But the first appellate Court failed to note the above said facts and set aside the decree of divorce granted by the trial Court. According to the learned counsel, the first appellate Court failed to note that the appellant had married another lady, after expiry of 90 days from the date of divorce decree and since the second marriage of the appellant is good, the first appellate Court ought to have granted decree of divorce. The next submission of the learned counsel is that the oral evidence of P.W.1 and P.W.2 clearly proves that the respondent had treated the appellant with cruelty. Hence, he prayed for restoring the decree of divorce granted by the trial Court.

12. On the other hand, the learned counsel for the respondent submitted that the respondent was willing to join with the appellant and she never refused to go with the appellant and in fact, the appellant alone refused to live with the respondent. He would submit that the appellant never showed any kindness towards the respondent during matrimonial life and he never used to give respect either to the respondent or to the family members of the respondent.

13. The learned counsel further submitted that it was the appellant who forcibly sent the respondent to her parents house and the entire allegation set out by the appellant in his petition is nothing but a cock-and-bull story invented by him only to get divorce from the respondent and the first appellate Court having found the truth, rightly set aside the decree of divorce granted by the trial Court and allowed the appeal of the respondent.

14. The learned counsel next submitted that the appellant performed the second marriage in a hurried manner and that cannot be a ground for seeking divorce by the appellant. According to the learned counsel, the respondent filed the appeal in time and therefore, there is no perversity in the judgment of the first appellate Court and prayed for dismissal of the present appeal.

15. I have considered the submissions made by the learned counsel appearing on either side and also perused the materials available on record.

16. The point that arises for consideration is whether the first appellate Court was right in setting aside the decree of divorce granted by the trial Court.

17. The grievance of the appellant seeking divorce against the respondent is that she is not cooperating with him on each and every trivial issue and has caused mental agony and refused for daily cohabitation and also threatened to commit suicide, which constitutes mental cruelty to the appellant.

18. Per contra, the case of the respondent is that the appellant never showed any kindness towards her during the matrimonial life and he never used to give any respect either to the respondent or to her family members. According to the respondent, the appellant is not having any affection towards the respondent. It is the specific case of the respondent that she is always ready for cohabitation with the appellant, but the appellant is interested in unnatural sex.

19. The cruelty suffered by the appellant for seeking divorce from the respondent, as could be seen from the petition averments, is that the respondent is not interested to have sex with the appellant. In his petition, in paragraph 5, the appellant averred as under:

"5. The petitioner submits that the respondent has daily refused to cohabit with the petitioner and she has openly told that she has no interest to have sex with him. But after the great difficulty, she accepted to have cohabitation once in two days or three days. At that time of cohabitation, she simply lay along with the petitioner just like wood and wantonly failed to co-operate with him in any type. Whenever he eagerly approached her to cohabit and to lead happy married life, she has simply told that she is not willing to live with him as his dutiful house wife and wants to live along with her parents and further she has no interest to lead marital life with him as his wife."

20. It is pertinent to note that the marriage between the appellant and the respondent was solemnized on 29.4.2007. Since the appellant was working in Eastern Railway at Calcutta, after few days of marriage, they decided to have the family at Calcutta and spouses along with the family members of the respondent went to Calcutta and at Calcutta separate family was arranged at Railway quarters. According to the appellant, in Calcutta, the respondent failed to cooperate for daily cohabitation. During August 2007, the respondent was very much adamant to go to her parents house. While they reached Katpadi Railway Station, the respondent went along with him to his father's house and thereafter, she had gone to her parents house and not returned back.

21. From the narration of averments set out in the petition

filed by the appellant, it is seen that from day one of the marriage, the respondent refused to have cohabitation with him.

22. Refusal to have sex with a life partner during honeymoon does not amount to cruelty. The married life should be assessed as a whole and a few isolated instances over certain period will not amount to cruelty.

