

IN THE HIGH COURT OF JUDICATURE AT MADRAS**Reserved on : 01.11.2018****Delivered on : 21.12.2018****Coram****THE HONOURABLE MS. JUSTICE P.T. ASHA****C.R.P.(PD).No.2160 of 2011**

S.N.Hamsapriya ... Petitioner

Versus

T.R. Krishnamurthy ...Respondent

Prayer: This Civil Revision Petition is filed under Article 227 of the Constitution of India, against H.M.O.P.No.1216 of 2009 on the file of the District Family Judge of Coimbatore, seeking struck off the same from its file.

For Petitioner : Mr. R. Nagasundaram

For Respondent : Mr. N. Jothi for M.C. Govindan

ORDER

This Civil Revision Petition is filed to strike off H.M.O.P.No.1216 of 2009 on the file of the District Family Judge, Coimbatore, on the ground that the same is an abuse of process of law and is a case of re-litigation.

2. The facts in brief necessary for disposing of this Civil Revision Petition are as follows:-

- The revision petitioner and the respondent had got married on 18.04.1997 as per the Hindu Rites and Customs and from and out of this wedlock, a female child Kausika was born on 14.01.1998. The respondent herein is a serving Army Officer. Difference of opinion erupted between them right from the beginning and after the birth of the child, the relationship soured further and the respondent herein had filed H.M.O.P.No.338 of 2005 on the file of the Family Court Coimbatore, seeking divorce on the ground of desertion.
- It was the case of the respondent that after the birth of the child the revision petitioner started behaving in an irresponsible manner both towards the respondent herein as well as their child and she constantly threatened to commit suicide. The revision petitioner was totally indifferent even to the child and she was not taking care of the child. The behaviour of the revision petitioner caused a great deal of mental agony and harassment to the respondent and in fact, the harmony at home was in total shambles. The attempts of the elders to reconcile between the two also did not yield the desired result, which constrained the petitioner to file the petition for divorce on the ground of

desertion in HMOP.No.338 of 2005.

- The revision petitioner had resisted this H.M.O.P. by inter-alia denying the allegations put forward by the respondent herein and contending that she and this respondent had not lived together for any continuous period as the respondent was constantly posted in sensitive posts and whenever he was posted at a place with temporary quarters, she had stayed with him. She would further contend that the allegations made in the H.M.O.P. was totally false. She had contended that she was never welcome in her matrimonial home and nor did she stay there as the parents of the respondent herein had never accepted her. So the allegations that she had left the matrimonial home is totally false.
- The learned Family Judge, Coimbatore, by the order dated 21.03.2006, dismissed the said petition, stating that the respondent herein had not proved his case that the petitioner had deserted him and there was no cause of action for filing of the said petition.

4. Challenging the said order, the respondent herein had filed C.M.A.No.2118/2006 on the file of this Court, which was ultimately withdrawn by him on 11.12.2009. Within 5 days of the withdrawal of

the appeal, the respondent herein filed H.M.O.P.No.1216/2009 on the file of the Family Court, Coimbatore for divorce on the ground of cruelty. The respondent had elaborated on the pleadings made in HMOP.No.338 of 2005 by listing out the various instances which caused a great deal of hardship and mental agony to the respondent. The following were the allegations made by the respondent in the petition in H.M.O.P.NO.1216 of 2009:-

- On the first day of marriage, the revision petitioner had quarreled with the respondent on the issue of giving money to her mother.
- When the respondent had requested the revision petitioner to go to his parents house for seeking their blessings, the respondent refused and threatened to commit suicide.
- In June 1997, the respondent had reported for duty at Jammu and Kashmir and on 14.01.1998 his daughter Kausika was born and when the petitioner had wanted to take his wife and child to his quarters at Jammu and Kashmir the revision petitioner bluntly refused. Thereafter, it was in the year 1999 that he was able to take his family to Jabulpur where the revision petitioner stayed for 8 months and then, insisted that she should return to Coimbatore.
- At Coimbatore the revision petitioner insisted on staying at her

parents place.

