

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 26.03.2018

Pronounced on : 11-08-2018

CORAM:

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE P.D. AUDIKESAVALU

Civil Miscellaneous Appeal No. 3294 of 2011
Civil Miscellaneous Appeal No. 102 of 2013
and
Miscellaneous Petition Nos. 1 and 2 of 2013

S. Ramila .. Appellant in both the appeals

Versus

E. Srinivasan .. Respondent in both the appeals

Appeals filed under Section 19 of The Family Courts Act
against the Order and Decree dated 27.06.2011 passed in
F.C.O.P. No. 82 of 2008 on the file of Family Court, Salem

For Appellant : Mr. R. Singaravelan, Senior Advocate
for Ms. M. Srividhya
in both the appeals

For Respondent : Mr. T. Murugamanickam, Senior Advocate
for Ms. Zeenath Begam
in both the appeals

सत्यमेव जयते
COMMON JUDGMENT

R. Subbiah, J

These appeals are filed by the appellant questioning the correctness and validity of the decree of divorce granted by the Family Court, Salem on 27.06.2011 in FCOP No.82 of 2008, which was filed by the respondent herein/husband. While C.M.A. No. 3294 of 2011 was filed by the appellant as against the decree of divorce granted by the Family Court, C.M.A. No. 102 of 2013 was filed questioning the quantum of permanent alimony granted by the Family Court.

2. The averments made in F.C.O.P. No. 82 of 2008 filed by the respondent/husband for dissolution of the marriage are as under:-

(i) The respondent herein/husband has filed FCOP No. 82 of 2008 before the Family Court, Salem contending inter alia that he married the appellant on 07.06.1976 as per Hindu rites and customs and the marriage was solemnised at Shevapet, Salem.

After the marriage, the respondent and the appellant commenced their matrimonial journey in the house belonging to the father of the respondent at No.128, Appuchetty Street, Chevvaipet, Salem. The appellant lived with the respondent only for a year until November 1977 and thereafter, she left the matrimonial company of the respondent without any justifiable or reasonable cause and stayed in the house of her parents. At the instance of the elders in the Family, mediation took place and the appellant reluctantly joined the respondent in the matrimonial home only to leave again on 12.01.1980. Once again, at the instance of elders in the family, the appellant returned back to the matrimonial home on 25.11.1981 on condition that a separate residence has to be arranged for the stay of the appellant and the respondent. In other words, the appellant was not prepared to live jointly with the respondent and his parents in the matrimonial home. Thus, even after returning to the matrimonial home on 25.11.1981, the appellant was in the habit of leaving the matrimonial company of the respondent on and off and stayed in the house of her parents. Ultimately, on 05.10.1983, due to a trivial quarrel, the appellant left the matrimonial home without the consent of the respondent and thereafter, she never returned back. The respondent therefore filed HMOP No 25 of 1986 on the file of Sub Court, Salem for dissolution of the marriage. The Sub Court allowed the petition on the ground that the desertion of the appellant from the matrimonial home is without any just or sufficient cause. However, the appellant preferred an appeal before the Additional District Court, Salem in C.M.A. No. 49 of 1988 and the appeal was allowed on 26.11.1991. Aggrieved by the same, the respondent herein has filed C.M.S.A. No. 37 of 1992 before this Court and it was dismissed on 08.01.1999.

(ii) According to the respondent, the appellant and the respondent are residing separately for more than 23 years. The desertion of the respondent is without just and sufficient cause. The appellant has filed several cases against the respondent, both before the Civil and Criminal forum thereby he was subjected to acute mental cruelty. The appellant has filed M.C. No. 8 of 1990 before the Judicial Magistrate No.III, Salem under Section 125 of Code of Criminal Procedure claiming maintenance by suppressing her employment as Administrative Officer in Salem Textiles Limited, Salem. In the said case, the learned Judicial Magistrate No.III, Salem, has passed an order on 12.07.1990 directing the respondent herein to pay a sum of Rs.400/- per month as maintenance to the appellant. That apart, the appellant also initiated Civil proceedings and filed O.P. No. 12 of 1992 as a pauper seeking maintenance but subsequently, she voluntarily paid court fee after 7 years and the suit was numbered as O.S. No.2 of 1998 on the file of the Family Court, Salem. Pending suit, the appellant also filed an application to implead the parents and brothers of the respondents as parties. In the said suit, she specifically prayed for a direction to the respondent to pay maintenance to her at the rate of Rs.1,500/- per month from 17.02.1992 till 31.12.1995 and at the rate of Rs.4,000/- per month from 01.01.1996 till her life time. In the application to implead the parents and brother of the respondent, the appellant had

made untenable averments against them which had caused mental agony and thereby she subjected the respondent to cruelty. Hence, the respondent filed a suit in O.S. No. 805 of 1998 before the II Additional District Munsif, Salem to declare that the order obtained in M.C. No. 8 of 1990 by the appellant is null and void as the order of maintenance was obtained by suppressing material particulars relating to her employment. While so, the appellant/wife also filed F.C.O.P. No. 89 of 1999 before the Family Court, Salem for restitution of conjugal rights as if the respondent had driven her out of the matrimonial home. Even in the said FCOP No. 89 of 1999, she filed I.A. No. 165 of 1999 for maintenance and an order was passed directing the respondent to pay maintenance of Rs.3,000/-.

(iii) While facts are so as stated above, the suit filed by the respondent herein in O.S. No. 805 of 1998 was dismissed on 09.12.2002. While dismissing the suit, a specific observation was made by the learned II Additional District Munsif, Salem that the appellant has filed M.C. No. 8 of 1990 by suppressing her employment status. The said finding rendered in the judgment dated 09.12.2002 in O.S. No. 805 of 1998 has become final inasmuch as it was not appealed against. Thus, it is evident that the appellant herein has filed M.C. No. 8 of 1990 by suppressing her employment status and therefore, she is not entitled for any maintenance.

(iv) In the F.C.O.P. No. 89 of 1999, the appellant had obtained an exparte decree on 09.07.2003 by which the respondent was directed to take the appellant back to the matrimonial home

(v) In O.S. No.2 of 1998 even though the appellant prayed for grant of maintenance at the rate of Rs.4,000/- per month from 01.01.1996 till her life time, subsequently, she has filed an application in C.M.P. No. 192 of 2004 in MC. No. 8 of 1990 before the Family Court, Salem under Section 127 of the Code of Criminal Procedure to enhance the maintenance amount from Rs.4,000/- to Rs.9,000/- per month.

(vi) The appellant also sought to attach the immovable properties belonging to the family members of the respondent in R.E.P. No. 10 of 2013 to execute the decree dated 09.07.2003 passed in the FCOP No. 89 of 1999 under Section 9 of The Hindu Marriage Act for restitution of conjugal rights which would clearly indicate the manner in which the respondent was subjected to matrimonial cruelty. According to the respondent, the appellant is only desirous of getting maintenance amount from the respondent and she has no intention to join the matrimonial company of the respondent.

(vii) Above all, according to the respondent, both the appellant and himself are residing separately for the past 23 years. There were several cases filed by the appellant against the respondent thereby he was humiliated and made to undergo sleepless nights. The matrimonial relationship between the appellant and the respondent has come to an end and it had broken irretrievably. In such circumstances, the respondent has filed F.C.O.P. No. 82 of 2008 before the Family Court, Salem under Section 13 (1) (i-A) (ii) and 13-A of The Hindu Marriage Act for dissolution of the marriage dated 07.06.1976

solemnised between the appellant and the respondent on the ground of cruelty and desertion.

