



C.M.A.(MD)No.353 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 06.09.2024

CORAM

THE HONOURABLE MR.JUSTICE P.VELMURUGAN
AND
THE HONOURABLE MR.JUSTICE K.K.RAMAKRISHNAN

C.M.A.(MD)No.353 of 2019

Ignatious Xavier

...Appellant

vs.

Ramalekshmi

... Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 39 of the Special Marriage Act, 1954, Section 19 of the Family Courts Act, 1984 r/w Section 96 of the Code of Civil Procedure, 1908 praying to set aside the Judgment and decree dated 14.02.2019 in S.M.O.P.No.40 of 2018 on the file of the Famil Court, Kanyakumari at Nagercoil.

For Appellant : Mr.V.George Raja

For Respondent : Mr.K.P.Narayanakumar



C.M.A.(MD)No.353 of 2019

JUDGMENT

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(Judgment of the Court was delivered by P.VELMURUGAN, J.)

The appellant is the husband, who filed a petition for divorce on the ground of desertion under Section 27(b) of the Special Marriage Act, 1954 in S.M.O.P.No.40 of 2018 before the Family Court, Kanyakumari at Nagercoil against the respondent / wife. The Family Court after trial found that the appellant has not proved the allegations against his wife and dismissed the divorce petition. Challenging the same, the appellant has filed the present appeal.

2. According to the appellant, marriage was solemnized between him and the respondent on 02.07.2024. Thereafter, they were blessed with a child on 09.10.2005 and they lived as a husband and wife under the same roof. However, on 12.11.2007, the respondent left the matrimonial home without any valid reason. She also made false complaint against him before All Women Police Station on 24.11.2007 on the allegations of dowry and harassment. The said complaint was closed as a 'mistake of fact'. Since the respondent left the matrimonial home without any valid reason and deserted him for more than the



C.M.A.(MD)No.353 of 2019

WEB COPY

statutory period of two years i.e., from 12.11.2007 to 04.09.2010, he filed a petition for divorce on the ground of desertion.

3. The brief facts of the case of the respondent is that after marriage they lived together happily as a husband and wife and they were blessed with a child on 09.10.2005. Thereafter, she came to know that the appellant was having illegal intimacy with one Yesupunniam and she also found that he married one Sundari on 05.10.2008. At the ill-advice of Sundari, the appellant made cruelty against her. Therefore, she is living with her child separately. Subsequently, the appellant demanded dowry also. Hence, she gave a complaint, however, the appellant managed to close the same. Thereafter, she filed a complaint under Section 156 (3) of Criminal Procedure Code before the Judicial Magistrate No.III, Nagercoil on the allegations of bigamy and other cruelty. The Judicial Magistrate directed the Police to register a case. In pursuance therefore, police registered the case in Crime No.6 of 2009 under Sections 120(b), 494, 498A, 114 and 406 IPC read with Section 34 IPC. The above mentioned Sundari was also made as one of the accused, namely, the eighth accused. Subsequently, the Police laid a charge sheet



C.M.A.(MD)No.353 of 2019

and the same is pending trial in C.C.No.228 of 2009 on the file of the Judicial Magistrate No.III, Nagercoil. According to the respondent, since the appellant caused cruelty to her, she left the matrimonial home and is living separately. She also filed a petition for maintenance in M.C.No.22 of 2009. The trial Court rightly appreciated both the oral and documentary evidence and dismissed the petition for divorce. There are no merits in the appeal and the appeal is liable to be dismissed.

4. The learned counsel for the appellant / husband would submit that after marriage, the appellant and the respondent were blessed with a child on 09.10.2005. While so, the respondent left the matrimonial home on 12.11.2007 and till 04.09.2010, she did not come back. She deserted the appellant and is living away from the matrimonial home. However, the respondent lodged a complaint against the appellant making bald allegations of dowry and harassment. She also gave a complaint before the Judicial Magistrate No.III, Nagercoil against the appellant for bigamy and other cruelty. Though she made bald allegations against the appellant, she has not proved that he was leading adulterous life and that he got married with one Sundari, by examining any witness. In support



C.M.A.(MD)No.353 of 2019

of his contention, he placed reliance on the Judgment of the Apex Court in the case of *Vijayakumar Ramachandra Bhate vs. Neela Vijaykumar Bhate reported in (2003) 6 SCC 334*. Learned counsel further submitted that the respondent making character assassination without any materials which amount to a cruelty and is a ground for divorce and whereas, the Family Court failed to consider the same. In fact, the respondent admitted that she is living away from the matrimonial home. Therefore, he prayed that the Judgment of the Family Court is liable to be set aside and divorce has to be granted as sought for by the appellant.

5. The learned counsel for the respondent would submit that the appellant is having illegal intimacy with one Yesupunniam and he also married one Sundari when his first marriage is alive. Though the respondent lodged a complaint on the allegations of dowry and harassment, the Police closed it as 'mistake of fact'. The respondent also made a complaint before the Judicial Magistrate No.III, Nagercoil for bigamy and cruelty. At the directions of the Magistrate, the Police registered First Information Report in Crime No.6 of 2009 under Sections 120(b), 494, 498A, 114 and 406 IPC read with Section 34 IPC



C.M.A.(MD)No.353 of 2019

WEB COPY

and after investigation they also laid a charge sheet. When the appellant approached this Court for quashing the complaint / First Information Report, this Court dismissed the Criminal Original Petition and only dispensed with the personal appearance. The respondent left the matrimonial home only on the ground that the appellant got married with another woman and he was leading adulterous life. The learned counsel would submit that the Trial Court rightly appreciated the material evidence and dismissed the petition for divorce. There are no merits in the appeal and the appeal is liable to be dismissed.

