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IN HIGH COURT OF JUDICATURE AT MADRAS

Reserved On	29.11.2019
Pronounced On	08.01.2020

CORAM

THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.M.A.No.1951 of 2009
and
M.P.No.1 of 2009

Malliga ... Appellant/Respondent

vs

P.Ganesan ... Respondent/Petitioner

Civil Miscellaneous Appeal filed under Section 28 of Hindu Marriage Act, 1955, to set aside Judgment and Decree dated 31.12.2008 passed in H.M.O.P.No.196 of 2003 on the file of Additional District and Sessions Judge (Fast Track No.1), Poonamallee and to dismiss the H.M.O.P.No.196 of 2003.

For Appellant : Mr.S.Sairaman

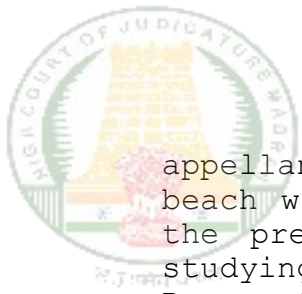
For Respondent : Mr.N.A.Nissar Ahmed

J U D G M E N T

The appellant is aggrieved by the fair and decretal order dated 31.12.2008 passed by the learned Additional District and Sessions Judge in H.M.O.P.No.196 of 2003.

2.By the impugned order, the learned Additional District and Sessions Judge has allowed the petition filed by the respondent under Section 13(1) (a) of the Hindu Marriage Act, 1955.

3.The appellant got married to the respondent on 23.05.1983. The respondent filed H.M.O.P.No.196 of 2003 to dissolve the marriage between the appellant and the respondent. It was the case of the respondent in the said proceedings that the appellant had deserted the respondent and had over a period of time developed physical intimacy with one Ranganathan and that the entire village came to know about the same. He alleged that the said Ranganathan was a bus conductor employed with MTC who used to frequent to their shop to buy cigarettes etc. looked after by the appellant. The respondent further alleged that the



appellant used to frequent several places like cinema theatre, beach with the said Ranganathan. It was further alleged that in the pretext of visiting their daughter who was at that time studying in Madras, the appellant used accompany by the said Ranganathan. According to the respondent, though he had advised the appellant to mend her ways and to not to lead adulterous life, the appellant however continued to meet the said Ranganathan and lead an immoral life.

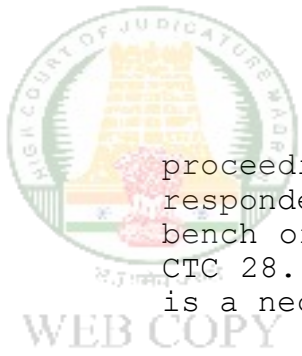
4.The respondent further submitted that on 12.07.2001, the appellant informed respondent that she was visiting Elankali Amman Temple, Thiruvalluvur with some of the tenants and left the matrimonial home. Two hours later while the tenants returned back, the appellant failed to come back home and was informed that the appellant left them in a white Ambassador Car bearing registration No. 3080 parked front of the temple.

5.On coming to know that the appellant had left in the aforesaid car and had not returned to the matrimonial home, the respondent informed the appellant's parents and started to search for the appellant, but she could not be found and that on 13.07.2001, after a police complaint was lodged with Vellavedu Police Station by the appellant's own brother he came to know about the Appellant. It is stated that the appellant had developed intimacy with the said Ranganathan.

6.According to the respondent, the appellant returned to her parents house after a week's time. Since no steps were taken to reunite the appellant with the respondent, the respondent was constrained to initiate the proceedings to dissolve the marriage solemnised between them on 23.05.1983 and prayed for dissolution of marriage.

7.The respondent denied the allegations. On the other hand, she stated that the respondent was abusive and used to frequently drink. The Appellant submitted that even after their daughter was born, the respondent used to come drunk consuming arrack. Over a period of time, her in-laws expressed their desire to have a grandson and force the appellant to abort pregnancy as soon as they realized the foetus was that of a female and started abusing her resulting in mental cruelty.

