

(2011) 08 MAD CK 0413
In the Madras High Court
Case No : C.M.A. No. 1046 of 2009

N. Jayaprakash

APPELLANT

Vs

R. Santhi

RESPONDENT

Date of Decision : 04-08-2011

Acts Referred:

Evidence Act, 1872 — Section 101, 102, 103
Hindu Marriage Act, 1955 — Section 9, 9(1)

Citation : (2012) 1 CivCC 764 : (2012) 1 RCR(Civil) 446 : (2012) 1 RCR(Civil) 446

Hon'ble Judges : M. Venugopal, J; Elipe Dharma Rao, J

Bench : Division Bench

Advocate : K. Chitharanjani and K. Govi Ganesan, for the Appellant;

Final Decision : Allowed

Judgement

M. Venugopal, J.—The appellant/petitioner/husband has filed the instant civil miscellaneous appeal as against the judgment and decree, dated 26.3.2008 in H.M.O.P. No. 419 of 2006 passed by the learned Family Court Judge, Coimbatore. The trial Court, while dismissing the H.M.O.P. No. 419 of 2006, has among other things observed that the insistence upon the respondent/wife compelling the appellant/husband to set up a separate family cannot be construed as a cruelty and further the respondent/wife, in her evidence, has also deposed that she is willing to live with the appellant/husband and since he has not taken any endeavour after the disposal of the H.M.O.P. No. 45 of 2001 in order to jointly live with the respondent/wife, has dismissed the petition without costs. Being aggrieved against the said dismissal order passed by the learned Family Court Judge, Coimbatore, in H.M.O.P. No. 419 of 2006, the appellant/husband has projected the present civil miscellaneous appeal before this Court.

2. It is not in dispute that the appellant/husband earlier filed H.M.O.P. No. 245 of 2001 on the file of Family Court, Coimbatore, and the same has been allowed on 22.9.2003. Subsequent to the order being passed by the Family Court Judge,

Coimbatore, in H.M.O.P. No. 245 of 2001, dated 22.9.2003, the appellant/husband has filed H.M.O.P. No. 419 of 2006 praying for the relief of Divorce.

3. It is the stand of the appellant/husband that there has been no restitution of conjugal rights between the parties in a period of 2-3/4 years after passing the Decree of Restitution of Conjugal Rights in H.M.O.P. No. 245 of 2001. But the trial Court has not taken into account the said fact and dismissed H.M.O.P. No. 419 of 2006 on irrelevant grounds.

5. The marriage between the appellant/husband and respondent wife has taken place on 27.11.1996. According to the Appellant/Husband, he has called the respondent/wife to come and live with him on 5.12.2003. But in spite of the same, the respondent/wife has not chosen to come and live with him in his evidence, the appellant/husband, as P.W.1 before the trial Court, has deposed that after the order dated 22.9.2003 passed in H.M.O.P. No. 245 of 2001, he has not gone to the house of the respondent/wife and made a request or called upon her to come and live with him. But, the appellant/husband has stated that he has asked the wife to come and live with him, after the order in H.M.O.P. No. 245 of 2001, while seeing her on the Thadagam Road. But, he has not stated that on which date he has called the respondent/wife to come and live with him and the said omission is not fatal.

6. The matter has come before this Court earlier on 1.8.2011 and even then, the respondent/wife has not appeared before this Court, though she has been served as early as on 12.3.2011. Even today, when the matter has been taken up, the respondent/wife has not appeared before this Court.

6. In a petition as per Section 9 of the Hindu Marriage Act 1955, it is to be noted that (i) Whether the husband or wife has, without a genuine and reasonable cause or excuse, withdrawn from the Society; (ii) A Court of Law should be satisfied about the veracity of the averments made in the petition; (iii) There ought to be no legal ground as to why the relief sought for should not be given.

7. The ambit of the term, "excuse" is not restricted to the grounds which under sub section (2) of the Section can be taken in reply to petition for restitution of conjugal rights. As per Sections 101, 102 and 103 of the Indian Evidence Act, the burden of establishing the two conditions in sub section (1) of Section 9 lies on the petitioner. The petitioner cannot take advantage of the weakness of the defence as per decision Sadhu Singh Balwant Singh Vs. Jagdish Kaur Sadhu Singh,

8. The main principle in matrimonial law is that one party is entitled to the Society and comfort of the other. If one party abandoned the other party without a reasonable or genuine cause/or excuse, then a Court of Law, upon a petition being filed by the affected party, will grant a Decree for the Restitution of Conjugal Rights.

9. Notwithstanding the fact that the respondent/wife has been called upon by

the appellant/husband to come and live with him, after the judgment being passed in H.M.O.P. No. 245 of 2001. and although he has called her to come and live with him, when he has met her at Thadagam Road, yet the fact remains that the respondent/wife, as a dutiful Hindu Woman, has not chosen to come and live with the appellant/husband. It is the duty of the Hindu Wife to come and live with the appellant/husband. The appellant/husband has earlier filed H.M.O.P. No. 245 of 2001. in which, he has got orders in his favour. Subsequently only, he has filed the present H.M.O.P. No. 419 of 2006 praying for Divorce on the ground that the respondent/wife has not chosen to come and live with him. The action of the respondent/wife in not coming and living with the appellant/husband amounts to cruelty. The appellant/husband is entitled to have a separate matrimonial home and accommodation with the respondent/wife. However, the respondent/wife has refused the matrimonial obligations to be performed by her to the appellant/husband.

10. This is a case of respondent/wife refusing to come and live with the appellant/husband. Since the marriage has taken place between the parties on 27.11.1996 and inasmuch as the respondent/wife has not taken any interest to come and live with the appellant/husband, we are of the considered view that the appellant/husband is entitled to get he relief of Divorce in H.M.O.P. No. 419 of 2006. However, the contra view taken by the trial Court in H.M.O.P. No. 419 of 2006 is not in consonance with the settled principles of law. Consequently, the civil miscellaneous appeal succeeds. In the result, the civil miscellaneous appeal is allowed leaving the parties to bear their own costs. The order passed by the learned Family Court Judge, Coimbatore, in H.M.O.P. No. 419 of 2006, dated 26.3.2008 is hereby set aside for the reasons assigned by this Court in this appeal

Appeal allowed.