



C.M.S.A(MD).No.15 of 2011

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 19.06.2023

PRONOUNCED ON : 12.07.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.S.A(MD)No.15 of 2011

Chandra

... Appellant

vs.

Selvaraj

...Respondent

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act read with Section 100 of C.P.C, to set aside the order and decretal order dated 09.11.2010 in CMA.No.2 of 2010 on the file of the District Judge, Karur reversing the order and decretal order dated 23.12.2009 in HMOP.No.35 of 2007 on the file of the Additional Subordinate Judge , Karur.

For Appellant : Mr.E.R.Kumaresan

For Respondent : Mr.A.N.Ramanathan
For Mr.M.Bindran



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JUDGMENT

The respondent herein had filed HMOP.No.35 of 2007 on the file of the Additional Subordinate Court, Karur seeking divorce on the ground of cruelty and desertion. The said petition was dismissed by the Trial Court. Challenging the same, the respondent herein had filed CMA(MD).No.2 of 2010 before the District Court, Karur. The First Appellate Judge after re-appreciation of oral and documentary evidence, has allowed the appeal and granted a decree for divorce. Challenging the same, the present Civil Miscellaneous Second Appeal has been filed by the appellant/wife.

2.The appellant herein had got married to the respondent on 14.09.1987. Out of the said wedlock, a son was born to them who is now a major.

3.The summary of the allegations in the divorce petition are as follows:

(i).The wife was leading an adulterous life with one Madasamy who was the then Special Officer of the Karur Town Co-operative Bank. Despite several requests, the wife refused to abandon her illicit activities.

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The husband had lodged a complaint before the Judicial Magistrate No.I, Karur which was dismissed after enquiry.

(ii).The husband had purchased an immovable property under a registered sale deed dated 21.08.1991 in the name of his wife out of love and affection. He had further alleged that he had obtained loan from the Co-operative Bank and constructed the building. However, the wife had made a claim to the said property and filed O.S.No.46 of 2002 seeking injunction not to disturb her possession. As a counter blast, the husband had filed O.S.No.96 of 2002 seeking declaration of title and permanent injunction. The suit filed by the husband in O.S.No.96 of 2002 was dismissed. The husband had filed A.S.No.20 of 2005 before the Subordinate Court, Karur. The learned Subordinate Judge had decreed the suit partly to the effect that the land belongs to the husband and the building belongs to the wife. Challenging the same, the wife had filed S.A(MD).No.1068 of 2007 and the same is pending before the High Court.

(iii).The wife had initiated O.S.No.708 of 2005 before the District Munsif Court, Karur seeking guardianship of the minor son.



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(iv).The wife had lodged a false complaint as against the husband as if he had claimed dowry and after contest the same was dismissed by the Judicial Magistrate on 02.02.2005.

(v).The husband has contended that for the past 10 years, there is no connection between him and the respondent. Therefore, the respondent/wife is guilty of desertion for the past 10 years.

4.The summery of contentions of the wife:

(i).The immovable property was purchased out of earning of the wife and the construction was put up only with a loan obtained from the Bank by the wife. Therefore, the husband has no title whatsoever over the property.

(ii).The allegation of the adulterous life is completely false and therefore, the complaint lodged by the husband was dismissed by the Judicial Magistrate, Karur.

(iii).There is no panchayat or any mediation between the parties.

(iv).Right from the inception of marital life, the husband had harassed her and demanded dowry and she had parted away 30 sovereign of jewels presented to her at the time of her marriage.



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(v).The wife is delivering arulvakku and used to receive money as gift. From the said amount and also from the financial assistance of her parents, sister and brother, the wife had purchased two house sites at Puliur under two different sale deeds dated 21.08.1991 and 13.12.1991 and she had constructed a building by availing loan from the Karur Co-operative Bank Limited.

(vi).When the husband insisted the wife to transfer ownership of the immovable property, the wife had refused for the same. Furious over this, the husband and his family members had beaten the wife in the presence of people who had approached her for getting arulvakku.

