



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 12.02.2021

DATE OF DECISION : 24.03.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

AND

THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

C.M.A.No.4247 of 2019

Narayane @ Krithika
D/o Mr.Vishwanathan

...Appellant/Respondent

-vs-

S.Karthik

...Respondent/Petitioner

Memorandum of Grounds of Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act, against the judgment and decree dated 30.08.2019 made in O.P.No.383 of 2007 on the file of the Principal Judge, Family Court, Chennai.

For Appellant :: Dr.K.Santhakumari

For Respondent :: Mr.J.Saravanel

JUDGMENT

T.RAJA, J.

This civil miscellaneous appeal has been directed against the judgment and decree dated 30.8.2019 passed by the learned Principal Judge, Principal Family Court, Chennai in O.P.No.383 of 2007 dissolving the marriage between the parties solemnized on 20.05.2005 at Sri Kamakshi Mahal, No.123, Arcot Road, Saligramam, Chennai and awarding cost of Rs.2,611/- to the respondent herein.

2. Dr.K.Santhakumari, learned counsel appearing for the appellant/wife Narayane @ Krithika, assailing the decree of divorce granted by the Court below on the ground of cruelty, argued that the trial Court, without even taking into account the contents of various exhibits and the contents of cross examination of the respondent/husband, has given a finding of guilt of cruelty meted out to the respondent/husband which cannot be sustained, as it is a result of erroneous appreciation of the entire materials available before the Court below. Continuing her arguments, Dr.Santhakumari stated that one of the



findings given by the Court below that the appellant/wife had filed number of false complaints against her husband and thereby caused cruelty upon him, cannot be accepted. The reason being that the several applications filed by the wife before the Court below were also out of necessity, as the respondent was evading the payment of maintenance to his wife and child in spite of the order passed by the Court below. Moreover, the conduct of the respondent was evasive and he has also fabricated certain documents to evade the payment of maintenance. In such circumstances, the appellant/wife was constrained to file number of proceedings against the respondent/husband to get the maintenance amount, for which the appellant cannot be demoralized giving a stamp of inflicting cruelty upon her husband. When the filing of proceedings were allowed by law, the same cannot be faulted and characterized as a cruel conduct on the part of the appellant. When the respondent/husband, during his cross examination, has clearly admitted that when he joined duty at Mumbai, he was staying with his wife, the appellant herein, in a hotel room and at that time, they were peaceful and happy. Besides, he also deposed that both of them were searching for a residence in Mumbai and even after occupying the residence in Mumbai, they were living happily. That indicated that there was good understanding and happiness between them. This apart, the evidence shows that they purchased a car by the end of June, 2006 and while in the United States of America in July 2006, he used to speak to his wife and send her normal email marked as Ex.R10 containing the pictures of both the wife and child to her. That also shows that even upto October 2006, life was peaceful between the couple. The above evidence would clearly show that the respondent/husband has admitted that he participated in the appointment seeking process for his wife and they together selected a creche for the child. These facts clearly indicate that the husband had condoned the cruelty, if any at all, by the wife upto January 2007 and when they had lived together happily, it can never be said or inferred that the past cruelty revived just because of the allegations regarding the events on 28.1.2007. Therefore, when the above conducts of the couple clearly show that in the matrimonial life, there were normal wear and tear, this has been blown out of proportion as if the appellant/wife had caused cruelty, that cannot be accepted by the Court of law for dissolving the marriage of the happy couple.

3. Again arguing further, Dr.Santhakumari, drawing our notice to page-70 of the judgment passed by the Court below, stated that the Court below, after finding that all the instances of cruelty that took place between 20.5.2005 and 28.1.2006 were condoned by the respondent ensuring a happy family atmosphere, has wrongly taken into account only two instances of cruelty. Firstly, the Court below in its finding



