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C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

C.M.S.A.No.12 of 2018

and

C.M.A.No.2784 of 2018

S. KANNAMMAL, J.

Today, the matter has been posted under the caption “For being mentioned.”

2.The learned counsel for the appellant submitted that the case in C.M.A.No.4 of 2016 is actually on the file of the “III Additional District and Sessions Judge, Erode at Gobichettipalayam”, however, in the common judgment dated 28.04.2022, it has been typed as “III Additional District and Sessions Judge, Coimbatore” at various places and further, in Para No.5, it has been typed as “Kelpauk Medical College Hospital, Chennai” instead of “Kovai Medical Centre Hospital, Coimbatore” and therefore, prayed that the same may be corrected and a fresh copy of the judgment may be issued.

3.In view of the submissions made by the learned counsel for the appellant, the following corrections shall be effected in the common judgment passed by this Court in C.M.S.A.No.12 of 2018 and C.M.A.No.2784 of 2018, dated 28.04.2022 :



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

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- i. The phrase “III Additional District and Sessions Judge, Coimbatore” which occurs in the Prayer portion at Page No.1, Para No.56(i), Line 1 at Page No.40 shall be replaced with “III Additional District and Sessions Judge, Erode at Gobichettipalayam”.
- ii. The phrase “Kelpauk Medical College Hospital, Chennai” which occurs at Para No.5 shall be replaced with “Kovai Medical Centre Hospital, Coimbatore”.
- iii. In Para No.49, the sentence “Furthermore, the respondent has given a complaint dated 30.12.2014 to the Thudiyalur police station against the appellant and his parents and subjected them to enquiry” shall be replaced with *“Furthermore, the husband's mother has given a complaint dated 30.12.2014 to the Thudiyalur police station against the respondent/wife and her parents and subjected them to enquiry.”*

4.Registry is directed to carry out the aforesaid corrections and issue a fresh copy of the judgment, today.

16.06.2022

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C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

S. KANNAMMAL, J.

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C.M.S.A.No.12 of 2018
and C.M.A.No.2784 of 2018

16.06.2022



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 24.11.2021

PRONOUNCED ON: 28.04.2022

CORAM:

THE HONOURABLE MRS.JUSTICE S.KANNAMMAL

Civil Miscellaneous Second Appeal No.12 of 2018
and
Civil Miscellaneous Appeal No.2784 of 2018
and
C.M.P.No.9813 of 2018

C.M.S.A.No.12 of 2018:

R.C.Sathya Priyanga .. Appellant

Versus

P.Saravana Kumar ... Respondent

C.M.A.No. 2784 of 2018

P.Saravana Kumar ... Appellant

Versus

R.C.Sathya Priyanga ... Respondent

C.M.S.A.No.12 of 2018 : Civil Miscellaneous Second Appeal filed
under Section 13(1) (ia) of the Hindu Marriage Act, read with Section



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

100 of Code of Civil Procedure, against the Judgment and decree made in C.M.A.No.4 of 2016, dated 12.12.2017 on the file of the learned III Additional District and Sessions Judge, Coimbatore and to confirm the Judgment and Decree passed in H.M.O.P.No.2 of 2016, dated 29.04.2016 on the file of the learned Subordinate Judge, Sathyamangalam.

C.M.A.No.2784 of 2018: Civil Miscellaneous Appeal filed under Section 47 (C) of the Guardians and Wards Act, against the order passed in G.W.O.P.No.226 of 2016 dated 22.10.2018 on the file of the learned Principal District Judge, Erode.

For Appellant : Mr.S.Parthasarathy
in both the cases

For Respondent : Mrs.D.Geetha
for Mr.D.Divakaran
in both the cases

COMMON JUDGMENT

C.M.S.A.No.12 of 2018 is filed by the wife aggrieved by the Judgment dated 12.02.2017 passed in C.M.A.No.4 of 2016.

2. C.M.A.No.2784 of 2018 is filed by the husband aggrieved by the dismissal of G.W.O.P.No.226 of 2016 by the learned Principal District Judge, Erode on 22.10.2018.

3. For the sake of disposal of these appeals, the parties shall be



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

referred to as per their litigative status in C.M.A.No.2784 of 2018 as appellant (husband) and respondent (wife).

Background facts:

4. The marriage between the appellant and the respondent was solemnized on 20.02.2011 at Gobichettipalayam as per Hindu Rights and Customs. At the time of marriage, the appellant was working in Chennai. Therefore, immediately after the marriage, both the appellant and the respondent settled at Mugappair, Chennai in the house of the appellant. Due to the wedlock, a son by name S. Magizhan was born on 19.11.2011. Thus the marriage between the parties has been consummated.

5. During the course of the matrimonial journey, disputes and misunderstanding cropped up between the couple. According to the appellant, the respondent intended to live a wayward life and she is a spend-thrift. The respondent intended to lead a luxurious life at the cost of the appellant and his wealth. In fact at the instance of the respondent, the appellant gave a sum of Rs.3 lakhs to his father-in-law on 11th May



2012 for carrying out business. This amount was not repaid by the father-

in-law in spite of his many demands. When the minor son S.Magizhan was hospitalized due to Denque fever on 13.11.2012, the parents of the appellant visited the minor child. During such visit the parents of the appellant casually remarked that had the kid been admitted in Kelpauk Medical College Hospital, Chennai, he would have recovered. In this context, there were exchange of heart burns and this had sown the seeds for further widening of the relationship between the parties.

6. In the Original Petition filed by the appellant, reference was made to a similar dispute on 20.11.2012 during which, the respondent shouted at the appellant and his parents by getting in to the street, thereby put the appellant and his parents to shame and degradation. Similarly, on 28.09.2013, due to a petty quarrel, the respondent attempted to commit suicide by cutting her palm using a blade. The appellant also referred to the habit of the respondent in throwing whatever articles that she could pick towards him. The appellant also referred to various instances in the Original Petition and contended that he could not concentrate in his profession due to the attitude of the respondent.

