

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Orders Reserved on 16.08.2019	Orders Pronounced on 23.09.2019
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CORAM:

THE HON'BLE MRS JUSTICE S. RAMATHILAGAM

C.M.P.No.11629 of 2019
in &

Rev.SR.No.45641 of 2019
in

Civil Miscellaneous Second Appeal No.26 of 2008

Kirubavathy ... Petitioner in CMP & Review

..vs..

P.Thulasiraman ... Respondent in CMP & Review

C.M.P.No.11629 of 2019 is filed praying to condone the delay of 78 days in filing the Review Petition to review the judgment and decree dated 06.06.2018 passed in CMSA No.26 of 2008.

Prayer in Rev.Appln.SR.45641 of 2019:

to review the Judgment and decree dated 6.6.2018 passed in CMSA No.26 of 2008 and allow the Revision Petition.

Prayer in CMSA No.26 of 2008:

Appeal filed under Section 28 of the Hindu Marriage Act r/w section 100 of CPC against the Judgment and Decree of the Principal District Judge, Vellore dated 21/09/2006 in HMCMA 3/2005 preferred against the Judgment and decree of the Subordinate Judge, Tirupathur, Vellore District dated 17/09/2004 in HMOP NO.30/1994.

For Petitioner : Mr.K.S.Gnanasambandan
in CMP & Review

For Respondent : Mr.V.Jeevagridharan
in CMP & Review

ORDER

This Miscellaneous Petition is filed praying to condone the delay of 78 days in filing the Review Petition to review the judgment and decree dated 06.06.2018 passed in CMSA No.26 of 2008.

2. The brief facts of the case of the respondent before the trial Court is that the respondent/husband and the petitioner/wife got married on 02.09.1981 according to Hindu Rites and their Family customs and they have no issues. The respondent/husband has stated that though, the petitioner/wife was 23 years old at the time of marriage, she has not attained puberty. Even after 1½ years, the petitioner/wife has not conceived and therefore, the respondent/husband has taken the petitioner/wife for medical check-up to C.M.C.Hospital, Vellore and only then, the fact that the petitioner/wife has not attained puberty came to be known by him and he was very much shocked and surprised and he felt that his life was put into misery. The respondent/husband has also stated that he has spent lakhs of money for the treatment. It is the averment of the respondent/husband that after the treatment, the petitioner/wife has made a fraudulent play that she has attained puberty and also conceived, for which, Dr.Charles also supported her. The real condition of the petitioner/wife was informed by Dr.Jegtha Venkatraman and it was also ascertained by G.G.Hospital, Dr.Kamala Selvaraj. Hence, the respondent/husband was forced to file a petition seeking for divorce. The respondent was also inculcated and desire of their family members for second marriage, whereas, the petitioner/wife has admitted the defect in her body chosen not fit for matrimonial life and out of that enmity, she left the matrimonial home with all the things, when the respondent/husband was not present. The respondent/husband has also suffered mental agony because of the petitioner/wife. The further activities of the petitioner/wife were not with his knowledge and she also created false impression as though the respondent/husband has married one Vidya, who is the daughter of respondent's Bank Manager Bala Subramaniam and criminal case is also registered and pending before the Court.

3. The petitioner/wife in her counter statement, denied the entire facts stated by the respondent/husband, but she admitted the fact that she was given treatment for getting the child. It is the grievance of the petitioner/wife that the respondent/husband married one Vidya, daughter of Bala Subramaniam and the marriage was held on 26.01.1994 at Elagiri Murugan Temple and got one male child also. The petitioner/wife has admitted the fact that she has informed the officials regarding the family dispute and also registering the case. Hence, the consideration placed before the Sub-Judge was that whether the respondent/husband was forced to file the petition for divorce on the grounds stated in his petition. The Trial Court after analyzing the evidence and also the documents placed before it, answered in favour of the respondent/husband with regard to the issue No.1 that the petitioner/wife is not fit for giving birth to a child. Regarding the other issue, whether, the petitioner/wife left the matrimonial home for a period of two years, the Trial Court has answered in favour of the respondent/husband.

4. Aggrieved against the Order passed by the Trial Court, the petitioner/wife has preferred H.M.C.M.A.No.3 of 2005 on the ground that the Trial Court has not considered the medical records and only based on the case of the respondent/husband, the Trial Court has passed the order of divorce.

