



C.M.S.A.No.29 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment reserved on: 28.08.2023

Judgment delivered on: 21.03.2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.29 of 2021

and

C.M.P.No.2156 of 2021

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Mr.P.Sivaraj

.. Appellant

Vs.

1. Krishnaveni

2. Senthilvel

.. Respondents

Civil Miscellaneous Second Appeal filed under Section 13(1)(i) of the Hindu Marriage Act read with Section 100 of the Code of Civil Procedure (CPC) against the judgment and decree dated 06.10.2020 on the file of the IV Additional District and Sessions Judge, Coimbatore in C.M.A.No.17 of 2018, in reversing the fair and final order, dated 21.06.2018 passed in H.M.O.P.No.82 of 2012 on the file of the Subordinate Court, Pollachi.

For appellant : Mr.V.Arunagiri

For respondents: Mr.L.Mouli for R-1

Mr.P.Ravi Shankar Rao for R-2

JUDGMENT

This Civil Miscellaneous Second Appeal is filed against the judgment and decree dated 06.10.2020 on the file of the IV Additional District and Sessions

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Judge, Coimbatore in C.M.A.No.17 of 2018, reversing the fair and final order, dated 21.06.2018 passed in H.M.O.P.No.82 of 2012 on the file of the Subordinate Court, Pollachi.

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

3. The case of the appellant/husband is as follows:

(a) The marriage between himself and the first respondent was solemnised on 14.11.2005. After marriage, they lived in the residence of the husband. The wife started to avoid having cohabitation with the husband. She insisted the appellant for separate family. Due to her compulsion, separate family was put up.

(b) Due to business pre-occupation, the appellant-husband goes to Tiruppur for three days and to stay in Pollachi for four days. At this time, the second respondent visits his house and stayed for hours together. After one month of their separate life, the first respondent was pregnant and hence, she wanted to go to her parents' house and she was adamant in going to her parents' house. On 14.12.2006, the first respondent gave birth to a male child and the appellant was prevented from seeing the child.

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(c) On 12.12.2011, at about 2 p.m., when the appellant as usual prepared to go to Udumalpet for his routine business purpose, he informed the wife that he would return by 8 p.m, after completion of works at Pollachi, he decided to proceed towards Udumalpet and for taking a file of his business transaction, he returned home and knocked the door for about 10 minutes. When he entered the house, he was shocked to see that the second respondent was lying under the cot in the bed room. The respondents admitted their illegal contacts, and also even prior to marriage of the appellant with the first respondent. They admitted that the child Naveen was born to them and not to the appellant.

(d) After many mediation, it was agreed that till the completion of the academic year of the child's education, the first respondent was allowed to stay with her parents. On 03.01.2012, the parents of the first respondent brought her and the child to the appellant's house and requested the appellant to allow the first respondent and the child till the first anniversary in the school of the child is over. The appellant accepted the same and on 03.04.2012, the first anniversary of the child in his school was over and the first respondent with her child went to her parents house. On 21.05.2012, the appellant issued legal notice to the first respondent for divorce, for which reply was also sent by her. Hence, the appellant had filed the petition for divorce on the ground of adultery.



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4. The first respondent/wife filed counter to the divorce petition stating as follows:

She admitted the marriage between herself and the appellant. At the time of marriage, the appellant was working in Sundaram Finance and afterwards, as an Insurance Agent and as per her advise, he was selected as Insurance Surveyor. In the year 2009, the appellant was having standard income. On 06.03.2008, the first respondent's parents deposited Rs.1,50,000/- in the name of the appellant in the ICICI Bank. The appellant and his parents told that he would marry some other girl unless they get 100 sovereigns of gold and was having suspicion with the first respondent if she talks with any third party. The first respondent denies of having any illegal intimacy with the second respondent, which, according to her is a concocted false story. While denying the fact that the child was born to the second respondent, she was ready for scientific examination. She made several attempts for re-union with the appellant, but in vain. The appellant deserted her and child. The appellant had not provided any maintenance to them. She prayed to dismiss the petition.

5. The second respondent has filed counter before the trial Court stating that there was no illegal intimacy with the first respondent. The second respondent is only the relative of the first respondent. The factum of the



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appellant seeing the second respondent under the cot on on 12.12.2011 is denied and thus, he prayed to dismiss the petition.

6. Before the trial Court, the appellant examined himself as P.W.1 and one Ponnusamy was examined as P.W.2, and Exs.P-1 to P-5 were marked. On the side of the respondents, the first respondent (wife) examined herself as R.W.1 and one Sudha was examined as R.W.2 and Exs.R-1 to R-9 were marked. Ex.C-1 was marked as Court document, which is the DNA laboratory report.

