

In the Court of the Principal District Judge
Kanchipuram District@ Chengalpattu

Present : Thiru R.Selvakumar, B.A.M.L
Principal District Judge, Chengalpattu.

Thursday the 31st day of August 2017.

Civil Miscellaneous Appeal No. 1/2014

Malathy .. Appellant/Respondent.

//Versus//

J.Krishnamohan. ..Respondent/Petitioner.

**(On Appeal as against the Fair and Decretal order
passed in HMOP No. 261/2009 dated 07.11.2013
by the Subordinate Judge, Tambaram.)**

J.Krishnamohan. .. Petitioner.

//Versus//

Malathy .. Respondent.

This Civil Miscellaneous Appeal is coming on 17.08.2017 before me for final hearing in the presence of Tvl.D.Sekar, M.Anandeeswaran, Advocates for Appellant and Tvl. N.Baskaran, K.Chandrajkal and K.Karthikeyan, Advocates for the Respondent, upon hearing the arguments on both sides, upon perusing the documents and having stood over for my consideration, this Court delivered the following

JUDGMENT

This Civil Miscellaneous Appeal has been filed by the Wife against the Order of Divorce granted against her U/s 13(i)(ia) and (ib)

of Hindu Marriage Act on the ground of cruelty and desertion in HMOP.No. 261/2009 dated 07-11-2013 by the Subordinate Judge, Tambaram.

2. The Point for consideration is :

Whether the Appeal deserves to be allowed?

3. Point :-

This Civil Miscellaneous Appeal has been preferred against the decree passed by the Learned Subordinate Judge, Tambaram in HMOP.No. 261/2009 thereby granting divorce in favour of the husband on the ground that the marriage was irretrievably broken down. The application for divorce has been filed by the husband U/s 13(i)(ia) and (ib) of Hindu Marriage Act on the ground of cruelty and desertion. Admittedly, the marriage between the petitioner and the respondent took place on 31-01-1999 at West Tambaram. At the time of marriage the wife was employed at Indian Bank, Kanchipuram. On the other hand, the respondent was employed at Aircel, Coimbatore. According to the husband right from the date of marriage they have not lived together continuously. Though the wife assured to get transfer to Coimbatore she had not taken any steps for such transfer and at last the petitioner was employed at Gurgaon in the year 2005. The respondent after deliberation came and live with him for a short duration and left the place and thereafter she has not joined with the husband. She has voluntarily deserted the husband by the conduct of not living together. The wife also guilty of continuing cruelty by depriving matrimonial bliss to the husband.

4. On the other hand, the wife contents that the husband alone was not living with the wife. Her attempt to get transfer to Coimbatore was failed since certificates produced by the husband was

not accepted by her employer. In fact the respondent's family went to meet the petitioner in July 2005 at Gurgaon at the time the petitioner was not ready to lead a happy married life. In spite of several steps taken by the respondent/ appellant's family there was no reunion. The petitioner alone is guilty of desertion. Erring spouse is not entitled to divorce on his own fault and prays for dismissal of the petition.

5. On the side of the husband he was examined as P.W.1. He has chosen to mark Ex.P.1 to Ex.P.4. On the side of the wife, she was examined as R.W.1 and Exs.R.1 and R.2 were marked. Except the interested testimony of the spouses no other independent evidence is available to fix the reason for separate living. Ex.P.1 is the Marriage Invitation. Ex.P.2 is the notice dated 05-10-2005. Ex.P.3 is the notice sent by the petitioner on 12-06-2008. Ex.P.4 is the returned cover. Ex.R.1 and R.2 are equivalent to Ex.P.2 and Ex.P.3.

6. The Learned Trial Judge after elaborate discussion has come to the conclusion that the petitioner has not proved the ground of cruelty and desertion. On the other hand, they are living separately for several years. There is no possibility of re union and granted divorce on the ground that the marriage is irretrievably broken down. The counsel for the appellant submits that no such decree can be passed. Having come to the conclusion that the ground of cruelty and desertion has not been proved the Trial Judge ought to have dismissed the application. The Trial Judge erred in granting divorce. Further, P.W.1 in cross itself admits that there is no evidence to prove cruelty. Further, he deposed as if, " எதிர்மனுதாரருடன் சேர்ந்து வாழ நான் தயாராக இல்லை". So, the husband alone is the erring spouse and prays for allowing the appeal. He relies upon a decision reported in 2002(4) AWC 3002 of Supreme Court in Pushpavathi Alias Lalitha //vs// Manickasamy. In the said case, it has been held that living

separately itself is not sufficient to make out a ground of cruelty. In this case the divorce has not been granted on the ground of cruelty. He further relies upon the Judgment of the Supreme Court in Appeal 6534-6536 of 1995 between Adhyatma Bhattar Alwar //vs// Sri Devi which is also in connection with cruelty and desertion. Another Judgment relied upon by him is that of Supreme Court in Savitri Pandey //vs// Prem Chandra Pandey. Therein it has been held that the irretrievable broken down of marriage is not a ground by itself to dissolve it. Another decision of Madhya Pradesh High Court reported in I(1992)DMC 579 is also in respect of cruelty. The ground of cruelty and desertion has to be decided on the facts and circumstances of each and every case no two cases are similar in nature, the Court has to approach the case on the facts of the cases independently.