5. The First Appellate Court after analysing the evidence especially the admission made by the respondent/husband that the respondent/husband has relationship with one Vidya and they got male child by name Adhithan, the said child was born on 27.02.1994 and another girl child also born. Even before the petitioner/wife left the matrimonial home, the respondent/ husband had relationship with Vidya and the said relationship was very much admitted by the respondent/husband. Hence, the observation of the First Appellate Court that when the respondent/husband has a relationship with the said Vidya, whose house is nearer to the respondent's/husband's house, there cannot be any chance for the petitioner/wife to live with the respondent/husband. The relationship with the respondent/ husband and one Vidya was admitted by P.W.2. Hence, because of the said relationship, the petitioner/wife left the matrimonial home. Hence, it is observed by the First Appellate Court that not because of the reason that the petitioner/wife is not fit for giving birth to the child but only because of the reason that he had developed relationship with one Vidya and has also got two children, the First Appellate Court has given a finding that the respondent/husband has not proved with sufficient evidence and documents that he is entitled to get divorce under the Hindu Marriage Act.

6. Aggrieved against the Order passed by the First Appellate Court, the respondent/husband has preferred the Civil Miscellaneous second appeal on the ground that the Trial Court has not considered the Medical report and refusal on the part of the wife to go for medical test. Further, admission of the wife that she herself took away all the things which amounts to cruelty was not considered. It is also the grievance of the respondent/husband that the Trial Court has not considered the evidence that the petitioner/wife has sent complaint to the higher authorities of her husband. The other ground is that the petitioner/wife has initiated criminal proceedings against the respondent/husband and further the criminal case against him ended in acquittal. The other ground strenuously stated by the respondent is that the petitioner/wife never made a statement in her proceedings or in her evidence that she is ready to live with the respondent/husband.

7. This Court, with the following observation, allowed the CMSA:-

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9. In view of the facts and the

circumstances and as observed from the evidence, both the appellant and the respondent are living separately from the year 1993. The respondent/wife left the matrimonial home when there was no atmosphere prevailing to continue her life with the appellant/husband. In such a situation, the evidence of the appellant/husband and his mother that the appellant is living with one Vidya and also got two children through her, will add further atmosphere not suitable to the respondent/wife. The present continuous proceedings for all these years will also create only aversion for both parties. This situation is also not favourable for both of them to live together.

10. It is also suggested and argued that all along they are leading their life separately and also there is no express willingness by the respondent to continue her matrimonial life with the appellant/husband. It is very difficult for them to renew their life as husband and wife. During all these years, the proceedings were going on only as opposite parties and neither of them expressed their willingness for re-union. From the above observations, it is just and proper that, the appeal has to be allowed. Accordingly, this Civil Miscellaneous Second Appeal is allowed. No costs."

8. Aggrieved against the said order passed in CMSA, the wife has filed this Review Application with a petition to condone the delay of 78 days in filing the Review Application.

9. The petitioner/wife in the Review Petition contended that she is preferring this Review Petition against the judgment and decree passed on 06.06.2018 in CMSA.No.26 of 2008. The petitioner contended that the respondent/husband filed HMOP No.30 of 1994 only on 13.06.1994, whereas the marriage took place on 02.09.1981, after living with the petitioner for 14 years. The respondent/husband has filed the HMOP for divorce on the ground that the petitioner did not attain puberty, which itself is the ground for denying the relief of divorce. But the said aspect was not considered by the learned Judge. Further, the said fact was not proved by any medical evidence and it is also not a ground to be considered for granting the relief of divorce. Further granting the relief of divorce after a period of 37 years is the great injustice rendering as a divorcee at the end of her life. The said relief granted will not serve any purpose when both the parties become old enough and this relief on any

account never change their life and hence, the said decree is not a legally valid one. Further the relief granted ought to have been granted on legal grounds and not on sympathetic grounds. Therefore, the petitioner contended that the judgment and decree passed in the said CMSA has to be considered by allowing this Review Petition.