7. According to the appellant, on 10.07.2014, due to a trivial



matrimonial dispute, the respondent consumed 8 to 10 Dolo-650 tablets and she was admitted at Sundaram Medical Foundation, Chennai as an in-patient. In this context, a case was registered as an attempt to suicide by the Inspector of Police, J.J Nagar, East Police Station, Chennai and the appellant and his parents were enquired. After such enquiry, as per the advice of the Inspector of Police it was decided to take a separate residence for living of the appellant and the respondent along with the minor child for rent. Accordingly, on 27.08.2014, a separate abode was taken. However, even after a separate residence was taken, the differences between the parties cannot be doused.

8. It is stated by the appellant that on 22.12.2014 the respondent left the matrimonial home along with the minor son to his parents house. On 25.12.2014, the appellant also left Chennai, visited the respondent in her parents house and with the permission of the respondent, he had taken his son to his parents house at Coimbatore. Thereafter, the appellant accompanied by his minor son went to Namakkal Anjaneyar Temple and also Kolli Hills. According to the appellant, the respondent made a big scene as to why the appellant could take the minor son to the Namakkal without her permission or consent and demanded the appellant to immediately bring the minor son. Even



before the appellant could bring the minor son, the respondent, on 26.12.2014 came to the parents house of the appellant and shouted towards them in a filthy language. In this context the mother of the appellant has given a complaint to the Tudiyalur Police Station at Coimbatore. Ultimately, the respondent came and taken the minor child with her and stayed in her parents house. By quoting all the above instances, the appellant sent a legal notice on 31.12.2014, calling upon the respondent to give her consent for divorce by mutual consent. The respondent sent a reply notice dated 13.01.2015 with untenable grounds. Therefore, the petition in HMOP No.2 of 2016 was filed by appellant under Section 13(1) (i-a) (iii) of the Hindu Marriage Act, for dissolving the marriage solemnized between them on 20.02.2011, by passing a decree of divorce.

Counter averments of the respondent:

9. Denying the averments made in the Original Petition, the respondent filed a counter. According to the respondent, from the date of marriage, the mother and sister of the appellant as also the sister's husband have unleashed matrimonial cruelty towards her in one form or the other. In fact, two months after the birth of the minor child, the appellant called her over phone and informed that her parents did not like



her and insisted her to give her consent for filing an application for divorce. This had come as a rude shock to the respondent. During

July 2014, due to headache, the respondent consumed tablets with an empty stomach and this has caused giddiness to her. However, she was taken to Sundaram Medical College Hospital, Chennai and also informed the police as if the respondent consumed 8 to 10 Dolo-650 tablets in an attempt to commit suicide. Even though the respondent explained to the Doctors, they refused to head to her. Even the police authorities from J.J Nagar Police Station, enquired the respondent and she has narrated as to what has really happened. Thereafter, the police authorities advised both the parties to take a separate residence for their living.

10. According to the respondent, on 22.12.2014, the appellant himself called the respondent to go to her parents house with the minor son and booked the bus ticket on 24.12.2014. The appellant also expressed his desire to come to her parents house on 25.12.2014. Accordingly, on 25.12.2014, the appellant came to her parents house. After such visit, the appellant accompanied the minor son to Namakkal and Kolly Hills but it was never questioned by her. Only on 29.12.2014,



when the respondent contacted the appellant he has informed that he will not come to her parents house and he will continue to retain the custody of the minor son. Therefore, on 30.12.2014, the respondent went in search of the appellant to his mother's house and the mother of the appellant lodged a false complaint before the Inspector of Police, Tudiyalur. Upon enquiry, it was concluded that the complaint was false. In the meantime, the appellant vacated the rented house at Mugappair, Chennai and taken up all his belongings to Coimbatore without even informing the respondent. At this stage, suppressing the real facts, the appellant had issued a legal notice on 31.12.2014, for which, a suitable reply was given on 13.01.2015 and a re-joinder dated 02.12.2015 was given by the appellant.

11. According to the respondent, unmindful of the manner in which the respondent conducted herself in the matrimonial home as a dutiful Hindu wife the appellant proceeded to file H.M.O.P.No.2 of 2016 for a decree for divorce. There was no cruelty meted out the appellant by the respondent. On the other hand it was the appellant, who had subjected the respondent with matrimonial cruelty and therefore she



prayed for dismissal of the Original petition.

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12. Before the learned Subordinate Judge, Sathyamangalam, in H.M.O.P.No.2 of 2016, the appellant examined himself as PW1 along with three other witnesses as Pws 2 to 4 and Exs. P1 to P8 were marked. The respondent examined herself as RW1 and Ex. R1 was marked.

13. The learned Sub Judge, Sathyamangalam, on appreciation of the oral and documentary evidence, by decree and judgment dated 29.04.2016, dismissed the Original Petition filed by the appellant on the following reasons:

(1) the instances cited by the appellant/husband are not such that it warrants a decree of divorce to be passed. In other words, the appellant has not proved by legally acceptable evidence that he was subjected to matrimonial cruelty by the respondent.

(2) the instances cited by the appellant in the Original Petition are to be construed as a normal wear and tear which is



possible in all the household and it cannot be regarded as cruelty towards the appellant.

(3) Thus, every matrimonial conduct, which may cause annoyance to the other cannot be brought within the fold of cruelty.

14. Aggrieved by the dismissal of the Original Petition, the appellant has filed C.M.A. No.4 of 2016 before the District Judge, Erode. The Appellate Court by the Judgment dated 12.02.2017 allowed the appeal, reversed the Judgment dated 29.04.2016 passed in H.M.O.P.No.2 of 2016 for the following reasons:

(1) The conduct of the respondent in consuming 8 to 10 Dolo-650 tablets is proved by Ex.P12 filed by the appellant. The appellant also cited several instances during which, the respondent/wife threatened to commit suicide. In such circumstances, no prudent husband could live peacefully and those attempts made by the respondent/wife would certainly fall within the scope and ambit of cruelty.

