

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 06.08.2019

CORAM

THE HONOURABLE Mr.JUSTICE T.RAJA

C.M.S.A. 34 of 2014

and

M.P. 1 of 2014

V. Mallika ... Appellant/Petitioner/Respondent

Vs

Varaguna Pandian,
S/o. Loga Perumal,
Thirupullvanam Village,
Uthiramerur Taluk. ... Respondent/Respondent/Petitioner

PRAYER : Civil Miscellaneous Second Appeal filed under Sec.100 of C.P.C. against the judgment and decree 28.04.2014 passed in C.M.A.No.1 of 2012, on the file of District Judge, District Court, No.II Kancheepuram confirming the judgment and decree dated 06.09.2011 passed in H.M.O.P.No.12 of 2008, on the file of Subordinate Judge, Kancheepuram.

For Appellant : Mrs.Sudharshana Sundar

For Respondent : Mr.C.Ramesh

O R D E R

Mrs. V.Mallika, appellant herein, having suffered by the concurrent findings of both the Trial Court and the first Appellate Court and dissolving the marriage held on 14.02.2001 between the appellant and the respondent, has brought this Civil Miscellaneous Second Appeal.

2. At the time of entertaining this Appeal, this Court has framed the following two substantial questions of law :-

- (i) Whether the courts below held in shifting the burden of proof on the respondent? And
- (ii) Whether the courts below were right in holding that the petitioner herein is entitled to the relief as prayed for, in the absence of any evidence?

The repeated reading of the above questions would raise a doubt whether the same could be taken as substantial questions of law.

3. Further, on the substantial question of law, the Apex Court in the case of Hero Vinoth (minor) vs. Seshammal in Appeal (Civil) 4715 of 2000 vide order dated 08.05.2006 has held what is substantial question of law as follows :-

"In Guran Ditta v. T.Ram Ditta (AIR 1928 PC 172), the phrase 'substantial question of law' as it was employed in the last clause of the then existing Section 100 CPC (since omitted by the Amendment Act, 1973) came up for consideration and their Lordships held that it did not mean a substantial question of general importance but a substantial question of law which was involved in the case. In Sri Chunilal's case (supra), the Constitution Bench expressed agreement with the following view taken by a full Bench of the Madras High Court in Rimmalapudi Subba Rao v. Noony Veeraju (AIR 1951 Mad.969).

"When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Court thought it necessary to deal with that question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand, if the question was practically covered by the decision of the highest court or if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to be particular facts of the case it would not be a substantial question of law."

This Court laid down the following test as proper test, for determining whether a question of law raised in the case is substantial"

"The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law."

In Dy. Commr. Hardoi v. Rama Krishna Narain (AIR 1953 SC 521) also it was held that a question of law of importance to the parties was a substantial question of law entitling the appellant to a certificate under (the then) Section 100 of CPC.

To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis. (See: Santosh Hazari v. Purushottam Tiwari (deceased) by Lrs. [(2001) 3 SCC 179].

In the light of the above, the above questions framed cannot be considered as substantial question of law. However, both learned counsels requested this Court to appreciate whether the decree of divorce can be granted during the long separation.

4. Mrs. Sudharshana Sunder, learned counsel appearing for the appellant assailing the impugned judgment and decree, argued that both the courts below have repeatedly and concurrently committed errors in not appreciating the painful case placed before them. The marriage was solemnised on 04.02.2001 at Nagarathan Thirumanamandapam, Thiruvottiyur, Chennai. Though there was an allegation against the appellant/wife by the respondent/husband that from the date of beginning the matrimonial life, the appellant was not willing to live happily with the respondent, but, the said allegation has not been properly substantiated with relevant evidence by the respondent/husband. The learned counsel appearing for the appellant had further argued that when the appellant/wife has not accepted the peaceful matrimonial living with the respondent on the ground that the respondent/husband was all the time

demanding dowry, without which, he won't be staying with her, the appellant/wife keeping in mind, the tradition of the family life, has chosen, not to make any dowry complaint against the respondent/husband. Almost for the period of 7 years, she has not given any complaint and that zero tolerance and patience shown by the appellant has been wrongly misinterpreted by both the courts below that the appellant has not given any criminal complaint against her own husband.

5. The learned counsel has also submitted that in yet another place in the judgment of the Trial Court, a wrong finding has been given against the appellant/wife that when the respondent has issued notice dated 08.11.2004, which was marked as Ex.P2 calling upon the wife to come and live with him, for which, a reply dated 19.11.2004, which was marked as Ex.P3 was sent from the appellant side containing many allegations of the strained relationship between appellant/wife and the respondent/husband, and also stated that before going for reunion, both should sit across the table and resolve the matter amicably once and for all, the same was misunderstood by both the courts below. In the meanwhile, the interregnum period of the separation for 6 ½ years has been taken as a ground for dissolving the marriage, putting the blame on the appellant/wife that she is only responsible for not coming forward to lead the happy matrimonial life with the respondent/husband. When the appellant has also filed a counter claim before the trial court seeking restitution of conjugal rights, both the courts below have completely overlooked the same. The claim of the appellant/wife was that all the time, she was always ready and willing to accept the reunion, but this has been overlooked by the courts below.

