



C.M.A.Nos.2393 and 2394 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 23.08.2022

PRONOUNCED ON : 18.10.2022

CORAM :

THE HONOURABLE MS.JUSTICE V.M.VELUMANI

AND

THE HONOURABLE MR.JUSTICE S.SOUNTHAR

C.M.A.Nos.2393 and 2394 of 2021

and

C.M.P.No.13631 of 2021

C.M.A.No.2393 of 2021:

D.John

... Appellant

VS.

1.C.Jaya

2.Priya

... Respondents

Prayer: Civil Miscellaneous Appeal is filed under Section 19 of the Family Courts Act, 1984 read with Section 55 of Indian Divorce Act, praying to set aside the fair and decretal order passed in O.P.No.620 of 2016 dated 08.01.2021 by the learned III Additional Principal Judge, Family Court, Chennai.

For Appellant : Mr.C.Samivel

For R1 : Mr.Kaja Navas



C.M.A.Nos.2393 and 2394 of 2021

C.M.A.No.2394 of 2021:

WEB C D.John

... Appellant

VS.

C.Jaya

... Respondent

Prayer: Civil Miscellaneous Appeal is filed under Section 19 of the Family Courts Act, 1984 read with Section 55 of Indian Divorce Act, praying to set aside the fair and decreetal order passed in O.P.No.2134 of 2015 dated 08.01.2021 by the learned III Additional Principal Judge, Family Court, Chennai.

For Appellant : Mr.C.Samivel

For Respondent : Mr.Kaja Navas

COMMON JUDGMENT

(Judgement of the Court was made by S.SOUNTHAR.J.,)

These Civil Miscellaneous Appeals are filed by the appellant/husband, challenging the fair and decreetal order passed by the learned III Additional Principal Judge, Family Court, Chennai, dismissing his petition for divorce in O.P.No.2134 of 2015 and allowing the petition filed by the respondent/wife seeking restitution of conjugal rights in O.P.No.620 of 2016.



2. The appellant/husband filed a petition for divorce in O.P.No.2134 of 2015 on the grounds of cruelty and desertion. The respondent/wife on her part filed petition for restitution of conjugal rights in O.P.No.620 of 2016 expressing her willingness to join with appellant/husband in matrimonial life. Both the petitions in O.P.Nos.2134 of 2015 and 620 of 2016 were tried together and common evidence was recorded in respondent's petition for restitution of conjugal rights in O.P.No.620 of 2016.

Pleadings of the Appellant/Husband:

3. The appellant/husband averred in his petition that his marriage with respondent was solemnized on 14.06.1995 at C.S.I.Church, Marthandam, Kanniyakumari District as per the Christian Rites and Customs. After marriage, both of them lived together at Royapuram, Chennai for nearly 10 years and through the said wedlock, 2 female children were born to them. The appellant/husband alleged that from the beginning the respondent/wife did not co-operate with the appellant/husband and she used to quarrel with the appellant on flimsy grounds. It was alleged that the respondent/wife would go out of home as per her wish and return late in the night and when the



appellant questioned her attitude, she used to pickup quarrel and abuse him with filthy language. The appellant alleged that the respondent withdrew from matrimonial home on 19.07.2005 along with two daughters and started living in her mother's house at Marthandam by admitting the children in Good Shepherd School, Marthandam. Though appellant visited Marthandam and stayed with respondent for sometime in his endeavor to change the adamant attitude of the respondent, he could not achieve success in his endeavor. The appellant further averred that the respondent returned to Chennai during May-2011 along with her two daughters and occupied the residential quarters allotted to the appellant by his Department and had thrown the appellant out of matrimonial home. Further, the respondent preferred a false criminal complaint before the Commissioner of Police on 30.04.2015 and alleged that the appellant did not maintain her and two daughters. On these allegations, the appellant sought for divorce under the Indian Divorce Act on the ground of cruelty and desertion.

The averments found in the pleadings of the respondent/wife:

4. The respondent/wife filed a detailed counter denying allegations of cruelty and desertion made by the appellant/husband. The respondent averred



in her counter that both the parties were living happily upto 2011. The respondent alleged that during May-2011, she went to her parental home along with her two daughters during vacation. The appellant lied to the respondent as if he got transfer to Ramnad and convinced her to stay at Marthandam till he gets retransfer to Chennai. The appellant had received the Transfer Certificate of the children from C.S.I Bain School, Kilpauk, Chennai, where the children were studying till then and forcefully put the children in a school at Marthandam. Though the respondent insisted the appellant to take them to Ramnad to lead a matrimonial life, the appellant denied her genuine request picked up quarrel with the respondent. During May-2011, the respondent and her children, brother and his wife came back to Chennai and informed him over phone about their arrival in Chennai. The appellant immediately came to house and shouted at the respondent and her brother by using filthy language. He also confessed that he had never been transferred to Ramnad and he had been working in Chennai only. It was also alleged that the appellant threatened the respondent that some people from Pondicherry would come and kill all of them. The appellant ignored the respondent and her children by refusing to enter matrimonial home inspite of several attempts



