



C.M.A(MD)No.275 of 2020

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED: 16.12.2022

CORAM

**THE HON'BLE DR JUSTICE G.JAYACHANDRAN
AND
THE HON'BLE MR JUSTICE SUNDER MOHAN**

C.M.A(MD)No.275 of 2020

P.Karuppiah

.. Appellant/Respondent
/petitioner-husband

Vs.

Alagammal

.. Respondent/Petitioner
/Respondent-wife

Appeal filed under Section 19 of the Family Court Act, praying this Court, to set aside the fair and decretal order dated 24.07.2018 passed in I.A.No.368 of 2017 in H.M.O.P.No.175 of 2016 on the file of the Family Court, Dindigul.

For Appellant :Mr.P.Saravanakumar,
for Mr.M.Siddharthan
For Respondent :Mr.Babu Rajendran



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JUDGMENT

DR G.JAYACHANDRAN,J.
and
SUNDER MOHAN,J.

The short point involved in the appeal is whether the second petition filed by the husband for divorce on the ground of cruelty and desertion, after his earlier petition filed on the ground of adultery, cruelty and desertion got dismissed for default, will act as *res judicata*.

2.The parties got married, on 09.06.1978 and they begotten three children. Thereafter, difference of opinion has crept up between them, the husband has filed H.M.O.P.M.10 of 1998 before the Principal Sub-Court, Dindigul, on the ground of cruelty, adultery and desertion. This petition had a checkered history of dismissal of default, restoration and again ex-parte decree, setting aside the ex-parte decree and so on and so forth. At last, when the said H.M.O.P.No.10 of 1998 posted for trial, the husband, who is the petitioner, did not turn up for cross-examination, leading to dismissal of H.M.O.P, on 08.09.2005. After some time, the husband tried to restore his petition with condone delay application for restoration.



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3, While being so, the second petition for divorce on the ground of cruelty and desertion was filed on 08.12.2016 and it was taken on file in H.M.O.P.No.175 of 2016. The respondent herein filed an application in I.A.No.368 of 2017, under Order 7 Rule 11(d) and Section 12 of C.P.C., to reject the petition. Counter affidavit filed and both sides were heard by the Family Court, Dindigul and at last, I.A.No.368 of 2017 filed for rejection of the petition filed under Order 7 Rule 11(d) and Section 12 of C.P.C., was allowed. The said order is challenged by the husband in this Appeal.

4. On perusing the records and comparing the earlier petition filed in H.M.O.P.No.10 of 1998 and the subsequent petition filed in H.M.O.P.No. 175 of 2016 in just a position, this Court finds the following difference. Firstly, in the earlier petition, it is pleaded that the respondent is living in adultery. The said allegation is raising in the subsequent petition. New incident of cruelty is being narrated in the petition, in Paragraph Nos.16, 18 and 19, which alleged to have been occurred on 20.02.2021, 23.02.2016 and 10.11.2016. When the respondent alleged to have gone to the shopping complex owned by the appellant, she caused reckless. Alleging that the cruelty being perpetual one and desertion as a cause of action, the second



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petition for divorce is filed. The trial Court, while considering the application to reject the petition as resorted to Order 23 Rule 1 of C.P.C., held that the appellant has not obtained leave of the Court before withdrawal or abandon of his claim in the earlier proceedings.

5.A perusal of the records indicates that the earlier proceeding was dismissed, after non-prosecution of the appellant and the present H.M.O.P is not on the same cause of action, but on the different cause of action, which has arisen after the dismissal of the earlier petition. Therefore, the dismissal of the previous divorce petition cannot act as *res judicata* for the subsequent petition. When fresh cause of action has been pleaded, it is a matter of trial whether the alleged fresh cause of action is true or not. But the threshold, the trial Court cannot throw away the petition on the ground of *res judicata*, when there is a plea in the petition, which prima facie sufficient to take the petition on file for the fresh cause of action.

6.The learned counsel appearing for the respondent has made a meticulous research on the line and has circulated a judgment of Chhattisgarh, wherein the High Court has held that the subsequent petition



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for divorce on the ground of cruelty and desertion is not maintainable, when there is no fresh cause of action pleaded in their plaint. On facts, in the present case, there are fresh incidence of cruelty pleaded in the plaint. Therefore, Order 7 Rule 11(d) and Section 12 of C.P.C cannot be invoked to reject the petition. When specific incident of cruelty being pleaded in the petition, it is to be decided in the trial. Neither Order 7 Rule 11(d) and Section 12 of C.P.C., or Order 23 Rule 1 of C.P.C., relied upon by the Court below is applicable to the facts of the case. Hence, the judgment of the Trial Court is set aside. The trial Court is directed to restore the H.M.O.P on file. The Family Court, Dindigul shall give priority to this case and complete the trial as early as possible, taking note of the fact that the supporting parties are senior citizens.

(G.J.,J.) (S.M.,J.)
16.12.2022

Index:Yes/No
Internet:Yes/No
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DR G.JAYACHANDRAN,J.
and
SUNDER MOHAN,J.
Ns

To

1.The District Judge,
Family Court,
Kanniyakumari District,
Nagercoil.

2.The Section Officer,
VR Section,
Madurai Bench of Madras
High Court,
Madurai.

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