

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on : 11.12.2020

Judgment delivered on : 23-12-2020

Coram :

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE C. SARAVANAN

C.M.A. No. 240 of 2018

Atkinson Samuel Paul .. Appellant/Claimant
Versus
Rajini Paul .. Respondent/ Respondent

Civil Miscellaneous Appeal (CMA) filed under Section 19 of The Family Courts Act against the Order and Decretal Order dated 12.10.2017 passed in I.D.O.P. No. 46 of 2016 on the file of Family Court, Chengalpattu.

For Appellant : Mr. P. Thiagarajan
For Respondent : Mr. D. Stephen

JUDGMENT

R. SUBBIAH, J

This appeal has been filed as against the order and decree dated 12.10.2017 passed by the Family Court, Chengalpattu in IDOP No. 46 of 2016. By the said order dated 12.10.2017, the Family Court dismissed the Original Petition filed by the appellant herein and refused to grant a decree of divorce to dissolve the marriage solemnised between him and the respondent on 03.05.1995.

2. The case of the appellant, as unfolded from the averments made in the Indian Divorce Original Petition, is that the marriage between him and the respondent was solemnised on 03.05.1995 at C.S.I. Emmanuel Church, Anna Nagar West, Chennai, as per Christian rites and customs. Due to wedlock, a girl child was born on 03.10.1997, named as Joanna Paul. After the marriage, the appellant and the respondent resided at No.46, Parali Nellaiappan Street, Ganapathipuram, East Tambaram, Chennai - 600 059 till 2003. According to the appellant/husband, during the middle of 2002, difference of opinion cropped up between them, which is largely attributable due to the change in the behaviour pattern of the respondent/wife towards the appellant/husband. It is the contention of the appellant that the respondent is working as a Teacher at SBOA Matriculation and Higher Secondary School, Chennai - 600 101. It is stated that the respondent had frequent conversation with a third person, who is said to be her colleague and this had resulted in the matrimonial rift. In fact, the so-called colleague's wife also threatened the respondent-wife to stop her relationship with her husband.

When this was questioned, the respondent-wife left the matrimonial home along with the minor child. Immediately, the appellant-husband had sent a notice dated 07.10.2002 to the respondent calling upon her to come and live with him, but the respondent did not comply with such demand. The appellant and the respondent were residing separately for about 11 years. While so, on 07.04.2014, the appellant sent another notice to the respondent calling upon her to give her consent for filing a Petition for dissolution of marriage by mutual consent. According to the appellant-husband, for the notice dated 07.04.2014, the respondent-wife had given a vague and bald reply dated 26.04.2014. Therefore, the appellant-husband has filed the Original Petition under Sections 10 (1) (ix) and 10 (1) (x) of the Divorce Act on the grounds of cruelty and desertion.

3. Countering the averments made by the appellant-husband in the Original Petition, the respondent-wife has filed a detailed counter affidavit before the Family Court, Chengalpattu. According to the respondent, she is working as a Teacher in a matriculation school at Anna Nagar, Chennai. After the marriage, the appellant and respondent resided together at East Tambaram and therefore, she travelled from East Tambaram to Anna Nagar for the sake of her employment. The daughter of the respondent is 19 years old at the time of filing the Original Petition and pursuing Second Year B.E. Course in Raja Institute of Technology, Thandalam, Chennai. It is the contention of the respondent that out of her employment, she had provided all the amenities and necessities for running the family and the appellant-husband used to give only Rs.2,500/- per month during school days. After the daughter joined the Engineering college, the appellant-husband paid only Rs.5,000/- per month, which is a very meagre amount. Thus, it was the respondent-wife who is taking care of the education and other amenities required to be provided for the daughter. The respondent-wife also stated that the appellant-husband used to visit the house of the respondent and take the daughter with him every week i.e., on Saturday and leave her back on Monday, which was not questioned by her.

