

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.09.2017

Pronounced on : 30-11-2017

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE A.D. JAGADISH CHANDIRA

Civil Miscellaneous Appeal No. 2571 of 2015
Civil Miscellaneous Appeal Nos. 1961 and 1962 of 2017

V.M. Jawahar Lal .. Appellant in all the appeals

Versus

K.A. Sheela .. Respondent in all appeals

CMA No. 2571 of 2015:- Appeal filed under Section 19 of The Family Courts Act against the Order and Decree dated 22.09.2015 passed in I.A. No. 39 of 2015 in F.C.O.P. No. 166 of 2010 on the file of the Judge, Family Court, Salem

CMA No. 1961 of 2017:- Appeal filed under Section 19 of The Family Courts Act against the Decree and Order dated 20.09.2016 passed in F.C.O.P. No. 40 of 2009 on the file of the Judge, Family Court, Salem

CMA No. 1962 of 2017:- Appeal filed under Section 19 of The Family Courts Act against the Decree and Order dated 20.09.2016 passed in F.C.O.P. No. 166 of 2010 on the file of the Judge, Family Court, Salem

For Appellant : Mr. D. Rajagopal
in all the appeals
For Respondent : Mr. P. Neethi Kumar
for M/s. Waron & Sai Rams
in all the appeals

COMMON JUDGMENT

R. SUBBIAH, J

The appellant has filed CMA No. 2571 of 2015 aggrieved by the order dated 22.09.2015 passed by the Family Court, Salem allowing the I.A. No. 39 of 2015 in F.C.O.P. No. 166 of 2010 filed by the wife/respondent herein under Section 24 of The Hindu Marriage Act directing the appellant herein to pay a sum of Rs.25,000/- per month towards interim maintenance from the date of the petition, another sum of Rs.25,000/- towards one time litigation expenses besides a sum of Rs.3 lakhs for the medical expenses for the wife/respondent herein.

2. CMA No. 1961 of 2017 is filed by the appellant questioning the correctness of the order dated 20.09.2016 passed in FCOP No. 40 of 2009 whereby the Family Court allowed the Original Petition filed by the respondent herein under Section 13 (1) (1-a) (1-b) of The Hindu Marriage Act thereby dissolving the marriage solemnised between the appellant and the respondent on 07.02.1982.

3. CMA No. 1962 of 2017 is filed by the appellant as against the order dated 20.09.2016 passed in FCOP No. 166 of 2010 thereby dismissing the petition filed by the appellant under Section 9 of The Hindu Marriage Act for restitution of conjugal rights.

4. As all the appeals are inter-connected and common argument has been advanced by the counsel for both sides, they are taken up for hearing together and are disposed of by this common Judgment.

5. The appellant herein has filed FCOP No. 40 of 2009 under Section 9 of The Hindu Marriage Act (hereinafter called as The Act) for restitution of conjugal rights. On notice, the respondent herein has filed FCOP No. 166 of 2010 under Section 13 (1) (1-a) (1-b) of The Act for dissolution of the marriage solemnised between her and the appellant on 07.02.1982 on the ground of cruelty. In such circumstances, we are of the view that it would be appropriate to deal with the averments made in FCOP No. 40 of 2010 filed by the appellant herein for restitution of conjugal rights for the purpose of appreciation of the factual matrix involved in these appeals.

6. The appellant has filed FCOP No. 40 of 2009 before the Family Court, Salem contending inter alia that the marriage between the appellant and the respondent was solemnised on 07.02.1982 as per Hindu rites and customs at Devanga Sri Ramalinga Sowdeswariamman Kalyana Mandapam situated at Vasagasalai Street, Shevapet, Salem. At the time of marriage, the parents of the respondent offered 10 sovereigns of gold and other house hold articles and the appellant never demanded any dowry from the respondent. Further, the appellant himself has presented 25 sovereigns of gold ornaments to the respondent at the time of marriage. The matrimonial life went on peacefully and the appellant had fulfilled all the basic needs of the respondent befitting to his financial status and treated her well. Due to the wedlock, two male children have born and the appellant has provided all financial assistance to enable the children to pursue education. As a token love and affection the appellant had towards the respondent, he had purchased an immovable property - house and registered it in the name of the respondent herein on 24.04.1991. However, there were rifts caused in the matrimonial relationship between the appellant and the respondent which is largely attributable due to the frequent intervention of the father of the respondent herein. The respondent deserted the matrimonial company of the appellant without any just and sufficient cause. The appellant is always ready and willing to live with the respondent and he

had also made several attempts for a re-union, but they could not fructify. While so, the respondent issued a notice dated 20.01.2009 for which the appellant has issued a reply dated 30.01.2009 and called upon the respondent to come and live with him to lead a peaceful married life. In spite of the same, the respondent did not turn up to the matrimonial home, hence, the appellant has filed F.C.O.P. No. 40 of 2009 for restitution of conjugal rights.

