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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.11.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

C.M.A.Nos.1047 and 1048 of 2018 and CMP.No.8488/2018 in
CMA.No.1047/2018

V.Duraivel @ Durai Rajan ...Appellant in both C.M.As.

-vs-

G.Sivagami ...Respondent in both C.M.As.

Civil Miscellaneous Appeals filed under Section 19 of the Family Court Act, 1984, against the Common fair and decreetal order dated 02.02.2018 passed in HMOP.Nos.4012 and 3269/2013 by the learned V Additional Judge, Family Court, Chennai.

For Appellant : Mr.M.Kamaraj
For Respondent : Mr.S.Senthilnathan

COMMON JUDGMENT

(Judgment of the Court was pronounced by T.RAJA, J.)

The CMA.No.1047/2018 has been filed challenging the decree for divorce granted on the petition filed by the respondent-wife under Section 13(1) (i-a) of the Hindu Marriage Act, 1955, whereas CMA.No.1048/2018 has been filed challenging the dismissal of the petition seeking restitution of conjugal rights on the petition filed by the appellant-husband under Section 9 of the Hindu Marriage Act, 1955, both by a Common fair and decreetal order dated 02.02.2018 passed in HMOP.Nos.4012 and 3269/2013 by the learned V Additional Judge, Family Court, Chennai.

2. Learned Counsel appearing for the appellant-husband submitted that the appellant is now aged about 62 years whereas the respondent-wife is running 56 years. The marriage between the appellant and the respondent was solemnized on 01.02.1988 at K.P.Kalyana Mandapam, No.70, Alandur Road, Saidapet, Chennai, in the presence of both sides' well wishers, family members and friends as per the Hindu rites and customs



and thereafter, they were living happily at the matrimonial home at Pammal, Chennai, resultantly, they also had two male children, namely, V.D.Dhandayudhapani, born on 07.12.1988 and V.D.Thanigaivel, born on 10.05.1991.

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3. Learned Counsel for the appellant further submitted that it was the respondent-wife, who was adamant and did things on her own as per her whims and fancies without even consulting the appellant. Only due to the said nature of the respondent, he was tortured to a great extent. However, as the passage of time did not pave any way for improvement, the appellant got frustrated. He was also running a business in the name and style of 'Sri Venkateswara Enterprises' and few workers were working in his Firm. His company is producing subsidiary products for a company called 'M/s.Alsthom' which is an International Company. In view of the continuous and good production, he was able to generate reasonable revenue and support his family for the day-to-day affairs and he was also educating his children. But all of a sudden, the company M/s.Alsthom was shifted from Chennai to Coimbatore, as a result, he also migrated to Coimbatore and started running his small business at No.8/22, E.R.S. Nagar, Goundampalayam, Coimbatore and taken the respondent and his children along with him to Coimbatore. After living with the appellant for some time at Coimbatore, the respondent moved to her parental place at Chennai in the year 1997 and started living with her parents permanently. As the parents of the respondent are well off, they have taken care of the respondent and his children and their education. After sometime, the appellant's Company M/s.Alsthom was shifted to Calcutta. In Calcutta, due to paucity of funds and language problem, the appellant could not establish his business, however, as M/s.Alsthom employed the appellant as supervisor on contract basis, he was in Calcutta only for few years and due to food and language problems, he was not able to stay in Calcutta, therefore, he went back to Coimbatore and again moved to Karnataka. In view of this frequent changes in his working place, the appellant-husband was unable to come and live with the respondent-wife and the respondent also refused to come and live with the appellant in his working place. When the respondent deserted the appellant and her in-laws from coming home to lead the matrimonial life, the appellant invited the respondent along with the children, but the respondent was not paying any heed to his request. Therefore, the appellant was advised to approach the Family Court seeking restitution of conjugal rights. Accordingly, he filed a petition under Section 9 of the Hindu Marriage Act in HMOP.No.3269/2013 before the I Additional Family Court, Chennai. Subsequently, the respondent



wife filed HMOP.No.4012/2013 before the same court seeking dissolution of the marriage that took place between them under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, on the ground of cruelty and desertion.

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4. Learned Counsel appearing for the appellant also submitted that when the appellant was originally eking out his livelihood by working as Supervisor in M/s. Alsthom and as it was shifted from Chennai to Coimbatore and from Coimbatore to Calcutta and again from Calcutta to Karnataka, he was unable to stay at one place which is the only case of the appellant for his movement from one place to another. Taking advantage of the said fact, the respondent-wife has filed a petition seeking dissolution of the marriage on the ground of cruelty and desertion. Even today, the appellant husband is ready to live with the respondent and his children.

5. Concluding his arguments, learned Counsel for the appellant submitted that when the bread winner of the family has to move at the behest of the employment from Chennai to Coimbatore where the company was shifted and again from Coimbatore to Calcutta and once again from Calcutta to Karnataka, it would be very difficult to give up the job and lead the matrimonial life as the appellant being the bread winner of the family cannot think of leading peaceful matrimonial life without employment, therefore, his transfer as an incident of service, cannot be put against him. Hence, the question of desertion ought not to have been found against him, and it is not his deliberate abandonment of his family. Hence, the findings and the conclusions reached by the Family Court cannot be accepted and such a finding is without any justification. Even today, the appellant is ready to come and live with the respondent-wife and his children. Further, the appellant was the one who moved the Family Court seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955. Only thereafter, the respondent has filed the petition for divorce on the ground of cruelty and desertion. This clearly shows that the appellant has not deserted the respondent and his children at any stage. The other side of the appellant could have also been properly seen by the Family Court. Therefore, the impugned Common Order granting a decree for dissolution of the marriage and dismissing the conjugal rights petition have to be set aside.