4. It is the further case of the respondent that the appellant-husband had always suspected her for no reason. The appellant used to watch the movement of the respondent and indulged in character assassination. Whenever the respondent-wife casually speaks to her colleagues regarding the school timings or programmes, the appellant-husband doubted her fidelity and conducted secret enquiries. When this was questioned, a quarrel erupted during February 2002 and the appellant-husband had beaten her severely and driven her out of the matrimonial home. However, at the behest of the elders, the respondent re-joined the appellant in the matrimonial home during October 2002. However, the appellant-husband continued his activities to spy and watched the movements of the respondent closely and thereby caused utmost mental cruelty to her. Therefore, for the second time, during February 2003, the respondent-husband left the matrimonial home. The respondent, out of her own savings purchased a house at Door No.2/5, 'Ayishwariyam', Nolumbur, Mogappair, Chennai - 600 095 where

she is living with her daughter. The desertion of the respondent is not voluntary, but she was forced to leave the matrimonial home due to the cruel treatment meted out to her by the appellant-husband. Even after filing the Original Petition, the appellant-husband used to come to the house of the respondent at Mogappair and take the minor daughter with him during every week end and leave her back in the house of the respondent. In such circumstance, the question of desertion will not arise. The Original Petition is devoid of any merits and it is liable to be dismissed.

5. Before the Family Court, the appellant-husband examined himself as PW1 and marked Exs. P1 to P8. The respondent-wife also examined herself as RW1 and marked Exs. R1 to R8. The Family Court, on a consideration of the oral and documentary evidence, concluded that the appellant-husband had acted as a spy, suspected the movements of the respondent-wife even when she was working in the school and thereby caused her untold humiliation. The Family Court also referred to the deposition of the respondent that even if she casually had a conversation with her colleagues in the school, it was suspected by the appellant and this had led to the matrimonial rift between the spouse. On a consideration of the entire evidence on record, the Family Court concluded that the respondent-wife was subjected to harassment and cruelty by the appellant-husband and therefore, the respondent was compelled to leave the matrimonial company of the appellant. While so, the Family Court refused to accept the theory of voluntary desertion of the respondent portrayed by the appellant-husband and dismissed the Original Petition.

6. The learned counsel for the appellant contended that the appellant-husband and the respondent-wife have led a happy and blissful matrimonial life from the date of their wedlock on 03.05.1995 until 2002. Due to the behaviour and attitude of the respondent, matrimonial discord cropped up during 2002. During a quarrel, the respondent deserted the matrimonial home during February 2002 and re-joined the appellant during October 2002. However, shortly thereafter, she once again deserted the matrimonial company of the appellant during February 2003. According to the learned counsel for the appellant, the desertion of the respondent is voluntarily and without any just or sufficient cause. Since 2003, the appellant and the respondent are residing separately and it is also admitted by the respondent. Thus, such a long and continued separation of the spouse had rendered the matrimonial life a dead wood. Further, after such desertion, the respondent had purchased a house, which only indicates that she has no intention to re-join the appellant-husband forever. In this regard, the learned counsel for the appellant placed reliance on a decision of a Division Bench of this Court in the case of L.Stella Vs. V.Ponnusamy, reported in 2015-5-Law Weekly 214 to contend that, when the factum of separation and animus deserendi co-exists, a decree for dissolution of marriage can be granted. Reliance was also placed on a decision of the Supreme Court in the case of Manju Kumari Singh vs. Avinash Kumar Singh reported in 2018 SCC Online SC 739, wherein it has been observed that when the parties have been living separately for the last more than a

decade and all attempts of reconciliation through mediation have failed, there is absolutely no chance of both living together to continue their marital life.

7. By placing reliance on the aforesaid decisions, the learned counsel for the appellant contended that the appellant-husband and the respondent-wife are living separately for the past 17 years without any contact between them. Such a long and continued separation had rendered the marital life between the appellant and the respondent irretrievably broken and there is no scope for re-union among the parties. The Family Court, without taking note of the admission of the respondent-wife that she is residing separately since 2003, had refused to grant a decree of divorce and it calls for interference by this Court.

8. Per contra, the learned counsel for the respondent-wife contended that the circumstances which forced the respondent-wife to leave the matrimonial company of the appellant-husband, had been taken note of by Family Court to hold that desertion of respondent is not voluntary. The Family Court also concluded that appellant himself admitted that he used to visit the respondent in her house and the respondent also permitted him to take the daughter with him during week-ends and he will leave her on Mondays. According to the learned counsel for the respondent, even till this date, the appellant-husband visits house of the respondent-wife and taking the daughter to his house during week-ends. While so, it cannot be said that desertion of the respondent-wife is voluntary without any just or sufficient cause. In this regard, reference was made to the judgment of Supreme Court in the case of Judgment dated 01.10.2014 passed by Supreme Court in Appeal (Civil) No. 6409-6410 of 2004, in the case of Shyam Sundar Kohli Vs. Sushma Kohli @ Satya Devi, to contend that when husband forcibly chased his wife out of the matrimonial home, then it cannot be contended that desertion of the wife is voluntary.

