

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 18.03.2021

CORAM

THE HONOURABLE MR. JUSTICE S.M.SUBRAMANIAM

C.M.S.A.No.22 of 2020

S.Ajayraj

..Appellant/Respondent

vs.

E.Divya

.. Respondent/Respondent

PRAYER : Civil Miscellaneous Appeal filed under Section 28 of Hindu Marriage Act, 1955 r/w Section 100 of C.P.C, against the judgment and decree dated 31.10.2019 made in C.M.A.No.4 of 2019 on the file of the Principal District Court, Thiruvavarur reserving the judgment and decree dated 15.03.2019 made in H.M.O.P.No.64 of 2017 on the file of the Sub-ordinate Court, Thiruvavarur.

For Appellants : Mr.M.V.Venkataseshan

For Respondent : Ms.E.Divya

Party-in-person

J U D G M E N T

The Civil Miscellaneous Appeal is filed against the judgment and decree dated 31.10.2019 made in C.M.A.No.4 of 2019 on the file of the Principal District Court, Thiruvavarur reserving the judgment and decree dated 15.03.2019 made in H.M.O.P.No.64 of 2017 on the file of the Sub-ordinate Court, Thiruvavarur.

2. The appellant is the husband who filed H.M.O.P.No.603 of 2016 before the Family Court, Madurai for dissolution of marriage. The petition for divorce was dismissed by the trial Court and the appellant preferred an appeal in C.M.A.No.4 of 2019. The First Appellate Court also dismissed the appeal by confirming the judgment and decree of the trial Court. Thus, the present appeal is filed before this Court by the appellant.

3. The substantial question of law raised in the appeal reads as under:

1.It is not the judgments of the trial Court and the first appellate Court are vitiated for non-consideration of vital admissions of the wife?

2.Whether the judgment of the first appellate Court is legally sustainable for non-considering the material evidence?

3.When admittedly the trial Court has held that the allegations of demand of dowry, money and jewels made by the wife as against her husband are not at all proved by cogent evidence and whether does not amount to cruelty on the part of the wife against her husband as per the definition under Section 13(1)(i-c) of the Hindu Marriage Act, 1955?

4. Whether the finding of the first appellate Court as regards cruelty is a result of admission of irrelevant, immaterial and inadmissible evidence and rejection of relevant material and of admissible evidence and when such a finding based on such perverse and legally unacceptable evidence is liable to be set aside under section 100 of C.P.C 1908?

5. It is not the judgments of the Courts below are vitiated for not considering the subsequent events?

4. The questions of law raised are relatable to the factual matrix of the case. However, the learned counsel appearing for the appellant made a submission that the trial Court has not considered the cruelty with reference to the allegations raised by the appellant/husband. The learned counsel appearing for the appellant questioned the findings arrived by the trial Court as well as the first Appellate Court regarding the materials and evidence produced by the appellant to establish the ground of cruelty. However, such questions of law were decided by both the Courts based on the evidences and materials produced by the respective parties.

5. The trial Court adjudicated the issues with reference to the documents and evidence produced by the respective parties to the lis. The marriage between the petitioner and the respondent was solemnized on 16.05.2013 at Karaikudi as per the Hindu Rites and Customs. The appellant is a Doctor by profession and now he is working in Andaman Nicobar Island on contract basis. The contention of the appellant was that the respondent/wife had voluntarily deserted the appellant without any justifiable reasons. A female child born from and out of wedlock and now aged about 6 years. The child is now under the custody of the respondent/mother. With reference to the allegations raised in the petition, the trial Court adjudicated the issues and arrived a conclusion that such allegations raised are not established and insufficient for grant of divorce. The trial Court made a finding that without any justification, the appellant and the respondent left the matrimonial home and there is no enough ground for the purpose of grant of divorce. Certain allegations made on flimsy reasons cannot be constituted a ground for grant of divorce. Even the ground of desertion raised by the appellant/husband was not proved before the trial Court. However, the respondent/wife could not establish that in between the alleged period of desertion, both the appellant and the respondent were living together for about 33 days at Andaman Nicobar Island. Thus, the trial Court arrived a conclusion that the desertion was not established. At the outset, the trial Court formed an opinion that the allegation raised by the appellant/husband are flimsy and the same would not constitute a ground of cruelty and the trial Court held that the appellant and the respondent have left the matrimonial home without any justification. Even during the alleged period of desertion, there was correspondence between the appellant and the respondent and birthday wishes were also exchanged. Considering all these facts, the trial Court dismissed the petition for divorce filed by the appellant. The appellant filed C.M.A.No.4 of 2019 before the Principal District and Sessions Judge, Thiruvavur. The First Appellate Court considered the facts and circumstances as well as the documents and evidence along with the findings of the trial Court. The First Appellate Court elaborately discussed the facts as well as the grounds raised by the appellant and the respondent. The findings of the First Appellate Court in paragraph Nos.29 and 30 are relevant and the same reads as under:

