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C.M.A.No.1275 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :04.08.2022

PRONOUNCED ON :12.10.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and
THE HONOURABLE MR.JUSTICE S.SOUNTHAR

C.M.A.No.1275 of 2020
and
CMP.No.4172 of 2021

G.Dhanasekaran

.. Appellant

Vs.

G.K.Sandhia

.. Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19 of the Family Courts Act 1984, to prefer this Memorandum of Civil Miscellaneous Appeal aggrieved by the judgment and decree dated 30.12.2019 made in O.P.No.542 of 2017 on the file of the IV Additional Family Court, Chennai.

For Appellant : M/s.M.Sriram

For Respondent : M/s.B.Poongkhulali



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J U D G M E N T

(Judgment of the Court was delivered by **S.SOUNTHAR, J.**)

The appellant/husband has filed a petition for divorce against wife on the grounds of cruelty and desertion before the IV Additional Family Court, Chennai in H.M.O.P.No.542 of 2017 and the same was dismissed. Aggrieved by the same, the husband has come up with this appeal.

2. The gist of averments found in appellant's petition for divorce:

The marriage between the appellant and the respondent was solemnized on 25.10.2009 at Thiruvannamalai and the same was also subsequently registered. After marriage both the parties lived together at Perungalathur at Chennai for five months. During their short matrimonial life, misunderstanding erupted between them which resulted in their separation in April 2010. The respondent gave a complaint before All Women Police Station, Tambaram on 30.12.2011 and by intervention of police they started living together at Guduvancherry. Though, they started living together under one roof, the respondent refused conjugal rights to the appellant. Again on 06.07.2013, respondent suddenly deserted the appellant and gave a complaint



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before the Assistant Commissioner of Police, Tambaram on 28.07.2013 with the intention to harass the appellant. Subsequently, the appellant filed a petition for restitution of conjugal rights in H.M.O.P.No.142 of 2013 before the Principal Subordinate Court, Thiruvannamalai. Again respondent gave police complaint against the appellant during February 2014, when the matter was subjudice. The respondent filed a counter in petition for restitution of conjugal rights wherein, she specifically admitted that marriage was not consummated. In the counter, the respondent also averred that she was not interested in living with the appellant and she was entitled to get divorce from the appellant and she was taking steps for filing divorce petition. The said averment of respondent in her counter to petition for restitution of conjugal rights filed by the appellant clearly established the intention of the respondent to snap the marital tie. Fed up with the series of complaints preferred by the respondent before the police and her counter statement in the petition for restitution of conjugal rights expressing her unwillingness not to continue the marital tie, the appellant decided to withdraw the petition for restitution of conjugal rights and the same was dismissed on 25.10.2019. Thereafter, the appellant has filed this present petition for divorce on the ground of desertion and cruelty.



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3.The gist of averments found in the counter of the respondent:

The respondent averred in her counter that in the petition filed by the appellant for restitution of conjugal rights, she had consented for reunion, but in spite of granting sufficient time, the appellant herein did not take steps to take her back to the matrimonial home but contrarily, he withdrew the petition and immediately after one month filed a petition for divorce. The sequence of event shows the petition filed by the appellant is not bonafide and he has not come to the Court with clean hands. The respondent specifically contended that the marriage was not consummated due to certain issues faced by the appellant and he refused to acknowledge the same and address the issues and find out a solution. The respondent also mentioned various acts of cruelties meted out to her by her in-laws during her stay at matrimonial home. The respondent in her counter narrated various complaints preferred by her against the appellant before police station. It was her claim that all those complaints were aimed at resolving the dispute and seeking reunion. The respondent further clarified that only due to the cruelties suffered by her in the matrimonial home, she filed a counter in the petition for restitution of conjugal rights filed by the appellant that she was not interested in continuing the



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marital tie and she was taking steps to file divorce petition. But she expressed her willingness for reunion in unequivocal terms in person and same was recorded by the learned Judge. The appellant failed to take her back and hence her offer for reunion is thwarted. On these pleadings, she sought for dismissal of the petition.