23. It is settled that mere trivial irritations, quarrels, normal wear and tear of married life which happens in day-to-day life in all families would not be enough for grant of divorce on the ground of cruelty. Only sustained unjustified and reprehensible conduct affecting physical and mental health of the other spouse may lead to mental cruelty.

24. In the present case, based on the oral testimony of the appellant that when they were in Calcutta the respondent did not allow him to have sexual intercourse cannot be said to be an issue to cause mental or physical cruelty to the appellant. On the other hand, the respondent has given reason for refusing to have sex with the appellant and the same cannot be brushed aside by the Court. According to the respondent, even during the bed time the appellant compelled her for unnatural cohabitation. There may not be any proof to prove such an allegation by the respondent. However, the plea of the respondent also cannot be brushed aside. No particulars have been given by the appellant and only vague and general allegations have been made by him. These, in my view, are not sufficient to prove that the respondent treated him with cruelty.

25. In a catena of decisions, the Hon'ble Supreme Court held that not allowing the spouse for long time to have sexual intercourse by his or her partner, without sufficient reason, causes mental cruelty to such spouse. However, in the present case, as per the version of the respondent, the appellant compelled the respondent to have unnatural cohabitation. Therefore, this Court is of the view that no fault could be attributed on the respondent qua cohabitation.

26. Parties to the marriage, tying nuptial knot, are supposed to bring about the union of two souls. It creates a new relationship of love, affection, care and concern between the husband and wife and that it brings two families together. Such ties cannot be allowed to be severed on the grounds which are ordinary wear and tear of matrimonial life.

27. As rightly argued by the learned counsel for the respondent, there will be some problem in everybody's family and such a issue cannot be treated as cruelty to anyone of the spouses to file petition for divorce. According to the

respondent, she was willing to continue the life and cohabitation with the appellant, but the appellant was refusing to take back the respondent. Even during this extended period of separation, none of the parties have taken steps for reunion or restitution of conjugal rights. However, in a hurried manner, after getting divorce decree, the appellant had contracted the second marriage.

28. In this regard, it is the submission of the appellant that the appellant married another lady after the expiry of 90 days from the date of divorce decree and the first appellate Court erred in considering the said fact.

29. As rightly recorded by the first appellate Court, decree of divorce was granted on 08.08.2012. The respondent has filed the appeal against the decree passed in H.M.O.P.No.96 of 2008 on 06.09.2012 and initially, the appeal was returned by the office and the respondent represented the same on 12.09.2012. The filing of the appeal by the respondent challenging the decree of divorce is evidenced from the decree passed in H.M.C.M.A.No.1 of 2014, where it has been clearly stated that the date of presentation of the appeal is 06.09.2012. Thus, it is clear that within the period of limitation, the respondent has preferred the appeal.

30. The contract of second marriage by the appellant is at his own risk and it is unfair on his part to state that he has not received any appeal notice from the respondent. The conduct of the appellant in performing the second marriage immediately after the decree of divorce would clearly establish that he is not interested in living with the respondent. In fact, the first appellate Court in paragraph 12 of its judgment recorded the evidence of appellant as under:-

எதிர்மனுதாரர் தற்போதும் சேர்ந்து வாழ தயாராக இருக்கிறார் என்றும்,
நான் தான் அவருடன் சேர்ந்து வாழ மறுக்கிறேன் என்றால் சரிதான்.

The above evidence of the appellant would clearly shows that the appellant is not willing to take the respondent to lead the matrimonial life. Thus, the plea of the appellant that the act and conduct of the respondent caused mental cruelty is totally unsustainable and only for the purpose of maintaining petition for divorce, the appellant has taken the said ground and having found the reality of the appellant, the first appellate Court rightly set aside the divorce granted by the trial Court.

31. However, the thing needs to be considered in this matter is spouses are living separately for a sufficient length of time. In her evidence the respondent stated that she is willing

to live with the appellant, but the appellant is not willing to live with the respondent. When that being the plea of the parties compelling the appellant to lead matrimonial life with the respondent and similarly, forcing the respondent to go and live with the appellant would not serve any purpose, as both the parties have failed to knock the door of the Court for restitution of conjugal rights and have also failed to show that they have taken effective steps for reunion. As per the pleadings, the spouses are living separately from 2007 onwards.

32. Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. In this regard, the legal position of the Hon'ble Supreme Court, in the following cases, is as under:

(1) In *Naveen Kohli v. Neelu Kohli*, reported in 2006(4) SCC 558, it has been held as under:-

"Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. The court, no doubt, should seriously make an endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties.

A law of divorce based mainly on fault is inadequate to deal with a broken marriage. Under the fault theory, guilt has to be proved; divorce courts are presented with concrete instances of human behaviour as they bring the institution of marriage into disrepute.

We have been principally impressed by the consideration that once the marriage has broken down beyond repair, it would be unrealistic for the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties. Where there has been a long period of continuous separation, it may fairly be surmised 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.

Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact.

Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied for ever to a marriage that in fact has ceased to exist".

(2) In Sukhendu Das v. Rita Mukherjee, reported in (2017) 9 SCC 632, it has been held as under:

"This Court, in a series of judgments, has exercised its inherent powers under Article 142 of the Constitution for dissolution of a marriage where the Court finds that the marriage is totally unworkable, emotionally dead, beyond salvage and has broken down irretrievably, even if the facts of the case do not provide a ground in law on which the divorce could be granted (Manish Goel v. Rahini Goel, (2010) 4 SCC 393). Admittedly, the appellant and the respondent have been living separately for more than 17 years and it will not be possible for the parties to live together and there is no purpose in compelling the parties to live together in matrimony (Rishikesh Sharma v. Saroj Sharma, (2007) 2 SCC 263). The daughter of the appellant and the respondent is aged about 24 years and her custody is not in issue before us. In the peculiar facts of this case and in order to do complete justice between the parties, we allow the appeal in exercise of our power under Article 142 of the Constitution."

(3) In Rishikesh Sharma v. Saroj Sharma, reported in (2007) 2 SCC 263, it has been held:

"4. ... In the instant case the marriage is irretrievably broken down with no possibility of the parties living together again. Both the parties have crossed 49 years and living

separately and working independently since 1981. There being a history of litigation with the respondent wife repeatedly filing criminal cases against the appellant which could not be substantiated as found by the courts. This apart, only child born in the wedlock in 1975 has already been given in marriage. Under such circumstances, the High Court was not justified in refusing to exercise its jurisdiction in favour of the appellant. This apart, the wife also has made certain allegations against her husband, that the husband had already remarried and is living with another lady as stated by her in the written statement. The High Court also has not considered the allegations made by the respondent which have been repeatedly made and repeatedly found baseless by the courts.

5. In our opinion it will not be possible for the parties to live together and therefore, there is no purpose in compelling both the parties to live together. Therefore, the best course in our opinion is to dissolve the marriage by passing a decree of divorce so that the parties who are litigating since 1981 and have lost valuable part of life can live peacefully for remaining part of their life.

6. During the last hearing both the husband and wife were present in the Court. The husband was ready and willing to pay a lump sum amount by way of permanent alimony to the wife. The wife was not willing to accept the lump sum amount but however expressed her willingness to live with her husband. We are of the opinion that he desire to live with her husband at this stage and at this distance of time is not genuine. Therefore, we are not accepting this suggestion made by the wife and reject the same."

33. No doubt, it is true that it is only the Hon'ble Apex Court, which in exercise of its extraordinary powers under Article 142 of the Constitution of India, can pass such orders to do complete justice to the parties. The said power is not vested with any other Court in the country.

34. Inordinate long period of separation, where the initial cause of separation can now be said to be hardly relevant, that the marriage between the parties can be said to be nothing but a

fiction. There is practically no hope for any revival or survival. The matrimonial bond exists, if at all, only in form and not one bit in substance. One would do well to recall here the words of the Hon'ble Supreme Court in the case of Naveen Kohli v. Neelu Kohli, reported in (2006) 4 SCC 558, extracted supra.