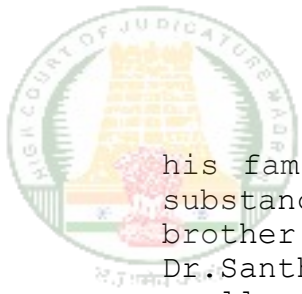
went against the appellant/wife stating that she made an unproved false allegation against the respondent/husband that he slapped her on being questioned about his unilateral decision on the naming of the child, as a result of which the wife suffered a damage to her left eardrum leaving her to take treatment, the Court below even refused to mark it, as the respondent/husband pleaded ignorance of the same. When it is the specific admission of the respondent/husband that on that date, his wife was in the matrimonial home, it becomes necessary that the husband is expected to know that the wife went for treatment and naturally he should know why she went. The second finding of the Court below on the allegation made by the husband that his wife and her parents abused him in filthy language by pushing him into a room and ordering him not to use his phone and again abusing him whether he could sleep with his mother and thereafter the police arrived on receipt of information and rescued him and they advised both parties to take legal recourse for necessary remedies, shows that such a finding is totally unsustainable and cannot be countenanced. She also pleaded that the Court below has overlooked one vital aspect that when the respondent/husband has admitted that the police did not take any action on the complaint given by him on 28.1.2007, inasmuch as if the allegation of the husband was true that his wife had confiscated his cellphone on that day, he could not have given any message to his sister. On the other hand, he had his phone with him and called somebody. That shows that his wife did not snatch his cellphone. But this evidence has been overlooked, therefore, such a finding is untenable and illogical.

4. Dr.Santhakumari, continuing her arguments, fairly pleaded that when the respondent/husband examined himself as a sole witness and marked Exhibits P1 to P14, the appellant/wife did not let in any oral evidence. However, she marked Exhibits R1 to R56 during the cross examination of the husband. Learned counsel for the appellant further argued that the respondent/husband and his family members showed extraordinary interest in the alliance and persuaded the appellant's family to make a trip to Chennai convincing the appellant and her family for post engagement and early marriage, for which they used to talk for nearly 1 ½ hours each day from their cellphone. Finally when the bride seeking ceremony took place at Chennai, the allegations that the appellant's mother showed extraordinary anxiety in responding to the questions and was effectively preventing the appellant/wife from expressing or participating in the dialogue, were false. Even the story that during a private conversation with the appellant, the appellant's mother interfered to defeat the respondent/husband's endeavour to meet and converse with the appellant in privacy, was without any evidence. As a matter of fact, when the appellant and the respondent before marriage during the engagement time were privately discussing, there is



nothing wrong on the part of the appellant's mother bringing coffee to find out whether they were really engaged in the conversation or showing any interest for the marriage. The act of the appellant's mother in bringing coffee cannot be construed as a discouraging factor. When the appellant was told that the respondent/husband had learnt carnatic music from Prof.T.V.Gopalakrishnan and he had also participated in various concerts with him, it was an admitted fact that the appellant/wife had already told the respondent/husband that she also appreciated his efforts. When the appellant's father is a retired Senior Manager from Indian Bank and her mother is working as Officer in UCO bank, they were academically rich and that the appellant had also done her Mathematics Honours Degree in under-graduation from the prestigious St.Stephen's College, Delhi and had done her Master's Degree in Business Administration and was working in Phillips Lighting, Gurgaon. However, during the alliance period, she was constrained to resign her job and shifted to Chennai to settle down with the respondent/husband. These facts would clearly show how the wife was willing to sacrifice everything for the sake of the matrimonial life. Since the respondent was in the habit of passing comments on the members of the opposite gender, particularly the women staff working with him in his company, it was the appellant/wife who used to advise him to treat the women with respect, especially those in his company. While this being the factual position, contrary thereto, making an allegation that the appellant/wife used to shout at the respondent and other staff members in his office, as a result the staff members were not comfortable in the office, cannot be accepted without any material evidence. In any event, that cannot be taken as part of cruelty.

5. Yet another allegation put against the appellant that she demonstrated her arrogance by dictating terms to a business client thus causing loss and disrepute to the company and that she also behaved rudely with the staff, as a result of which many members of the staff in protest of her belligerent attitude resigned, are against the truth. Coming to another allegation that the appellant abused and insulted the respondent's uncle Mr.Raman, who gave her a book containing some advises useful for an executive as well as house wife; that she threw away the books and pushed him violently, cannot be accepted without any oral or documentary evidence. Even the allegation that the appellant caused severe injuries to the said Raman in the presence of her parents, who also encouraged her on her atrocious behaviour, is simply imaginary in nature, because it has not been established before the Court to prove that it could be taken as an incident causing cruelty on the mind of the respondent/husband. Meeting another allegation that the appellant/wife and her family members called the respondent and