6. Admittedly, the marriage between the appellant and the respondent solemnized on 02.07.2004 under the Special Marriage Act and they were blessed with a child on 09.10.2005 and they lived together as husband and wife till 12.11.2007. Thereafter, the dispute arose. According to the appellant, the respondent / wife left the matrimonial home voluntarily without any valid reason. Despite taking steps, he could not take her back to the matrimonial home from 12.11.2007 to 04.09.2010. He had been waiting for a long period of three years and she never turned up. His further contention is that the respondent filed a



C.M.A.(MD)No.353 of 2019

WEB COPY

false complaint on the allegations of dowry harassment and also assassinated his character. Therefore, he filed a petition for divorce. According to the respondent, till the birth of the child, they were living together happily. Subsequently, the appellant had illegal intimacy with one Yesupunniam and also married one Sundari when the first marriage was still alive. With the ill-advice of Sundari, the appellant caused cruelty to the respondent. Therefore, she filed a complaint and a criminal case is pending before the Judicial Magistrate III, Nagercoil.

7. The points for consideration are (i) whether the appellant has proved that the respondent / wife left the matrimonial home voluntarily without any valid reason? (ii) whether the respondent deserted him over the statutory period of two years? and (iii) whether the appellant has proved the allegations made against the respondent / wife in the petition for divorce.

8. The relationship of the parties are admitted. Marriage solemnized between the appellant and the respondent under the Special Marriage Act. Since they belong to different castes and loved each other,



C.M.A.(MD)No.353 of 2019

they got married thus and lived happily till 12.11.2007. Out of their wedlock, they were blessed with a child. The above facts are not disputed. The allegations levelled against each other are alone disputed. The appellant as a petitioner in the petition for divorce has to prove his case in the manner known to law. The appellant examined himself as PW1 and marked three documents as Ex.P1 to Ex.P3, which are Marriage Agreement Certified Copy, Copy of Aadhar Card and Copy of orders in CrI.O.P.(MD)Nos.3076 and 10629 of 2009. Since there is no dispute with regard to the marriage, those documents are not necessary to decide this case. As stated above, the appellant has to prove that the respondent left the matrimonial home without any valid reason and she stayed out of the matrimonial home over and above the statutory period of two years and that the respondent levelled bald allegations against him. However, the divorce petition was filed by the appellant under Section 27(b) of the Special Marriage Act, which reads as follows.

"27. Divorce.- (1) Subject to the provisions of this Act and to the rules made thereunder, a petition for divorce may be presented to the district court either by the husband or the wife on the ground that the respondent-
(a)...



C.M.A.(MD)No.353 of 2019

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(b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;"

9. Therefore, though the learned counsel appearing for the appellant stated that character assassination amounts to cruelty and mere character assassination without any proof is a ground for divorce, the appellant has filed the petition for divorce only on the ground of desertion and not on the ground of cruelty. Hence, the appellant has to prove desertion and not otherwise. In view of the same, the facts and circumstances in the citation referred to by the learned counsel for the appellant and facts and circumstances of the present case on hand are entirely different and hence, the above cited case is not applicable to the present case on hand. The point that the appellant has to establish is that the respondent left the matrimonial home voluntarily without any valid reason and deserted him over and above the statutory period of two years immediately prior to filing of the petition for divorce. On reading of the entire allegations levelled in the petition for divorce, proof affidavit, cross examination and other materials, we find that the appellant has not proved that the respondent left the matrimonial home voluntarily without any valid reason.



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10. Even though the allegation of the appellant that the respondent has assassinated his character is taken into consideration, based on the complaint given by the respondent, a case was registered against the appellant, her in-laws and one Sundari. The concerned Magistrate after considering the facts, found that *prima facie* case is made out and forwarded the complaint to the Police. The Police registered First Information Report in Crime No.6 of 2009 under Sections 120(b), 494, 498A, 114 and 406 IPC read with Section 34 IPC. Subsequently, charge Sheet was also filed. The case is pending for trial before the Judicial Magistrate III, Nagercoil. Admittedly, Sundari was impleaded as one of the accused, namely, the eighth accused. Therefore, under these circumstances, we find that the allegations levelled by the respondent against the appellant are not bald. The appellant as a petitioner in the petition for divorce has to prove his case. He cannot take advantage of the loop holes left by the respondent. The appellant himself admitted in his cross examination that he frequently visited the respondent's house for seeing the child and therefore, he admitted the fact that he has been meeting his child. In view of the above facts, we find that the appellant has not proved that the respondent deserted him voluntarily over and



C.M.A.(MD)No.353 of 2019

WEB COPY

above the statutory period of two years. Hence, there are no merits in the present appeal and the appeal is liable to be dismissed.

11. Accordingly, the Civil Miscellaneous Appeal is dismissed. Considering the relationship between the parties, there is no order as to costs.

(P.V., J.) (K.K.R.K., J.)
06.09.2024

NCC:Yes/No
Index:Yes/No
Speaking/Non-speaking order

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To

- 1.The Famil Court, Kanyakumari at Nagercoil
- 2.The Section Officer,
Vernacular Records Section,
Madurai Bench of Madras High Court,
Madurai.



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C.M.A.(MD)No.353 of 2019

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and
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C.M.A.(MD)No.353 of 2019

06.09.2024