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C.M.S.A(MD).Nos.12 and 13 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 01.08.2023

Pronounced on : 31.10.2023

CORAM:

THE HONOURABLE MR.JUSTICE P.VADAMALAI

C.M.S.A(MD).Nos.12 and 13 of 2022

M.Deivam

...Appellant/Petitioner
in both CMSAs

Vs.

Bhuvaneswari

...Respondent/Respondent
in both CMSAs

PRAYER in C.M.S.A(MD)No.12 of 2022: Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act r/w Section 100 of the Civil Procedure Code, to set aside the fair and decreetal order passed in H.M.C.M.A.No.15 of 2019 on the file of the Additional District Court (Fast Track), Theni dated 23.12.2021, confirming the fair and decreetal order passed in H.M.O.P.No.49 of 2011 on the file of the Subordinate Judge, Theni, dated 11.02.2019 and to allow this appeal.

PRAYER in C.M.S.A(MD)No.13 of 2022: Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act r/w Section 100 of the Civil Procedure Code, to set aside the fair and decreetal order passed in H.M.C.M.A.No.16 of 2019 on the file of the Additional District



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Court (Fast Track), Theni dated 23.12.2021, confirming the fair and decreetal order passed in H.M.O.P.No.131 of 2011 on the file of the Subordinate Judge, Theni, dated 11.02.2019 and to allow this appeal.

For Appellant : Mr.M.M.Iqbal in both CMSAs

For Respondent : Mr.P.Arun Jayatram in both CMSAs

COMMON JUDGMENT

These Civil Miscellaneous Second Appeals are preferred against the common judgment and decree dated 23.12.2021 passed in H.M.C.M.A.Nos.15 of 2019 and 16 of 2019 on the file of the Additional District Court (FTC), Theni, confirming the common judgment and decree dated 11.02.2019 passed in H.M.O.P.Nos.49 of 2011 and 131 of 2011 on the file of the Subordinate Court, Theni.

2. The appellant is petitioner in H.M.O.P.No.49 of 2011 and respondent in H.M.O.P.No.131 of 2011 on the file of the Subordinate Court, Theni.

3. For the sake convenience, the parties are referred as petitioner/husband and respondent/wife as adopted in H.M.O.P.No.49 of 2011 on the file of the Subordinate Court, Theni.



4. It is the case of the petitioner that the petitioner and the respondent are husband and wife and their marriage was solemnized on 22.08.2010 as per Hindu Rites and Customs. At the time of marriage, the petitioner was working in Indian Army. From the day of marriage, the respondent adamantly refused to have cohabitation and attempted to beat the petitioner and she did not allow for consummation. The respondent used to threaten the petitioner that if he attempts to touch her she would commit suicide. The respondent stated that she was not interest to get marriage with the petitioner and she is already married and having one female child and got divorce. The respondent has suppressed her first marriage and having a child. The respondent used to quarrel with the petitioner and his family members and used to visit her parental house according to her wish. The respondent is not a dutiful wife. The respondent made allegation against the father and sister of the petitioner that they had illicit intimacy. The respondent suffered by mental illness and she assaulted herself on her head and closed doors in a room and attempted to commit suicide by hanging. Because of attitude of the respondent, the petitioner could not concentrate in his duty in Indian Army. The petitioner suffered not only from mental strain, but also physical strain. The respondent left the matrimonial home in the month of February 2011 and has been living with her parents and her parents did



not heed the advise of the village Panchayatars and well-wishers for reunion. The act of the respondent spoiled the reputation of the petitioner and caused mental and physical cruelty to the petitioner. The respondent suffered from mental disorder. There is no possibility of reunion. Hence, the petitioner has filed the petition in H.M.O.P.No.49 of 2011 against the respondent seeking for divorce.