7. Even though notice was served to the respondent in FCOP No. 40 of 2009, she did not contest the FCOP No. 40 of 2009, with the result, an ex parte decree was passed on 26.10.2009. Seeking to set aside the ex parte decree, the respondent has also filed I.A. No. 86 of 2010 in FCOP No. 40 of 2009 to condone the delay of 72 days in filing an application to set aside the ex parte decree dated 26.10.2009 and the said application was also allowed

8.(i) The respondent herein has filed FCOP No. 166 of 2010 before the Family Court, Salem contending inter alia that the marriage between the appellant and the respondent was solemnised on 07.02.1982 at Salem as per Hindu rites and customs in the presence of friends, relatives and well wishers on both sides. At the time of marriage, the parents of the respondent have presented 60 sovereigns of gold, 8 sovereigns of gold chain and 2 sovereign of finger ring to the appellant, wooden cot, ever silver utensils and other valuable articles worth about Rs.1,00,000/- apart from 5 kilograms of silver articles as sreedhana properties. Furthermore, as per the custom, a sum of Rs.2 lakhs was paid to the appellant towards pottipanam so as to enable the appellant to develop his business. After the marriage, the appellant and the respondent commenced their matrimonial home and due to the wedlock, the first male child V.J. Vishnu Prasad was born on 08.06.1983 and after the birth of the child, the behavioural pattern of the appellant had completely changed. According to the respondent, the appellant was a drunkard and led a wayward life. The appellant also harassed the respondent to get a sum of Rs.10 lakhs from her parents and driven her from the matrimonial home on 27.01.1984. After having waited for about six months and there was no sign of the appellant coming forward to take the respondent and the minor back to the matrimonial home, the respondent decided to live on her own without the support of the appellant and started pursuing B.A. English Literature in Sri Sarada College for Women, Salem during the academic year 1984. While so, on 07.04.1985, the appellant, along with the elders in his family, came to the parents house of the respondent and expressed his intention to take the respondent and the minor child back to the matrimonial home. The appellant also assured that he will reform himself and will not indulge in any activities that would be detrimental to the respondent. Accordingly, the respondent also joined the matrimonial home. On 05.08.1992, the second male child V.J. Amith Vikram was born.

(ii) According to the respondent, after the birth of the second child, the appellant indulged in obscene and illicit

activities by bringing call girls to the home and had sexual intercourse with them in the presence of the respondent and the minor children. In spite of resistance by the respondent, the appellant continued with his illicit activities under the influence of alcohol and whenever it was questioned, the respondent was assaulted physically. There were occasions when the appellant physically assaulted the respondent in full public view and it was also witnessed by the general public. The appellant also confined the respondent in his house for several hours by locking the house and keeping the key with him. While so, on 16.08.2007, when the respondent questioned the illicit activities of the appellant, he driven the respondent along with the minor children out of the matrimonial home and once again, the respondent was compelled and constrained to take shelter in her parents house along with the two minor children. There were several meetings convened by the elders of both sides for a re-union but they went in vein as the appellant continued his illicit activities, never cared for the welfare of the respondent and the minor children and led a wayward life.

(iii) According to the respondent, the children have grown up but the appellant did not reform him. While so, on 07.02.2008, the appellant went to the Holy Cross Matriculation School, Ammapet, Salem and applied for transfer certificate for his second son V.J. Amith Vikram without the knowledge of the respondent and it was successfully prevented by the respondent by explaining the strained matrimonial relationship between the appellant and the respondent to the school authorities. Thereafter, during September 2008, when the first son Vishnu Prasad attempted to board a train to Chennai to attend his examination, the appellant intervened him at Salem Railway Station, physically assaulted the first son and thereby prevented him from boarding the train. The police officials who were present at the Railway Station had intervened and advised the appellant not to behave in such a fashion towards his son in a public place.

(iv) According to the respondent, unable to tolerate the atrocities of the appellant and his periodic interference with the respondent and her sons, the father of the respondent gave a complaint dated 20.10.2008 to the Commissioner of Police, Salem City and an enquiry was conducted in which a warning was given to the appellant not to indulge in unruly behaviour towards the respondent and the sons. The appellant also given a written undertaking that he will not indulge and commit any such illegal acts thereafter. While so, on 20.1.12008, the appellant came in his Bullet Motorcycle bearing Registration No. TDS 4570 and intentionally hit the second son Amith Vikram when he was riding his bicycle, pulled him down on the road and caused him severe injuries. When questioned by the injured son, the appellant had asserted that unless the respondent pays a sum of Rs.10 lakhs on or before 31.12.2008, he would continue with such acts. In this context, the respondent preferred a complaint to the Inspector of Police, Sooramangalam Police Station and an enquiry was conducted. During the course of such enquiry, once again, the appellant gave a false assurance that he would not cause any physical

