

Madras High Court

S. Saikumari vs P. Mohanasundaram on 24 August, 1994

Equivalent citations: I (1995) DMC 520

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Bench: Srinivasan, S Subramani

JUDGMENT S.S. Subramani, J.

1. This appeal is preferred by the counter-petitioner against the decision of the Principal Family Court, Madras in H.M.O.P No. 1071 of 1988. It was originally filed before the City Civil Court, Madras. By the impugned decision, the Family Court has allowed judicial separation. The wife has come up with this appeal.

2. The relevant facts are as follows:

The respondent married the appellant on 31.10.1977. A daughter was born to them, who is named as Shanmugha Priya. On the date of the petition, she is seven years old. The petition filed by the husband was one for divorce under Section 13(1)(i-a) of the Hindu Marriage Act, 1955. The ground urged for divorce is cruelty. Paragraphs 4, 5, 6 and 7 are the allegations which constitute a cause of action for filing the petition. They are as follows:

"...It is submitted that even though the respondent promised that she would be a house-wife and look after the household work, prior to the solemnization of the marriage between the petitioner and the respondent, she did not adhere to the same, subsequent to the same. She was employed as Assistant Professor in the Department of Sociology at Queen Mary's College, Madras. Though the petitioner objected to the same she refused to accede to his advice. In any event, despite working, she did not contribute any amount towards the maintenance of the house or expend any amount towards the education and the welfare of the minor child. The petitioner alone contributes his entire earnings for the maintenance of the house and for the education and welfare of the minor child till date.

The respondent by habit is acutely quarrelsome and resorts to constant nagging of the petitioner, or acute mental agony to the petitioner. Further, the respondent has at all times behaved badly and irresponsibly by speaking ill of the petitioner to his clientele which has resulted not only in the petitioner's name being defamed but his reputation was also affected. The same has affected the petitioner in his career to a very large extent. The constant quarrelling of the respondent even on petty matters and her incompatible attitude has caused her acute harm to the mental and physical well being of the petitioner and has affected his concentration at work. The peace in the family having been shattered due to the respondent's constant quarrels the petitioner has been forced to reside in one room in his office itself. The petitioner has been thus living for the past one year.

This apart, the respondent is also in the habit of quarrelling constantly with the neighbouring and has behaved in a despicable manner necessitating the petitioner to apologise to the neighbours time and again. She has also spoken ill of the petitioner's relatives and have told them not to visit the petitioner's house. Even her own relatives did not visit her due to fear that the respondent would

abuse them and quarrel. Further the respondent has accused the petitioner of unfaithfulness which affected the petitioner's mental frame and balance. The marriage itself has thus become incompatible.

Despite the best efforts of the petitioner to change the attitude of the respondents, she has refused to do so. Due to her constant nagging the petitioner is not able to reside in the house and is forced to stay in the office in one room. The petitioner is also forced to see his only daughter at school and look after her. The respondent has not even cared to look after the necessities of the petitioner or render conjugal rights. Due to the constant cruelty the petitioner is unable to reside with the respondent any longer..."

3. For the said averment, the appellant has tiled counter affidavit. She has denied the cruelty. According to her, the petition is vague without any details. Paragraphs 3, 4 and 5 of the counter affidavit are as follows:

"The respondent denied all the allegations made in para 4 of the petition. The respondent never promised that she would give up her job after marriage. The respondent took maternity leave when she is on the family way. After the child birth she was on long leave and for some time without job. Since there was nobody to look after child, when the child started going to school, the petitioner again with the consent of the petitioner has got back the job and continuing the job till date. The petitioner's allegation that he is contributing funds to welfare of the house is utter lies. In fact the respondent herein took all the care for the house and child and she is looking after the welfare and of the child, till date.

The allegations made in para 5 also denied. The allegations never mentioned about any specific incidents and respondent never abused the petitioner nor defamed his credit in the house or in the office. In fact, the petitioner's attitude to find fault with respondent in petty matters, just reversed in the petition. The respondent sometimes continuously stays in the office room to study for his law exams. Sometimes, he will come to the respondent and stay in the house continuously without attending the office work for several occasions. During the period the respondent and petitioner had several marital relationship for several times and the respondent was once again on the family way and the allegations are purely imaginary. At the instigation of the petitioner the respondent had terminated the pregnancy and the continuous separation of the petitioner from the respondent for one year prior to the filing of the petition as alleged by the petitioner is false. Even after the institution of this matrimonial proceeding, the petitioner is still visited several days and had several relationship with the respondent. The allegation of the petitioner that he was forced to stay outside the house is also false.

