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C.M.S.A. No.1 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 03.08.2023

Coram:

**THE HONOURABLE MR. JUSTICE P.VELMURUGAN**

C.M.S.A. No.1 of 2017

and

C.M.P. Nos. 347 and 348 of 2017

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P.S.Giridharan

... Appellant

Vs.

Smt.Chita

... Respondent

**Prayer:** This Civil Miscellaneous Second Appeal is filed under Section 28 of the Hindu Marriage Act read with Section 100 of CPC, to set aside the decree and judgment in C.M.A. No.6 of 2015 dated 04.10.2016, on the file of the Principal District Judge, Chengalpet, confirming the decree and judgment in H.M.O.P. No.346 of 2010 dated 21.10.2011, on the file of the Subordinate Judge, Tambaram, by allowing the above CMSA.

For Appellant : Mr.K.Mani

For Respondent : Mr.V.Krishnan



## **JUDGMENT**

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The Civil Miscellaneous Second Appeal is filed to set aside the decree and judgment in C.M.A. No.6 of 2015 dated 04.10.2016, on the file of the Principal District Judge, Chengalpet, confirming the decree and judgment in H.M.O.P. No.346 of 2010 dated 21.10.2011, on the file of the Subordinate Judge, Tambaram, by allowing the above CMSA.

2. The appellant is husband and the respondent is wife. The wife had filed a petition for divorce in HMOP No.346 of 2010, on the file of the Subordinate Court, Tambaram, on the ground of impotency of the appellant/husband and the learned Judge in which, ex-parte order was passed.

3. Challenging same, the husband filed an appeal in CMA No.6 of 2015, on the file of the Principal District Judge, Chengalpet. The learned Judge, after hearing the arguments, dismissed the appeal and confirmed the order and decree passed by the Subordinate Judge.

4. Aggrieved over the same, the husband has filed the present Second Appeal, raising the following substantial questions of law.



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1. Whether the appellate Court erred in law in dismissing the CMA, challenging the exparte order of the divorce petition on the ground of impotency?

2. Is the appellate Court right in law in dismissing the appeal by holding that the appellant has not filed the counter in the HMOP challenging the petition for divorce but failed to note that the appellant filed counter to the other IA Nos.125, 126 and 127 of 2011 in HMOP NO.346 of 2011 to prove that the appellant opposing the petition filed by the respondent on the ground of impotency?

3. Whether the petition for divorce on the ground of impotency, medical examination is necessary to decide the issue, if no medical examination done, can the petition be allowed on the ground of impotency exparte?

4. Is the appellate Court right in law even though the respondent was set exparte, the court should consider the entire pleading and evidence before passing final orders in the HMOP filed for divorce come to the conclusion whether the HMOP petition is maintainable or not?

5. Is the appellate Court right in law coming to the conclusion that the appellant has not filed application to set aside the ex-parte judgment when it is challenged by filing an appeal?

6. Is the appellate Court right in law in dismissing the appeal having come to the conclusion that the decree is defective, that the petition filed on the ground of impotency under 12(1)(a) of the Hindu Marriages Act, but decreed for divorce on the ground of cruelty?

5. Though the matter is pending from the year 2017, the same is



pending without even formulating the substantial question of law.

6. The learned counsel for the appellant/husband submitted that the marriage between the appellant and the respondent was solemnized on 27.11.2009. Along with the petition for divorce, the respondent/wife also filed three interlocutory applications viz., I.A.No.125 of 2011 (for payment of monthly maintenance), I.A. No.126 of 2011 (for litigation expenses of Rs.10,000/-) and I.A.No.127/2011 (for return of articles). Though the appellant/husband participated in the proceedings in IA's, he was set ex-parte in the main O.P. The learned counsel submitted that the respondent/wife had not established her case. However, the Courts below failed to properly appreciate the evidence and materials and passed the ex-parte order. The respondent alone was examined and 12 documents were marked at the time of examining her. Since the appellant/husband was set ex-parte, he was not in a position to file his medical certificate issued by Urology and infertility Clinic by Dr.Devenanthan and Dr.Vikram Sreedharan on 28.05.2010 and even before filing of the divorce petition by the respondent/wife, the said certificate was received by One Krishnan, the uncle of the respondent/wife. The marriage between the appellant and the respondent was an arranged marriage and the same was registered on 08.12.2009. The appellant/husband lived with the