assault to the respondent or her children and that he will not interfere with their peaceful life. In the above circumstances, on 20.01.2009, the respondent sent a notice through her lawyer calling upon the appellant to come forward for filing a petition for divorce by mutual consent. On receipt of the notice dated 20.01.2009, the appellant had sent a reply dated 30.01.2009 containing false and frivolous averments. While so, in order to escape from the legal liabilities and to make it as if the appellant is always ready and willing to take the respondent and the minor children in the matrimonial home, the appellant has filed FCOP No. 40 of 2009 under Section 9 of The Act for restitution of conjugal rights. Even though notice was served on the respondent in FCOP No. 40 of 2009, due to her ill-health, she did not contest the Petition with the result, she was set exparte on 26.10.2009 and an exparte decree was also passed. Thereafter, she has filed I.A. No. 86 of 2010 in FCOP No. 40 of 2009 to condone the delay of 72 days in filing an application to set aside the exparte decree dated 26.10.2009 and it was allowed. Thereafter, on 26.03.2010, the respondent has filed FCOP No. 166 of 2010 for dissolution of the marriage solemnised between her and the appellant on 07.02.1982 on the grounds of cruelty.

9. The appellant has filed a Counter Statement in FCOP No. 166 of 2010 filed by the respondent for dissolution of the marriage. According to the appellant, the allegations that he is a drunkard, demanded dowry and led a wayward life are false and factually incorrect. In fact, at the time of marriage, the appellant had presented 25 sovereign of gold ornaments to the respondent and after the marriage, the respondent lived peacefully with the appellant and the appellant also fulfilled all the matrimonial obligations as a dutiful husband. In fact, the appellant has purchased immovable property measuring an extent of 4260 square feet and registered it in the name of the respondent on 24.04.1991 as a token of his love and affection towards her. The appellant has further contended that he had met all the educational expenses for both the sons and the first son had completed M.Sc., Physics and presently employed in the Research Department attached to Indian Institute of Technology, Chennai. Similarly, the second son is pursuing his Higher Secondary in Salem Holy Cross Higher Secondary School, Salem for which the appellant had spent amount. It is the contention of the appellant that it is his father-in-law who is instrumental for the matrimonial dispute between the appellant and the respondent as he visited the matrimonial home very often and made the respondent to desert the matrimonial company of the appellant. In fact, the father of the respondent demanded to take a rented house for the appellant, respondent and the minor children and such house has to be within the locality where he is residing. Even though there were petty quarrel between the appellant and the respondent, such disputes were compromised then and there and there was no serious issue which is required to be sorted out in the matrimonial relationship between the couple. However, on 16.08.2007, the respondent deserted the matrimonial company of the appellant and inspite of repeated demands and requests made, the

respondent refused to come back to the matrimonial home. According to the appellant, he was always ready and willing to live with the respondent and therefore, he prayed for dismissal of the Original Petition filed by the appellant for dissolution of the marriage.

10. The appellant has also filed a suit in O.S. No. 12 of 2013 before the Family Court, Salem under Order VII Rule 1 of CPC against the respondent and the first son born to the appellant and the respondent. In the suit, the appellant, while referring to the matrimonial dispute between the appellant and the respondent, has inter alia contended that even though the suit property was purchased by the appellant out of his own funds, it was registered in the name of the respondent herein when she was living with the appellant. However, in order to defeat the right of the appellant over the said property, the respondent herein has executed a gift deed in favour of the first son on 21.11.2008. Therefore, the suit was filed for a declaration to declare that the gift/settlement deed dated 21.11.2008 executed by the respondent in favour of the son bearing document No. 7311 of 2008 on the file of Sub-Registrar, Sooramangalam is null and void and for a consequential injunction restraining the respondent and the son from alienating or encumbering the suit property to any third parties.

11. Pending FCOP No. 166 of 2010, the respondent has filed I.A. No. 39 of 2015 in F.C.O.P. No. 166 of 2010 under Section 24 of The Hindu Marriage Act seeking to direct the appellant to pay interim maintenance. According to the respondent, on and from 16.08.2007, she is residing separately as the appellant had driven her from the matrimonial home. It was further stated that 12.08.2010, the respondent was admitted in Apollo Super Speciality Hospital, Chennai and it was diagnosed that the respondent is suffering from Breast cancer. The respondent also underwent a surgery (Right modified Radical Mastectomy) for such ailment besides she is taking continued chemotherapy for 6 sittings. The Doctors have also advised her to be in constant medication for the rest of her life. It was stated that the expenses for the surgery, including various medical examination, travelling expenses, hospital expenses etc., have exceeded Rs.3 lakhs and the respondent was constrained to take hand loans from her relatives and friends to meet such medical expenses. It was also stated that the respondent is not employed or she has any source of income. She is dependent on others and she has no wherewithal even to take care of her own medical needs. On the other hand, the appellant is engaged in business of sale of silver articles and he is resourceful enough to pay maintenance to the respondent. The obligation of the appellant to provide maintenance to the respondent is not only legal but also moral. Apart from medical expenses, the respondent needs atleast Rs.25,000/- to meet her day to day expenses relating to food, clothing and shelter. The respondent is also required to undergo medical check up once in three months at Chennai for which she has to spend atleast a sum of Rs.15,000/- per month. Therefore, the respondent has

filed the above said I.A. No. 39 of 2015 in FCOP No. 166 of 2010 and prayed to direct the appellant to pay a sum of Rs.25,000/- per month towards interim maintenance for food, medical expenses and clothing, Rs.25,000/- towards litigation expenses and Rs.3 lakhs for medical expenses.

