

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.09.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.13 of 2014

G.Senthil Iyappan

.. Appellant/Petitioner

-vs-

S.Kavitha

.. Respondent/Respondent

Memorandum of Grounds of Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act read with Section 100 of the Code of Civil Procedure, against the judgment and decree made in C.M.A.No.462 of 2011 dated 21.12.2012 on the file of the Principal District Judge, Namakkal, confirming the judgment and decree made in H.M.O.P.No.259 of 2005 dated 29.8.2011 on the file of the Subordinate Judge, Namakkal District.

For Appellant:: Mr.Harinath for Mr.R.Karthikeyan

For Respondent:: Mr.R.Krishnamoorthy

JUDGMENT

Heard learned counsel for the parties through video conferencing due to the Covid-19 pandemic.

2. This civil miscellaneous second appeal has been filed challenging the concurrent findings of both the Courts below, raising the following substantial questions of law:-

"(a) Whether the Courts below were correct in holding that the appellant has not made out a case of desertion under Section 13(1)(i-b) as against the respondent, since the respondent has written several letters to the appellant?

(b) Whether the Courts below were correct in holding that the act of the respondent in leaving the matrimonial home without disclosing that she was having ailments and then taking treatment for about one long year

without the knowledge of the appellant/husband would not amount to cruelty?"

3. Mr.Harinath, learned counsel appearing for the appellant/husband argued that after the solemnization of marriage between the parties on 10.7.2003 at Vasavi Mahal, Justice Sundaram Hall, Salem as per the Hindu rites and customs in the presence of well-wishers belonging to both families, they were living together only for about three months. At the time of marriage, the appellant was employed in Trivandrum. But the respondent was avoiding the appellant to lead a matrimonial life. Supporting his submissions, learned counsel stated that the appellant being employed in Trivandrum, left the respondent in his house at Erumapatti and he used to visit his native place Erumapatti once in a month or once in two months. But during that time, the respondent was avoiding the appellant/husband to lead the marital life. When questioned as to why she was avoiding the appellant, the respondent stated that she wanted to continue her education and that the marriage was held against her willingness. Therefore, it was not possible for her to lead the marital life with the appellant. But later on, the appellant came to know that the respondent was having some ailments and supressing the same, she got married. Keeping in mind her ailments, the appellant invited the parents of the respondent to come to Erumapatti and the parents of the respondent also informed the appellant that they would come with the medical records. But they did not turn up thereafter. In the meanwhile, from 28.10.2003, the respondent, deserting the appellant, started living separately. Therefore, he filed the petition for divorce to dissolve the marriage held on 10.7.2003 under Section 13(1)(i-b) of the Hindu Marriage Act in H.M.O.P.No.259 of 2005, taking a ground that there was a desertion and also consequent cruelty caused to the matrimonial life of the appellant/husband, by the respondent. The respondent filed a counter affidavit stating that only the appellant neglected and avoided the respondent and she was always ready to live with the appellant to lead the matrimonial life. Finally the trial Court took up the matter for trial and after examination of the witness P.W.1 and also the documents Exs.P1 to P3 and on examination of the witness R.W.1 and also the documents Exs.R1 to R7, dismissed the H.M.O.P.No.259 of 2005 on the ground that the appellant/husband failed to make out the case of desertion, by the judgment dated 29.8.2011. Aggrieved thereby, an appeal was filed in C.M.A.No.462 of 2011 on the ground that the trial Court failed to appreciate the Exhibits P1 to P4 and also the other crucial evidence placed by the appellant. Moreover, it was also pleaded before the lower appellate Court that the trial Court miserably failed to consider the admission of the respondent that she was

having ailments in her body and thereupon prayed for setting aside the final decretal order passed by the learned Subordinate Judge, Namakkal.