(vii).The husband had contracted a second marriage with one N.Sambaki @ Saritha aged 19 years on 28.08.2006 at Murugan Temple, Devarmalai, Oruvandhur Village, Nammakkal District.

(viii).The petitioner had lodged a private complaint before the Judicial Magistrate No.I, Karur and it has been taken on file as C.C.No. 675 of 2007. In order to get rid of the said prosecution, the present divorce petition has been filed on the ground of desertion and mental cruelty. From the inception, the wife has been living with the husband as



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a dutiful Hindu wife, but the husband did not take care of her and her minor son.

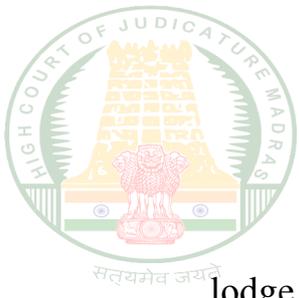
(ix).The husband had started an adulterous life in the year 2001 and had deserted her wife and her minor son without providing any maintenance. O.S.No.708 of 2005 was filed only seeking maintenance for the minor son and it has been decreed on 06.09.2007.

5.Findings of the Trial Court.

(i).The husband has not stated in the petition either the date or month or even in the year of desertion. Except the pleadings, nothing is available on record.

(ii).The husband in the petition has given the same address as that of the wife. Therefore who deserted the other spouse cannot be found out. The present address of the wife has not been furnished.

(iii).From the evidence of PW1-the husband, it is clear that the husband alone had deserted the wife. Therefore, the husband has not established that the wife had deserted him for a continuous period of not less than 2 years, immediately preceding the presentation of the petition. Though it is alleged by the husband that the wife got red handed in a



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lodge, no one connected with the said incident was examined to prove the same.

(iv).Even adulteror was not impleaded which would make the petition as not maintainable. The husband in his evidence has not stated how the wife has shown disrespect to him where and in what manner. No specific incident of disrespect has been pleaded or proved. As far as the criminal cases filed by the wife are concerned, she has not filed against the family members of the husband, but only to vindicate her civil rights, the wife has initiated those proceedings.

(v).RW2 is an independent witness where had clearly spoken that he has seen the marriage of the husband with a lady by name N.Sambaki @ Saritha. Therefore, it is clear that only an husband is leading an extra marital life with another lady. Therefore, filing of criminal case as against the husband cannot be considered to be an incident of cruelty. On the other hand, the husband has caused cruelty to the wife. Though it is contended that they are living separately for the past 10 years, but only during the past 7 years, they are residing apart. The marriage cannot be considered irretrievably broken down. Based upon the said finding, the



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trial Court had dismissed the divorce petition on both the grounds.

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6.Finds of the First Appellate Court:

(i).The husband has not substantiated that the wife was leading an adulterous life and therefore, he is not entitled to divorce on the ground of adultery.

(ii).Only after filing of O.S.No.96 of 2004, the husband and wife had started living separately. Neither the husband nor the wife have furnished the exact date of their separation. The wife had lodged C.C.No. 734 of 2002 before the Judicial Magistrate No.I, Karur alleging demand of dowry and it ended in acquittal. The wife had initiated C.C.No.675 of 2007 as against the husband which has also ended in acquittal. The wife had filed O.S.No.708 of 2005 seeking guardianship of the minor son. Therefore, the attitude of the wife is to harass the husband by filing petition one after another.

(iii).Even though there is no specific cruelty, but the husband has suffered mental cruelty at the hands of the wife as allegations have been made against him and several complaints have been lodged against him. Therefore, the husband is entitled to a decree for divorce on the ground



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of mental cruelty.
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(iv).The wife in her evidence had stated that the husband has voluntarily deserted her, but careful analysis of the oral evidence discloses that the husband was forced to leave the matrimonial home. The wife had not taken any steps to restore the conjugal rights but initiated legal proceedings to give trouble to her husband. There is no reunion between the husband and the wife for more than 10 years. Therefore, the husband is entitled to divorce on the ground of desertion also. Based upon the said findings, the First Appellate Court had set aside the finding of the trial Court and allowed the appeal and granted a decree for divorce.