3. (i) The Original Petition filed by the respondent in F.C.O.P. No. 82 of 2008 was resisted by the appellant by filing a counter affidavit contending inter alia that the FCOP No. 82 of 2008 filed by the respondent is not maintainable. According to the appellant, already, the respondent has filed FCOP No. 25 of 1986 for dissolution of the marriage on the ground of desertion and it was allowed on 05.10.1988. Aggrieved by the same, the appellant filed C.M.A. No. 49 of 1988 before the I Additional District Court, Salem and it was allowed on 26.11.1991 setting aside the decree of divorce granted by the trial Court. As against the Judgment dated 26.11.1991, the respondent has filed C.M.S.A. No. 37 of 1992 before this Court and it was dismissed on 08.01.1999. Thus, the attempt on the part of the respondent to get the marriage solemnised between him and the appellant dissolved reached a finality by virtue of the Judgment dated 08.01.1999 passed by this Court in C.M.S.A. No. 37 of 1992. While so, according to the appellant, the present Petition in F.C.O.P. No. 82 of 2008 which was filed on the ground of desertion and cruelty is hit by the principles of res judicata and not maintainable.

(ii) It is further contended by the appellant that the respondent and his parents, during the course of her stay in the matrimonial home, subjected her to acute cruelty by demanding more amount, jewels and other household articles as dowry notwithstanding the 35 sovereigns of gold ornaments presented to her, 6 sovereigns of gold ornaments to the respondent and other house hold articles presented at the time of the marriage. According to the appellant, from the date of the marriage, the respondent and his parents have demanded more jewels and cash and when it was refused, she was driven out of the matrimonial home. On one such occasion, during 1977, on the eve of Deepavali festival, the respondent and his parents demanded more jewels to be given by her parents and when such a demand was not fulfilled, she was driven out of the matrimonial home. Subsequently, after the intervention of the elders in the family, the appellant was sent back to the matrimonial home. Even thereafter, the appellant was forced to leave the matrimonial home on account of the demand made by the respondent and his parents to get more jewels and cash from her parents. Thus, according to the appellant, her desertion from the matrimonial home was not voluntary but she was made to leave the matrimonial home by the respondent and his parents. On and from 05.10.1983, the appellant is staying with her parents. The efforts made by the father of the appellant for re-union went futile as her father could not cater to the ugly demands made by the respondent and his parents for more jewels and cash. In fact, the appellant went to the matrimonial home on several occasion and pleaded with the respondent to take her back, but she was not allowed to step into the matrimonial home. The respondent was earlier employed in Canara Bank, Percaud Branch and subsequently he was transferred to Salem Branch. On coming to know about the transfer, the appellant went to the bank thrice and pleaded with the respondent to take

her back to the matrimonial home, but the respondent ignored her genuine request. The appellant was always ready and willing to live with the respondent but it was only the respondent who neglected the appellant.

(iii) When C.M.S.A. No. 37 of 1992 filed by the respondent came up for hearing, this Court, after hearing both sides, dismissed the appeal on 08.01.1999, confirming the Judgment of the Appellate Court, which set aside the decree of divorce granted by the Family Court. Thereafter, the appellant filed FCOP No. 89 of 1999 for restitution of conjugal rights on 11.05.1999 in which the respondent has also filed his counter affidavit after three years. Even when conciliation efforts were made pending FCOP No. 89 of 1999, the respondent refused to take the appellant back to the matrimonial home. The Family Court, after considering the rival pleadings, allowed FCOP No. 89 of 1999 on 09.07.2003. In spite of the order passed in FCOP No. 89 of 1999, the respondent failed to take the appellant back to the matrimonial home, therefore, the appellant was constrained to file REP No. 10 of 2003 in FCOP No. 89 of 1999 for enforcing the decree. In REP No. 10 of 2003, the appellant sought for a direction to the respondent to take her back to the matrimonial home and on his failure, order for attachment of the joint family properties in Door No.128-129, Appu Chetty First Street and 1/3rd share thereof to the appellant. Such a prayer was made under the impression that the respondent would take the appellant back to the matrimonial home, but it was not done. Therefore, on 28.11.2003, the properties of the respondent were attached and in spite of the same, the respondent refused to take the appellant back to the matrimonial home. According to the respondent, REP No. 10 of 2003 was filed to enforce the decree passed in her favour and it cannot be construed as a matrimonial cruelty perpetrated on the husband/respondent. The appellant also filed REP No. 15 of 2003 to return the 35 sovereigns of jewels and other articles. Thus, according to the appellant, she was constrained and compelled to file the Execution Petitions to enforce her legal right and therefore, mere filing of petitions to assert her right cannot be construed as an attempt to inflict matrimonial cruelty on the respondent.

(iv) Above all, it was contended by the appellant that she has filed M.C. No. 8 of 1990 on 12.07.1990 for maintenance. Before filing of M.C. No. 8 of 1990, during March 1989, when C.M.A. No. 49 of 1988 filed by the appellant before the I Additional District court, Salem was pending, the respondent married one Meena during March 1989 and was living along with her. It is the respondent who had inflicted matrimonial cruelty on the appellant. In any event, the Original Petition filed by the respondent in HMOP No. 82 of 2008 is not maintainable especially when the earlier HMOP No. 25 of 1986 filed by the respondent was decreed, however, the decree passed thereon was set aside by this Court in the Judgment dated 08.01.1999 passed in C.M.S.A. No. 37 of 1992. While so, the present Petition in HMOP No. 82 of 2008 is hit by the principles of res judicata and on that ground, the appellant prayed for dismissal of the Original Petition, by setting aside the order of the Family Court.

4. Before the Family Court, in order to prove the averments contained in the Original Petition, the respondent herein examined himself as PW1 and Ex.P1 was marked. On behalf of the appellant, the appellant examined herself as RW1 along with another witness A. Sathish as RW2 and Exs. R1 to R28 were marked. The Family Court, upon considering the oral and documentary evidence framed the following points for consideration and they are as follows:-

(i) Whether the petitioner is estopped from raising the

plea of desertion? Does the principle of res judicata applies to the facts of the case?

(ii) Whether the petitioner was subjected to matrimonial cruelty

(iii) Whether the separation of respondent is a wilful desertion

(iv) Whether the petitioner is entitled for the relief sought."

5. The Family Court, by taking note of the earlier order dated 05.10.1988, passed in HMOP No. 25 of 1986, pointed out that the cause of action for filing the earlier petition is that the appellant was caught red handed while she attempted to mix poisonous substance in the food served to the respondent. In connection with the same, a Panchayat was convened and thereafter, the appellant left the matrimonial home on 05.10.1983. Whereas, the present petition in HMOP No. 82 of 2008 was filed on the ground that the appellant and the respondent are residing separately for about 25 years besides there were several petitions, applications, revisions and appeals filed either by the appellant or the respondent against each other which had widened the matrimonial relationship between them. Therefore, the Family Court concluded that the cause of action for filing HMOP No. 25 of 1986 and HMOP No. 82 of 2008 are different, both in respect of the matter in issue and that of the relief sought for therein. The Family Court also, by pointing out the various applications filed by the appellant as well as the respondent, concluded that in the given circumstances, instead of weighing as to who is at more fault, a pragmatic approach is warranted. It was also observed that the cases filed and pending between the parties would only indicate the simmering matrimonial dispute existing between them and which had resulted in the irretrievable breakage of the matrimonial tie between them. The Family Court further pointed out that during the pendency of the matrimonial proceedings, the respondent contracted a second marriage and was living with another wife, thereby he conducted himself in such a way that the appellant could not resume the marital relationship to join him. Therefore, the Family Court has come to the conclusion that there is no possibility for re-union between the appellant and the respondent and keeping the matrimonial tie alive will not serve any useful purpose. Accordingly, the Family Court granted a decree of divorce dissolving the marriage solemnised between the appellant and the respondent on 07.06.1976. At the same time, the Family

Court directed the respondent herein to pay a sum of Rs.10 lakhs towards permanent alimony in addition to periodical payment made pursuant to the order passed in M.C. No. 8 of 1990 within a period of 90 days from the date of the order and only on such payment, the decree of divorce shall come into force. Aggrieved by the said order passed by the Family Court, the appellant/wife has come forward with these appeals.