(2) Further the Appellate Court comes to a conclusion



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that the mother of the appellant was constrained to give a complaint against the respondent when she shouted towards her in filthy languages much to the chagrin of the husband and his family. When the respondent went to the extent of causing dis-repute to the family of the appellant it would also certainly amount to cruelty.

(3) The Appellate Court also reasoned that the respondent has not taken any steps to rejoin the matrimonial company of the appellant by filing a petition under Section 9 of the Hindu Marriage Act, to restitute the conjugal rights. This conduct of the respondent wife, according to the Appellate Court, would speak volumes about her conduct. Further there are allegation and counter allegations made by the appellant and the respondent against each other and this has certainly widened the matrimonial relationship between the parties.

(4) By citing the above instances, the Appellate Court comes to a conclusion that there is no scope for re-union among the parties and the matrimonial relationship between



them as come to a stage where there is no scope for re-union.

WEB COPY Accordingly, the Appellate Court allowed the appeal filed by the appellant and granted a decree of divorce.

15. Aggrieved by the Judgment dated 12.12.2017 passed in C.M.A.No.4 of 2016 the respondent wife has filed the instant C.M.S.A.No.12 of 2018.

Proceedings initiated by the husband for custody of the child:

16. The appellant-husband has filed G.W.O.P.No.226 of 2016 before the learned Principal District Judge, Erode. According to the appellant the minor child was about 7 years old. As a father, he is entitled to take custody of the minor child, as contemplated under Section 6 of the Hindu Minority and Guardians Act, 1956. The appellant is financially capable of raising the minor child. He has also made certain investments with an intention to provide education and health care of the minor child. If the custody of the minor child is entrusted, he will be in a position to



nurture the minor child well. The appellant is living in Chennai where education, sports and extracurricular activities are in abundance. The appellant has nature love and affection towards the minor child and he wants to raise the minor child befitting his financial capability. On the other hand, if the custody continues to remain with the respondent, she will spoil the carrier and future of the minor child. Therefore, taking note of the welfare of the minor child, being a father, the custody of the child can be entrusted to him.

17. Further reference was made to the Insolvency Proceedings filed by the father of the respondent. In this context, the appellant has placed reliance on the Government Gazatte dated 09.08.1995, in which, I.P.No.18 of 1994 filed by the father of the respondent before the Sub Court at Sankari was published. By referring to the same, it is vehemently contended that neither the respondent not her father had wherewithal to raise the minor child. In such circumstances, the appellant prayed for allowing G.W.O.P.No.226 of 2019 filed by him.

18. The appellant also referred to M.C.No.5 of 2016 filed by the respondent and her minor son before the Judicial Magistrate Court,



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

Sathyamangalam seeking maintenance under Section 125 of the Code of Criminal Procedure. The appellant also referred to a Tr.C.M.P.No.685 of 2015 seeking to transfer of H.M.O.P.No.28 of 2015 from the Sub Court, Coimbatore to the Sub Court, Sathyamangalam. As per the order passed by this Court on 17.12.2015 allowing Tr.C.M.P.No.685 of 2015, H.M.O.P.No.28 of 2015 was transferred to the file of the Sub Court, Sathyamangalam and re-numbered as H.M.O.P.No.2 of 2016. By quoting the Tr.C.M.P.No.685 of 2015 filed by the respondent/wife it is submitted by the appellant that even for travelling from Sathyamangalam to Coimbatore, the respondent wife expressed her inability, financially and therefore also vesting the custody of the minor child may not be in the larger interest of the minor child and therefore he prayed for allowing G.W.O.P.No.226 of 2019.

Counter filed by the respondent in GWOP No.22//2010:

19. The respondent/wife opposed G.W.O.P.No.226 of 2019 mainly on the ground that as a mother, she is the best person to bring up the minor child in a good way. At the same time, it was stated that she has no objection for the appellant to meet the minor child either during school hours or at any other common place. The filing of M.C.No.5 of



2016 has nothing to do with the financial capability of the respondent to nurture the minor child.

20. The appellant has filed I.A.No.18 of 2016 in H.M.O.P.No.2 of 2016 seeking interim custody of the minor child and even that was refused by the Trial Court. Whenever the appellant intended to meet the minor child he could very well meet the minor son in her presence. A reference was also made to Crl.O.P.No.1456 of 2014 filed by the appellant for transfer of M.C.No.5 of 2016 from the Judicial Magistrate, Sathyamangalam to Chennai or Coimbatore. Therefore she prayed for dismissal of G.W.O.P.No.226 of 2019.

21. Before the Principal District Court in G.W.O.P.No.226 of 2016, the appellant examined himself as P.W.1, R. Nithyanandam as P.W.2 and Doctor Prasanth as P.W.3 and Exs.P1 to P50 were marked. On the side of the respondent, the respondent examined herself as R.W.1 and marked 3 documents as Exs.R1 to R3.

22. The learned Principal Judge, Erode upon appreciation of the oral and documentary evidence refused to entrust the custody of the



minor child to the appellant on the ground that the welfare of the minor child is paramount importance and the minor child will live in convenience if the custody of the child is left to the mother being a natural guardian. Further, the appellant being a father will not be in a better position than the respondent to bring up the minor son in a natural way. The learned District Judge also relied on the decision of the Hon'ble Supreme Court in *2017 (3) MLJ 184 SC* to conclude that a child who is 7, 8 years old must be left in the custody of the mother to ensure that the child lives in abundant comfort, naturally. Taking note of the fact that the minor child is 7 years old as on the date of the order passed in G.W.O.P.No.226 of 2019, the learned District Judge refused to grant the relief of custody.

