

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.12.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.No.32 of 2019

V.Vasudevan

..Appellant/Respondent/Petitioner

-vs-

Rajeshwari

D/o late Punniyakodi

...Respondent/Appellant/Respondent

Prayer: Memorandum of Grounds of Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act, 1955 read with Section 100 of the Code of Civil Procedure, against the fair and decretal order dated 29.08.2019 passed in C.M.A.No.16 of 2017 on the file of the learned Additional District Judge (FTC), Arani, reversing the fair and decretal order dated 6.9.2017 passed in H.M.O.P.No.42 of 2015 on the file of the learned Subordinate Judge, Cheyyar.

For Appellant :: Ms.B.Poongkhulali
For Respondent :: Mr.P.Mani

JUDGMENT

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

2. The appellant, being the husband of the respondent, aggrieved by the reversal of the divorce decree granted by the trial Court, in the impugned judgment and decree passed by the lower appellate Court, has filed this civil miscellaneous second appeal, raising the following substantial questions of law:-

"(i) Whether the lower appellate Court was correct in allowing the I.A.No.6 of 2019 filed under Order XLI, Rule 27 of the Civil Procedure Code for adducing additional evidence along with the main appeal, without following the mandatory requirements mentioned in Rule 28 of Order XLI of the Civil Procedure Code, which directs the lower appellate Court either to take such evidence or to direct the Court from whose decree the appeal is preferred to take such evidence and to send it when taken to the appellate Court.

(ii) When the additional evidence sought to be adduced were essentially to bring out a just decision and decide the case, whether the lower appellate Court ought to have adopted the procedure that is mandatorily required under Order XLI, Rule 27 of the Code of Civil Procedure?

(iii) When P.W.2 has spoken about the mental and physical cruelty caused by the respondent/wife herein on daily basis, which was also duly and rightly recorded by the trial Court, whether the lower appellate Court, while reversing the well reasoned decree of divorce, can ignore the speaking evidence adduced by P.W.2?

(iv) Whether the impugned judgment and decree passed by the lower appellate Court without touching the evidence of P.W.2, are not amounting to perversity in reversing the reasoned judgment?"

3. Ms.B.Poongkhulali, learned counsel appearing for the appellant/husband pleaded that when the marriage was solemnized on 7.6.2004, both the husband and wife were not living happily. Although the appellant/husband is a small time merchant selling silk sarees in Kanchipuram, keeping in mind the family reputation and goodwill, adjusted with the unreasonable attitude and behaviour and conduct of the respondent/wife, who was initially working as a Teacher in a private school and subsequently appointed as Stenographer in the office of the Chief Educational Officer, Kanchipuram. After she became a Stenographer in the office of the Chief Educational Officer, Kanchipuram, her behaviour also completely turned different. Finally she left the matrimonial home on 7.2.2015 after eleven years. Even before she left the matrimonial house, they were not able to lead a peaceful matrimonial life that could be seen from the fact that there was no child born to them. Finding that the respondent/wife was not cooperative to lead a peaceful family life, he filed the H.M.O.P.No.42 of 2015 before the Sub Court, Cheyyar under Section 13(1)(ia) of the Hindu Marriage Act seeking a decree for dissolution of marriage.

4. Opposing the above prayer, a detailed counter affidavit has been filed by the respondent/wife stating that there is no cruelty. Moreover, she has not deserted or left the matrimonial house on 7.2.2015. It was also specifically pleaded that she was living along with her husband in the matrimonial home.

5. When the matter was taken up for trial, considering the evidence adduced by P.W.2, who was an independent witness,

speaking clearly that the respondent/wife used to cause both physical and mental cruelty regularly on her husband, the trial Court, finding that there has been frequent fighting between them and also taking note of the fact that respondent/wife left the matrimonial house on 7.2.2015, granted divorce between the parties. But inadvertently, instead of mentioning the provision as under Section 13(1)(ia), it has wrongly mentioned the same as under Section 13(1)(ib). But the findings and conclusions reached by the trial Court are predominantly on the physical and mental cruelty caused by the respondent/wife. A cursory reading of the evidence given by P.W.2, an independent witness, clearly shows that the appellant/husband was put to great mental cruelty, as the respondent/wife used to beat up her husband mercilessly. At one point of time, the husband was beaten up very badly to the extent of causing bleeding injuries on his head. In support of her submission, drawing the notice of this Court to page-79 of the typedset, she has stated that when the husband has been beaten up with bleeding injuries on his head, it cannot be construed that they were leading a happy life. Secondly, it was also the case of the appellant/husband that since the respondent/wife's sister was also employed as a Police Constable in the Kanchipuram Police Station, in an effort to infuriate the husband, the respondent used to make a complaint to her Constable sister, who was working in the Kanchipuram Police Station. On receipt of message, the respondent's sister used to call the appellant/husband to the police station regularly, where the appellant was made to wait for the whole day in the police station. The said harassment has been taking place on regular basis. Therefore, when all these happenings were spoken to clearly by P.W.2, the trial Court has rightly considered the evidence on record and ultimately gave a finding that there was sufficient evidence convincing the Court that the respondent/wife had caused both physical and mental cruelty, on which basis the decree for divorce was granted. But instead of mentioning the right provision, namely, under Section 13(1)(ia), it has wrongly mentioned as Section 13(1)(ib). It has been a well settled legal position that if a wrong provision is mentioned, that would not vitiate the judgment.

