



CMSA(MD).No.1 of 2014

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 29.03.2023

PRONOUNCED ON : 05.04.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.S.A(MD)No.1 of 2014

Poominathan

... Appellant

VS.

Saraswathi

...Respondent

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act read with Section 100 of C.P.C, to set aside the judgement and decree dated 22.01.2013 in C.M.A.No.16 of 2011 on the file of the Additional District & Sessions Judge, Tirunelveli confirming the fair and decreetal order passed in H.M.O.P.No.24 of 2007 dated 07.06.2011 on the file of Subordinate Court, Ambasamudram and allow this second appeal.

For Appellant : Mr.Niranjana S.Kumar

For Respondent : No Appearance



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J U D G M E N T

The appeal has been filed by the husband challenging the concurrent findings of the trial Court as well as the Appellate Court wherein his prayer for divorce has been rejected.

2.The husband has filed a divorce petition contending that he got married with the respondent on 01.06.1984 and after marriage while the couple were living in Mumbai, the wife has exhibited bad character. The wife came to her parental house for delivery in which a girl child was born. The said child had passed away in 15 days. The wife wanted to be at Ambasamudram for some more time in order to get out of the grief due to death of the child. However, while she was in Ambasamudram, she developed illicit intimacy with one Jayaraman and the said Jayaraman has addressed several letters to his wife.

3.The husband had further contended that he had again taken her back to Mumbai and in Mumbai on 21.06.1986, the wife developed intimacy with one Muthusamy and the same was witnessed by him along with one Muthappa and Balasubramaniam. He had further contended that the wife had admitted about the illicit relationship with the said Muthusamy. In view of such bad character of the wife, both of them



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agreed to dissolve their marriage by some compromise before the village elders. As per the custom of Nadar Community People, a customary divorce was entered into between the parties and thereafter, the husband had left for Mumbai. Since the husband had immediately left for Mumbai, the divorce deed could not be executed on the said date.

4.The husband had further contended that a legal notice was issued to the wife on 08.10.1986 seeking divorce legally. Though the wife had received the same, she has not responded. The relatives of the wife had threatened the husband for payment of some maintenance amount and therefore, a divorce deed was prepared and the wife had received a sum of Rs.31,000/- as cash and another sum of Rs.28,000/- through demand draft for maintenance. The said document was executed on 03.04.1988.

5.After entering into such a divorce document, the husband had married another lady by name Muthulakshmi on 21.10.1986 and he is living a happy married life. However, the respondent wife had sent a legal notice on 25.05.1988 containing false allegations for which the husband has sent a reply on 21.06.1988. The wife had also lodged a complaint before the All Women Police Station, Tirunelveli and after enquiry, the police officials came to the conclusion that already divorce



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has taken place between the parties and the wife had also received maintenance amount and therefore, they closed the complaint. The wife is residing away from the husband for more than 14 years.

6. The wife had filed M.C.No.4 of 2011 seeking maintenance before the Judicial Magistrate Court, Ambasamudram and an order was passed on 30.04.2003 directing the husband to pay maintenance. The husband had filed a revision before the Additional District Court, Tirunelveli in Crl.R.C.No.30 of 2003 and the same was allowed on 15.10.2003. Challenging the same, the wife had filed Crl.O.P.No.1977 of 2003 and the same was allowed by the High Court confirming the order of the Judicial Magistrate to pay maintenance to the wife.

7.The husband had further contended that after execution of the divorce deed, the wife had also married one Vellaidurai and she is leading a matrimonial life with him and hence, she is not entitled to any maintenance. The husband had further contended that the wife has obtained a certificate from the Taluk Office, Ambasamudram that she is a deserted woman.

8.In view of the above said allegation, the husband has prayed for



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divorce on the ground of cruelty and the desertion.

