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IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.12.2020

DATE OF DECISION : 26.04.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A.NOS.8 & 10 OF 2013

V.Ramasamy ..Appellant in both the C.M.S.A's/
Appellant/Petitioner

-vs-

L.Priya @ Priya Bhuvaneswari ..Respondent in both the C.M.S.A's/
Respondent/Respondent

Memorandum of Grounds of Civil Miscellaneous Second Appeals filed under Section 28 of the Hindu Marriage Act, 1955 read with Section 100 of the Code of Civil Procedure, against the common judgment and decree dated 08.11.2012 passed in H.M.C.M.A.Nos.5 & 6 of 2006 on the file of the learned Principal District Judge, Vellore District, confirming the common judgment and decree dated 12.04.2006 passed in M.O.P.Nos.90 & 91 of 2003 on the file of the learned Additional Subordinate Judge, Vellore.

For Appellant :: Mrs.K.Sumathi

For Respondent :: Mr.E.Raj Thilak

JUDGMENT

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

2. These two civil miscellaneous second appeals are directed against the concurrent findings of facts reached by both the trial Court and the lower appellate Court repeatedly refusing to grant divorce in favour of the appellant/husband and granting restitution of conjugal rights in favour of the respondent/wife.

3. The facts in brief leading to the filing of the appeals are stated as follows:-

The appellant is a retired Bank Officer. He married the



respondent on 10.2.89 at Sholinghur, Vellore District as per the Hindu rites and customs. Out of the wedlock, a male child was born on 26.11.89. During the pregnancy, it was alleged that in spite of the doctor's advice as well as the advise of the appellant, the respondent/wife had not taken proper care. Although the respondent had undergone the scan procedure, the result thereof with regard to the health of the child was concealed, ultimately the respondent delivered a handicapped male child. It was further alleged that the respondent/wife was behaving in an adamant manner and she is a severe sugar and blood pressure patient and the same were purposefully suppressed by her and her family members with an ulterior motive. It was also further alleged that from the date of marriage, the respondent was adamantly raising disputes and quarrels even for cohabitation, as a result, the appellant underwent mental agony, that cannot be expressed in words, hence, the appellant, who is of soft nature, was not able to lead a happy matrimonial life with the respondent. On the contrary, the respondent was in the habit of threatening the appellant in a cruel manner causing not only stress, strain and mental agony, but also lot of worries and unpleasantness to the appellant. Many times the respondent used to raise quarrels and would throw vessels and articles on the appellant's face and this behaviour of the respondent became a routine affair from the beginning of the marriage. Although the appellant tolerated all the unlawful activities of the respondent on the belief that she would change her attitude in due course, no improvement thereon had occurred. In the meanwhile, subsequent to the delivery of the male boy, the appellant was transferred to Coimbatore. It was also pleaded that the appellant had given good treatment to his son in various hospitals at Coimbatore including one of the famous hospitals, namely, Telungupalayam Hospital. But there was no improvement in his son's health. This apart, on many occasions, the respondent had gone to the extent of having kerosene etc., with her and by way of closing the door of the room, she used to give threats of suicide. Although the appellant was transferred to Coonoor, he used to visit the house in alternate days for providing treatment to his son, but the respondent continued her unlawful activities and never cooperated with the appellant. At one point of time, the mental agony, stress, strain caused by the respondent's behaviour went out of control, but considering the health condition of his son, he tolerated her insults. However, the respondent, taking advantage of the ill-health of her mother, left the matrimonial home on 5.4.95 to her parental home informing the appellant that she would come back after a month. Thereafter, the appellant visited her parents house more than 50 times and in addition, the appellant's parents also visited the respondent's house and requested her to come back to the matrimonial home. But the respondent, purposefully and intentionally with an ulterior motive, never turned back to the