5. It is the case of the respondent/wife that the marriage between the parties solemnized as per the Hindu Rites and Customs is admitted. They lived happily in the petitioner's house. The allegations that the respondent refused to cohabitation and attempted to beat the petitioner and threatened to commit suicide are all denied as false. Further, the allegation of suppression of first marriage of the respondent is utter false. The petitioner knew about the first marriage of the respondent and also she had a female child, who was handed over to the child's paternal grandparents after divorce in H.M.O.P.No.15 of 2008. The petitioner admitted these facts in his complaint lodged before the Superintendent of Police Theni in Na.Ka.No.8/6875 given by the petitioner against the respondent and her family members. The marriage was taken place in a temple and in the temple receipt also it was mentioned as second marriage of the respondent and also the Village Administrative Officer



issued the certificate to that effect. The petitioner knew very well about these facts. Whenever the petitioner returned to Army, the petitioner's parents demanded more dowry of Rs.12 lakhs, which was refused by the respondent and her parents. When the petitioner was in Army, the petitioner's brother used to wear unshaped dress and used to see the respondent while taking bath in bath room. The petitioner's brother was warned several times. The petitioner falsely alleged that the respondent suffers from mental illness and deserted the petitioner in the year 2011. The respondent is always healthy. The respondent is always a dutiful wife to the petitioner and she was performing all affairs to the petitioner as a dutiful wife. The petitioner took and dropped the respondent in her parental house on 07.03.2011 stating he would take back soon, but the petitioner did not do so. The petitioner has filed the petition for divorce upon ill advise of his parents and family members. The respondent is always ready and willing to live together with the petitioner and she has filed the petition in H.M.O.P.No.131 of 2011 for restitution of conjugal rights.

6. During enquiry before the Trial Court, both parties have conducted a joint trial in both petitions and the evidence was recorded in H.M.O.P.No.49 of 2011. The petitioner/husband examined himself as



P.W.1 and examined one Muthaiah as P.W.2 and marked 15 exhibits as Ex.P.1 to Ex.P.15. The respondent/wife has examined herself as R.W.1 and also examined two other witnesses as R.W.2 and R.W.3 and also marked 13 exhibits as Ex.R.1 and Ex.R.13. In addition to them, Ex.X.1 was also marked through R.W.3.

7. After hearing both and after considering both side evidences, the learned Subordinate Judge, Theni was not inclined to grant divorce and dismissed the petition in H.M.O.P.No.49 of 2011 and allowed the petition in H.M.O.P.No.131 of 2011 filed by the respondent/wife for restitution of conjugal rights by passing common order dated 11.02.2019.

8. Aggrieved by the said common judgment and decree, the petitioner/husband has preferred the Civil Miscellaneous Appeal in H.M.C.M.A.Nos.15 of 2019 and 16 of 2019 before the Additional District Court (FTC), Theni. The petitioner/husband also filed the petition in I.A.No.1 of 2019 in H.M.C.M.A.No.15 of 2019 to receive the additional document. The First Appellate Court after hearing both and after considering the material records passed judgment and decree dated 23.12.2021 dismissing the Civil Miscellaneous Appeals and petition to receive the additional document and confirmed the common judgment



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and decree dated 11.02.2019 passed in H.M.O.P.No.49 of 2011 and H.M.O.P. No.131 of 2011.

9. Challenging the common judgment and decree of the First Appellate Court, the petitioner/husband has preferred these Civil Miscellaneous Second Appeals and the same have been admitted on the following substantial questions of law:-

i) Whether the courts below are right in granting the relief of restitution of conjugal rights in the absence of bonafide intention on the part of the respondent/wife?

ii) Whether the learned lower appellate court is justified in ignoring the point of irretrievable break down of marriage in the event of separation between the parties for the past 12 years?

iii) Whether the learned courts below are justified in ordering the restitution of conjugal rights by ignoring the final report given in Ex.P.15?