6. Mr. Singaravelan, learned Senior counsel appearing for the appellant/wife would contend that earlier, the respondent herein has filed HMOP No. 25 of 1986 for dissolution of the marriage on the ground of desertion. Even though HMOP No. 25 of 1986 was allowed by the Family Court, it was reversed by the Appellate Court in CMA No. 49 of 1988 and further affirmed by this Court in CMSA No. 37 of 1992 on 08.01.1999. Therefore, the present Petition filed in HMOP No. 82 of 2008 for the very same relief of dissolution operates as a res judicata and the respondent is not entitled to seek very same relief which was negated by this Court in CMSA No. 37 of 1992. When the prayer sought for in both HMOP No. 25 of 1986 and HMOP No. 82 of 2008 are one and the same, the Family Court is not justified in holding that the cause of action for filing the two petitions are different.

7. The learned Senior counsel for the appellant would further contend that the appellant was made and compelled to file various applications before the competent Court to assert her legal right. Mere filing of petitions before the competent Court cannot be construed as an attempt to inflict matrimonial cruelty on the husband/respondent. The learned Senior counsel for the appellant would further contend that the appellant was constrained to file several applications seeking to enforce the order of interim maintenance granted by the competent Court, while so, the Family Court has erroneously concluded that the filing of several applications itself would tantamount to inflicting matrimonial cruelty on the respondent. Thus, according to the learned Senior counsel for the appellant, the Family Court erred in holding that the filing of applications before the competent Court had prejudiced the respondent and subjected him to matrimonial cruelty.

8. The learned Senior counsel for the appellant relied on several decisions to contend that there is no irretrievable breakage of the matrimonial relationship between the appellant and the respondent especially when the appellant is ready and willing to live with the respondent. In fact, the appellant has filed HMOP No. 89 of 1999 before the Family Court under Section 9 of The Hindu Marriage Act for restitution of conjugal rights and the same was allowed exparte on 09.07.2003, but the respondent did not comply with the direction issued thereon. Further, to set aside the exparte order dated 09.07.2003, the respondent has filed I.A. No. 388 of 2004 seeking to condone the delay of 377 days in filing the petition to set aside the exparte decree of restitution of conjugal rights along with I.A. No. 389 of 2004 to set aside the exparte decree. The said application in I.A. No. 388 of 2004 was filed by stating that

at the instance of the appellant herein, he was arrested and remanded to judicial custody, due to which he was mentally upset and that he could not file the application to set aside the exparte order within time. The Family Court dismissed the said application and refused to condone the delay. As against the order of dismissal passed in the said applications, the respondent filed two revision petitions before this Court in CRP (PD) No. 922 and 923 of 2005 and both the Civil Revision Petitions were dismissed on 17.02.2005. Therefore, according to the appellant, all the efforts taken by the respondent to prevent the appellant from re-joining him in the matrimonial home went in vain. However, inspite of the order passed by the court below, the respondent refused to take back the appellant to the matrimonial home. In such circumstances, it cannot be said that there is a breakage of matrimonial relationship between the appellant and the respondent. In support of this contention, the learned counsel for the appellant relied on the decision of the Honourable Supreme Court in (Chettan Dass vs. Kamala Devi) reported in (2001) 2 CTC 690 to drive home the point that irretrievable breakage of marriage cannot be used as a straight jacket formula for grant of relief of divorce. For the very same proposition, the learned Senior counsel for the appellant also relied on the decision in Neetam Kumar vs. Daya Rani reported in (2010) 13 SCC 298 wherein also it was held that if a party to the marriage on his or her own conduct brings the relationship to a point of irretrievable break down, he or she cannot be allowed to seek divorce on the ground of breakdown of marriage.

9. The learned Senior counsel for the appellant would further contend that all along the appellant is unemployed and she is depending on others for her livelihood. Even though the respondent repeatedly harped upon by saying that the appellant had suppressed her employment particulars, the respondent failed to prove it in a manner known to law by producing any documentary evidence. As the appellant has no wherewithal for her survival, she filed M.C. No. 8 of 1990 before the learned Judicial Magistrate No.III, Salem praying to direct the respondent to pay Rs.400/- per month as monthly maintenance and it was also granted. Aggrieved by the same, the respondent filed Crl.R.C. No. 219 of 1994 before this Court and it was dismissed on 10.01.1997. Not content with the same, the respondent filed CMP No. 116 of 1997 before the Family Court, Salem to cancel the order of maintenance passed by the learned Judicial Magistrate No.III, Salem and it was also dismissed on 29.11.1999. Thereafter, the respondent has filed O.S. No. 805 of 1998 before the Additional District Munsif, Salem to declare that the order of maintenance granted in M.C. No. 8 of 1990 as null and void and the said suit was dismissed on 09.12.2002. Subsequently, the appellant filed CMP Nos. 66 of 1997, CMP No. 11 of 1998, CMP No. 89 of 1998 claiming arrears of maintenance before the Family Court, Salem and as against the orders passed in the applications seeking enhancement of maintenance amount, the respondent filed revision before this Court and on it's dismissal, the respondent paid the arrears of maintenance on 17.03.1999. It is also an admitted fact that the appellant has

also filed successive petitions claiming arrears of maintenance inasmuch as the respondent did not pay the maintenance amount periodically. In fact, the appellant has filed CMP No. 192 of 2004 in M.C. No. 8 of 1990 for enhancement of maintenance amount and it was partly allowed on 20.12.2010 directing the respondent/husband to pay a sum of Rs.6,000/- per month as maintenance from 17.06.2004 to 20.12.2010 and Rs.7,500/- per month from 20.12.2010. However, without paying the maintenance amount, the respondent has filed a Objection Memo in CMP No. 192 of 2004 praying to keep the proceedings in MC No. 8 of 1990 in abeyance till the disposal of the suit filed by him in O.S. No. 2 of 1998. By order dated 22.01.2007, the Family Court, Salem rejected the Memo against which the respondent filed CrI.R.C. No. 448 of 2007 and it was dismissed by this Court on 04.04.2007. Thereafter, when CMP No. 192 of 2004 in MC No. 8 of 1990 was taken up for hearing, the respondent sought adjournment and therefore, by order dated 29.03.2010, the respondent was directed to pay a sum of Rs.2,000/- as costs. As against the order dated 29.03.2010 imposing costs of Rs.2,000/-, the respondent filed CRP No. 18815 of 2010 and it was dismissed by this Court on 12.08.2010. According to the learned Senior counsel for the appellant, the respondent, being the husband, has an obligation to pay the pendente lite maintenance so as to enable the appellant/wife to survive. Even otherwise, the maintenance was directed to be paid by the Family Court and the orders passed therein were also confirmed by this Court at the instance of the respondent. While so, it cannot be said that the appellant is only interested in getting the maintenance amount from the respondent and that she has no interest to join the respondent in the matrimonial home. As mentioned above, the appellant has also filed HMOP No. 89 of 1999 before the Family Court under Section 9 of The Hindu Marriage Act for restitution of conjugal rights and the same was allowed exparte on 09.07.2003 and inspite of the said order, the respondent did not permit the appellant to enter the matrimonial home. In such circumstances, as long as the matrimonial proceedings between the appellant and the respondent are pending, the respondent has an obligation to pay maintenance and the non-payment of the maintenance amount by the respondent is illegal.

