

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 28.11.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.No.19 of 2014

Mahalingam

... Appellant/Respondent/Petitioner

Vs.

Rajeswari

... Respondent/Appellant/Respondent

Civil Miscellaneous Second Appeal is filed under Order 43 of Civil Procedure Code r/w 100 of C.P.C. to set aside the Judgment and decree dated 20.12.2013 made in C.M.A.No.2 of 2009 on the file of learned Principal District Judge, Villupuram setting aside the Judgment and Decree dated 10.09.2008 made in H.M.O.P.No.19 of 2004 on the file of the learned Principal Subordinate Judge, Villupuram.

For Appellant : Mr.D.Kumaralingam

For Respondent : Mr.A.Muthukumar

J U D G M E N T

The present Civil Miscellaneous Second Appeal is filed by the appellant / husband to set aside the Judgment and decree dated 20.12.2013 made in C.M.A.No.2 of 2009 on the file of learned Principal District Judge, Villupuram and consequently, confirm the Judgment and Decree dated 10.09.2008 made in H.M.O.P.No.19 of 2004 on the file of the learned Principal Subordinate Judge, Villupuram.

2. The case of the appellant / husband is that he has filed a petition in H.M.O.P.34 of 1997 for divorce on the ground of cruelty and desertion stating he had married the respondent on 15.04.1992 at Mylam and the marriage was solemnized, as per Hindu Rites and Customs. Immediately, after the marriage, the respondent gave birth to a female child on 31.01.1993. During the said period, the respondent was not living with the appellant peacefully. Further, the appellant submits that the respondent used to always leave the matrimonial home and proceed to her brother's house since the date of marriage, she was not faithful or loyal to the appellant and has not discharged her

duties as wife. The appellant and the respondent were living originally at Neyveli Township and then, they have shifted to Cuddalore, where they were residing till the problems arose.

3. It is the further case of the appellant that he married the respondent / wife as a second wife. Through the 1st marriage, he had two female children aged 12 and 9 and the 1st wife died, hence he married the respondent, as second wife. To his disappointment, the respondent did not take care of the children born through the 1st wife and his mother. He also stated that she refused to maintain them and directed the appellant to make them stay in some school hostel, as she could not take care of them. She would always stay in her brother's house for days together without the consent of the appellant.

4. It is also the case of the appellant that the respondent always developed bitterness against his family members and was always taking shelter under her brother. The appellant, who went to see the child after birth had requested her to come back and stay with him, but she refused to come and deserted the appellant without any reasonable cause, which amounts to refusal of conjugal rights to the appellant. As he was a teacher in Vikaravandi School, he was not in a position to take care of the female children and due to the desertion, he sent a lawyer notice on 20.07.1993 to the respondent asking her to come and live with him. The respondent had sent a reply on 30.07.1993 stating that she is ready and willing to come and live with the appellant. Again the appellant waited for three months, but the respondent did not come back. A panchayat was held on 07.11.1993 where the respondent and her brother promised to come back within two days to the matrimonial home, but they did not act as per their promise. Hence the appellant gave a complaint before the All Women Police Station on 08.01.1994 and on 25.02.1994 .

5. According to the appellant, on the complaint given by the respondent, he was made to attend the police enquiry, when he was teaching in the school, as if he had demanded dowry. It is only the respondent, who had created some grounds for harassing and humiliating the appellant with ulterior motive and he denied the demand of dowry by him or his family at any point of time. The respondent had deserted the appellant by giving complaint of dowry and the same had caused insult to the appellant in the presence of his co-employees and has lowered the status in the eyes of public and has caused mental agony and cruelty to the appellant. On account of desertion, the appellant had to engage somebody to take care of the children. The humiliation caused by the respondent to the appellant cannot be described by words and cannot be felt except by the appellant. Accordingly, on the above averments, the appellant

had prayed for divorce.

