

AmrithaA. Vs. V.Krishna Kumar.

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Court : Chennai

Decided On : Aug-12-2010

Judge : R.Banumathi; G.M.Akbar Ali, Jj.

Acts : Family Courts Act - Section 19

Appeal No. : C.M.A.No.2786 of 2008

Appellant : AmrithaA.

Respondent : V.Krishna Kumar.

Advocate for Def. : Mr.V.Krishnakumar, Adv.

Advocate for Pet/Ap. : Mr.P.S.Raman,Sr.Counsel, Adv.

Judgement :

1.This Appeal arises out of the judgment in F.C.O.P.No.2359 of 2004 on the file of Principal Family Court, Chennai dismissing the Petition filed by the Appellant/wife under Section 13(1)(ia) and (ib) of the Hindu Marriage Act seeking for dissolution of marriage on the ground of cruelty and desertion.

2. The brief facts of the case are as follows:-

The marriage between the Appellant and Respondent was solemnised on 28.10.1983 and out of the lawful wedlock, two children were born first son was born on 21.4.1985 and second son was born on 1.9.1988. Case of Appellant/wife

is that after the marriage, she found that the Respondent was abusing medicines like cough syrups and consuming them in great quantities and that he had no interest in the Appellant and showed indifference and neglect towards her. Further case of Appellant is that Respondent's indifference and neglect towards her caused mental agony to her. Further case of Appellant is that the Respondent spoke to her on limited occasions and he refused to acknowledge her existence. Appellant further averred that unable to withstand the indifference and abuse she left the matrimonial house on four occasions. However, keeping the welfare of children in mind, she re-joined the Respondent. The Appellant further averred that the Respondent contributed very meagre amount to the household expenses and when she took up employment to tide over financial difficulties, the Respondent resigned his job as Senior Manager from Ashok Leyland, all of which caused mental agony and cruelty to the Appellant.

3. In the Petition, it is further averred that the Respondent left the matrimonial home and lived in Madurai and came to the house only once in a month and in 1996 the Respondent left the matrimonial house once for all and living separately since then. Appellant sought for dissolution of marriage on the ground of cruelty and desertion.

4. Denying petition averments, the Respondent resisted the Petition contending that he was never indifferent towards the Appellant and never neglected her. The Respondent averred that even after 1997 he continued to visit the Appellant and the children, who are staying along with parents of the Appellant. The Respondent denied having abused the Appellant as alleged by her. In the counter, the Respondent further averred that he has been taking care of the financial needs and the educational expenses of the children and that he is always ready and willing to live together with the Appellant and in fact he is suffering from loneliness and he is made to suffer emotionally by the Appellant for no fault of the Respondent.

5. Before the Family Court, Appellant examined herself as P.W.1 and Ex.P.1 was marked. The Respondent/R.W.1, even though filed proof affidavit, inspite of adjournments, he did not turn up for cross-examination and Ex.R.1 was marked on

his side. Upon consideration of oral and documentary evidence, the Family Court held that the evidence of Appellant/P.W.1 is not specific about the cruelty and negated the Appellant's plea of cruelty. The Family Court further held that the Respondent has been visiting the Appellant and children once in a month and he was also contributing to the educational expenses of children and held that there was no intentional desertion on the part of Respondent and on those findings, the trial Court did not accept the case of Appellant on both the grounds of cruelty and desertion and dismissed the Petition for divorce.

6. On behalf of the Appellant, Mr.P.S.Raman, learned Senior Counsel contended that the trial Court erred in saying that the Appellant has not mentioned anything about the cruelty in her notice sent to the Respondent, inspite of the fact that the Appellant has categorically stated in her notice about the cruelty meted out to her. It was further submitted that in her chief examination/proof affidavit, the Appellant has clearly spoken about the negligence and indifference of the Respondent and the mental torture and agony to which she was subjected to and while so the trial Court erred in brushing aside the evidence of the Appellant. It was also submitted that even during the cross-examination, the Appellant was persistently questioned about her relationship with Santhosh and Subash, which is suffice to prove that the Respondent was cruel towards the Appellant and while so the trial Court erred in saying that the Appellant has not come out with a clear case of cruelty. Learned Senior Counsel would also submit that occasional visit of Respondent to matrimonial house would not in any way dilute the intentional desertion on the part of the Respondent. It was further argued that in the absence of any evidence adduced by the Respondent, the trial Court ought not to have negated the plea of the Appellant. In support of his contention, the learned Senior Counsel placed reliance upon a Division Bench judgment of this Court in D.NAGAPPAN VS. T.VIRGIN RANI, (2009(3) CTC 15).