- In March 2002, the respondent took his wife and daughter to Sikkim and they were there with him for 4 months
- From the day of the marriage till the day of their separation, the respondent and the revision petitioner lived together sporadically only for 23 months.
- The revision petitioner suffered from a superiority complex and was always in the habit of the shaming the respondent.
- Though the revision petitioner lived in Coimbatore ,she never agreed to visit the respondent's parents or brother
- His attempts to take the revision petitioner and his daughter along with him were always discouraged by the revision petitioner. **(Details and period of this attempts are not given)**
- The petitioner's attempt was to isolate the respondent from his friends and family
- The revision petitioner started poisoning the daughter against him.
- The revision petitioner had also caused physical harm to the respondent
- The only new pleading that was made was that the respondent had made several attempts between the years from 2006 to 2009 to reunite with the respondent. However ,all his attempts

were in vain. On the basis of the above, he sought for divorce on the ground of cruelty. Incidentally, the petition also contained pleadings with reference to desertion.

- On the revision petitioner being served with summons in the above H.M.O.P., the revision petitioner had entered appearance. Since the respondent was not maintaining her and her minor daughter, she had filed I.A.No.389 of 2010, seeking maintenance from the respondent. This was contested by the respondent. Considering the fact that the subsequent HMOP was also on the same cause of action as in the earlier petition, the revision petitioner was advised to move this Court under Article 227 of the Constitution of India, for striking off HMOP.No.1216 of 2009 from the file of the District Family Court, Coimbatore.

5. The following are the main grounds on which the petitioner has moved this Court: सत्यमेव जयते

a) that the respondent has wilfully suppressed the earlier petition in HMOP.No.338 of 2005 filed by him before the District Family Court, Coimbatore, its dismissal after contest, the appeal in CMA 2118 of 2006 and its withdrawal on 11.12.2009.

b) that though the original petition was on the ground of desertion and the present petition is on the ground of cruelty the narration of facts are the same for both the petitions. In the earlier petition the pleadings were brief and in the subsequent one pleadings have been elaborately given.

6. It is seen that the notice in the above Civil Revision Petition was served on the petitioner's Coimbatore address on 09.07.2011 and documents have been filed to show that the respondent had sent the vakalat to his counsel to enter appearance in the present CRP on 15.07.2011. However, the counsel had not entered appearance and therefore the CRP was ordered *exparte* on 01.08.2011.

7. The petitioner has subsequently filed an application for restoring the revision to file and by an order dated 12.12.2015, this Court was pleased to restore the revision to file. Thereafter, this Court had heard the arguments of counsel on either side.

8. Heard Mr. Nagasundaram, learned counsel for the petitioners. He would submit that H.M.O.P.No.1216 of 2009 has been filed on the very same pleadings, on which H.M.O.P.No.338 of 2005 has been filed though H.M.O.P.No.1216 of 2009 has been filed with more details. He

would contend that the grounds on which the divorce is sought for in the two petitions, are different, but, however the pleadings, which form the basis for the ground are the same. Both petitions ultimately seek to dissolve the marriage.

9. He further argued that the respondent is guilty of re litigating since even in the earlier H.M.O.P.No.328 of 2005 allegations of cruelty had been made though the petition had been filed only on the ground of desertion. The learned counsel would argue that the respondent has also suppressed the earlier proceedings and this suppression amounts to an abuse of process of law. He would argue that the petition deserves to be struck off from the file on the ground of abuse of process.

