



C.M.S.A.No.33 of 2020

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 22.03.2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.33 of 2020
and
C.M.P.No.14262 of 2020

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Mrs.Shoba

.. Appellant

Vs.

V.Vijayakumar

.. Respondent

Civil Miscellaneous Second Appeal under Order XLIII Rule 1 read with Section 100 CPC read with Section 13(1)(i-a) of the Hindu Marriage Act, against the judgment and decree dated 17.12.2019 in C.M.A.No.2 of 2018 on the file of the First Additional District Court, Thiruvallur, confirming the fair and decretal order dated 01.11.2017 passed in H.M.O.P.No.129 of 2010 on the file of the Subordinate Court, Ponneri.

For appellant : Mr.J.Thilagaraj

For respondent: Mr.K.Ramesh

JUDGMENT

This Civil Miscellaneous Second Appeal (CMSA) has been filed against the judgment and decree dated 17.12.2019 in C.M.A.No.2 of 2018

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on the file of the First Additional District Court, Thiruvallur, confirming the fair and decretal order dated 01.11.2017 passed in H.M.O.P.No.129 of 2010 on the file of the Subordinate Court, Ponneri.

2. The appellant is the wife and the respondent is the husband

3. The respondent/husband has filed a petition under Section 13(1)(i-a) of the Hindu Marriage Act before the trial Court, seeking divorce, stating as follows:

The marriage between himself and the appellant was solemnized as per Hindu rites and customs on 10.02.1989 at Andhra Pradesh and out of their wed-lock, two female children were born, namely Sindu and Shailaja. He was serving as Sub-Inspector of Police in the Tamil Nadu Police Department. He was promoted as Inspector of Police. He was already married to one Venkatamma and out of this marriage, two female children, namely Monisha and Lakshmipriya were born. The said Venkatamma was Woman Police Constable and later promoted as Sub-Inspector of Police in the Tamil Nadu Police Department. The marriage of the respondent herein with the said Venkatamma was dissolved by a decree of divorce in H.M.O.P.No.7 of 1986 on the file of the Sub-Court, Kancheepuram on

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09.07.1986 and she is living with her children separately in Chennai. The respondent tortured the appellant after she came to know of the earlier marriage with the said Venkatamma and suspected him from the year 2002. The appellant deserted the respondent and lived in Red Hills with her children. In the year 2002, the appellant gave a complaint of dowry harassment against the respondent to the higher police authorities, which was closed as false complaint. Due to the activity of the appellant-wife, the respondent-husband was suspended from service for about 19 months and only in the year 2004, he joined duty. Though she is living separately with her children and all the expenses are borne by the husband, the appellant tactically transferred the undivided partition share of the husband without his knowledge. The appellant gave false complaint. The appellant used to visit the office of the respondent and made enquiry with regard to the salary and arrears, etc., of the husband. The wife is highly money minded and without love and affection, the appellant-wife committed cruelty affecting the normal life of the respondent-husband. Hence, he sought divorce on the ground of cruelty and also desertion.

4. The appellant-wife filed counter before the trial Court stating as follows:

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She admitted that the husband met with an accident and sustained grievous injuries. She had taken care of the husband during the period when he was bedridden. The earlier marriage with Venkatamma is admitted. The respondent-husband was having illicit relationship with his first wife Venkatamma, who was working in the same Department and they were living together as husband and wife. The appellant-wife gave a complaint to Superintendent of Police, Chengalpet East, against the respondent-husband, but no action was taken against him. The respondent-husband threatened the wife that she would live with the husband along with Venkatamma, otherwise, he would divorce the wife. The respondent-husband is addicted with bad habits like drinking, smoking, and also living in adultery with several women. Hence, she came to her brother's place at Chittor District in April 2010 and in March 2010, the husband's sister's marriage was performed, for which both the appellant and the respondent participated. The wife has given complaint before D.S.P., Kundrathur and the husband was suspended for about 19 months. The appellant-wife depends upon her parents or her in-laws to meet out the educational expenses. When the mother-in-law of the wife came to know, she transferred the property in the name of the second daughter after informing the husband. The husband was living with his erstwhile wife



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VENKATAMMA and has not given entire salary for household expenses. On the complaint given by the wife to higher Police officials, and on their direction, the ATM card of the husband was given to her, who used the same for three months, and subsequently, the husband changed his Bank Account. The husband, along with henchmen, came to the house of the wife and threatened to register the property in the name of the daughter of the first wife. The husband had not taken care of the appellant-wife and her daughters, who were pursuing higher studies and in order to escape from the departmental action, the respondent-husband has filed the H.M.O.P. for divorce.