6. However, when the matter was taken on appeal by the respondent/wife, the lower appellate Court, misconstruing that the trial Court has granted divorce under Section 13(1)(ib) that deals with desertion, after one and half years, when the respondent/wife moved an application under Order XLI, Rule 27 of the Code of Civil Procedure for receipt of additional evidence, which would not fit into any one of the three situations contemplated under Rule 27 of Order XLI, after allowing the I.A.No.6 of 2019 filed under Order XLI, Rule 27, without even allowing anyone of the parties to examine or cross examine any one of the evidences, violating the mandatory provisions

mentioned under Rule 27 and also equally under Rule 28 dealing with the mode of taking additional evidence, the lower appellate Court has allowed the appeal reversing the findings of the trial Court. Learned counsel appearing for the appellant also submitted that when Rule 27(1) states that the parties to appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court, three situations have been contemplated for receipt of additional evidence, namely, (i) if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; (ii) or the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, such evidence was not within his/her knowledge or could not, after the exercise of due diligence, be produced at the time when the decree appealed against was passed; or (iii) if the appellate Court requires any document to be produced, the appellate Court may allow such evidence and documents to be produced. But none of the situations has been satisfied by the respondent/wife. The reason being that the additional evidence produced after one and half years from the date of admitting the appeal, were not refused by the lower appellate Court. Therefore, the first situation is ruled out. Coming to the second situation, if the party seeking to produce additional evidence establishes that notwithstanding the exercise of due diligence, she was unable to produce the evidence before the trial Court and only after exercise of due diligence, she was able to get it, then she should have filed the additional evidence along with the main appeal. But in the present case, the respondent/wife had approached the lower appellate Court after one and half years with I.A.No.6 of 2019 after filing of appeal. Therefore, the second situation is also ruled out. While coming to the third situation, learned counsel appearing for the appellant argued that if the lower appellate Court requires any document to be produced, the lower appellate Court may allow such evidence. But in the present case, the lower appellate Court also did not require any evidence to be produced. Therefore, the lower appellate court ought to have rejected the I.A.No.6 of 2019 that was filed after one and half years from the date of filing the appeal, which has not been done. Secondly, when Rule 28 of Order XLI of the Code of Civil Procedure lays down how the additional evidence should be taken and accepted by the lower appellate Court, none of the parties to appeal was allowed to examine or cross examine the evidence.

7. It is at this stage, Mr.P.Mani, learned counsel appearing for the respondent/wife, conceding the said proposition, fairly stated that the lower appellate Court, while accepting the appeal in 2017, after receiving I.A.No.6 of 2019, ought to have followed the mandatory requirements mentioned under Rule 28 of Order XLI of the Code of Civil Procedure, which has not been

followed, therefore, the matter may be remanded back to the trial Court for examining the evidence sought to be produced before the lower appellate Court.

8. At this juncture, this Court wants to know the veracity of the documents sought to be relied on by the lower appellate Court. Let us see what are the documents produced by the respondent/wife before the lower appellate Court in I.A.No.6 of 2019. They are as follows:-

- (i) xerox copy of the ration card (old);
- (ii) xerox copy of the ration card (new);
- (iii) aadhaar card of the respondent;
- (iv) voter's identity card of the respondent;
- (v) house warming ceremony photographs;
- (vi) letter received by the wife in her name;
- (vii) letter received by the husband;
- (viii) the Court notice addressed to the husband;
- (ix) Thusi village voters list of 2019;
- (x) marriage photographs relating to respondent's brother's marriage of 2019.