9. According to learned counsel for the respondent, appellant-husband was always suspicious about the attitude of respondent-wife. The Family Court in Paragraph No.20 of the order, referred to an incident that took place during December 2003 when the appellant came to the school, where the respondent was working and insisted her to remove the sacred "thali". According to the respondent, she was forced and compelled to remove the sacred "thali", else the appellant threatened to snatch it in the midst of her colleagues and students. It is in those circumstances that the respondent was forced to remove the sacred "thali" and gave it to the appellant. The Family Court, by pointing out this piece of evidence, had concluded that, it was the appellant-husband who was the wrong doer and the appellant-husband had only subjected the respondent-wife to cruelty. The respondent also, in the proof affidavit filed before the Family Court specifically averred that, on 05.08.2002, she was beaten severely and driven out of the matrimonial home by the appellant. In such circumstances, unable to bear the physical assault of the appellant, the respondent left the matrimonial home by taking the minor female child with her. Such a desertion cannot be construed as a voluntary desertion to make the appellant-

husband suffer. In this context, the learned counsel for the respondent placed reliance on a Judgment dated 01.10.2014 passed by the Supreme Court in Appeal (Civil) No. 6409-6410 of 2004, in the case of Shyam Sundar Kohli Vs. Sushma Kohli @ Satya Devi and contended that it is only in extreme circumstances that the Court may use the ground of irretrievable break down of marriage as a ground for dissolving the marriage. When the respondent is always ready and willing to live with the appellant, a decree of divorce must be refused.

10. Above all, the learned counsel for the respondent-wife contended that the daughter passed B.E. degree course and she is 23 years old now. The appellant is also visiting the house of the respondent, taking the daughter with him during the week-ends and leaves her back on Mondays. The respondent also permitted the appellant-husband having the custody of the daughter with him during week-ends. The respondent also purchased the flat at Nolambur, Mogappair with the consent and knowledge of the appellant-husband. She purchased the house to enable her to attend her employment in the School and this was also agreed to by the appellant-husband. On a cumulative assessment of the aforesaid facts, it could be inferred that the matrimonial life between the appellant and the respondent still subsists and it has not been broken irretrievably, as has been alleged by the appellant. According to the counsel for the respondent, this is not a fit case where this Court is required to dissolve the marriage solemnised between the appellant and respondent. The Family Court, on analysing the entire evidence on record, had concluded that the appellant failed to establish that he was subjected to cruelty by the respondent and therefore he prayed for dismissal of this appeal.

11. We have heard the learned counsel appearing for both sides and perused the materials placed on record. The marriage between the appellant and the respondent was solemnised on 03.05.1995 at CSI Emmanuel Church, Anna Nagar, Chennai as per Christian rites and customs. At the time of marriage, respondent-wife was working as a Teacher in SBOA Matriculation and Higher Secondary School, Chennai - 600 101. Due to the wedlock, a female child, named as Joanna Paul was born on 03.10.1997. The matrimonial life between the appellant and the respondent, was by and large, peaceful and blissful. However, it is stated that during the middle of the year 2002, there arose matrimonial discord between the spouse. According to the appellant, the respondent-wife was talking to a colleague in the School and the wife of the colleague had complained to the respondent herself not to talk with her husband. On the other hand, it is stated by the respondent that the appellant is suspicious in nature and he had closely watched her movements even when she was in the school. The appellant has suspected the respondent-wife talking to her male colleagues even officially and this had enlarged the dispute between them. Due to such dispute, the respondent left the matrimonial home of the appellant during February 2002. However, at the intervention of the elders of the family, she rejoined the matrimonial company of the appellant during October 2002 and left the matrimonial home once again during March 2003. Since

2003, the appellant and the respondent are residing separately.

12. According to the appellant, after the respondent left his matrimonial company, she had purchased a separate house, which only indicates that she has no inclination to join his matrimonial company for ever. On the other hand, it is stated by the respondent that she purchased the house to enable her to attend her employment with ease, besides it was purchased with the expressed consent and knowledge of the appellant.