23. Aggrieved by the same, the appellant has filed the present C.M.A.No.2784 of 2018.

24. The learned counsel appearing for the appellant submitted that during the course of matrimonial journey with the respondent, the appellant had sleepless night due to the attitude of the respondent. In order to prove the manner in which he was subjected to cruel treatment,



the appellant examined himself as P.W.1 besides examining three other witness as P.Ws.2 to 4. Several instances were cited by the appellant to drive home the point that he was subjected to cruel treatment by the respondent. The main plea of the appellant, among other things, is that the respondent threatened that she would commit suicide and would throw the blame on him and his parents. This according to the appellant had caused a reasonable apprehension in his mind to live along with the respondent. In order to prove this assertion, the appellant examined himself and reiterated that on 10.07.2014, the respondent, due to a trivial matrimonial dispute, had consumed 8 to 10 Dolo-650 tablets and she was immediately admitted in Sundaram Medical Foundation Hospital at Chennai as an in-patient and a stomach wash was done during the course of treatment. In this context, a reference was also made by the hospital authorities to the jurisdictional police station purportedly referring the instant as an attempt to commit suicide. Investigation was conducted by the police and they have advised the appellant and the respondent to take a separate house for their living.

25. Further, the learned counsel for the appellant placed heavy reliance on Paragraph No.13 of the Original Petition wherein, it was



stated as follows:

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“ Because of the Respondent pinpricks & Mental Tortures given to the Petitioner and his parents, both the Petitioner and his father were not able to focus on their professional life. The Respondent on 28.09.2013 picked up a quarrel for a petty issue created by her, then Respondent went into bedroom, bolted and attempted to commit suicide by cutting herself on her left hand palm using a blade. Later Respondent herself applied turmeric powder to the cut and avoided blood loss. At various instance Respondent has broken 2 costly mobile phones throwing against the wall that is bought by the petitioner, during their petitioner's quarrels. On 01.02.2014 Respondent has also broken the petitioner's Dell Laptop in a quarrel and has caused heavy loss and damage to his professional career in terms of Finance & data loss in the Laptop. Respondent on 09.07.2014 has also refrained petitioner's parents to cook in their own house by dismantling a & hiding the Gas Stove burner, Holer & the on/off knobs. On 19.12.2014 Respondent has also hindered the petitioner to visit any client outside Chennai city assuming that the petitioner is lying to Respondent and visiting his parents, by threatening him to kill their son & commit suicide if he leaves to Coimbatore on professional grounds. There are many such instances respondent gave mental agony, tortures and impeded the professional development of the petitioner.”

26. The learned counsel for the appellant also brought to the notice of this Court the various communications exchanged between the



appellant and the respondent through what's app and which were reduced

in the form of writing and they are available from Page Nos.300 to 350 of

the typed set of papers. Based on the above material documents the

learned counsel for the appellant submitted that the appellant has a

reasonable apprehension to live with the respondent. Due to the conduct

of the respondent, the appellant find it impossible to lead a normal live.

The evidence of the appellant as P.W.1 was also corroborated by P.Ws.2

to 4. Therefore, the learned counsel for the appellant would submit that

the matrimonial relationship between the parties has snapped and there is

no chance for re-union among them. However, the Trial Court without

appreciating the above aspects has erroneously dismissed the Original

Petition. On appeal, the First Appellate Court has found that the dispute

between the couple are such that there is no possibility of re-union. The

First Appellate Court also specifically pointed out that the respondent

throughout the matrimonial proceedings has not uttered that she is ready

and willing to live with the appellant. Further, the respondent also has

not taken any steps to re-join the matrimonial company of the appellant

by filing an application under Section 9 of The Hindu Marriage Act and

allowed the appeal. According to the learned counsel for the appellant,

such a well considered judgment of the Appellate Court needs no



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

interference by this Court and prayed for dismissal of the appeal filed by the respondent/wife in C.M.S.A.No.12 of 2018.

27. Countering the submission of the learned counsel for the appellant, the learned counsel for the respondent would contend that the matrimonial disputes *inter se* between the appellant and the respondent are trivial in nature that it does not warrant a decree of divorce to be passed. The Trial Court taking note of the above, had dismissed the Original Petition. The Trial Court has reasoned that the dispute among the parties are nothing but normal wear and tear that could be witnessed in all households.

28. As regards the instance relating to consuming Dolo-650 tablets, the Trial Court has reasoned that the respondent was subjected to cruel treatment by the appellant and his family members and therefore, she was constrained to take the extreme steps. In effect, it is submitted that the attempt on a part of the respondent to commit suicide is not voluntarily but it was taken at the spur of the moment. In any event, after this incident, there was no such recurrence in the family and therefore, it cannot be taken note of by the appellate Court to grant a



decree of divorce. The various instances cited by the appellant in the Original Petition have been rebutted by the respondent in the counter affidavit, while so, it cannot be said that the appellant was in any manner subjected to cruel treatment.

29. As regards the custody of the minor child, it is vehemently argued by the learned counsel for the appellant that the respondent has refused the custody of the minor child for no reasons. The interest of the minor child is paramount and that was not properly considered by the learned Principal District Judge, Erode, while dismissing G.W.O.P.No.226 of 2019 filed by the appellant. The appellant is financially capable to bring up the minor child befitting to his capability and capacity. On the other hand, the respondent has exhibited a penurious situation even in the maintenance case filed by her in M.C.No.5 of 2016. Thus, it is evident that the respondent has no independent income of her own and she has no wherewithal to bring up the minor child. The minor child is now 11 years old. Therefore, it cannot be gainsaid that the child has to continue to remain in the custody of the respondent. As a 11 year old minor boy, if his custody is entrusted to the appellant no prejudice will be caused to the respondent in any manner.



Therefore, keeping in mind the welfare and interest of the minor child, the minor child custody has to be given to the appellant. By pointing out the above, the learned counsel for the appellant would submit that refusing visitation right to the father is unjust and arbitrary, therefore he prayed for allowing the C.M.A.No.2784 of 2018 filed against the order passed in G.W.O.P.No.226 of 2019.

