



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 29.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

C.M.A.No.2955 of 2019 and CMP.No.15747 of 2019

Priya ... Appellant/Respondent

-vs-

Saravanan ... Respondent/Petitioner

Civil Miscellaneous Appeal filed under Section 19 of the Family Court Act, 1984, against the Fair and decreetal order dated 13.03.2019 in F.C.O.P.No.356/2018 on the file of the Family Court, Namakkal.

For Appellant : Mr.D.Shivakumaran

For Respondent : Mr.V.K.Vijayaraghavan

JUDGMENT

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

The Civil Miscellaneous Appeal has been directed against the fair and decreetal order dated 13.03.2019 passed in F.C.O.P.No.356/2018 by the learned District Judge, Family Court, Namakkal, thereby dissolving the marriage that took place between the parties.

2. The case of the appellant-wife before the lower court is that the marriage between herself and the respondent-husband was solemnized on 04.06.2009 at Mohanur, Namakkal District and out of the said wedlock, in the first delivery, a female child, namely, S.Preethika was born to them on 02.03.2010 and in the second delivery, twins, namely Rakshitha and Ranjan were born to them on 13.05.2014. While so, the respondent-husband developed illicit intimacy with a woman, whose name is also Priya and also brought her to the home, which made her to leave the matrimonial



WEB COPY

home and live separately within the same compound along with her children. Thereafter, when due to the inducement of that Priya, the respondent and his family members tried to kill her on 15.01.2015, she gave a complaint before Mohanur Police Station and based on the same, a FIR in Cr.No.13/2015 was lodged and after filing of the charge sheet, the same was taken cognizance by the learned Assistant Sessions Judge, Namakkal in S.C.No.109/2017 for the offences under Sections 326 and 307 IPC. That apart, since the respondent has deserted the appellant-wife, she has filed M.C.No.22/2015 on the file of the learned Chief Judicial Magistrate, Namakkal, under Section 125 of Cr.P.C. claiming maintenance and by order dated 01.08.2017, the learned Chief Judicial Magistrate granted maintenance of Rs.3,500/- p.m. for her and Rs.3,000/- p.m. for each of the 3 minor children totalling Rs.12,500/- p.m. Challenging the same, the respondent-husband has filed C.R.P.No.27/2017 on the file of the learned District Sessions Judge, Namakkal.

3. The further case of the appellant-wife is that subsequently, the respondent-husband has filed a petition in HMOP.No.34/2018 seeking divorce before the learned Subordinate Judge, Namakkal which was later on transferred to the Family Court, Namakkal and renumbered as FCOP.No.156/2018 and though a counter affidavit has been filed by the appellant-wife denying all the allegations levelled against her, a decree for divorce was granted on 13.03.2019. According to the appellant-wife the respondent, a wrong doer cannot take advantage of his own wrong and file a petition for divorce alleging falsehood. Hence, challenging the said decree granting divorce, the appellant-wife is before this Court with this Civil Miscellaneous Appeal.

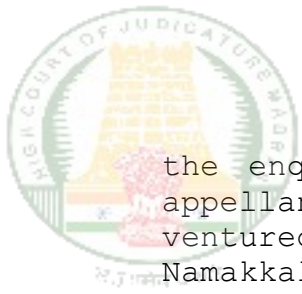
4. Mr.D.Shivakumaran, learned Counsel for the appellant-wife heavily assailing the impugned decree of divorce dated 13.03.2019 pleaded that dissolving the marriage solemnized between the parties on 04.06.2009 thereby granting divorce against the appellant-wife on the ground that the wife has caused cruelty and desertion is wholly unacceptable and unjustifiable. The reason being that when the respondent-husband was found to be wrong doer, the learned trial court ought not to have shifted the focus against the wife for having caused cruelty and desertion. Further, when the evidences were available before the Assistant Sessions Court, Namakkal, for convicting the respondent-husband under Section 325 of IPC, thereby any man of ordinary prudent can come to a conclusion that the wrong doer was only the respondent-husband, based on which the Family court ought to have been dismissed the petition seeking divorce. On the other hand, taking a stand that the appellant-wife against whom the divorce petition has been filed remained absent and failed to appear before the trial court for



stepping into the witness box, the trial court ought not to have drawn an adverse inference under Section 114(g) of the Indian Evidence Act, 1872 that she failed to disprove the allegation made against her by the respondent-husband. Inasmuch as when the evidences available before the Family Court were self-speaking against the respondent-husband to come to a conclusion that he alone is the wrong doer, that itself in a matrimonial matter is sufficient to hold that the allegations against the appellant-wife have not been proved. Therefore, the impugned fair and decreetal order of the Family Court are liable to be set aside.