10. Above all, the learned Senior counsel for the appellant would contend that the respondent is engaged in silver business besides he owns several immovable properties. The respondent is a man of means and he has the wherewithal to pay maintenance amount to the appellant, who is depending on others for her day to day maintenance. The value of the immovable properties in the form of gold and silver ornaments in possession of the respondent will not be less than Rs.10 crores. This was also specifically pleaded by the appellant before the Family Court. While so, the Family Court ought not to have awarded only a sum of Rs.10 lakhs as permanent alimony and the same is required to be enhanced. Therefore, the learned Senior counsel for the appellant prayed for allowing CMA No. 102 of 2013.

11. Countering the submissions of the learned Senior Counsel for the appellant, Mr. Murugamanickam, learned Senior Counsel for the respondent-husband would contend that the marriage between the appellant and the respondent was solemnised on 07.06.1976 and the appellant lived with the respondent only for a few months and she often deserted the matrimonial company of the respondent. In other words, from the date of marriage, the appellant stayed in the matrimonial home only till November 1977 for a period of 15 months. Again, the appellant returned to the matrimonial home and within a short period, she left the matrimonial company of the respondent on 12.01.1980 and returned on 25.11.1981. After staying in the matrimonial home for about 23 months, on 05.10.1983, the appellant left the matrimonial home and she never returned back. Thus, due to the frequent desertion of the appellant from the matrimonial home, the matrimonial relationship had been ruined and it had widened the relationship between the couple. Even though the respondent filed HMOP No. 25 of 1986 before the Sub Court for dissolution of the marriage and it was also granted, such decree was set aside in the appeal filed by the appellant and further confirmed by this Court in C.M.S.A. No. 37 of 1982 on 08.01.1999.

12. According to the learned Senior counsel for the respondent/husband, admittedly, both the appellant and the respondent are residing separately since 1983 for the past atleast 25 years and taking note of the long and continued separation, during which there was no cohabitation or physical relationship between the appellant and the respondent, the respondent was constrained to file FCOP No. 82 of 2008 for dissolution of the marriage. In the Petition in FCOP No. 82 of 2008, the respondent had disclosed about the earlier petition filed by him in HMOP No. 25 of 1986 and there was no suppression of the earlier order. In the subsequent FCOP No. 82 of 2008, the respondent had clearly indicated the plethora of matrimonial cases filed by the appellant, with an intention to harass the respondent and his family members which caused acute pain and mental agony to the respondent. Such cases filed by the appellant against the respondent and the family members had left no scope or chance for reunion of the appellant and the respondent and the matrimonial relationship had widened. The appellant also did not dispute the various applications filed by her seeking maintenance or arrears of maintenance. In fact, the appellant furnished the particulars of the cases filed by her in the counter affidavit. While so, the Family Court, rightly held that the intention of the respondent in filing the present FCOP No. 82 of 2008 to get a decree of divorce on the subsequent events unfolded therein and the cause of action for filing the earlier HMOP No. 25 of 1986 are totally different and it would not operate as res judicata.

13. Though the Family Court held that the respondent herein is living with another lady through whom a female child was also delivered, a specific finding was rendered by the Family Court that the present Original Petition in HMOP No. 82

of 2008 will not operate as a bar or it is hit by the principles of res judicata in view of the filing of the earlier Original Petition in HMOP No. 25 of 1986. That apart, yet another specific finding was rendered by the Family Court that the cause of action for filing HMOP No. 82 of 2008 is on a different set of facts and the cause of action for filing the earlier petition is dissimilar. Therefore, HMOP No. 25 of 1986 will not operate as res judicata for the respondent to file the present petition in HMOP No. 82 of 2008.

14. As regards the permanent alimony of Rs.10,00,000/- granted by the Family Court, against which the appellant has filed C.M.A No. 101 of 2013 for enhancement, the learned counsel for the respondent would contend that F.C.O.P. No. 82 of 2008 filed by the respondent was decreed on 27.06.2011 thereby dissolving the marriage solemnised between the appellant and the respondent on 07.06.1976 on the ground of cruelty and desertion. While passing the decree, the Family Court has directed the respondent to pay a sum of Rs.10 lakhs within 90 days from the date of receipt of the order to the respondent towards permanent alimony. It was specifically directed that only on such payment, the decree of divorce shall come into force. Thus, the Family Court directed the respondent to deposit Rs.10 lakhs as a condition precedent for granting a decree of divorce. In compliance with the conditional decree dated 27.06.2011, the respondent had also deposited the sum of Rs.10,00,000/- towards permanent alimony on 23.09.2011. On 11.10.2011, the appellant has filed the CMA No. 3254 of 2011 against the decree of divorce granted by the Family Court in FCOP No. 82 of 2008. However, during the pendency of the appeal, on 27.03.2012, the appellant had withdrawn the entire amount of Rs.10 lakhs. Such amount of Rs.10 lakhs was withdrawn by the appellant without recording any protest. Thus, the appellant acquiesced with the decree of divorce granted by the Family Court by reason of her withdrawing the sum of Rs.10 lakhs deposited by the respondent. Therefore, she is not entitled to challenge the decree granted by the Family Court. Further, when the appeal challenging the decree of divorce namely C.M.A. No. 3294 of 2011 was pending, since the respondent raised an objection as regards maintainability of C.M.A. No. 3294 of 2011 after withdrawal of the sum of Rs.10 lakhs by the appellant, the appellant has filed the subsequent appeal in C.M.A. No. 102 of 2013 for enhancement of the maintenance amount thinking that she could overcome the question of maintainability of the former appeal in C.M.A. No. 3294 of 2011. According to the learned counsel for the husband/respondent herein, since the wife/appellant had withdrawn the sum of Rs.10 lakhs without any protest, she is not only entitled to challenge the decree of divorce granted by the Family Court but also estopped from seeking enhancement of the maintenance amount. The appellant cannot approbate and reprobate in prosecuting this appeal. The appellant is only interested in getting maintenance from the respondent and thereby she has subjected the respondent to sheer harassment. In this context, the learned Senior counsel for the respondent would rely on the decision of this Court in the case of (Gadde

Venkatarayudu vs. Anumolu Chinna Rama Krishnayya) reported in Volume 31 Law Weekly Page 30 wherein it was held that a party, taking advantage of an order, cannot object to the same. The learned Senior counsel for the respondent also relied on the decision of the Honourable Supreme Court in the case of (Bank of India and others vs. K.V. Vivek Ayer and another) reported in 2006 (9) SCC 177 wherein it has been held that when there is utilisation of the amount, so deposited that it would amount to acquiescence.

15. By way of reply, the learned Senior counsel for the appellant, by placing reliance on the decision rendered by the Honourable Supreme Court in the case of (P.R. Deshpande vs. Maruti Balaram Haibatti) reported in (1998) 6 SCC 507 to fortify his submission that merely because the appellant had withdrawn the sum of Rs.10 lakhs deposited by the respondent, as directed by the Family Court, it will not disentitle the appellant to challenge the decree of divorce granted by the Family Court.