6. Further, referring to some of the findings given by the learned Trial Court, the learned counsel appearing for the appellant/wife stated that at one point of time, there was a panchayat organised for both the appellant and the respondent to live together. On the basis of the advice given by the panchayat, the respondent/husband has arranged for a separate rented house at the rate of Rs.1000/- per month, but, after some time, the respondent/husband went away from the house without even paying the rent and finally, he failed to return. When the appellant/wife was taken to a separate rented house, the respondent has not even brought any ration viz., rice, food items, grocery etc. Hence, the appellant/wife was forced to leave the house and that was also taken as a ground for the desertion by the appellant. Arguing further, it is pleaded that when she was taken to a separate house and deserted without food and without any financial assistance to buy grocery, rice etc. how she can continue to live in such a situation. Arguing further, the learned counsel appearing for the appellant would

submit that the findings of the appellate court confirming the judgment and decree passed by the trial court on the ground that there is some misunderstanding between the appellant and the respondent itself shows that no reason has been given for dissolving the marriage solemnised on 14.02.2001 and equally no reasons are assigned for confirming the judgment and decree passed by the trial court. For all the above reasons, she prayed to allow the appeal filed against the concurrent findings of the courts below.

7. Mr.C.Ramesh, learned counsel appearing for the respondent/husband, refuting the submissions made by the appellant side argued that even though the appellant, for no reason, has deserted him and left the matrimonial home, the respondent/husband has written several letters, which were marked as Ex.R2, R3 and R4 and all those letters were received by the appellant. A careful reading of the above letters would show that how repeatedly the respondent/husband, as a dutiful husband, has requested the appellant/wife to come and join the matrimonial home. When the letters were repeatedly perused and appreciated by the lower court calling upon the appellant wife to come for reunion, deliberately, the appellant has not even produced the same before the trial court. Therefore, the learned first Appellate court has pointed out that what prevented the appellant from producing the same before the court was not explained. When all the letters, according to the respondent were written requesting the appellant to come and live with him, and when the letters were in possession of the wife, the appellant/wife has conveniently chosen not to produce letters for the reason that in all the letters, the respondent has invited her to come for reunion with all regards and respects. Referring to one another allegation made by the appellant that there was a demand of Rs.10 lakhs as dowry from the father of the appellant and finally, the appellant came forward with a sum of Rs.2 lakhs and gave it to the respondent's mother, the learned counsel appearing for the respondent stated that the demand of dowry by the respondent was denied before the Trial Court. Secondly, the payment of Rs.2 lakhs demanded by the respondent/husband was also stoutly denied and that was also on record. Moreover, in the cross-examination, the respondent has also properly brought out the case against the appellant that from the day one of the marriage, there was no consummation of marriage. Therefore, when the marriage was not consummated from the year 2001 to till date, the Apex Court in a reported judgment in the case of Samar Ghosh Vs. Jaya Ghosh in (2007) 4 SCC 511, has specifically given a clear guidance in paragraph 101 (xiv), stating that when there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair.

8. I fully agree with the submissions made by the learned counsel appearing for the respondent. When the marriage was solemnised on 14.02.2001, the respondent having been affected gravely by the non-consummation of marriage, issued a notice, which is marked as Ex.P2, in paragraph 1 therein, it has been stated by the respondent that after the marriage, they have settled in the matrimonial home at No.8, Nookalamman Koil Street, Uthiramerur. The first Appellate Court also considering the entire evidence and the conduct of the parties found that right from the beginning, there has been a misunderstanding, as a result, wife has been living separately in her parents house. When several requests were made to her, she has not chosen to live with her husband and imposing a condition to set up a separate house leaving the aged inlaws. In view of the above, seeing the unusual attitude shown by wife, the first Appellate Court has come to a conclusion that pursuant to the demand for separate living, the problem arose between the parties and that there was not even any complaint by the wife before any authority as if there was any demand for dowry.

9. While coming to yet another fact that now the parties are learnt to live separately in the last 18 long years, the ratio laid down by the Apex Court in the case of Samar Ghosh Vs. Jaya Ghosh reported in (2007) 4 SCC 511 ruling that when there has been a long period of continuous separation, it could be fairly concluded that matrimonial bond has gone beyond repairs. In this context, it is pertinent to extract the relevant portion of the said judgment as follows :-

"101. (xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded 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. In such like situations, it may lead to mental cruelty."

10. In the above judgment, the Apex Court has categorically held that any unilateral decision of refusal to have intercourse for considerable period may amount to mental cruelty. Besides, any unilateral decision of either husband or wife after marriage

not to have child from the marriage may amount to cruelty and finally, it has made it vividly clear that if there is a long period of continuous separation, the matrimonial life has become meaningless. In spite of long separation of 18 years, if this Court issues a direction against both parties to live together, no useful purpose would be served, since their mindset and their lifestyle would have been changed in the last 18 years. Therefore, the present Civil Miscellaneous Second Appeal filed by the appellant wife is liable to be dismissed. Accordingly, the Civil Miscellaneous Second Appeal stands dismissed. There is no order as to costs. Consequently, the connected Miscellaneous Petition is also closed.

Sd/-
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

- 1.The District Judge,
District Court No.II,
Kancheepuram.
- 2.The Subordinate Judge,
Kancheepuram,
- 3.The Section Officer,
VR Section, High Court, Madras.

+1cc to Mr.Sudharshana Sundar, Advocate Sr.67640
+1cc to Mr.C.Ramesh, Advocate Sr.67250

C.M.S.A. 34 of 2014
in
M.P. 1 of 2014

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