10. The counsel for the petitioner has relied upon the following Judgements in support of his arguments:-

- 2017 (3)-LW 443,[P. Srikanth vs. R. Venkatesan and others]
- (1998) 3 Supreme Court Cases 573 [K.K.Modi Vs. K.N.Modi and others]
- (2010) 2 Supreme Court Cases 114 [Dalip Singh Vs. State of Uttar Pradesh and others]
- (2010) 4 Supreme Court Cases 728 [Oswal Fats and Oils Limited Vs. Additional Commissioner, (Administration) Bareilly Divison,

Bareilly and others]

- (2009) 12 Supreme Court Cases 40 [Umanath Pandey and others Vs. State of Uttar Pradesh and another]
- 2003 (4) CTC 347 [K. Swaminathan Vs. Srinivasagam]

11. Per contra, Mr. N. Jothi learned counsel appearing on behalf of the respondent would argue that the respondent is not guilty of suppression since the case of suppression would arise if the other party is not aware of a particular point or the fact. He would further argue that the respondent is not guilty of re-litigating. He would contend that cruelty is a continuing cause of action and therefore, the petition is very much maintainable. He had also raised the issue the maintainability of the petition under Article 227 of Constitution of India.

On the issue of suppression, the learned counsel for the respondent has relied on the following cases:-

- AIR 1960 MP 323 [S. Chatterjee Vs. Dr. K.L.Bhave and other]
- 1989 (4) SCC 275 [Padmini Products Vs. Collector of Central Excise]
- 1997 (10) SCC 538 [Collector of Customs, Calcutta Vs. TIN Plate Co. of India Ltd.]
- 2007 (8) SCC 89 [Commissioner of Central Excise, Nagpur.. Vs. Ballarpur Industries Ltd.]
- 2009 (7) SCC 186 [Chandrakant Hargovindas Shah Vs. Deputy Commissioner of Police and another]

- 2009 (8) SCC 316 [Satwant Kaur Sandhu Vs. New India Assurance Company Limited]

For the issue of re litigation, the following Judgments have been relied upon:-

- 1998 (3) SCC 573 [K.K. Modi Vs.K.N.Modi and others]
- 1998 (1) CTC 66 [Ranipet Municipality Rep. By its Corner and Special Officer, Ranipet Vs. M. Shamsheerkhan]
- AIR 1998 GAU 107 [Basudeb Nath Vs. Smt. Díptikona Nath]
- AIR 2007 Raj 93 [Shyam Lal Vs. Smt. Leelawat]
- AIR2006 MP 51 [Sunder Lal Soni Vs. Smt. Namita Jai]
- CRP(PD)No.1427 of 2013 [Dr.G.Sankara Vadivoo vs. S. Palavannam]

On the maintainability of petition under Article 227 of the Constitution of India, he had relied upon the following Judgments:-

- 2011 (1) CTC 854 [Shalini Shyam Shetty and another Vs. Rajendra Shankar Patil]
- 2014 (6) SCC 508 [Jacky Vs. Tiny @ Antony and others]
- 2015 (3) CTC 485 [T.K. Chithran and another Vs. C. Samsari @ Chithran and others]
- 2016 (2) Law weekly 311 [K. Sekar Vs. M. Dhivya]
- 2017 (1) MWN (Civil) 337 [Ramalingam and another Vs. Selvam and others]

13. This Court heard the learned counsels on either side and

carefully considered their submissions and perused the Judgments cited on either side, including the materials placed on record.

14. This is an unfortunate case, where a man, that too a highly ranked Officer in the Indian Army, attached to one of the oldest and highly decorated Regiment, has been filing one petition after another to get out of his legally wedded marriage. It is seen that he had first moved a petition in HMOP.No.338 of 2005 before the Family Court, Coimbatore, seeking divorce, no doubt on the ground of desertion. However, the pleadings in the said petition primarily deal with instances of cruelty that the petitioner is said to have inflicted on the respondent herein.

15. The issue before this Court is whether the second petition for divorce in HMOP.No.1216 of 2009, on the file of the learned District Family Judge, Coimbatore, amounts to re litigation and thereby, an abuse of process of law entailing the same to be struck off the files.