30. On the above contention, this Court heard the learned counsel appearing for the respondent, who would submit that being a mother and natural guardian, the respondent is the competent person to retain the custody of the minor child to ensure the convenience and comfort of the child. He also placed reliance on Section 6 of the Hindu Minority and Guardians Act, 1956 and contend that the continuous custody of the minor child with the respondent will be proper and it need not be disturbed. The respondent is residing in Sathyamangalam along with the minor child. The appellant is residing in Chennai. The minor child is studying in a school at Sathyamangalam. Therefore, the sudden shift of the school or the location where the minor child is residing all along would have an adverse impact on the behavioural pattern of the minor child. The minor child is just 11 years old and therefore, the minor



child cannot be compelled to remain in custody of the appellant/father.

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31. The learned counsel for the respondent proceeded to contend that for the purpose of vesting custody of the minor child, financial capability or capacity is immaterial. Therefore in the best interest of the minor child, the custody of the minor child must continue to remain with the respondent. The First Appellate Court has considered the above aspects and rightly dismissed the G.W.O.P.No.226 of 2019 filed by the appellant/husband and he prayed for dismissal of the Original Petition.

32. The point arises for consideration in C.M.S.A.No.12 of 2018 is:

1. Whether the appellant is entitled for a decree of divorce on the ground of cruelty?
2. Whether the appellant has proved that he was subjected to matrimonial cruelty by the respondent?
3. Whether the First Appellate Court is right in reversing the Judgment and decree passed by the Sub Court, Sathyamangalam in H.M.O.P.No.2 of 2016?



WEB COPY 33. The point arises for consideration in C.M.A.No.2784 of 2018 is:

1. Whether the learned Principal District Judge, Erode is right in dismissing G.W.O.P.No.226 of 2019 filed by the appellant seeking permanent custody of the minor child viz., S.Maghizhan with the appellant?
2. Whether the refusal on the part of the respondent to even permit the appellant to have visitation right of the minor child is proper?

34. The appellant has filed the Original Petition for dissolution of marriage solemnized between him and the respondent on 20.02.2011. According to the appellant, the marriage between him and the respondent was by and large peaceful and the marriage was also consummated by virtue of the birth of the male child on 19.11.2011. However, few years after the marriage, the respondent started dominating the appellant and insisted him to come to terms. The appellant also referred to the respondent spending amount for no reasons and that she is a spent thrift.

35. In the Original Petition the appellant narrated various



instances to show that he was subjected to cruel treatment by the respondent and which had made him undergoing sleepless nights.

Reference was also made to the instances that took place on 13.11.2012, when the minor son suffered Denque and on that date, in the hospital, a quarrel took place between the parties as also their family members which resulted in exchange of heart-burns. On 20.11.2012, owing to a trivial matrimonial dispute, it is stated that the respondent deserted the matrimonial company of the appellant however, she came back on 30.11.2012. On 28.09.2013, it is alleged that the respondent attempted to commit suicide by cutting her left hand palm using a blade. Reference was also made to the respondent throwing the laptop of the appellant and caused severe damage to it due to a trivial quarrel. Similarly, several instances were quoted in the Original Petition to bring to the core the manner in which the appellant was subjected to cruelties.

36. However, in the counter affidavit, the respondent denied each and every one of the allegations as false and motivated. In the counter, it was stated that due to instigation of the parents of the appellant, the appellant has filed the present petition for dissolution of the marriage. However, the respondent is willing to live with the



appellant and the minor child without the intervention of the parents,
elder sister and brother-in-law of the appellant.

37. In the light of the above, now it has to be examined as to whether the averments made by the appellant and denied by the respondent in the counter would constitute matrimonial cruelty on the appellant and whether those averments would qualify grant of decree of divorce.

38. This Court has gone through the averments made in the Original Petition as well as the counter affidavit. The deposition of the appellant as P.W.1 and the respondent as R.W.1 has also been scanned thoroughly. A reading of the entire averments would only show that the matrimonial life between the appellant and the respondent was not cordial and it was marred by incessant dispute. Therefore, the appellant has filed the Original Petition alleging that he was subjected to matrimonial cruelty by the respondent.

39. At this juncture, it must be stated that cruelty has not been defined in exactitude by the constitutional Courts. There was no



parameters laid down as to what could constitute cruelty. However, to conclude that a spouse was subjected to cruelty by the other, facts of each case is relevant to be noted down. In other words, the conclusion with respect to cruelty must be based on the averments, counter averments and the oral and documentary evidence produced in the given case. It will be useful to refer to the below mentioned decisions to fortify this conclusion

40. The Honourable Supreme Court in the off-quoted decision in **(Raj Talreja vs. Kavita Talreja)** reported in **(2017 (4) CTC 208)** held as follows:-

“10. Cruelty can never be defined with exactitude. What is cruelty will depend upon the facts and circumstances of each case. In the present case, from the facts narrated above, it is apparent that the wife made reckless, defamatory and false accusations against her husband, his family members and colleagues, which would definitely have the effect of lowering his reputation in the eyes of his peers. Mere filing of complaints is not cruelty, if there are justifiable reasons to file the complaints. Merely because no action is taken on the complaint or after trial the accused is acquitted may not be a ground to treat such accusations of the wife as cruelty within the meaning of the Hindu Marriage Act (for short “the Act). However, if it is found that the allegations are patently false, then there can be no manner of doubt that the said conduct of a spouse levelling false accusations against the other spouse would be an act of cruelty...



