IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **24.01.2017**

CORAM

THE HON'BLE MR.JUSTICE M.JAICHANDREN
and
THE HON'BLE MR.JUSTICE T.MATHIVANAN

C.M.A.No.1652 of 2015

K.Kannusamy .. Petitioner

Vs

T.Sumathi .. Respondent

Civil Miscellaneous Appeal filed under Section 19 of the Family Court Act against the decree and judgment dated 06.06.2015 and made in H.M.O.P.No.16 of 2014 on the file of the Family Court Judge, Erode.

For Petitioner : Mr.S.Chandrasekharan

For Respondents : Mr.D.Selvaraju

ORDER

[Order of the Court was made by **T.MATHIVANAN, J.**]

This memorandum of Civil Miscellaneous Appeal has been directed against the fair and decretal order dated 06.06.2015 and made in the matrimonial proceedings in H.M.O.P.No.16 of 2014 on the file of the Family Court, Erode.

2. Heard Mr.S.Chandrasekharan, learned counsel appearing for the appellant and Mr.D.Selvaraj, learned counsel appearing for the respondent.

3. The appellant herein is none other than the husband of the respondent. Their marriage was solemnized on 25.11.1998 at Naziyanur. While the appellant was pursuing his Bachelor degree in Chemistry, he was put in employment in Indian Air Force. Thereafter, he had completed his M.A Degree and obtained a Diploma in Radio Communication Engineering. On account of his educational qualification, he got promotion and now he has been working in the cadre of Sergeant in New Delhi.

4.The respondent is qualified in B.Sc Degree. At the time of their marriage, the appellant was working as Corporal at Srinagar, Jammu and Kashmir and therefore, he had taken the respondent to Srinagar and lived therein as husband and wife for about 4 months. Since the respondent was conceived and due to the extreme cold climate, she had come down to Erode and thereafter, gone to her parents house without the consent of the appellant.

5. The respondent had delivered a male child on 19.09.1999. Even prior to the birth of the child, the father of the respondent had insisted the appellant to hand over his entire salary to the respondent for her

maintenance for which the appellant was not amenable. Having been aggrieved by the act of the appellant, the respondent had, at the instigation of her father, threatened the appellant not to provide any financial assistance to his parents and also insisted him not to go to the house of his parents and relatives without her consent. She also used to abuse him with filthy language and became very adamant and used to pick up petty quarrels even for trivial issues. The appellant had taken several efforts to mediate the respondent and he had also made arrangement for counselling and all his entire efforts were ended in vein.

6. On one occasion, the family members of the respondent had attacked the appellant to compelling him to come to their terms. In this connection he had lodged a police complaint and based on his complaint, an enquiry was conducted. During the course of enquiry, he was advised to pay a sum of Rs.2,000/- to the respondent as well as the child. The respondent had also agreed to join with him soon after her completion of the academic course. However, she did not join with him, for the reason best known to her.

7. Besides this she had also failed to provide conjugal benefits to the appellant. She has been adamantly residing in her parental house, deserting and neglecting the appellant. Therefore, the appellant had filed a petition in H.M.O.P.No.149 of 2008 for restitution of conjugal rights. That petition was allowed and a decree for restitution of conjugal rights was passed on

28.08.2009. Even after passing of one year from the date of the above decree, she did not turn up to live with him. Instead, she had chosen to file a suit in O.S.No.113 of 2008 in the name of her son Pavithran for partition of the family properties of the appellant on the file of Subordinate Court, Erode.

8. That on 01.03.2010, the appellant had sent a legal notice to the respondent to come and join with him to lead a peaceful family life. However, there was no response on the other end and therefore, he was constrained to file the above said petition in H.M.O.P.No.175 of 2010 for dissolving their marriage solemnized on 25.11.1998 by granting a decree for divorce on the grounds of cruelty and desertion.

9. The respondent, while refuting the allegations levelled her, has contended that she was always ready and willing to live with the appellant to lead a peaceful family life, but the appellant had not evinced any interest in taking her back to the matrimonial home. She has contended further that she was, in fact, driven out of the matrimonial home by the appellant with the help of his parents and even after passing of the decree in H.M.O.P.No.149 of 2008 for restitution of conjugal rights, the appellant did not come forward to take her back to the matrimonial home and that she had never proclaimed that she would not allow the appellant to live peacefully in future. It is also her case that as the appellant had failed to live with her and deserted her as well as her son for more than two years, she had filed a suit for partition.

10. In order to substantiate their respective cases, the appellant had examined himself as PW1 and during the course of his examination, as nearly as 22 documents were exhibited. On the other hand, the respondent and her son Pavithran were examined as RWs 1 and 2 respectively and no documentary evidence was adduced on her behalf.