The allegations made in para 6 of the petition is also denied. Every housewife in the city have some problems with the servants sometimes with the neighbours which is common in day today affairs in leading the family life. This patty thing was magnified in the petition. The respondent never misbehaved with the relatives. The visit of the relatives of the petitioner's to the house was very much restricted as the petitioner even before his marriage has limited his relationship with his relatives as he was staying away from his parents away for more than ten years. Hence, the

respondent disrespecting the relatives of the petitioner did not arise, in the abovesaid circumstances, invented for the purpose of the proceedings. The allegations in para 7 are also false. Before the institution of the proceedings and even after the proceedings this petitioner is in the habit of visiting the house, stays in the house and sees his daughter and in the nights shared the bed of the petitioner. Hence which is clearly evident that the petitioner wants to live with the respondent still. When there is no separation of petitioner and respondent, the petition filed by the petitioner deserves to be dismissed with the costs of the respondent.."

We have extracted the pleadings itself so that, we need not explain it in detail.

4. During evidence. P.W. 1 specified the acts of cruelty and the same happened between 1979 and 1985. The specific acts of cruelty are :

- (1) The appellant did not resign her Job after marriage;
- (2) By paying Rs. 40/- to the Chit Fund, the appellant caused disrespect to her husband;
- (3) The appellant is not a believer in God;
- (4) The appellant is quarrelsome and used to nag her husband harming his reputation;
- (5) The appellant used to defame her husband and used to inform the neighbours that he is a womaniser; and (6) Because of the acts of the appellant the relatives of the husband are not moving with him.

On the basis of the above acts, the husband says that he cannot cohabit with his wife and wanted divorce.

5. The Court below held that the refusal to resign the job will not amount to cruelty. The payment to Chit Fund was also justified. The allegation that the appellant is not a believer in God was also held by the lower Court, as not amounting to cruelty. Regarding those points, the lower Court has said that there was no undertaking by the appellant that she will resign after marriage and by payment to the Chit Fund the appellant was discharging a legal obligation and the non-belief in God is a personal matter which never affected the marital life. The findings on the above three acts have become final. We are concerned only with other acts alleged by the husband.

6. Before going into the merits of the case, we may understand the position of law Section 13(1) of the Hindu Marriage Act says that any marriage solemnized, whether before or after the commencement of the 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... "has, after the solemnization of the marriage, treated the petitioner with cruelty...". What is cruelty is not defined in the Act. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence is not defined by any statute of the Indian Legislature relating to marriage and divorce. It may be noticed that cruelty per se was not a ground for relief by way of divorce prior to the

amendment by the Amending Act, 1976. It is only made a ground for judicial separation Section 10(1)(b) of the Act, which deals with judicial separation says "...has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it will be harmful or injurious for the petitioner to live with the other party...". After the amendment in the year 1976, the term 'cruelty' was made a ground of 'divorce' and the entire Section in 10(1)(b) is not incorporated in Section 13(ia). The reason behind is that actions of men are so diverse and infinite that it is almost impossible to expect a general definition which could be exhaustive and not fail in some cases. The consequences of the acts of cruelty depend upon the facts and circumstances of each case.

In *Narayan Ganesh Dastane v. Sucheta Narayan Dastane* the question came up for consideration. It was held in that case that the enquiry regarding cruelty must be as to whether there is reasonable apprehension in the mind of the petitioner that the continued cohabitation will be harmful or injurious. It is also held in that case that the decision should be based on preponderance of probabilities as in any other civil case. Their Lordships also said that the proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature.

7. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities and if the probabilities are so nicely balanced that a reasonable, not a vacillating mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved, the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature. It is also held in the very same case that in many marriages each party can if it so wills, discover many a cause for complaint but such grievances arise mostly from temperamental disharmony and such disharmony or incompatibility is not cruelty and will not furnish a cause for the dissolution of marriage, and grave incidents which cause a reasonable apprehension in the mind of the petitioner alone can give a cause of action. Reasonable apprehension contemplates an objective satisfaction and not subjective satisfaction of the complainant.

8. In *J.L. Nanda v. Veena Nanda* it was held that sometimes the temperament of the parties may not be conducive to each other which may result in petty quarrels and troubles. Although it was contended in that case that the parties had to suffer various ailments on account of the kind of behaviour meted out to them, it was held that it could not be held on the basis of such petty quarrels, a ground of cruelty is made out. In *Pushpa Rani v. Vijpai Singh* (A.I.R. 1944 All 216) it was held; "...evidence regarding cruelty must be such a nature which may inspire confidence in the mind of the Court...".