5. Arguing further, learned Counsel for the appellant-wife fairly pleaded that although the respondent-husband filed HMOP.No.34 of 2018 seeking divorce under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955 on the ground of cruelty and also desertion, now much water has flown. Firstly, the appellant-wife having suffered cruelty on the hands of the respondent-husband has given a criminal complaint in Cr.No.13/2015 before Mohanur Police Station and later on, the said complaint was culminated into S.C.No.109/2017 on the file of the learned Assistant Sessions Judge, Namakkal, for the offences under Sections 326 and 307 IPC. and the learned Assistant Sessions Judge, found the respondent-husband guilty under Section 325 of IPC for which he was convicted and sentenced to undergo simple imprisonment for three weeks by the Sessions Court. That judgment of the Sessions Court clearly shows that the respondent-husband was a wrong doer. Therefore, the allegation levelled by the respondent-husband before the Family Court that there was a cruelty and desertion on the side of the appellant-wife and unable to sustain the same, the respondent-husband filed divorce petition under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955, ought not to have been accepted. Hence, taking into account the conviction and sentence imposed in S.C.No.109/2017 by the learned Assistant Sessions Judge, Namakkal, against the respondent-husband, the impugned judgment and decree passed by the court below are liable to be set aside, it is pleaded.

6. Mr.V.K.Vijayaraghavan, learned Counsel for the respondent-husband opposing the above prayer pleaded that it is a case where the respondent-husband has rightly approached the learned Subordinate Judge, Namakkal, seeking divorce under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955, on the ground of cruelty and desertion. When several allegations have been made against the respondent-husband by his wife-appellant herein, it is well settled legal position that the respondent against whom allegations have been made one after the other should come and disprove the same by participating in



the enquiry before the court below. In the present case, the appellant-wife has boycotted the Family Court. She has not ventured to get into the witness box of the Family Court, Namakkal for denying the allegation levelled against her by her husband-respondent herein. Secondly, when the appellant herein was able to prosecute the respondent-husband so meticulously and carefully by producing all sorts of evidence to convict him in a criminal case which was registered based on her complaint, there cannot be any justification in not appearing before the Family Court, therefore, the learned Family Court, rightly taking support from Section 114 (g) of the Indian Evidence Act, has drawn adverse inference that all the allegations made by the respondent-husband in the petition for divorce should be taken as established and decreed the divorce petition filed by the respondent-husband.

7. In support of his submissions, placing reliance on the judgment of the Apex Court in *Man Kaur (Dead) by LRs v. Hartar Singh Sangha*, (2010) 10 SCC 512 ruling that where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross examined by the other side, a presumption would arise that the case set up by him is not correct, he pleaded that the appellant ought to have participated in the enquiry before the Trial Court, whereas she remained absent from enquiry, therefore, the Family Court rightly drew the adverse inference by virtue of Section 114(g) of the Evidence Act. Besides, when the appellant was finding time to file cases one after the other, namely, lodging of criminal complaint in Cr.No.13/2015 on the file of Mohanur Police Station which was later on culminated into a Sessions Case in S.C.No.109/2017 on the file of the Assistant Sessions Judge, Namakkal for offences under Sections 326 and 307 of IPC, filing of Maintenance Case in M.C.No.22/2015 before the Chief Judicial Magistrate, Namakkal and filing of Partition Suit in O.S.No.183/2015 before the Subordinate Court, Namakkal, deliberately and willfully not choosing to appear in the witness box when the matter was tried by the Court below, the Court would be constrained to draw an adverse presumption against her and as a consequence, after the decree of divorce was granted, she cannot come to this Court by filing this appeal. When the appellant has deliberately boycotted and refused to assist the Court below by answering or denying any of the allegations made by the respondent-husband with her oral or documentary evidence, she is not entitled to maintain this appeal, therefore, the appeal is liable to be rejected, he pleaded.

8. Learned Counsel for the respondent-husband further pleaded that as canvassed by the learned Counsel for the appellant that a wrong doer has to suffer the legal