10. Heard both side and perused the records in these Civil Miscellaneous Second Appeals.



11. The learned counsel for the petitioner/husband has placed the arguments that the respondent/wife has refused to cohabitation even from the date of marriage and there is no issue between the petitioner and the respondent out of wedlock. The respondent has suppressed her first marriage and female child born to her and when the petitioner asked about her first marriage, she deserted the matrimonial home without consent and knowledge of the petitioner in February 2011 and since 2011 the respondent is living separately. Then the respondent was filing case one after another against the petitioner and his family members. Further, the respondent has sent several communications to the higher Army Officials of the petitioner and they were marked as Ex.P.6, 7 and 8. The respondent suffered from mental illness, which is established by Ex.P.15 Medial Report and as per that report the respondent has to under psychometric assessment. Due to the acts of the respondent, she caused mental cruelty to the petitioner. The respondent is living separately for long period and also she has refused for consummation with the petitioner and thereby the marriage bond between the petitioner and the respondent was broken and there is no chance for reunion. Both the Courts below failed to consider all these aspects and dismissed the petition for divorce filed by the petitioner. Therefore, these Second Appeals may be allowed. In support of his argument, the learned counsel



for the petitioner has relied on citation reported in **AIR 2023 Supreme Court 2144 (Rakesh Raman Vs. Kavita)**, wherein it is held in paragraph No.18 as follows:

“18. We have a married couple before us who have barely stayed together as a couple for four years and who have now been living separately for the last 25 years. There is no child out of the wedlock. The matrimonial bond is completely broken and is beyond repair. We have no doubt that this relationship must end as its continuation is causing cruelty on both the sides. The long separation and absence of cohabitation and the complete breakdown of all meaningful bonds and the existing bitterness between the two has to be read as cruelty under section 13(1)(ia) of the 1955 Act. We therefore hold that in a given case, such as the one at hand, where the marital relationship has broken down irretrievably, where there is a long separation and absence of cohabitation (as in the present case for the last 25 years), with multiple Court cases between the parties; then continuation of such a ‘ marriage ’ would only mean giving sanction to cruelty which each is inflicting on the other. We are also conscious of the fact that a dissolution of this marriage would affect only the two parties as there is no child out of the wedlock”.



12. Per contra, the learned counsel for the respondent/wife has vehemently contended that the petitioner has very well known about the first marriage of the respondent and he admitted in his evidence about the same. Since the petitioner is working in Army, during his absence, the family members of the petitioner started harassment by demanding dowry and the petitioner's brother acted against the respondent in a bad manner. The petitioner has taken the respondent to her parental house on 07.03.2011 and stated that he would take back soon. But, in spite of several talks the petitioner did not turn up. The respondent has not caused any cruelty on the petitioner or his family members. The respondent has not deserted the petitioner. As she was living with her parent at the instance of petitioner, she wrote letters and communications seeking maintenance only and she never alleged any allegations against the petitioner. During such separate living the respondent has been having touch with the petitioner either one way or another. Therefore, the petitioner failed to prove the desertion as well as cruelty. The Courts below have correctly appreciated the evidences adduced by both parties and correctly allowed the petition filed by the respondent for conjugal rights and dismissed the petition for divorce. There is no question of law arisen in these Second Appeals and therefore, these Second Appeals may be dismissed.



13. Heard the arguments of both and perused the material records of the case. It is admitted by both that the marriage between the petitioner and the respondent solemnized on 22.08.2010. The petitioner mainly argued that the respondent suppressed her earlier marriage and having female child through first marriage and when it came to know to the petitioner, he asked about the respondent. So, the respondent left the matrimonial home in February, 2011. On perusal of material records, the Courts below discussed about Ex.R.9, which is a police complaint lodged by the petitioner against the respondent, wherein the petitioner has clearly admitted that he knew about the first marriage of the respondent and the female child born to her through first marriage and after knowing the facts he married the respondent as second marriage. There is no contra material or evidence let in by the petitioner. Therefore, the main ground raised by the petitioner fails.

14. The next point raised by the petitioner, is that the respondent refused to cohabitation and she is mentally illness and relied on Ex.P.15 Medical Report. On perusal of the said Ex.P.15, as rightly held by the Courts below that it is only to undergo psychometric assessment and in Ex.P.15 there is no opinion given by the medical officers that the respondent is mentally affection person. Further, in the



first page itself in Ex.P.15 it is stated as MSE Good, which was observed by the Courts below. Except Ex.P.15, the petitioner has not produced any other material to establish his allegations against the respondent regarding cohabitation.

