



C.M.A(MD)No.251 of 2019

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 05.04.2024

Pronounced on: 29.07.2024

CORAM

**JUSTICE N.SESHASAYEE
AND
JUSTICE P.VADAMALAI**

C.M.A(MD)No.251 of 2019

R.Baskar

...Appellant/Petitioner

Vs.

Kavitha

... Respondent/Respondent

Prayer:- Civil Miscellaneous Appeal filed under Section 19 of Family Courts Act, to set aside the fair and decreetal order dated 22.11.2018 passed in H.M.O.P.No.21 of 2018 on the file of the Family Court, Karur, by allowing the Civil Miscellaneous Appeal.

For Appellant : Mr.G.Aravinthan
For Respondent : No Appearance



C.M.A(MD)No.251 of 2019

J U D G M E N T

WEB COPY (Judgment of this Court was delivered by P.VADAMALAI, J.)

This Civil Miscellaneous Appeal is preferred against the fair and decreetal order dated 22.11.2018 passed in H.M.OP.No.21 of 2018 on the file of the Family Court, Karur, which the appellant had filed for dissolution of his marriage with the respondent.

2. The appellant is the petitioner/husband and the respondent is the respondent/wife in H.M.O.P.No.21 of 2018 on the file of the Family Court, Karur.

3. For the sake convenience, the parties are referred as petitioner and respondent in H.M.O.P.No.21 of 2018 on the file of the Family Court, Karur.

4. It is the case of the petitioner that the petitioner and respondent are husband and wife. Their marriage solemnized on 13.03.2009 at P.K.A. Thirumana Mahal, Puliur, Karur as per Hindu rites and customs. Out of wedlock, they were blessed with two female children. After birth of



C.M.A(MD)No.251 of 2019

WEB COPY

first child, the respondent insisted the petitioner for separate living during the month of March, 2010. The petitioner told her that he is the only son of his parents and so he has to look after them, but the respondent did not heed his words and started to make unnecessary quarrels. To avoid unnecessary matrimonial problems, the petitioner consented for separate living and they started separate living from March 2010. Thereafter, the respondent urged the petitioner to help her mother for purchase of land and the petitioner gave Rs.1,50,000/-. The petitioner ran a bakery at Dindigul. The respondent conceived for 2nd child and the petitioner took of her medical expenses. The respondent again insisted the petitioner to give additional money to her mother during November 2012. The petitioner refused, so the respondent picked up frequent quarrels with the petitioner. Without the knowledge and consent of the petitioner, the respondent left the matrimonial home and went to her parental home along with her belongings. When the petitioner went to her parental home and asked her to come back to matrimonial home, she refused and asked the petitioner to live along with her in her parental home. The respondent gave 2nd child birth on 24.08.2013, but the respondent did not inform the same to the petitioner. On coming to know



C.M.A(MD)No.251 of 2019

about 2nd child's birth, he went to see the child, but the respondent did not allow him. Thereafter, the petitioner took several attempts for reunion and the same ended in vain. So, the petitioner filed H.M.O.P.No.215 of 2014 against the respondent for restitution of conjugal rights and the said petition was allowed. Despite the order of the Court for conjugal rights directing the respondent to live with the petitioner, the respondent did not join the petitioner. Again the petitioner has made mediation talks along with his elders. The respondent did not return back to matrimonial home. Even after one year completed from the Court order for restitution of conjugal rights, the respondent did not come back and join the appellant to lead matrimonial life. Hence, the petitioner has filed the petition for divorce.

5. It is the case of the respondent that after marriage the respondent started living with the petitioner at matrimonial home. The respondent did not pick up quarrel with the petitioner and his mother. The 1st child birth is admitted. The respondent did not insist the petitioner for separate living. The averment that the petitioner and respondent started separate living is true. It is false that the petitioner gave Rs.1,50,000/- to the respondent's



C.M.A(MD)No.251 of 2019

mother for purchasing a property. The petitioner started bakery business at Dindigul is true. But it was only by pledging the respondent's 10 sovereigns gold jewels, but the said business went in loss. The respondent conceived for 2nd child. The petitioner failed to take care of her. The respondent gave 2nd birth a female child on 24.08.2013 and this fact was informed to the petitioner. The averment that the respondent did not intimate the child birth and when the petitioner came to see the child he was not permitted to see and the petitioner asked the respondent to come back to matrimonial house is denied. The petitioner filed a petition for conjugal rights. The respondent appeared through counsel. The Court passed the order on 13.03.2015 for restitution of conjugal rights. After the Court order, the respondent went to the petitioner for joint living, but the petitioner drove out the respondent as he did not want to live with the respondent. The respondent always wants to live with the petitioner. But, the petitioner has filed this petition with false averments. Hence, this petition may be dismissed.



