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C.M.S.A.Nos.43 of 48 of 2



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 11.08.2023

Coram:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

C.M.S.A.Nos.43 of 48 of 2021

and

C.M.P. Nos.5875 and 8159 of 2021

In both CMSAs

Periyanayaki @ Jeevitha

... Appellant

Vs.

Ganesan

... Respondent

Prayer in C.M.S.A. No.43 of 2021: This Civil Miscellaneous Second Appeal is filed under Section 13(1) (ia) of the Hindu Marriage Act read with Section 100 CPC to set aside the Judgment and Decree in C.M.A.No.13 of 2019 dated 27.09.2019 passed by the Additional District (Fast Track) Judge at Mettur, reversing the Judgment and decree of the Subordinate Judge at Mettur in H.M.O.P. No.63 of 2012 dated 28.02.2019

Prayer in C.M.S.A. No.48 of 2021: This Civil Miscellaneous Second Appeal is filed under Section 13(1) (ia) of the Hindu Marriage Act read with Section 100 CPC to set aside the Judgment and Decree in C.M.A.No.14 of 2019 dated 27.09.2019 passed by the learned Additional District (Fast Track) Judge at Mettur, reversing the Judgment and decree dated 28.02.2019 on the file of the Subordinate Judge at Mettur in H.M.O.P. No.38 of 2011.



In both CMSAs

For Appellant : M/s.B.Aparna

For Respondent : Mr.S.Viswanathan for
M/s.Dass & Viswa Associates

COMMON JUDGMENT

The Civil Miscellaneous Second Appeals are filed to set aside the Judgment and Decree made in C.M.A.Nos.13 and 14 of 2019 dated 27.09.2019 passed by the learned Additional District (Fast Track) Judge at Mettur, reversing the Judgment and decree dated 28.02.2019 made in H.M.O.P. Nos.63 of 2012 and 38 of 2011 on the file of the Subordinate Judge at Mettur.

2. It is settled proposition of law that at the time of admitting the second appeal, the Court has to first of all satisfy whether substantial question of law exists and the Court has to formulate the substantial question of law and the appeal has to be admitted on those grounds. Unfortunately, in this case, this Court has not formulated the substantial question of law at the time of admission. Though the appeals are pending from the year 2021, no



substantial question of law is framed by this Court and without framing of substantial question of law, the appeals were admitted and notice was ordered and the respondent has appeared through counsel. Because of the mistake committed by the Court, the parties should not suffer. Therefore, this Court heard both sides.

3. The appellant is the wife and the respondent is the husband in both the appeals.

4. The husband had filed a petition for divorce on the ground of cruelty under Section 13 of Hindu Marriage Act in HMOP No.38 of 2011 on the file of the Subordinate Judge, Mettur. Pending divorce petition, the wife had filed a petition under Section 9 of Hindu Marriage Act for the restitution of conjugal rights in HMOP No.63 of 2012 before the very same Court. The learned Subordinate Judge dismissed the divorce petition filed by the husband and allowed the petition for the restitution of conjugal Rights filed by the wife by order dated 28.02.2019. Against the said order, the husband filed appeals before the learned Additional District Judge (FTC) Mettur in CMA Nos.13 and 14 of 2009. The First Appellate Court, after hearing the arguments and considering the materials, allowed the appeals and set aside the order passed



by the Subordinate Judge and granted divorce and denied the restitution of conjugal Rights. Aggrieved by the same, the wife has filed the present Second Appeals in C.M.S.A. No.43 and 48 of 2021.

5. Since both the appeals are arising out of the common orders passed by both the Courts below, this Court also heard both the appeals together.

6. The learned counsel for the appellant/wife submitted that the respondent/husband has not proved the petition filed by him for divorce and the allegations levelled in the petition were not proved with any material evidence and therefore, the trial Court has rightly appreciated the materials and dismissed the petition filed for divorce. Whereas, the First Appellate Court failed to consider the materials available on record and traversed beyond the scope of appeal and also by considering the subsequent events, without any reasons, has granted divorce on the ground of long period of separation which is against the provisions of law. Further, the first appellate Court, by taking into consideration the subsequent complaint given by the appellant/wife against the respondent/husband and also the report filed by the District Social Welfare Officer, granted divorce, which is against the



proposition of law. A person who files the petition has to prove his case on his own strength and he cannot take advantage of the weakness of the respondent. Therefore, the divorce granted on the basis of the subsequent event and also the long period of separation is liable to be set aside. The learned counsel placed reliance on the Judgment of the Karnataka High Court *in Miscellaneous First Appeal No.3352 of 2016 dated 14.03.2022 (Smt.S.Shyamala @ Kathyayani Vs. Sri.B.N.Mallikarjunaiah).*

