

(2011) 08 MAD CK 0396

Madras High Court (Madurai Bench)

Case No: C.M.S.A (MD) No. 12 of 2004 and C.M.P. No. 5848 of 2004 and M.P. (MD) No. 2 of 2011

Malarvizhi

APPELLANT

Vs

Poovalingam (Died) and Others,
R2 to R5 are brought on record
as L.Rs. of the deceased sole
respondent vide order dated
9.3.2011 in MP (MD) No. 2/2010
in MP (MD) No. 1 of 2011 in
CMSA. (MD) No. 12 of 2004

RESPONDENT

Date of Decision: Aug. 10, 2011

Acts Referred:

- Constitution of India, 1950 - Article 142

Hon'ble Judges: K.B.K. Vasuki, J

Bench: Single Bench

Advocate: A. Haja Mohideen, for the Appellant; G.R. Swaminathan -R4 and 5, NA-R2 and 3 and died R1, for the Respondent

Final Decision: Allowed

Judgement

Honourable Ms. Justice K.B.K. Vasuki, J.

The wife is the appellant herein. The appeal is filed against the order of divorce granted by the trial court as confirmed by the lower appellate court.

2. During the pendency of the appeal, the husband died and in view of the ratio laid down by the Supreme Court reported in [Smt. Yallawwa Vs. Smt. Shantava](#), the appellant filed an application to implead the brothers of the deceased husband, who are according to her, the surviving II Class legal heirs of her deceased husband as respondents 2 to 4. While so, one Narmada Nachiar also filed an application to implead her on record claiming herself to be the adopted daughter of the deceased respondent. This Court by common order permitted all of them to be brought on

record as the respondents 2 to 5 for the limited purpose of deciding the legal status of the appellant in the presence of all the parties claiming themselves to be the legal heirs of the deceased husband.

3. The few facts, which are relevant for considering this appeal are that the appellant got married to the deceased 1st respondent on 25.3.1974 and they had been after the marriage living together in the husband's place at Eriyur and they had no issues out of their wed lock due to which, misunderstanding arose between the parties and they were separated during 1978. Much thereafter, the wife lodged a police complaint and instituted a civil suit against her husband to prevent him from contracting second marriage. The police complaint was treated as petition and an enquiry was held and at the end of the same, the wife started living in the house belonging to the husband and the husband started living in his brother's house. The wife again filed M.C. No. 29 of 1997 claiming maintenance on the ground that the wife has been willing to join her husband, but the husband has for no reason, refused to take her back and neglected to maintain her and MC was after due contest ordered in favour of the wife. While doing so, the trial court found that the respondent attempted to contract second marriage and it is the respondent-husband who separated from the wife and failed to maintain her and ordered Rs. 300/-as monthly maintenance and the same was subsequently enhanced to Rs. 450/-per month by order dated 13.6.2001 in Crl.M.P. No. 2263 of 1999. The wife again filed Crl.M.P. No. 2263/2002 for enhancement of maintenance and the maintenance was enhanced to Rs. 750/-p.m and the enhancement of maintenance was set aside by the revisional authority in Crl.R.P. No. 5 of 2005. Against which, the wife filed Crl.O.P. No. 6114/2007, in which, the order of enhancement of maintenance of Rs. 750/-is restored. Thereafter no further proceedings was filed by the husband challenging the order made either in MP or Crl.OP and the order of enhancement of maintenance become final and binding upon the parties even during the lifetime of the husband. The wife again filed Crl.MP. No. 411 of 2008 for enhancement of maintenance and the maintenance was enhanced from Rs. 750/-to Rs. 1250/-and the same was not challenged by the husband and the last order passed during 2008 is hence the final order in this regard.

4. During the pendency of Maintenance Case, the husband filed HMOP. No. 47 of 2001 against the wife for divorce on the ground of act of cruelty and desertion. The acts of cruelty referred to in the petition are (i) indifferent attitude of the wife towards husband, (ii)non Co-operation with her husband for undergoing treatment for infertility, (iii) failure of the wife to carry out matrimonial duties as dutiful wife to the husband, (iv) failure of the efforts taken by the husband for re-union, (v)civil and criminal proceedings initiated by the wife against the husband (vi) act of adultery of the wife with her sister's husband and (vii) failure to mend herself despite the advice given by her husband. The HMOP was seriously contested before the trial court by the wife denying all the allegations raised in the petition and by raising

counter allegations against the husband.

5. The Trial Court was on the basis of the available evidence, found that the wife had no intention to live with her husband and she acted in such a manner to cause insult, humiliation and such mental agony to her husband and she did not take any legal steps to resume matrimonial relationship and the same amounts to willful desertion and the act of cruelty and granted divorce as prayed for. Aggrieved against the same, the wife filed H.M.CMA. No. 2 of 2003. The lower appellate court though did not agree with the finding of the trial court regarding the act of cruelty, confirmed the order of divorce on the ground of willful desertion on the part of wife. The lower appellate court while doing so, also found that there is irrevocable breakdown of marriage and there is no possibility for the parties to resume matrimonial relationship. Hence, this CMSA by the wife before this court.

