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C.M.S.A(MD).No.30 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 21.07.2023

Pronounced on : 17.08.2023

CORAM:

**THE HONOURABLE MR.JUSTICE P.VADAMALAI**

C.M.S.A(MD).No.30 of 2022

and

C.M.P(MD)No.7523 of 2022

Amsavalli

...Appellant/Respondent

Vs.

Tharmaraj

...Respondent/Petitioner

**PRAYER:** Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act, 1955 r/w Section 100 of the Civil Procedure Code, to set aside the judgment and decree passed by the Principal District and Sessions Judge, Dindigul in C.M.A.No.41 of 2019 dated 23.02.2022, confirming the judgment and decree passed by the Subordinate Judge, Veda sandur in H.M.O.P.Nos.38 of 2015 and 23 of 2019 dated 12.09.2019.

For Appellant : Ms.G.Dhivya Bharathi

For Respondent : Mr.B.Azhagesh



## **JUDGMENT**

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This Civil Miscellaneous Second Appeal is preferred against the judgment and decree dated 23.02.2022 passed in C.M.A.No.41 of 2019 on the file of the Principal District and Sessions Court, Dindigul, confirming the judgment and decree dated 12.09.2019 passed in H.M.O.P.Nos.38 of 2015 and 23 of 2019 on the file of the Subordinate Court, Veda sandur.

2. The appellant is the respondent in H.M.O.P.No.38 of 2015 on the file of the Subordinate Court, Veda sandur.

3. For the sake of convenience, the parties are referred as petitioner/husband and respondent/wife as arrayed in H.M.O.P.No.38 of 2015 on the file of the Subordinate Court, Veda sandur.

4. It is the case of the petitioner that the petitioner and the respondent are husband and wife. They developed love each other and their marriage was solemnized on 22.01.1999. As love marriage, dowry and other seer articles were not given and marriage was taken place in a simple manner. They lived few years at Chatrapatti, Nagampatti and



finally at petitioner's house situated at Pallapatti of Palapatti village.

Thereafter from the year 2005, the respondent used to make frequent quarrel with the petitioner insisting him as her house bride. The petitioner maintained tolerance considering the family's welfare. Then at the instance of petitioner, as his maternal aunt had no issue, she settled her properties in favour of the respondent. After gift of properties, the respondent changed her attitude and drove away his aunt. The respondent obtained loan of Rs.7 lakhs from one Ganesan of Vedasandur and did not repay the same and hence the said Ganesan tortured the petitioner to repay the loan. While so, in the year 2014 the petitioner came to know that the respondent already married one Palanisamy and without leading life with him and without getting any divorce from him, the respondent married a second time with the petitioner. The respondent suppressed her first marriage. When the petitioner asked about her first marriage, the respondent left the matrimonial home and went to her parental house. The petitioner along with his elders and well-wishers, made a compromise talk with the respondent, but the respondent refused to return back and neglected the petitioner. The respondent further continued harassment over the petitioner. The respondent gave a police complaint before the All Women Police Station, Vadamadurai against the petitioner and his family members alleging dowry demand. The police



officials enquired the complaint and advised the respondent to live with the petitioner as the complaint has no true facts. But, the respondent continued to harass and torture the petitioner. Hence, the petitioner has filed the petition in H.M.O.P.No.38 of 2015 against the respondent seeking divorce.

5. It is the case of the respondent that the respondent admits the love affairs and her marriage is a love marriage with the petitioner and that they lived few years as stated in the petition. Due to misunderstanding and ill advice of his men, the petitioner filed the petition for divorce. They have no issues out of wedlock. The respondent with her own income purchased a house site and constructed a house on obtaining loan of Rs.10 lakhs from Rajendran of Thanthondrimalai. After construction of house, the petitioner drove away the respondent from the house on 01.06.2014. The respondent is now residing with her parental home. The petitioner is bounden duty to maintain the respondent. The petitioner is trying to get second marriage with another woman and hence, the respondent lodged a police complaint. On warning of the police officials, the petitioner temporarily stopped his second marriage plan. In order to get second marriage, the petitioner has filed this petition for divorce stating false allegations against the



respondent. The respondent is willing and ready to live with the petitioner and stating so, the respondent has filed the petition in HMOP.No.23 of 2019 against the petitioner for restitution of conjugal rights.