13. Before filing the original petition, there was exchange of notices. On 07.10.2002, the appellant sent a notice to the respondent, in which he had alleged that the respondent is leading an adulterous life with one Samson and called upon the respondent to give her consent for filing a petition for dissolution of marriage by mutual consent. Denying the allegations as regards adulterous life, the respondent sent a reply notice dated Nil.2002 and refused to give her consent for filing a Petition for dissolution of marriage by mutual consent. After 12 years, once again, on 07.04.2014, appellant sent a notice to the respondent reiterating his demand for giving her consent to file a petition for dissolution of marriage by mutual consent and also stated that for the past more than 11 years, they are residing separately and it had rendered their marital life meaningless. The respondent sent a reply dated 26.04.2014 refusing to comply with his demands. In the reply dated 26.04.2014, the respondent-wife specifically referred to the fact that the appellant-husband had physically assaulted her and therefore, she was forced to part with the matrimonial company of the appellant by residing separately for more than 11 years.

14. The appellant-husband had filed the original petition in the year 2015 as I.D.O.P.No.2 of 2015 before the District Court, Chengalpattu and it was transferred to the file of the Family Court and re-numbered as F.C.I.D.O.P.No.46 of 2016. The original petition was filed under Sections 10(1)(ix) and 10(1)(x) of the Divorce Act to dissolve the marriage solemnised between him and the respondent on the ground of cruelty and desertion. We have gone through the averments made in the Original Petition. In the original Petition, absolutely, there was no incident cited by the appellant to show that he was subjected to matrimonial cruelty by the respondent. A mere reading of the averments in Original Petition show that the appellant has filed it with bald and vague allegations on surmises without any bona-fides. Even as per the averments made in the Original Petition, we could infer that the appellant appears to be a suspicious nature of person which led to matrimonial discord. The appellant also alleged that the respondent left matrimonial home during February 2002 without just and sufficient cause and rejoined during October 2002, but she once again left his matrimonial company during February 2003. According to the respondent, the appellant-husband used vulgar words and she was driven out of the matrimonial home along with the minor female child. Therefore, her desertion is not voluntary, but she was chased out of the matrimonial home by the appellant-husband. In any event, when the appellant has filed the Original Petition for dissolution of marriage on the grounds of cruelty, he must specifically show as to in what

manner he was treated by the respondent cruelly or desertion. There is nothing in the original petition to show that he was treated cruelly or harassed by the respondent in any manner. Therefore, we hold that the appellant-husband failed to prove the averments based on which he filed the original petition for dissolution of marriage on the ground of cruelty.

15. It is well settled that desertion must be preceded by just or sufficient cause without any intention to deprive the matrimonial company of the other spouse. This was the ratio laid down by a Division Bench of this Court in the case of Padmini vs. Hemachandran, reported in 2018 (4) Law Weekly 812. Useful reference to the said decision can be quoted hereunder:-

"17. It is well settled that desertion by either a husband or wife should be preceded by just or sufficient cause without any intention to deprive the matrimonial company of the other spouse. It cannot be said that a short period of separation cannot be regarded as desertion and that desertion must be for a longer period. In our opinion, irrespective of the period of desertion of the couple, either it is for an intermittent period or for a longer period, it must be shown that such a separation is wilful and deliberate. In other words, a desertion should be preceded by animus deserendi, meaning thereby, there must be an ill intention or mal intention to part with the matrimonial company of the other spouse and to deprive him or her the matrimonial bliss. Thus, what is relevant for considering desertion is not the length of period during which the couple was living separately, but the reasons or cause therefor. To prove desertion by the other spouse, heavy burden lies on the person who seeks the relief of divorce on the ground of desertion. Such person has to prove four essential conditions namely (i) factum of separation (ii) animus deserendi (iii) absence of any of his or her consent and (iv) absence of his or her conduct giving reasonable cause to desert the spouse to leave the matrimonial home. If the above principles are adopted to the facts of the present case, we are of the view that the desertion of the appellant is with a just and sufficient cause. Even as admitted by the respondent, the appellant left the matrimonial home when she was pregnant. Even thereafter, as mentioned above, the appellant had taken very many steps to rejoin the matrimonial company of the respondent, but it was the respondent, who refused to take her back to the matrimonial home. Thus, the burden is on the respondent/husband to prove that the appellant had left his matrimonial company without any sufficient or justifiable cause, but such a burden has not been proved by him in this case sufficiently to the satisfaction of this Court. In such circumstance, the plea of the respondent that the appellant did not invoke Section 9 of the Hindu Marriage Act to