12. The application in I.A. No. 39 of 2015, filed by the respondent, was resisted by the appellant by filing a counter. In the counter affidavit, the appellant denied the various averments made by the respondent seeking maintenance. It was contended that the children have completed their education and the first son is working as Assistant Professor in Neerajlal Gandhilal Engineering College, Salem and earning a sum of Rs.75,000/- per month. Further, the second son is employed in a private firm and earning a sum of Rs.25,000/- per month. Therefore, the children are taking care of the needs of the respondent, but it is the appellant who is left without any source of income or any one to care and support him. It was contended that due to old age, the appellant is suffering from poor vision in his eyes and he could not continue his business. The appellant also underwent surgery in his eyes and no one is looking after him. The appellant is surviving independently without any source of income. The children have to look after the appellant as well, however, due to the ill advise of the respondent, they are ignoring the appellant. Due to old age and also loss in the business carried on by the appellant, he finds it very difficult to maintain himself. Therefore, the appellant has filed Original Petition in M.C. No. 42 of 2015 under Section 125 of the Code of Criminal Procedure seeking maintenance from his sons and it is pending. While so, the appellant is not in a position to pay any amount towards maintenance to the respondent herein and therefore, he prayed for dismissal of the application for interim maintenance filed by the respondent.

13. Before the Family Court, in I.A. No. 39 of 2015 in FCOP No. 166 of 2010, there was no oral evidence let in either by the respondent or the appellant. However, the respondent/wife marked Exs. P1 to P3. Ex.P1 is the xerox copy of the discharge summary issued to the respondent by the Apollo Hospital, Chennai. Ex.P2 and P3 are the xerox copy of the bills issued by Apollo Hospital, Chennai for payments made. On the side of the appellant, there was no documentary evidence marked.

14. Before the Family Court, in I.A. No. 39 of 2015, it was contended that the appellant is a silver merchant and earning Rs.1,00,000/- per month through such business besides that he is getting Rs.10,000/- as rent by leasing his properties. However, in order to disprove such averments made by the respondent, the appellant has neither let in any oral evidence nor any documentary evidence. Therefore, the Family Court concluded that the appellant herein is resourceful enough to pay the maintenance amount claimed by the respondent. The Family Court also found from the documentary evidence, Exs. P1 to P3 filed by the respondent that the respondent is suffering from breast cancer and she is required to frequently undergo

chemotherapy and other allied medical examinations. The Family Court also taken into account that the respondent had spent amount towards her treatment by borrowing loan from outsiders as she has no independent source of income. Having regard to the above circumstances, the Family Court, Salem passed an order dated 22.09.2015 directing the appellant herein to pay a sum of Rs.25,000/- per month towards interim maintenance per month from the date of the petition, another sum of Rs.25,000/- towards one time litigation expenses besides a sum of Rs.3 lakhs for the medical expenses for the wife/respondent herein. Aggrieved by the order dated 22.09.2015, the appellant has come up with CMA No. 2571 of 2015.

15. As regards F.C.O.P. No. 40 of 2009 filed by the appellant for restitution of conjugal rights and F.C.O.P. No. 166 of 2010 filed by the respondent for dissolution of marriage, they were taken up for hearing together. In both the petitions, common evidence was let in by both sides. On the side of the respondent herein, she examined herself as PW1 and the elder son V.J. Vishnu Prasad was examined as PW2 and Exs. P1 to P14 were marked. On behalf of the appellant herein, one Mr. Jerson, Physical Education Teacher, Golden Gate School, Salem was examined as RW1, Mr. Gavaskar, Superintendent, Holy Cross School, Salem was examined as RW2 and the appellant examined himself as RW3. Exs. R1 to R7 were marked on behalf of the appellant besides Exs. C1 to C15 were marked as Court documents.

16. The Family Court, Salem, upon consideration of the oral and documentary evidence concluded that the act of the appellant in bringing call girls to the home and indulging in illicit sexual activities has caused mental agony to the respondent and it was the reason for breakage of matrimonial relationship between the spouse and therefore, the respondent has proved that she was subjected to matrimonial cruelty at the behest of the appellant. Consequently, the Family Court held that the desertion of the respondent from the matrimonial home cannot be said to be voluntary and she was made, compelled and forced to leave the matrimonial home along with the minor children. In such circumstances, holding that the matrimonial relationship between the appellant and the respondent had broken irretrievably, the Family Court, by a common order dated 20.09.2016 granted a decree of divorce as prayed for by the respondent and dismissed the petition filed by the appellant for restitution of conjugal rights. As against the common order dated 20.09.2016 passed by the Family Court, appellant has filed CMA Nos. 1961 and 1962 of 2017.