5. Before the trial Court, the respondent herein examined himself as P.W.1 and marked Exs.P-1 to P-3. The wife examined herself as R.W.1 and filed Exs.R-1 to R-4. On an analysis of the oral and documentary evidence, the trial Court allowed the H.M.O.P., granting divorce. Challenging the same, the wife preferred appeal in C.M.A.No.2 of 2018 before the first appellate Court, and the appeal was dismissed, confirming the decree of divorce granted by the trial Court. As against the same, the wife has preferred the present C.M.S.A.

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6. On 11.01.2021, this Court admitted this appeal on the following substantial questions of law:

(a) Have not the lower Courts erred in being oblivious to the well-established principle of law that the petitioner must stand or fall on its own merits and that the petitioner cannot succeed by picking holes in the defence of the respondent ?

(b) Have not the lower Courts erred in deciding the case indirectly on the ground of 'irretrievably broken marriage', when it is not at all a ground enumerated in the statute ?

(c) Have not the lower Courts erred in holding that just because the appellant had not filed any petition for restitution of conjugal rights (vis-a-vis, the divorce petition of the respondent) she is not willing to live with the respondent and that the respondent is entitled for divorce on that score ?

(d) Have not the lower Courts violated Section 14 of the Family Courts Act by holding that Ex.R-4 is inadmissible in evidence ? and

(e) Have not the lower Courts erred in being oblivious to the well-settled law that an admitted fact need not be proved, especially when the respondent had conceded his act of adultery ?

7. Learned counsel for the appellant submitted that as a dutiful wife, she wanted to live with him and it was he who had forsaken the appellant. The appellant strongly opposed the divorce petition filed by him. However, the trial Court allowed the petition filed for divorce. Aggrieved by the same,



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she filed appeal before the first appellate Court, which had dismissed the appeal and confirmed the decree of divorce granted by the trial Court.

Aggrieved by the same, the wife has filed the present CMSA on the ground that the Courts below caused gross injustice by granting divorce to them. Despite the respondent-husband having not made out any case warranting dissolution of marriage on the ground of cruelty, the trial Court passed the order without properly hearing the arguments of the appellant-wife. The lower appellate Court being the first appellate Court of fact-finding, failed to properly analyse and re-appreciate the evidence. The respondent has marked only three documents, namely the marriage invitation, driving licence and the voter I.D. and that he has not produced any other document to prove his allegation against the appellant-wife. Even in the cause of action column in the original petition, there is no mention of the word "cruelty" and it is the duty of the party who files the petition for divorce against his/her spouse to plead and prove it. The trial Court erred in holding that just because the appellant had not filed any petition for restitution of conjugal rights, it has to be presumed that she is not willing to live with him. The lower appellate Court failed to see that at the time of allegation of forcible abduction of the respondent, the respondent was working as Inspector of Police, and therefore, it is highly unbelievable that

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someone can forcibly abduct an Inspector of Police to the office of the Sub-Registrar and coerce him to sign the settlement deed. Even the respondent has not given any complaint to the Police about such serious incident. The respondent is not a lay-man who himself was an Inspector of Police at the relevant point of time and therefore, he know very well as to what action would be taken against him. Even during the cross-examination, the respondent admitted that out of his own love and affection only, he executed the settlement deed and subsequently, due to family dispute, he cancelled the settlement deed and he has not stated that it was obtained by forcible coercion. The respondent, as petitioner, has to plead and prove and he has not substantiated the allegations levelled in the petition for divorce. In order to substantiate his allegations, the respondent has not examined any other witness. Only the respondent alone was examined as P.W.1 and he marked three documents and he has not examined any other witness, namely mother or any of the Department staff/official to show that the appellant gave a false complaint and also frequently went to the office and causing disturbance in the office. The respondent himself admitted that earlier, she married one Venkatamma who was working as Constable in the very same Department in which the respondent was working, but after divorce, he married the appellant, but the respondent