file a petition for restitution of conjugal rights had lost significance especially when the appellant, in the counter affidavit filed in HMOP No. 108 of 1993 as well as the instant petition in HMOP No 143 of 2014, had categorically asserted that she is ready and willing to join the respondent in the matrimonial home. In such circumstances, we are of the view that the Family Court has hastily jumped to a conclusion that the appellant did not prove that she had taken steps to join the matrimonial company of the husband in the matrimonial home."

16. The parameters laid down by the Division Bench of this Court is absent in the present case. Therefore, the Family Court is wholly justified in holding that the desertion of the respondent herein is not preceded by animus deserendi warranting dissolution of the marriage solemnised between her and the appellant on the ground of desertion.

17. The learned counsel for the appellant has contended that after the respondent-wife left the matrimonial company of the appellant-husband, she had purchased a residential house property at Nolambur, which only indicates that she has no inclination to re-join the matrimonial company of the appellant. In this context, the learned counsel for the respondent invited our attention to paragraph No.5 of the proof affidavit of the respondent dated 06.07.2017, in which clear reference was made to the fact that she had informed the appellant about her inclination to purchase a property, for which, the appellant informed her to apply for loan and purchase the property. Therefore, it is evident that only with the consent and permission of the appellant-husband, the property was purchased by her. Further, the respondent has produced Exs.R-3 and R-4 Bank Statement of Accounts to show that the instalment amount is being paid from the joint account held in the name of the appellant and the respondent with Indian Overseas Bank, Anna Nagar Branch, Chennai. Therefore, it is futile on the part of the appellant-husband to contend that the respondent had purchased the residential house without his knowledge and consent. Even otherwise, purchasing a house property to attend to her employment with ease by the respondent-wife cannot be construed as a matrimonial cruelty towards the appellant.

18. As regards the irretrievable break down of marriage pleaded by the learned counsel for the appellant-husband, we find that even now, the appellant is taking the daughter during the week-ends and leaving her in the custody of the respondent-wife every Mondays. The daughter had completed Engineering degree and now she is aged about 25 years. The daughter was not examined by the appellant to prove cruelty, if any. The entire allegation relating to desertion and cruelty is based on suspicion without any substance. Absolutely, no case is made out warranting us to dissolve the marriage solemnised between the appellant and the respondent. The Family Court, on a consideration of the entire evidence on record, has come to a

correct conclusion to dismiss the Original Petition filed by the appellant.

19. The decision relied on by the learned counsel for the appellant-husband in the case of L. Stella Vs. V.Ponnusamy, reported in 2015-5-Law Weekly 214, cannot be made applicable to this case. In this case, it was clearly established by the respondent that she was driven out of the matrimonial house by the appellant and therefore, she was constrained and forced to leave the matrimonial company of the appellant. In such circumstance, it cannot be said that animus deserendi exists in this case.

20. Similarly, in the decision of the Surpeme Court in the case of Manju Kumari Singh Vs. Avinash Kumar Singh, reported in 2018 SCC Online SC 739, relied on by the learned counsel for the appellant, it has been held that there were several criminal complaints registered by the parties against each other. Therefore, it has been observed that the parties have been living separately for more than a decade and all attempts of reconciliation through mediation have failed. This decision cannot lend support to the appellant in this case where there is no criminal complaint launched either by appellant or the respondent. Except exchange of notices making allegation and counter-allegation, the parties to this appeal have not resorted to criminal prosecution and therefore, the above decision of the Supreme Court, relied on by the counsel for the appellant, is of no use to this case.

21. For all the above reasons, we confirm the Order and Decretal Order dated 12.10.2017 passed in I.D.O.P. No. 46 of 2016 on the file of Family Court, Chengalpattu. The Civil Miscellaneous Appeal filed by the appellant-husband, is dismissed. No costs.

Sd/-

Assistant Registrar(insp cell)

//True Copy//

Sub Assistant Registrar

rsh/cs

To

1. The Judge, Family Court
Chengalpattu.

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

C.M.A. No. 240 of 2018

LN co

A.SK(21.01.2021)