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9. The wife had filed a counter mainly disputing the allegation made against her character. She had also disputed all the allegations relating to illicit relationship alleged by the husband in the divorce petition. She had also disputed about the alleged agreement between the parties and the execution of the divorce deed. She had further disputed that there is no such custom prevailing among the Nadar Community relating to the customary divorce. She had also disputed the conduct of any Panchayat by the said community people. She has not received any notice dated 08.10.2006 seeking divorce. She had also disputed the receipt of any amount towards maintenance.

10. The wife had further contended that the alleged deed dated 03.04.1988 which is said to be a marriage cancellation deed is a forged document. The wife had further contended that same allegations were made by the husband in the maintenance case which were rejected by the Hon'ble High Court and the order of maintenance was affirmed. She had strongly disputed the contention of the respondent that she had remarried one Vellaidurai. Only because of the cruelty of the husband demanding additional dowry, she could not go back to the matrimonial home. When



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she was in Mumbai, she was mentally tortured by the husband and she had sent a telegram to her parents, they came to Mumbai and rescued her. The wife had further contended that the husband is running a Gas Agency in Mumbai and he has not paid any money towards maintenance despite the order of the High Court. Hence, he prayed for dismissal of the petition.

11. Findings of the trial Court:

(i). The husband has not established or proved the alleged illegitimate relationship of the respondent/wife with Jayaraman or Muthusamy.

(ii). The husband has not established the alleged marriage of the wife with Vellaidurai.

(iii). The trial Court had rejected Exhibit P1- Remarriage agreement yadasthu as a forged document.

(iv). Just because of the name of the wife and Vellaidurai are found in a ration card, it cannot be considered that they are living as husband and wife.

(v). Admittedly, the husband has remarried the one Muthulakshmi and therefore, the first wife cannot be expected to live with the husband.



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Hence, the prayer for divorce on the ground of desertion is not maintainable.

12.Findings of the First Appellate Court:

(i).The divorce petition has been filed only on the ground of cruelty and desertion and not on the ground of adultery and the alleged adulterers have not been impleaded as a party to the petition.

(ii).The petitioner had not placed any oral or documentary evidence before the Court to prove that mental cruelty was committed by the wife.

(iii).Even assuming that the wife had executed a divorce deed, the same is not valid in the eye of law.

(iv).The relationship of the husband and wife is subsisting and only because of the said relationship, the High Court has passed an order directing the husband to pay maintenance.

(v).The Hon'ble High Court has found that the wife is living separately on valid reason and therefore, has proceeded to award the maintenance.

(vi).The husband has not proved the plea of adultery and remarriage of the respondent through any proper, oral or documentary



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evidence. Since the husband has remarried and living with another lady, it is a sufficient cause for the wife to live away from the husband and the same cannot be considered to be a desertion.

(vii).Exhibit-P1-remarriage agreement is an unilateral document and therefore, it is not admissible in the eye of law. Based upon the said findings, the First Appellate Court had dismissed the appeal.

13.Contention of the learned counsel appearing for the appellant:

(i).The learned counsel for the appellant had contended that the wife was leading a wayward life while she was in Ambasamudram. While she was in Mumbai having illegitimate relationship with one Muthusamy. In view of the such illegitimate relationships, often there was a quarrel between the husband and wife which resulted in a Panchayat conducted by the elder people of the community. In the said Panchayat, the petitioner and the respondent had agreed to get separated and she had executed Exhibit P1 dated 30.03.1998 to get separated from the appellant and to remarry another person by name Vellaidurai.

(ii).The learned counsel for the appellant had further contended that two of attesting witnesses to the said Exhibit A1 namely Panchavarnam and Murugan have been examined as PW2 and PW3 to



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establish the fact that there was such an agreement and the circumstances under which the agreement was entered into. Therefore, the appellant had established the divorce deed and the fact that the parties are living separately from the year 1988 onwards.