4. Before the Family Court, the appellant was examined as P.W.1 and he marked Exs.P1 to P.14 on his side. The respondent examined herself as R.W.1 and she marked Exs.R1 to R.6 on her side. After consideration of oral and documentary evidences, the Family Court came to the conclusion that husband failed to prove both the grounds of desertion and cruelty and hence dismissed the divorce petition. Aggrieved by the same, the husband has come up with this appeal.

5. The learned counsel for the appellant vehemently contended that the respondent/wife even in her pleadings filed before the Principal Subordinate Court, Thiruvannamalai, in the petition for restitution for conjugal rights filed by the husband specifically averred that the marriage was not consummated and she was not interested in continuing the marital tie. Having filed a counter



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before the Court of law that she wanted to get divorce from husband, she exhibited her animus to put a permanent end to the marriage. The learned counsel submitted that refusing conjugal rights by respondent/wife would amount to a serious act of cruelty. The learned counsel also by taking us to the various complaints preferred by the respondent against husband submitted that the wife by dragging the appellant and his parents to police station committed mental cruelty. The learned counsel also drawn our attention to the petition filed in C.M.P.No.4172 of 2021 for raising additional evidence. The Additional evidence now sought to be produced by the appellant is relating to various proceedings before the police in the complaint preferred by the respondent/wife against the appellant.

6. Per contra, the learned counsel for the respondent submitted that various complaints preferred by the respondent against the appellant was only with good intention of seeking reunion and the respondent never wanted appellant to be punished under Criminal law. In fact, when the petition for restitution of conjugal rights filed by the appellant was pending the respondent based on the compromise reached out between the parties withdrew the complaints preferred before the police, but however the appellant failed to take



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her back. The learned counsel for the respondent vehemently contended that various acts of cruelties pleaded by the appellant were prior to the filing of petition for restitution of conjugal rights in H.M.O.P.NO.142 of 2013. The appellant condoned those acts of cruelties by filing the petition seeking restitution of conjugal rights. When the said petition was taken up for hearing, the respondent appeared before the Court and expressed her willingness to join the appellant. In spite of two adjournments by the Court, appellant failed to take her offer of reunion, but ironically not pressed the petition for restitution of conjugal rights. The said act of appellant proves that he was not really interested in reunion. The learned counsel further submitted that subsequent to not pressing of earlier petition for restitution of conjugal rights, immediately appellant filed a petition for divorce on the ground of cruelty and desertion. There was no fresh allegation or fresh cause of action for the present application and therefore sought for dismissal of the appeal.

7. On the basis of the pleadings of both the parties, the evidence available on record and contentions of the counsel appearing for both the sides, the following points are arising for consideration:



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- 1) Whether, the appellant/husband is entitled to divorce on the ground of cruelty?
- 2) Whether, the appellant/husband is entitled to divorce on the ground of desertion?

8. Points (1) and (2):

The present petition for divorce was filed by the husband on 23.05.2016 on the ground of cruelty and desertion. Earlier appellant filed a petition for restitution of conjugal rights on 30.09.2013 in H.M.O.P.No.142 of 2013 on the file of Sub Court, Thiruvannamalai. The said petition was subsequently not pressed by the appellant on 29.04.2016. The order passed by the learned Sub Judge, dismissing the petition for restitution of conjugal rights on the ground appellant not pressing it reads as follows:

"2.Today both petitioner and respondent present. The respondent while questioned reported that she is inclined to go and live with the petitioner and the counsel for the respondent also made endorsement to that effect in the notes paper. In spite of giving two adjournments, the petitioner is not willing to take the offer. He had today endorsed that he is not pressing the petition. In view of the



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endorsement made, the petition is dismissed as not pressed."