appellant's house. Therefore, the appellant sent several letters requesting the respondent to come back to the matrimonial home to lead the matrimonial life. When there was no response from the respondent for seven long years and thereby deserted the appellant, he filed the petition in H.M.O.P.No.471 of 2001 before the Family Court, Coimbatore seeking divorce, on the ground of cruelty and desertion, under Section 13(1)(i-a) & (i-b) of the Hindu Marriage Act, to dissolve the marriage solemnized on 10.2.89 between the appellant and the respondent. Thereafter, within three months, the respondent filed H.M.O.P.No.629 of 2001 before the Family Court, Coimbatore seeking restitution of conjugal rights under Section 9 of the Hindu Marriage Act, on 22.11.2001. The said petitions were transferred to the jurisdictional Court at Vellore pursuant to the order passed by this Court in Tr.C.M.P.Nos.5474 & 5475 of 2003 dated 10.7.2003 and re-numbered as M.O.P.Nos.90 & 91 of 2003 respectively on the file of the Additional Subordinate Judge, Vellore.

3.2. The trial Court took up both the petitions for joint trial. While considering the allegation of cruelty caused to the appellant/husband, with reference to the alleged letters said to have been written by the respondent/wife giving threats of suicide, the trial Court, finding that no letters as alleged by the appellant were produced before the Court and that the allegation of murder of the appellant's parents not being substantiated, for the simple reason that the parents of the appellant were not even examined before the Court to prove that allegation, came to the conclusion that no cruelty as alleged by the appellant/husband was made out. The trial Court also perused the Exhibits A2 & A3 letters, which do not indicate the intention of the respondent to put an end to the matrimonial tie. On the other hand, the trial Court has come to the conclusion that a perusal of the letters would go to show that the respondent is interested in her son's life and requested for sufficient money from the appellant to maintain herself and the son. At one point of time, the respondent/wife having taken care of the son for 15 long years, filed a memo on 22.8.2002 requesting her husband to keep his son for sometime, citing a reason that he was longing for the love and affection of the father, for which the appellant has filed a counter statement opposing the said request stating that it would be difficult to maintain him. Therefore, the trial Court has come to the conclusion that the appellant/husband, to get rid of the special child and also the mother, who cannot be faulted for delivering the special child, as the appellant has invented the grounds for divorce, rejected the petition for divorce and allowed the petition for restitution of conjugal rights, giving a finding that there was no cruelty caused by the respondent/wife and that there was no desertion, for the simple reason that only the



appellant has taken both the respondent with the son by car to her parental house and left them there with the promise that he would come and take them back. But he did not turn up to take them back to the matrimonial home. Therefore, the trial Court held that the ground of desertion also was not made out.

3.3. Aggrieved thereby, H.M.C.M.A.Nos.5 & 6 of 2006 were preferred by the appellant before the learned Principal District Judge, Vellore. The lower appellate Court, finding that the foundation of marriage is tolerance, adjustment and respect towards each other and that there is no iota of evidence to show that the appellant was put into mental agony by means of cruelty and that the respondent/wife has proved the case by way of adducing oral evidence for confirming the order granting restitution of conjugal rights, also gave a finding that the appellant was not subjected to cruelty at the hands of the respondent as alleged therein. When the lower appellate Court also has come to the conclusion that no case of cruelty or desertion was made out, aggrieved thereby, the present civil miscellaneous second appeals have been filed by the appellant raising the following substantial questions of law:-

- “(i) Whether the appellant/husband is entitled for divorce on the ground of cruelty and desertion and whether the respondent/wife is entitled for the relief of restitution of conjugal rights?
- (ii) Whether the Courts below have properly applied the law of evidence as the question of proof of cruelty and desertion can always be decided only on oath?
- (iii) Whether the finding of the lower appellate Court in putting the blame on the appellant in not taking care of the spastic child is not contrary to the evidence available on record?”