7. The Learned counsel appearing for the respondent invites this Court's attention to a decision reported in II(2001) DMC 155 between Sudhakar Vs Smt.Kalavati of Madhya Pradesh High Court and contend that the divorce can be granted when the reconciliation is not possible. Argued that the case on hand is the classic example for such break down of matrimonial relationship.

8. In this case as already stated the Trial court not accepted the plea of desertion as well as cruelty. Admittedly the husband and wife are not living together. Both of them are living at a distant places. Under such circumstances there is no direct chances for cruelty. Refusal to give matrimonial bliss itself is not sufficient to made out a ground of cruelty. When the husband is away when he has not taken any steps to live together he cannot blame the wife only for such lapses. As far as desertion is concerned due to the employment the husband and wife are living separately. There are attempts to transfer to a common place which was ended in vain. In fact the

husband chosen to go far away from Coimbatore to Gurgaon for employment for which neither the wife nor the husband can be held responsible. There are extraordinary circumstances which forced separate living. There was a notice in the year 2005 by the husband. Therein it has been mentioned as *the mistake is with both of us which cannot be solved*. The said line in Ex.A.2 itself would go to affect the petitioners case of placing the entire blame on the wife. For separate living as well as for the absence of matrimonial relationship both the spouses are responsible. Under such circumstances the Trial Judge was right in holding that the petitioner has not proved the case of cruelty and desertion.

9. The only point remains to be answered is whether the Trial Judge was right in granting divorce on the ground that the marriage was irretrievably broken down. Admittedly, the husband went to Gurgaon for employment in the year 2005. The Husband contents that the wife lived there for a short duration. On the other hand in the counter the Wife contents that she went to Gurgaon with her family members and husband send them away etc. In this connection except the oral evidence no other evidence is placed before the court. The cross examination of P.W.1 not even touched the events at Gurgaon. On the other hand, R.W.1 's evidence in cross is as follows:-

“ ஜனவரி 2005ல் மனுதாரருக்கு கூர்கானுக்கு மாறுதல் வந்தது. நான் என் பெற்றோருடன் மனுதாரருடன் சென்று கூர்கானில் தங்குவதற்கு சென்றோம் என்றால் அது சரி தான். ஆனால் கூர்கானுக்கு சென்ற ஒரு வாரத்தில் நாங்கள் எல்லோரும் சென்னைக்கு வந்து விட்டோம் என்று சொன்னால் மனுதாரர் புறப்பட சொன்னார் அதனால் புறப்பட்டோம். ----- 2005க்கு பிறகு மனுதாரருடன் இணைந்து வாழவில்லை என்று சொன்னால் சரி தான். நான் சம்பளம் இல்லா விடுப்பு எடுக்கவில்லை என்றால் சரி தான்”.

The answer given by RW.1 in cross would go to show that she was not interested to go to Gurgaon and live therein. There was a notice Ex.P.2. There in it has been categorically stated as there is no chance for reunion the said notice was issued on 05-10-2005. The present application for divorce was filed in the year 2009. Prior to the divorce application another notice was also issued in the year 2008. For those notices the wife had not chosen to give any reply. In Ex.R.1 notice the husband had stated categorically as if he is not interested in the married life since nothing is fruitful and keeping myself away. Even after the receipt of the notice the wife has not even raised her little finger disputing the allegations made in Ex.R.1. It appears that the respondent is having thyroid problem and diabetes and there are no issues between them. All those things aggravated the rift between the husband and wife. Though the marriage took place in the year 1999. For the past 18 years they were not not able to cope up with each other. The wife is reasonably employed in a public sector Bank. There are chances for not showing interest in leaving the job and joining the husband. The silence on the part of the wife after Ex.R.1 = Ex.P.2 would go to show lack of interest on the part of the wife. R.W.1 in her evidence admits about the thyroid and diabetic and lack of children. She is not able to remember the mobile number of the husband, that itself would go to show the mind set of the wife. The Trial Judge having weighed the evidence at the first hand. on seeing the parties personally and came to the conclusion that the marriage has been irretrievably broken down. Being the Appellate Court, this court is not in a position to differ from the view taken by the Trial Judge. Thus, this court finds the appeal deserves to be dismissed.

10. In the result, the Civil Miscellaneous Appeal is dismissed. The Order and Decree passed by the Subordinate Judge, Tambaram in HMOP.No. 261/2009 dated 07.11.2013 is confirmed. No costs.

Dictated to the Stenographer, taken down, transcribed and Computerized by her corrected and pronounced by me in open Court this the 31st day of August 2017.

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Sd/-R.Selvakumar
Principal District Judge
Chengalpattu.

Exhibits and witnesses on both sides:-

-- Nil --

Sd/-R.SK
P.D.J.,
CPT.