6. Per contra, the respondent by way of a counter has denied all the allegations stated by the appellant. The respondent submitted that she and the appellant were living in Neyveli Township as husband and wife and she had taken care of the children born to the 1st wife and the respondent had showered the motherly affection towards them. The appellant did not take care of the wife and took the respondent to her brother's house only for Deepavali, as per custom, and the appellant and the respondent were gifted with Deepavali seer. At that time itself, the respondent was pregnant and on the advice of the respondent's family, the appellant had left the respondent in her brother's house for delivery. The child was born on 31.01.1993 by cesarean section and due to which, the respondent could not move freely and she was not active, therefore, she stayed in her brother's house, as advised by the appellant himself to the respondent to take rest for some more time. The appellant used to visit the respondent, but the appellant / husband did not want take her back and delayed the same on one ground or the other. But, the respondent was always ready and willing to live with the appellant and he did not take her back and submitted that it is the appellant, who had deserted the respondent/ wife without any reason or probable cause and the respondent had not deserted him.

7. Further, according to the respondent, she had requested the appellant to come over and take her and his child, for which the appellant / husband did not respond, so the respondent was waiting for three months assuming that the husband will come and take her, as per the custom, but, instead the appellant had filed a petition for divorce. The respondent had not given any complaint to the police, as if the appellant had demanded dowry and no body went to the school, where the appellant is working and insulted him and denies the same. The respondent had only informed that she was ready and willing to rejoin the appellant and it is only the appellant, who had evaded the same. The respondent had further averred that for a parentless woman like her, the only asylum is the husband's home and absolutely there is no reason for her to flout it and she is prepared to live with the appellant. She had also stated that she had only her brother to take care of her. Accordingly, she prayed to dismiss the petition for divorce.

8. The lower court after elaborately considering the issues had found that from year 2004, the respondent has not taken any steps for reunion with the appellant, but now after 9 years, she had requested to the court that she is willing to go and live with appellant. However, the appellant did not want to live with the respondent, because of the petition filed before the All Women Police station by the wife, he had suffered mental

agony. Further, by stating that even if the court allowed this petition, after a long time, they cannot live as husband and wife whole heartedly, hence the lower court had allowed the divorce application filed by the appellant / husband.

9. Aggrieved against the order passed by the lower court, the respondent / wife had filed an appeal before the lower appellate court and the said Court in its judgment has stated that the appellant / husband did not take any steps to take the wife and child to the matrimonial house. Further, the lower appellate court also suggested that it is not too late for mediation and conciliation between the husband and wife for reunion and the said court has reversed the judgment of the lower court, as not sustainable and set aside the order of granting divorce and has allowed the petition filed by the respondent / wife for restitution of conjugal rights.

10. Against the said reversal order passed by the lower appellate court, the appellant/husband has filed this present Civil Miscellaneous Second Appeal on the following grounds:

(i) Only because the 1st wife died due to illness and left the children, the appellant had married the respondent, as second wife, thinking that she will take care of the said children born through the 1st wife and will take care of his aged mother. Whereas, the respondent / wife had quarreled with him frequently and she has failed to take care of the children born to the 1st wife and his mother. After giving birth to the child also, the respondent did not return back inspite of repeated request. Due to the complaint given by the respondent in All Women Police Station, the respondent had suffered mental agony and dis-respect in front of the society and there is no possibility of living a happy married life, even if they start to live again.

(ii) The lower appellate court ought to have confirmed the decree of the lower court granting divorce, as for the past 20 years, they were living separately.

(iii) The intention of the respondent / wife is only to harass the appellant / husband herein, as she has not made any attempt to live with him. As the respondent / wife has filed several petitions for enhancement of maintenance / permanent alimony rather than filing petition for restitution of conjugal rights, would show the intention of the respondent / wife, which is only to grab the money from the appellant than living with him.

11. The appellant has also raised the following Substantial Questions of Law and pleaded to allow this appeal.

(i) Whether merely contesting a divorce case filed on the ground of cruelty and desertion would be enough for reunion with the husband without taking any steps legally for restitution of conjugal rights for more than 20 years?

(ii) Whether the Court can disallow the relief of divorce on the ground of desertion, when the parties are living separately for more than two decades?