41. On the other hand, the parameters that are required to be fulfilled by the spouses to get a decree of divorce is delineated by the Division Bench of this Court in the case of **V.R. Rajkumaran vs. B.S. Lavanya** reported in (2020) 8 MLJ 170. Useful reference of the judgment can be made hereunder as follows:-

"5. It is well settled that cruelty or cruel treatment, is not defined precisely in the Hindu Marriage Act or conspicuously by way of judicial pronouncements by the Courts in our country. The definition of "cruelty" has to be inferred from the facts pleaded and evidence adduced by the party. Some of the leading cases in which cruelty was construed as a ground for dissolution of marriage are:

(i) Proof of the husband or wife falsely or maliciously prosecuting the other through the Criminal Courts and thereby harassing the other;

(ii) Proof of refusal to have conjugal relationship, which is a part of the matrimonial obligation.

(iii) Proof of refusal on the part of either spouse to postpone the child birth;

(iv) Proof of either spouse assaulting or causing bleeding injury during the course of the matrimonial life, thereby making the other spouse to live in constant fear;

(v) Proof of either spouse threatening or intimidating the other to commit suicide and to throw the blame on the other, thereby putting and intimidating the other spouse to remain in fear;

(vi) Proof of voluntary desertion by either spouse without any just or sufficient cause, thereby making the other spouse to suffer silently;

(vii) Proof of scolding or abusing either spouse, either in privacy or in front of others, thereby putting the other spouse into shame and degradation.



42. In this case, one of the main grounds raised by the appellant

is respondent frequently threatened him that she would commit suicide and would throw the blame on him and his family members. She also threatened that she would prefer the complaint under the Protection of Women from Domestic Violence Act by giving a false complaint to the Social Welfare Officer. The appellant mainly projected the incident that had taken place on 10.07.2014, during which, due to a trivial matrimonial dispute, the respondent said to have consumed Dolo-650 pills purportedly with an intent to end her life. The respondent was taken to the Sundaram Medical Foundation Hospital where she was treated by the Doctor, who also made a reference to the jurisdictional police. The Trial Court on analyzing this aspect of the matter has concluded that due to harassment meted out to her, she had taken extreme step to end her life. This specific conclusion of the trial Court has not been challenged by the respondent. In other words, the incident that had taken place has been admitted even by the respondent. This would only indicate that the appellant had made an attempt to end her life. This would also confirm the averment of the appellant that the respondent was in the habit of threatening him and his family members with an attempt to commit suicide. In this context, in Para No.12 of the counter affidavit filed by the



respondent, it is stated as follows:

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“12. The allegations made in Para 16 & 17 are all denied as false. Admittedly, because of the torture given by the petitioner's parents, elder sister and brother in law, she suffered head ache and she ate tablet as prescribed by the petitioner. Thereafter, the police officers advised the petitioner that it is better to live independently without his parents by taking a separate house. Only upon advice given by the police officers the petitioner on 27/08/2014 setup a separate rented house at No.6/13, Maraimalai Adigalar Street, Mugappair East, Chennai-600 037 and lived together with the respondent and his son happily without any interference of the petitioner's parents and relatives for four months”

43. Therefore, the observations of the trial court that the respondent, due to the harassment meted out to her by her in laws had consumed dolo-650 pills is proved to be erroneous by virtue of the averments made in the counter of the respondent herself. Thus, the incident that had taken place on 10.07.2014 has been admitted by the respondent in the counter affidavit. It is needless to mention that such attempt was made by the respondent on 10.07.2014 within two years or more of the marriage solemnised between the appellant and her on 20.02.2011. Thus, within few years of the marriage, the respondent made such an attempt. Assuming that, if, any untoward incident happened on



that day, definitely the appellant and his parents would have been prosecuted criminally for having committed the offence under Section 304(b) of the Indian Penal Code. In fact, soon after the respondent was admitted in Sundaram Medical Foundation Hospital, Chennai, a reference was made to the jurisdictional police and an enquiry was conducted. In such a situation, no normal prudent man would have any inclination to live with such a spouse under the threat of criminal prosecution. This fulfils the requirement as enunciated by the Division Bench of this Court in *V.R Rajkumar* case in clause (v) mentioned above.

44. That apart, even in the Original Petition in Para No.13, the appellant made a reference to the attempt on the part of the respondent to commit suicide with a blade. Therefore, the attempt of the respondent on 10.07.2014, to commit suicide by consuming Dolo 650 pills cannot be regarded as an isolated incident, rather, the respondent made such attempts previously as well. If this attempt of the respondent is considered, definitely the appellant is justified in contending that he could not live in peace and he had a reasonable apprehension that the respondent may attempt to end her life and throw the blame on him. Therefore, it can reasonably be presumed that in a situation of this nature,



no prudent man could conduct the matrimonial life with the other spouse in peace.

45. Yet another instance cited by the appellant is the one during which, the respondent and her mother engaged in a quarrel with the appellant and his family members. During such quarrel, the respondent and her mother engage in war of words and this was witnessed by neighbors, thereby the appellant and his family were put to shame and humiliation. The appellant, as PW1 had deposed about this incident, but in his cross-examination, nothing useful could be elicited from him.

46. In the original petition, the appellant also cited another instance whereby the respondent hurled the laptop used by the appellant for his official purpose and broken it into piece thereby, he was subjected to untold hardship and inconvenience. These instances quoted by the appellant in the Original Petition has not been specifically denied by the respondent in the counter.

47. Further more, the learned counsel for the appellant brought to the notice of this Court the affidavit filed by the respondent/wife on



28th August 2019 in C.M.S.A.No.12 of 2018 wherein, it was stated as

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1. *I am the appellant herein and as such I am well acquainted with the facts of the case.*
2. *I submit that I have filed the above said C.M.S.A.No.12 of 2018 against the decree of divorce passed by the III Additional District and Sessions Judge, Gobichettipalayam, dated 12.12.2017 in C.M.A.No.4 of 2016. The respondent filed C.M.A.No.2784 of 2018 before this Hon'ble Court against the order passed by the Principal District Judge, Erode in G.W.O.P.No.226 of 2016, dated 22.10.2018.*
3. *I further submit that without prejudice to my rights pending in the above said cases, I tender my unconditional apology for the act of me in my matrimonial home. I will not repeat the same and I undertake that I will abide by the words of the respondent and be a truthful wife.*

In the said circumstance, it is prayed that this Hon'ble Court may be pleased to accept the above said undertaking affidavit and pass such further or other orders as this Hon'ble



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

Court may deem fit and proper in the circumstances of the case and thus render justice.