6. The substantial questions of law raised in this appeal are as follows:

1. Whether the finding of the courts below in favour of the husband on the ground of desertion is based on no evidence and by overlooking the actual state of affairs and on presumptions and surmise and perverse in nature?

2. Whether the courts below have failed to see that the husband, who is guilty of an act of desertion cannot be permitted to take advantage of his own act of wrong?

7. The wife has also, during the pendency of this appeal, filed MP (MD) No. 2 of 2011 to receive the petition mentioned document as additional documents on her side. The petition mentioned document is the copies of the documents forming part of Ex.R4 police proceedings, which can be discussed at the appropriate stage in this judgment.

8. The two grounds on which the divorce sought for, are the act of cruelty and willful desertion. Though the trial Court granted divorce on both grounds, the lower appellate court restricted it on one of the grounds i.e. willful desertion. Both the courts below have arrived at a conclusion that the appellant wife separated from her husband from 1978 and the wife initiated proceedings against her husband for not contracting second marriage and though, filed maintenance case, did not take any legal steps for re-union. While doing so, both the courts below have relied upon Ex.R4 which is the statement given before the police in the course of enquiry by the police upon the complaint given by the wife. The additional document sought to be marked before this Court is the records relating to the same proceedings i.e., the statement of the wife and the opinion rendered by the Inspector of Police at the end of the enquiry. The appellant/wife has contended that while marking Ex.R4, entire records relating to Ex.R4 police enquiry are by bonafide mistake omitted to be marked. As such, this Court, considering the reasons set out in the affidavit filed in support of the petition for failure to make the document available at the earliest point of time and having regard to the fact that police enquiry is admitted on both sides and that part of the records relating to such police enquiry is also available as

Ex.R4, is inclined to receive the petition mentioned documents consisting of the statement of the wife and the opinion given by the Inspector of Police in Ex.R4 police enquiry as additional evidence Ex.R5 on the side of the wife.

9. As referred to above, both the Courts below accepted the case of the husband that the spouses had been living separately for considerably longer time, but both the courts below arrived at an erroneous conclusion that such separation is solely due to willful conduct on the part of the wife without duly considering the circumstances under which and the party at whose instance such separation taken place. The husband during trial in HMOP. except examining himself as PW1, did not produce any other independent evidence in this regard. Further, the husband in his divorce petition, raised serious allegations against the wife as if she had illicit intimacy with her brother-in-law and she behaved in such an indifferent manner which caused him mental agony and she did not discharge her duty as dutiful wife etc. Though the trial Court accepted the same amounting to an act of cruelty, the lower Appellate Court rejected it. The lower Appellate Court in paras 10 to 13 has after detailed discussion, negatived the husband's case regarding the act of cruelty. While doing so, the lower appellate court observed that there is no iota of truth in the husband's version that the wife committed any physical or mental cruelty to the husband. The lower Appellate Court treated the legal steps taken by the wife only to safeguard her status and right as legally wedded wife of the husband. The husband did not file any cross appeal against the dismissal of his divorce petition on the ground of act of cruelty. In that event, the reasons assigned by the husband to show that it is the wife who voluntarily left him, are no longer available to the opponents.

10. Regarding the act of separation, the consistent theory of the wife is that they were separated from 1976 and she was compelled to live separately in her matrimonial house, because of the conduct of the husband in forcing her to agree for second marriage. It is to be noted herein that the husband, according to whom, the wife voluntarily left him from 1978, filed divorce petition only during 2001 that too during the pendency of the proceeding of enhancement of maintenance filed by the wife and he had in his divorce petition raised serious allegations against the wife and he went to the extent of alleging her guilty of adultery. Whereas, the wife did not raise any such serious allegations against the husband. As rightly observed by the lower appellate Court, her conduct in approaching the courts by way of suit to prevent the husband from contracting second marriage, is only to save the matrimonial relationship between herself and her husband. The wife with none to help her, had to necessarily approach the court claiming maintenance from her husband, who though had regular earning, failed and neglected to do so. That being the conduct of the parties, the wife's theory that she was compelled to live in matrimonial house because of the conduct of the husband appears to be more probable. She has also through out in her Ex.R4 statement before the police, in her counter in this petition and in her maintenance petition, contended that she was sent away during 1996. The maintenance case was after due contest, decided in her

favour and the proceedings initiated by her for enhancement of maintenance, was subsequently confirmed by the High court. The trial Court, which dealt with the maintenance petition accepted the case of the petitioner that she was originally driven out from the matrimonial house on 10.6.1996 on her refusal to agree for the second marriage of the husband and it is the husband who left her and failed and neglected to maintain her and the husband's theory that the wife voluntarily left from the matrimonial house, was disbelieved by the concerned trial court, while dealing with maintenance case.

