

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : **06.12.2017**

CORAM:

THE HONOURABLE MR.JUSTICE A.SELVAM
and
THE HONOURABLE MR.JUSTICE P.KALAIYARASAN

C.M.A.No.1333 of 2017
and C.M.P.No.6997 of 2017

Kavitha @ Poongodi Appellant / Respondent

Vs.

Kumar @ M.Shanmugasundaram ... Respondent / Petitioner

Prayer : Civil Miscellaneous Appeal filed under Section 19 of Family Courts Act, 1984, seeking an order to allow this appeal by setting aside the fair and final order, dated 22.02.2017 passed in H.M.O.P.No.4 of 2014 on the file of the Family Court, Erode.

For Appellant : Mr.I.C.Vasudevan

For Respondent : Mr.V.S.Kesavan

JUDGMENT

(Judgement of the Court was delivered by
P.KALAIYARASAN, J)

This Civil Miscellaneous Appeal has been directed against the order of the Family Court, Erode, dated 22.02.2017 in H.M.O.P.No.4 of 2014 granting divorce on the ground of desertion, i.e., under Section 13 (1) (ib) of the Hindu Marriage Act in favour of the husband as against wife.

2. The respondent / husband in his petition averred that the marriage between the respondent / petitioner and appellant / respondent was solemnized as per Hindu Rites and Customs on 02.03.1998 at Tiruppur. They were also blessed with two children, one female and one male in 1999 and 2001 respectively. Thereafter the wife started abusing the husband and even refused to cohabit with him. When he intended to purchase a house, wife and her relatives compelled him to get it registered in the name of his wife, but he got the sale deed executed in his name so as to start a business by availing loan. On 12.01.2006, wife and her relatives beat the petitioner in the house. On 22.09.2007 at about 9 'O' clock, wife, her father, brothers and others attacked the respondent / petitioner and he had to take treatment in the hospital for four days as inpatient. A case was also registered on the basis of the complaint given by the husband. On the same day, i.e., on 22.09.2007, wife left the house with the children after locking the house. When she left, she also said that she is not willing to live with the respondent / petitioner. Therefore, the respondent / petitioner has filed the petition under Section 13 (1) (ia) and (ib) of Hindu Marriage Act for divorce.

allegations made by the petitioner. She never abused her husband. The alleged attack on the husband on two occasions are false. The wife alone gave a complaint with all women police station for the attack made by the husband on her on 19.07.2006. Neither she nor her relatives ever asked her husband to execute the sale deed in her favour. The wife has always been willing to join with her husband but only the husband has not even allowed her to see her children.

4. The spouses have been examined on their respective side as P.W.1 and R.W.1. 5 Exhibits have been marked on the side of the respondent / petitioner. The learned Family Court Judge, after analysing both oral and documentary evidence of both sides, granted divorce on the ground of desertion, i.e., under Section 13 (1) (ib) of the Hindu marriage Act, 1955. Aggrieved by the said order, the appellant / respondent / wife has preferred this Civil Miscellaneous Appeal.

5. The learned counsel appearing for the appellant argued that the petition for divorce on the ground of desertion is not maintainable as there is no continuous period of two years of desertion immediately preceding to the filing of the petition and the trial Court is not correct in holding that the appellant deserted the

respondent for more than 7 years.

6. The learned counsel appearing for the respondent argued that the wife left the matrimonial home with her children to her parental home without any sufficient cause and she has never attempted to come back to the matrimonial home and the petition has been filed in time and the trial Court after analysing the evidence has rightly granted divorce and the same does not require any interference.

7. The admitted facts are that marriage between the appellant and the respondent was solemnized on 02.03.1998 as per Hindu rites and customs at Tiruppur. They were also blessed with two children out of the wedlock. Admittedly the appellant / wife left the matrimonial home with children in 2007.

8. During cross-examination the wife as R.W.1 says that the children have been with the respondent / husband. According to her she was not even allowed to see the children.

9. The question that arises in this Appeal is whether the petition for divorce on the ground of desertion is maintainable.