WEB COPY

his family members by names, she pleaded that it is without any substance. Denying another allegation that the appellant's brother physically assaulted the respondent's mother, Dr.Santhakumari stated that when the appellant was unable to spell out the complete sequence of events, words used by the respondent and his abuses out of decency, it was argued that at no point of time the respondent gave the appellant and her child a comfortable stay and he always quarrelled on money and other issues. When the respondent had visited Delhi twice to attend his interview with Microsoft, he was keen to obtain a job with Microsoft, although his parents did not favour for the same. During that time, the respondent made the appellant to be with him throughout the interview for support and telling that she was his lucky charm. Subsequently, the respondent/husband, after getting a job offer from Microsoft Corporation in Delhi and later on joined duty at Mumbai in the month of January 2006, requested the appellant to come to Mumbai to help him to seek a house and other facilities although his parents had accompanied him. The appellant only showed her seriousness, for which she was subjected to mental torture and threats by the respondent's parents, as a result the appellant was depressed. Sometimes, the respondent's father used to misbehave by calling the appellant with foul words and even the respondent's mother used to abuse the appellant for having delivered a girl child. When the respondent's parents insulted and humiliated the appellant and her parents, this was communicated to the respondent. Thereafter, he advised her to stay with her parents at Mandaveli. Such an attitude of the respondent broke the heart of the appellant. Finally Dr.Santhakumari argued that the finding given by the Court below that the non-participation of the appellant/wife in the enquiry before the Court below without stepping into the witness box and not specifically denying the allegation in the counter affidavit filed by her on the issue whether the allegation made by the respondent/husband that she attacked the respondent/husband on the vital parts, cannot be taken as a serious allegation causing mental cruelty. In a matrimonial matter, when the appellant has given birth to a child, it is the duty of the Court below to see how best the strained relationship can be saved from getting disintegrated. This aspect has been overlooked, therefore, the impugned judgment and decree passed by the Court below are liable to be set aside, she pleaded.

6. Mr.J.Saravanavel, learned counsel appearing for the respondent/husband, pressing two vital arguments, among other things, pleaded that the appeal is liable to be dismissed on two arguments. Firstly, when the respondent/husband had presented the petition for divorce under Section 13(1)(ia) of the Hindu Marriage Act before the Principal Family Court at Chennai in O.P.No.383 of 2007 14 years ago, before the judgment was



WEB

delivered on 30.8.2019, for about 12 years, the appellant/wife had filed 13 interlocutory applications in the pending O.P., to extract money and also to delay the proceedings. Secondly, the respondent/husband was forced to contest cases in the Metropolitan Magistrate Court, Sessions Court, Family Court in Mumbai for the said period of 12 years. Thirdly, when the respondent/husband filed the case for divorce, in February 2007 itself, the appellant/wife has ensured to delay the matter deliberately, as the trial could be taken up only in the year 2019. Besides, she filed a false case for the offence under Sections 498(A), 406, 323, 504 & 506 of IPC in Mumbai, which was taken up on file in C.C.No.1623 of 2007 on the file of the 60th Metropolitan Magistrate, Kurla, Mumbai and after a full-fledged trial, the respondent and his family members were acquitted on 6.6.2016. In the meanwhile, she also filed a case of domestic violence in DVC No.2 of 2007 before the 45th Court, Kurla, Mumbai and this apart, she filed a maintenance case under the Hindu Adoption and Maintenance Act before the VII Family Court, Bandra, Mumbai seeking for Rs.80,000/- per month or Rs.60 lakhs as one time maintenance, which ended with an order of Rs.5,000/- per month for the child only. Therefore, when the appellant has shown interest to file 13 interlocutory applications in the pending O.P., she did not even choose to come and take part in the enquiry before the Principal Family Court, Chennai and by merely filing a counter affidavit boycotting the Court for all these 12 years, the same would clearly show that she is not entitled to be heard before this Court. The reason being that the Court below, after waiting 12 long years for the appellant to participate in the enquiry, finding her non-participation in the enquiry to answer all the allegations, has found that all the allegations made by the respondent/husband in the petition for divorce should be taken as established. 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. Therefore, when the appellant was finding time to file 13 interlocutory applications in the pending O.P., deliberately and wilfully 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.



WEB COPY

7. 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?