16. With regard to the submissions of the learned Senior counsel for the respondent that the appellant had repeatedly filed petition after petition and harassed the respondent, it is replied by the learned Senior counsel for the appellant that those petitions have been filed by the appellant to assert her right to get redressal of her legal grievance. The appellant was constrained to file O.P. No. 12 of 1992 on 17.02.1992, as a pauper seeking maintenance, which was later numbered as O.S. No. 2 of 1998 inasmuch as the respondent was not regular in paying the monthly maintenance amount ordered by the learned Judicial Magistrate No.III, Salem in M.C. No. 8 of 1990. In fact, in the said suit, the appellant was constrained to implead the family members of the respondent because, during the pendency of the matrimonial proceedings, the family members have attempted to alienate and encumber the share of the respondent in the family property. In any event, mere filing of the petitions before the competent Court having jurisdiction cannot be said to be an attempt on the part of the appellant to harass the respondent, rather, they were filed to get the grievance of the appellant ventilated through a legal forum.

17. We have heard the learned Senior counsel appearing for both sides and perused the material records placed for our consideration. Keeping the submissions made on behalf of both sides, the following points emerge for our consideration in these appeals and they are

1. Whether the appellant can maintain these appeals when she has chosen to withdraw the amount of Rs.10 lakhs deposited by the respondent before the Family Court as a pre requisite for enforceability of the decree of divorce?

2. Whether the decree and judgment passed in HMOP No. 25 of 1986 filed by the respondent will operate as res judicata for the filing of the subsequent petition in HMOP No. 82 of 2008?

3. Whether the respondent was subjected to matrimonial cruelty by reason of the appellant filing several applications or petitions before the competent Court of law against him and his family members?
4. Whether the long and continued separation of the appellant and the respondent can be taken note of to dissolve the marriage solemnised between them?
5. Whether the appellant is entitled for enhancement of maintenance notwithstanding the withdrawal of the sum of Rs.10,00,000/- deposited by the respondent as directed by the Family Court in HMOP No. 82 of 2008, during the pendency of the appeal?

18. As we have dealt with the factual matrix of the case in detail, we are of the view that the facts leading to the filing of the appeals need not be dealt with any further. At the same time, certain facts, which are germane and necessary for disposal of these appeals are delineated hereunder.

19. Point No.1:- Whether the appellant can maintain these appeals when she has chosen to withdraw the amount of Rs.10 lakhs deposited by the respondent before the Family Court as a pre requisite for enforceability of the decree of divorce?

20. The learned Senior counsel for the husband/respondent would contend that the Family Court, while granting a decree of divorce, directed the respondent to pay a sum of Rs.10 lakhs as a condition precedent for enforcement of the decree of divorce. Thus, the enforceability of the decree of divorce depends upon compliance of clause 3 of the decree relating to deposit of Rs.10 lakhs before the Family Court within a period of 90 days. Accordingly, the respondent has deposited the amount within the time stipulated by the Family Court and therefore, the decree gets enforced. While so, the appellant filed the appeal in C.M.A. No. 3294 of 2011 before this Court challenging the decree of divorce granted by the Family Court. On the other hand, during the pendency of C.M.A. No. 3294 of 2011, the appellant had withdrawn the sum of Rs.10 lakhs deposited by the respondent. The appellant did not record her protest while withdrawing the amount of Rs.10 lakhs. By virtue of withdrawal of the sum of Rs.10 lakhs, the appellant acquiesced with the decree passed by the Family Court. While so, the appellant cannot maintain these appeals. The appellant cannot approbate and reprobate and it is legally impermissible. Therefore, according to the learned Senior counsel for the respondent, the appeals filed by the appellant are not maintainable.

21. Repudiating the contention of the learned Senior counsel for the respondent, the learned Senior counsel for the appellant would contend that irrespective of the withdrawal of the amount of Rs.10 lakhs, the appellant has a statutory right to file an appeal and it cannot be curtailed. Merely because the appellant had withdrawn the amount, it will not be an embargo or bar for her to file an appeal questioning the

correctness of the decree of divorce or for enhancement of the permanent alimony granted by the Family Court. While so, the learned Senior counsel for the appellant would contend that the appeals are maintainable.

22. We have given our anxious consideration to the rival submissions made. A fitting answer for this issue, as regards maintainability of the appeals filed by the appellant, is given by the Honourable Supreme Court in Deshpande case mentioned supra wherein in Para No.8 and 9, it was held as follows:-

"8. The doctrine of election is based on the rule of estoppel - the principle that one cannot approbate and reprobate inheres in it. The doctrine of estoppel by election is one of the species of estoppel in pais (or equitable estoppel) which is a rule in equity. By that rule, a person may be precluded by his actions or conduct or silence when it is his duty to speak, from asserting a right which he otherwise would have had (vide Black's Law Dictionary, 5th Edn.)

9. It is now trite that the principle of estoppel has no application when statutory rights and liabilities are involved. It cannot impede right of appeal and particularly the constitutional remedy. The House of Lords has considered the same question in Evens vs. Bastlam. The House was dealing with contention of a party to put the matter on the rule of election on the premises to apply to set the judgment aside by asking for and obtaining time, he irrevocably elected to abide by the judgment.

....

11. A party to a lis can be asked to give an undertaking to the Court, if he requires stay of operation of the judgment. It is done on the supposition that the order would remain unchanged. By directing the party to give such an undertaking, no court can scuttle or foreclose a statutory remedy of appeal or revision, much less a constitutional remedy. If the order is reversed or modified by the superior court or even the same court on a review, the undertaking given by the party will automatically cease to operate. Merely because a party has complied with the directions to give an undertaking as a condition for obtaining stay, he cannot be presumed to communicate to the other party that he is thereby giving up his statutory remedies to challenge the order. No doubt he is bound to comply with his undertaking so long as the order remains alive and operative. However, it is open to such superior court to consider whether the operation of the order or judgment challenged before it need be stayed or suspended having regard to the fact that the party concerned has given undertaking in the lower court to abide by the decree or order within the time fixed by that Court.

12. We are, therefore, in agreement with the view of Sabai and Venkatachalam, JJ that the appeal filed under Article 136 of The Constitution by special leave cannot be dismissed as not maintainable on the mere ground that the appellant has given an undertaking to the High Court on being so directed, in order to keep the High Court's Order in abeyance for some time.

23. In the above decision, it was held that notwithstanding the undertaking given by a party to the litigation as a condition precedent for obtaining interim stay, such a party can file an appeal or revision challenging the order. In other words, by virtue of an undertaking given before the Court, it will not preclude a party from exercising his/her right to file an appeal or revision. In the present case, the appellant had, after filing the C.M.A. No. 3294 of 2011, withdrawn the sum of Rs.10 lakhs deposited by the respondent before the Family Court which cannot be a ground to contend that the appeal filed by her in C.M.A. No. 3294 of 2011 is not maintainable. It is needless to mention that the principles of estoppel cannot be pressed into service when there is a statutory remedy or right available to a litigant. In this case, merely because the appellant had withdrawn the sum of Rs.10 lakhs deposited by the respondent, it will not deprive her statutory remedy of filing an appeal before this Court. Thus, notwithstanding the withdrawal of the amount of Rs.10 lakhs, the appeal filed by her has to be dealt with independently and the withdrawal of the sum of Rs.10 lakhs will not have any bearing on the maintainability of these appeals. Accordingly, we hold that the appeal filed by the appellant is maintainable and it cannot be rejected at the threshold merely because she had withdrawn the sum of Rs.10 lakhs deposited by the respondent.

