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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 26.03.2018

PRONOUNCED ON : 14.09.2018

CORAM

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

C.M.S.A (MD) Nos.1 and 2 of 2016

and

C.M.P. (MD) .Nos.852 and 853 of 2016

C.M.S.A. (MD) .No.1 of 2016:-

E.Nagalakshmi@Sharmila ... Appellant/Respondent/Respondent

Vs.

M.Karthick ... Respondent/Appellant/Petitioner

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act read with 100 of C.P.C against the judgment and decree passed in H.M.C.M.A.No.5 of 2014 on the file of the Additional District Court, Virudhunagar dated 11.12.2015 which was reversed in H.M.O.P.No.111 of 2013 of the file of the Sub-Court, Virudhunagar, dated 12.09.2014.

C.M.S.A. (MD) .No.2 of 2016:-

E.Nagalakshmi @ Sharmila ... Appellant/Respondent/Petitioner

Vs.

M.Karthick ... Respondent/Appellant/Respondent

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act read with 100 of C.P.C against the judgment and decree passed in H.M.C.M.A.No.6 of 2014 on the file of the Additional District Court, Virudhunagar dated 11.12.2015 which was reversed in H.M.O.P.No.103 of 2013 of the file of the Sub-Court, Virudhunagar, dated 12.09.2014.

For Appellant :Mr.C.Vakeeswaran

For Respondent :Mr.R.Suriyanarayanan

**COMMON JUDGMENT**

Both the Civil Miscellaneous Second Appeals have been filed against the decree and judgments dated 11.12.2015 in H.M.C.M.A.Nos.5 & 6 of 2014 Additional District Court, Virudhunagar reversing the decree and judgments dated 12.09.2014 in H.M.O.P.Nos.111 and 103 of 2013 of the file of the Sub-Court, Virudhunagar.

2. Since the issues are inter-woven to each other, both the appeals are taken up together and decided by this common judgment.

3. This appellant herein is the wife of the respondent herein. For the sake of convenience, the parties are referred to as per the rank mentioned in the civil miscellaneous second appeals.

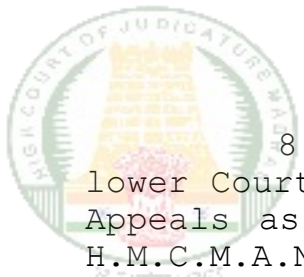
4. Sans unnecessary details, the facts are depicted below:-

4.1. The marriage between the appellant and the respondent was solemnised on 24.11.2010. Due to matrimonial dispute, the appellant herein left the matrimonial home on 27.01.2011 wherefrom the litigation sprouted out. To put it in a nutshell, originally, the respondent herein filed a Petition in H.M.O.P.No.597 of 2011 for divorce against his wife on the file of the Family Court, Madurai. During its pendency, the appellant herein filed a petition against this respondent in H.M.O.P.No.01/2013 for restitution of conjugal rights on the file of Sub-Court, Sankarankovil. Pursuant to the order passed by this Court vide TR.CMP(MD).No.75 of 2013 dated 30.10.2013, both the cases were transferred to the Sub-Court, Virudhunagar, wherein the case of the husband had been taken as H.M.O.P.No.111 of 2013 and the case of the wife, had been taken as H.M.O.P.No.103 of 2013 on the file of the Sub-Court, Virudhunagar. Considering the fact that the issue involved in both cases are between the husband and wife, both cases had been tried jointly by the lower Court and the evidence had been recorded in H.M.O.P.No.111 of 2013.

5. The trial Court after careful consideration allowed the restitution of conjugal rights filed by the wife vide its order dated 12.09.2014 in H.M.O.P.No.103/2013 and dismissed the divorce petition filed by the husband in H.M.O.P.No.111 of 2013.

6. Assailing over the findings of the trial Court, the husband preferred appeals in H.M.C.M.A.Nos.5 and 6 of 2014 on the file of Additional District court, Virudhunagar.

7. The lower appellate Court, after appreciating the evidence on record and relying upon the judgments of this Court as well as the Supreme Court tried both the petitions together and declared, that the marriage between the appellant and the respondent is null and void and further dismissed the petition filed by the appellant for restitution of conjugal rights.