17. The learned counsel appearing for the appellant would mainly contend that now the appellant is aged 64 years and he is suffering from age old ailments, including cardiac related diseases. Further, the appellant had substantially lost his vision in his eyes and he could not concentrate on his business which resulted in severe loss in the business. The appellant is not resourceful enough to even maintain himself and that is the reason why he had filed M.C. No. 42 of 2015 under Section

125 of Criminal Procedure Code claiming maintenance from his sons, who are earning substantially. The family Court, without considering the above aspects has mechanically allowed the I.A. No. 39 of 2015 in F.C.O.P. No. 166 of 2010 under Section 24 of The Hindu Marriage Act and directed the appellant to pay maintenance to the respondent. The learned counsel for the appellant would also contend that the appellant and the respondent are residing separately since 16.08.2007. After eight years of separation and after five years from the date of filing FCOP No. 166 of 2010 for restitution of conjugal rights, the respondent has filed I.A. No. 39 of 2015 in FCOP No. 166 of 2010 seeking interim maintenance which would only indicate that during these period, the respondent could maintain well and she was adequately taken care by the sons. Therefore, the appellant would contend that the instant application in I.A. No. 39 of 2015 was filed only to harass him. The Family Court, without taking note of the above aspects has erroneously passed the order dated 22.09.2015 directing the appellant/husband to pay a sum of Rs.25,000/- per month towards interim maintenance from the date of the petition, another sum of Rs.25,000/- towards one time litigation expenses besides a sum of Rs.3 lakhs for the medical expenses for the wife/respondent herein.

18. As regards the findings rendered by the Family Court that the appellant had subjected the respondent to physical and mental cruelty, the learned counsel for the appellant would contend that both the appellant and the respondent resided together till 16.08.2007. The appellant, out of love and affection, has purchased an immovable property and registered it in the name of the respondent on 24.04.1991 where the appellant and the respondent resided and enjoyed the amenities till the respondent deserted the matrimonial company of the appellant and this would indicate that the appellant maintained the respondent befitting to his financial status and ability and he had never subjected the respondent to matrimonial cruelty. Even PW1 and 2 in their cross-examination have admitted that there was no documentary evidence filed by them to show that the appellant had ever demanded dowry from the father of the respondent. PW1/respondent, in her cross-examination had specifically stated that the appellant did not demand any dowry or her father gave any amount towards dowry to the appellant. This would falsify the plea of the respondent that the appellant had demanded dowry and subjected the respondent to mental cruelty. Even the allegation of the respondent that the appellant had consumed alcohol daily and physically assaulted her has not been proved by any acceptable evidence. Merely the appellant consumes alcohol, according to the counsel for the appellant, it cannot be said that he had caused mental cruelty to the respondent. Further, none of the neighbours or any independent witness was examined to prove that the appellant, under the influence of alcohol, had physically assaulted the respondent or treated her with cruelty.

19. The learned counsel for the appellant would contend that the respondent, without the knowledge of the appellant, had executed a settlement deed only in favour of one of the sons thereby deprived the other son of any right over the

property. When this was questioned, the respondent and the elder son have projected hostile attitude towards the appellant. In fact, the appellant had filed a suit in O.S. No. 12 of 2013 for a declaration to declare that the gift/settlement deed dated 21.11.2008 executed by the respondent in favour of the elder son bearing document No. 7311 of 2008 on the file of Sub-Registrar, Sooramangalam is null and void and for a consequential injunction restraining the respondent and the son from alienating or encumbering the suit property to any third parties. Further, the appellant also filed M.C. No. 42 of 2015 against the eldest son seeking maintenance. The respondent and the elder son have made untenable and false averments and deposed against him as if the appellant had brought call girls and indulged in illicit activities in the presence of the respondent and the son. In this context, there is no acceptable evidence adduced on behalf of the respondent except the interested testimony of PW1/respondent and the elder son/PW2. During the cross-examination, PW2 would only depose that he did not inform about the appellant bringing the call girls to the house to any one or lodged any police complaint complaining such illicit acts of the appellant. Thus, the respondent had simply alleged that the appellant had brought call girls to the house and indulged in illicit activities. Even though this averment has not been proved by the respondent, the Family Court, by taking note of the deposition of the PW2/son, has held that such an illicit attitude on the part of the appellant would constitute 'mental cruelty' and on that ground granted a decree of divorce. The learned counsel for the appellant would further contend that the Family Court failed to take note of the averments of the appellant made in FCOP No. 166 of 2010 under Section 9 of The Hindu Marriage Act for restitution of conjugal rights wherein the appellant had categorically pleaded that the dispute between the spouse is not such that it warrants dissolution of the marriage between them. The learned counsel for the appellant therefore prays for allowing all the appeals by setting aside the order passed by the Family Court, Salem.