9. When the appellant/husband has prayed for dissolution of marriage on the ground of cruelty under Section 13(1)(ia) of the Hindu Marriage Act, taking support of the evidence produced by him and also by P.W.2, who is an independent witness, before the trial Court, to find out whether physical and mental cruelty has been caused to the appellant/husband, the appellant has enclosed the photographs at page-79 of the typedset showing the bleeding injury caused to the husband on his head, which have not been marked before the trial Court, as the date of occurrence is mentioned as 20.2.2019 after the judgment was given by the trial Court on 6.9.2017. Therefore, this Court is not inclined to rely on the photographs showing the head injury caused to the husband said to have been perpetrated by his wife. However, the evidence of P.W.2 shows that the respondent's sister, who has been working as Police Constable in Kanchipuram Police Station, used to call the appellant/husband to the police station by using her police power, as a result, he has been paraded to the police station everyday. This has been rightly noticed by the trial Court. Secondly, as rightly contended by the appellant/husband, when the husband has asked for divorce on the ground that they were not living together and the respondent was not cooperating for cohabitation, the respondent/wife has not moved any application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act. That also shows that she was not willing for restitution of conjugal rights. Therefore, when the trial Court has granted divorce accepting the mental cruelty caused to the appellant/husband by the respondent/wife, the lower appellate Court, without even giving a chance to the other side to cross examine the evidences and the additional

documents sought to be marked, simply allowed the I.A.No.6 of 2019, which is not legally sustainable.

10. In this context, it is relevant to restate the observations made by the Hon'ble Apex Court in the case of Naveen Kohli v. Neelu Kohli, (2006) 4 SCC 558, which are reproduced as follows:-

"85. Undoubtedly, it is the obligation of the Court and all concerned that the marriage status should, as far as possible, as long as possible and whenever possible, be maintained, but when the marriage is totally dead, in that event, nothing is gained by trying to keep the parties tied forever to a marriage which in fact has ceased to exist. In the instant case, there has been total disappearance of emotional substratum in the marriage. The course which has been adopted by the High Court would encourage continuous bickering, perpetual bitterness and may lead to immorality.

86. In view of the fact that the parties have been living separately for more than 10 years and a very large number of aforementioned criminal and civil proceedings have been initiated by the respondent against the appellant and some proceedings have been initiated by the appellant against the respondent, the matrimonial bond between the parties is beyond repair. A marriage between the parties is only in name. The marriage has been wrecked beyond the hope of salvage, public interest and interest of all concerned lies in the recognition of the fact and to declare defunct de jure what is already defunct de facto. To keep the sham is obviously conducive to immorality and potentially more prejudicial to the public interest than a dissolution of the marriage bond.

87. The High Court ought to have visualised that preservation of such a marriage is totally unworkable which has ceased to be effective and would be greater source of misery for the parties.

88. The High Court ought to have considered that a human problem can be properly resolved by adopting a human

approach. In the instant case, not to grant a decree of divorce would be disastrous for the parties. Otherwise, there may be a ray of hope for the parties that after a passage of time (after obtaining a decree of divorce) the parties may psychologically and emotionally settle down and start a new chapter in life.

89. In our considered view, looking to the peculiar facts of the case, the High Court was not justified in setting aside the order of the trial court. In our opinion, wisdom lies in accepting the pragmatic reality of life and take a decision which would ultimately be conducive in the interest of both the parties."

11. A perusal of the observation made in paragraph-85 would show that when there has been total disappearance of emotional substratum in the marriage, the course adopted by the lower appellate Court in the case on hand would encourage continuous bickering, perpetual bitterness and the same may lead to permanent chaos in the family. Therefore, this Court, accepting the judgment of the trial Court and also taking note of the fact that the learned counsel appearing for the respondent has also admitted that the mandatory requirements contemplated under Rules 27 and 28 of Order XLI of the Code of Civil Procedure have not been followed by the lower appellate Court, is inclined to interfere with the impugned judgment and decree passed by the lower appellate Court. Accordingly, the judgment and decree passed by the lower appellate Court are set aside answering the substantial questions of law in favour of the appellant. Since the trial Court has granted the divorce decree only on the ground of cruelty, the same is accepted and the civil miscellaneous second appeal stands allowed granting the decree of divorce by dissolving the marriage that took place on 7.6.2004 between the parties. Consequently, C.M.P.Nos.22764 and 22766 of 2019 are closed. No costs.

s/d-

Assistant Registrar(CS VIII)

True Copy

Sub-Assistant Registrar

SS

To

1. The Additional District Judge (FTC)
Arani
2. The Subordinate Judge
Cheyyar

Copy to
The Section Officer
VR Section
High Court, Madras 104.

+1 CC to Mr.P.Mani, Advocate sr 41151.

C.M.S.A.No.32 of 2019

SSV(CO)
SP(26/03/2021)



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