11. As a matter of fact, the wife filed maintenance case in 1997 within one year from her separation. The order of maintenance is produced as Ex.P1 on the side of the husband in his divorce petition. The same would also reveal that by the time the divorce petition is filed, the wife came back to the husband's house and even expressed her willingness to join him in her Ex.R5 statement given before the police and the same was referred to in the final report of the police officer and the wife is in Ex.R5 advised to approach appropriate forum for restitution of her conjugal rights. She has also in her evidence during trial in HMOP, expressed her willingness and readiness for re-union, but it is the husband who had no intention at all to do so.

12. Both the courts below have failed to consider the conduct of the husband in proper perspective. It is the husband who raised serious allegations against the wife. The husband alleged her of illicit contact with her brother-in-law. The conduct of the husband to drive the wife away from the matrimonial house is also accepted by the other court in the maintenance case and the husband did not take any steps to challenge such finding. The outcome of maintenance proceedings initiated by the wife already become final during the lifetime of the husband and binding upon the husband. The wife was forcibly separated from 1996 and within a reasonable time, she came back to the husband's house, but the husband neglected her and lived away from her and the wife had to approach the court claiming maintenance from the husband, who was working as teacher at the relevant point of time and the husband did not take any steps to resume matrimonial relationship. Though he would say that panchayat was held at four or five times and the wife did not agree with the Panchayatar's decision, he did not examine any of the panchayathars as witness on his side. The facts may reveal that there is failure on the part of both parties to take any legal steps for restitution of conjugal rights. But the wife had on more than one occasion expressed her willingness to resume her matrimonial relationship. But the husband thought fit to file divorce petition against the wife with serious allegations. Major part of which are now found to be untrue. Such conduct of the husband in raising serious allegations against the wife and in neglecting to maintain her and his failure to take any legal steps for re-union has to be necessarily construed to be adamant and indifferent towards his wife and he remained so throughout. But both the courts below failed to view such conduct of the husband in the light of the helpless condition in which the wife was given up and

found the wife, who was mainly for re-union than for divorce, to be at fault for their separation and mainly relied upon the fact that the parties have been living separately for more than 20 years and applied the theory of irretrievable breakdown of marriage and granted divorce to the husband.

13. As rightly argued by the learned counsel for the wife, mere omission of the wife to initiate steps for reunion, as observed by the High Court in the judgement reported in 2008 (2) CTC 745 (C.R. Chenthilkumar v. K. Sutha) would not prove her lack of intention to resume act of co-habitation. Further, the evidence on record would reveal that the husband had at no point of time, expressed his intention or made any attempt to bring about conciliation, when the wife had been living in the husband's house. No positive steps was taken on the part of the husband to restore the wife to matrimonial house. The husband is also equally duty bound to make positive efforts for any reconciliation. The trial court has without any pleading and proof, recorded a finding as if the wife is greedy and is interested only in her husband's money and his property.

14. Further, the principle of irretrievable breakdown of marriage can be invoked only by the Apex Court in exercise of extraordinary jurisdiction vested with the same under Article 142 of the Constitution. As a matter of the fact, the Apex Court in the judgement reported in [Vishnu Dutt Sharma Vs. Manju Sharma](#), expressed the view that "there are different set of rulings of the Supreme Court applying and denying irretrievable breakdown of marriage as a ground for divorce and the matter should be considered by a larger Bench". It is further observed by the Supreme Court that "it is for the parliament to specifically incorporate the same as one of the grounds for divorce in all the marriage laws". That being the legal and factual position, the orders of the courts below by applying the theory of irretrievable breakdown of marriage which is not approved by the Apex Court as one of valid and legal grounds for granting divorce, are legally and factually unsustainable.

15. Here is the case, wherein the husband is the wrong party and the wife is the wronged party and the finding vis-a-vis given by the courts below cannot be sustained and both the substantial questions of law are thus answered in favour of the wife.

16. In the result, M.P (MD) No. 2 of 2011 is ordered and the additional evidence is received as Ex.R5 on the side of the wife.

17. In the result, the appeal is allowed by setting aside the judgment and decree dated 31.12.2003 made in H.M.C.M.A. No. 2 of 2003 on the file of the District Court, Sivagangai and the judgement and decree dated 31.3.2003 in H.M.O.P. No. 47 of 2001 on the file of the Sub Court, Sivagangai. There is no order as to costs. Consequently, C.M.P. No. 5848 of 2004 is closed.