C.M.A(MD)No.251 of 2019

WEB COPY

6. During enquiry, on the petitioner side, the petitioner examined himself as P.W.1 and examined one Elangovan as P.W.2 and marked 7 exhibits as Ex.P.1 to Ex.P.7. The respondent has examined herself as R.W.1, examined her mother as R.W.2 and marked one exhibit as Ex.R.1.

7. After hearing both and after considering both sides evidences, the Family Court, Karur declined to grant divorce and dismissed the petition in H.M.O.P.No.21 of 2018 by passing order dated 22.11.2018.

8. Aggrieved by the said fair order and decreetal order, the petitioner has preferred this Civil Miscellaneous Appeal before this Court.

9. Heard the petitioner's side. Though notice was served on the respondent, the respondent did not appear either in person or through any counsel.



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C.M.A(MD)No.251 of 2019

10. The point for determinations:

(i) Whether the ground of cruelty and desertion is made out or not?

(ii) Whether the appellant made out the case as contemplated under Section 13(1)(ia)(1A)(ii) of Hindu Marriage Act?

(iii) Whether rulings relied on by the petitioner is applicable to the facts of this case?

11. On perusal of records and on hearing the petitioner's counsel, it is admitted that the marriage between the petitioner and respondent was held on 13.03.2009, the petitioner is the only son to his parents, after marriage as the respondent insisted for separate living they started separate living from March 2010, out of wedlock two children born to them, during second pregnancy after 2011 the respondent left the matrimonial home and gave 2nd child birth on 24.08.2013.

12. It is the main case of the petitioner that the respondent left matrimonial home without knowledge and consent of the petitioner and that in spite of several attempts the respondent failed to return back and so, he



C.M.A(MD)No.251 of 2019

WEB COPY

filed petition in H.M.O.P.No.215 of 2014 under Section 9 of Hindu Marriage Act, seeking for restitution of conjugal rights. It is the further case of the petitioner that the Family Court has passed order of restitution of conjugal rights on 13.03.2015 and despite the Court order, the respondent has not come back to the matrimonial home even after lapse of one year, so he filed the present petition for divorce. It is further contended that after the decree for restitution of conjugal rights the petitioner along with his family members approached the respondent for reunion, but she refused and they were assaulted by the respondent and her family members. It is also contended that since the respondent made frequent quarrels and insisted the petitioner for separate living after marriage, the petitioner lived separately from his mother to avoid matrimonial problems, even then the respondent again started quarrels and left the matrimonial home which caused him mental agony and also the respondent's mother lodged a police complaint against the petitioner, which also caused cruelty.

13. The learned counsel for the appellant/petitioner has argued that after marriage, the respondent made frequent quarrels with the



C.M.A(MD)No.251 of 2019

petitioner for separate living, in order to avoid matrimonial problems the petitioner agreed and lived separately with the respondent. Even then the respondent picked up quarrels with the petitioner and asked him to give money to her mother and the petitioner tolerated the quarrels. Thereafter, the respondent conceived 2nd time. The respondent again made frequent quarrels and left the matrimonial house without knowledge and consent of the petitioner, she went to her parental home and has been living with her parents. She gave birth to 2nd child and the same was not intimated to the petitioner. On coming to know about the 2nd child's birth, the petitioner went to see the child, but he was driven out by the respondent and her family members. The petitioner took several steps for reunion, the respondent refused to return back to matrimonial home. Then the petitioner filed petition against the respondent for restitution of conjugal rights in H.M.O.P.No.215 of 2014 before the Principal Sub Court, Karur. That petition was allowed on 13.03.2015 directing the respondent to live with the petitioner. The orders were marked as Ex.P.5 and Ex.P.6. Despite the Court order, the respondent did not choose to return back to matrimonial home for reunion. The petitioner along with his elders went to the respondent's



C.M.A(MD)No.251 of 2019

parental home and asked her to come back with children to his house. All efforts went in vain. The petitioner took steps for reunion and the respondent did not come to live with the petitioner even after lapse of one year from the Court order of restitution of conjugal rights. The respondent left the petitioner in the year 2012 and till date, the respondent has not chosen to return back to matrimonial home. The respondent/R.W.1 admitted that the petitioner visited on two occasions regarding reunion. Further, the respondent gave a police complaint against the petitioner and his mother. The respondent underwent surgery for family planning without the consent and knowledge of the petitioner.