4. Learned counsel appearing for the appellant further submitted that when the appellant has pleaded before the trial Court and also before the lower appellate Court that after the solemnization of marriage on 10.7.2003, the respondent deserted the appellant on 28.10.2003 and even before that also, she refused to lead the normal matrimonial life, a detailed counter affidavit has been filed by the respondent admitting both the desertion as well as the ailment. A reading of paragraph-5 of the counter affidavit clearly shows that one Dr.Rajasekar, Gastrointestinal specialist conducted test on the respondent and found that she has got inflammation in large intestine and was taking treatment for the same. That clearly shows that the respondent was suffering from ailment in the large intestine, for which she admittedly stated in the counter that she was taking treatment for the same and the said treatment was going for about six months to get the ailment cured completely. In the same paragraph, the respondent/wife also pleaded that during the treatment for about a year, she was periodically conveying to the appellant. Therefore, when the respondent has left the matrimonial home without the knowledge and consent of the appellant/husband on 28.10.2003, within four months from the date of marriage on 10.7.2003 and when she had admitted in the counter affidavit filed before the trial Court that she was taking treatment for the large intestine problem and she was also vomiting, having loose motion and there was no appetite and she was unable to take normal food. In addition thereto, she has also admitted that she was also getting fever on and off. The counter affidavit filed by the respondent has clearly established that the respondent/wife was having serious health problems, therefore, she was not able to cooperate with the appellant to lead the matrimonial life. The very admission made by the respondent/wife stating that she was taking treatment for large intestine for more than a year clearly proved the fact that she had concealed the ailment she suffered in the large intestine at the time of marriage. This apart, both the appellant and the respondent, although married on 10.7.2003, after the respondent deserted the appellant on 28.10.2003, are living separately for the past 17 long years. Therefore, it is a case for dissolution of marriage on the ground of desertion and also the consequent cruelty caused to the appellant. But this issue has been completely lost sight of by both the trial Court and the lower appellate Court. Hence the case made out by the appellant under Section 13(1)(i-b) of the Hindu Marriage Act against the respondent has to be accepted, for the simple reason

that the respondent herself admitted in her counter statement that she left the matrimonial home to take treatment for her ailment in her large intestine and in view of leaving the house without the knowledge and consent of the appellant/husband, the trial Court ought to have held that there was a desertion and the lower appellate Court also, after taking note of the fact that from the date of desertion, namely, 28.10.2003, they were living separately and there was no reunion or meeting taking place, ought to have agreed with the prayer for dissolution of marriage on the ground that in view of the desertion committed by the respondent, the appellant has been put to both physical and mental cruelty. As the Courts below have repeatedly fell in error, the concurrent findings of the Courts below are liable to be set aside.

5. Opposing the above prayer, Mr.R.Krishnamoorthy, learned counsel appearing for the respondent submitted that after the solemnization of marriage on 10.7.2003, without the consent and knowledge of the appellant, the respondent was taking treatment for the ailment in her large intestine. During her stay in the hospital and also with her parents, the respondent has been writing several letters requesting the appellant to come and take her back to the matrimonial home. But at no point of time, the appellant has sent any reply letter nor came forward to take back the respondent to the matrimonial home. Therefore, the Courts below have rightly come to the conclusion that it was not a case of desertion as alleged by the appellant to dissolve the marriage on the ground of desertion and the resultant cruelty caused to him. When the marriage took place, the respondent was working as Lecturer. Only on the compulsion made by the appellant to leave the job, the respondent left the job. For the reason that she had a small health issue for which she underwent treatment with the assistance of her parents, the appellant cannot throw any serious allegation against the respondent that she left the matrimonial home and that would amount to desertion, which would pave the way for dissolution of marriage. The reason being that even during the period of taking treatment, she was writing letters informing the appellant about the course of treatment taken by her and after one year of completion of treatment, when she was also additionally writing letters, which are marked as Ex.R5, the same clearly demolish the case of desertion attempted to be made against the respondent.

6. But this Court is unable to find any merit on the submissions made by the learned counsel appearing for the respondent nor find any justification on the part of the trial Court and also the lower appellate Court in rejecting the prayer

of the appellant. The reason being that when the marriage was solemnized on 10.7.2003 at Vasavi Mahal, Justice Sundaram Hall, Salem, the appellant was working in Air Force as Sergeant at Trivandrum. Both the appellant and the respondent are post graduate degree holders. When the appellant left Erumapatti to join his office at Trivandrum, it was averred in the petition that he used to visit Erumapatti once in a month or once in two months. During that time, the respondent refused to involve herself in the family life. As there was some problem in leading the marital life, the respondent, within four months time, namely, on 28.10.2003, left for her parental home and thereafter, she was taking treatment for some ailment in her large intestine. In view of the fact that she left the matrimonial home without the knowledge and consent of the appellant and his parents, taking serious note of the sudden desertion made by the respondent, the appellant filed the H.M.O.P.No.259 of 2005 before the Sub Court, Namakkal seeking dissolution of marriage. The respondent, while filing the counter affidavit, has almost admitted that she was having some serious health problem. It is pertinent to extract the relevant portion of the admission made by the respondent in paragraph-5, as follows:-