9. Section 23 of the Act says "In any proceeding under this Act, whether defended or not, if the Court is satisfied that (a) any of the grounds for granting relief exists..." and there is no fear for granting the relief from the Scheme of the Act, even after amendment in 1976, is not to make divorce easy. Divorce in case of Hindu Marriage, is not favoured, nor is it encouraged. It is the duty of Court to see that the relationship is retained and it cannot grant a divorce on vague allegation. In dealing with cases of divorce, the Court is not dealing with an 'ideal husband' or "ideal wife" but "with this man and this woman" only, It is on the basis of above law, we have to decide whether the cruelty alleged

in this case, is established,

10. As stated earlier, paragraphs 4, 5, and 6 of the petition deal with cruelty, it is a general submission without any details. No acts of cruelty are specified in the pleadings. The appellant in her counter stated that the pleadings in the petition are vague without any substance. In and spite of the same, the husband did not file a supplementary pleading or affidavit with better particulars. In this connection, it is also worthwhile to note that the appellant has further pleaded that even when the divorce petition was filed, both were living together and even after the petition, both have shared the bed.

11. The only evidence that is adduced is that of P.W. 1 (husband) and his relation, who is P.W. 2. As against the said evidence, we have evidence of R.W. 1 (appellant). In this connection, it is also worthwhile to note that the acts of cruelty spread over the period 1979 to 1985. The petitioner has not given detailed dates or years, when these acts are alleged to have been committed. The first allegation is that the appellant is quarrelsome and nagging her husband which is harming husband's reputation. It is the case of the husband, that it is the habit of the appellant to quarrel with neighbours and the husband had to tender apologies to them. We may say that this part of the pleading in para 6, is not even spoken to by P.W. 1 anywhere in the evidence. It is alleged by the respondent that the appellant, has spoken ill of the petitioner to his relations and they are not visiting his house. The specific answer given by the appellant is that even before marriage, the husband and was never in the habit of mingling with his relations and the same continued even after marriage. To support the said contention, P.W. 2 was also examined. But, he goes against the case of the husband. According to P.W. 2, he is not visiting the respondent's house, due to the attitude of the appellant. But at the same time, he says that such petty quarrels between husband and wife happen in every house. Why he failed to visit the house is not spoken nor the details of the "so called attitude" of the appellant are in evidence, The fact that the appellant and her mother are not on good terms even before marriage is no proof of quarrelsome nature between parties to the proceeding when the respondent married the appellant after knowing the same. The appellant and her relatives are on cordial terms as also spoken by her. So that part of the allegation of the husband also does not prove any cruelty.

12. The husband has got a further case that the appellant used to abuse him as unfaithful and as a womaniser. P.W. 1 has spoken about the same. According to him, they had a neighbour who had a younger sister aged 15. The petitioner alleges that the appellant has asked the girl not to talk to her husband because of his loose character. This fact, according to the husband, was informed to him the brother of the girl. The year or the date is not mentioned, nor what transpired between them is in evidence. The best evidence would have been that the girl or her brother through whom the husband came to know about it. We do not find any explanation for non-examination of the brother of that 15 years old girl. The appellant, in her evidence, specifically denied the same and according to her, no such incident occurred at any point of time. The evidence of P.W. 1 seems imaginary and it does not inspire the confidence of Court.

13. Another incident, according to P.W. 1, was another neighbour brought her daughter to the house of the petitioner, when he was not there. The lady was brought to the house to study Chartered

Accountancy under the respondent. It is the case of the husband that the lady was driven away from the house by the appellant informing her that her husband is a womaniser. The husband says that this fact was also informed to him by the mother of the said girl. Why she was not examined, is not explained. This fact was also denied by R.W. 1 in her evidence. Another incident was also mentioned by P.W.1. A girl was introduced to P.W. 1 by one Durai and she was asked not to attend the house by the appellant. Both the parties to the litigation know who the said Durai is. He is not examined. What the appellant said to Durai are not known and how the statement has affected the mind of the petitioner is also not disclosed. The above alleged fact is also not proved.