6. During enquiry, the Trial Court has conducted a joint trial in both petitions. The petitioner examined himself as P.W.1 and examined one Muthusamy as P.W.2 and marked six exhibits as Ex.P.1 to Ex.P.6. The respondent has examined herself as R.W.1 and marked two exhibits as Ex.R.1 and Ex.R.2.

7. After hearing both and after considering both side evidences, the learned Subordinate Judge, Veda sandur allowed the petition in H.M.O.P.No.38 of 2015 granting divorce and dismissed the petition in H.M.O.P.No.23 of 2019 filed by the respondent for restitution of conjugal rights by passing common order dated 12.09.2019.

8. Aggrieved by the said judgment and decree, the respondent has preferred Civil Miscellaneous Appeal in C.M.A.No.41 of 2019 before the Principal District Court, Dindigul. The First Appellate Court after hearing both and after considering the material records passed judgment



and decree dated 23.02.2022 dismissing the Civil Miscellaneous Appeal and confirmed the common judgment and decree dated 12.09.2019 passed in H.M.O.P.No.38 of 2015 and H.M.O.P.No.23 of 2019.

9. Challenging the judgment and decree of the First Appellate Court, the respondent has preferred this Civil Miscellaneous Second Appeal and the same has been admitted on file on the following substantial questions of law:-

*i) Whether in law, accusations alleged in the petition by the husband constitute desertion for sustaining the claim for divorce under section 13(1) (ib) of the Hindu Marriage Act?*

*ii) Whether in the law, filing of restitution of conjugal rights will prove the intention of the wife to live with the husband?*

10. Heard both sides and perused the records in this Civil Miscellaneous Second Appeal.

11. The learned counsel for the appellant/wife (hereinafter referred as respondent) has argued that the petitioner has to prove that the respondent/wife has wilfully deserted the matrimonial home and that the



respondent deserted the petitioner without his consent and against his wish. In fact, the petitioner insisted for conveyance of property stood in the name of the respondent. Since the respondent refused for conveyance, she was driven away from the matrimonial home by the petitioner himself. The respondent never deserted the petitioner. The petitioner has not let in any evidence to corroborate his version. When the respondent filed a petition for restitution of conjugal rights which proves the intention of the respondent for reunion. The Courts below failed to consider the same. The Courts below has not appreciated the evidence given by the respondent as R.W.1. The Trial Court has granted divorce on the ground of desertion. The petitioner has not proved the desertion as wilful one by adducing sufficient evidence. The petitioner is trying to get second marriage that is why the petition for divorce is filed with false allegations. Therefore, this Civil Miscellaneous Second Appeal may be allowed.

12. Per contra, the learned counsel for the respondent/husband (hereinafter referred as petitioner) has vehemently contended that the respondent suppressed her first marriage and when he learnt about the same in the year 2014 he asked about the same, the respondent started giving harassment and torture to the petitioner and left the matrimonial



home without consent of the petitioner and is living separately for more than five years. During these periods, the respondent gave harassment to the petitioner on various kinds by giving police complaint alleging dowry and also filing suits against the petitioner. Though the petitioner took steps for compromise through his mediators, the respondent refused to reunion. So, the petitioner filed the petition for divorce in the year 2015 and after lapse of 4 years, the respondent filed the petition for restitution of conjugal rights. The Courts below correctly appreciated the evidences adduced by both parties and correctly granted divorce to the petitioner. The Courts below gave a concurrent findings and there is no question of law arisen in this appeal. Therefore, the appeal has to be dismissed. In support of his argument, the learned counsel for the respondent/petitioner has relied on the citation reported in **(2013) 5 Supreme Court Cases 226 (K.Srinivas Rao Vs. D.A.Deepa)**, wherein it is held in paragraph Nos.28 and 30 as follows:

*“28....The conduct of respondent wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of sentence awarded to the appellant husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is*



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*removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant husband.*

*30. It is also to be noted that the appellant husband and the respondent wife are staying apart from 27.04.1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in Samar Ghoseh, if we refuse to sever the tie, it may lead to mental cruelty.”*

13. Heard the arguments of both and perused the material records of the case. It is admitted by both that the petitioner and the respondent developed love affairs with each other and their marriage is love marriage and they have no issues out of wedlock. The main contention of the petitioner is that the respondent deserted the petitioner without any reason and without consent of the petitioner. On perusal of judgments of Courts below, the evidence of respondent as R.W.1 has been elaborately discussed. The respondent as R.W.1 has clearly admitted that she is living separately from the year 2014 and she has not taken sincere steps for living together with the petitioner. R.W.1 further admitted that even though the compromise talks for reunion made by the petitioner through mediators/well wishers she has not consented for joint



living. The respondent has not adduced any evidence to prove her sincere steps for reunion with the petitioner in his matrimonial home. Except the respondent as R.W.1, no other witness was examined. Moreover, the respondent has not marked any document except her voter identity card and aadhaar card. Whereas the petitioner has examined P.W.2 to prove his steps for reunion by making compromise talks with the respondent. This was also admitted by the respondent in her cross examination. Admittedly, the respondent was living separately for more than four years. After the petitioner filed the petition for divorce in the year 2015, the respondent filed the petition for restitution of conjugal rights in the year 2019. If a spouse is living separately for more than two years continuously without any reason or consent, then another spouse can file a petition for divorce on the ground of desertion. 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 respondent that though they are living separately, they were 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. The respondent has clearly admitted that



she is living separately for more than four years without any conversation or communication with the petitioner. While being the facts, the emotional bondage between the petitioner and the respondent might have also lost and their marriage bondage is irretrievably broken by this time. Thus, the Courts below have correctly held that the petitioner has established the ground of desertion against the respondent.

14. On perusal of material records, it is very clear that the respondent as R.W.1 has clearly admitted that she has given three police complaints against the petitioner and his family members alleging dowry demand and dowry harassment. The petitioner stated that his parents age was above 70 years while the respondent gave police complaint. This was not disputed or denied by the respondent in her evidence. It is well settled principle of law that the filing of criminal case by the wife alleging dowry harassment against the husband and his family members constitutes mental cruelty. The citation relied on by the respondent counsel reported in **(2013) 5 Supreme Court Cases 226** applies to the facts of this case.

15. From the above facts and circumstances, the respondent has not established her case and therefore, the substantial question of law are



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decided against the respondent, appellant herein. This Court is of the considered view that the case of the petitioner is proved by him as correctly decided by the Trial Court and confirmed by the first Appellate Court. The concurrent finding of the Courts below does not warrant interference by way of this Second Appeal. Thus, this Civil Miscellaneous Second Appeal fails.

16. In the result, this Civil Miscellaneous Second Appeal is dismissed. The judgment and decree dated 23.02.2022 passed in C.M.A.No.41 of 2019 on the file of the Principal District and Sessions Court, Dindigul, confirming the judgment and decree dated 12.09.2019 passed in H.M.O.P.Nos.38 of 2015 and 23 of 2019 on the file of the Subordinate Court, Veda sandur are confirmed. No costs. Consequently, connected miscellaneous petition is closed.

17.08.2023

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

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To

- 1.The Principal District and Sessions Judge,  
Dindigul
- 2.The Subordinate Judge,  
Vedasandur
- 3.The Record Keeper,  
Vernacular Section,  
Madurai Bench of Madras High Court,  
Madurai.



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**P.VADAMALAI, J.**

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Pre - Delivery Judgment made in  
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