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

13. Admittedly, the appellant and the respondent got married on 15.04.1992 and a girl baby was born on 31.01.1993, exactly within 10 months, the girl baby was born. It is stated by the appellant that the respondent / wife was always moving to her brother's house, as it has been pointed out by the respondent / wife that she is a parentless woman and only the brother is the guardian, she was visiting him. Further, within 10 months of marriage, a child is born and the appellant / husband himself stated that the respondent / wife went to her brother's house for Deepavali and the same was not denied by him, which would confirm that the respondent / wife was left in her brother's house, as she was in advance stage of pregnancy. Within a short period she could not come back, since she delivered a baby through cesarean section, she was staying in her brother's house. Immediately, on 20.07.1993, the appellant / husband had called upon for reunion of the respondent / wife. In the respondent's reply notice, she has submitted that she was ready and willing for reunion, but the Doctor had advised her to stay for three or four months and take rest at Villupuram and that she would come and join him at Neyveli after some time, but, that was not taken note of. Further, the respondent in her reply notice has submitted that she is ready and willing to join the appellant and requested him to come and take her back. There is no answer for this question, viz., regarding her wish to come back and live with the appellant, but the appellant / husband has not taken any steps to take the respondent and child to the matrimonial house.

14. It is seen from the perusal of Ex.R1 dated 21.10.1996 [letter / complaint given by the respondent] that the respondent / wife had given an application to All Women Police Station at Villupuram requesting the authorities to call upon the appellant / husband for a mediation and conciliation to enable her to join her husband. The appellant / husband alone has taken it as an offensive, but the petition would show that she has not made any wild allegation against the appellant / husband, but, had only requested the All Women Police Station Authorities to conduct a

mediation to enable her to join her husband. The letter was only a request to the said authorities and it could be seen that the daughter had grown up and was studying in a reputed school at X standard, when the appeal was taken up before the lower appellate court.

15. Other than this complaint, that too a request, no other petition has been filed by the respondent before the police authorities to reunite with her husband, which the appellant / husband has taken it as a mental agony. Assuming the said request, as a complaint, the appellant has filed a petition for divorce stating that the respondent has failed to join him. Further, the appellant has not shown any material to substantiate that he had taken steps to take back the respondent and his child to the matrimonial house. In spite of the fact that the lower appellate court has granted a decree setting aside the order of the lower court, it is learnt that the appellant has married another lady, who was appointed as care taker, to take care of his two girl children and his mother and they have a male child at present.

16. Apart from that, the lower court's conclusion that the appellant and the respondent were living separately for nine years and even if they join, they may not lead a happy married life, was a erroneous thinking and at that point of time, if the lower court had ordered the petition in favour of the respondent / wife, there could have been chances of living together and the girl child would have got the affection of the father. Till date, the respondent / wife is taking care of the female child, who was grown up on her own with the help of the mother and it will be really a heart breaking issue for the girl child.

17. The appellant has stated in his chief examination that he has appointed one warden for maintenance of his children born through 1st wife and mother by spending lots of money, whereas, in the cross examination, he has given a contradictory statement that the said warden is his own sister's daughter and friend of his relative, which cannot be accepted. Thereafter, in the cross examination, he has stated that the said warden is a daughter of one Visalam and Venkatachala Mudaliar and her name is Gandhi, he has also married that lady at Thiruvanthipuram temple, as a third time and a male child has been born between them.

18. With regard to the point of desertion, it is clear that when one partner behaves in such a manner that it becomes difficult for the other partner to live under the same roof or is compelled to leave the matrimonial home. Then, it will be considered as desertion by the first party. Desertion is not a single act for the divorce but it is a continuous act or conduct and it is to be determined by the court from facts and

circumstance of each case.