14. The evidence of P.W. 1 regarding all the above incidents are only hearsay and hence in admissible in evidence. In this connection we may also note that in a decision of this Court, in which one of us, (Srinivasan, J.) is a party, in *Tamizh Selvi v. Arumugam* (1990 (2) L.W. 133 = 1990 T.L.N.J. 237) it was held at p. 243 :

"...In a Hindu Society, if an allegation of unchastity is made against woman falsely, it would certainly amount to cruelty on the part of the husband. But, the converse will not be correct. The Court can certainly take judicial notice of the fact that even though bigamy is made an offence under the Penal Code and bigamy is prevented by legislation from 1949 onwards, there are numerous instances where men are living with more than one woman in extra marital relationship. If an allegation is made against a man that he is living with another woman in illicit intimacy, that will not by itself amount to Cruelty..."

We agree with the said statement of law and hold that the allegation will not amount to cruelty.

15. It is the case of the husband that he purchased some property at Tambaram and wanted the document to be registered at Tambaram Sub-Registrar's office. At that time, the appellant refused to do so, and used certain cruel words as if anticipating his death. R W. T denies any such incident. According to her, it was registered by P.W. 1 at his own instance at Madras. These are the only instances of cruelty, spoken to by P.W.1 and denied by the respondent. We have only interested testimony of the parties. Even in the evidence of P.W. 1 the dates and the details are not given. His allegations are also based on hearsay evidence. Even in the notice issued before the institution of the proceedings, no details are given. We cannot say that by the above allegations alone, a ground of divorce is made out and we are not satisfied that grounds for relief exist.

16. Learned Counsel for the respondent argued, on the basis of the decision in *Keshaorao v. Nisha* that the cruelty contemplated is a conduct of such type that the petitioner cannot reasonably be expected to live with the respondent and that the reasonable apprehension is proved in this case. We say that the said contention presupposes the apprehension is based simply on subjective satisfaction of the respondent. When the law says that the Court must be satisfied that the ground for relief exists, it pre-supposes that there must be legal evidence which inspires the confidence of Court for granting a decree for divorce.

17. An argument is taken by the husband, that the relationship between the parties has strained and they cannot live together and under such circumstances, divorces has to be granted. We do not find

any justification for entertaining such a contention which has no factual or legal foundation, nor is it supported by good faith. Section 13 of the Hindu Marriage Act was amended in the year 1976. At the time, when the amendment was moved, there was a proposal to amend the Act providing "breaking of relations" between the parties as a ground for divorce. But, when the Bill was passed, the same was omitted. It makes it clear that the said ground was purposely not included as a ground of relief and therefore it cannot be ground for divorce. We can only grant the relief on the grounds mentioned in Section 13 of the Hindu Marriage Act. We have also taken into consideration totality of all circumstances. Even the alleged acts of cruelty are trivial in nature. When we take all these acts together and also other circumstances, we do not find that there are grounds made out for granting the relief.

18. The lower Court has passed only a decree for judicial separation when the relief sought for is divorce. The main reason for passing such an order was, the parties have a daughter who is now aged 16. The strained relationship between the parties, will affect the future of an innocent girl and as such the lower Court thought that in spite of the alleged cruelty, divorce cannot be granted. We may say that even grounds of judicial separation are not made out. The lower Court has simply believed the assertions of the petitioner, without any legal evidence. The Court below has passed an order as if there is no contest by the appellant. Her evidence was not even discussed and according to us, the lower Court has not even taken her contentions seriously.

19. Though the appellant denies the acts of cruelty, she had also another case that even if such acts are proved, they have been condoned by her husband. The lower Court simply ignored such contentions on the ground that there is no plea of condonation as most of the alleged acts of cruelty are between the year 1979 and 1985". A reading of the said sentence is sufficient to show that the lower Court has not taken the contentions of the appellant seriously. It is her case that all along they cohabited as husband and wife and even on the date of the petition, their cohabitation continues. When the alleged cruelty is from the year 1979 to 1985 it can be assumed that at least after some of the alleged acts, they have cohabited.

20. We do not find any ground to grant a divorce, and the decision of the lower Court, granting judicial separation also cannot be justified. On the available evidence, we are of the view that the decree and judgment of the lower Court have to be set aside and we do so.

21. In the result, we allow the appeal, setting aside the decree and judgment of the Court below and dismiss the Original Petition. The respondent has come to Court with vague allegations. He never attempted to prove the same. He ignored the interest of the innocent daughter, who is to be given in marriage within few years. He thought of only himself and not about the family. From the records in this case, we feel, he is also responsible for the unhappiness in the family. In such circumstances, we are of the view that this is a case where, he should pay the costs of the appellant before this Court. The appeal is allowed with costs in this appeal.