



C.M.S.A(MD).No.15 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 27.06.2023

PRONOUNCED ON : 12 .07.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.S.A(MD)No.15 of 2018

R.Venkatesh

... Appellant

vs.

G.Sujatha

...Respondent

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act, 1955 read with Section 100 of C.P.C 1908, to allow the Civil Miscellaneous Second Appeal and set aside the judgment and decree dated 19.02.2018 made in HMCMA.No.16 of 2017 on the file of Additional District Court (Fast Track Court), Kumbakonam, confirming the judgment and decree dated 20.01.2017 made in HMOP.No.64 of 2014 on the file of the Additional Subordinate Court, Kumbakonam with costs throughout and thus render justice.

For Appellant : Mr.A.Arumugam
For M/s.Ajmal Associates

For Respondent : Mr.L.George Paul Anto



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JUDGMENT

The appellant herein as petitioner had filed HMOP.No.64 of 2014 on the file of the Additional Subordinate Court, Kumbakonam for the relief of divorce on the ground of cruelty. After contest, the said petition was dismissed. The appellant had filed CMA(MD).No.16 of 2017 before the Additional District Court (Fast Tract Court), Kumbakonam. The appeal was dismissed. Challenging the concurrent finding, the present civil miscellaneous second appeal has been filed wherein the husband has sought for a decree for divorce on the ground of mental cruelty.

2.The allegation made in the divorce petition could be summarized as follows:

(i).The wife had compelled the husband to shift his residence to a place where she was working namely Tindivanam.

(ii).The wife was not properly co-operating for sexual relationship and she was not maintaining a cordial relationship with other family members. Whenever, the husband had an intercourse, he was affected with an allergy on every occasion. The wife had not taken proper



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treatment for the same and she had tortured the husband.

(iii).Despite the objection raised by the husband, the wife used to travel in night hours from Tindivanam to Kumbakonam.

(iv).When the husband requested her for going on an honeymoon during Christmas vacation, she had refused to do so.

(v).She never mingled with the family members and his relatives during any function or temple festival and she remained aloof. Even after being transferred to Kumbakonam she had refused to live with the husband. On one occasion, she had taken lift from an unknown person to attend her office. She never acted as a dutiful Hindu wife. She is not fit for sexual relationship and she had refused to undergo medical treatment.

(vi).The couple are living apart for the past 1 ½ years and a legal notice was sent to the wife seeking divorce on 29.03.2014 for which her counsel replied on 07.04.2014 making allegations against the husband. Based upon the said averments, the husband prayed for a divorce.

3.The wife had filed a counter disputing all the allegations. The wife had pointed out that the husband had refused to attend Thalai Deepavali function at Tindivanam. She had further contended that her



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mother-in-law used to abuse her. She had undergone full medical checkup up on 21.02.2014 and when she had attempted to meet her husband with the said medical reports, she was not permitted to enter into the house. She was made to stand outside the house till 12 mid-night and her brother had come to take her back. Hence, she prayed that she had not caused any mental cruelty upon her husband. But on the other hand, the husband and his mother caused mental cruelty to her. Hence, she prayed for dismissal of the divorce petition.

4.Findings of the Trial Court.

(i).Though the husband had contended that he is affected with allergy whenever he had a sexual relationship with his wife, no medical records have been place on record for the same.

(ii).Though it is alleged by the husband that the wife had created cut injuries and threatened her, no legal records have been placed before the Court.

(iii).Though the husband had contended that the wife had abused him in the presence of his office staff, no one from the office have been examined to prove the same.



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(iv). The wife was working as an engineer in Electricity Board at Tindivanam. After office hours, she had to travel from Tindivanam to Kumbakonam only during night hours on Saturdays. Therefore, the night travel undertaken by the wife cannot be found fault with.

(v).Even when the father-in-law was seriously affected with diabetes and admitted to a hospital in Chennai, the wife and her mother have made an attempt to celebrate Thalai Deepavali at Tindivanam. However, the husband has not shown any desire and has not gone to Tindivanam or to Chennai to meet his father-in-law.

(vi).On 04.03.2014, the wife was made to stand outside the house till 12 mid night and she was taken back only by her brother. Therefore, it is clear that the husband had alone caused mental cruelty to his wife. The wife had initiated DVOP proceedings only for getting united with her husband and therefore, the same cannot be considered to be a cruelty upon the husband.

5.Based on the above said findings, the trial Court had dismissed the divorce petition filed by the husband.



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6.Findings of the First Appellate Court:

(i).The husband has not established the allergic reaction or the contagious disease arising out of his sexual intercourse with his wife. Night travel undertaken by the wife to reach her matrimonial home on a Saturday night cannot be considered to be a mental cruelty. The husband has not established that the wife had refused to have intercourse or had compelled her husband to shift himself to Tindivanam. The husband has also not proved the abuse made by the wife. On the other hand, the wife had proved that the husband had thrown her out of the house during mid night. In fact, the husband alone has lodged a police complaint as against his wife to reunite with him. The husband ought not to have approached the police for re-union.