19. Since the averments / reasons stated by the appellant / husband are false, this Court is not inclined to interfere with the reasons stated by the appellant / husband. Further, it is presumed that due to the fact that only girl child was born to him, the appellant would not have any interest to take back the respondent and his child. The appellant had already married another lady and he does not have any intention to take back the respondent, as they have a male child. Immediately, after the marriage the respondent had become pregnant and at that point of time, it will not be fair to say that the respondent did not take care of the children born to the 1st wife of the appellant. When a woman becomes pregnant they themselves definitely need the assistance from another person to take care of them, that being the case, the respondent, who would have needed assistance, had gone to her brother's place and this will not be a valuable reason for the appellant / husband to state that the wife has wantonly deserted the husband and gone to her brother's house. The respondent / wife has taken steps for reunion, but the husband has not taken any steps for re-union, however, has conducted marriage for the 3rd time with another girl, which would show the real intention of the appellant / husband. It is the husband, who had deserted the wife and had married again, the said act definitely caused cruelty.

In view of the above, the appellant has not made any valid grounds to interfere with the order passed by the learned Principal District Judge, Villupuram in C.M.A.No.2 of 2009 dated 20.12.2013 and the substantial questions of law raised by the appellant are answered accordingly. The present Civil Miscellaneous Second Appeal is dismissed by confirming the order passed by the appellate court. No costs.

Sd/-

Assistant Registrar

//True Copy//

Sub Assistant Registrar

ssd

To

1. The Principal District Judge,
Villupuram
2. The Principal Subordinate Judge,
Villupuram.

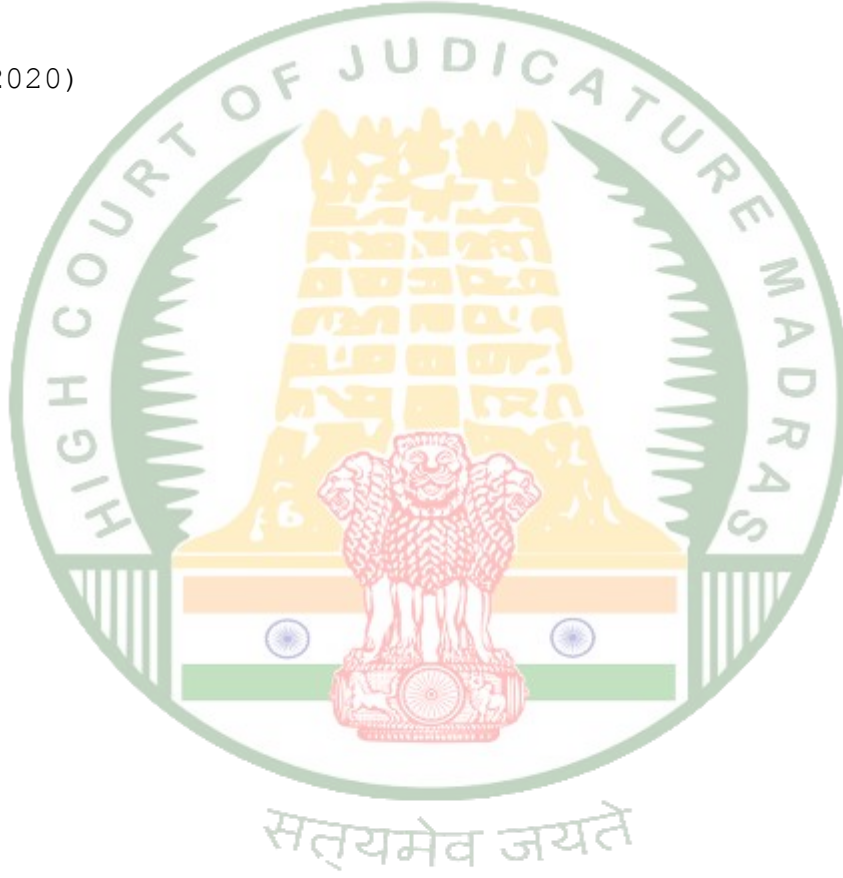
3. The Section Officer,
VR Section,
Madras High Court,
Chennai

+1cc to Mr.D.Kumaralingam, Advocate, S.R.No. 99362

+1cc to Mr.A.Muthukumar, Advocate, S.R.No. 99229

C.M.S.A.No.19 of 2014

KJ(CO)
GN(25/08/2020)



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