11. On a meticulous analysis of the evidences, both oral and documentary, the learned Family Court Judge, had proceeded to dismiss the petition on 06.06.2015. Having been aggrieved by the impugned order, the present Civil Miscellaneous Appeal has been preferred by the appellant.

12. Mr.G.Chandrasekharan, learned counsel appearing for the appellant has invited our attention to Paragraph Nos.22 and 23 of the impugned order. It reads as under:

> *"22. Now let us forget for a moment about the allegations and the counter allegations of the parties. They got a son of tender years. He is also examined as RW2. He got his future; he has to undergo his higher education and life under proper care and custody. He requires financial and moral support of the parents. When the need of such a tender boy is taken into consideration, then it is the duty of the parties to sort out their failures by siting across a table for resuming re-union.*
>
> *23. No major dispute has been brought on record. Mere*

technical plea should not take away the life of the parties and the tender one. So in my considered view, the granting of divorce under Sec.13 (1-A) (ii) is not at all desirable. So the petition deserves to be dismissed."

13. The learned counsel has adverted to that the learned Family Court Judge had not considered and appreciated the materials placed before him and also failed to apply the relevant position of law to grant the decree of divorce. He would further contend that the appellant had taken several efforts to take the respondent back to the matrimonial life. But it was only the respondent, who willfully had deserted the appellant and showed least interest in resuming cohabitation with the appellant. He has also maintained that the efforts to resume the matrimonial life with the respondent were completely brushed side mechanically by the learned Family Court Judge.

14. On the other hand, Mr.D.Selvaraju, learned counsel appearing for the respondent, has submitted that obviously, the appellant had obtained a decree for restitution of conjugal rights in the matrimonial proceedings in H.M.O.P.No.149 of 2008 on the file of the Sub-Court, Erode. The said decree was passed by the Sub-Court, Erode on 28.08.2009. In this connection, he would submit that even after passing of that decree for restitution of conjugal rights, the appellant had never taken possible steps to bring back the respondent to the matrimonial home. Having failed to execute the decree, it was not open to the appellant to say that the respondent had willfully

neglected and deserted him for more than a continuous period of two years.

15.The learned counsel for the respondent would further contend that the appellant had not produced any satisfactory evidence, either oral or documentary, to substantiate his case to get the relief of divorce on the grounds of cruelty and desertion. Further, he would submit that the allegations of cruelty and desertion levelled against the respondent were failed to be proved and therefore, the order of dismissal passed by the learned Family Court Judge, Erode, did not require the interference of this Court.

16. The petition in H.M.O.P.No.175 of 2010 seems to have been filed under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter be referred to as "the Act" in short). Section 13 of the Act deals with divorce. Sub-Section (1) envisages that any marriage solemnized, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

> *(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or*
> *(ia)has, after the solemnisation of the marriage, treated the petitioner with cruelty; or*
> *(ib)has deserted the petitioner for a continuous period of not*

less than two years immediately preceding the presentation of the petition;

17. Since the appellant, being the husband, had presented the above petition under Section 13 (1)(ia) and(ib) i.e., on the grounds of cruelty and desertion, the burden lies on him to prove his case in an unambiguous manner. The judicial opinion on the question of standard of proof in case of matrimonial offence of cruelty cannot be said to have been quite uniform. It has at times been said that accusation of cruelty is a very grave and serious charge and, therefore, the Court should insist on proof with the same degree of strictness as in the case of a criminal offence. On the other hand, it has been said that the Court should not require proof with any more strictness that is required in a civil case.

18. The provisions of Section 23 lays down that the Court shall decree the relief if it is satisfied that the other party has treated the petitioner with cruelty. In order to prove the allegation of cruelty, the evidence which may be adduced on that part of the complaining party must preponderate in favour of the petitioner and must be clear and satisfactory. The offence charged must be established on a preponderance of probability. The court would not be satisfied that it is established if it entertains any real doubt on the matter. What is required is that cruelty must be strictly proved. The word 'strict' is sufficiently apt to describe the measure and standard of proof

and it is unnecessary to introduce any question of a standard of proof which may be required in a criminal charge.

19. A decree of of divorce cannot *per se* be granted on the basis of allegations made in the pleadings, because as stated earlier, what has not been stipulated by the legislature, cannot be read into or imputed in the section. In order to arrive at a definite conclusion that the marriage has irretrievably broken down, the Court must endeavour to analyse the attendant circumstances in order to determine the veracity of such allegations before arriving at a conclusion. This principle is laid down by the Apex Court in ***V.Bhagat Vs. D.Bhagat*** reported in ***AIR 1994 SC 710***.