7.Challenging the said judgment and decree, the wife had filed the above second appeal and the same has been admitted on the following substantial questions of law:

(a).Whether the lower appellate Court erred in reversing the well considered order and decretal order of trial Court by granting divorce to the respondent on the ground of cruelty and desertion, when there is lack of pleadings and evidence to the alleged cruelty and desertion?



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(b).Whether the Lower Appellate Court grievously erred in coming to the conclusion that mere lodging criminal complaints by the wife against husband would amount to legal cruelty entitling the husband to get divorce, in the absence of any pleadings and evidence that it was with intention to harass the husband and where it is not against his relations?

(c).Whether the lower appellate Court is correct in granting a decree for divorce for the simple reason that the relationship between the parties have strained?

8.Both the Courts below have concurrently found that the husband has not established the allegations of adultery as against the wife. The First Appellate Court has granted divorce only on the ground of mental cruelty and desertion. Therefore, this Court proceeds to analyze whether the husband has established the ingredients of mental cruelty and desertion.

9.In Paragraph No.8 of the divorce petition, the husband has stated that for the past 10 years, there is no connection between him and his wife and therefore, the wife is guilty of desertion for the past 10 years which is wilful and wanton. Except this pleading, there is no other pleading to indicate when the wife had left the matrimonial home and

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what was there any reason for that. There is no pleading whatsoever to the effect that the husband had made any attempt for reunion and the wife had refused for such a reunion.

10.A perusal of the divorce petition indicates as if the husband and wife are residing in the same address even on the date of filing of the divorce petition. Therefore, the husband has not come forward to place on record on what date the wife had left the matrimonial home and where she was residing for the past 10 years.

11.Only during the definition, the husband came forward with a case that the wife continues to reside in the matrimonial home and he had left the matrimonial home and residing away from the wife on account of cruelty. There is no pleading whatsoever to the said effect in the divorce petition. Explanation to Section 13(1) provides the meaning for desertion. Mere living away from one of the parties to the marriage is not a desertion, if it is accompanied by a reasonable cause and if it is without consent or against the wish of such party. It includes wilful neglect of the petitioner by other party to the marriage. It could be seen from the cross examination of the wife that they are living separately from 2001

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onwards. The criminal and civil cases that are cataloged by the husband are only from the year 2002 onwards. The husband has not narrated any incident except the allegation of adultery to prove cruelty on the part of the wife which made reasonable apprehension in the minds of the husband not to live with his wife.

12. Even after initiation of civil and criminal Court proceedings, the wife had never left the matrimonial home and she continues to reside there even today. Only the husband had left the matrimonial home and he is alleged to have contracted a second marriage. The husband has suppressed the fact that he is residing away from the matrimonial home in his divorce petition. Even the First Appellate Court has recorded a finding that the husband has not mentioned the date of desertion. However, the First Appellate Court has proceeded to grant a decree for divorce on the ground of desertion that the husband was forced to leave the matrimonial home due to mental cruelty caused by the husband. There is no reason whatsoever to the effect that the husband was forced to leave the matrimonial home due to the mental cruelty of the wife. Therefore, the finding of the First Appellate Court to the said effect is

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perverse and the same is liable to be set aside.

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13. The bone of contention between the parties seems to be the house property in which the wife and her son are residing. The wife had filed O.S.No.46 of 2002 seeking injunction not to disturb her possession over the said property. The husband had filed O.S.No.96 of 2002 seeking declaration of title and permanent injunction for the very same property. The suit filed by the husband for declaration and injunction has been dismissed by the trial Court. The husband had filed A.S.No.20 of 2005 in which the First Appellate Court has partially decreed the suit to the effect that the land belongs to the husband and the building belongs to the wife. The wife had filed S.A(MD).No.1068 of 2007 challenging the decree granted in favour of her husband with regard to the land.

