

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 26.04.2017

PRONOUNCED ON : 08.06.2017

CORAM:

THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN

S.A.(MD) No.62 of 2006

Kothar Beevi @ Badrunnisha

... Appellant

-vs-

K.Aminudeen

... Respondent

PRAYER: Appeal is filed under Section 100 of the Civil Procedure Code against the Decree and Judgment of the 1st Additional District Judge, Tirunelveli passed in A.S.No.256 of 2003, dated 27.02.2004, reversing the decree and judgment of the Principal District Munsif, Tirunelveli, passed in O.S.No.771 of 1999, dated 14.02.2003.

For Appellant : Mr.T.Selvam

For Respondent : Mr.D.Nallathambi

J U D G M E N T

For the sake of convenience, the parties are referred to as per the ranking before the Trial Court.

2.The respondent/plaintiff has filed a suit in O.S.No.771 of 1999 before the learned Principal District Munsif, Tirunelveli, for the relief of restitution of conjugal rights against the appellant's wife on the ground that she voluntarily withdrawn from the matrimonial home and hence he sought for restitution of conjugal rights.

3. The appellant-wife has filed a written statement, denying the various allegations and resisted the claim for restitution of conjugal rights on multiple grounds and inter-alia contended that, the respondent/plaintiff-husband has not conducted himself properly and her life was threatened and she refused to join the matrimonial home on justifiable grounds.

4. Based upon the above pleadings, the Trial Court had framed as many as many as three issues for consideration.

5. On analysis of the evidence in both oral and documentary, the Trial Court came to the conclusion that the plaintiff is not entitled to the reliefs sought for and the dismissed the suit, on appeal, the Lower Appellate Court has allowed the appeal and decreed the suit. Hence, the Second Appeal.

6. At the time of admission, the following substantial question of law are framed:-

(i) Whether the first appellate Court had erred in reversing the judgment by not appreciating the fact deposed by respondent witnesses?

(ii) Whether the first appellate Court is correct in asking for corroboration of the evidence given by lady witness D.W.1?

(iii) Whether the first appellate Court is correct in not discussing all the judgments discussed in the trial Court judgment?

7. The factual matrix of the case are as follows:-

The marriage between the parties were solemnized on 20.08.1981 at Maharaja Naga Tirumana Mahal according to Muslim right and custom and initially, they have stated in the Maharaja Nagar and on 12.03.1984, they begotten a baby boy named as Ahamed Kammal and thereafter, on 11.04.1987 Hamsa Sabeeka was born and on 06.07.1994 Mahimudha Afra was born.

8. The respondent/plaintiff-husband filed the above suit for restitution of conjugal rights on the ground that the appellant-wife has left the matrimonial home without any justifiable cause and hence, he filed guardian O.P.No.36 of 1999 for the custody of one of the minor child and followed by another suit after pre-suit notice to come and joint with him and to discharge the matrimonial obligation and hence, suit for restitution of conjugal rights.

9. The said claim of the husband was resisted by the wife on multiple grounds in inter-alia contended that date of solemnization of marriage and birth of one son and two daughters were admitted and after the marriage, the father of the wife as set up a shop (viz) "zenith opticals" in the Tirunelveli Railway Station and also by investing one lakh rupee and also purchased a house for living in Tirunelveli in the name of the wife and the wife's father was already paid Rs.7,00,000/- on various heads on various occasions. He also looking after the educational expenses of all the three grand children and also given Fridge, Refrigerator, T.V. and Washing Machine. All the domestic materials for leading the life. However, the plaintiff has forged the optical-shop accounts and

created a impression that as if there was a loss in the business and hence compelled the appellant wife to raise the loan by mortgage the house property. Since, properties are standing in her name, she refused and hence she was subjected to physical pain on 25.05.1999 and 30.05.1999 and on 30.05.1999, she refused sign the mortgage deed for raising the loan. She was threatened with knife and hence she left the matrimonial home due to the fear of her death, on that night, went to his eldest brother on the following date to her parents house. Subsequently, the husband has filed the G.W.O.P.No.96 of 1999 and followed by the present suit for restitution of conjugal rights.

10. During the trial, the plaintiff husband examined himself as P.W.1 and marked Exhibit A1 to A4 and the respondent-wife as D.W.1 also examined, (her paternal aunt as D.W.2).

11. The P.W.1 in his cross examination has categorically admitted that after the institution of the guardian O.P.36 of 1999 under Exhibit A3. the defendant-wife has returned the house articles under the document Exhibit A4 dated 05.08.1999 and in lieu thereof, the youngest daughter by name Apsara was returned to the mother. Further, in the cross-examination P.W.1 also admitted that during the pendency of the suit for restitution of conjugal rights, he has married another person and now residing with his 2nd wife in T.Nagar in Chennai.