14. The learned counsel for the appellant/husband would further argue that the appellant/husband suffered mental agony due to the activities of the respondent/wife and that in spite of several attempts for reunion the respondent/wife never returned back to matrimonial home and even after order of court for restitution of conjugal rights she did not return back, the spouses are living separately more than 10 years and are living in their respective settled lives and so, there is no chance for reunion. The trial



C.M.A(MD)No.251 of 2019

Court failed to take into account all these facts. For the last more than 10 years, the respondent has not returned back to live with the petitioner in spite of Court order of restitution of conjugal rights. The petitioner lost hope for reunion. So, the petitioner may be granted divorce. In support of his argument, the learned counsel for the petitioner relied on rulings as follows:

**1. (2021) 3 Supreme Court Cases 742
(Joydeep Majumdar /v/ Bharti Jaiswal Majumdar)**

**2. AIR 2023 Supreme Court 4186 (Roopa
Soni /v/ Kamalnarayan Soni).**

15. On perusal of records, the trial Court has passed the impugned order on 22.11.2018. The trial Court has observed that the petitioner filed the petition for restitution of conjugal rights mentioning certain cause of action and after order of restitution of conjugal rights, the petitioner filed the present petition for divorce on the same cause of action, whileso the trial Court observed that as per Order 2 Rule 2 CPC, the petitioner ought to have sought all remedies available to him on the first occasion. The observation of the trial Court/Family Court is totally misconceived about the Code of



C.M.A(MD)No.251 of 2019

Civil Procedure and the Hindu Marriage Act. The petitioner has filed the petition under Section 13(1)(ia)(1A)(ii), which reads as follows:

*“1A(ii) that there has been no resumption of cohabitation as between the parties to the marriage for a period of **one year** or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.”*

So, the trial Court ought to have seen whether the petitioner made out the case in consonance with the above proviso.

16. On perusal of records, it is admitted fact that the petitioner filed petition under Section 9 of the Hindu Marriage Act against the respondent for restitution of conjugal right and that petition was allowed on 13.03.2015. It is admitted that the respondent remained ex-parte in that petition and order of restitution of conjugal rights was passed. The respondent has also admitted that she knew about the said order. The order of restitution of conjugal rights were marked as Ex.P.5 and Ex.P.6.



C.M.A(MD)No.251 of 2019

WEB COPY

17. Further, the respondent/wife as R.W.1 has clearly admittedly that the appellant filed H.M.O.P.No.215 of 2014 against her for restitution of conjugal rights and she knew about the order in that petition. R.W.1 in her cross examination stated as “என்னை வாழ அழைத்து எச்.எம்.ஒபி.215/14ல் கருர் முதன்மை சார்பு நீதிமன்றத்தில் தாக்கல் செய்தார் என்றால் சரி. என் கணவரின் கோரிக்கை நியாயமானது என்பதால் நீதிமன்றம் அந்த மனுவை அனுமதித்தது என்றால் சாட்சி என்னால் வரமுடியவில்லை எனவே தேதி தெரியாமல் போய்விட்டது என்று சொல்கிறார். அதன் பின்னிட்டும் நான் என் கணவருடன் சேர்ந்து வாழத் தயாராக இல்லாத காரணத்தினால் இந்த மனுவை தாக்கல் செய்துள்ளார் என்றால் சரியல்ல ..” The respondent/wife’s mother was examined as R.W.2, who deposed in his cross examination as “பலமுறை பேச்சுவார்த்தை நடத்தியும் என் மகள் வரமறுத்ததால் மனுதாரர் கூடுதல் சார்பு நீதிமன்றத்தில் எச்எம்ஒபி 215/14 என்ற வழக்கை சேர்ந்து வாழவேண்டும் என தாக்கல் செய்தார் என்றால் சரி/ அதில் சேர்ந்து வாழவேண்டும் என உத்தரவு பிறப்பிக்கப்பட்ட பின்னரும் என் மகள் சேர்ந்து வாழ வரவில்லை என்றால் சரியல்ல/ இரண்டு முறை வந்தார் இரண்டு முறையும் அடித்து விரட்டிவிட்டார்கள்..”



C.M.A(MD)No.251 of 2019

WEB COPY

From the evidence of the respondent/wife and her mother, it is very clear that the appellant took sincere steps for reunion even before filing of H.M.O.P.215 of 2014 for conjugal rights as well as even after order of the Court. But, the respondent/wife has not joined him and hence, the appellant/husband was constrained to file the present petition for divorce under Section 13(1)(ia)(1A)(ii) of the Act.

18. On perusal of order of the trial Court, it is observed that the appellant/husband has not taken steps for reunion after the order of restitution of conjugal rights and he took only attempts before filing of the petition for restitution of conjugal rights. On perusal of records, the petitioner took steps for reunion as evident from the evidence of P.W.1 and P.W.2. As there were attempts for reunion, a wordy quarrel occurred and a police complaint was lodged as seen from Ex.R.1 which is dated 16.06.2017. R.W.1 in her cross examination deposed as “என்னையும் என் குழந்தைகளையும் ஜெகதாபிரியில் உள்ள எனது கணவா வீட்டில் அழைத்துச் சென்று வாழவேண்டும் என்று என் கணவர் பலமுறை அழைத்தும் நான் செல்ல மறுத்துவிட்டேன் என்றால் சரியல்ல. 2013ம் ஆண்டிலிருந்து இன்றுவரை கணவருடன் சேர்ந்து வாழ நான் எந்த நடவடிக்கையும் எடுக்கவில்லை