(iii). The learned counsel for the appellant had further contended that though the parties are living separately from the year 1988 onwards, the wife has not chosen to file any application for restitution of conjugal rights. This would clearly indicate that she is not interested to live with the appellant herein. The learned counsel had further contended that only after the divorce deed, the husband had remarried with one Muthulakshmi and the wife had remarried one Vellaidurai. Therefore, it is clear that both the parties have accepted the said document and they have proceeded to act upon the said document. Now that 25 years have lapsed from the date of separation, there is no possibility of any reunion and hence, the fair and decreetal order may be reversed and a decree for divorce may be granted.

14. Though the respondent/wife was served through Court and her name was printed in the cause list, there is no representation either in person or through counsel.



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15.I have heard the learned counsel appearing for the appellant and perused the pleadings and documents filed on either side.

16.The husband has filed the divorce primarily on the ground of cruelty and desertion and not on the ground of adultery.

17.The husband has not produced any oral or documentary evidence to establish that the wife has caused mental cruelty to him to such an extent that it will not be possible for the couple to live together any longer. All the allegations in the divorce petition relate to the alleged illegitimate relationship of the wife with one Jayaraman and Muthusamy.

18.Though it is alleged in the divorce petition that there were two eye witnesses namely one Muthappa and Balasubramaniam for the same, the husband has not chosen to examine any one of them for the reasons best known to him. Though it is alleged by the husband that he had seen the letters written by one Jayaraman to his wife, none of those letters have been placed on record before the Court. Except the pleadings relating to the alleged adultery, no other pleadings relating to the mental cruelty are placed on record.

19.Both the incident of alleged adultery one at Ambasamudram and other one at Mumbai, have not been proved before the Court. Even



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though the husband had claimed that he had seen the letter and two other witnesses were available during the alleged incident. Therefore, this Court is of the view that the husband has completely failed to establish the allegation of the mental cruelty alleged to have been committed by his wife.

20. According to the appellant/husband, the wife had deserted him from the year 1998 onwards. It is the admitted case of the husband that he got remarried in the year 1998 itself with one Muthulakshmi. When he had remarried another lady, the first wife cannot be expected to come back to the matrimonial home to live with the husband. Hence, it is clear that the wife was residing away from the husband due to reasonable cause. Therefore, the husband has not established the plea of desertion also.

21. The husband has proceeded to make various allegations as against his wife including the plea that she had remarried one Vellaidurai and has produced a ration card to that effect. The ration card does not reflect whether the respondent herein and the said Vellaidurai are husband and wife or not. The wife has also produced a ration card to the effect that she is residing only with her son begotten through the



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appellant herein. Therefore, it is clear that the husband had started making these allegations only with a view of legalise his second marriage. If really the parties have entered into a divorce deed, there is no necessity for the husband to file the present divorce application after so many years.

22.A perusal of Exhibit P1-remarriage agreement deed clearly shows that it was executed by the wife in favour of one Vellaidurai. It is not known how the appellant managed to get a copy of the said document. The appellant is not the competent person through whom such a document could be marked. The wife had denied the execution of the said document. Though PW2 and PW3 have been examined who are attestors of the said document, the said document is not valid on the eye of law.

23.According to the appellant, they belong to the Nadar Community and there is a custom in their community for entering into a customary divorce. No elderly person from their community have been examined in order to establish the existence of any such custom in the community. The husband has not let in any evidence to prove the custom as contemplated under the Indian Evidence Act. Therefore, the plea of



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customary divorce has been rightly rejected by the Courts below.

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24.The appellant/husband has miserably failed to prove either the ground of mental cruelty or the ground of desertion in order to obtain a decree for divorce as against the wife. The trial Court as well as Appellate Court have fairly appreciated the oral and documentary evidence and arrived at correct findings.

25.All the substantial questions of law raised by the appellant are factual in nature and they cannot be considered in the second appeal. The substantial questions of law are answered as against the appellant and the Civil Miscellaneous Second Appeal stands dismissed. No costs.

05.04.2023

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

1. The Additional District & Sessions Judge, Tirunelveli
2. The Subordinate Judge, Ambasamudram
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.

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R.VIJAYAKUMAR,J.

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Pre-delivery Judgement made in
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