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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.28 of 2017

Poonkuzhali ... Appellant /Appellant/Respondent
Vs.
Ganapathy ... Respondent/Respondents/Petitioners

Civil Miscellaneous Second Appeal is filed under Section 100 of C.P.C., to set aside the Judgment and Decree passed in C.M.A.No.1 of 2016 dated 28.07.2017 on the file of learned Principal District & Sessions Judge, Thiruvannamalai confirming the decreetal order dated 01.12.2015 passed in H.M.O.P.No.62 of 2011 on the file of Principal Sub Court, Thiruvannamalai.

For Appellant : Mr.R.Thanjan
For Respondent : Mr.C.Mahendran

J U D G M E N T

The appellant has filed the present Civil Miscellaneous Second Appeal seeking to set aside the Judgment and Decree passed in C.M.A.No.1 of 2016 dated 28.07.2017 on the file of learned Principal District & Sessions Judge, Thiruvannamalai confirming the decreetal order dated 01.12.2015 passed in H.M.O.P.No.62 of 2011 on the file of Principal Sub Court, Thiruvannamalai.

2. The appellant is the wife and the respondent is the husband. The case of the respondent/husband is as follows:

a. The respondent filed a petition before the Principal Subordinate Court, Thiruvannamalai in H.M.O.P.No.62 of 2011 for divorce under Section 13(a) of Hindu Marriage Act on the ground of cruelty. The respondent got married with the appellant on 08.12.2008 at Angalaparameswari Mandapam, Thiruvannamalai and they were residing at Mazhavanthangal village. On 08.12.2008, when the elders have arranged for nuptial night, the appellant / wife had informed that she had the menstrual cycle and could not co-operate for the same and hence on 01.01.2009, it was postponed. Even on 01.01.2009, the appellant had avoided the said function citing some frivolous reasons and she had no cohabitation with the respondent and was avoiding by citing one reason or other.



b. Thereafter, the respondent had taken the appellant to a rented house at Thiruverkadu, Chennai and living there for some time. There also the appellant was trying to be alone and she was sitting idle in the home by thinking of something and was not at all moving freely with the appellant. She had not taken good food purposely and spoiled her health and in April, 2009, the parents of the appellant have taken her back to their house and whenever the respondent had requested the appellant to come to matrimonial home and live with him, she had refused to return to the said house. When the appellant was brought her from her village to Chennai, she had returned on her own to her village from Koyambedu bus stop itself without even informing the respondent.

c. The respondent has taken the appellant for counselling and during the time of counselling, the appellant had scolded the counsellor and came out abruptly and had not co-operated for the counselling. The respondent has also given a police complaint seeking their intervention to unite them and at that time, the appellant had sought for two days time and incident was known to the parents of the appellant also. Thereafter, the respondent had sent a legal notice to the appellant through an advocate seeking divorce and the same was returned and no further communication from the appellant was received. Thereafter, notice was sent once again to appellant, through registered post, for which a reply was received. Since the appellant did not show any interest to live with the respondent any more and it was learnt that she married the respondent only on the compulsion of her parents, the respondent had no other choice and had filed a petition seeking divorce on the ground of cruelty.

3. The appellant / wife had filed a counter stating that all the allegations are false and denied. The appellant stated that she was ill treated and beaten up by the respondent and she had mentally and physically suffered a lot in the hands of the respondent. When the same was questioned by her father, the respondent became violent and quarreled with the appellant's father and she also denied the refusal in co-operating with respondent in the matrimonial life. The statement of the respondent that the appellant was physically and mentally ill, was denied. Only due to the harassment made by the respondent, who had driven her out of matrimonial house, she had taken treatment.

4. The counter of the appellant proceeds to state that the appellant's parents felt that it will be dangerous to live with the respondent, hence they have taken their daughter to their house. The allegation of non-consummation of marriage was also refuted by the appellant / wife. The appellant's parents have given Rs.50,000/- to the respondent for purchasing a two wheeler, but, the said money was spent by the respondent for some other purpose and he has not purchased the two wheeler.



The respondent has also insisted to purchase a car and gift it to him, as per their status. Therefore, the appellant prayed for dismissal of the petition, as the respondent did not make out a ground for granting divorce.

5. The Principal Subordinate Court, Thiruvannamalai after hearing the parties and recording the evidence, has considered all the issues raised by the appellant and the respondent. The respondent was examined as P.W.1 and he has marked documents Ex.P.1 to Ex.P.3. On the side of the appellant, R.W.1, appellant and R.W.2, appellant's father were examined and no documents were marked.