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never disclosed the factum of earlier marriage either prior to his marriage with the appellant or even subsequent thereto. Therefore, it is for the respondent who has filed the petition for divorce, on the ground of cruelty and also long desertion, to plead and prove that the appellant caused mental cruelty as well as she deserted him without any valid reason. Therefore, the appellant has not established the same. However, both the Courts below have not granted divorce on the main ground of irretrievable break-down of marriage, but they have discussed and also considered the same. The Courts below have come to the conclusion that the appellant has committed cruelty on the respondent.

8. Learned counsel for the respondent submitted that the appellant-wife has neglected the husband and failed to take care of him at the time when he met with an accident and took treatment and he was unable to attend the office for more than one year. Further, the appellant gave a false complaint against the respondent and due to that, the respondent was suspended from service for a period of 19 months. Though the respondent has earlier married Venkatamma and he divorced her and she was also working in the Police Department and after promotion, she was working as Inspector of Police and is living with her children and after coming to know



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of the factum of the first marriage of the respondent with the said Venkatamma, the appellant unnecessarily quarrelled with him and became a trouble-maker and she made a false complaint before the Department and the superior officials of the respondent, and also threatened him and forcibly obtained the settlement deed, which was also subsequently cancelled. The appellant never lived with the respondent for more than a decade and the respondent was even residing in a Mansion for some time and he met with the mental cruelty and long desertion. The respondent filed the petition for divorce and both the Courts below have rightly appreciated and re-appreciated the oral and documentary evidence and granted divorce and there is no substantial question of law to be adjudicated in this CMSA, which may be dismissed.

9. Heard both sides and perused the materials available on record.

10. Admittedly, the marriage between the parties is not in dispute and it is also not in dispute that, out of their wed-lock, they have begotten two female children. According to the respondent-husband, the appellant caused mental cruelty by making false complaint and also by frequently going to his office and in front of the colleagues/co-workers/co-employees,

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raised quarrel and she also deserted him for a long period and also due to false complaint given by her, the respondent had to undergo suspension from service for a period of 19 months. The appellant also admitted during cross-examination that she gave a complaint once before the higher officials against him on the ground that he was not taking care of the family due to his illicit intimacy with the erstwhile first wife/Venkatamma and the respondent was suspended from service due to his above act. The respondent has established the ground of mental cruelty for grant of divorce.

11. According to the appellant/wife, she admitted the marriage, but she has stated that prior to their marriage, the respondent already married the said Venkatamma, which was suppressed by him and even after divorcing her, he had intimacy with her and he tortured the appellant and since he did not provide food and shelter, the appellant made a complaint and the Department took the ATM card from him and gave the same to the appellant. After some time, the respondent had changed the Bank Account and she could not get anything for her survival and for her children and only the respondent and mother voluntarily executed a settlement deed and if at all there was forcible coercion, the respondent would have made a



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complaint and even before the Registrar, the respondent could have refused to execute the settlement deed and it is also highly unbelievable that the appellant had set up henchmen/rowdies and the respondent was abducted and was forcibly made to execute the document. Therefore, both the Courts below failed to appreciate and re-appreciate the evidence and without any specific pleading and without any specific evidence, the respondent proved the same and the trial Court granted divorce, but unfortunately, even the first appellate Court, as a fact-finding Court, did not properly re-appreciate it and had simply endorsed the view of the trial Court.