"29. On a careful perusal the instances of mental cruelty, as per the petitioner's case, it appears that petitioner is a Doctor by Profession and the respondent has obtained Post-Graduate in Engineering. One instance complained off is that he was compelled by the respondent to live in a place where the parents of the respondent are residing. Petitioner refused to accept the proposal made by the respondent, she sued to quarrel with the petitioner very often without any reason. He was not intimidated about the birth of the child. Though the respondent has denied the allegations made in the petition, for the sake of arguments, even if it is taken to be true, wife's wish to shift their residence near her parent's place, per se cannot be treated as mental cruelty. As regards the second commission, the respondent would state that after the birth of the child, she tried to contact the petitioner by calling him on several occasion. It is the petitioner who avoided on attending her telephone calls. With regard to intimating the birth of the child, both sides should have interest to get to know about the birth of the child. The petitioner, being husband of the respondent, has also got equivalent duty to get to know about the health of his pregnant wife and the birth of the child. So also, the respondent's family should also show some interest to inform about the birth of the child to the husband and his family. The petitioner could have rung up to get to know about the birth of the child. Omission on either part cannot be treated as cruelty. Therefore, cruelty ground is not established.

30. The next ground put forth is desertion. Desertion in the Matrimonial Law is the abandonment of one spouse by the other without reasonable cause and without the consent or against the wish of the other. The Law lays down the rules that desertion, in order to consider it as a matrimonial offence must be a continuous period of not less than two years immediately proceeding the presentation of the petition. The essential ingredients are factum of separation, animus deserendi. Desertion is a matter of inference which has to be drawn from the facts and circumstances of each case. Therefore, in fact, if there has been a separation, the foremost question is whether the act could be attributable as an animus deserendi. Both should co-exist. Both elements need not have been commenced at the same time.

6. In paragraph No.31 of the findings, the First Appellate Court held that with regard to the allegation made by the petitioner to the effect that many times, he was deserted by his wife/respondent and for some occasions, due to the intervention of relatives/well wishers, he came to the matrimonial home and living a short period. For which the respondent has stoutly denied that no steps have been taking to take her back to the matrimonial home from her parent's residence. If that be the case, mere assertion of the pleadings in the petition through filing of Proof affidavit is not suffice, but that was not done by the petitioner's side by examining suitable persons who had knowledge about the same. In the case of respondent, though she was taken to her mother's place as her grandmother was seriously ill. I don't find any animus deserendi on the part of the respondent. It is the respondent's stand that she was not taken to Andaman to her matrimonial home".

7. Based on the facts and circumstances as well as the evidence, the First Appellate Court also arrived a conclusion that "this

continuous period of not less than two years is not at all made out and the petition is prematured as regard the ground of desertion". The First Appellate Court considering the judgment of the Hon'ble Apex Court held that "the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc., What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any straight-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. In these circumstances, having regard to the chronology of events, the case of the appellant cannot be believed and the version of the respondent is more probable. Therefore, emotional out burst even if it is true is acceptable as it would be a normal behavior of a prudent woman who has been cheated by her husband". Considering all these reasons, the First Appellate Court also agreed with the trial Court and confirmed the judgment passed in H.M.O.P.No.603 of 2016.