4. Mrs.K.Sumathi, learned counsel appearing for the appellant/husband, narrating the facts that there was a marriage solemnized between the appellant and the respondent on 10.2.89 and out of the said wedlock, a male child was born on 26.11.89, drawing the Court's notice to paragraph-6 of the divorce petition, stated that when a specific averment about the respondent's adamant attitude, behaviour and quarrelling nature was made, there was no specific denial by the respondent in the counter affidavit. Moreover, when it was pleaded by the appellant/husband that the respondent by taking kerosene with her and by way of closing the door of the room in which she was staying, gave a threat of suicide attempts and thereby caused mental agony, there was no specific denial, except a formal



denial in paragraph-7 of her counter affidavit. When the Courts below have wrongly proceeded that there was no sufficient evidence produced to substantiate the allegation of cruelty said to have been caused to the appellant, the concurrent findings of both the Courts below are liable to be interfered with, she pleaded. In support of her submissions, placing reliance on the judgment of the Apex Court in Pankaj Mahajan v. Dimple, (2011) 12 SCC 1, Mrs.Sumathi argued that the Apex Court in the said judgment has held that giving repeated threats to commit suicide would amount to cruelty. Even in the case of Narendra v. Meena, 2016 (6) CTC 440, the Apex Court has clearly observed that the threats or acts of committing suicide would constitute cruelty. Moreover, when the respondent has not even denied the averments of the appellant with regard to the cruelty said to have been caused by the respondent by making threats of suicide and once the respondent failed to deny the said averment, the same should be taken as proved, as per the ratio laid down by the Apex Court in Laxman v. Annapurani, 2018 (6) MLJ 289. Since the evidence on record and the ratio laid down by the Apex Court on the issue of cruelty were ignored repeatedly, the said concurrent errors of the Courts below shall be liable to be interfered with by this Court.

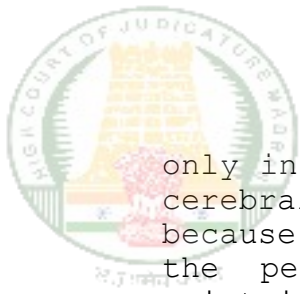
5. Adding further, Mrs.Sumathi argued that as the parties are living separately from 5.4.95, the date on which the respondent deserted the appellant, they cannot come back to the matrimonial home. Therefore, on the ground of long separation of 25 long years, the appellant's prayer for divorce can be considered, because a quarter century of the matrimonial life had been wasted by both parties. When many efforts were taken before the Mediation Centre, during the pendency of the matters before this Court and also before the Family Court, no more further deliberations could be initiated to patch up the huge gap that has occurred in the matrimonial life. Therefore, it is a case where, considering the long separation of a quarter century, the marriage solemnized on 10.2.89 is liable to be dissolved. Continuing her arguments, learned counsel appearing for the appellant submitted that when the Civil Procedure Code is made applicable in matrimonial dispute, this matrimonial dispute was tried by the Courts below. When the appellant has specifically pleaded the threats of suicide made by the respondent for causing cruelty, the respondent in her counter has not made a specific denial. In view of the legal position that the respondent has not legally established her case, the Courts below ought to have rejected her case as unsustainable in law and granted divorce holding that the appellant has established the ground of cruelty and desertion. Since the appellant, who is now aged 62 years, is not able to handle the physique of his son, who is aged 32 years, he has engaged a helper and also paying him from his pension, apart from paying



Rs.10,000/- as monthly maintenance to his wife, the respondent herein without any default. Although the appellant has been taking care of his son for the past 13 years, admittedly during this long period, the respondent has not shown any iota of love and affection towards the son and also to the appellant/husband. That clearly shows that they are inimically opposed to each other, therefore, any proposal for re-union would put the son also in a hostile atmosphere. Hence the re-union will not be in the interest of any one, especially the ailing son. This aspect has been completely overlooked by the Courts below. Therefore, considering the fact that they are living separately for the past 25 long years, visualizing that the preservation of such a marriage is totally unworkable which has ceased to be effective and allowing the same deadlock to continue would be a greater source of misery to the parties, she prayed for granting divorce by dissolving the marriage.