8. Fulminating at the decision and findings of the lower Court, the wife has preferred the Civil Miscellaneous Second Appeals as against the decree and judgments dated 11.12.2015 in H.M.C.M.A.Nos.5 & 6 of 2014 Additional District Court, Virudhunagar for the relief stated supra.

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9. Learned counsel appearing for the appellant would submit that the marriage in dispute was registered under the provisions of the Tamil Nadu Registration of Marriage Act, 2009. The lower appellate Court failed to consider that the marriage was solemnized on 24.11.2010 and the appellant left the matrimonial home on 27.01.2011. So, the appellant and the respondent lived together only for two months. In between these months, the respondent worked in Chennai and therefore, there is no co-habitation between the appellant and the respondent and they hardly lived together only for a few days. In other words, there is no question of cruelty made by this appellant in between these few days as alleged by the respondent. The lower appellate Court without appreciating such vital point derailed the just and fair judgment made in H.M.O.P.No.103 and 111 of 2013 on the file of the Sub-Court, Virudhunagar dated 12.09.2014. Further, the lower appellate Court failed to consider that the husband examined himself and his father as a witness and there were no independent witnesses examined on his side in order to prove the cruelty made by the appellant/wife as alleged in his affidavits. It is also not dispute that the respondent/husband made intolerance of phone call to his own sister during night hours to upset the minds of the appellant/wife and the said factum was not disputed by the respondent/husband during the cross-examination. Being a newly married woman, it is common knowledge that the bridegroom would have got lot of dreams and expectations in her mind. Such natural expectations could not be fulfilled by the husband/respondent. In the case on hand, the husband/respondent did mental cruelty to his wife rather than alleging his wife/respondent. Added further, before the Court below, the appellant/wife examined herself and one independent witness, namely, S.Ramakrishnan on her side as R.W.2, who clearly deposed that the appellant/wife was willing to live with the respondent/husband, who in turn, refused to unite and all efforts to re-unite with the respondent/husband made futile. Mere wear and tear, skirmishes and regular fight between the spouses in day today family life shall not take the character of cruelty which does not contemplate under the Act and there must be specific and concrete instances of cruelty. Therefore, he prays for setting aside the order of the lower appellate Court and allowing these Civil Miscellaneous Second Appeal.

9.1. In support of his contentions, the learned counsel appearing on behalf of the appellant/wife has relied on the following judgments:-

<https://hcservices.ecourts.gov.in/hcservices/> **a. Gurbux Singh Vs Harminder Kaur reported in 2010(7) Supreme (SC) 980.**



***b.Ramachander Vs Ananta reported in 2015
2 JCR (SC) 235***

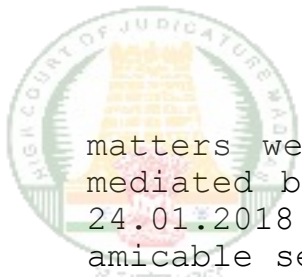
10. Repelling the contentions of the learned counsel appearing for the appellant/wife, the learned counsel appearing for the respondent/husband would submit that the second appeal in the matrimonial cases under Section 28 of the Hindu Marriage Act is maintainable only when there is a substantial question of law available under Section 100 CPC. In the case on hand, absolutely, there is no substantial question of law raised in the afore-said second appeals. The last fact finding Court, namely, the first appellate Court, after evaluation of the evidences very categorically found that there is non-cooperation for coitus on the part of the appellant and intolerance of phone talks with mother and sister and found that it created the mental cruelty to the respondent. The quarrel between the appellant and the respondent started during honeymoon and it ended on 27.01.2011, when she left the respondent without any valid reasons. The act of the appellant respondent is clear case of non-cooperation of coitus and it forms mental cruelty, as it is the main part of the marriage. Leaving the matrimonial home without any reason would cause stigma on the husband, when facing his friends and relatives, as there would be every chance of having bad impression on him that he might be impotent or man of worst character in treating the appellant. No doubt the appellant and the respondent lived as husband and wife for two months intermittently from the date of marriage on 24.11.2010 but have been separated for about seven years thereafter without coitus and hence, their marriage is irretrievably broken down. Drawing the attention of Section 13(1A) sub clause (ii) of the Hindu Marriage Act, he would submit that it is a fit case for granting divorce instead of restitution, as the date of restitution decree on 12.09.2014 but thereafter sofar no restitution of conjugal rights taken place between the parties.