20. Per contra, the learned counsel for the respondent would vehemently contend that before the Family Court, in I.A. No. 39 of 2015 in F.C.O.P. No. 166 of 2010 filed by the wife/respondent herein has filed documentary evidence - Exs. P1 to P3 to show that she is suffering from breast cancer, the costs incurred by her for such treatment as also the necessity to continue the treatment for her ailment in future. The documentary evidence produced by the respondent in I.A. No. 39 of 2015 would disclose that the respondent had undergone mastectomy surgery and she is continuously undergoing the procedure called Chemotherapy in Apollo hospital, Chennai. Further, from the date of separation namely 16.08.2017, the appellant failed and neglected to maintain the respondent and the children and he did not provide any financial support. The respondent is also not employed and she has no source for her livelihood. The Family Court, taking note of the ailment suffered by the respondent, the period of treatment, the expenses incurred by her for such treatment and the necessity

to continue such treatment in future, had rightly allowed the application filed by the respondent granting interim maintenance. The Family Court has also considered the admission of the appellant that he is carrying on silver business and having business transaction with the jewellers at Vijayawada. Above all, the appellant is having immovable properties at (i) No.43, Devangapuram Extension, Salem (ii) a house at Swarnapuri Salem and (iii) two other houses, which he had inherited from his mother which were rented out to tenants and receiving rent. The appellant also during his cross-examination admitted that he owns the immovable properties as aforesaid and is in receipt of rental income. Therefore, having regard to the said facts, especially when the respondent is suffering from breast cancer and taking treatment for the same at Apollo Hospital, Chennai, the learned counsel for the respondent prayed this Court to dismiss C.M.A. No. 2571 of 2015 by confirming the order passed by the Family Court, Chennai.

21. As regards the mental cruelty inflicted on the respondent by the appellant, the learned counsel for the respondent would contend that the appellant, under the influence of alcohol, had physically assaulted the respondent. There was an occasion when the appellant had assaulted the respondent in full public view in a public place and this was also pleaded by her in the Original Petition filed by her for dissolution of the marriage. In such circumstances, the respondent left the matrimonial home and stayed with her parents. After mediations at the instance of the elders of both sides, the respondent, in the interest of the children, who were minor by then, had joined the appellant in the matrimonial home. However, the appellant continued his cruel treatment towards the respondent. Above all, the appellant had brought call girls to the matrimonial home and in the presence of the respondent and the elder son, he had indulged in illicit activities. This was spoken to by PW2/son in detail in his proof affidavit and also in his cross-examination. The averment that the respondent or the son/PW2 did not give any complaint as against the appellant with respect to bringing of prostitutes to the matrimonial home is unsustainable. The Family Court, while appreciating the evidence of PW2/son in this aspect, has given cogent reasons for accepting the evidence of PW2/son and held that the appellant is guilty of bringing prostitutes to the matrimonial home and thereby subjected the respondent to matrimonial cruelty. Above all, the learned counsel for the respondent would contend that the appellant and the respondent are residing separately since 16.08.2007 for the past 10 years. The children of the appellant and the respondent have also grown and they are now employed. The appellant has no love and affection towards the respondent or his children. The marriage relationship between the spouses has broken irretrievably due to the cruel attitude of the appellant.

22. The learned counsel for the respondent relied on the decision of the Apex Court in the case of (Durga Prasanna Tripathy vs. Arundhati Tripathy) reported in (2005) 7 Supreme

Court Cases 353 wherein it was held that "fourteen years have elapsed since the appellant and the respondent have been separated and there is no possibility of the appellant and the respondent resuming normal marital life even though the respondent is willing to join her husband. There has been an irretrievable breakdown of marriage between the appellant and the respondent." By placing reliance on the above decision, the learned counsel for the respondent would only contend that there is no possibility of reunion between the appellant and the respondent in this case and therefore, he prayed for dismissal of the appeals.

23. We have heard the learned counsel appearing for both sides and perused the materials placed on record. Let us first deal with CMA No. 2971 of 2015 which arise out of an order passed by the Family Court, Salem in I.A. No. 39 of 2015 in FCOP No. 166 of 2010 filed under Section 24 of The Hindu Marriage Act.

24. Before dealing with the rival contentions urged in CMA No. 2571 of 2017, we find from the records that when CMA No. 2571 of 2015 filed by the appellant was listed for hearing, this Court, by an order dated 03.02.2016 made in MP No. 1 of 2015 in CMA No. 2571 of 2015, directed the appellant herein to deposit a sum of Rs.1,50,000/- to the credit of IA No. 39 of 2015 in FCOP No. 166 of 2010 on the file of Family Court, Salem. It is report that the appellant has also deposited the sum of Rs.1,50,000/- and the same was also encashed by the respondent herein. The same is hereby recorded.

