

(2009) 06 KL CK 0127

High Court Of Kerala

Case No: MFA. No. 467 of 2001 (B)

Malayilmeethal Kumaran

APPELLANT

Vs

Mambatta Geetha

RESPONDENT

Date of Decision: June 5, 2009**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 13(1)

Hon'ble Judges: R. Basant, J; M.C. Hari Rani, J**Bench:** Division Bench**Advocate:** Thomas Antony, for the Appellant; G. Gopalakrishnan Nair, for the Respondent**Final Decision:** Dismissed

Judgement

R. Basant, J.

This appeal is preferred by the appellant/husband against the dismissal of his claim for divorce u/s 13(1)(ia) of the Hindu Marriage Act (hereinafter referred to as the "Act").

2. The marriage between the spouses had taken place on 05.02.1989. The marriage is admitted. The marriage has undergone a tumultuous course. They cohabitated for some period of time and one child was born. Thereafter they started separate residence. The wife complained that the husband has withdrawn from her society unjustifiably and prayed that there may be a decree for restitution of conjugal rights. She also filed a petition claiming maintenance for herself and the minor. Both the petitions were allowed and a decree for restitution of conjugal rights was passed. The appellant/husband was directed to pay maintenance to the wife and the first child. The appellant/husband had resisted the said petition for restitution of conjugal rights, inter alia, on the ground that the wife is mentally unsound and there can be no cohabitation with her. That contention was found against and the decree for restitution of conjugal right was granted.

3. Be that as it may, the parties appear to have settled their disputes and resumed cohabitation after the said decree for restitution of conjugal rights. But that period of cohabitation did not last long. The wife became pregnant again. At that juncture they again started separate residence. The second child was born. The husband thereafter filed an application for restitution of conjugal rights. The wife resisted the said claim. After hearing both sides and adducing evidence, that petition for restitution of conjugal right was dismissed. To the second child the husband did not pay maintenance. This obliged the wife to approach the Family Court with another claim for maintenance. That claim was also allowed.

4. The husband, though liable to pay maintenance to his wife and children as per the orders referred above, is alleged to have defaulted in making such payments obliging the wife to approach the Family Court for execution of the decree for maintenance.

5. It is at this juncture that the present petition for divorce was filed by the husband. In his petition, he specifically claimed an order of divorce on the ground of cruelty u/s 13(1)(ia) of the Act. However, as rightly pointed out by the counsel, there are indications which suggest that the husband wanted to raise an allegation that the wife had unjustifiably withdrawn from the society of the husband and she is guilty of desertion. But significantly no ground of desertion to justify a claim for divorce u/s 13(1)(ia) of the Act was specifically raised or pleaded.

6. The wife resisted the claim for divorce. She contended that she had not withdrawn from the society of the husband. The boot was on the other foot, it was contended. It was the husband who was guilty of cruelty and desertion of the wife. The wife even offered to live with the husband if he would properly take care of and maintain the wife.

7. Parties went to trial on these contentions. The appellant/husband examined himself as PW1. The respondent/wife examined herself as RW1. Ext.A1, a notice calling upon the wife to resume cohabitation after the spouses started separate residence immediately prior to the filing of the petition, was produced. The wife had not replied to the same. She took up the plea that she was too impecunious to approach a lawyer and give reply to Ext.A1.

8. On the side of wife, she proved Ext.B1. The counter statement was filed by the husband in the earlier proceedings. In that he had raised a contention that the wife was mentally unsound and not a fit person with whom he can undertake cohabitation. Ext.B2 is the order passed in the earlier O.P filed by the wife for restitution of conjugal rights. Ext.B3 is the order passed by the Family Court in the claim for maintenance filed by the wife, which was allowed earlier.

