



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.01.2022

CORAM :

THE HON'BLE MR.JUSTICE T.RAJA
AND

THE HON'BLE MR.JUSTICE D.BHARATHA CHAKRAVARTHY

C.M.A.No.3660 of 2021

Kalaiselvi ... Appellant/Petitioner

Versus

Sivapriyan ... Respondent/Respondent

Prayer : Civil Miscellaneous Appeal has been filed under Section 19 of Family Court Act to set aside the order and decreetal order passed by the learned Family Court Judge, Vellore in F.C.O.P. No:179/2018 dated 30.03.2021 and pass orders.

For Appellant : Mr. M. Udayakumar

For Respondent : Mr. Arun Anbumani

JUDGMENT

(Judgment of this Court made by Mr.Justice D.Bharatha Chakaravarthy)

This Civil Miscellaneous Appeal in CMA.No.3660 of 2021 is filed by the appellant/wife, namely Kalaiselvi aggrieved by the judgment and decree of the learned Family Court, Vellore in F.C.O.P.No. 179 of 2018 whereby the application filed by the appellant wife for Restitution of Conjugal Rights under Section 9 of the Hindu Marriage Act was dismissed.

2. The gist of allegations made in the petition for restitution of conjugal rights is that the appellant wife got married to the respondent on 27.08.2012 at Vellore as per Hindu rites and customs. Fifteen days after the marriage they went to Jodhpur and started living there as the respondent was working there in the Air Force station.



3. The respondent husband thereafter started harassing the appellant wife by making false accusation that she is in relationship with someone else and the family members of the respondent husband harassed her for bringing more dowry. The petitioner had already lodged a complaint before the All Woman Police Station, Vellore on 13.08.2013. The respondent husband also filed a divorce petition in F.C.O.P.No. 348 of 2014 and the same is dismissed for default.

4. Interim maintenance was also ordered in the said divorce petition. Thereafter, the appellant wife also filed a maintenance case in FCMC No. 158 of 2014 in which Rs.6,000/- was ordered as monthly maintenance. Even though the respondent husband filed a revision as against the said order, he is refusing to join with the appellant wife and therefore the appellant wife has filed the present petition for restitution of conjugal rights.

5. The respondent husband contested the matter by filing a counter stating that when the appellant and the respondent were living in Rajasthan, the respondent purchased a mobile phone with sim card No. 8752078074, for convenience purposes, he has kept the call recording option on and therefore he discovered that the appellant wife is having an illicit relationship with one Vijayaraj working as Sub Inspector of Police in CISF at Arakonam and she had continuously had conversation with the said person in his mobile No. 7708096544. The voice recordings available in the mobile phone would clearly and categorically prove that they were having an illicit relationship and therefore since the appellant wife is having an extra marital affair, the respondent is justified in not living together and he has already filed a divorce petition.

6. Upon being unable to resolve the issue by way of counseling, the Family Court had no other option than to proceed with the trial and the appellant wife examined herself as P.W.1 and Exs.P-1 to P-8 were marked on her behalf. On behalf of the respondent, the respondent husband examined himself as R.W.1 and one Kavitha as R.W.2 and one Mangayarkarasi, Inspector of Police of All Women Police Station, Vellore as R.W.3. Exs. R-1 to R-5 were marked on behalf of the respondent. The copy of the CSR No. 531 of 2013 was also marked as Ex. X-1 as court document.

7. The learned Family Court, after considering the pleadings of the parties and appraising the evidence on record, had listened to the recorded conversations between the appellant wife and the said 3rd party, namely Vijayaraj in Ex.R-5 cellphone and



had concluded that the conversation between the appellant wife and the other man clearly established that there was an affair between the both of them for quite a long time before the marriage itself and there was also physical contact between them and the family court further found that the said person and the appellant wife still continued their contact even after the marriage and therefore dismissed the petition. Aggrieved by the same, the appeal is laid before this court.

8. Mr. N. Udayakumar, learned counsel appearing on behalf of the appellant would submit that the Divorce Petition filed by the respondent husband has been dismissed for default. As on date, the appellant is the lawful wife and therefore the respondent husband cannot refuse to live together and the Family Court therefore ought to have allowed the petition for restitution of conjugal rights. According to the learned counsel, the sole basis for the family court to dismiss the petition for restitution of conjugal rights, is the recordings in Ex.R-5 cell phone. He would submit that in this case, no certificate as required under Section 65-B of the Indian Evidence Act was marked and therefore the entire evidence on the basis of Ex.R-5 cell phone recordings cannot be taken on record and therefore in the absence of any other clinching evidence, the allegations of extra marital relationship did not stand proved. This apart, he would submit that R.W.3, the Inspector of Police, took sides with the respondent husband as he is employed in Navy and therefore her evidence should not also be considered.

9. Per contra Mr. Arun Anbumani, learned counsel appearing for the respondent husband taking notice pursuant to the caveat filed, would submit that it is a clear and categoric case whether the appellant wife has an extra marital affair and there is clinching evidence which is placed before the Family Court and the Family Court has rightly come to the conclusion that the wife is not entitled for the relief of restitution of conjugal rights. As far as the Divorce Petition is concerned, already the appellant husband has filed a restoration petition which is pending consideration before the family court and therefore he would pray that there is nothing for this court to interfere in this appeal.

10. We have give our consideration to the submissions made on both sides and the pleadings of the parties and the evidence on record. We are unable to agree that the learned counsel appearing for the appellant that there is any error in the order of the Family Court. Even before this court, the contents of the alleged conversations between the appellant wife and the third



person is not denied to be false. But on the other hand, only a technical objection stating that the same has been wrongly marked without complying with the mandatory requirements of a certificate under Section 65-B of the Indian Evidence Act is raised. However, the said legal submission is without any merits because when the alleged electronic equipment itself is actually produced before the Court and the court heard the conversations from the very equipment in which it is recorded, there is no requirement of any certificate as per Section 65-B and therefore we reject the said technical contention on behalf of the appellant wife. When the Family Court has adverted to and listened to the conversations and has come to the conclusion without any hesitation that the conversations clearly demonstrate an extra marital affair, it has rightly dismissed petition for restitution of conjugal rights and therefore there is absolutely no merit whatsoever in this appeal. We also further see that R.W.3, the Inspector of Police, who conducted an enquiry in the complaint given had also deposed corroborating the recordings made in the mobile phone.

11. Under these circumstances, there is nothing to interfere with the order of the Family Court and accordingly this Civil Miscellaneous Appeal stands dismissed. However, there will be no order as to costs.

Sd/-

Assistant Registrar(I)

// True Copy //

Sub Assistant Registrar

mrn

To

The Family Court Judge,
The Family Court, Vellore.

+1cc to Mr.Arun Anbumani, Advocate SR.No.2292

C.M.A.No.3660 of 2021

SRA (CO)
CB(02/03/2022)