48. On a conspicuous reading of the entire averments and counter averments, it is very clear that the appellant was subjected to matrimonial cruelty by the respondent and therefore, the respondent is entitled for a decree of divorce. Further, as rightly pointed out by the First Appellant Court, the respondent throughout the matrimonial proceedings, has not whispered anything that she is ready and willing to live with the appellant. On the other hand, she has filed several proceedings against the respondent apart from filing the instant appeal. The respondent also filed maintenance case No.5 of 2006, before the Judicial Magistrate Court at Sathyamangalam. That apart, the respondent also filed Transfer C.M.P. No.685 of 2015 before this Court to transfer H.M.O.P.No.28 of 2015 filed by the appellant before the Sub Judge at Coimbatore and as per the order passed by this Court the Original Petition stood transferred to the file of the Subordinate Judge, Sathyamangalam and re-numbered as H.M.O.P.No.2 of 2016. However, the respondent/wife has not chosen to file a petition under Section 9 of



the Hindu Marriage Act for restitution of conjugal rights and it speaks volumes about the conduct of the respondent. This would also indicate that the respondent has no intention to live with the appellant. Of course, in the counter in Para No.14, the respondent only stated that "*she is always willing to live together with the appellant and the minor child peacefully without the intervention of the parents, elder sister and brother-in-law of the appellant.*" Thus, it is evident that the willingness of the respondent to join the matrimonial company of the appellant is not voluntarily or free from any condition, rather it is attached with a condition that the appellant's mother, elder sister or brother-in-law shall not interfere into the matrimonial life of the respondent with the appellant.

49. This Court also takes notice of the fact that the respondent deserted the matrimonial company of the appellant on 22.12.2014 and from that date onwards she is residing separately, without the company of the appellant/husband. This Court also gone through the notice dated 31.12.2014, issued by the appellant as well as the reply notice sent by the respondent. Furthermore, the respondent has given a complaint dated 30.12.2014 to the Thudiyalur police station against the appellant and his



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

parents and subjected them to enquiry. On considering the above,

this Court has no hesitation to hold that the First Appellate Court is legally right in concluding that the appellant was subjected to cruel treatment by the respondent and that there is no scope for re-union among the couple as the matrimonial relationship between them had gone to an extent where there is no possibility to return. Having regard to all the above, this Court holds that the First Appellate Court is correct in over turning the Judgment of the Trial Court and allowing the appeal filed by the appellant. Accordingly, the points for consideration raised in C.M.S.A. No. 12 of 2018 are answered in favour of the appellant/husband and against the respondent/wife.

50. With respect to custody of the minor child, admittedly, out of the wedlock between the appellant and the respondent, the minor child by name Magizhan was born on 19.11.2011. The child is 11 years old now. According to the appellant, from the date of desertion of the respondent namely 22.12.2014, he had not given access to even meet the child and he was ailing to have a glimpse of the minor child, but it was calculatedly prevented by the respondent all these days. In fact, the appellant and the respondent were heard by this Court in the chambers



and enquired. During such enquiry, the respondent agreed to permit the appellant to have a glimpse of the child. However, immediately thereafter, she had revolted from her words and remind firm in not allowing the appellant to see the minor boy.

51. The learned Principal District Judge, Erode refused to vest the custody of the minor child with the appellant on the ground that the mother is the competent person to retain the custody of the minor child and taking note of the age of the child being 7 years old by then, the G.W.O.P.No.226 of 2019 filed by the appellant/husband was dismissed.

52. The learned counsel for the appellant also brought to the notice of this Court, the affidavit filed by the appellant on 21st August 2019 wherein, a reference was made to the counselling conducted by this Court among the appellant and the respondent and her parents. According to the learned counsel for the appellant, during such counselling, the respondent categorically admitted that she would permit the appellant to meet the minor son. However, contrary to such undertaking on 02.08.2019, after the counselling, when the appellant called upon the respondent to provide him access to the minor son. she



bounced back from her promise and refused to provide access to the minor child. This was also specifically pointed out by the appellant in the affidavit dated 21.08.2019 wherein, it is stated as follows:

“2.On 02.08.2019 this Hon'ble Court after counseling asked me to take the Appellant along with me and give a chance for her. Before this Hon'ble Court the Appellant stated that she would like to live with me under any circumstance, whether she is getting food or not, whether she is provided with any comfort or not.

3.I was very devastated and was not in a position to continue my life with the Appellant due to the torture and harassment faced by me and my aged ailing parents. Further the Appellant has not obeyed the orders of this Hon'ble Court dated 20.02.2019 and 24.02.2019. She failed to provide me access to my son. Despite so many visits to the residence of the Appellant, she continued to abuse me and treated me badly without providing access to my son. She has poisoned the mind.

4.Hence with all due respect to this Hon'ble Court's counselling on 02.08.2019, after the hearing in the Court corridor, in the presence of my counsel and the junior counsel of the Appellant I called upon the Appellant and asked her to provide me access to my son during the weekend and conveyed that I shall thereafter think of any other possibilities. Immediately the Appellant stated that she cannot provide access and also in a loud voice told me, “You first ask your father and mother to call me and talk to me”. Immediately I said that I am the father of the child and I will only speak to you or the child and my parents are not connected to this. She grew very angry and started shouting at me saying “Your parents should talk to me first, otherwise I will not let my child go with you ever.” Then my counsel



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C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

asked the Appellant junior counsel to advice their client and informed the Appellant junior counsel that your client is saying something different before the Hon'ble Judge and now saying something else differently. My Counsel also asked the Appellant Junior Counsel to keep me or my counsel.