11. In support of his contention, he relied on the following judgments:-

- (a) 2005-2-L.w.149, A.Jayachandra Vs. Aneel Kaur***
- (b) 2005(3) CTC 504, Govindaraju Vs Mariamman***
- (c) 2006(4) L.W.959, Sugani Vs Rameshwar Das & another***
- (d) 2006(13) SCC 272, Sujata Uday Patil Vs Uday Madhukar Patil***
- (g) 2007(4) SCC 511***
- (h) 2007(3) CTC 464, Samar Ghosh Vs. Jaya Ghosh***
- (i) 2010-3-L.W.10, Ravi kumar Vs Julmidevi***

12. Heard the learned counsel appearing for the appellant/wife and the learned counsel appearing for the respondent/husband and perused the materials available on record.

13. Notice to the respondent was ordered on 15.02.2016 and interim stay was granted on 29.01.2016. Thereafter, the



matters were listed on various occasions and the matters were mediated both by My Predecessor and before Me on 18.02.2016 and 24.01.2018 respectively in the Chambers for arriving at an amicable settlement between the parties. Despite best efforts, Our attempts to unite the couple through mediation failed. Now, the Court has no option but to deal with the matters as per the merits and provisions of the Act contained therein.

14. Though very many contentions and ground have been raised, to the case hand, it would be appropriate to say that as on today, the appellant has been living separately from the husband for the past seven years and the admitted fact is that the husband is not willing to live with her. Though strenuous efforts have been done to unite the couple, it went in vain. Therefore, where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such cases, it may lead to mental cruelty. Therefore, the appellant falls within the category of Section 13(1)(i)(a) of the Hindu Marriage Act.

15. Needless to mention that the law is only for the welfare of the people. Though this Court understand the anxiety of the appellant to unite with the respondent, when he refuses to do so, this Court has no other option. In the matrimonial cases, when hearts unite, the law has no role to play. But, when it refuses to unite, then the Court has no option but to proceed as per the law. In matrimonial matters, this court keeps in mind that it has to be very cautiously and sparingly to be applied before going to the extreme step of separating the couple. But, in the case on hand, the husband refuse to live with the appellant and it cannot compel to live with her. The applicability of law is more important in matrimonial related issues. The long separation between the husband and wife should have taught a lesson, despite the allegations levelled against each other, but it is not so. They should have longed for each other though the cases are pending against them. However, this Court could not see any such improvement despite Our personal efforts to unite them in the Chamber.

16. When I take into consideration the aforementioned factors along with an important circumstance that the parties have been admittedly living separately for more than seven years and in such cases, the irresistible conclusion would be that matrimonial bond has been ruptured beyond repair. The conduct of the parties also shows that the widening of the rift between them. Therefore, this is a clear case of irretrievable breakdown of marriage. In my considered view, it is impossible to preserve or save the marriage by force or coercion. Any further effort to keep it alive would



prove to be totally counterproductive.

17. In my considered opinion, the lower appellate Court in the impugned judgment after considering the most important and vital circumstance of the case in proper perspective granted the relief sought for by the husband/respondent. In my view, in a case of this nature, no other logical view is possible. In other words, on proper consideration of cumulative facts and circumstances of this case, the appellate court, applied the concept of mental cruelty as pointed out in paragraph No.18 of its judgment and accordingly, granted divorce to this appellant and the same is confirmed by this Court. In the backdrop of the spirit of the case, the lower appellate court, was fully justified in favouring with the respondent. Consequently, the impugned judgment of the appellate Court made in H.M.C.M.A.Nos. 5 &6 of 2014 on the file of the Additional District Court, Virudhunagar dated 11.12.2015 stands confirmed. These appeals are accordingly dismissed. However, in the facts and circumstances of the case, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-

Assistant Registrar (CS-III)

// True Copy //

Sub Assistant Registrar (CS-IV)

To,

- (i) The Additional District Judge, Virudhunagar
- (ii) The Sub-Judge, Virudhunagar.

Copy to:-

The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai. (2 copies)

+2 CC To MR.C.VAKEESWARAN, Advocate SR. NO. 84186

C.M.S.A (MD) Nos.1 and 2 of 2016
14.09.2018

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TR/RP/SAR-IV(22.11.2018) 6P 7C