made by the respondent. The respondent also received threatening calls from a lady. When the respondent out of her own efforts put her children back to C.S.I. Bain School, Kilpauk, Chennai by getting Transfer Certificates from Good Shepherd School, Marthandam, the appellant had stopped monetary help to the respondent and her children. In order to attempt a re-conciliation, the respondent approached the Commissioner of Police on 30.04.2015 with a request to advise the appellant to live with the respondent in matrimonial home. In spite of advice by the Police, the appellant refused to return to matrimonial home and also refused to maintain the respondent and her children. But strangely he filed petition for divorce on false grounds. Thereafter, the respondent filed the above mentioned petition for restitution of conjugal rights before the Family Court, Chennai. On these pleadings, the respondent prayed dismissal of the petition for divorce filed by the appellant.

5. The pleadings of the parties are repeated and reiterated in the petition for restitution of conjugal rights filed by the respondent/wife. As stated earlier, both the petitions were tried together and common order was passed.

6. Before the Family Court, Chennai, the evidence was recorded in the



petition filed by the respondent/wife. She was examined as PW.1 and Ex.P1 to Ex.P24 were marked on behalf of her side. On behalf of the appellant/husband, he was examined as RW.1 and Ex.R1 to Ex.R3 were marked. Though in the certified copy of the common order, it was mentioned that on behalf of the appellant/husband one Priya was examined as RW.2, in the body of the order at Paragraph No.7, the learned Judge recorded that only one witness was recorded on behalf of the appellant.

7. The learned counsel for the appellant/husband submitted that wife caused severe cruelty to appellant/husband by preferring a police complaint against him based on unsubstantiated false facts. He further submitted that the respondent without any reasonable cause withdrew from matrimonial home on 19.07.2005 and thereafter, there was no meaningful cohabitation between the parties and hence, the respondent/wife is guilty of willful desertion. He further submitted that in the petition for restitution of conjugal rights filed by the respondent/wife, there was allegations of adultery against the appellant/husband and the same was not substantiated. The allegations of adultery of the respondent/wife without any justification and cruelty and



C.M.A.Nos.2393 and 2394 of 2021

hence, he sought for allowing the appeal by setting aside the common orders passed by the Family Court, Chennai.

8. Per contra, the learned counsel for the respondent/wife submitted that upto 2014, there was no dispute between the parties and suddenly, the appellant/husband withdrew from the matrimonial home in the year 2014 and refused to return. In order to make him to return to matrimonial home, a police complaint was given with a good intention. Inspite of the advise tendered by the police, the appellant did not join matrimonial home and hence, the respondent/wife was constrained to file petition for restitution of conjugal rights. The appellant/husband as a counter blast filed petition for divorce with false allegations of desertion, without any substance.

9. The learned counsel further submitted that though there is an allegation of the extra marital affairs against the appellant/husband in Paragraph No.12 of the respondent/wife's petition for restitution of conjugal rights, the appellant in his counter did not specifically denied the same and therefore, it cannot be taken as unsubstantiated allegations. He submitted that



in the absence of specific denial, it should be taken as an admission. The learned counsel for the respondent submitted that the pleadings in the petition filed by the appellant/husband is not sufficient to support his prayer for divorce on the ground of cruelty.

10. On considering of the pleadings of the parties, evidence available on record and contentions of the learned counsel, following points are arising in these appeals:-

- (i) Whether the appellant/husband is entitled to divorce on the ground of cruelty?
- (ii) Whether the appellant/husband is entitled to divorce on the ground of desertion?
- (iii) Whether the respondent/wife is entitled to restitution of conjugal rights?

Points (i) to (iii):

11. Since all the points arising for consideration are interlinked, all these points are discussed together.

12. The appellant/husband in support of his plea alleged following acts



of cruelty:-

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- (i) From the beginning the respondent/wife did not co-operate and picked up frequent quarrel.
- (ii) The respondent/wife used to go out of house as per her wish and return to house in the late night and when the appellant questioned her attitude, she used to abuse appellant with filthy language.
- (iii) The respondent/wife left the matrimonial home on 19.07.2005 with her two daughters and started living in her mother's house in Marthandam by putting her children in school at Marthandam.
- (iv) The respondent/wife returned to matrimonial home at Chennai during May-2011 and had thrown the appellant out of matrimonial home.
- (v) The respondent/wife preferred a police complaint on 30.04.2015 against the appellant/husband.

13. The respondent/wife in her petition for restitution of conjugal rights, raised a plea of adultery against the appellant (this plea was not raised by the husband in his petition but argument was advanced). To prove the allegations of cruelty, the appellant has not examined any independent witnesses. The



interested testimony of the appellant as RW.1 is not sufficient to support the above acts of cruelties alleged by the appellant.