10. Heard both.

11. Originally, HMOP No.30 of 1994 was filed by the respondent/husband in for the relief of divorce by stating the fact that both the petitioner and respondent got married in the year 02.09.1981 and at the time of marriage, wife did not attain puberty and the said fact was suppressed by the wife as well as their parents and the said fact came to his knowledge only after 1½ years. The husband also taken all responsibilities and providing treatment for the same and on number of occasions, the wife also deceived him by stating that as though she is conceived. But after two years, it was confirmed that there is hardly any chance for the respondent to get conceived and the diagnosis of the Doctor, who treated the respondent also narrated in the petition filed by the husband. During the year 1993, ie., on 06.12.1993, the wife left the matrimonial home by taking all the properties, which belong to her and further she also let the house for rent to a tenant and the husband was made to stand in the street. The number of incidents, which occurred during their lifetime were narrated by the husband and the circumstances arose between them that there was no possibility for both of them to lead a matrimonial life together and hence, he was seeking the remedy before the Court by filing the said petition.

12. The wife also filed the counter statement by denying the fact that she attained puberty at the time of marriage and she is also a physically fit person to get conceived and the allegations made against her regarding the said fact and also alleged treatment given to her are all very much denied by the wife. But the wife admitted the fact she was given treatment in C.M.C. Hospital, but the diagnosis given by one Doctor in G.C. Hospital is vehemently denied by the wife. The wife also contended that the husband was having a close relationship with the Branch Manager of his Bank, one Balasubramanian. He started living with one Vidhya, who is the daughter of the Branch Manager and he started neglecting his wife also and he married the said Vidhya on 26.01.1994 and they also got one male child. Only because of the attitude of the husband, who had neglected the respondent by living with the said Vidhya, the wife came to her mother's house, having no other go. But she totally denied the fact that she has taken all the articles in the house. Regarding the fact that she also let the house to rent is not a fair one, but the said house was purchased to the wife by her parents and hence, the husband cannot have any grievance over the said fact.

13. The trial Court after observing the said facts stated by both sides and also by examining them and also verifying the documents relating to their marriage and the report of the Doctor, who made investigation also discussed before the said trial Court and regarding the facts raised by the wife with regard to marriage of her husband with one Vidhya and neglecting his wife. The husband has filed all the documents regarding the treatment/consultation made with the number of Doctors and the result of the investigation that his wife is not a fit person to give birth to a child. The trial Court, based on the report of the Doctor and also the attitude of the wife that she has not proved before the Court that she is very much capable person for giving birth to a child by furnishing any relevant evidence and the trial Court relied upon the judgments and the relief sought, found that in the absence of any such evidence and proof, the husband has remedy before the Court for the relief of divorce as per Section 12 (1) (ia) of Hindu Marriage Act, 1955.

14. The trial Court observed the fact that they are living separately for a long time and further the admission made by the wife herself is that she herself voluntarily left the home on 06.12.1993 by taking all the things and granted the relief that she never made any attempt to renew her matrimonial life with the husband and also observed the fact that till the date of filing the petition, the wife is staying with her mother, hence granted the relief sought for by the husband.

15. Aggrieved against the said order, the respondent/wife appealed and in the appeal, the appellate Court, on hearing the arguments advanced by both and also perusing the evidence placed before the trial Court, has observed that the documents relied by the husband are one made for the purpose of filing the case, since the investigation report of one Dr.Jegatha Venkatesan does not contain any date and regarding Ex.P2, “எதிர்மனுதாரர் உடல் உறவு கொள்ள தகுதியற்றவர்” , the issue of Ex.P2 as a proof that the wife is not a fit person to have marital affairs with the petitioner and in the report Ex.P2, it is mentioned as “Turner's Syndrome” and based on the said document, there cannot be any finding that the respondent is not a fit person for family life. Even for getting a baby by in-vitro fertilization (in a test tube or other artificial environment) , there is no relevant document filed by the husband. On the other hand, on the side of wife, Exs.R1 and R2 were marked and stated that if proper treatment is given to the respondent, there is every possibility of getting a child. The fact that the respondent/husband living with one Vidhya and also got a child by name Adithan, born on 27.02.1994 was admitted by the respondent/husband as well as the petitioner/wife. This living with Vidhya and the child born to them were occurred even before the respondent left the matrimonial house. The appellate Court has observed that only because of leaving the wife and having affairs with one

Vidhya, the wife left the matrimonial home, and there is no possibility for the respondent/husband to live with this petitioner/wife as he is living with one Vidhya and also two children born to them by necessity and circumstances arises for the petitioner/wife to leave the matrimonial home, where there is no comfort for her. Hence, the first appellate Court has given a finding that for seeking the relief of divorce, the husband has not furnished any clear evidence. Hence, the first appellate Court allowed the appeal by setting aside the order passed by the trial Court, which granted the relief of divorce.