7. On an analysis of the oral and documentary evidence, the trial Court granted divorce, against which, the wife preferred appeal before the first appellate Court, which allowed the appeal setting aside the decree of divorce granted by the trial Court and as against the same, the husband has filed the present Civil Miscellaneous Second Appeal.

8. This Court, on 19.02.2021, has admitted the present appeal on the following substantial questions of law:

(i) Whether the adultery cannot be proved with direct evidence, whether the first appellate Court is right in ignoring the evidence of P.W.2 (father of the husband) as interested witness ? and



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(ii) When the wife/first respondent admitted that she lived separately for some time after 12.12.2011 dated incident, vide her petition I.A.No.7 of 2013 for maintenance, whether the findings of the first appellate Court is justified in holding that she/wife continued to live with the husband even after 12.12.2011 dated incident ?

9. Learned counsel for the appellant submitted that the first respondent is the wife and the second respondent has been impleaded to show the factum of adultery. The Original Petition for divorce has been filed on the ground of adultery. Though the appellant proved the same with the averments made in the affidavit and also through the oral and documentary evidence, the trial Court rightly appreciated the evidence and on being satisfied with the grounds raised by the appellant/husband for divorce, granted the same. Challenging the same, the first respondent/wife appeal before the appellate Court and the first appellate Court failed to re-appreciate the evidence and erroneously allowed the appeal by setting aside the decree of divorce granted by the trial Court. Challenging the same, the present appeal is filed by the husband.

10. The learned counsel for the appellant further submitted that the first appellate Court failed to note that there cannot be any direct and independent

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evidence regarding adultery. In this case, the appellant/husband himself stated that on 12.12.2011 at about 2 p.m., he informed the first respondent that he would return by 8 p.m., as he left for Udumalpet for his business purpose and while he was on the way, since he realised that he left a file pertaining to his business transactions, he returned back home to take that file and at that time, the door was locked inside the house and he knocked the door for about ten minutes, but the first respondent did not open the door immediately, and his father who was residing in the adjacent portion behind the house of the appellant and the neighbours also gathered at that time and when the first respondent opened the house after ten minutes, and when he entered into the house and started searching for his file, he was shocked to note that the second respondent was lying under the cot in his bed-room. The appellant/husband enquired both the first and second respondents, and they admitted their illegal intimacy. They also admitted that both of them had pre-marital relationship prior to marriage. Subsequently, he informed to their parents' house and left for her parents' house and she took them and left there and since the child of the appellant and the first respondent is studying and is in the middle of the academic year, the father-in-law of the first respondent requested to continue the studies of the child till the end of the academic year and requested for stay of both the mother and the child in their house, and therefore, they were allowed



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to continue to reside.

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11. Learned counsel for the appellant further contended that the appellant/husband's father was examined as P.W.2 and he has categorically stated the above incidents and facts. The first respondent frequently talked with the second respondent over cell phone and even for a long time and it was also marked as Ex.P-4. The trial Court rightly appreciated the evidence and granted divorce. The First Appellate Court allowed the appeal on the ground that P.W.2 who is none other than the father of the appellant, is an interested witness. The appellant failed to prove the adultery and thereby, the first appeal was allowed and that the first appellate Court failed to re-appreciate the evidence and erroneously came to the conclusion that there is no independent witness examined on the side of the appellant and the lower appellate Court failed to consider the fact that the in a case of this nature, no independent witness would come forward to tender evidence before Court, though, in this case, though P.W.2 is the father of the appellant and he is only a natural witness and he cannot be treated as an interested witness. Admittedly, the appellant and the first respondent lived in their house in one portion and the parents of the appellant (husband) were living in the other portion of the same house and therefore, the evidence of P.W.2 is only natural. Further, the first respondent



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also admitted that the second respondent is known person even prior to their marriage and he was helping them for arranging the marriage for her sister and he is also in the same location. Under these circumstances, the appellant/husband has proved the ground of adultery in the manner known to law with the available evidence. The trial Court appreciated the same, whereas, the First Appellate Court failed to re-appreciate the evidence while allowing the appeal, and the same is erroneous. The reasons stated for allowing the First Appeal are perverse and therefore, the present CMSA is filed by the husband and prayed that the judgment and decree of the First Appellate Court may be set aside and that of the trial Court may be confirmed.

12. In support of his submissions, learned counsel for the appellant relied on the following decisions of the Supreme Court:

(i) 2018 (2) SCC 801 = 2018 (1) SCC (Cri) 860 (Shafhi Mohammad Vs. State of H.P.):

"28. The expression "data" is defined in Section 2(1)(o) of the Information Technology Act as follows:

"2.(1)(o) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalised manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or



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optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer."