12. The appellant-wife while examining herself as D.W.1, could deposed that there is stay in the petition and during the cross-examination he has stated that she was subjected to physical cruelty and husband has demanded of money persistently and since the marriage in the year 1989 upto 1997, i.e., nearly about 18 years she lived with him.

However, the husband has fabricated the false records and created as of there is a loss in business and want to mortgage the property standing in the name of the wife, and when she refused to sign the documents she was physical assault and threatened at knife point and hence she has no other option left the matrimonial home and further stated that as the matrimonial home, not congenial for matrimonial life with him coupled with fact that during the pendency of the suit for restitution for conjugal rights, the respondent /plaintiff husband has married the another person now living in T.Nagar at Chennai. It remains to be stated that D.W.2, paternal aunt of the D.W.1. She had supported the version of the D.W.1, the trial Court on consideration entire evidence has dismissed the suit. However, the lower Appellant Court has held that the DW2 as interested witness and caused burden of proof on the appellant-wife to demonstrate the reason for non-joining with the husband.

13. It is seen from the evidence of the P.W.1 and D.W.1 after the dispute arose on 20.05.1999 the son and one of the daughter are with the appellant-wife and one daughter was with the husband. It remains to be stated that the husband has originally filed a guardian O.P in respect custody of the children and after the copy was served. The household articles at the Maharajapuram was handed over by the appellant-wife under Exhibit A4 in lieu of one of the daughter been handed over to the appellant-wife.

14. The learned counsel for the appellant/wife has submitted that the lower Appellate Court has committed a gross error in not considering the fact that during pendency of the suit for restitution of conjugal rights, the husband has not waited for the result and went on to contract to the second marriage and hence, the suit itself is not bonafide. Besides, the fact that the G.W.O.P.36/1999 was filed only threaten the wife to handover of the domestic articles being handed over under exhibit A4.

The respondent/husband has returned the one female child to the mother also goes to show, he is not a bonafide person to live with him.

15. During the argument of the learned counsel for the appellant submitted that the son has attained majority and he has an Engineer and daughter is a Architect of also with the appellant-wife and all the children have been now brought by her and the husband has not taken any interest after the disposal of the first appeal.

16. In the decision reported in A.I.R.1976 Karnataka Page 200 Raj Mohammed V.Saseeda Amina Begum has held as follows:-

Mohamedan Law - Marriage - Restitution of conjugal rights - Suit by husband - Duty of Court - Decision does not entirely depend upon the right of the husband - Court should also consider whether it would be inequitable for it to compel the wife to live with her husband..

17. It is seen from the evidence of the D.W.1 which was duly corroborated by the evidence of the D.W.2, the paternal aunt that the decree of cruelty meet by D.W.1 has rendered the appellant-wife unsafe to return husband's domain are established. In such circumstances, the Court might refused to send her back. After going through the chief and cross examination of D.W.2, this Court finds that the evidence of D.W.2 cannot be brush aside lightly merely because she is happened to be a relative of the D.W.1. It remains to be stated that in the matrimonial dispute only the relative can be in a better position to depose of what had happen in side, the four walls of the house and the lower Appellate Court in my considered view, has committed a error in brushing aside the evidence of D.W.2 by terming it to be interested witness is not a correct approach and the same is liable to be vacated.

18. After going through the evidence of D.W.2, who is the paternal aunt of D.W.1 since also pardshina lady has clearly stated about the various crucial act committed by the respondent-husband on the appellant-wife and also narrated that the appellant wife was subject to physical cruelty on the demand of money. It remains to be stated that the dispute between the parties have arosed after 18 years of matrimonial life and after three childrens were born to them. At the time of dispute, the fact that the elder son was 16 years of age cannot be ignored as it was done by the lower Appellate Court. The respondent-husband initially filed guardian O.P.under Ex.A3 . After the dispute, the husband has taken away one of the two daughters after the institution of guardian O.P under Ex.A3, he has collected all the domestic items which is said to have been purchased by the wife's father and given for them has been handed over by the appellant-wife and in lieu thereof one of the minor daughter was handed over back to the appellant-wife. Thereafter, the present suit for restitution of conjugal rights has been filed. Further as admitted by the P.W.1 in the cross examination during the pendency of the present suit for restitution of conjugal rights, he has contracted second marriage and living with his second wife at T.Nagar, Chennai and thus, on a cumulative analysis of the above said factors coupled with the evidence of the D.W.1, this Court finds that the evidence of the D.W.2, pardshine lady cannot be labelled as interested witness and this Court has satisfied that the version of the D.W.2 in the witness box duly stands in corroboration with the evidence of the D.W.1 with regard to the Act of cruelty committed by the respondent-husband.