8.The respondent had met with an accident and fractured his right hand and therefore be the appellant and the respondent were asked to set up a new matrimonial home and a new business. The business however suffered loss as the respondent was alcoholic and therefore the appellant was forced to come back to his parents home with the child. Since the respondent was asked to help out in the textile business of his parents, the appellant was asked to take care of the petty shop by the



proceeding to prove adultery. The burden of proof was on the respondent to prove the same. This also the view of the division bench of this court in M.Mallika vs M.Raju and Another, 2005 (2) CTC 28. It has been held that in case of adultery, the adulterer is a necessary party to the proceedings.

16.The entire case is based on the so-called complaint given by the appellant's own brother and the respondent to the police station alleging intimacy between the appellant and the said Ranganathan and the statement of PW 2 that on 12.07.2002, appellant left their company when they had gone together to the temple and thereafter did not return. However, there is no other direct evidence to substantiate the allegations that the appellant was having an adulterous relationship with the said Ranganathan. There are several contradictions in the narration of the facts in the impugned order.

17.The learned Additional District and Sessions Judge has declined to accept the submission of the appellant that the respondent had married one Shanthi after the separation between the appellant and the respondent and that another daughter. At the same time, the learned Additional District and Sessions Judge has given undue importance to Exhibit P3 Letter of the appellant stating that she was severing the relationship with the respondent and since both the appellant and the respondents were living separately for over a period of 6 years, the marriage was irretrievably broken to no point of return as per the decision of the Honourable Supreme Court in Naveen Kohli Vs. Neelu Kohli, 2006 (2) LW 606 and therefore the respondent was entitled to a decree of divorce.

18.The learned Additional District and Sessions Judge has further placed reliance on Exhibit PW 4 letter dated 10.12.2003 purportedly sent by the said Ranganathan to the appellant wherein he has apparently exhorted the appellant to forget about him and to lead chaste life with her husband namely the respondent. The said letter has been stated to bear the postal seal dated 10.12.2003 whereas H.M.O.P.No.196 of 2003 is dated 01.11.2003.

19.The learned Additional District and Sessions Judge has also failed to note that the appellant has also filed a petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights but was withdrawn. In the said proceeding, there are documents to show that there was correspondence exchanged right from 11.11.2002 between the parties, whereas these documents were not filed/considered by the learned Additional District and Sessions Judge while passing the impugned judgement and decree. The learned Additional District and Sessions Judge



has concluded that the appellant had herself deserted the matrimonial home and had removed the nuptial chain and thereby impliedly indicated her desire to live with the said Ranganathan. The ground for dissolving the marriage on account of irretrievable breakdown of marriage is not available to the courts under the provisions of Hindu Marriage Act, 1956.

20.The evidence on record are also fraught with contradictions. The respondent has not proved adultery. The only possible ground for divorce would have been whether there was desertion by the appellant by withdrawing the company of the respondent deliberately or whether she was driven out of the matrimonial house by the respondent. There are no evidences to show that the withdrawal was voluntary.

21.As mentioned above, on the ground of irretrievable breakdown of marriage is not a ground to grant divorce under the Act, therefore, the reasoning of the learned Additional District and Sessions Judge granting a decree of divorce is liable to be set aside. Therefore, the impugned order passed by the learned Additional District and Sessions Judge is set aside and the case is remitted back to the Additional District Court to consider the evidence on record and to pass a speaking order within a period of six months from date of receipt of a copy of this order.

22.The present Civil Miscellaneous Appeal is thus allowed by way of remand. No cost. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

jen

To

1.The Additional District and Sessions Judge
Fast Track No.1,
Poonamallee.

2.The Section Officer,
V.R.Section. High Court,
Madras.



+1cc to M/s.N.A.Nissar Ahmed, Advocate Sr No.2326

+1cc to Mr.S.Sairaman, Advocate Sr No.1762

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C.M.A.No.1951 of 2009
and M.P.No.1 of 2009

LN (CO)
PR (29/10/2021)