7. The Respondent has been served by substituted service. His name has been printed in the cause list. The Respondent has neither entered appearance nor appeared in the Court.

8. We have carefully considered the evidence, materials on record and the judgment of the trial Court. Upon consideration, the following points arise for consideration in this appeal:

"1. Whether the trial Court was right in saying that the Appellant has not proved cruelty and desertion under Section 13(1)(ia) and Section 13(1)(ib)?

2. When the Respondent has not appeared for cross-examination, whether the trial Court was right in shifting the burden of proof upon the Appellant in establishing her case?"

9. Points Nos.1 and 2: There is no dispute that the marriage of the Appellant and the Respondent was solemnised on 28.10.1983 and the first child was born on 21.4.1985 and the second child was born on 1.9.1988. There is also no dispute that the Respondent has been living in Madurai from 1996.

10. In her chief examination, the Appellant has stated that after the marriage she found that the Respondent was abusing medicines like cough syrups and consuming them in great quantities. P.W.1/Appellant has also stated that the Respondent was indifferent and neglecting her and the Respondent refused to acknowledge even her existence, which according to her, has caused mental agony and cruelty. The Appellant has also stated that the Respondent used to abuse her and unable to withstand the abuses, indifference and neglect, she left the matrimonial house on four occasions between 1985-1990 and keeping the welfare of the children in mind she rejoined the Respondent. Appellant/P.W.1 has further stated that the Respondent has been contributing very meagre amount towards household expenses and to tide over financial difficulties she has taken up employment in 1990 and immediately thereafter the Respondent has resigned his job as Senior Manager from Ashok Leyland. P.W.1 has further stated that the Respondent left Madurai in 1991 and thereafter he was only occasionally visiting her and the children.

11. So far as the cruelty, the learned Judge, Family Court referred to Ex.R.1 and observed that in Ex.R.1, the wife has not described the details regarding acts of cruelty. Even as pointed out by the Family Court, the Appellant sought for consent

of the husband for divorce by mutual consent. In such circumstances, the Appellant cannot be expected to elaborately narrate the details of the cruelty and mental agony caused to her. By reading of Ex.R.1 notice, we find that in the said notice it has been stated that "the Appellant was subjected to lot of cruelty at Respondent's hands and that even his family members did not spare her, but subjected her to extreme cruelty." Of course, Ex.R.1 has not elaborated upon the details of the cruelty. In our considered view, any omission to elaborate the nature of cruelty in Ex.R.1 by itself would not dilute the evidence adduced by the Appellant in the chief examination.

12. The mental cruelty under Section 13(1)(ia) can be broadly be defined as that conduct which one inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. It is necessary to bear in mind that the conduct of the parties will have to be analysed and examined in the light of the family background and education and status of the parties. They are of varied degrees from house to house or person to person. Therefore, when a spouse makes a complaint about the treatment of cruelty by the partner or relations the Court is not to import its own ideas and notions.

13. Elaborately considering the conduct of parties in matrimonial matters and that the conduct complained of should be grave and weighty, in NAVEEN KOHLI VS. NEELU KOHLI ((2006) 4 SCC 558 = 2006(2) Supreme 627), the Supreme Court has observed as under:

"36. The Court had an occasion to examine the pre-1976 Amendment position in N.G. Dastane v. S. Dastane ((1975) 2 SCC 326: AIR 1975 SC 1534). The Court noted that

The enquiry has to be whether the conduct charged as cruelty is of such a character as to cause in the mind of the petitioner a reasonable apprehension that it will be harmful or injurious for him to live with the Respondent.....