14. We perused the evidence of the appellant/husband who was examined as RW.1. In his cross examination, he admitted that he himself had obtained the Transfer Certificate of the children from Chennai School and sent it to the respondent for putting the children in a school at Marthandam. Therefore, his averment, as if, the respondent/wife voluntarily withdrew from matrimonial home with her children and put her children in a school at Marthandam appears to be an averment made for the purpose of the case. Further, he admitted that on the complaint preferred by the respondent to police, he had been paying Rs.15,000/- to the respondent every month and he had no document to show that before the complaint to police, he paid them any amount for maintenance. He further deposed that immediately after police enquiry on a complaint preferred by the respondent/wife, in order to save him, he filed petition for divorce in O.P.No.2134 of 2015. These admissions of the appellant creates a serious doubt with regard to the genuineness and *bona fide* of the averments in support of his petition for divorce.



WEB COPY 15. The perusal of the averments, complaints to police marked as Ex.P.15 and Ex.P.16 make it clear that she made complaint regarding the failure of the appellant/husband to visit matrimonial home and his failure to pay maintenance. Therefore, police complaint was given by wife is an attempt to seek reunion and maintenance. The same cannot be termed as cruelty entitling the appellant to seek divorce.

16. As far as the arguments raised by the appellant that the respondent wife in her petition for restitution of conjugal rights, raised a plea that the appellant was having extra marital affair with a lady is concerned, the appellant failed to deny the said averment of the wife in his counter to petition for restitution of conjugal rights. Further, the respondent/wife in her petition for restitution of conjugal rights, added one Priya as 2nd respondent in O.P.No.620 of 2016 by alleging that the appellant was having extra marital affair with her.

17. The Family Court, Chennai, in its order observed that inspite of several notices to her, she never appeared before the Court and she remained



ex parte. The husband in his pleadings failed to deny the allegations of extra marital affair made by the wife. Therefore, we cannot come to a conclusion that those allegations are unsubstantiated allegations, when appellant/husband failed to deny the same, when he had an opportunity to deny it by way of counter.

18. As far as allegation of desertion is concerned, it is settled law that in order to grant divorce on the ground of desertion, mere separation is not sufficient. But, the party who is guilty of withdrawing from matrimonial society must have necessary animus to put permanent end to the matrimonial relationship. In the case on hand, as per the averment of the appellant/husband, wife went to her mother's home in the year 2005 and lived there till her return to matrimonial home in Chennai in the year 2011. During the intervening period, the appellant/husband went to wife mother's house and stayed for a while then and there. The appellant himself admitted as RW.1, that he obtained Transfer Certificates from Chennai school and sent it to the respondent for putting their children in a school at Marthandam. From the evidence available on record, it is seen that after respondent returned to



matrimonial home in May-2011, the appellant/husband refused to return to matrimonial home and stopped financial help also. After respondent made an attempt for re-union by giving a police complaint, the appellant started extending financial help but refused to return to matrimonial home and cohabitate with the respondent.

19. It is settled law that a person cannot be permitted to take advantage of his own wrong in matrimonial proceedings. Therefore, we come to a conclusion that the appellant failed to prove the plea of desertion. The children of the parties were examined as PW.2 and PW3. The daughter of the parties who was examined as PW.2 deposed that it was her father who advised them to go to grand mother's place. She also deposed that her father represented that he was transferred to Ramnad and it was he who received the transfer certificate from Chennai school and sent it to Marthandam for putting her in Marthandam school. She asserted the same in her cross examination also, she deposed that the appellant/husband did not like her and also her mother. The second daughter of the parties was examined as PW.3, she deposed that her mother was constrained to give a police complaint as the appellant/husband



C.M.A.Nos.2393 and 2394 of 2021

refused to maintain them. She also deposed that the friction between her father and mother is not so serious, so as to snap the matrimonial tie.

20. On appreciation of the evidence available on record and also evidence of children/PW.2 and PW.3, we come to a definite conclusion that the appellant failed to prove both the grounds of cruelty and desertion and hence, the Family Court, Chennai has rightly come to the conclusion that he is not entitled to divorce.

21. We do not think the relationship between the parties is beyond repair. We hope by taking into consideration the interest and future of the children, they would reunite. Hence, we confirm the decree for restitution of conjugal rights.

In nutshell:

(i) The Civil Miscellaneous Appeal in C.M.A.No.2393 of 2021 is



C.M.A.Nos.2393 and 2394 of 2021

dismissed by confirming the decree for restitution of conjugal rights granted in O.P.No.620 of 2016.

- (ii) The Civil Miscellaneous Appeal in C.M.A.No.2394 of 2021 is dismissed by confirming the order dismissing the petition for divorce filed by the appellant/husband in O.P.No.2134 of 2015.
- (iii) In the facts and circumstances of the case, there shall be no order as to costs. Consequently, the connected civil miscellaneous petition is closed.

(V.M.V.J) (S.S.J)
18.10.2022

Index : Yes / No
Speaking Order : Yes / No
dm



C.M.A.Nos.2393 and 2394 of 2021

To

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The III Additional Principal Judge,
Family Court, Chennai.



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C.M.A.Nos.2393 and 2394 of 2021

V.M.VELUMANI, J.
and
S.SOUNTHAR, J.

dm

Pre-delivery order made in
C.M.A.Nos.2393 and 2394 of 2021

18.10.2022