C.M.A(MD)No.251 of 2019

WEB COPY

என்றால் சரியல்ல. ஆள்விட்டு பேசினோம். அவர் வீட்டிற்கும் போனோம் அவர் மறுத்துவிட்டார்.... 16.06.2017 அன்று நானும் எனது சகோதரர்களும் எனது மாமாவுடன் சேர்ந்து கொண்டு பொரணியில் உள்ள எனது கணவர் மற்றும் அவரது பெற்றோர்களை கடுமையாக தாக்கினோம் என்றால் சரியல்ல. மேற்படி சம்பவம் குறித்து எனது கணவர் வெள்ளியனை காவல் நிலையத்தில் புகார் கொடுத்தார் என்றால் நாங்கள்தான் கொடுத்தோம்...”

The evidence of R.W.2, who is the mother of the respondent deposed in her cross examination that “பலமுறை பேச்சுவார்த்தை நடத்தியும் என் மகள் வர மறுத்ததால் மனுதாரர் கூடுதல் சார்பு நீதிமன்றத்தில் எச்எம்ஓபி 215/14 என்ற வழக்கை தாக்கல் செய்தார் என்றால் சரி. அதில் சேர்ந்து வாழ வேண்டும் என உத்தரவு பிறப்பிக்கப்பட்ட பின்னரும் என் மகள் சேர்ந்து வாழ வரவில்லை என்றால் சரியல்ல. இரண்டு முறை வந்தார் இரண்டு முறையும் அடித்து விரட்டிவிட்டார்கள்.”

19. It is pertinent to point out here that the appellant/husband mainly pleaded specific ground in this petition that the respondent/wife deserted him in spite of obtaining an order of restitution of conjugal rights in H.M.O.P.No.215 of 2014 and he waited for the stipulated period of one



C.M.A(MD)No.251 of 2019

year, even then she did not join with him in matrimonial life. On perusal of records, it is further clear that the respondent/wife has not come back to live with the appellant/husband abiding by the order of the Court and there has not been any restitution of conjugal rights between the parties for more than a period of one year after the order of conjugal rights passed on 13.03.2015. The present petition for divorce was filed on 28.03.2016. The trial Court's observation that the appellant/husband had not taken steps before the filing of conjugal rights petition is not acceptable. Because, from the evidences of both parties it is clear that the appellant/husband along with his elders has taken several steps for reunion, but the respondent/wife refused. The refusal of the wife to join with the appellant/husband even after decree of restitution of conjugal rights is sufficient reason for divorce as contemplated in the provision of Section 13(1)(ia)(1A)(ii) of the Hindu Marriage Act, under which section the present petition is filed.

20. On perusal of records, it is clear that the appellant/husband subjected to mental agony after marriage, caused his mother to separate living with his wife and thereafter, the wife left him and also not allowing



C.M.A(MD)No.251 of 2019

him to see his 2nd child and also she suppressed about undergoing of family planning. The facts are not specifically denied by the respondent/ wife. Moreover, the appellant and respondent have been living separately for more than 10 years as of now, and their lifestyle including their children by settling in their respective lives and so, the marriage has been irretrievably broken down, as rightly argued by the learned counsel for the appellant and the citations relied on by the appellant side are squarely applicable to the facts of this case. The trial Court has not properly appreciated the evidence adduced by both sides. From the above facts and circumstances, the appellant has made out his case as contemplated under Section 13(1)(ia) (1A)(ii) of the Hindu Marriage Act. This Court is of the considered view that the case of the petitioner is proved by him correctly. Thus, the points are answered in favour of the appellant/husband. Therefore, the finding of the Trial Court warrants interference and thus, this Civil Miscellaneous Appeal succeeds.

21. In the result, this Civil Miscellaneous Appeal is allowed and the fair and decreetal order dated 22.11.2018 passed in H.M.O.P.No.21 of



C.M.A(MD)No.251 of 2019

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2018 on the file of the Family Court, Karur, is set aside. The H.M.O.P.No. 21 of 2018 is allowed. The marriage solemnized between the appellant and respondent on 13.03.2009 is dissolved by way of decree of divorce. No costs.

(N.S.S.,J.)

(P.V.M.,J.)

29.07.2024

NCC : Yes / No
Internet : Yes / No
Index : Yes / No
VSD

To

- 1.The Family Court,
Karur.
- 2.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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C.M.A(MD)No.251 of 2019

N.SESHASAYEE, J.
AND
P.VADAMALAI. J.

VSD

Pre-delivery Judgment in
C.M.A(MD)No.251 of 2019

29.07.2024