47. In the case of Sobha Rani vs. Madhukar Reddi reported in (1988) 1 SCC 105, this Court had an occasion to examine the concept of cruelty. The word 'cruelty' has not been defined in the Hindu Marriage Act. It has been used in Section

13(1)(i)(a) of the Act in the context of human conduct or behaviour in relation to or in respect of matrimonial duties or obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must begin as to the nature of the cruel treatment and then as to the impact of such treatment on the mind of the spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other, ultimately, is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted. The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty. Intention is not a necessary element in cruelty. The relief to the party cannot be denied on the ground that there has been no deliberate or wilful ill-treatment.

50. In *V. Bhagat v. D. Bhagat*, 1994(1) SCC 337, this Court had occasion to examine the concept of mental cruelty. This Court observed as under:

16. Mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case

having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

14. As pointed out earlier, in her evidence, the Appellant has clearly spoken about the negligence of the Respondent and that he has been talking to her only occasionally and that too, only few words. A meaningful marriage is sharing of thought and experience and sharing of emotional bonds between the husband and wife. It helps both the partners to feel adequate, wanted, and sharing of love with each other. Any indifference or negligence on the part of the Respondent/husband towards the Appellant/wife would have certainly caused mental agony and cruelty. In our considered view, the trial Court did not analyse the evidence of the Appellant/P.W.1 in proper perspective and erred in brushing aside her evidence on the ground that the details of cruelty has not been elaborated in Ex.R.1. This is all the more so, when the Respondent/husband has not chosen to enter into the box for the purpose of cross examination. It is pertinent to note that the evidence of Appellant/P.W.1 on the aspect of cruelty remains unrebutted. We are unable to endorse the views taken by the Family Court on the aspect of cruelty.

15. It is fairly well settled that it is difficult to establish the mental cruelty and agony by direct evidence. A feeling of anguish, disappointment and frustration in one spouse caused by conduct of the other is to be appreciated in the background of the facts and circumstances of the case. The spouses were having two sons. With the two sons to bring up, any indifference and neglect on the part of the Respondent would have certainly caused mental agony and cruelty in the mind of the Appellant. While analysing the evidence, the Court should take into account the cumulative effect of facts and circumstances. The trial Court was not right in ignoring the evidence of the Appellant. Finding of the trial Court that the Appellant has not proved cruelty cannot be sustained and is liable to be set aside.

16. In so far as desertion, in her evidence, the Appellant has stated that the Respondent lived in Madurai since 1991 and she was left alone in Chennai to take care of the children and the business venture which she has started on her own in 1991. Since 1991, the Respondent has been living in Madurai and he was visiting

Chennai once in a month. P.W.1 has further stated that in 1990, they purchased house in the joint name of the Appellant and the Respondent. In her evidence, P.W.1 has further stated that finally in 1996, Respondent left the matrimonial home and thereafter they are living separately and since 1997 she is taking care of herself and the minor children and fulfilling their needs. Though Respondent is living in Madurai, it is admitted that he has been making 50 percent contribution for the educational expenses of the minor children.

17. It is not in dispute that the Respondent has been visiting the children once in a month. The trial Court negated the plea of desertion mainly on the ground that the Respondent was visiting wife and children once in a month and that there is nothing to indicate that the Respondent intended to forsake the company of the Appellant and children. The trial Court did not accept the plea of desertion mainly on the ground that there was no intentional desertion - "animus deserendi" on the part of the Respondent.

18. Under Section 13(1)(b) of Hindu Marriage Act, the Respondent/husband has to prove (i) that there was desertion for a continuous period of two years immediately preceding the presentation of the petition; (ii) the desertion was without reasonable cause and without the consent or against the wish of the petitioner/Appellant herein. The desertion requires four important elements viz., (i) factum of separation (ii) necessary intention to put an end to matrimonial consortium and cohabitation permanently, (iii) want of reasonable cause and (iv) want of consent or against the wish of the other spouse.