(ii).Based on the above said finding, the First Appellate Court confirmed the dismissal of the divorce petition.

7.Challenging the concurrent findings, the present civil miscellaneous second appeal has been filed by the husband and the appeal has been admitted on the following substantial questions of law:

“(i).Whether the acts of the wife as alleged by the petitioner



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amount to legal cruelty under Section 13(1)(a) of Hindu Marriage Act or not?

(ii).Whether the wife is debarred from raising the very same grounds in her counter, urged by her in the petition filed under the Prevention of Domestic Violation Act, when the said petition itself was dismissed?

(iii).Whether the long separation of the couple for more than seven years is a valid ground for grant of divorce or not? “

8.The learned counsel appearing for the appellant had contended that from day one of the marriage, the wife has been causing mental cruelty to the husband. Whatever that has been expressed by the wife in the counter or in the deposition is only a fake readiness, but she is not really wiling to join with her husband. In case, if any physical cruelty has been perpetrated by the husband, the wife would have certainly filed a police complaint. She had also not made any attempt to mediate or to settle the issue. So far the wife has not filed any application for restitution of conjugal rights. The couple are living apart for more than 9 years. The marriage has become dead and the same cannot be revived. No love or affection is left with the couple so as to work out for re-union. The wife is a Government servant and the husband is a chartered



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accountant and they do not have any issue out of the wedlock. Therefore, the marriage is having only on legal tie without any love or affection.

9.The learned counsel for the appellant had further contended that the wife had initiated DVOP.No.44 of 2019 before the Judicial Magistrate No.II, Kumbakonam wherein various reliefs have been sought for including the relief that the husband should not be permitted to enter into the matrimonial home. Therefore, it is clear that the wife is not interested in continuing her marital relationship with the appellant. As a result, no purpose would be served in maintaining the matrimonial relationship and a divorce may be granted on the ground of long separation between the parties.

10.The learned counsel for the appellant had relied upon the Judgment of the Hon'ble Supreme Court reported in **2023 SCC Online SC 497 (Rakesh Raman Vs. Kavitha)** to drive home the point that the parties are living separately for more number of years and a decree for divorce could be granted. The learned counsel had further relied upon the Division Bench Judgement of our High Court in **CMA.No.1377 of 2007 dated 30.11.2016 (K.J.Suriyanarayanan Vs. Poornima S.Narayanan)**



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to contend that the Court should taken consideration not only the allegations and the counter allegations made in the petition, but also the events that are subsequent to the filing of the divorce petition.

11.In the present case, the wife having initiated DVOP.No.44 of 2019 with a prayer to keep away the husband from matrimonial home which will clearly establish the evil intention of the wife. The Courts below have taken a pedantic approach in considering the divorce petition strictly within the four corners of law without properly appreciating the emotional aspect of the case. Hence, he prayed for allowing the appeal.

12.Per contra, the learned counsel appearing for the respondent had contended that the entire burden is upon the appellant to establish the ingredients of mental cruelty so as to get a decree for divorce. All the allegations made by the husband have been specifically refuted in the counter affidavit. The husband has miserably failed to prove any one of the allegations made in his divorce petition. On the other hand, the Courts below have arrived at a concurrent finding that the husband alone has caused cruelty to the wife by making her to stand outside the house at 12 mid-night. Every attempt made on the side of the wife to join with the



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husband has been thwarted only by the husband. The husband had refused to attend the Thalai Deepavali at Tindivanam and he has not assigned any reason so far. He had never visited the wife at Tindivanam and he had not even taken care to pick up his wife from Thiruppanandal which is 15 km away from Kumbakonam where she was working. Therefore, he contended that the trial Court as well as the Appellate Court have arrived at a concurrent finding that the husband has not established the plea of mental cruelty and no substantial question of law arises for consideration. The questions of law that have been framed by the Court did not arise on the facts of the present case. Hence, he prayed for dismissal of the appeal.

13.I have considered the submissions made on either side and perused the materials available on record.

14.The arranged marriage between the couple has taken place on 06.07.2009. At the time of marriage, the husband was working as an Auditor at Kumbakonam and the wife was working as an Assistant Engineer in Tamil Nadu Electricity Board at Vallam near Senji in Tindivanam District. The couple got separated in March 2014 and they

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are not blessed with any child. These facts are not in dispute.

15.The husband had alleged that the wife had compelled him to shift to Tindivanam to have a separate matrimonial home. However from the deposition of the husband and the wife, it could be seen that hectic efforts were made by both the parties to get a transfer for the wife to Kumbakonam and ultimately within a period of 1 ½ years, the wife got transferred to Thiruppanandal near Kumbakonam in the year 2010. The present divorce petition has been filed in April 2014. From 2010 to 2014, the wife was residing with the husband in the matrimonial home and attending the office at Thiruppanandal. Therefore, the allegation that the wife had compelled him to shift to Tindivanam and she caused mental cruelty is not factually correct.