16. Aggrieved against the same, the husband preferred CMSA. In the CMSA, once again the said facts and circumstances that was prevailing between the wife and husband after their marriage and the circumstances under which the husband filed the petition and the attitude of both the petitioner as well as the respondent and their evidence before the trial Court and the finding of the trial Court as well as the first appellate Court were very much observed and on observing the said circumstances, that is prevailing between the petitioner and the respondent, this Court analysed all these aspects and has observed the fact that even before leaving the matrimonial home, the review petitioner/wife knows the affairs between her husband/respondent and Vidhya and it is her own admission that she left the matrimonial house as early as in the year 1993 and she has not taken any steps to claim her right of living with him by taking any appropriate proceedings and further there is no such pleadings in the counter statement or in the evidence before the trial Court that she is always ready and is expecting the respondent/husband has to take her to the matrimonial home. Both the counsels have also contended before this Court that both the petitioner and the respondent are living separately from the year 1993 and there is no possibility prevailing between them that the wife is never had any intention to live with the husband and the husband is also living with one Vidhya with two children and that is the evidence of the wife's mother and there is also no feasible atmosphere prevailing for both of them to live together and no such vehement steps taken by the petitioner/wife to fight for restoring her matrimonial life with the respondent/husband by taking any appropriate steps. Above all, there is no expressed willingness by the review petitioner/wife to continue her matrimonial life with the respondent/husband. From the evidence placed before the trial Court and the pleadings placed before the trial Court, it is clear that the review petitioner never expressed any iota of willingness or any pleadings in the review petitioner's counter statement that her matrimonial life has to be restored. But that is absent in the evidence as well as in the counter statement. Observing all these aspects and also the attitude of both parties and the prevailing conditions of life that they are leading from 1993 till date and also the vehement arguments by

both the counsels, one can easily observe that the review petitioner/wife has no intention for reunion and both of them openly contended before the Court that they have crossed so many years by living separately and no purpose will be served if prolonging the issue by keeping the proceedings pending.

17. The attitude of both the parties also reflected that they have made up their mind to live separately. The said proceedings was also pending from the year 1994. Hence, it is observed that it is very difficult for them to renew their life after a very long period as husband and wife. If it is the problem that the review petitioner/wife is not capable of giving birth to a child and that is the reason that she was neglected by the respondent/husband and the review petitioner/wife whether made any appropriate steps for getting proper treatment or for having a child by any scientific methods and if the respondent/husband is also of the view that she need not be neglected for the said incapacity, since in this advanced medical world, they can get child, but from their pleadings, this is not a main grievance for seeking the relief. It is here under admission that she left the matrimonial house in the year 1993. She herself has determined that she should live separately after leaving her matrimonial house. As per her own admission, she did not made any attempt for reunion. No steps were taken by them for altering the situation of their life and simply filing a petition and they are living separately for the years together and the case is also pending and only at a very later stage, they expressed their view that they are living separately all these years and none of the order of the Court can alter their life.

18. Based on these observations, the CMSA was allowed. The said order was passed in CMSA by observing all these facts and circumstances that is prevailing between the parties and also the procedures pending before the Court. It is not a property dispute, which can be decided by any relevant document or any other fact by way of observing and presuming the facts and circumstances. It is also not a case to be decided based on certain facts and also the relevant documents supporting the said fact. But, this is a matrimonial dispute and when both the parties come to the Court seeking the relief, it is not only the care of respective parents of the disputing parties, but it is the great responsibility of the Court in taking all possible steps to make them understand the life that is given to them by their parents and both should take care and responsibility on each other by forming a new family. These responsibilities and the steps that every Court will take one as an important issue in the society and appropriate steps will be taken by the Court, it is to bring the parties together by mending their minds to realise that they have to shed their aversion towards each other ignoring silly difference of opinion and they have to live a happy life in the society, but in this case on hand, neither parties

taken any steps to show their mind that they are capable of living together. Instead of these deficiencies, they can still live a happy family, but at any circumstances, both the parties or any one interested has not open their mind for taking any steps to bring the two persons together. Hence, it is not an order that is given mechanically as in other case, but only with very much observation, care and responsibility, on perusing the proceedings and also on hearing both the petitioner and the respondent, they also gave consent, their attitude, their present status of living and also the arguments advanced by both sides, the said order was passed, i.e., allowing the appeal.