7. The learned counsel for the respondent/husband submitted that prior to the filing of the petition for divorce in HMOP No.38 of 2011, the respondent/husband had sent a notice to the appellant/wife. On receipt of the same, the appellant/wife had levelled certain allegations and imposed a condition that she would come and reside with the respondent/husband only if he provided an adequate house that too in Chennai. Only thereafter, the respondent/husband filed the petition for divorce and till then, the appellant/wife had not filed any petition or complaint against the respondent/husband. Only after the filing of the petition for divorce, the appellant/wife gave a complaint against the respondent/husband before the police on 17.03.2011. She had not only stopped with that, but also gave a



complaint against her in-laws. The District Social Welfare Officer who made enquiry has clearly submitted that there was no demand of dowry and there was only misunderstanding between the parties. The learned counsel further submitted that the appellant/wife had demanded the respondent/husband to reside along with her parents or to set up a house near by her parental house and she did not want to live with the respondent/husband separately or in his native place. She only wanted to live with her parental house or near by her parental house. Since the father of the appellant/wife was a police officer, they gave complaint after complaint and forced the respondent/husband to live in the parental house of the appellant/wife and also caused cruelty on the respondent/husband. Though the trial Court had not properly appreciated the evidence, the first appellate Court rightly appreciated the evidence and granted divorce. The learned counsel also submitted that the respondent/husband was all along ready for the trial and had filed proof affidavit and he was all along present in the Court for cross examination. The appellant/wife cross examined the respondent/husband to some extent in one or two hearings. Thereafter, though the respondent/husband appeared for the cross examination, the appellant/wife had not cross examined P.W.1/husband. After laps of time, the appellant/wife filed a proof affidavit for chief examination as R.W.1, but she never turned up for cross examination.



Therefore, the appellant/wife had not proved the allegations levelled against the respondent/husband and she had not challenged the averments made in the petition by way of cross examination. The learned counsel submitted that even the subsequent event can also be taken into consideration. Though the trial Court not properly appreciated the evidence, the first appellate Court as a final Court of fact finding, independently re-appreciated the entire evidence and given the findings that the respondent/husband is entitled to get the relief of divorce. Accordingly divorce was granted and the petition filed by the appellant/wife for the restitution of conjugal rights was dismissed. The learned counsel also placed reliance on the Judgment of the Hon'ble Supreme Court *in Civil Appeal No.1213 of 2006 dated 19.11.2014 (K.Srinivas Vs.K.Sunita)* and submitted that the subsequent events of the parties can be taken into consideration while considering the petition in matrimonial matters. Therefore, there is no perversity in the findings given by the Court below. Therefore, there is no merit in the appeals and the same are liable to be dismissed.

8. Heard the learned counsel on either side and perused the materials available on record.



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9. A perusal of records shows that even prior to the filing of the complaint, the respondent/husband had issued notice to the appellant/wife and the appellant/wife has also sent a reply for the same. Even prior to litigation, the parties have exchanged notice which clearly reveals the cruelty caused by the appellant/wife. Still the appellant/wife wanted to live with the respondent/husband subject to providing adequate house that too in Chennai and she had not tendered unconditional offer to live with her husband. She has only made a demand that the respondent/husband has to provide adequate house only in Chennai and not anywhere else. The respondent/husband has clearly stated that the appellant/wife continuously demanded him either to live with her parental house or to make suitable arrangements to have separate residence which is nearby or in around the place of her parental house which shows that the appellant/wife is not ready to live with the respondent/husband. The respondent/husband has stated that in the parental house of the appellant/wife, there was no self respect for him and they were causing mental cruelty to him. Though the appellant/wife denied the same, she was never cross examined by the respondent/husband fully when she was examined as R.W.1. Though the appellant/wife filed a proof affidavit for chief examination, she did not appear before the Court for cross examination. The



appellant/wife had not appeared in the witness box for subjecting her to cross examination and not denied the allegations levelled by the respondent/husband and also not substantiated the averments made in the counter. Though the trial Court had not gone into that aspects and simply dismissed the petition, the first appellate Court, as a final Court of fact finding, re-appreciated the entire materials and granted divorce.

10. As stated above, prior to litigation, notice was exchanged. Even in that notice itself, the respondent/husband has levelled certain cruelties. However, the appellant/wife had not taken any steps either for re-union or filed any petition for restitution of conjugal rights before the Court and only 3 years later, when the respondent/husband filed a petition for divorce, the appellant/wife gave a complaint to police alleging demand of dowry and one year thereafter, she has filed the petition for restitution of conjugal right. Though the complaint made against the respondent/husband was closed based on the preliminary enquiry conducted by the appropriate authority, the appellant/wife had not challenged the closing order and she had also not filed any protest petition or a private complaint which clearly shows that the appellant/wife has simply made bald allegations of dowry demand without any materials which would amount to cruelty. Therefore, the



appellate Court considering all those aspects, allowed the appeals filed by the husband and granted divorce.

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11. On hearing both sides and perusal of records,, this Court finds that the findings of the Court below is only based on the factual aspects. Therefore, this Court finds that no substantial question of law arises to be answered by this Court. This Court does not find any merits in the Second Appeals filed by the wife and the same are liable to be dismissed.

12. The citation referred to by the learned counsel for the appellant/wife is not applicable to the present case on hand as the facts and circumstances of the present case is entirely different and distinguishable from the facts mentioned in the case cited.



13. The citation referred to by the learned counsel for respondent/husband is squarely applicable to the present case that the subsequent events can also be taken into consideration.

14. Accordingly, the Civil Miscellaneous Second Appeals are dismissed. Consequently, connected Miscellaneous petitions are closed. There shall be no order as to costs.

11.08.2023

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Index : Yes / No

Speaking Order : Yes / No

Neutral Citation Case : Yes/No

To

1.The Additional District (Fast Track) Judge at Mettur

2. The Subordinate Judge, Mettur

3.The Section Officer,
VR Section, High Court, Madras.



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P.VELMURUGAN. J.

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