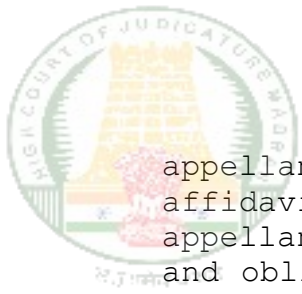
consequences, the appellant herein also being a wrong doer by her own acts, has to suffer the decree for divorce, the reason being that she has also filed a suit for partition against the respondent-husband in O.S.No.183/2015 before the Subordinate Judge, Namakkal, joining hands with her children. In addition thereto, she has also filed a Maintenance Case in M.C.No.22/2015 before the Chief Judicial Magistrate Court, Namakkal seeking maintenance and by order dated 01.08.2017, the learned Chief Judicial Magistrate granted maintenance of Rs.3,500/- p.m. for her and Rs.3,000/- p.m. for each of the 3 minor children totalling Rs.12,500/- p.m. Challenging the same, the respondent husband has filed C.R.P.No.27/2017 on the file of the District Sessions Judge, Namakkal. Thirdly, she has also filed a criminal case in S.C.No.109/2017 before the learned Assistant Sessions Judge, Namakkal against the respondent husband, forgetting for a moment that sending him to jail, would affect the future career and welfare of their poor innocent children in which the respondent-husband was imprisoned for three weeks simple imprisonment by the Sessions Court. Therefore, the present appeal shall be liable to be dismissed as devoid of merits, it is pleaded.

9. Having heard learned counsel appearing for the parties, the following two issues arise for consideration in this appeal:-

“(i) Whether the failure on the part of the appellant/wife to participate in the divorce proceedings before the Court below would amount to accepting the allegations made by the respondent/husband as true?

(ii) When the respondent/husband has filed the petition for divorce under Section 13(1)(ia) of the Hindu Marriage Act, on the refusal of the appellant/wife either to appear in the witness box to state her own case on oath or not offering herself to be cross examined by the other side, whether the Court below is legally justified in drawing an adverse presumption that the case set up by the appellant/wife is not correct, under Section 114-Illus.(g) of the Evidence Act?

10. Issue Nos.(i) & (ii): It is not in dispute that the respondent-husband has filed the HMOP.No.34/2018 seeking a decree of divorce under Section 13(1)(i-a) and 13(1)(i-b) of the Hindu Marriage Act, 1955, before the Subordinate Court, Namakkal, and, later on, the same was transferred to the Family Court, Namakkal and renumbered as FCOP.No.156/2018, raising various allegations of cruelty meted out at the hands of the



WEB COPY

appellant-wife, for which the appellant-wife has filed a counter affidavit raising various counter allegations. When the appellant-wife has raised counter allegations, it is her duty and obligation to appear before the Court below and substantiate her counter allegations by disproving the allegations made by the respondent-husband by seriously participating in the enquiry. But unfortunately, as rightly argued by the learned counsel appearing for the respondent-husband, when the appellant-wife has initiated proceedings one after the other against her husband, namely, Criminal Complaint in Cr.No.13/2015 on the file of Mohanur Police Station which was later on culminated into S.C.No.109/2017 on the file of the learned Assistant Sessions Judge, Namakkal for offences under Sections 326 and 307 of IPC, Maintenance Case in M.C.No.22/2015 before the learned Chief Judicial Magistrate, Namakkal and a Partition Suit in O.S.No.183/2015 before the Subordinate Court, Namakkal, it is not known why she has not chosen to appear before the Court below to take part in the matrimonial case enquiry. Secondly, in the criminal case in S.C.No.109/2017, he was convicted and sentenced to undergo simple imprisonment for 3 weeks for the offence under Section 325 of IPC. Therefore, when the appellant has devoted more time to prosecute a criminal case for various offences to convict her husband, it is not known why she has not appeared for the enquiry before the Family Court to disprove the allegations made by the respondent-husband. Thirdly, when she also filed a maintenance case before the learned Chief Judicial Magistrate, Namakkal, the same also ended with an order for payment of Rs.3,500/- per month for herself and Rs.3,000/- p.m. each to their three children, totalling Rs.12,500/- p.m. towards maintenance. Therefore, when she has boycotted the proceedings before the Court below, where she had the advantage of examining and cross examining the respondent, she cannot come to this Court. The Court below has also found that she has not shown any interest or care to appear before the Court below to disprove the allegations made by the respondent-husband by letting in oral or documentary evidence.

11. Very recently, we have come across a similar issue wherein also the wife having made herself prosecuted several cases against the husband, failed to appear before the Family Court, although that matter was pending for a long time and after dealing with the matter elaborately, We dismissed the said appeal against the wife who failed to appear before the Family Court. In this context, it is pertinent to refer to Order VIII, Rule 5(1) of the Code of Civil Procedure, which reads as follows:-

"Rule 5 of Order VIII of Code of Civil Procedure 1908 "Specific denial"



WEB COPY

(1) Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under disability."

A perusal of the above provision clearly shows that every allegation of fact in the plaint, if not denied specifically or by necessary implication, the same shall be taken to be admitted as against the person who failed to deny the same. It is also pertinent to extract Order XVI, Rule 20 of the Code of Civil Procedure, as follows:-

"Rule 20 of Order XVI of Code of Civil Procedure 1908 "Consequence of refusal of party to give evidence when called on by Court"

Where any party to a suit present in Court refuses, without lawful excuse, when required by the Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit."