35. It is admitted that the marriage has not been consummated. Nearly 11 years have elapsed since their separation during which there was no single attempt to resume cohabitation. Is there any sanctity or, for that matter, even semblance of a purpose left in continuing this legal tie? Is there any stake of either party or, for that matter, of the society in preserving this broken marriage? In my mind the answer seems to be clear. It would be unjust not to sever the marital tie in the facts of the case. Justice, consistent with good conscience, demands that the marriage be dissolved.

36. In an unreported judgment in C.M.A. (MD) Nos.238 and 239 of 2012 (Salome v. Dr.Prince D.Immanuel), this Court held that where the appellant/wife and the respondent/husband were living separately for more than 10 years and the attitude of the respondent even after obtaining a decree of restitution of conjugal rights has not taken steps to enforce the same, but insisting on retaining matrimonial bond that would amount to causing mental cruelty and to torment and traumatized the appellant. In the given facts and circumstances of the case, in Salome v. Dr.Prince D.Immanuel, supra, the learned Single Judge of this Court held as under:

"20. The insistence of the respondent to continue the matrimonial tie even though he is fully aware that there is no possibility of re-union and living together as husband and wife, amounts to causing mental cruelty to the appellant."

37. In Sandhya Rani v. Kalyanram Narayanan, reported in 1994 Supp (2) SCC 588, the Hon'ble Supreme Court held:

"since the parties are living separately for the last more than three years, we have no doubt in our minds that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. Therefore, the Court granted the decree of divorce."

38. Since there was no possibility of re-union, directing the appellant and the respondent to live together as husband and wife would in fact make the matrimonial life a hell for both parties.

39. In K.Srinivas Rao v. D.A.Deepa, reported in 2013 (2)

SCALE 735, the Hon'ble Supreme Court held as under:

"We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree."

40. Following the decisions of the Hon'ble Supreme Court, this Court is of the view that since the parties are living separately for the past 11 years, the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. Therefore, this Court is inclined to grant the decree of divorce considering the welfare of the spouses.

41. Before parting with the order, let us consider the permanent alimony to be given by the appellant to the respondent. In *Naveen Kohli v. Neelu Kohli*, supra, while granting divorce to the appellant therein, the Hon'ble Supreme Court has considered permanent maintenance to be paid to the wife.

42. In the case on hand, admittedly, the appellant is working in Eastern Railway at Calcutta and is earning considerable salary. The avocation and his earnings have not been denied by the appellant. Considering the avocation and also the financial status of the appellant, it would be appropriate to direct the appellant to pay the permanent alimony of Rs.10,00,000/- (Rupees Ten Lakhs) to the respondent within a period of eight weeks from the date of receipt of a copy of this order. It is also directed that golden ornaments, silver and other articles, belonging to the respondent, if any, lying with the appellant, the same shall be returned to her.

43. In the result, the Civil Miscellaneous Second Appeal is allowed and the judgment and decree dated 05.04.2016 passed in H.M.C.M.A.No.1 of 2014 on the file of learned I Additional District Judge, Vellore, reversing the order and decretal order

passed in H.M.O.P.No.96 of 2008 dated 08.08.2012 on the file of the learned Sub-Judge, Vellore is set aside and the order of the trial Court stands restored, however, on different ground. H.M.O.P.No.96 of 2008 filed by the appellant is allowed on the ground the long separation thereby dissolving the marriage between the appellant and the respondent solemnized on 29.04.2007 by a decree of divorce. No costs.

vs

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The I Additional District & Sessions Judge,
Vellore.

2.The Subordinate Judge,
Vellore.

Copy to:-

The Section Officer,
V.R.Section,
High Court, Madras - 104.

+1cc to Mr.E.Kannadasan, Advocate, SR.No.15371

+1cc to Mr.T.Dhanyakumar, Advocate, SR.No.16270

C.M.S.A.No.32 of 2016

Kak(18/06/2019)

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