6. At the time of Trial, during the cross examination of the respondent, viz., P.W.1, the appellant's counsel before the trial court could not get anything in his favour with regard to the allegation that the respondent was consuming liquor and harassing the appellant and assaulted her several times and the appellant's counsel did not examine the respondent, P.W.1 regarding the said allegations. Further, only allegation regarding the consummation of marriage was raised by stating that the respondent / husband and appellant / wife were living together, as husband and wife in Thiruverkadu for one year, but, the said suggestion was denied by the respondent / husband stating that during the stay at Thiruverkadu, father of the appellant was always available and they never had any cohabitation during the said period. In the deposition, the respondent / wife has submitted that it is false to state that though the marriage took place in the year 2008 and the respondent / husband had called appellant/wife several times to the matrimonial home and the appellant / wife has denied the same and a petition has been filed by the respondent/ husband for divorce only after four years. But it is admitted that when the respondent invited the appellant to come and live with him, her father had informed the respondent / husband to wait for some more time, as the appellant was not feeling well.

7. Apart from the above, in the evidence, the appellant / wife had submitted that she was not aware about the complaint petition given by the respondent / husband before the police station for restitution of conjugal rights. The respondent had submitted that in the police station, her father had given an undertaking that he will bring his daughter [viz., respondent] and allow her live in matrimonial house within a short period. The father of the appellant / wife has also in his evidence has accepted the same stating that during January, 2009, his daughter / appellant was not well and after restoring her health, he had left the appellant in her matrimonial house and after two or three months, the appellant's father brought her back. He further deposed that from the year 2010 onwards, the appellant was living in her parents house.

8. Further, the allegation of ill-treatment, habitual



alcoholic and the harassment by the respondent/ husband was not substantiated on the side of the appellant / wife. It is also seen from the deposition that the appellant / wife was an engineering graduate, but, the respondent / husband was only a Diploma Holder. From the year 2008 to 2009, the appellant/ wife did not have any cohabitation with the respondent / husband and she did not have any intention of having sexual relationship with the husband and from April, 2009, the appellant / wife was living with her parents. When the appellant / wife did not return back to the matrimonial house, inspite of sending legal notice, it was brought to the knowledge of the respondent / husband that the appellant / wife did not have any interest in having a sexual relationship with him and only it was a forced marriage by the parents of the appellant/wife .

9. Since the appellant did not act as dutiful wife and have cohabitation with the husband, the respondent did not have any other go, than to file a petition for divorce stating that his life has been spoiled, who had waited for the wife to come back to his house from the year 2009-2011. The respondent / husband has stated that the appellant / wife did not have proper mental growth and hence there is a non consummation of marriage and they were living separately from 2009 to 2011 and due to refusal by the appellant / wife to cohabit with the respondent / husband, cruelty has been caused by the respondent / wife. Thereby, the court below has decided the issue not on the ground of cruelty, because there was no medical report filed to show that the wife did not have proper mental growth or marriage was consummated. Aggrieved by the said order, the appellant / wife has preferred an appeal before the lower appellate court. The said court by taking note of the fact that the appellant and the respondent were living separately for a long time has considered the same on the ground of desertion and passed an order by deciding the petition under Section 13(1)(ia) of Hindu Marriage Act on the ground of desertion and has allowed the petition in favour of the respondent / husband and granted divorce and since the said court had negated the claim of the appellant / wife, she has preferred this present Appeal before this Court.

10. The learned counsel for the appellant by raising the following substantial questions of law has submitted that the order passed by the lower court and lower appellate court are erroneous and pleaded to set aside the same.

- '(i) Whether the Judgment is sustainable in law?
- (ii) Whether there is misconstruction of the pleadings and the evidence on record?
- (iii) Whether Lower Court exceeded its jurisdiction by



altering the scope of original petition from 13(a) to 13(1)(1) (b) of the Hindu Marriage Act suo-mottu in the absence of any amendment of the pleadings?'

Further, when the pleadings are based on Section 13(a) of the Hindu Customs and Marriage Act, the lower court instead of confining itself on the ingredients of the said section, has exceeded its jurisdiction by passing a decree under Section 13 (1) (1) (b), which was not asked for by the appellant.

11. The learned counsel appearing for the respondent / husband submitted that after the divorce was granted by the court below, the respondent has also married another person and he is not interested in living with the appellant, as she did not give him the comforts as a newly married wife and inspite of his repeated request, the appellant did not return to the matrimonial life to live with him, hence the respondent seeks for dismissal of the present Appeal.