20. In ***Vishnu Dutt Sharma V. Manju Sharma***, reported in ***AIR 2009 SC 2254***, the Apex Court has stated that the revising author has consistently advocated that the Court cannot extend the legislative intent by adding new grounds to an enactment and that a section cannot be stretched by adding to what the legislature has sought to restrict. Attention is invited to the commentary above. When the Supreme Court recommended in ***Naveen Kohli's case***, infra, that irretrievable break down be made a ground for divorce by the legislature, it was stated herein, that it was a shift towards a progressive approach. But a caveat is entered to the effect that, that is in the realm of legislative competence. The Supreme Court has now categorically stated that if we grant divorce on the ground of irretrievable breakdown, then we shall by judical verdict be adding a clause to Section 13

of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can also be done by the legislature and not by the Court. It is for the Parliament to enact or amend the law and not for the Courts.

21. We have carefully perused the grounds of appeal along with the impugned order. We have also perused the relevant materials and considered the submissions made on behalf of both sides. As rightly addressed by Mr.D.Selvaraju, learned counsel appearing for the respondent, the appellant had miserably and unfortunately failed to prove the allegation of cruelty and desertion.

22. With reference to this concept, we would like to place it on record that insofar as clause (ia) of Sub-Section (1) of Section 13 of the Act is concerned i.e., with reference to the term cruelty, the offending spouse must have treated the appellant with cruelty and the Court has to ascertain whether or not there was anything which could be described as treatment or conduct of the nature discussed above. There are no limits to the kind of treatment or conduct that might constitute cruelty. It is settled position of law that to amount to cruelty, the acts must be of a very serious nature than mere wear and tear of married life. The Apex Court in **J. L. Nanda vs Smt. Veena Nanda** reported in AIR 1988 SC 407 has observed that sometimes, the temperament of the parties may not be conducive to each other, which may result in petty quarrels. There is difference between original wear and

tear of married life and when the disputes between the parties are not attributable to cruelty, no divorce can be granted.

23. On coming to clause (ib)of Sub-Section (1) of Section 13 of the Act, we may say that desertion *per se* was not a ground for the relief by way of divorce prior to the amendment of this section by the Amending Act of 1976, but was only a ground for the relief of judicial separation under clause (a) of sec.10(1) which was in identical terms.

24. The expression 'desertion' in the context of of matrimonial law represents a legal conception and is only very difficult to define. The essence of desertion is the forsaking and abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. It has been said more than once that no judge has ever attempted to give a comprehensive definition of desertion, and that probably no Judge would ever succeed in doing so, but among the descriptions of desertion one which has always appealed to courts trying matrimonial causes is that 'desertion' is 'a withdrawal not from a place, but from a state of things'. This principle laid down in ***Pulford v. Pulford reported (1923) p.18, p.21***. From the available materials we would like to express our view that the allegations levelled by the appellant cannot be termed as willful neglect on the part of the respondent.

25. With regard to the term desertion, it is a continuing offence and

the element of permanence necessarily involved in it requires that both separation and animus deserendi should continue during the entire statutory period of two years immediately proceeding the presentation of the petition. It must be noticed that the continuing offence of desertion for the statutory period of at least two years can never become complete until the petition is actually presented. In ***Carpenter V. Carpenter*** reported in ***(1955) 2 All ER 449 at Page 451***, it is held that it is sometimes said that desertion of itself cannot be cruelty.

26. In ***Cade Vs. Cade*** reported in ***(1947)1 All ER 609*** it is held that it was held in England that the same conduct could constitute expulsive conduct founding a charge of constructive desertion and could also be an element of conduct founding a charge of cruelty. It may at times be impossible to draw the line between the two i.e., desertion and cruelty, because very often the facts are mixed so that it is impossible to extricate one from the other.

27. However, it is a firmly established rule that the ground for the relief in a matrimonial cause should be strictly proved. As observed in the forgoing paragraphs, the standard of proof in case of all proceedings under the Act that the Court must be satisfied on a preponderance of probability that the ground for relief is proved and normally, the Court requires that the evidence of a spouse who charges the other spouse with a matrimonial offence should be corroborated. In the given case on hand, we are not able to find even a

single piece of evidence relating to the allegation of cruelty and desertion to grant the relief of divorce as against the respondent.

28. Having regard to the relevant facts and circumstances, we are of the considered view that the impugned order need not be disturbed and therefore, the Civil Miscellaneous Appeal must necessarily fail.

In the result, the Civil Miscellaneous Appeal is dismissed. The impugned order dated 06.06.2015 is confirmed. However, there shall be no order as to costs.

[M.J.,J.] **[T.M.,J.]**

25.01.2017

Index: Yes/No
Internet: Yes

gpa

To

The Family Court Judge
Erode

M.JAICHANDREN,J.
AND
T.MATHIVANAN, J.

gpa

C.M.A.No.1652 of 2015

21.12..2016