16. Before proceeding to discuss the issue on hand, this Court would like to place on record certain facts relevant for the disposal of this Revision. The revision petitioner and the respondent, who are cousins (the respondent being the paternal uncle's son of the revision petitioner) got married at Coimbatore on 18.04.1997. At the time of

the marriage, the husband was a Lance Naik. It also appears that the respondent has been constantly posted in various places where there was no permanent quarters available. In fact within 2 months of marriage he had been posted to Jammu and Kashmir. It is also seen from the counter filed by the revision petitioner in the earlier HMOP that between the years 1999 and 2005, the revision petitioner and the respondent has lived together wherever temporary quarters had been allotted to the respondent as detailed below:-

- “(a) 1999-2000- 10 months at Jabalpur Madhyapradesh Family quarters.
- (b) 2002-2003- 4 months stay at Sikkim in temporary Quarters
- (c) 2003-2004- 3 months stay at Mhow in Madhya Pradesh family quarters.
- (d) 2004-2005- 22 June to 14 April, 2005 stayed at Pune in Maharashtra family quarters.”

17. It is also seen that the daughter Kausika was born to them on 04.01.1998. There appeared to be some marital discord, which resulted in the respondent herein invoking the jurisdiction of the Family Court by filing HMOP NO.338 of 2005 on the file of the Family Court, Coimbatore for divorce on the ground of desertion. It is to be noted the HMOP No.338 of 2005 was filed within two months of the revision petitioner returning to Coimbatore she and her daughter had spent nearly a year with the respondent at Pune. The pleadings in the said H.M.O.P.No..338 of 2005 are extracted as under:-

- a) The revision petitioner from the birth of the child i.e., from 04.01.1998 has been behaving in an irresponsible manner with the respondent as well as the child.
- b) The petitioner had threatened to commit suicide if questioned by the respondent.
- c) The petitioner was ill treating and abusing the child
- d) The petitioner was not taking care of the needs of the child and would torture the child by destroying the food prepared by the respondent and awakening the baby in a rude manner while the child was in deep slumber.
- e) The revision petitioner was arrogant, uncivilized and indisciplined and thereby, the respondent and the child have been put to innumerable hardship and mental turmoil.
- f) The wife had tarnished the reputations, personality etc., of the respondent from 27.06.2002.
- g) The revision petitioner left the matrimonial home and is residing with her parents and there is no possibility of a reunion.

18. Incidentally, there is no averment in this petition as to the steps taken by the revision petitioner to rejoin his wife and also the

respondent has nowhere stated that the revision petitioner hated the respondent's job with the Army, and that she wanted him to give up his army service. The petitioner, who claims that his harmony has been destroyed from 27.06.2002, has lived with his wife in the temporary quarters between 2002 and 2003 for 4 months and for 3 months in 2003 and 2004 and for nearly a year in 2004-2005.

19. The above petition was resisted by the revision petitioner, wherein she had contended that there was no question of her leaving her matrimonial home since right from the day of her marriage, she had never lived with her in-laws as they were not ready to accept her. The revision petitioner had in a very clear terms stated that she was not willing for a divorce and she wanted to live with her husband and her child. The revision petitioner has also contended that it was the respondent who had put the child, who was only aged about 7 years, into a residential school Monarch International School at Pannimadai, Coimbatore, though the child hated staying alone in a residential school. The petitioner also did not like to leave her baby daughter in a boarding school. Despite this the respondent insisted on putting the child in a residential school.

20. It is further seen that the learned Family Judge, Coimbatore

by her order dated 21.03.2006 was pleased to dismiss the said HMOP on the ground that the petitioner has not proved any of the allegations contained in his petition and that he has also not proved that the revision petitioner has deserted him. It is also seen from this Judgment that PW.2, the uncle of the revision petitioner and the respondent had added to the pleadings of the respondent in HMOP No.338 of 2005 by introducing instances like removing the 'tali' and throwing it on the respondent, frequent quarrels taking place between the petitioner and the respondent, a Panchayat held to bring about the reconciliation etc.,(such a statement was never made by the petitioner) None of these had been stated by the respondent in his petition. The learned Judge has observed that there was no step taken by the respondent for reunion and therefore he had not proved the desertion. The learned Judge has also taken note of the evidence of PW2 who had stated that it was on the instructions of the respondent, he had again left the revision petitioner at her house.