24. Point No.2:- Earlier, the respondent has filed HMOP No. 25 of 1986 before the Family Court, Salem contending inter alia that after the marriage that had taken place between him and the appellant on 07.06.1976, the appellant frequently left his matrimonial company without sufficient or just cause and stayed in the house of her parents. In such a fashion, on 05.10.1983, due to a trivial quarrel, the appellant left the matrimonial home and thereafter, she never returned back. In these circumstances, the respondent filed the above said HMOP No 25 of 1986 on the file of Sub Court, Salem for dissolution of the marriage on the ground of desertion. The learned Subordinate Judge, Salem allowed HMOP No. 25 of 1986 by holding that the desertion of the appellant from the matrimonial home is without any just or sufficient cause and on that ground, a decree, dissolving the marriage held between the appellant and the respondent, was passed. However, at the instance of the appellant, the Additional District Court, Salem set aside the decree of divorce passed by the Family Court on 26.11.1991 in C.M.A. No. 48 of 1998. The Judgment of the Additional District Court, Salem was further confirmed by this Court in C.M.S.A. No. 37 of 1992 filed by the respondent on 08.01.1999.

Notwithstanding the filing of the earlier petition in HMOP No 25 of 1986, the respondent, filed FCOP No. 82 of 2008 for dissolution of the marriage on the ground of desertion and cruelty. In FCOP No. 82 of 2008, very many contentions have been raised by the respondent to demonstrate that the conduct of the appellant had in fact caused rift in the matrimonial relationship between the appellant and the respondent. One among the contentions urged in FCOP No. 82 of 2008 is that the long and continued separation of the couple for about 25 years had snapped the matrimonial tie and that the existence of matrimonial relationship had become meaningless. It was further contended that the appellant had frequently filed petitions, one after the other against the respondent and his family members and the respondent was made and compelled to defend those vexatious proceedings tirelessly and endlessly, whereby he was subjected to harassment. According to the respondent, such enmasse filing of petitions against the respondent and his family members periodically had caused him acute mental cruelty besides it had worsened the matrimonial relationship between the appellant and the respondent beyond repair.

25. This contention was repudiated by the appellant stating that when already the respondent has filed a petition in HMOP No. 25 of 1986 seeking dissolution of the marriage and it was negatived by this Court in CMSA No. 37 of 1992, the respondent is not entitled to file a subsequent petition in FCOP No. 82 of 2008 for the very same relief and it certainly amounts to res judicata. It is further contended that mere filing of the petitions by the appellant cannot be construed to be an attempt on her part to subject the respondent to matrimonial cruelty, rather, they were filed to get the genuine grievance of the appellant redressed.

26. Having regard to the above submissions, we are of the view that the petition in HMOP No. 25 of 1986 was filed by the respondent with a plea that the appellant deserted his matrimonial cruelty on and off and thereby the matrimonial relationship between him and the appellant had irretrievably broken and even though the respondent could obtain a decree in HMOP No. 25 of 1986, it was set aside by the Additional District Court, Salem on 26.11.1991 in C.M.A. No. 48 of 1998 filed by the appellant which was confirmed by this Court in C.M.S.A. No. 37 of 1992 filed by the respondent on 08.01.1999. At the same time, it is to be noted that the subsequent petition in FCOP No. 82 of 2008 was filed with the plea that the appellant and the respondent were residing separately atleast for a period of 25 years and such a long and continued separation of the couple had in fact worsened the matrimonial relationship between them. The further plea raised in FCOP No. 82 of 2008 is that the appellant had repeatedly filed petitions before the competent Court against the respondent and his family members and thereby the respondent was subjected to sheer harassment. Thus, it would be evident that the petition in HMOP No. 25 of 1986 was filed only on the ground of desertion, on the other hand, FCOP No. 82 of 2008 was filed by

incorporating the subsequent events which had taken place in the matrimonial relationship between the appellant and the respondent. It is pertinent to mention that the cause of action available for the respondent to file FCOP No. 82 of 2008 was not available for him at the time of filing HMOP No. 25 of 1986. The simmering matrimonial dispute between the appellant and the respondent by reason of the appellant filing one petition or the other against the respondent and his family members had compelled the respondent to file the subsequent petition in FCOP No. 82 of 2008. Therefore, it cannot be said that filing of HMOP No. 25 of 1986 and the decree passed thereon, would operate as res judicata for the filing of the subsequent petition in FCOP No. 82 of 2008. Thus, the subsequent events that had unfolded in the matrimonial relationship between the appellant and the respondent had necessitated the respondent to file FCOP No. 82 of 2008 with different set of facts and cause of action. The subsequent events narrated in FCOP No. 82 of 2008 were not the subject matter of the petition filed by him in HMOP No. 25 of 1986. Thus, on the basis of subsequent events, which had taken place in the matrimonial relationship between the spouses, the filing of FCOP No. 82 of 2008 is proper. In this context, reference was made to the decision of the Honourable Supreme Court in the case of (K. Srinivas vs. K. Sunita) reported in (2014) 16 Supreme Court Cases 34, wherein, in Para Nos. 6 and 7, it was held as follows:-

"6. Another argument which has been articulated on behalf of the learned counsel for the respondent is that the filing of the criminal complaint has not been pleaded in the petition itself. As we see it, the criminal complaint was filed by the wife after filing of the husband's divorce petition, and being subsequent events could have been looked into by the Court....."

27. Therefore, we are of the view that the filing of HMOP No. 25 of 1986 with a different set of facts and cause of action, will not operate as a bar for the filing of the the present petition in FCOP No. 82 of 2008. We answer this point accordingly.

28. Point No.3:- Next it has to be examined as to whether the filing of the petition (s) by the appellant before the competent Court of law can be construed to be a harassment or infliction of mental cruelty on the respondent.

29. Admittedly, the appellant and the respondent have filed several petitions before the Family Court as well as other jurisdictional Courts and this Court against each other. Some of the petitions filed by the appellant and the respondent are delineated hereunder.

(i) The appellant has filed FCOP No. 89 of 1999 before the Family Court, Salem for restitution of conjugal rights. Pending FCOP No. 89 of 1999, on 21.01.2013, she filed I.A. No. 43 of 2003 in FCOP No. 89 of 1999 under Section 27 of The Hindu Marriage Act for return of articles and it was allowed on 09.07.2003.

(ii) The appellant has filed M.C. No. 8 of 1990 under Section 125 of Code of Criminal Procedure before the Judicial Magistrate No.II, Salem on 12.07.1990 in which a sum of Rs.400/- was awarded towards interim maintenance on 28.02.1994. Aggrieved by the same, the respondent filed Crl.RC No. 219 of 1994 against MC No. 8 of 1990 and it was dismissed by this Court on 10.01.1997.

(iii) The appellant/wife filed CRP No. 29 of 1994 to revise the quantum of maintenance awarded in MC No. 8 of 1990 from Rs.400/- to Rs.500 before the Additional District Court, Salem and it was allowed on 15.02.2001.

(iv) The respondent/husband filed CMP No. 116 of 1997 to set aside the order of maintenance passed in MC No. 8 of 1990 and it was dismissed by the Family Court, Salem on 28.11.1999.