6. Learned counsel appearing for the respondent, opposing the above prayer, argued that after the marriage was solemnized on 10.2.89, the respondent underwent a medical check up including scan procedure. When it was found out that the child was not growing normally, after deliberations, the appellant advised the respondent to abort the child. This was not liked by the respondent/wife. Therefore, alleging that the respondent was showing adamant attitude and quarreling with the appellant for not aborting the child, has wrongly added yet another unfounded allegation that she used to make threats of committing suicide, thereby causing mental agony and mental cruelty to him. This aspect has been examined by the trial Court. When no letters as alleged by the appellant were produced by him before the trial Court and this apart, the allegation of murder of his parents also was not substantiated, inasmuch as the parents of the appellant were not even examined before the trial Court to prove the above allegation. Above all, the trial Court, going into the evidence, came to the conclusion that the conduct of the appellant in writing letters in cordial terms in the years 1998 and 2000 under Ex.B3 and Ex.B4 would clearly militate the allegation of the appellant that the respondent used to make suicide attempts during her stay at the matrimonial home etc. On this score, the trial Court came to the conclusion that the allegation levelled by the appellant against his wife are unbelievable.

7. Coming to the allegation of desertion, it was pleaded that it is the own admitted case of the appellant that after the birth of the child, he was transferred to Coimbatore in the year 1991. During that time the respondent has joined the company of the appellant. Therefore, when the respondent had gone to her parental home in the month of March 1989 for delivery, she also returned to the matrimonial home after the birth of the child



only in the year 1991. Secondly, as the child was afflicted with cerebral palsy, it is always difficult to maintain the child, because there is no proper treatment for cerebral palsy. Even the persons who are suffering from cerebral palsy cannot maintain independently. Knowing this, the appellant had developed hatred and disliking towards the spastic child from the very beginning. This could be evidently seen from the memo filed by the respondent before the trial Court on 22.8.2002 requesting the appellant to keep his son in custody for sometime, as he was longing for the affection of the father. For this memo, the appellant father has filed a counter affidavit opposing the said prayer stating that it was difficult to maintain him. The counter affidavit filed by the father not to take his son would clearly show that the appellant was not interested in maintaining him. In view thereof, the trial Court has come to the conclusion that mere sending of monthly maintenance alone would not prove the good conduct of the appellant and the facts of the matter would show that the allegation of cruelty has been pressed into service by the appellant only in order to get rid of the respondent and his son. Moreover, the appellant alone brought the respondent and his son in a car to her parental house and left them. Thereafter abruptly, he filed the case for divorce. As the respondent was living with her parents, she has been giving treatment to the child from the date of his birth till 2003 at C.M.C.Hospital, Vellore and the Exhibits B7, B8, B9, B10, B23 and B31 would clearly suggest the fact that the child was treated only at the C.M.C.Hospital, Vellore. The continuous treatment record of the hospital would clearly suggest the fact that the respondent was taking care of the child from the very beginning and only for treating the child, she was staying with her parents. Therefore, the allegation of desertion also should not be accepted for the findings given by both the Courts below. Hence such findings on record supported by evidence cannot be interfered with by this Court, he pleaded.

8. Heard both sides.

9. Admittedly, after the marriage was solemnized on 10.2.89 between the parties, the respondent became pregnant. When she went for medical check up, it was found that the child was not growing as a normal child, therefore, on the advice given by the doctors, both the appellant and the respondent had detailed discussions whether to go for delivery of the child or to abort the child. It appears that the respondent/wife declined to accept the advise of the husband to abort the child. Finally, when the child was born, it was a spastic child. Naturally when the child became spastic, the husband's advise to the respondent to abort the child became the cause of frustration, as a result, the frequent quarrels and differences between the couple got



aggravated. Even from the date of birth of the child, the respondent has been giving treatment in the C.M.C.Hospital, Vellore. Therefore, the Courts below have found that the allegation of cruelty should be more serious than ordinary wear and tear of marital life. Even the insignificant and trivial wear and tear cannot be taken as a ground for divorce, for the simple reason that the foundation of marriage is tolerance, adjustment and respect towards each other. In this context, the Courts below have come to the conclusion that there was no iota of evidence to show that the appellant had been put into mental agony by means of cruelty. The attitude of the appellant by filing counter affidavit to a memo filed by the respondent on 22.8.2002 requesting the appellant to keep his son in custody for sometime, as he was longing for the affection of the father, would show that the appellant was not interested to maintain him. In this regard, the Courts below have given a finding that only to get rid of the custody, the appellant has invented frivolous allegations of cruelty.