29. The applicability of procedural requirement under Section 65-B(4) of the Evidence Act of furnishing certificate is to be applied only when such electronic evidence is produced by a person who is in a position to produce such certificate being in control of the said device and not of the opposite party. In a case where electronic evidence is produced by a party who is not in possession of a device, applicability of Sections 63 and 65 of the Evidence Act cannot certainly be invoked. If this is not so permitted, it will be denial of justice to the person who is in possession of authentic evidence/witness but on account of manner of proving, such document is kept out of consideration by the court in the absence of certificate under Section 65-B(4) of the Evidence Act, which party producing cannot possibly secure. Thus, requirement of certificate under Section 65-B(4) is not always mandatory."

30. Accordingly, we clarify the legal position on the subject on the admissibility of the electronic evidence, especially by a party who is not in possession of device from which the document is produced. Such party cannot be required to produce certificate under Section 65-B(4) of the Evidence Act. The applicability of requirement of certificate being procedural can be relaxed by the court wherever interest of justice so justifies."

(ii) 2007 (14) SC 150 = 2009 (1) SCC (Cri) 773 (Namdeo Vs. State of Maharashtra):

"29. We are unable to uphold the

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contention. In our judgment, a witness who is a relative of the deceased or victim of a crime cannot be characterised as "interested". The term "interested" postulates that the witness has some direct or indirect "interest" in having the accused somehow or the other convicted due to animus or for some other oblique motive."

"35. Negating the contention, upholding the order of conviction, and referring to Dalip Singh (Dalip Sing Vs. State of Punjab - AIR 1953 SC 364 : 1954 SCR 145) this Court stated: (SCC pp.167-68, para 11):

"There can be no doubt that having regard to the fact that the incident took place at midnight inside the house of Ajaib Singh, the only natural witnesses who could be present to see the assault would be Jaswant Kaur and her mother Shvi Kaur. No outsider can be expected to have come at that time because the attack by the appellants was sudden. Moreover a close relative who is a very natural witness cannot be regarded as an interested witness. The term 'interested' postulates that the person concerned must have some direct interest in seeing that the accused person is somehow or the other convicted either because he had some animus with the accused or for some other reason. Such is not the case here. In the instant case there is



absolutely no evidence to indicate that either Jaswant Kaur or Shiv Kaur bore any animus against the accused."

"38. From the above case law, it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully. IF on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.":

13. Learned counsel appearing for the first respondent/wife submitted that the marriage between the appellant and herself is arranged marriage and at the time of marriage, the appellant did not have any permanent job or permanent income, and later he became an LIC agent and after settling in the life, he wanted to get divorce and marry another woman with dowry and he has made



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false allegations against the first respondent. Though the appellant denied the paternity of the child, whereas, they have sent the test to Forensic Department for analysis and that from the report submitted by the Forensic Laboratory, it is clear that the appellant is the biological father of the child. The second respondent is only a relative of the first respondent and in order to get a drive from the first respondent, he made false allegations and the second respondent who is a relative of the first respondent and digital evidence/certificate under Section 65-B of the Indian Evidence Act was not obtained. P.W.2 is none other than the father of the appellant who is an interested witness. Though P.Ws.2 and 3 have stated that at the time of knocking the door, the parents and the neighbours gathered there, but to prove the same, no neighbour was examined. The appellant and P.W.2 father of the appellant, are interested witness and except them, no other independent witness was examined. Though the trial Court failed to consider the above facts in proper perspective, the first appellate Court re-appreciated the evidence as the fact-finding Court and set aside the order of the trial Court. Hence, there is no merit in the present Second Appeal.

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

15. As far as the first substantial question of law is concerned, it is seen

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that the marriage between the appellant and the first respondent, is not in dispute. Though the paternity of the child is disputed, but the DNA test confirmed that the appellant is the biological father of the child. However, the appellant filed the petition for divorce on the ground of adultery, and the first respondent had illegal intimacy with the second respondent. The pleadings and evidence of the appellant/husband shows that on 12.12.2011, at about 2 p.m., when the appellant left for Udumalpet for his business purpose, at the time, he informed the first respondent that he would return back at about 8 p.m. on that day, after completion of his work at Pollachi, and he decided to proceed and accordingly, he left home. On the way, the appellant realised that he had left one file in the house itself and he wanted to take it back with him for his business transactions and accordingly, he returned to his house and knocked the door for nearly ten minutes and the near-by residents and his parents gathered there in front of the door and at that time, the first respondent opened the house after ten minutes. The appellant entered into the house and searched for his file, but at that time, he was shocked to see the second respondent lying under the cot in his bed-room. Immediately, he left the house. He deposed in his evidence that in order to substantiate the same, his father was examined as P.W.2 and he also narrated the above incident. Further, the second respondent also admitted that he is a known person and he is her relative and she also admitted that since he



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was helping for her sister's marriage, she used to talk with him. However, she denied illegal intimacy with the second respondent.