25. In the affidavit filed in I.A. No. 39 of 2015, the respondent has stated that she is residing separately along with the two children from 16.08.2007 and she has no independent source of income even to maintain herself. While so, on 12.08.2010, the respondent was admitted in Apollo Speciality Hospital, Chennai for treatment for breast cancer and during the course of such treatment, she had undergone mastectomy surgery, followed by chemotherapy for six sittings continuously. It was further stated that she has to take treatment for her treatment for the rest of her life. It was also stated that she had raised loan from her well wishers and relatives to meet her medical expenses. According to the respondent, the appellant is a silver merchant and earning more than Rs. 1 lakhs and also getting Rs.10,000/- as rent through the properties owned by him. In such circumstances, the respondent prayed for a direction to direct the appellant to pay a sum of Rs.25,000/- per month towards day to day expenses, Rs.3 lakhs for medical expenses and Rs.25,000/- towards one time litigation expenses.

26. The application was opposed by the appellant before the Family Court by contending that even though the Original Petition was filed in the year 2010, after five years, the respondent has filed the I.A. No. 39 of 2015 seeking interim maintenance which would show that the respondent is capable of maintaining herself. It was further stated that the eldest son

is employed as a Assistant Professor in the Research Department of Dheerajlal Gandhilal Engineering College, Salem and earning Rs.75,000/- per month. The youngest son is also employed in a private company and earning Rs.25,000/- per month. Both the sons are supporting the respondent financially. On the other hand, due to old age and loss in the business, the appellant is left with no source of income and he has filed M.C. No. 42 of 2015 under Section 125 of the Code of Criminal Procedure seeking maintenance from his sons and it is pending. The appellant is not resourceful enough to maintain himself. While so, the claim for maintenance made by the respondent is legally not sustainable.

27. In order to sustain the averments in I.A. No. 39 of 2015, the respondent has filed Exs. P1 to P3 to show that she is suffering from breast cancer and that she had taken treatment at Apollo Superspeciality Hospital, Chennai. The respondent also produced xerox copy of the bills issued to her by Apollo Hospital, Chennai. The Family Court, Salem, on considering the documentary evidence under Exs. P1 to P3 concluded that the respondent is suffering from breast cancer for which she has incurred substantial amount towards medical expenses by raising loan from her well wishers and relatives. The Family Court specifically recorded a finding that the respondent has clearly stated that the appellant is a silver merchant and earning Rs.1,00,000/- per month and also receiving Rs.10,000/- as rental income and such averment was not disproved by the appellant by filing any contra evidence. It is not the contention of the appellant that the respondent is employed and earning substantially so as to maintain herself or she is capable of incurring medical expenditure for her ailment. Further, in the proof affidavit filed by the appellant on 06.05.2014, he has admitted that he is doing silver business. Further, the appellant also admitted in his cross-examination on 06.05.2014 that he owns three properties and therefore, it can reasonably presumed that the appellant is in receipt of rental income from the properties owned by him. Thus, the respondent has proved that the appellant is engaged in silver business and is also receiving rental income from the properties owned by him. The Family Court also, while granting pendente lite maintenance has considered Exs. P1 to P3 filed by the respondent herein to show that she is suffering from breast cancer and taking treatment. When a specific question was put to the appellant during cross-examination as to whether he is in a position to maintain the respondent and the minor children, he had only stated that he will be in a position to maintain them provided the respondent joins him in the matrimonial home. Therefore, the appellant had imposed pre-conditions to maintain the respondent and the children which would show that the respondent is having the wherewithal and he is resourceful enough to maintain the respondent. Even though the appellant claimed that he had sustain loss in the business, he had underwent surgeries in his eyes and is suffering without any income, he has not filed any documentary evidence to prove the same. When a question was posed to the appellant as to whether he will be in a position to file the Income Tax Returns

to show that he is not running the business, he has stated that he can file the documents relating to Income Tax Returns, however, he failed to produce any such document before the Family Court. In such circumstances, we hold that the appellant is in a position to maintain the respondent. The obligation of the appellant to maintain the respondent is not only moral but also legal. Therefore, this Court is of the view that the Family Court is right in granting interim maintenance in favour of the respondent and it calls for no interference by this Court.

28. As regards the Petition filed by the appellant and the respondent for restitution of conjugal rights and dissolution of marriage respectively, admittedly, both the appellant and the respondent got married on 07.02.1982 and out of the wedlock, two male children have born on 08.06.1983 and 05.08.1992 respectively and they are now employed. On and from 16.08.2007, both the appellant and the respondent are residing separately.

29. The main ground on which the respondent deserted the matrimonial company of the appellant is that the appellant subjected the respondent to physical and mental harassment. According to the respondent, the appellant is addicted to alcoholic drinks and under the influence of alcohol, he had physically assaulted the respondent. It is the further contention of the respondent that the appellant used to confine her in a room, lock the room and will take the key with him whenever he used to leave the matrimonial home for any work. It is also the specific contention of the respondent that at the height of cruelty, the appellant brought call girls to the matrimonial home and indulged in illicit sexual activities when the respondent and her elder son was present in the house. In order to prove the allegation with respect to the act of the appellant in bringing prostitutes to the matrimonial home, the respondent examined herself as PW1 and the elder son was examined as PW2. According to the appellant, no independent witnesses were examined to prove that he had brought prostitutes to the matrimonial home except the interested testimony of the respondent and the elder son.