9. The perusal of the above order make it clear that respondent appeared before the Court and expressed her willingness to join the appellant/husband. In spite of two adjournments, the appellant was not willing to take her offer and on the contrary, he preferred to not press the petition for restitution of conjugal rights. Therefore, it is clear though appellant filed a petition for restitution of conjugal rights, when respondent expressed her willingness to join the appellant, he refused to take her back. The present petition for divorce was filed by him immediately on 23.05.2016 within a month. The perusal of the averment found in the present petition make it clear, the appellant has not made out any new allegation of cruelties against the respondent. He only reiterated the averments found in the petition for restitution of conjugal rights. By filing a petition for restitution of conjugal rights, the appellant/husband condoned the earlier acts of respondent/wife. Therefore, the very same allegations cannot be a basis for seeking divorce subsequently. The only new allegation found in the petition for divorce is the filing of counter by respondent in his petition for restitution of conjugal rights,



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wherein she averred that she was not ready to continue the marital tie and she was thinking of taking steps to get divorce. The said counter was filed by respondent on 05.07.2014. The appellant has not filed a petition for divorce immediately thereafter. He waited for nearly 2 years. If the filing of counter by respondent is the reason for the appellant to file a petition for divorce, he could have filed petition for divorce immediately. But he has not chosen to do so. But he decided to continue with the petition for restitution of conjugal rights. In his legal notice issued to All Women Police Station, Chengalpattu dated 08.08.2015 marked as Ex.P.9, the appellant stated that he was ready to act in accordance with the order of the Court in his petition for restitution of conjugal rights. The averments made by the appellant in Ex.P.9 legal notice to All Women Police, Chengalpattu is a clinching document in this case. The said document came into existence subsequent to filing of counter by respondent in the petition for restitution of conjugal rights. Even in this legal notice, appellant expressed his willingness to continue with the petition for restitution of conjugal rights and act in accordance with orders passed by the Court. Subsequently, the order passed by Court in H.M.O.P.No.142 of 2013 marked as Ex.R1 make it clear that in spite of the fact that the respondent expressed her willingness to join appellant and the Court adjourned hearing



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twice to enable the appellant to take her back, the appellant instead of taking her back not pressed the application. If really the appellant had any intention to take the respondent back he could have made an endorsement accepting the offer made by the respondent and he could have taken her to matrimonial home immediately. Instead, he preferred not to press the application. Therefore, there is a force in the contention of the respondent counsel that the very filing of petition for restitution of conjugal rights itself is not bonafide.

10. The appellant has not made out any new ground subsequent to filing of petition for restitution of conjugal rights, for seeking divorce. The only allegation is filing of counter by the respondent expressing her unwillingness to continue the marital tie. But even after filing of counter, the appellant preferred to continue with the petition for restitution of conjugal rights. Therefore, we cannot presume that the marriage between the parties is beyond repair at that point of time. When respondent expressed her willingness to join appellant, instead of taking her back appellant preferred to not press the petition for restitution of conjugal rights and immediately filed the present petition for divorce on the ground of cruelty and desertion. In the present application the appellant has not made any fresh allegations of



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cruelties. The allegations he made in the petition for restitution of conjugal rights are repeated in this petition also. Those allegation are not serious enough to say that it would amount to cruelty within the meaning of section 13 (1)(ia) of the Hindu Marriage Act. In addition to that by filing petition for restitution of conjugal rights appellant condoned those allegations. As far as desertion is concerned, in order to get divorce on the ground of desertion mere separation is not sufficient. It should be accommodated by animus to put a permanent full stop to the marital tie. In the case on hand, as evidenced by Ex.R.1, the respondent /wife expressed her willingness to join appellant and in spite of same appellant failed to take her back. Hence, the animus which is essential requirement to prove the desertion within the meaning of Section 13(1) (b) of the Hindu Marriage Act, is absent in this case. The learned Family Court Judge rightly weighed evidence available on record and came to the conclusion that both the grounds of cruelty and desertion were not proved in this case. We do not find any reason to interfere with the findings of the learned IV Additional Family Court, Judge, Chennai.