12. It is seen that the relationship of the parties is admitted. The respondent-husband also admitted that prior to their marriage, he earlier married the said Venkatamma and he also admitted that the erstwhile wife Venkatamma was working as Constable and she belonged to Scheduled Caste community and therefore, there was registered marriage with her without knowing the fact to their parents and after coming to know of the same, and since the said Venkatamma was a Schedule Caste woman, the parents raised objection and they did not accept their marriage and therefore, he obtained divorce by mutual consent. The respondent has not



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made any allegation against the said Venkatamma for the divorce and only reason for dissolution of their marriage was that since she is a Scheduled Caste woman, the parents of the respondent did not accept her and therefore, admittedly, from the evidence, it is clear that the respondent did not reveal his earlier marriage with the said Venkatamma. Even after marriage with the appellant, he did not disclose the earlier marriage, but however, the appellant came to know about the same and raised quarrel with him. Certainly, a woman, if cheated by her husband and the family of the husband by suppressing the earlier marriage with the said Venkatamma, who is a lower caste woman and got married the appellant, would naturally react for it and that may not be a ground for cruelty. Further, it is a presumption that the respondent himself admitted that there was registered marriage with the said Venkatamma and thereafter, divorce was obtained due to the opposition made by his parents. But there is no other personal reason given for the same. Further, the appellant also stated that she frequently saw the respondent meeting the said Venkatamma and he also brought her to his house and shared the bedroom. Though the Courts below have stated that the appellant has not proved the facts, it is very difficult to prove the fact that both the appellant and the erstwhile wife Venkatamma are working in the very same

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Department of the respondent.

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13. In the above circumstances, there is no personal allegation for divorce. Even the respondent who has filed the petition for divorce, had not examined any witness and either his mother or any well-wisher or also any Department staff or any other co-employee regarding the cause of cruelty.

14. Though the appellant admitted that she gave a complaint because she has given the reason for it that he mingled with the said Venkatamma, the erstwhile wife and he neglected the appellant by not providing even the basic needs to her and therefore, she made a complaint. There is nothing wrong that a person who cheated a woman and suppressed the factum of his earlier marriage, and that he had also not provided food, naturally, she would give a complaint and it may not be termed 'cruelty'. Further, the respondent has not filed any petition for restitution of conjugal rights and despite that, the respondent refused to live with her. When the petition filed for divorce is on the ground of cruelty and desertion, it is for the husband to prove that she refused to live with him without any valid reason.

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15. Admittedly, the respondent, before marrying the appellant, had earlier married the said Venkatamma and lived with her and she gave birth to two children and later, because of the caste being the social stigma, he left the ex-wife and with their mutual consent, divorce was granted to them. In the above circumstances, the suspicion of the appellant could be termed as reasonable and therefore, after coming to know of the factum of the earlier marriage, she reacted on that, and the same cannot be taken as a cruelty and it is the respondent-husband who invited the cause.

16. Therefore, the respondent himself admitted that he did not reveal the factum of the first marriage before marrying the appellant, but she came to know of the same only after giving birth to two children and only due to that, she made quarrel and therefore, the desertion is not without any valid reason. It is the respondent who has filed the HMOP for divorce, and it is only for him to prove the same. But on a reading of the entire materials, this Court finds that the respondent has not substantiate his case by examining any independent or oral evidence and both the Courts below erroneously held that the appellant herself admitted the facts. But the person who filed the petition for divorce, has to plead and prove and the petitioner in HMOP being the husband, who filed the petition for



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divorce, has to stand on his own legs on his pleadings and he cannot take the advantage of the loopholes left by the appellant. Though both the Courts below discussed the facts, they have not appreciated the evidence and pleadings and they have only stated that the appellant has failed to prove the same. Therefore, without any valid ground or reason, the onus has been shifted on the appellant/wife and appreciation of evidence by both the Courts below is erroneous and therefore, all the substantial questions of law are answered in favour of the appellant/wife and against the respondent/husband.

17. Accordingly, the judgment and decree of both the Courts below are liable to be set aside and accordingly, the same are set aside. The CMSA is allowed. There shall be no order as to costs. Consequently, C.M.P. is closed.

22.03.2024

CS

To

1. First Addl. District Judge, Thiruvallur.
2. The Sub-Judge, Ponneri.
3. The Section Officer, VR Section, High Court, Madras.

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P.VELMURUGAN, J

CS

Pre-delivery Order in

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Judgment delivered

on 22.03.2024

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