10. The husband in his petition pleaded that from the date of filing of the FIR, i.e., on 29.04.2007, the appellant / wife deserted him. The petition for divorce was filed on 03.10.2007. Thus within six months from the date of desertion, the petition has been filed for dissolution of marriage taking desertion as one of the grounds.

11. Section 13 (1) (ib) of the Hindu Marriage Act, 1955 reads thus :

13. Divorce - (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party -

...

...

...

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

12. Thus to present a petition for dissolution of marriage on the ground of desertion, the period of desertion should be for a continuous period of not less than 2 years immediately preceding the presentation of the petition. Here in this case, within six months

from the date of desertion, the petition for divorce has been filed and therefore, as per the above provision of law, the petition on the ground of desertion is not maintainable.

13. The trial Court without looking into the above aspect granted divorce on the ground of desertion and the same is liable to be set aside.

14. In the result, this Civil Miscellaneous Appeal is allowed. The order of the trial Court, dated 22.02.2017 in H.M.O.P.No.4 of 2014 granting divorce under Section 13 (1) (ib) of the Hindu Marriage Act, 1955 is set aside. The petition filed in H.M.O.P.No.4 of 2014 is dismissed. No costs. Consequently connected miscellaneous petition is closed.

(A.S., J.) (P.K., J.)

06.12.2017

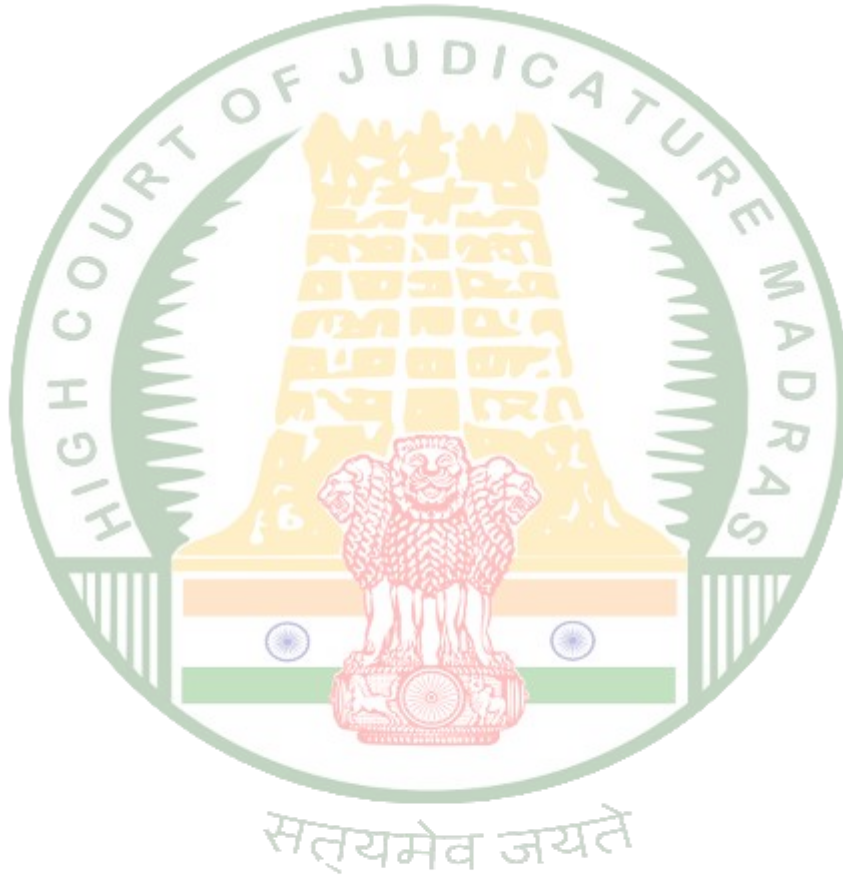
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To

The Family Court,
Erode.



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**A.SELVAM, J.
AND
P.KALAIYARASAN, J.**

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**Judgment in
C.M.A.No.1333 of 2017**

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