respondent/wife only for 15 days. Therefore, the appellant/husband proceeded to Dubai to join his duty on 12.12.2009 and also made arrangements to bring the respondent/wife to Dubai to live with him. Subsequently, the respondent/wife also left the matrimonial home on 12.12.2009 to Kancheepuram, promising to return to Srirangam, within four days. But, she never returned. In spite, she issued a legal notice on 25.01.2010 with the allegation of impotency against the appellant/husband. On 06.02.2010, the appellant/husband sent a reply notice through his Advocate denying all the allegations. Thereafter, on 18.02.2010, the respondent/wife through her Advocate, sent a rejoinder requesting the appellant/husband to appear for medical test and that she was also ready to go for medical examination. On 28.05.2010 and the appellant/husband underwent medical test in Urology and Infertility Clinic at C-73, 4th Cross Thillai Nagar, Trichy, conducted by Dr.K.S.Devananthan. As stated above, the medical certificate was collected by the uncle of the respondent/wife on 28.05.2010 itself which is before the date of filing of the HMOP and that the HMOP was filed on 06.10.2010. The appellant/husband had sent a letter calling upon the respondent/wife to undergo medical test which she had not attended. Again the appellant sent another notice through his counsel dated 01.11.2010 stating that he has undergone medical test regarding potency and the test report revealed that the



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appellant/husband is normal and requested the respondent to undergo medical examination about the potency but the lower Court held that the appellant/husband had not furnished any medical certificate to show the inability for cohabitation of the respondent. Against the ex-parte order and decree, the appellant/husband filed an appeal in CMA No.6 of 2015, on the file of the Principal District Judge, Chengalpet, and pending appeal, he filed an application in SR.No.2724 of 2016, to receive three additional documents viz., (1) 17.05.2013 regarding the appellant informing to the respondent that he will be available for medical examination between 26.05.2010 to 31.05.2010 (2) Medical certificate issued by the Dr.K.S.Devananthan of Urology and Infertility Clinic, Thillai Nagar, Trichy, dated 28.05.2010 (3) 07.06.2010 regarding informing the respondent/wife that the appellant/husband undergone medical examination and requested the respondent/wife to undergo medical examination. The learned Principal District Judge, Chengalpet, neither numbered the petition nor returned the same and subsequently, dismissed the appeal. Therefore, the husband is before this Court. The appeal may be allowed and the divorce granted by the Courts below may be set aside

7. The learned counsel for the appellant/husband further submitted that



the appellant/husband is ready to live with the respondent/wife. Even otherwise, the reason stated for the divorce is not correct. As stated above, the appellant/husband even prior to filing of the divorce petition, had undergone the medical test and the test report shows that he is fit for matrimonial relationship and it is the respondent/wife who failed to undergo the medical test. Therefore, the reason stated for divorce, is not acceptable.

8. The learned counsel for the respondent/wife submitted that even the marriage was not consummated. There are ample evidence to show that the marriage was not consummated due to the impotency of the appellant/husband. When such a serious allegation is levelled against the appellant/husband, he remained ex-parte and he failed to adduce any evidence before the trial Court. The trial Court properly appreciated both the document and oral evidence produced before it and passed the order. Therefore, there is no valid reason to interfere. Even in the appeal filed by the appellant/husband before the Principal District Judge, the appellant/husband was not able to substantiate his contentions. The documentary evidence produced by the respondent/wife amply proved that the appellant/husband is not fit for family life and that the non consummation of marriage itself is a valid ground for grant of divorce. Therefore, the trial Court rightly granted divorce and the



appellate Court also confirmed the same. Therefore, there is not merit the second appeal and the same is liable to be dismissed.

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9. Heard and perused the materials available on record.

10. The marriage between the appellant and the respondent was solemnized on 27.11.2009 which is not in dispute. The appellant/husband was working in Dubai and the marriage is an arranged marriage which are also not in dispute. After the marriage, the wife has filed the petition for divorce in HMOP No.346 of 2010, on the file of Subordinate Court, Tambaram and she also filed three interlocutory applications viz., I.A.No.125 of 2011 (for payment of monthly maintenance), I.A. No.126 of 2011 (for litigation expenses of Rs.10,000/-) and I.A.No.127/2011 (for return of articles) in which, the appellant/husband filed counter stating that he was employed and residing in Dubai. The respondent/wife was working up to her marriage i.e. up to 20.11.2009 and had no option than to resign her job so that she could move to Dubai to join the appellant/husband. The respondent/wife wrote an e-mail to the appellant's employer due to which he had to resign his job and that he is in India without any proper employment. On the contrary, the respondent/wife is gainfully employed and earning a huge salary and therefore, she filed separate applications seeking interim



maintenance and litigation expenses from the appellant/husband and thus, she cannot ask for maintenance. However, subsequently, he did not appear and therefore, he was ex-parte and the order in HMOP was passed on 21.10.2009.