19. In AIR 1964 SC 40 (Lachhman Uttam Chand Kirpalani v. Meena) the Supreme Court has held that where the wife refused resumption of marital cohabitation for a reasonable cause as there was hostile atmosphere and ill-treatment in the husband's house it does not imply animus deserendi. Mere leaving the matrimonial home is not sufficient. Animus deserendi at the time of leaving the matrimonial home has to be proved.

20. "Desertion" for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words, it is a

total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things,. Desertion, therefore, means withdrawing from the matrimonial obligations i.e., not permitting or allowing and facilitating cohabitation between the parties. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. The party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong. (vide SAVITRI PANDEY VS. PREM CHANDRA PANDEY ((2002) 2 SCC 73).

21. The trial Court faulted the Appellant that she created a situation in the house and therefore Respondent had reasonable excuse for withdrawal from the society of the wife. The trial Court pointed out that the Respondent spoke to parents of Santhosh that he should leave the house whereas the Appellant has stated that Santhosh never lived with her. The trial Court observed that if the Appellant has stopped Santhosh from the business and if he is not living in the house, there was no need for the husband to approach the parents of Santhosh with a request of making him to quit the house. At this juncture, it is pertinent to note that the finding of the trial Court is only based upon the answers elicited from P.W.1 during the cross examination. As we have pointed out earlier, the Respondent has filed proof affidavit before the trial Court and he has not chosen to enter into witness box. Without being subjected to cross examination, no evidentiary value could be attached to the averments in the proof affidavit filed by the Respondent.

22. Appellant has stated that she has started business venture along with one Santhosh. Neither the Appellant nor the Respondent made any averments regarding Santhosh in the Petition or in the counter affidavit. Only in the cross examination of Appellant/P.W.1, the Appellant was questioned about her relationship with the said Santhosh. In fact, during cross examination of the Appellant, the Respondent had gone to the extent of introducing one more person Subash, who is a colleague of the Appellant, alleging that she had contacts with him also. The direction of the cross examination would indicate that it was only the Respondent, who has been making false accusations against the Appellant. While so, the trial Court picked up answers elicited during the cross examination to arrive

at the conclusion that the Respondent had reasonable excuse for withdrawal from the society of the wife. In our considered view, the trial Court disregarded the Appellant's evidence on assumptions and presumptions. As pointed out earlier, even though Respondent has filed proof affidavit, he has abstained from the witness box and in the absence of any evidence from the Respondent, the evidence adduced by the Appellant remained unrebutted, the trial Court erred in presuming that the Respondent has reasonable excuse for withdrawal from the house. The trial Court observed that the Respondent has been frequently visiting the house once in a month and contributed for the educational expenses of the children. Even though the Respondent has visited the house, he is said to have visited the house once in a month and that by itself would not dilute the desertion of the Respondent. The Respondent has been living in Madurai from 1996. Any occasional visit to the matrimonial house cannot dilute the desertion. Living in Madurai means no cohabitation between the parties. The fact that he has been living in Madurai since 1996 and that he has withdrawn from the company of the Appellant indicates intentional desertion on the part of the Appellant.

23. The trial Court erred in not appreciating the evidence of the Appellant in proper perspective. The conclusions of the trial Court are not based upon evidence, but are assumptions and presumptions. In our considered view, in the absence of any rebuttal evidence adduced by the Respondent, the trial Court erred in brushing aside the evidence of the Appellant and therefore we are unable to subscribe to the views taken by the trial Court. The findings of the trial Court are therefore liable to be set aside and accordingly set aside.

24. In the result, the order dated 16.7.2008 made in F.C.O.P.No.2359 of 2004 on the file of of the Principal Family Court, Chennai is set aside and the Civil Miscellaneous Appeal is allowed. F.C.O.P.NO.2359 of 2004 on the file of Principal Family Court, Chennai filed by the Appellant under Section 13(1)(ia) and (ib) of the Hindu Marriage Act is allowed and the decree dissolving the marriage dated 28.10.1983 between the Appellant and the Respondent is granted. However, there is no order as to costs.