

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.03.2022

CORAM

THE HON'BLE Ms.JUSTICE P.T.ASHA

C.M.S.A.No.26 of 2020

Rajadurai ... Appellant/Respondent/Petitioner

Vs

Subasri ... Respondent/Appellant/Respondent

PRAYER : This Civil Miscellaneous Second Appeal is filed under Section 28 of Hindu Marriage Act, read with Section 100 of C.P.C, against the judgment and decree dated 10.02.2020 passed in C.M.A.No.04 of 2019 on the file of Additional District and Sessions Judge, Mayiladuthurai reversing the judgment and decree dated 28.11.2018 passed in H.M.O.P.No.118 of 2017 on the file of Principal Subordinate Judge, Mayiladuthurai.

For Appellant : Mr.R.Nalliyappan

For Respondent : Mr.K.R.Ramesh Kumar

J U D G M E N T

The husband, who was granted decree for divorce on 28.11.2018 by the Principal Sub Court, Mayiladudurai in H.M.O.P.No.118 of 2017, which was reversed by the Additional District and Sessions Court, Mayiladuthurai on 10.02.2020 in C.M.A. No.4 of 2019, is before this Court.

2. The facts in brief are as follows:

The appellant had filed the above referred H.M.O.P seeking divorce from the respondent herein under the ground of cruelty and desertion. It is the case of the appellant that both of them got married on 21.10.2009 at Sirkazhi. Out of the said wedlock, they were blessed with two children viz., a daughter, Pooja and a son, Pugazhendhi. At the time of filing of the petition for divorce, the daughter was aged 5 years and the son was aged 7 years. It is the case of the appellant that his parents were not alive and with the help of his brothers, he got

his marriage with the respondent fixed and had married her. It is his case that, prior to marriage, he was employed abroad as a Coolie and therefore, he had not sought for any dowry from the respondent's parents. It is his further case that immediately after the marriage, the respondent would frequently quarrel with him and return to her parents house. She would also insist upon leading a very affluent life, much beyond the means of the appellant. Despite the advice of the appellant, the respondent-wife was not ready to change over. The respondent had obtained a Diploma in Health Assistant and had been working for sometime. The appellant further contended that the respondent was close to another gentleman, by name, Chinnadurai, whom she had befriended, when she was working. When he came to know about the same, he had warned the respondent, as a result, the respondent had left the matrimonial home in the year 2012 and had not returned back. It is also the case of the appellant that since the wife had not evinced interest in returning to her matrimonial home, the appellant had issued a legal notice dated 14.06.2014 seeking a divorce. A reply notice containing false allegations was sent by the respondent/wife on 23.07.2014, to which, a rejoinder was also sent by the appellant/husband.

3. In the meanwhile, the respondent/wife had filed H.M.O.P. No.106 of 2014 seeking restitution of conjugal rights on the file of the Principal Sub Court, Mayiladuthurai. The respondent, who had left the matrimonial home in the year 2012 with the children, had filed H.M.O.P. No.106 of 2014 with ulterior motive. She had also initiated proceedings for maintenance in M.C.No.15 of 2016. Since the respondent/wife had left the matrimonial home nearly five years back from the year 2012 and not returned to her matrimonial home, she has deserted the appellant and also treated him cruelly and therefore, the appellant/husband has come forward with the petition for divorce.

4. On receiving the summons, the respondent/wife had filed a detailed counter, inter alia, contending that she had been subjected to lot of torture, both physically and mentally. The appellant had a free and colourful personality and was in relationship with several women and when questioned, he would state that this is the way he would behave and she had to keep quiet. The respondent/wife would further submit that even her Diploma Certificate had been taken away by the appellant and that the appellant was a spendthrift and if the respondent questioned him, she would be subjected to physical abuse.

5. On 18.04.2014, he had chased the respondent/wife and the children, demanding that her parents should handover the

jewelry that was given to her as well as make over the Punja lands belonging to the respondent's father in his name. Thereafter, a Panchayat was convened by the mediators and he was advised to take back the respondent/wife and the children. At that point of time, he had informed the mediators that it was not an auspicious time to take them back, as Jupiter was in motion and that he would take them back after 13.06.2014. However, contrary to the assurance, he had slapped the respondent with a legal notice on 14.06.2014, for which, the respondent had sent a reply stating that she was willing to rejoin the appellant, despite which, he did not come forward to take back the respondent and the children. Therefore, the respondent-wife herein had filed H.M.O.P.No.106 of 2014 seeking restitution of conjugal rights and this petition had been decreed on 27.03.2017. However, the appellant has not come forward to comply with the decree and has proceeded to file this petition.

6. The respondent-wife had denied the allegations contained in the petition for divorce and stated that there is no cause of action for the divorce, since the appellant had not proved the cruelty and there is no question of desertion, since the respondent had obtained a decree for restitution of conjugal rights and it is the appellant, who was not taking the respondent back.

7. The appellant/husband had examined himself as P.W.1 and marked Exs.P1 to P10. The respondent(wife) herein had adduced evidence, but had not produced any documentary evidence.