11. The learned counsel for the appellant relied on the decision in



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Uttara Praveen Thool versus Praveen reported in 2014 (2) Mh.L.J. 321

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wherein it was held that in order to constitute condonation in terms of Section 23 (1)(b) of the Hindu Marriage Act, the acts of both the parties to be taken into consideration. The relevant observation of the Division Bench of Bombay High Court is as follows:

"22. Thus, to constitute condonation in terms of Section 23(1)(b) of the said Act, there must be forgiveness and restoration. The question, however, is whether for constituting condonation, the conduct of only one of the parties is to be considered or whether the conduct of both parties is to be taken into account. In other words, whether the unilateral act of one of the parties is to be considered or whether the bilateral acts of both the parties are to be considered. If for constituting condonation, there must be forgiveness and restoration, it is obvious that bilateral acts of both parties will be required to be taken into account while considering the aspect of condonation. Forgiveness and restoration cannot be unilateral and for it to be effective and fruitful, it has to be bilateral. One party to the marital tie may be ready to forgive and restore the same. One of the modes could be by filing proceedings for restitution of conjugal rights. The other party



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may, however, not be ready to forgive and restore said tie. The proceedings filed by one party for restitution could be opposed by the other by refusing to rejoin the marital tie. The same would not result in condonation in as much as there would be no consensus between the parties for the purposes of forgiveness and restoration. It would remain one-sided. Hence, the aspect of condonation will have to be adjudicated after taking into account the bilateral acts of both parties. The offer made by one party and the reciprocal conduct of the other will have to be viewed together while determining condonation in terms of Section 23(1)(b) of the Said Act. "

12. In the case on hand, husband by condoning the various allegations of cruelty filed a petition for restitution of conjugal rights. The respondent appeared before the Court and expressed her willingness to join husband. Therefore by their bilateral acts, both the parties condoned the previous matrimonial wrongs and decided to join. But unfortunately, the appellant failed to take the respondent back to matrimonial home. Though the learned counsel for the appellant submitted that respondent expressed her willingness to join appellant and based on her compromise appellant not pressed application and thereafter when the appellant expressed his willingness to take



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back respondent to matrimonial home, she refused to cooperate and come along with him, there is no acceptable evidence or plea to support such an argument. First of all, there is no plea in the divorce petition that husband in response to offer made by respondent tried to take her back to matrimonial home but she refused to come along with husband. Secondly, there is also no independent evidence to support such stand. Therefore, the said argument of the learned counsel for the appellant is rejected.

13. The learned counsel for the appellant also relied on the judgment in ***Parveen mehta versus Inderjit Mehta reported in 2022 5 SCC 706 and Sivakumar. C versus Srividhya reported in 2022 (3) TLNJ 108 (Civil)*** for the proposition that filing police complaint against the appellant by respondent would amount to mental cruelty. As we discussed earlier, those complaints were only aimed at seeking reunion and therefore it cannot be put against respondent. In fact in Ex.R.4 which came into existence subsequent to filing of petition for restitution of conjugal rights by husband, the appellant made an endorsement that he was ready to take his wife to matrimonial home but however there was no attempt by him to take her back.



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14. As far as, the petition filed by the appellant to raise additional evidence is concerned, the new document sought to be marked as additional evidence are relating to various proceedings recorded by the police in the complaint preferred by respondent/wife. Those documents are prior to order passed in matrimonial proceedings marked as Ex.R1 dated 29.04.2016. We have already held that the appellant condoned the acts of respondents by filing a petition for restitution of conjugal rights and hence documents prior to said proceedings would not advance the case of the appellant. Hence, the petition filed by the appellant for raising additional evidence is dismissed.

15. In view of the our discussions earlier, we find no ground to interfere with the findings recorded by the IV Additional Family Court, Chennai that appellant/husband failed to make out a case for divorce on the ground of cruelty and desertion and accordingly the above Civil Miscellaneous Appeal is dismissed. In the facts and circumstances of the case there shall be no costs.



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16. In Nut Shell:

1) The Civil Miscellaneous Appeal No.1275 of 2020 is dismissed, by confirming the fair and decreetal order passed in H.M.O.P.No.542 of 2017 on the file of IV Additional Family Court , Chennai.

2) There shall be no order as to costs.

3) The Civil Miscellaneous Petition No.4172 of 2021, petition to raise additional evidence is dismissed.

(V.M.V., J) (S.S., J)

12.10.2022

Index : Yes / No
Internet : Yes/ No
Speaking/Non-speaking Order

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V.M.VELUMANI, J.
and



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S.SOUNTHAR, J.

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To

1. The IV Additional Family Court,
Chennai.
2. The Section Officer,
VR Section,
High Court, Madras.

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