21. This order was taken up on appeal by the respondent in CMA. No. 2118 of 2006. This appeal was withdrawn by the respondent on 11.12.2009, without seeking liberty to file a fresh petition. However, within 4 days from the date of withdrawing the said appeal, the respondent had filed HMOP.No.1216/2009 and the pleadings in

HMOP.No.1216/2009 also contains the same pleadings, albeit with elaborate details of the instances of cruelty and it also contains pleadings with reference to desertion.

22. In this petition, for the first time, the respondent has stated that the revision petitioner did not like the army and that she wanted the revision petitioner to leave from the army services. Such a pleading was not made in the first petition, HMOP.No.338/2005. He has also included the various instances that PW2 had stated during his evidence in HMOP 338/2005 in this second petition but the basis of the pleadings remained the same. The respondent, who has been contesting HMOP 338/2005 right up to this Court till 11.12.2009 and thereafter filed HMOP No.1216/2009, on 15.12.2009 would contend that he has been taking steps to reunite with the revision petitioner between the years 2006 to 2009. This statement is not supported by evidence. What can be inferred from the respondents conduct is that he wants to opt out of the matrimonial relationship and for this purpose he has been improving upon the case projected by him in the first round. It is also seen that no new cause of action has been pleaded by the respondent in HMOP No.1216 of 2009. The petition in HMOP.No1216 of 2009 is but an astute drafting as the respondent had sought to introduce a plea that his attempts to reunite between 2006

to 2009 had ended in a failure. As already narrated supra the respondent was actively contesting CMA.NO.2118 of 2006 till 11.12.2009 and on 16.12.2009 the present petition was filed and therefore the statement made by the respondent appears farcical.

23. It is seen that the respondent has put the revision petitioner through the ignominy of divorce proceedings right from the year 2005, after living together as husband and wife only for a period of 2 years, short by a month. The respondent has dragged this proceedings for divorce for a period of 13 years, the first petition had ended in a dismissal in the year 2006 which was challenged by the respondent before this Court and the entire proceedings lasted for over 6 years in this Court and within 4 days of the withdrawal of CMA 2118 of 2006, the respondent has filed the present HMOP.No.1216 of 2009, which is the subject matter of this revision. In the present petition, the revision petitioner has attempted to get over the finding of the Family Court Judge, Coimbatore in the earlier proceedings that the petition is lacking in pleadings. The present petition is nothing but a case of re litigation. Further, the respondent who has gone into very great details of describing each and instances of cruelty and desertion has omitted to even refer to the earlier proceedings, viz; HMOP.No.338 of 2005 which has ended in a dismissal and about the fact that he had, just 4

days prior to the filing of the HMOP, withdrawn the appeal filed against the earlier HMOP. It is also seen borne in mind that when the respondent had filed HMOP No.338 of 2005 the grounds for seeking divorce on the ground of cruelty was also pleaded but for reason best known, the respondent chose to seek divorce only on the ground of desertion. No new cause of action after the earlier HMOP has been pleaded in the present petition. This in the opinion of the Court would amount to a case of suppression and re litigation.

24. In the instant case, the respondent had earlier filed an application for divorce in which he had pleaded both cruelty as well as desertion and the dismissal of the said petition was taken up an appeal to this Court and the respondent had withdrawn the said appeal, the respondent had not obtained leave of the Court to file a fresh suit in respect of the subject matter or part of the claim. Had the respondent given details about his earlier petition HMOP 338 of 2005 that the same had been dismissed and the appeal filed by him has been withdrawn, the subsequent original petition may not have been numbered.

25. The learned counsel for the respondent would argue that the cause of action is different in both the petitions and the ground on

which the relief was claimed is different. However, a conjoint reading of the pleadings in both the petitions would clearly indicate that in the earlier petition though relief is claimed on the ground of desertion it also contained ingredients of cruelty and in the second petition though relief has been claimed on the basis of cruelty the petition contains ingredients of desertion as well. Therefore, it is a clear case of re litigation and having withdrawn the earlier petition without liberty a subsequent suit is clearly barred under the provision of the Order 23 Rule (1) (4) (b) of the Code of Civil Procedure.