12. Heard the learned counsel on either side and perused the documents placed on record.

13. When this Court posed a question that as to why the appellant / wife has not filed any petition for restitution of conjugal rights, for which, the appellant's father, who was present before the Court submitted that they are not aware that they can file a petition for restitution of conjugal rights, which is not accepted by this Court, because the respondent / husband has sent a notice for re-union and also given a petition before the concerned police station for uniting the appellant / wife with the husband, at that time also, the appellant's father had taken time that they will come and leave the appellant/wife at a later point of time. Moreover, the ignorance of Law by a party cannot be accepted and this plea is not of any use for stand taken by the appellant / wife. It is also seen that no other steps have been taken by the father of the appellant to reunite the appellant with the respondent/ husband.

14. On perusal of the materials available on record, it is seen that the appellant / wife had not shown any interest towards respondent/husband at the time of their marriage. Though the appellant has stated various reasons for non-cohabitation, she has not stressed much about the consummation of marriage. Further, the allegation by the appellant / wife that the respondent / husband had ill-treated and harassed her and was a drunkard, were not even proved on the appellant's side.

15. It is also seen from the deposition of the evidences by P.W.1, R.W.1 and R.W.2 that even though the respondent / husband has requested the appellant / wife to return to the matrimonial



house, the appellant's father has not acted promptly, but had taken time to take a decision to leave the appellant in the matrimonial house, which also shows that either the appellant or her father does not have intention to lead a happy life. When there was a chance which knocked the doors of the appellant / wife inviting her to join the respondent / husband for a happy married life, since they kept on avoiding by taking time, the respondent / husband also lost interest. As the appellant did not cohabit with the respondent / husband, left with no other choice, he has filed a petition for divorce on the ground of cruelty.

16. Before the lower court, the learned counsel for the respondent relied upon Judgment reported in 2015 (1) Law Weekly 830, wherein it is stated that 'Non-consummation of marriage by not allowing sexual interference without reason would also cause mental cruelty'. As the appellant / wife failed to show any valid reason that why she did not cohabit with the respondent / husband and she was living in her parents house, it is clear that the case of the respondent / husband has been proved and accordingly, both the courts below have decided the case in favour of the respondent / husband.

17. With regard to the Sections mentioned by the trial court as well as the lower appellate court, whatever it is, as this Court holds that the cruelty has been proved beyond doubt by the respondent / husband, there is no need for this Court to look into which Section divorce can be granted, the both the grounds, viz., desertion as well as cruelty, can be taken into account for divorce.

18. With regard to the contention of the appellant / wife that she has not been in desertion and she had to live apart only because she could not tolerate the ill-treatment caused by the respondent, apprehending danger to the life she was with her parents, is not acceptable, because if at all there was danger to her life, she could have given police complaint against the respondent / husband immediately after such incident, however, there was no such complaint given by the father of the appellant with regard to demand of money or ill-treatment.

19. Further, insofar as the 'Desertion' is concerned, 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 the facts and circumstances of each case.



20. The statement of the learned counsel for the respondent that the respondent / husband filed a petition seeking divorce on the ground of cruelty, but the Court has wrongly considered the Section 13(1)(1-b) on the ground of desertion and given the decree of divorce has to be dismissed, is not acceptable, because on the side of the respondent, it is stated that the marriage has been irretrievably broken and as a basic principle of marriage, to have a happy married life, the wife and the husband has to cohabit with each other, to enlarge their family with the children and the same was denied by the appellant/wife, which amounts to mental cruelty and since they were living separately from 2009 to till date, nearly 11 years, it amounts to desertion and as such, the appeal filed by the wife deserves to be dismissed.

In view of the above said reasons, the present Civil Miscellaneous Second Appeal filed by the appellant stands dismissed and the substantial questions of law raised by the appellant are answered accordingly. The orders passed by the courts below stands confirmed. No costs.

Sd/-

Assistant Registrar (CCC)

//True Copy//

Sub Assistant Registrar

ssd

To

1. The Principal District & Sessions Judge,
Thiruvannamalai
2. The Principal Sub Court,
Thiruvannamalai.
3. The Section Officer,
VR Section, Madras High Court,
Chennai

+1cc to Mr.R.Thanjan, Advocate, S.R.No. 99302
+1cc to Mr.C.Mahendran, Advocate, S.R.No. 99533

C.M.S.A.No.28 of 2017

KJ(CO)
GN(03/09/2020)