(v) The appellant/wife filed CMP Nos. 66 of 1997, CMP No. 11 of 1998 and CMP No. 89 of 1998 for non-payment of arrears and consequently sought for arrest of the respondent/husband. On 21.01.1999, arrest warrant was issued by the Family Court, against which the respondent/husband preferred Civil Revision Petition before this Court and upon it's dismissal, he paid the arrears of maintenance on 17.03.1998.

(vi) The respondent filed O.S. No. 805 of 1988 before the Additional District Munsif Court, Salem to declare that the order passed by the Judicial Magistrate No.II, Salem in MC No. 8 of 1990 awarding pendente lite maintenance of Rs.400/- per month is null and void. The said suit was dismissed on 09.12.2002.

(vii) As far as the FCOP No. 89 of 1999 filed by the appellant/wife under Section 9 of The Hindu Marriage Act for restitution of conjugal rights is concerned, it was decreed exparte. As against the exparte decree in FCOP No. 89 of 1999, the respondent filed I.A. No. 388 of 2004 and I.A. No. 389 of 2004 for condoning the delay of 377 days in filing the petition to set aside the exparte decree and to set aside the exparte decree passed in FCOP No. 89 of 1999. The Family Court dismissed those applications on 17.02.2005 against which the respondent unsuccessfully filed CRP No. 922 and 923 of 2004 before this Court as they were dismissed by this Court on 17.06.2005.

(viii) The appellant/wife filed CMP No. 192 of 2004 in MC No. 8 of 1990 for enhancement of maintenance amount. The respondent/husband filed Objection Memo in CMP No. 192 of 2004 to keep the Petition in CMP No. 192 of 2004 in abeyance till the disposal of the suit in O.S. No. 2 of 1998. The said Memo was rejected on 22.01.2007 against which the respondent/husband filed Crl.R.C. No. 448 of 2007 before this Court and it was also dismissed on 04.04.2007.

(ix) During the pendency of CMP No. 192 of 2004 in MC No. 8 of 1990, since the respondent/husband had taken repeated adjournment, a cost of Rs.2,000/- was imposed by an order dated 29.03.2010 by the Family Court, Salem. Aggrieved by the same, the respondent/husband has filed CRP No. 18615 of 2010 to quash the entire proceedings in CMP No. 192 of 2004 and to set aside the order of adjournment cost of Rs.2,000/-. This Court dismissed the Civil Revision Petition and directed the

respondent/husband to appear before the Family Court on 06.10.2010.

(x) After hearing both sides, Family Court, Salem allowed CMP No. 192 of 2004 on 20.12.2010 directing the respondent/husband to pay Rs.6,000/- per month from 17.06.2004 to 20.12.2010 and Rs.7,500/- from 20.12.2010.

(xi) Aggrieved by the order dated 20.12.2010 passed in CMP No. 192 of 2004 in MC No. 8 of 1990, the respondent has filed Crl.R.C. No. 491 of 2001 and it was dismissed by this Court on 29.07.2013.

(xii) The appellant/wife also filed Crl.R.C. No. 417 of 2011 to enhance the quantum of compensation awarded by the Family Court, Salem and it was allowed by this Court on 29.07.2013 revising the maintenance amount to Rs.8,000/- from Rs.6,000/- per month payable from the date of filing of CMP No. 182 of 2004.

(xiii) The respondent/husband also filed Review Petitions to review the order dated 29.07.2013 passed in Crl.R.C. No. 491 of 2011 and 417 of 2011 and they were also dismissed during the year 2013. Thereafter, the respondent filed O.S. No. 17 of 2006 before the Family Court, Salem, to declare that no jewels were presented to the appellant by her parents at the time of marriage and to restrain the appellant from taking any steps to recover the alleged jewels from him. In this suit also, the appellant raised a preliminary objection as it is hit by the principles of resjudicata and ultimately, this suit was withdrawn during the year 2012.

(xv) That apart, the respondent filed O.S. No. 1068 of 2007 before the Additional Munsif Court, Salem to declare that no jewels were presented to the appellant at the time of marriage and to restrain the appellant from taking any steps to recover those alleged jewels. A preliminary objection was raised by the appellant in her written statement as regards maintainability of the suit and accepting the same, the suit was returned for want of jurisdiction to try the same

(xvi) The appellant/wife filed I.A. No. 140 of 2008 in FCOP No. 82 of 2008 for pendente lite maintenance in which a sum of Rs.5,000/- was awarded towards litigation expenses on 27.12.2010 but no interim maintenance was ordered.

(xvii) Several Execution Petitions were filed by the appellant and the respondent and his family members also filed Execution Applications pending the Execution Petitions for various relief. The respondent has filed REA No. 4 of 2013 in REP No. 10 of 2003 on 18.03.2013 under Section 47 of Code of Civil Procedure by contending that as the Family Court has already dissolved the marriage between the appellant and the respondent, for execution of the decree in FCOP No. 89 of 1999 for restitution of conjugal rights, the family properties of the respondent need not be attached.

30. By placing reliance on the above proceedings, the learned Senior counsel for the respondent/husband would contend that the appellant/wife has repeatedly filed petitions after petitions and he was made and compelled to defend those vexatious proceedings, thereby, he was subjected to sheer harassment. The learned Senior counsel for the respondent,

therefore, would contend that the repeated filing of the petitions before the Court against the respondent and his family members are nothing short of an attempt on the part of the appellant to inflict matrimonial cruelty on him and therefore, the Court below is right in granting a decree of divorce on the ground of cruelty.

31. We are not in a position to accept the aforesaid submissions of the learned Senior counsel for the respondent/husband. A cursory perusal of the aforesaid applications, petitions, appeals or revisions filed thereof would only indicate that the appellant and the respondent have sought redressal through competent Court of law and mere filing of those petitions cannot be said to be an attempt to harass the other spouse. In fact, the respondent also filed several petition (s) against the appellant before the Competent Court of law. A litigant has every right to file a petition before the competent Court of law and he or she cannot be prevented from filing a petition or application. At the same time, if the application or petition is found to be vexatious, the Court has every right to reject the relief sought for therein. Thus, mere filing of the petition to seek redressal cannot be construed as an attempt on the part of the appellant to cause harassment or mental agony to the respondent. The Family Court ought not to have granted a decree of divorce on the ground that the respondent was subjected to matrimonial cruelty by reason of the appellant repeatedly filing petition or applications against the respondent and his family members. We answer Question No.2 accordingly.

32. Point No.4:- It is the contention of the learned Senior counsel for the respondent/husband that the appellant and the respondent are residing separately for more than 3 decades. The appellant and the respondent are residing separately for a longer period without there being any physical relationship and therefore, such long and separate living of appellant and respondent for about 35 years had made it practically impossible for a re-union. This contention of the learned Senior counsel for the respondent cannot be countenanced for the reason that the appellant herein has filed FCOP No. 89 of 2003 before the Family Court under Section 9 of The Hindu Marriage Act for restitution of conjugal rights. Admittedly, FCOP No. 89 of 1999 was decreed exparte 09.07.2003. In spite of the order passed in FCOP No. 89 of 1999, the respondent failed to take the appellant back to the matrimonial home, Subsequently, to set aside the exparte order dated 09.07.2003, the respondent has filed I.A. No. 388 of 2004 seeking to condone the delay of 377 days in filing the petition to set aside the exparte decree of restitution of conjugal rights and also another petition in I.A. No. 389 of 2004 to set aside the exparte decree itself. The Family Court dismissed both the applications. Aggrieved by the same, the respondent filed two revision petitions before this Court in CRP (PD) No. 922 and 923 of 2005 and the Civil Revision Petitions were dismissed on 17.02.2005. Thus, it could be evident that the order passed on 09.07.2003 in HMOP No. 89 of 1999 before the

Family Court by the appellant under Section 9 of The Hindu Marriage Act for restitution of conjugal rights has reached a finality. While so, it is futile on the part of the respondent to contend that both the appellant and the respondent are residing separately and on the ground of desertion of the appellant, the marriage solemnised between them has to be dissolved. The respondent, after passing of an order in HMOP No. 89 of 2003 ought to have taken the appellant back to the matrimonial home, but he did not do so. In such circumstances, it cannot be said that the desertion of the appellant from the matrimonial company is without just or sufficient cause. Therefore, we hold that the long and continued separation of the appellant and the respondent cannot be a ground to dissolve their matrimonial tie in the given facts and circumstance of this case.