8. As far as the substantial question of law is concerned, this Court is of the opinion that those questions are not substantiated in its real sense. All such questions are connected with the factual matrix of the case which are elaborately adjudicated both by the trial Court as well as by the First Appellate Court. The facts already were considered by the two Courts elaborately and a finding was arrived. Therefore, the same need not be interfered with by this Court, unless there is an error apparent in considering those facts and this Court do not able to find any such error apparent. Both the Courts have considered the grounds relating to the desertion as well as to the cruelty and the nature of allegation raised between the parties and held in clear terms that the appellant would not be able to get divorce on the ground of desertion or cruelty. More specifically, even during the alleged period of desertion, there were several communications between the appellant and the respondent and they lived for more than one month in Andaman Nicobar Island.

9. This being the factum established, this Court has no hesitation in arriving a conclusion that the appellant has not raised any acceptable substantial question of law warranting further interference from the hands of this Court. The factual adjudication elaborately done both by the trial Court as well as by the First Appellate Court deserves no further interference as those findings are candid and convincing. Thus, the judgment and decree dated 31.10.2019 passed in C.M.A.No.4 of 2019 confirming the judgment and decree 15.03.2019 made in H.M.O.P.No.64 of 2017 stands confirmed and consequently, Civil Miscellaneous Second Appeal stands dismissed. No costs.

-s/d-
Assistant Registrar (CS-IV)

True Copy

Sub-Assistant Registrar

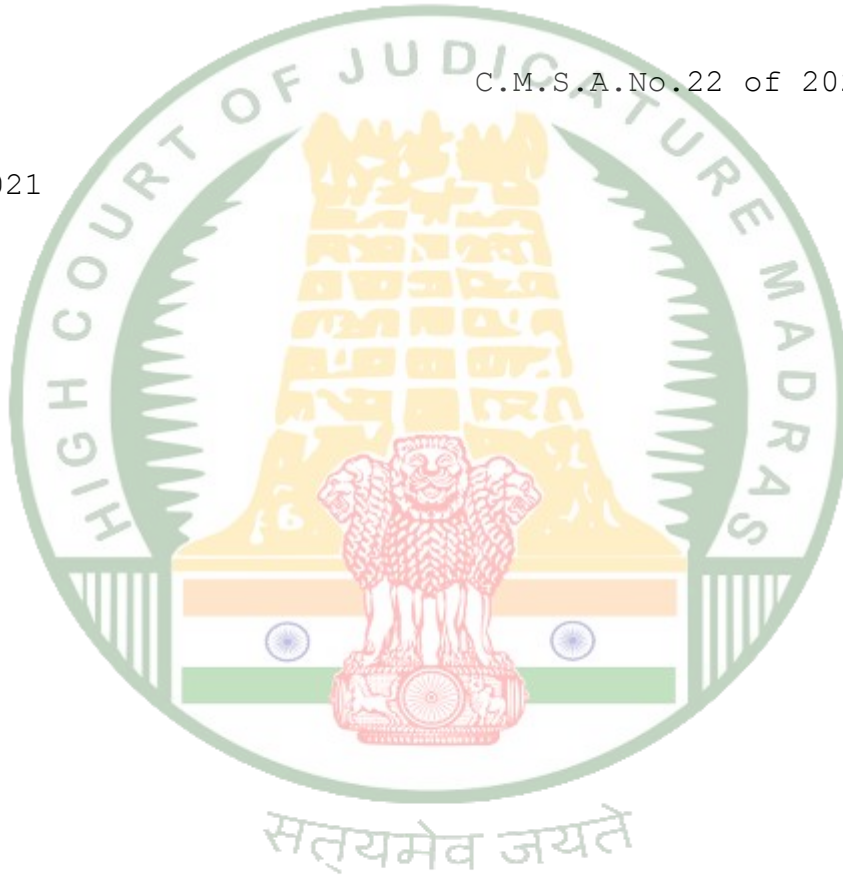
TO

1. The Principal District Judge, Thiruvavarur
2. The Sub-ordinate Judge, Thiruvavarur.

+ 1 cc to Mrs. A. Divya, Party in person Sr.17465
+ 1 cc to Mr.M.V.Venkataseshan, Advocate Sr.17846

C.M.S.A.No.22 of 2020

SVI (CO)
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