10. Coming to the allegation of desertion, the respondent deposed before the Courts below that she came to the parental house along with her father in law with the hope that her husband would come and take them back to the matrimonial home. But it was only the appellant who had delayed their return on the pretext of auspicious day and astrologer's opinion etc. When she visited the matrimonial home, thereafter, again the appellant brought her and the minor by car to her parental house and left them abruptly and subsequently filed the case for divorce. That also shows that the appellant was not interested to keep both the respondent and his son. Although the finding of facts by both the Courts below on the allegation of cruelty and desertion were found against the appellant, in the light of the memo filed before the Court on 22.8.2002 by the respondent/wife requesting the appellant to keep his son in custody for sometime, as he was longing for the affection of his father, the reply of the appellant through his counter that it was difficult to maintain his son, clearly shows that the appellant was not willing to see his wife and son. However, the written arguments filed by the appellant before this Court would show that the appellant, who is aged about 62 years, has taken back his son, aged 32 years, and maintaining him with the assistance of a helper by paying from his pension, besides paying Rs.10,000/- to the respondent as maintenance. Although the allegation of cruelty and desertion has been found against the appellant, yet another important factor that they are living separately for the past 25 long years, a quarter century, would compel this Court to grant the decree of divorce, in the light of the various pronouncements of the Apex Court.

11. In this context, it is pertinent to extract the ratio



following the ratio laid down by the Apex Court in Naveen Kohli's case cited supra, is inclined to dissolve the marriage solemnized between the parties.

13. Equally this Court is conscious of the fact that the interest of the respondent also has to be safeguarded. Section 25 of the Hindu Marriage Act says that at the time of passing any decree or at any time subsequent thereto, on an application made to it, may order one party to pay such monthly sum as maintenance to the other party. But the Division Bench of this Court in Chandrika v. M.Vijayakumar, 1996-1 117 Mad.L.W.695 has held that the Court may grant permanent maintenance to a party while disposing of the main petition even if no proper application has been moved. Following the said ratio, in the cases on hand, since it is represented that the appellant has been paying a sum of Rs.10,000/- per month to the respondent/wife as maintenance without any default and also taking care of his son with the assistance of a helper by paying from his pension, bearing in mind that the appellant is a retired Bank Officer, this Court directs the appellant to continue to pay the said sum of Rs.10,000/- per month as maintenance to the respondent without fail.

14. For all the aforementioned reasons, considering the long separation of the parties for almost a quarter century, the impugned judgments and decrees passed by the Courts below are set aside and the civil miscellaneous second appeals stand allowed, answering the substantial questions of law in favour of the appellant, granting the decree of divorce by dissolving the marriage solemnized on 10.2.89 between the parties, subject to the payment of the maintenance amount as quantified above, and rejecting the prayer of the respondent for restitution of conjugal rights. Consequently, M.P.No.1 of 2013 is closed. No costs.

26.04.2021

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After the pronouncement of the judgment, learned counsel appearing for the respondent requested this Court to make it clear that the respondent/mother is also entitled to have the visitation rights to see her son.

2. Although this request was objected to by Mrs.K.Sumathi, learned counsel appearing for the appellant stating that in view of the long gap created by the respondent in not visiting her son for a long time, her son may become volatile or tense at any moment.



3. However, this Court, for the reason that the son was with the respondent for long time till he was taken care of by the appellant, overruling the objection, hereby grants the visitation right and permits the respondent/mother to visit her son once in a month and be with him for half a day, either in the morning from 8.00 A.M. to 2.00 P.M., or in the evening from 1.00 P.M. to 7.00 P.M., as the case may be.

Sd/-
Assistant Registrar(SSA)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge
Vellore District.
2. The Additional Subordinate Judge
Vellore.

+4ccs to M/s.K.Sumathi, Advocate, S.R.No.25568,25569

C.M.S.A.Nos.8 & 10 of 2013

GP(CO)
PM/10/11/2021