33. Point No.5:- Whether the appellant is entitled for enhancement of the maintenance amount over and above Rs.10 lakhs awarded by the Family Court in FCOP No. 82 of 2008.

34. The learned Senior counsel for the appellant, by inviting the attention of this Court the order passed in MC No. 8 of 1990 filed by the appellant and the various applications filed thereof, would contend that respondent had successfully evaded payment of the maintenance amount awarded by the Court below and this conduct of the respondent was deprecated by this Court while dismissing the CRP No. 18615 of 2010 filed by the respondent to quash the proceedings in CMP No. 192 of 2004 in MC No. 8 of 1990. It is further contended by the learned Senior counsel for the appellant that the Family Court, without any basis, had directed the respondent to pay Rs.10 lakhs towards permanent alimony. While awarding the sum of Rs.10 lakhs, the Family Court did not take into account the financial capability and capacity of the respondent to pay more amount. It was specifically pleaded by the appellant before the Family Court that the respondent is in possession of immovable properties worth about Rs.10 crores,, as could be evident from Ex.R26 filed in CMP No. 192 of 2004 in MC No. 8 of 1990, while so, the Family Court, without regard to the financial condition of the appellant, had awarded a mere sum of Rs.10 lakhs as permanent alimony and it has to be enhanced.

35. Repudiating the averments made by the learned Senior counsel for the appellant, the learned Senior counsel for the respondent would contend that as directed by the Family Court in the judgment dated 27.06.2011 in FCOP No. 82 of 2008, the respondent deposited the sum of Rs.10 lakhs on 23.09.2011. The appellant, questioning the correctness of the Judgment dated 27.06.2011 in so far as it relates to dissolution of the marriage on the ground of desertion and cruelty, filed CMA No. 3294 of 2011 on 11.10.2011. During the pendency of the CMA No. 3294 of 2011, the appellant withdrew the entire amount of Rs.10 lakhs on 27.03.2012. After withdrawal of the amount, the appellant has filed CMA No. 102 of 2013 for enhancement of the maintenance amount. Having withdrawn the entire amount during the pendency of CMA No. 3294 of 2011, the appellant is estopped from filing CMA No. 102 of 2013 for enhancement of the maintenance amount and the appellant cannot be allowed to approbate and reprobate.

36. Admittedly, due to the wedlock between the appellant and the respondent, there were no children born to them. The appellant and the respondent are residing separately for the past 25 years. According to the appellant, she has no independent source of income to maintain herself. During the prolonged legal battle which emanated between the appellant and the respondent for the past 35 years, various orders have been passed by the Family Court at the instance of the appellant herein directing the respondent to pay maintenance amount to the appellant. Even though the order of maintenance were defended by the respondent, ultimately, he remitted the arrears of maintenance amount from time to time. We also take into account that the respondent is now 62 years old and the appellant is 54 years. Pursuant to the direction of the Family Court, as a condition precedent for grant of dissolution of the marriage, the respondent had deposited the sum of Rs.10 lakhs which was also withdrawn by the appellant. We feel that the sum of Rs.10 lakhs awarded by the Family Court will be a just and sufficient amount to maintain the appellant. Even though it is contended by the learned Senior counsel for the appellant that the respondent is capable of paying more amount and he had the wherewithal and resourceful enough to pay more amount, we are of the view that the object of granting alimony to the spouse is to enable her to maintain herself to the rest of the life. The maintenance amount cannot be ordered to elevate the status of the wife on par with the financial status of the husband. While considering grant of maintenance, regard be had to the just and reasonable requirement of the appellant to maintain herself. In such view of the matter, we are of the view that the sum of Rs.10 lakhs awarded by the Family Court, and which was withdrawn by the appellant, will be a just and fair amount towards permanent alimony payable to the appellant and we are not inclined to direct the respondent to pay any further amount towards maintenance to the appellant. Furthermore, as we are setting aside the decree of divorce granted by the Family Court, the question of awarding further maintenance will not arise.

37. It is contended by the learned Senior counsel for the appellant that during the pendency of these appeals, the respondent had contracted a second marriage and was living with another lady thereby he prevented the appellant to resume the matrimonial relationship with him. It is needless to mention that the respondent would have contracted the second marriage during the pendency of these appeals thinking that there is possibility of dismissal of these appeals by reason of the long and separate living of the appellant and the respondent, but unfortunately, we could not consider the mere long and separate living of the appellant and the respondent as a ground for dissolving the marriage solemnised between them. Hence, we are constrained to add that the second marriage contracted by the respondent during the pendency of these appeals is at his own risk. In any event, when we have decided the appeals on legal grounds, the factum of second marriage committed by the respondent has no significance to be attached. In this regard, useful reference could be made to the decision of the

Honourable Supreme Court in (Savitri Pandey vs. Prem Chandra Pandey) reported in (2002 (2) SCC 73 wherein it was held that the solemnisation of second marriage during the pendency of the appeal is at the own risk and choice of the appellant and that no person can be permitted to flout the course of justice by his or her overt and covert acts. In fact, in the said Judgment in Savitri Pandey's case, the Honourable Supreme Court referred to the decision rendered in Ms. Jorden Diengdeh vs. S.S. Chopra AIR 1985 SC 935 wherein it was observed as follows:

"It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases.... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken. We suggest that the time has come for the intervention of legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves."

38. Thus, it is evident that even in the year 1985, the Honourable Supreme Court has reiterated the need for suitable amendment to the Marriage or divorce laws by including 'irretrievable breakdown of marriage' as one of the grounds for dissolution of the marriage between the couple. Unfortunately, till this date, necessary legislation has not been passed to include 'irretrievable breakdown of marriage' as one of the grounds for dissolution of the marriage. In the absence of any such legislative intervention, as observed by the Honourable Supreme Court, this Court is not inclined to uphold the decree of divorce granted by the Family Court on the sole ground that the matrimonial relationship between the appellant and the respondent had broken irretrievably, since they are residing separately for the past 25 years and that the respondent had contracted a second marriage during the pendency of these appeals.

39. In the result, the Order and Decree dated 27.06.2011 passed in F.C.O.P. No. 82 of 2008 on the file of Family Court, Salem be and hereby is set aside and dissolution of the marriage solemnised between the appellant and the respondent on the ground of cruelty and desertion. Consequently, CMA No. 3294 of 2011 is allowed. Resultantly, CMA No. 102 of 2013 filed by the appellant for enhancement of maintenance be and hereby is dismissed. No costs. Consequently, connected miscellaneous petition (s) stand closed.

rsh

Sd/-

Assistant Registrar(CS VIII)

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CMA No. 3294 of 2011
CMA No. 102 of 2013



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