16.The husband had alleged that the wife was not inclined to have conjugal relationship and she was avoiding him. He had further alleged that she was not fit for family life. Whenever he had intercourse with her, he was affected with some allergic and contagious disease, but the wife had refused to take treatment. The wife had stoutly denied these allegations. Though the husband had pleaded that he had taken treatment



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with a Doctor by name John, no medical records have been placed before the Court to establish the said fact.

17.In order to disprove the allegation that she was unfit for giving birth to a child, the wife had undergone a complete medical check up on 21.02.2004 and when she had attempted to meet the husband on 04.03.2014 along with medical records, but she was not permitted to enter into the matrimonial home. During cross examination, the husband has categorically stated that even if she is medically fit, he is not ready to live with her. Therefore, the allegation made on the side of the husband that the wife is not co-operating for the conjugal relationship or she is not fit for matrimonial life do not stand proved.

18.As rightly pointed out by the Courts below, the wife was working at Tindivanam at the time of the marriage and Saturday being a working day, she had to leave at Saturday night to reach Kumbakonam to meet her husband. Therefore, the wife had undertaken night travel only to meet her husband at Kumbakonam and strangely the said act of the wife is being found fault with by the husband as an act of mental cruelty. She cannot travel on a Sunday morning to reach Kumbakonam during

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afternoon, because she has to again move for her work immediately on the early morning hours on Monday. Therefore, these other allegations have been made by the husband with ulterior motive to avoid the wife and therefore, the same cannot be considered to be a mental cruelty.

19.Though the husband had contended that right from day one, the wife was creating disharmony in the family, he has not cited any incident in the petition or he has attempted to prove the same. In fact, he has found fault with her wife for taking a lift of an unknown person to reach the office. Thereafter, the wife had admitted her mistake and had refrained from repeating it. During cross examination, the husband had admitted that he had never taken care to drop his wife or take her back from Thiruppanandal which 15 km away from Kumbakonam. Therefore, it is clear that the said allegation is not true.

20.In Paragraph No.21 of the Counter affidavit, the wife had contended that when she reached matrimonial home with medical reports on 04.03.2014, she was not permitted to enter into the house and she was made to stand till 12 mid-night till her brother came to take her back. During cross examination, the husband had admitted the said fact and he



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has not assigned any reason for not permitting the wife to enter into the house. The Courts below have pointed out this incident and held that the husband had committed mental cruelty upon the wife and not vice versa. This incident will clearly establishe that the husband was behaving in a arrogant manner and was not allowing his wife into the matrimonial home and made her to stand outside till 12 mid-night.

21.Though the husband had alleged that the wife was not interested in taking treatment for infertility, when she had undergone a complete medical check up and wanted to meet her husband with those records, he had refused to meet her. During cross examination, the husband had categorically admitted that even if she is medically fit, he is not willing to live with her. Therefore, it is clear that the husband is not willing to live with the wife on any legally acceptable reason.

22.It is contended by the learned counsel appearing for the appellant that the wife had initiated DVOP proceedings in DVOP.No.44 of 2019 in which along with other prayers there is a prayer to keep the husband and his family members away from the matrimonial home.



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According to him, the prayer in this petition will indicate that she is not willing to live with her husband. It is an admitted case that the husband has not permitted the wife to enter into the matrimonial home on 04.03.2014 and she was made to wait till 12 mid-night. Therefore, the attempt made on the part of the wife to seek residential protection under Domestic Violence Act cannot be found fault with and the same cannot be treated as a mental cruelty.

23.A perusal of the cross examination of the husband will clearly indicate that he has shown scant respect towards his wife and her family members. Even when questioned about the admission of his father-in-law in a hospital at Chennai, he says 'I heard about it'. Even though the wife's father was admitted in a hospital at Chennai, the wife's mother had left some one to attend her husband in Chennai and rushed back to Tindivanan awaiting the return of her son-in-law for Thalai Deepavali festival. The husband had not attended the said festival and the wife was forced to leave from Tindivanam to Kumbakonam to meet her husband. These facts are not in dispute. The husband has not assigned any reason whatsoever for refusing to attend the said function which was arranged



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despite the fact that his father-in-law was admitted in a serious condition in a hospital in Chennai.

24.A co-joint understanding of all these facts will make it clear that the husband has committed mental cruelty on the wife and it is not vice versa. All the allegations made by the husband have been not proved, but they have been disproved by the wife. Due to mental cruelty caused by the husband, the wife is living separately. The wife has not been permitted to enter into the matrimonial home and she is fighting before the Judicial Magistrate Court to protect her residential rights.

25.In the light of the above said finding, the parties living apart for more than 9 years cannot be a ground for granting divorce. The husband cannot take advantage of his own wrong and seek divorce on the ground that the couple are living apart for 9 years. All the substantial questions of law are answered as against the appellant. This Civil Miscellaneous Second Appeal stands dismissed. No costs.

12.07.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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1.The Additional District Judge (Fast Track Court),
Kumbakonam,

2.The Additional Subordinate Judge
Kumbakonam

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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