30. In this context, the Family Court on appreciation of the pleadings and evidence had rendered a finding in para No.21 that merely because the appellant consumes alcohol, it will not be a ground to dissolve the matrimonial tie, however, under the influence of alcohol, if a person humiliates or causes harassment to the family members, it would amount to cruelty. The Family Court further held in para No.25 that PW2, the elder son has specifically deposed that "at one stage, my father started to bring prostitutes to the house and had sexual intercourse with them in our presence which is intolerable which cause severe mental agony to my mother". PW2 was also subjected to cross-examination extensively but his evidence could not be shaken and that was recorded in detail in para No.25 of the judgment by the Family Court. After analysing the testimony of PW2, the Family Court concluded that the

deposition of PW2 is natural and cogent. It was further concluded that when the appellant, respondent and the sons are residing under one roof, the evidence of one of the family members can be accepted and it needs no corroboration by the other independent witnesses. Above all, the Family Court recorded a finding that the evidence of PW2 inspires confidence and there is no reason to disbelieve his evidence. In effect, the Family Court concluded that the appellant, by his acts and deeds, has inflicted mental cruelty on the respondent and it would constitute "cruelty" as defined under Section 13 (1) of the Hindu Marriage Act.

31. As regards desertion, the Family Court recorded a finding that even on 27.01.1984, for the first time, the respondent deserted the matrimonial home by stating that she was subjected to harassment and that she was driven out of the matrimonial home by the appellant. Thereafter, at the instance of elders of both sides, on 07.04.1985, the respondent joined the matrimonial home with the appellant. Thereafter, on 16.08.2007, the respondent deserted the matrimonial company of the appellant on the ground that she was driven out of the matrimonial home by the appellant along with the two children and she had taken shelter at her parents house. From the aforesaid pleadings and evidence, the Family Court has concluded that there were differences of opinion between the spouse and due to frequent quarrel, the respondent was compelled and constrained to come out of the matrimonial home. Therefore, the Family Court concluded that the desertion of the respondent from the matrimonial home is not voluntary, rather, she was made to desert the matrimonial company of the appellant owing to cruel treatment and harassment.

32. As regards allegation of demand for dowry raised by the respondent, the Family Court rendered a finding that the respondent has not proved by any acceptable evidence that the appellant demanded dowry to be brought from her parents house. Even in her deposition as PW2, respondent has only stated that she has not paid any money to the appellant from her father as dowry or she has given any complaint complaining that the appellant had demanded dowry from her parents. Therefore, the Family Court recorded a finding that the allegation that the appellant demanded dowry of Rs.10,00,000/- to be brought from her parents cannot be sustained and it was not proved by any acceptable evidence.

33. On a cumulative reading of the evidences available on record and the conclusion arrived at by the Family Court, we are of the view that both the appellant and the respondent have been residing separately since 16.08.2007 for the past about ten years. Now, the children have grown up and they are employed. In this context, useful reference can be made to the decision of the Honourable Supreme Court in (Durga Prasanna Tripathy vs. Arundhati Tripathy) reported in (2005) 7 Supreme Court Cases 353 relied on by the learned counsel for the respondent. The ratio laid down by the Honourable Supreme Court in the above decision squarely applies to the facts of

the case. In this case also, the appellant and the respondent are residing separately for about 10 years and therefore, no useful purpose will be served by directing them to get united in the matrimonial home especially when the matrimonial relationship between them has broken down irretrievably.

34. Admittedly, there were frequent quarrel between the appellant and the respondent and the appellant had treated the respondent with cruelty. Even on 24.10.2008, Ex.P6, a complaint was given by the father of the respondent against the appellant before the Commissioner of Police, Salem City complaining that the appellant is causing harassment to his daughter and grand sons on the basis of the same, an enquiry was conducted by the Police authorities. There were serious matrimonial disputes between the spouses which were narrated in the Original Petition and the respective counter statement filed before the Family Court. This would only indicate that the matrimonial relationship between the appellant and the respondent had strained and there is little or no scope for a reunion. Taking into consideration all the above aspects, the Family Court has rightly arrived at a conclusion to untie the matrimonial relationship between the appellant and the respondent. We also feel that there is no scope for reunion between the spouse and the Family Court is right in dissolving the marriage solemnised between the appellant and the respondent.

35. In the result, we confirm the order passed by the Family Court, Salem and consequently, all the appeals are dismissed. No costs. Consequently, connected miscellaneous petitions are closed.

rsh

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To
The Presiding Officer
Family Court, Salem

+3cc to Mr.D.Rajagopal, Advocate Sr.No.85237,85238,85239/17
+2cc to M/s.Waraon & Sai Rams, Advocate Sr.No.85482

Copy to:The Section Officer, VR Section,
High Court, Madras.(2 copies)

SSD(CO)
sm:30.1.2018

Common Judgment in
CMA No. 2571 of 2015
CMA Nos. 1961 and 1962 of 2017