15. The another main contention of the petitioner is that the respondent deserted the petitioner without any reason and without consent of the petitioner. It is the case of the respondent that she was dropped in her parental house by the petitioner on 07.03.2011 saying he would take back soon. On perusal of judgments of Courts below, the evidence of respondent as R.W.1 to R.W.3 has been elaborately discussed. The respondent has clearly established that she has been taking sincere steps for reunion through the evidence of R.W.1 to R.W.3. The petitioner has not denied about the same. During such separate living the respondent wrote communications to the petitioner demanding maintenance. The Courts below has discussed about the said communication which are marked as Exs.P.6 to P.8 and held that they are only for demanding of maintenance and nothing else therein. The petitioner has also admitted in his cross examination that Exs.P.6 to P.8 are written seeking maintenance, which correctly relied on by the Courts below. In such circumstances, they could not be taken to cause cruelty to



the petitioner. Further, the petitioner has not adduced any evidence to prove steps for reunion with the respondent. On perusal of records, the marriage between the petitioner and the respondent took place on 22.08.2010 and the petitioner has filed this petition in the year 2011 for divorce on the ground of desertion and cruelty. On receipt of notice, the respondent filed the petition for restitution of conjugal rights in the same year 2011. If a spouse is living separately more than two years continuously without any reason or consent, then another spouse can file for judicial separation. If the desertion is not wilful, there would be conversation or communication between the petitioner and the respondent during the separate living. It is not the case of the petitioner that though they are living separately, they were not having conversation or communication between them to maintain conjugal rights. Further, any spouse is staying apart due to any matrimonial issue or problem he/she cannot seek for restitution of conjugal rights. Desertion without reason or consent of other spouse can also constitute mental cruelty to other spouse. In this case, the petitioner is stated to be living separately from February, 2011 and the respondent stated that she has taken steps for reunion by filing the petition in H.M.O.P.No.131 of 2011. Further more, the respondent has been having communication with the petitioner which is seen from Exs.P.6 to P.8. The petitioner has also not denied the same.



In the facts and circumstances of the case, the citation relied on by the learned counsel for the petitioner reported in **AIR 2023 Supreme Court 2144** will not be applicable to the facts of this case.

16. The petitioner produced Ex.P.10 to Ex.P.14 to show that the respondent has given police complaints against the petitioner. The Courts below held that the petitioner has not filed any copy of FIR to corroborate Ex.P.10 complaint and Ex.P.11 to Ex.P.14 are all filed by the petitioner side against the respondent. On perusal of records, the petitioner has not disputed the above facts and hence, the petitioner could not say cruelty based on Ex.P.10 to Ex.P.14.

17. Thus, the Courts below have correctly held that the petitioner has not established the ground of desertion and cruelty against the respondent.

18. From the above facts and circumstances, the petitioner has not established his case and therefore, the substantial question of law are decided against the petitioner/appellant herein. This Court is of the considered view that the case of the petitioner is not proved by him as correctly decided by the Trial Court and confirmed by the First Appellate



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Court. The concurrent finding of the Courts below does not warrant interference by way of these Second Appeal. Thus, these Civil Miscellaneous Second Appeals fail.

19. In the result, these Civil Miscellaneous Second Appeals are dismissed. The common judgment and decree dated 23.12.2021 passed in H.M.C.M.A.Nos.15 of 2019 and 16 of 2019 on the file of the Additional District Court (FTC), Theni, confirming the common judgment and decree dated 11.02.2019 passed in H.M.O.P.Nos.49 of 2011 and 131 of 2011 on the file of the Subordinate Court, Theni are confirmed. No costs.

31.10.2023

NCC : Yes / No
Index : Yes / No
Internet : Yes / No

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To

- 1.The Additional District Court (Fast Track),
Theni.
- 2.The Subordinate Judge,
Theni.
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VADAMALAI, J.

vsd

Pre - Delivery Judgment made in
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