26. This Court exercising jurisdiction under Article 227 of the Constitution of India cannot over look the abuse of process of Court by the respondent and if this is overlooked, it would amount to this Court abdicating its duty in ensuring that the petitioner/wife does not suffer the agony of once again submitting herself to trial as the revision petitioner and her child have been before the Court from the year 2005.

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26. The Hon'ble Supreme Court in its decision reported in 1998 3 SCC 573 (K.K.Modi Vs. K.N.Modi) when dealing with a case of re litigation has observed as follows:

" One of the examples cited as an abuse of the

process of the Court is relitigation. It is an abuse of the process of the Court and contrary to Justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred as res judicata. But if the same issue is sought to be reagitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, as a spurious claim being made in litigation may also in a given set of facts amount to an abuse of process of the Court. Frivoulous or vexations proceedings may also amount to an abuse of the process of the Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of public and the Court from being wasted."

27. The Hon'ble Supreme Court had relied on the judgment reported in **Mckenny Vs. Chief Constable of West Midlands Police force (1980)** where the Court of appeal in England in one case has struck out plea as a case of abuse of process of Court; that was the case were the party was relitiigating an issue which already been

decided against him, in an earlier proceedings as in the instant case.

28. The decision of the Hon'ble Supreme Court in K.K.Modi has been quoted with approval in many of the subsequent judgements by our Hon'ble Court. In the judgement reported in **2000 (3) CTC pg.74 (Seeni alias Sundarammal Vs. Ramasamy Poosari)** while striking of the plaint the Learned Judge observed as follows"

" Process of Court must be used bona fide and properly and must not be misused or abused. It is the duty of the Court to prevent improper use of the machinery. The Court has to see that it is not used as a means of oppression and the process of litigation is free from vexatiousness. The categories of conduct rendering a claim frivolous, vexatious or an abuse of process would depend upon the relevant circumstances. But, it has to be judged from the angle of interest of justice and public policy."

29. In another Judgment reported in **2005 (4) L.W. 206 (The Member Concern Department of Post, Government of India Vs Ms. Annapoorni and others)** this Court has observed:

" One of the examples cited as an abuse of process of

the Court is relitigation. It is an abuse of the process of the Court and contrary to Justice and public policy for a party to relitigate the same issue which has already been tried and decided earlier against him. The reagitation may or may not be barred s res judicata. But, if the same issue is sought to be reagitated, it also amounts to an abuse of process of the Court."

30. The Learned Judge has gone on to observe that

"The Court then has the power to stop such proceedings summarily and prevent the time of public and the Court from being wasted."

This Court in an earlier judgment in CRP NO.4172 of 2010 has also followed the dicta laid in the above judgments and had struck off the original petition pending before the learned II Additional Family Judge, Chennai.

31. The learned counsel for the respondent had questioned the maintainability of the petition under Article 227 of the Constitution of India. The answer to this argument is found in the judgment of this Court reported in 2003 CRT **pg.74 (Seeni alias Sundarammal Vs. Ramasamy Poosari)** and 2005 (4) LW 206[The Member

concern Department of post, Government of India Vs. M/s Annapoorani and others] where this Court has held that where there is an abuse of process of the Court or a re-litigation the Court shall exercise its powers to stop the proceedings summarily.

32. Considering the fact that the respondent herein is only re litigating and relying upon the aforesaid judgments, the petition filed by the respondent is directed to be struck off from the file.

33. In the result, the Civil Revision Petition is allowed, as prayed for and H.M.O.P.No1216/2009 is directed to be struck off from the file of the District Family Judge, Coimbatore. No costs.

21.12.2018

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P.T.ASHA, J,

jrs

To

The learned Judge,
The District Family Court,
Coimbatore.



Pre-Delivery Order in
CRP.(PD).No.2160 of 2011

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