8. The Principal Subordinate Judge, Mayiladuthurai surprisingly decreed H.M.O.P.No.118 of 2017 on 28.11.2018 on the ground of desertion by stating that the wife, who had obtained a decree, had not taken any steps to give her consent to rejoin the husband and therefore, it is a clear case of desertion. With reference to cruelty, there was no finding on the part of the learned Principal Judge. Therefore, it can be safely presumed that the decree was granted only on the ground of desertion.

9. The respondent-wife took up this judgment in appeal to the Additional District and Sessions Court, Mayiladuthurai in C.M.A.No.4 of 2019. The learned Judge set aside the judgment and decree of the trial court dated 28.11.2018, by its judgement and decree dated 10.02.2020 in C.M.A.No.4 of 2019 and dismissed H.M.O.P.No.118 of 2017 filed by the appellant-husband. Aggrieved by the same, the appellant/husband is before this court.

10. The learned counsel appearing on behalf of the appellant-husband would contend that the appellant has clearly proved desertion on the part of the respondent/wife. The respondent, who had obtained a decree for restitution of conjugal rights, has not taken any steps whatsoever to rejoin the husband or to express her consent for rejoining him.

11. In respect of the above arguments, the learned counsel for the appellant would rely upon a judgment of a Division Bench of this Court reported in 2011 (7) MLJ 655 [N.Jayaprakash -vs- R.Santhi), wherein, the Court has observed that the wife had obtained a decree for restitution of conjugal rights and her husband, thereafter expressed his desire to rejoin the wife. The husband in order to rejoin the wife had met her, however the wife refused to rejoin the husband. The Court observed that this was clearly a case of cruelty and desertion and therefore, the husband was entitled to divorce.

12. Next judgment that was relied upon by the learned counsel for the appellant is reported in 2014 (5) MLJ 539 [K.Kuppuraj -vs- M.Rajasulochana], where, the Division Bench had observed as follows:

"14.The trial Court rendered a finding that the husband/appellant was having illicit relationship with one Subha and in view of the same, the respondent/wife was justified in living separately. The respondent/wife was examined as RW.1 and she deposed that she is aware of the relationship of her husband with one Subha and knowing this fact, she is ready and willing to live with her husband. It is to be noted that when she had no objection to live with her husband though he was having illicit relationship with another lady, the reason given by the Tribunal for separate living by the wife due to her husband's illicit intimacy with another lady, cannot be accepted. It is not in dispute that the respondent/wife had left matrimonial home and living separately for more than several years."

13. On the contrary, Mr.Ramesh, learned counsel appearing on behalf of the respondent-wife would submit that even while the petition for restitution of conjugal rights was pending, the respondent/wife had issued a notice for divorce, to which, the wife has immediately responded stating that she was willing to live with him. The petition for restitution of conjugal rights filed by the respondent-wife was decreed on 27.03.2017 and the

petition for divorce had been filed by the appellant-husband in the month of June 2017. Therefore, the findings of the trial Court with reference to desertion is without any basis and the same has been rightly set right by the Appellate Court.

14. Heard the counsels and perused the records.

15. Though the petition for divorce had been filed on the ground of cruelty and desertion, the Trial Court viz., Principal Subordinate Court, Mayiladuthurai, had granted divorce on the ground of desertion and there was no reference to the issue of cruelty. The divorce was granted on the ground that though a decree for restitution of conjugal rights had been obtained by the respondent/wife, she had not taken any steps to express her consent to live with his husband. This in the light of the sequence of events, is totally misconceived.

16. The respondent had filed a petition for restitution of conjugal rights in H.M.O.P.No.106 of 2014 within a period of two years from the date on which she claims that the appellant/husband had deserted her. While the petition was pending, the husband had issued a legal notice on 14.06.2014 seeking divorce. The respondent wife has immediately replied on 26.06.2014 expressing her willingness to rejoin the husband.

17. H.M.O.P.No.106 of 2014 for restitution of conjugal rights, had also been decreed on 27.03.2017. H.M.O.P.No.118 of 2017 for divorce has been filed within a period of three months from the date of decree for restitution of conjugal rights. Therefore, the observations of the learned Principal Subordinate Judge are totally misconceived. The judgment relied upon by the learned counsel for the appellant would not in any way advance the case of the appellant. The Appellate Court has rightly allowed the appeal filed by the wife and therefore, I do not find any reason to interfere with the same. According, the civil miscellaneous second appeal is dismissed. No costs.

Sd/-

Assistant Registrar(CS-IV)

// True Copy //

Sub Assistant Registrar

srn/ab

To

1. The Additional District and Sessions Judge,
Mayiladuthurai.

2. The Principal Subordinate Judge, Mayiladuthurai.

Copy to:

The Section Officer,
V.R.Section High Court, Madras.

+1cc to Mr.R.Nalliyappan, Advocate SR.No.18896

+1cc to Mr.K.R.Ramesh Kumar, Advocate SR.No.18704

C.M.S.A.No.26 of 2020

GP(CO)

CB(18/07/2022)