9. The court below considered the claim for divorce filed on the ground of cruelty u/s 13(1)(ia) of the Act. The court found that the husband has not succeeded in proving cruelty and that he, who had raised the claim that his wife is mentally

unsound in the earlier proceedings, had not succeeded in showing that there was any cruelty emanating from the side of the wife. Accordingly the court below sailed to the conclusion that the claim for divorce on the ground of cruelty has not been established. The court below thereupon proceeded to pass the impugned order.

10. We have heard the learned Counsel for the appellant/husband and respondent/wife. The learned Counsel for the appellant assails the impugned order on the following grounds.

i) The court below erred in coming to the conclusion that the ground of cruelty has not been established.

ii) At any rate the court below ought to have seen that in substance and virtually the claim for divorce on the ground of desertion had also been raised and decree ought to have been granted on that ground at least.

11. We have considered both the grounds. Coming to the first ground, there is only the oral evidence of PW1 against the oral evidence of RW1. In a matrimonial proceedings, we, as reasonably prudent persons, cannot obviously accept the disinterested testimony. The fact remains that the claimant has to satisfactorily establish the alleged cruelty. Less said about the evidence of PW1, the better. We have already adverted in detail to the course of events which resulted in the filing of the petition. We have not a semblance of doubt left in our mind that the finding of the court below on the question of alleged cruelty is most reasonable, cogent, just and correct. The same does not warrant any interference. No reasonably prudent person could have placed reliance on the oral evidence of PW1 in the light of his previous context which is clear from evidence and discarded the evidence of RW1 and granted decree for divorce on the ground of cruelty. The challenge raised must hence fail.

12. The learned Counsel for the appellant then contends that the claim must have been considered u/s 13(1)(b) of the Act - on the ground of desertion. A reading of the petition cannot obviously convey to the adversary that the appellant had any reasonable intention of claiming divorce on the ground of desertion. Specifically divorce is claimed only on the ground of cruelty. There is of course an averment regarding desertion also. A careful reading of the petition reveals that what was intended was only to press and substantiate the claim for divorce on the ground of cruelty.

13. Be that as it may, we felt that the claim of the appellant for divorce on the ground of desertion can also be considered by this Court. After all, the appellate jurisdiction is coextensive and coterminous with the jurisdiction of the first court and we felt that there was nothing wrong in considering whether such a claim on the basis of the materials presently available would be justified or not.

14. We find that the wife in response to this petition for divorce also had mentioned that if she were well looked after by the husband, she has no objection to cohabitation. But she had resisted the claim for restitution of conjugal rights when he filed such claim earlier. Earlier claim of the husband for restitution of conjugal rights after the second separation was dismissed by the court. Crucially and significantly the appellant had not produced that order dismissing that petition for restitution of conjugal rights before the trial court. We asked the learned Counsel the reasons thereof. The learned Counsel has in response to our request placed the same before us. That order dated 09.06.1997 in O.P. No. 37 of 1994 has been perused by us. The husband's prayer for restitution of conjugal right was resisted by the respondent. That claim was considered on merits and was rejected by the Family Court. The appellant accepted the same. He did not challenge the same.

15. No piece of conduct or circumstance subsequent to that order dated 09.06.1997 is pleaded or proved to justify a subsequent contention that the wife had withdrawn from the society of the husband unjustifiably. The order dated 09.06.1997 clearly shows that the husband's claim for restitution of conjugal rights on the ground that the wife had deserted him was rejected by the court below on merits. If the appellant has a case that subsequent separate residence amounts to desertion by the wife, it was certainly up to him to plead and prove the necessary ground. He having not done the same, we do not find any merit in the contention that if the claim were considered u/s 13(1)(ia) of the Act, the appellant would have succeeded. For consideration of such claim afresh u/s 13(1)(ia) of the Act, we are not satisfied that the matter deserves to be sent back to the Family Court. It is hence that we have attempted to consider the claim for divorce on that ground also.

16. The conclusion appears to be inevitable that this Appeal only deserves to be dismissed. We do so. We direct the appellant to pay the cost of the respondent.

17. This Appeal is accordingly dismissed.