6. Opposing the above prayer, learned Counsel for the respondent-wife argued that although the appellant after marrying the respondent has got two children, the respondent's



family members have been facing innumerable instances of cruelty coupled with desertion. The reasonings given by the appellant that only because of the shifting of the company, namely, M/s. Alsthom from Chennai to Coimbatore and then from Coimbatore to Calcutta and thereafter to Karnataka although appeared to be sound because he had to follow the dictums made by his employer, at no point of time, he has taken care of his family. Since the respondent's family members have extended a timely useful helping hand to the respondent for running a Mobile Shop when the respondent was not even a graduate and appears to have studied only upto VIII Standard, persistently, keeping in mind the future of the innocent children was able to run the mobile shop and through the earnings, she has educated the two children and they are now employed as I.T. Professionals in Bangalore. After knowing the prospects of the family which had undergone inevitable hurdles during the past 16 years, the appellant with a view to harvest the hardwork invested by the respondent in bringing up the family and educating the children has attempted to come back after 16 years of separation when he has not even taken any pain or interest to come and see the children and he has not moved any application seeking the custody of the children. The absence of any such application clearly shows the bad character on the side of the appellant that he was a man of opportunity because when the respondent and her children were seeing the dark days of life, he has not even moved any oral prayer before the Family Court praying to grant the relief to see the children. Although he has moved an application under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights, it is not known on what basis he could maintain that application when he was admittedly moving from Chennai to Coimbatore and Coimbatore to Calcutta and Calcutta to Karnataka at the behest of his employer and therefore, he cannot ask for restitution of conjugal rights as the respondent has already been taken care of the children by running a mobile shop. Therefore, the present appeals deserve to be dismissed, he pleaded.

7. This Court frames the following issues for determination:

- (i) Whether the findings and conclusions reached by the Family Court do deserve acceptance?; and
- (ii) Any other relief?

8. The learned Family Court, while dealing with this aspect in Point No.1 whether the wife is entitled for divorce on the ground of cruelty and desertion, has held clearly in paragraph No.7(iv) that from 1997 to 2013 i.e. for 16 long years



the husband has forgotten his wife and two children and now he has come forward with a petition for restitution of conjugal rights stating that he is willing to take care of them. Therefore, when the Family Court has given a clear finding that the husband neglected his duty when his assistance was needed to the wife and the two growing children, the appellant-husband explained that he wants to live with his wife and two children now and the Family Court has wrongly dismissed the plea for restitution of conjugal rights. Moreover, the appellant also while being examined before the trial court as P.W.1 has deposed in his cross-examination that he went to Calcutta without informing his wife. On this score, admitting his evidence that the respondent wife has proved the fact before the court that her husband deserted her for nearly 16 years, the trial court has rightly reached a conclusion to dissolve the marriage on the ground of desertion. While the appellant was standing before the court in the witness box as P.W.1 has admitted that he went to Calcutta without informing his wife. Therefore, it is not known how he can now plead for interference on the findings of the trial court. Hence, when the factum of desertion has been substantially proved before the trial court, we do not find any error in the said findings.

9. Coming to the second aspect to grant divorce on the ground of cruelty, learned Counsel for the respondent-wife also argued that the appellant while staying with the respondent has beaten up the respondent wife. No doubt, the parties are living separately for more than a decade and the findings of desertion is accepted. While so, coming to the allegation of cruelty to invoke a decree of dissolution of marriage under Section 13(1) (i-a) of the Hindu Marriage Act, 1955 on the ground that the husband has beaten up his wife is untenable. When it is the allegation made by the wife that her husband had left the home and he has not visited the family, it is difficult to accept the allegation that he had beaten up his wife. Besides, it appears that the appellant has miserably failed to take care of the respondent and his children for 16 long years. Further, when the children of the respondent are now well placed in I.T. field, the question of accepting the appellant as their father lies only at their hands. If both the children, in their wisdom, persuade their mother to accept for reunion of their father and mother, then no one can stop such a decision. Therefore, leaving the decision to their wisdom, we refrain from making any remarks thereof. However, we make it clear that the ground of cruelty raised under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 fails. Accordingly, the issues are jointly answered.



10. In the result, both these Civil Miscellaneous Appeals fail and the same are accordingly dismissed thereby confirming the common fair and decreetal order of the learned V Additional Judge, Family Court, Chennai passed in HMOP.Nos.4012 and 3269/2013 dated 02.02.2018. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True copy//

Sub Assistant Registrar

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To

1. The Motor Accident Claims Tribunal
V Additional Judge, Family Court,
Chennai.

2. The Section Officer
VR Section
High Court, Madras 104.

+2 Ccs to Mr.S.Senthilnathan, Advocate sr 58645 & 58644
+2 Ccs to Mr.M.Kamaraj, Advocate sr 58805 & 58806.

C.M.A.Nos.1047 and 1048 of 2018

JPL(CO)
SP(14/02/2022)