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CMA No.2584 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 26.04.2024

CORAM:

THE HONOURABLE MR.JUSTICE **R.SUBRAMANIAN**
and
THE HONOURABLE MR.JUSTICE **R.SAKTHIVEL**

CIVIL MISCELLANEOUS APPEAL No. 2584 of 2017

M. Selvaraj @ John Selvaraj

... Petitioner/Appellant

-VS-

J.Thankarathinakani

... Respondent/Respondent

Civil Miscellaneous Appeal filed under Section 55 of the Indian Divorce Act, to set aside the fair and decretal order dated 08.03.2017 passed in F.C.I.D. OP No.125 of 2016 on the file of the Family Court, Chengalpet.

For Appellant : Mr.Arumugam
for Mr.E.D.Sethupathi

For Respondent : Mr.G.Senthilkumar



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JUDGMENT

[Judgment of the Court delivered by R.SUBRAMANIAN,J.]

Challenge in the Appeal is to the order of the decree of the Family Court dismissing the application filed by the husband for divorce under Section 10 (1) (ix) and (x) of the Divorce Act, 1869 on the ground that the wife is guilty of desertion and cruelty.

2. The parties were married on 09.02.1979 and two children, a male and a female, were born on 29.01.1980 and 12.10.1982 respectively. According to the husband, the wife, who was employed in the Tamil Nadu Civil Supplies Corporation, got transferred to Virudhunagar in 1990. She joined at Virudhunagar leaving the children in the care of the husband and her in-law. It is the case of the husband that the wife never attempted to get back to the matrimonial home and she was transferred to various places and did not come back to Chennai till her retirement in the year 2011. The husband would further allege that the wife did not treat him and the children properly and she had no love lost for them.



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3. The husband, who had filed a petition for divorce in 1997, did not prosecute it on being persuaded by the relatives and on the undertaking by the wife that she would come back to the matrimonial house and live with him and his children. Complaining that the actions of the wife while she was residing in the matrimonial home and her complete neglect of the family from 1990 would constitute willful desertion without just cause, the husband sought for divorce. It was also contended that the husband was hospitalized for nearly four months with a fungal infection of his lungs, the wife did not bother to even visit him live alone taking care of him.

4. The wife resisted the claim for divorce contending that the allegations made against her in the divorce petition are completely false. She was transferred to Virudhunagar in 1990 and her efforts to get back to Chennai also failed miserably. Even though she was posted at faraway places like Virudhunagar, Thiruvarur, Thanjavur etc., she had been visiting the family very frequently and has been taking care of the children. It was also claimed that the marriage expenses of the children were borne by the wife and not by the husband.



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5. The wife would also plead that her husband had married one Jayalakshmi and had begotten a male child through her in the year 1999 and her complaints to the Police regarding the second marriage went unheeded because it was claimed that the said Jayalakshmi was a maid servant. On the above pleadings, the wife sought for dismissal of the application for divorce. The husband however, chose to deny the factum of marriage and the birth of the male child through Jayalakshmi.

6. On the above pleadings, the learned Family Judge framed the following issue: “*whether the petition is to be allowed or not*”.

7. At trial, the petitioner was examined as P.W.1 and Exhibits P1 to P10 were marked. The respondent was examined as R.W.1 and Exhibit R1, which is the birth certificate of the male child born to the husband and one Jayalakshmi was marked.

8. On a consideration of the evidence on record, the learned Family Judge concluded that the husband has not made out a cause for divorce. The learned Family Judge found that the transfers were official transfers and the husband did not have a cause to complain about the



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transfers till he issued a legal notice in the year 2011 under Ex.P5. The learned Family Judge also considered Ex.P4 and P10, the documents which were filed by the wife to show that she had made complaints regarding the second marriage of the husband with Jayalakshmi. On the above conclusions, the learned Family Judge dismissed the OP and it is that dismissal which is under challenge, before us, in this Appeal.

9. We have heard Mr.Arumugam, learned counsel appearing for the appellant and Mr.G.Senthilkumar, learned counsel appearing for the respondent.

10. Mr.Arumugam, learned counsel appearing for the appellant would vehemently contend that the very fact that the wife got transferred out of Chennai in 1990 and chose to remain outside Chennai for nearly 21 years would show that she had the animus to desert to the husband and the family. Though the wife claims that she had made attempts to get back to Chennai and live with the family no evidence has been placed on those attempts, therefore according to the learned counsel the fact that the wife deserted the husband has been established. Though the husband sought to deny paternity of the child born through Jayalakshmi, before



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the Trial Court, the learned counsel for the appellant would concede that the child was born through him to Jayalakshmi.

11. Though the petition has been filed under Section 10(1)(ix) and (x) of the Divorce Act, invoking the grounds of both cruelty and desertion, we do not find any evidence in support of the claim that the wife had treated the husband with cruelty. The husband requires the Court to presume that the long period during which the wife was employed outside Chennai as cruelty, but it is in evidence that the wife was visiting the family often and therefore, it cannot be said that the wife has treated the husband with cruelty.

12. As regards the claim that the wife did not choose to visit the husband when he was seriously ill and he was hospitalized for nearly four months, the Family Court has accepted the explanation offered by the wife to the effect that during that period, the second wife viz. Jayalakshmi was constantly staying with the husband and assisting him and therefore, she cannot be expected to visit the husband who is living in an illicit relationship with another woman. We do not find anything wrong in the conclusion of the Family Court that the wife conduct in that



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regard is justified.

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13. On the claim for desertion, it has always understood that mere living apart, does not constitute desertion as a ground for divorce. It should be with an animus to desert. Admittedly in the case on hand, the wife was employed in a transferable job and she was transferred from one station to another throughout the period. May be she has not put in proof of her efforts to get back to the matrimonial home, but that by itself cannot be a ground to conclude that the wife had the animus to desert the husband and the family. In her evidence, she has specifically stated that she made attempts to get back and stay with the family, but those attempts proved futile.

14. From Exs. P4 and P10, it could be gathered that the wife had specifically complained that the husband has contracted a second marriage with one Jayalakshmi and has been living with her. If that be the situation, the wife had a reasonable cause to stay away from the husband and staying away from the husband with the reasonable cause cannot amount to desertion. The fact that the husband is staying with Jayalakshmi and that he has begotten a child through the said



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relationship is also evidenced by Ex.R1, the birth certificate where the father's name of the child is shown as that of the husband. As we had already pointed out, the learned counsel has also not denied the paternity of the child, though it was denied before the Family Court.

15. Taking into account the conduct of the husband, we find that the wife had a just and sufficient cause for living away and such leaving apart by itself cannot amount to desertion so as to constitute a cause for grant of divorce. Having examined the evidence on record, we find that the Family Court had taken into account the relevant aspects and has rightly appreciated the evidence to come to the conclusion that the appellant is not entitled to a decree for divorce, we see no case for interference with the judgment of the Family Court that the Appeal is therefore **dismissed**. However there shall be no order as to costs.

(R.SUBRAMANIAN, J.) (R.SAKTHIVEL, J.)
26.04.2024

jv
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Speaking order
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To

1. The Judge,
Family Court, Chengalpet.
2. The Section Officer,
V.R. Section,
Madras High Court, Chennai 104.



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