19. Apart from that the Review Petition, which is filed now and that too, after a delay of 78 days. Further, the HMOP also filed only after 14 years.

20. Apart from the above, both the parties as well as the counsels present before the Court and also contended that whatever the order of the Court will not alter the situation and also the mind of the parties, since they are living separately from the year 1994, hence the pendency of the CMSA itself is only a mental agony for them and they are obliged by the Court order. Both the parties as well as counsels never claimed or made stress or show any vigour that they want to live together or the review petitioner/wife is ready to live with the husband and both of them never expressed any view that they want to renew their matrimonial life.

21. In the above circumstances, this Court is not inclined to condone the delay. The order was passed in CMSA on observing all the issues, facts and circumstances, evidence and everything and this order is not a hectic order. When there is no error apparent on the face of it, there cannot be any alterations.

22. Accordingly, the condone delay petition as well as the Review Petition are dismissed. No costs.

Sd/-

Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

To

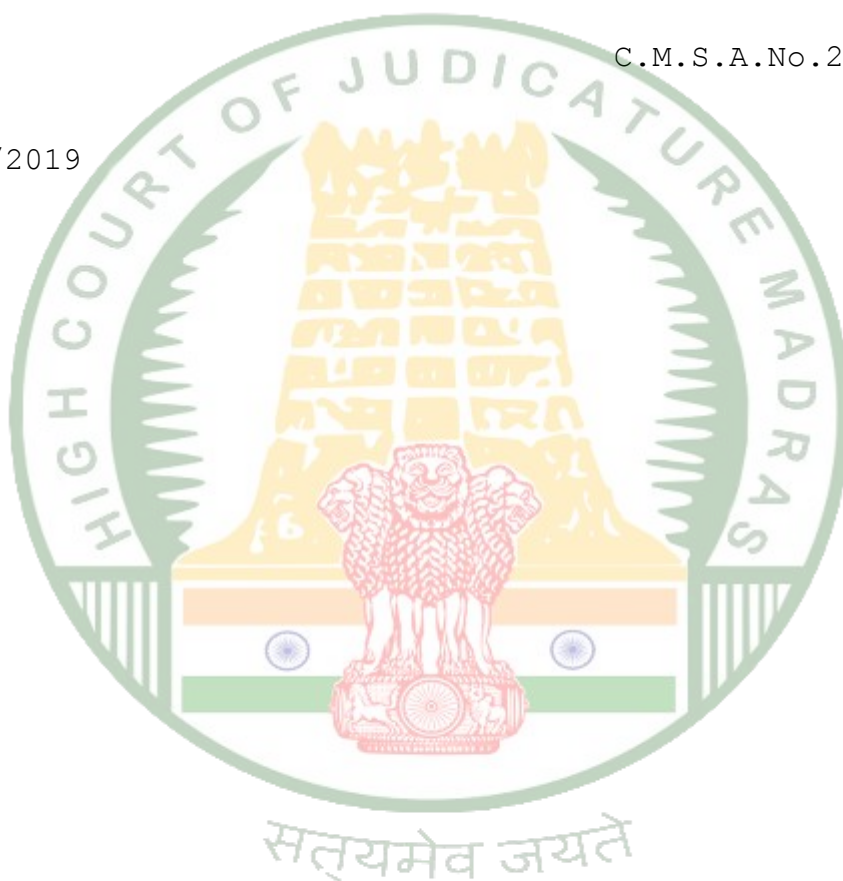
1. The Principal District Judge,
Vellore.

2. The Sub Judge,
Tirupattur, Vellore District.

3. The Section Officer,
V.R.Section,
Madras High Court,
Chennai 104.

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