19. In the above referred decision AIR 1976, Karnataka, Page No.200, it is held that in a suit for restitution of conjugal rights by a Muslim husband against the first wife and when he had taken as second wife during the pendency of the suit, it could be just and reasonable for the Court to deny the said relief to him.

20. On consideration of facts and circumstances revealed that the Muslim husband has not treated his wife in accordance of Holy Quran which leads to conclusion that he has dis-entitled himself to a decree of restitution of conjugal rights.

21. On re-appreciation of the evidence, as discussed in the preceding paragraph, this Court finds that in a suit for restitution of conjugal rights by Muslim husband against the first wife, and he has taken a second wife during pendency of suit, if the Court on appreciation of evidence feels that the circumstances are of such nature that wife was subjected to cruelty thereby rendering it unsafe for the wife to return to her husband's dominion were established, the Court might refuse to send her back. When there was a gross failure by the husband of the performance of the obligations which the marriage of contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court.

22. When the husband proceeds against wife for restitution conjugal rights and also contracted second marriage during the pendency of the suit for restitution of conjugal rights and in the instant case, the wife also complained of physical cruelty to extract money, after 18 years of matrimonial life. Then the burden proof is on the plaintiff-husband who takes a second wife to explain his action to prove that, his taking of a second wife involves no cruelty to the first wife, by adducing necessary evidence to that

effect. For instance, he may rebut the presumption of cruelty by proving that his second marriage took place on the suggestion of first wife otherwise the Court will presume that under modern social conditions that the action of the husband in taking second wife, during pendency of the suit for institution of conjugal rights involves cruelty to the first wife then it could be inequitable for the Court to ask the wife to live with such a husband.

23. In the case in hand the marriage between the parties was solemnized on 20.08.1981 and they have begotten three children during 1984, 1987, 1994 and dispute arose during 1998 namely nearly after 18 years and from the evidence of the P.W.1, this Court unable to accept the version of the P.W.1, he made attempt for re-union and what is significant is that within a 4 month after the suit for restitution of conjugal rights, he contracted second marriage and further, the present suit for restitution of conjugal rights itself has been filed only after guardian O.P. filed in respect of minor daughters (Ex.A3). Thereupon, the respondent-husband has satisfied himself after getting the all another household articles from the wife home and in the lieu interest of the same, has handed over one of the minor daughter to the appellant-wife goes long way against the husband motive behind the litigation.

24. In the circumstances, it could not be unreasonable to hold that after the plaintiff-husband contracted second marriage, the appellant wife is reasonable and justifiable in staying away from her husband. This Court while bearing in mind, the right of the Muslim husband as to contract of marriage more than once, however, it has to be borne in mind that the decision in a suit for restitution of conjugal rights does not entirely depend upon the right of the Muslim husband. The Court should also consider whether it

make it in-equitable for it to compel the wife to live with her husband. Our notions of law in that regard have to be held in such a way so as to bring them in confirmity with modern social condition. There is no law or a rule which compel the Court always to pass a decree in a suit for restitution of conjugal rights in favour of the husband. A duty is caused upon to the Court to find out whether it could be just and reasonable for the Court to deny the said relief to the plaintiff Muslim husband if the proved circumstances are such that it could be inequitable to do so for a muslim woman.

25. On consideration of the evidence and the pleadings thereon coupled with the admission of the P.W.1 and the D.W.1, this Court finds that the action of the plaintiff-husband is not bonafide and the fact that the plaintiff-husband has taken the second wife during the pendency of the suit also lead to the irresistible conclusion that he disqualified for a decree of restitution of conjugal rights and reasoning given by the lower Appellate Court is not sustainable in law.

26. Accordingly, the same is liable to be set aside and the substantial question of law framed is answered in affirmative in favour of the appellant-wife.

27. In the result, this Second Appeal is allowed and reversing the decree and judgment in O.S.No.771 of 1999 is set aside and the Judgment of the trial Court is restored. Consequently, O.S.No.771 of 1999 on the file of the Principal District Munsif, Tirunelveli filed by the husband for the restitution of conjugal rights was stands dismissed. No costs.

08.06.2017

To
1. The 1st Additional District Judge, Tirunelveli
2. The Principal District Munsif, Tirunelveli

RMT.TEEKAA RAMAN,J.,
krk/nvi

S.A.(MD) No.62 of 2006

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