"5.....The respondent had to write M.B.A examination in December 2003 and she said that she will come after the examinations are over. The petitioner and his parents agreed for the same. After the examinations were over the respondent fell ill and so immediately she could not go to Trivandrum. Then she was vomiting having loose motion and no appetite and she could not take her normal food. She was also getting fever on and of. So she was taking treatment at Gokulam Hospital for about six months. The doctors could not rightly diagnose her problems. Then Dr.Rajasekar, Gastrointestinal Specialist conducted tests and found that the respondent has got inflammation in large intestine and began to give treatment for the same. So, she had to go for treatment for about six months to get completely cured for the same. During the treatment for about a year, the respondent was periodically conveying everything to the petitioner and his parents over the telephone as well as by letters. But there was no response from them. Neither the petitioner nor his parents came to see the respondent during that time."

7. A perusal of the above stand taken by the respondent clearly shows that after the respondent left the matrimonial home, she was vomiting, having loose motion, because there was no appetite. Moreover, she could not take normal food. Besides, she was also getting fever on and off. When the counter affidavit filed by the respondent clearly shows that she was taking treatment at Gokulam Hospital for about six months, the counter affidavit further states that the doctors could not rightly diagnose the problems. Then Dr. Rajasekar, Gastrointestinal Specialist conducted tests and found that the respondent was having inflammation in her large intestine and for that, she started taking treatment for about six months to get completely cured of the same. The counter affidavit further states that during the treatment for about a year, the respondent was periodically conveying everything to the appellant. The counter affidavit in one place says that the respondent was taking treatment for six months and in another place says that she was taking treatment for a year. Therefore, it is clear that only to conceal her health issues, she was not able to cooperate with the appellant/husband to lead the matrimonial life and to conceal the factum of her ailment of inflammation in large intestine, she left the matrimonial home. When the respondent herself has admitted in the counter affidavit, literally the trial Court has totally overlooked to see the own admission made by the respondent in her counter affidavit. Therefore, when the prayer for grant of divorce was refused by the trial Court, the matter was taken to the lower appellate Court. The lower appellate Court also, for the reasons best known to it, without appreciating the fact that the respondent had admitted the health issue for which she was taking treatment for quite a long time, has forgotten to address the issue as to how the respondent/wife can conceal this vital health issue to the appellant. When the respondent herself has filed the counter affidavit stating that she was taking treatment from Gokulam Hospital for about six months and after the doctors could not rightly diagnose the problem, she went to Dr. Rajasekar, Gastrointestinal Specialist, who, after conducting tests, found that the respondent has got inflammation in the large intestine, for which she was taking treatment for about one year, it goes without saying that only to conceal her ailment, she avoided the cohabitation and refused to cooperate with the appellant to lead the matrimonial life. Secondly, she also left the matrimonial home just within four months from the date of marriage and till now, they are living separately for over a period of 17 long years. Therefore, it is a fit case where the Courts below ought to have accepted the request for dissolution of marriage and granted divorce. Therefore, this

Court, setting aside the concurrent errors committed by the Courts below, is inclined to allow the civil miscellaneous second appeal answering the substantial questions of law in favour of the appellant. Accordingly, the civil miscellaneous second appeal stands allowed and the judgments and decrees passed by the Courts below are set aside granting the decree of divorce as prayed for by the appellant. No costs.

Sd/-
Assistant Registrar(CS VI)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge
Namakkal

2. The Subordinate Judge
Namakkal.

Copy to

The Section Officer,
VR Section High Court,
Madras.

+1cc to Mr.R.Karthikeyan, Advocate, S.R.No.29808

C.M.S.A.No.13 of 2014

SAI(CO)
GSP(16/12/2020)