12. Yet another similar provision in Order XV, Rule 4 of CPC also reiterating the same as found in Order XVI, Rule 20 of CPC, which is extracted below:-

4. Failure to produce evidence.----Where the summons has been issued for the final disposal of the suit and either party fails without sufficient cause to produce the evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recording issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues.

13. Besides, one another similar provision embedded in Order XXII, Rule 4 of CPC also speaks as found in Order XVI, Rule 20 and Order XV, Rule 4, which is also extracted hereunder:-

"4. Procedure in case of death of one of several defendants or of sole defendant. ---

(1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving



WEB COPY

defendant dies and the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a part and shall proceed with the suit.

(2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where (a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963), and the suit has, in consequence, abated, and (b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act, the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."



A conjoint reading of the above said provisions would show that where any party to a suit pending in Court refuses to give evidence or to produce any document then and there in his/her possession or avoids the Court willfully, the Court can pronounce judgment or make such order against that party on the ground that he or she failed to prove the case in the manner known to law.

14. In this context, it is also pertinent to refer to the ratio laid down by the Apex Court on a similar issue in *Mohinder Kaur v. Sant Paul Singh*, (2019) 9 SCC 358, wherein the Apex Court has held that a party to the suit who does not appear in the witness box to state his own case on oath and does not offer himself to be cross examined by the other side, would suffer a presumption, because, the case set up by him would not be genuine, natural or honest and real one. The relevant paragraph-7 of the said judgment is extracted as follows:-

"7. In *Janki Vashdeo Bhojwani v. IndusInd Bank Ltd.*, (2005) 2 SCC 217, it was held that a power of attorney holder, who has acted in pursuance of the said power, may depose on behalf of the principal in respect of such acts but cannot depose for the principal for the acts done by the principal and not by the power-of-attorney holder. Likewise, the power-of-attorney holder cannot depose for the principal in respect of matters of which the principal alone can have personal knowledge and in respect of which the principal is entitled to be cross-examined. In our opinion, the failure of the respondent to appear in the witness box can well be considered to raise an adverse presumption against him as further observed therein as follows: (SCC p.223, para 15)

"15. Apart from what has been stated, this Court in *Vidhyadhar v. Manikrao*, (1999) 3 SCC 573 observed at SCC pp.383-84, para 17 that:

"17. Where a party to the suit does not appear in the witness box and states his own case on oath and does not offer himself to be cross-examined by the other side, a presumption would arise that



the case set up by him is not correct...."

The above settled legal position clearly shows that any person fails to appear in the witness box before the Trial Court would suffer a judgment against him.

15. In the present case also, in our opinion, when the appellant-wife has deliberately and willfully boycotted the proceedings before the Court below and abstained from witness box to move his/her case for the reason that she was not having any evidence to produce, it can be legally presumed that he/she has no case and in view of such settled legal position, she cannot come to this Court with this appeal, as the same is not legally maintainable.

16. Fourthly, when the learned Counsel for the appellant also fairly agreed that in the criminal case in S.C.No.109/2017 on the file of the Assistant Sessions Judge, Namakkal, the appellant-wife was able to succeed in convicting the respondent-husband and sentencing him to undergo simple imprisonment for a period of three weeks for the offence under Section 325 of IPC., We are of the considered view that under such circumstances, the parties have spoiled the family relationship between them wherein they cannot be able to see each other face to face. Again, exceeding the limit, it appears that the appellant-wife has filed a suit for partition in O.S.No.183/2015 on the file of the learned Subordinate Judge, Namakkal, against the respondent joining hands with the children and also filed maintenance case in M.C.No.22/2015 before the learned Chief Judicial Magistrate Court, Namakkal, and got maintenance to herself and her three children totalling Rs.12,500/- p.m. Therefore, we find no justification on the part of the appellant-wife in preferring this appeal.

17. For all the aforementioned reasons, answering the issue Nos.(i) and (ii) against the appellant-wife and in favour of the respondent-husband, finding no infirmity or illegality in the impugned judgment and decree passed by the Family Court below, the Civil Miscellaneous Appeal fails and the same is accordingly, dismissed. Consequently, interim order passed in CMP.No.15747/2019 stands vacated and the said CMP is also dismissed. No costs.

Sd/-

Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

tsi



To

The District Judge,
Family Court, Namakkal.

Copy to:

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

+1CC to Mr.D.Shivakumaran, Advocate, Sr.No.20250

C.M.A.No.2955/2019

PM (CO)

K.RK. (01.10.2021)