5.Neither me nor my counsel received any information after that from the Appellant or her counsel.

I wanted to bring these pertinent developments to the knowledge of this Hon'ble Court. I hence humbly pray this Hon'ble Court to take these developments into consideration and thus render justice in the facts and circumstances of this case.”

53. The learned counsel for the appellant further referred to the affidavit dated 22 November 2021 filed by the appellant wherein, he has stated thus:

“2.It's humbly submitted that the Appellant father has preferred the present appeal seeking custody of the child. The Respondent Mother has never complied with the Orders directing interim custody and visitation of the child by the Appellant/father. This Hon'ble Court has warned that it will take strong view against the Respondent if Court Order is not complied by her.

3.It's humbly submitted to this Hon'ble Court that, the Appellant/father believing that the Respondent/Mother will comply with the visitation orders passed by this Hon'ble Court to the Petitioner/Father, went to the Respondent's house on four Sundays as directed in the Order and waited in front of Respondent/Mother's home from morning 7.30 a.m., to evening 7.00 p.m., but the Respondent/Mother never allowed the child to be



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C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

with the Appellant/Father. The Respondent/Mother along with her family members abused the Appellant/Father in front of public with unparliamentary languages.

4.It's humbly submitted to this Honourable Court that the objective of the petitioner Father for filing the custody petition is to give his child a better education which will be in welfare of his child's future, the petitioner Father is now NOT PRESSING for the complete custody of the child, but beg this Hon'ble Court to allow him to admit the child at least from the next academic year, i.e., starting from the VI Standard Education of the child in any one of the below reputed school

1> Isha Home School, Coimbatore.

2>The Laidlaw Memorial School, Ooty.

3>The Lawrence School, Ooty.

Whichever school the petitioner Father is able to secure the admission for the child and to direct the Respondent/mother to support the Appellant/Father at least in this one aspect keeping the welfare of the child in mind and take the child and admit him in the above any one of the school where the admission is secured for the child.

5.It's humbly submitted to this Hon'ble Court that the Petitioner Father will take responsibility for the complete Education & Boarding cost of the child.

6.It's humbly submitted to this Hon'ble Court that though the Hon'ble Court may grant visitation right to the Appellant/Father to any decree that this Hon'ble Court believe to be fit and proper. The Respondent Mother will not comply with such orders as usual and will only try to poison the child's mind against the Petitioner Father more, so that the child does not go with the Father during the visitation. So it is humbly submitted that such a view of this Hon'ble Court will go Counter productive



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C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

due to the Respondent Mothers Attitude and will have a negative impact on the child's mental development and future welfare.

7.So, the Appellant/Father humbly submits that taking into consideration the welfare of the child instead of focusing on the battle over the custody or his visitation rights, the Appellant wants to focus in impressing upon this Honourable Court to ensure the Child is admitted in any one of the Good reputed International School welfare the child will get a better education than the current school at Koonamoolai near Sathyamangalam Village, which will be in welfare of the child's future and the Appellant/father is ready to bare all education and boarding expense of the child.

It is therefore humbly prayed that this Hon'ble Court may be pleased to pass an order that the child studies in any one of the Good reputed international school where the child will get a better education, which will be in welfare of the child's present and future and direct the Respondent to support the Appellant in this cause and pass such further or other order or orders as may be deemed fit and proper in the circumstances of the case and thus render justice.”

54. This Court has carefully considered the materials placed on record. Having regard to the above affidavit filed by the appellant, this Court is of the opinion that the appellant was reasonably prevented from having a glimpse of the minor child. At the same time, taking note of the age of the minor child, this Court is of the view that permanent custody of the child cannot be vested with the appellant for the simple reason,



that the child is studying in a school at Sathyamangalam. The child is 11 years old as of now. At this tender age, handing over the custody of the minor child to the appellant-father would result in shifting the minor child from Sathyamangalam to Chennai, which would adversely affect the behavioural pattern and other geographical disadvantage in favour of the minor child. Therefore, this Court is of the firm view that the custody of the child should remain with the mother/respondent until the minor son attains the age of majority. At the same time, as a father, the appellant cannot be made to grope in the dark to see his child and the appellant is entitled for visitation rights of the child atleast once in a month.

55. Accordingly, the order dated 22.10.2018, passed by the Principal District Judge, Erode in G.W.O.P.No.226 of 2019 is modified, permitting the appellant to visit the minor child once in a month on the first Sunday of every month between 10.00 a.m., and 5.00 p.m., during which the respondent shall hand over the custody of the child to the appellant. Further, during summer holidays when the schools will remain closed the appellant shall take the custody of the child for a week without the interference of the respondent or his family members. This



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

arrangement shall continue till the minor child attains majority.

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56. In the result,

(i) C.M.S.A.No.12 of 2018 is dismissed confirming the Judgment and decree made in C.M.A.No.4 of 2016, dated 12.12.2017 on the file of the learned III Additional District and Sessions Judge, Coimbatore

(ii) C.M.A.No.2784 of 2018 is partly allowed modifying the order passed in G.W.O.P.No.226 of 2016 dated 22.10.2018 on the file of the learned Principal District Judge, Erode to the extent indicated above.

(iii) However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

28.04.2022

ssi

Index:Yes/No

Internet:Yes/No

To:

1.The III Additional District and Sessions Judge,
Coimbatore.

2. The Subordinate Judge,



C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

Sathyamangalam.

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3.The Principal District Judge,
Erode.

4.The Section Officer,
V.R.Section,
High Court, Chennai.



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C.M.S.A.No.12 of 2018 & C.M.A.No.2784 of 2018

S.KANNAMMAL,J.

ssi

Pre delivery Common Judgment
made in CMSANo.12 of 2018
and
C.M.A.No.2784 of 2018

28.04.2022