11. The main contention of the appellant is that the trial Court failed to consider the materials properly. When the respondent/wife made an allegation against the appellant/husband about his impotency, then it is for the respondent/wife to prove that the appellant/husband was impotent and that, ex-parte order cannot be passed without any medical evidence especially in the case where there are allegations of impotency. Even prior to filing of the divorce petition, the appellant/husband had undergone medical test and the reports were with the respondent/wife which was actually received her uncle. But the respondent/wife neither filed the important document i.e. medical certificate issued by the Dr.K.S.Devananthan of Urology and Infertility Clinic, Thillai Nagar, Trichy, dated 28.05.2010, along with the divorce petition nor filed the same before the Court during the examination of witnesses, which would clearly show that the order passed against the appellant/husband is perverse. Unfortunately the appellate Court failed to consider the same and dismissed the appeal filed by the appellant/husband.



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12. The case of the respondent/wife is that the appellant/husband without any intimation, left to Dubai leaving the respondent/wife in India. Many attempts were made to bring back the appellant/husband from Dubai to the matrimonial home either at Srirangam or to Kancheepuram. The brother of the respondent/wife sent e-mail asking the appellant/husband to come to India for fulfilling the marital relationship which was duly received by the appellant/husband on 18.12.2009 for which, he did not give proper response and that the appellant/husband refused to come over to India for joining the matrimonial home. The appellant/husband also sent a e-mail accusing the physical and mental growth of the respondent/wife and also not directly reacted to the request of the respondent/wife which would show that the appellant/husband was not interested in the matrimonial relationship. Further, the marriage was not consummated even out of the efforts taken by the respondent/wife and all the attempts made by the respondent/wife went in vein. Therefore, the respondent/wife with no other petition, filed the petition for divorce.

13. A perusal of the entire materials shows that the respondent/wife filed a petition for divorce on the ground of impotency. Though the appellant/husband stated that even prior to filing of the OP by the respondent/wife, he had undergone medical test and the said report was with



the respondent/wife but she did not file the same before the Court and that the respondent/wife did not co-operate for medical examination. Pending OP., the respondent also filed three interlocutory applications for maintenance, for litigation expenses and for return of articles. Though the appellant/husband appeared initially and filed counter in the interlocutory applications, subsequently he failed to appear before the Court and thereby, the learned subordinate Judge passed the ex-parte order. If at all the appellant/husband had already undergone the medical test and when the respondent/wife failed to produce those reports before the Court, the appellant/husband should have approached the Court to take steps to produce the medical certificates. Instead, he remained ex-parte and he had not contested the case and also did not produce any contra evidence to show that the allegations levelled by the respondent/wife against him are incorrect.

14. Though the allegations were serious in nature and though the appellant/husband had an opportunity to prove his potency, he remained ex-parte before the trial Court. When the respondent/wife appeared and let evidence and also marked documents, the trial Court appreciated the same and with no other option, passed the ex-parte order. Thereafter, when the appellant/husband filed an appeal before the appellate Court, instead of filing the application to adduce additional documents, he should have filed an



application for undergoing medical treatment to disprove the allegations levelled by the respondent/wife. But he failed to do same.

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15. When the respondent/wife stated that the marriage was not consummated, it is for her to substantiate the same. The appellant/husband though appeared in the interlocutory applications, subsequently he failed to appear for enquiry and remained ex-parte in the main original petition. Even pending appeal, the appellant/husband did not take any effective steps for undergoing medical test.

16. If there is any perversity in the appreciation of evidence or failure to appreciate any material facts by the Courts below, it would lead to formulate substantial question of law. But there is no such material available. In the case on hand, all the findings are given only based on facts and materials. Therefore, this Court does not find any perversity in the factual findings given by the Courts below and when the marriage is not consummated, no woman would stay. Therefore, this Court does not find any substantial question of law to be formulated and answered by this Court.

17. Since there is no substantial question of law involved in this case,



this Civil Miscellaneous Second Appeal is dismissed. Consequently,  
connected Miscellaneous Petitions are closed. There shall be no order as to the  
costs.

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Index : Yes / No

Speaking Order : Yes / No

Neutral Citation Case : Yes/No

**Note: Issue order copy on 15.12.2023**



To

1. The Principal District Judge,  
Chengalpet
2. The Subordinate Judge, Tambaram
3. The Section Officer,  
VR Section,  
High Court,  
Madras.



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**P.VELMURUGAN. J.**

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