8. Issue Nos.(i) & (ii): It is not in dispute that the respondent/husband has filed the O.P.No.383 of 2007 seeking a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act before the Principal Family Court, Chennai raising various allegations of cruelty meted out at the hands of the 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 divorce petition was pending before the Court below from February, 2007, till the year 2019, for almost a period of 12 long years, it is an admitted fact that the appellant/wife had chosen to file 13 interlocutory applications in the pending O.P. When she filed 13 interlocutory applications one after the other, it is not known why she has not chosen to appear before the Court below to take part in the enquiry. Secondly, she filed a false case against the respondent, which was taken on file in C.C.No.1623 of 2007 for the offence under Sections 498(A), 406, 323, 504 & 506 of IPC by the 60th Metropolitan Magistrate, Kurla, Mumbai and after a full-fledged trial spreading over a period of nine long years, the respondent/husband and his parents were acquitted on 6.6.2016. When the appellant devoted time to project a false case, it is not known why she has not appeared for the enquiry before the Court below to disprove the allegations made by the respondent/husband. Thirdly, when she also filed a case of domestic violence in DVC No.2 of 2007 before the 45th



Metropolitan Magistrate, Kurla, Mumbai and also filed a maintenance case before the VII Family Court, Bandra, Mumbai seeking Rs.80,000/- per month or Rs.60 lakhs as one time maintenance, the same ended with an order for payment of Rs.5,000/- per month as maintenance to the child on the ground that she was employed. 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, as she appointed her father as power of attorney, who was permitted by the Court to proceed with the case on behalf of the appellant. 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"

(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."

9. 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."

10. 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



WEB COPY

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.

11. 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 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



WEB COPY

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.

12. 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:



WEB COPY

"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...."

13. In the present case also, in our opinion, when the appellant/wife has deliberately and wilfully boycotted the proceedings before the Court below for 12 long years, for the reason that she was not having any evidence to produce, she cannot come to this Court with this appeal, as the same is not maintainable.

14. Secondly, one of the crucial allegations made by the respondent/husband in para-31 of the petition for divorce is that the appellant/wife assaulted the respondent/husband on the vital part of his body. But this serious allegation has not even been denied by the appellant/wife in the counter affidavit. In that view of the matter also, as the crucial allegation made by the respondent/husband that the appellant/wife attacked him on his vital part, has not even been denied in her counter statement, it goes without saying that she has not only caused mental cruelty but also physical cruelty upon the respondent/husband. Besides, when the parties are all fighting for more than 14 long years, they cannot be made to live together.

15. In fact, the learned VII Family Court, Mumbai at Bandra, in its order dated 5.7.2014 in Petition No.C-36 of 2007, has found the guilt of the appellant/wife in coming to the Court with unclean hands. The relevant paragraph of the order is reproduced hereunder:-

"40. From the above averments, it is clear that the petitioner is getting maintenance as per the order of Chennai Court @ Rs.10,000/- per month for herself and her minor daughter Keerthana and she is also getting maintenance @ Rs.7,000/- per month as per the order of M.M.Court, that means as per the order of two different Courts she is entitled to get amount of Rs.17,000/- per month. Apart from this, the record shows that she is working and having source of income. The petitioner has not filed her income details. The petitioner has not come with clean hands therefore, in my view, petitioner is not



entitled for maintenance for herself but at the same time, she is entitled for the maintenance for her daughter Keerthana...."

When the appellant has been found guilty of coming to Court with unclean hands by the learned VII Family Court, Mumbai at Bandra and that order also has become final, this Court finds no justification in this appeal.

16. For all the aforementioned reasons, answering the issue Nos.(i) & (ii) against the appellant and in favour of the respondent, finding no infirmity or error in the impugned judgment and decree passed by the Court below, the civil miscellaneous appeal fails and it is dismissed. Consequently, interim order stands vacated and the C.M.P.Nos.24015 of 2019 & 5706 of 2020 are also dismissed. No costs.

-s/d-

Assistant Registrar(CS-IX)

True Copy

Sub-Assistant Registrar

SS

To

1. The Principal Judge
Principal Family Court
Chennai

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

+1 CC to Mr.J.Saravanel, Advocate sr 19834.

C.M.A.No.4247 of 2019

RP(CO)
SP(10/08/2021)