14. It is pertinent to point out that the husband has not challenged the decree that was granted in favour of the wife with regard to the building. Therefore, it is clear that the husband has conceded the title of the wife over the building. In such a situation, filing of O.S.No.46 of 2002 as against the husband cannot be considered to be without any basis thereby causing mental cruelty to the husband.

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15.O.S.No.708 of 2005 has been filed by the wife seeking guardianship of her minor son. Now admittedly, the son is a major. Filing of petition to protect her custodial rights cannot be considered to be a mental cruelty.

16.It is the specific case of the wife that the husband has contracted a second marriage. In Paragraph No.10 of the counter, she had given details of the second wife name, the date and place of the marriage and address of the second wife. She had examined an independent witness as RW2, who had categorically deposed that he had seen the husband with garland with another lady at 5.30 a.m in a temple. The said deposition has not been discredited in the cross examination. However, the criminal proceedings initiated by the wife in C.C.No.675 of 2007 for the offence of bigamy has ended in acquittal. The allegation of the wife in Paragraph No.10 of the counter has not been disputed by the husband by filing any reply statement. Just because he was acquitted from the said criminal proceedings, the proceedings initiated by the wife cannot be branded as a mental cruelty especially when she had made out a prima facie case of the husband contracting a second marriage.

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17.The order of acquittal in C.C.No.734 of 2002 and C.C.No.675 of 2007 has not been placed on record to identify whether the husband has been acquitted on benefit of doubt or on the ground that a false allegation has been made against him. Therefore, filing of the above cases by the wife cannot be considered to be a mental cruelty caused by her to the husband. In fact, the husband has made a serious allegation of adultery as against the wife and despite being unsuccessful before the criminal Court, he had chosen to repeat the same allegation in the divorce proceedings. Therefore, the finding of the First Appellate Court that the attitude of the wife is to harass of her husband by filing one petition after another is not legally sustainable. Even as per the case of the husband, he is residing away from the matrimonial home from the year 2001 onwards. He has chosen to file a present divorce petition in the year 2007 alleging mental cruelty. If really the husband had suffered mental cruelty before leaving the matrimonial home, he would have immediately presented a divorce petition on the said ground. Therefore, the findings of the First Appellate Court that the wife had caused mental cruelty by filing the civil and criminal proceedings is without any basis whatsoever.

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18. When the husband had left the matrimonial home and he is residing away and there is an allegation of second marriage on the husband, the wife cannot be blamed for not taking steps to restore the conjugal rights. The First Appellate Court was not right in placing the blame upon the wife for not filing any application for restitution of conjugal rights after arriving at a finding that the husband has miserably failed to prove the allegation of adultery.

19. In view of the above said deliberations, this Court is of the considered opinion that the divorce petition lacks pleadings with regard to the mental cruelty, desertion and the deposition of the husband relating to the said allegation do not support the case of the husband. The litigation initiated by the wife is only to protect her property rights and her custody of her son. When the initiation of such proceedings is for the vindication of her rights, the said proceedings can never be considered to be a ground for mental cruelty. It is clear that the parties to the marriage are living apart only due to the property dispute which is pending S.A(MD).No.1068 of 2007. Some attempts made by this Court to settle the issue were not fruitful. When the husband has not established the

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ground of mental cruelty and desertion, this Court is constrained to set aside the finding of the trial Court. All the substantial questions of law are answered in favour of the appellant.

20. The judgment and decree of the First Appellate Court are set aside and the judgment and decree of the trial Court are restored. This Civil Miscellaneous Second Appeal is allowed. No costs.

12 .07.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

1. The District Judge, Karur
2. The Additional Subordinate Judge , Karur.
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

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R.VIJAYAKUMAR,J.

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Pre-delivery Judgement made in
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