16. Though the first respondent/wife has also made an allegation of illegal intimacy of the appellant with a woman, she has not pleaded the same in the counter statement and only at the time of examination, R.W.2 who is none other than the sister of the first respondent, has spoken about the same and they have set up a new story that in order to get married with the said woman, he had illegal intimacy and that the appellant filed divorce petition against the first respondent. Since adultery is shown as a ground of divorce, it is very difficult to prove the same. However, in this case, P.W.2, who is the father of the appellant, has categorically stated in his evidence that the first respondent had not denied that R.W.2 admitted that they were residing in the adjacent portion and the portion in which the appellant and the first respondent were residing. The appellant also produced the cell phone of the second respondent bearing No.99762 99447 and the cell phone bearing No.97151 45861 belongs to the appellant. The cell phone of the first respondent is to frequently talk with the second respondent in unusual times and also suspects the same. It is admitted that the second respondent is a known person and is also a relative of the first respondent and living in the same area. It is also admitted that the second



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respondent helped the family of the first respondent for the marriage of her sister. In the said context, she used to talk with him. Therefore, in the above circumstances, this Court finds that the evidence of P.Ws.1 and 2 is natural even though P.W.2 is the father of the appellant and it cannot be simply ignored that he is an interested witness. The father of the appellant will not give such a false evidence and forget about the reputation of their family and against his own daughter-in-law, who gave birth to the child of his son.

17. Therefore, on a conjoint reading of the entire oral and documentary evidence, this Court finds that though the trial Court has appreciated the evidence of P.Ws.1 and 2 and also found that the other circumstances and that the appellant is entitled for divorce on the ground sought for, whereas, the first appellate Court has ignored the evidence of P.W.2, which is not correct and the reasons assigned by the first appellate Court for ignoring the evidence of P.W.2 is against the principles of law. Even though P.W.2 is the father of the appellant, his evidence is natural and therefore, the first substantial question of law is answered in favour of the appellant/husband and against the respondent/wife.

18. As far as the second substantial question of law is concerned, it is to be noted that the second respondent was living separately for some time after



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12.12.2011 incident. The first respondent also filed I.A.No.7 of 2020 for interim maintenance. Even though the appellant and the first respondent were living together for some time after 12.12.2011 incident, whereas the appellant has given explanation that since it was the running academic year of the child's study, the father-in-law made a request to the appellant that the child would continue the studies till the end of the academic year. Therefore, the appellant has clearly offered explanation and the first respondent has not specifically denied the same. There is no evidence to show that after 12.12.2011 incident, there was cohabitation between the appellant and the first respondent and the appellant lived with the first respondent as husband and wife and he also forgot her illegal intimacy with the second respondent and thereafter, the purpose of filing of the divorce petition, he has given a ground for divorce and for the purpose of divorce, he has taken this ground. There is no evidence to show that after 12.12.2011 incident, even though the appellant and the first respondent lived together in the house, for which the appellant has given the reason being the studies of the child for the academic year and thereafter, they have left the matrimonial home. There is no material to show that the appellant lived with the first respondent as husband and wife. Mere living under one roof for the welfare of the child for some time may not be the sole ground that the appellant has given up the allegations. The second substantial question of law is also answered

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in favour of the appellant/husband and against the respondent/wife.

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19. Therefore, in the above facts and circumstances, the first appellate Court has failed to appreciate the pleadings and evidence in proper perspective and therefore, the findings of the first appellate Court are perverse and the appellant is entitled for divorce on the ground of adultery as pleaded in the H.M.O.P. The findings of the first appellate Court are accordingly set aside and that of the trial Court are confirmed.

20. The citations referred to by the learned counsel for the appellant are applicable to the facts of the present case on hand. The evidence of the relative witness cannot be simply ignored because it is an interested witness and if it is natural, it can be taken into consideration for the case.

21. As far as the CMP.No.2156 of 2021 filed seeking permission to produce the audio containing the telephonic conversation of the first respondent, as additional evidence, this Court finds that evidence of the father is natural one and hence, the said CMP is not necessary and the same is closed.

22. In the result, the present CMSA is allowed. There shall be no order as to costs.

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Index: Yes/no
Speaking Order: Yes/no
Neutral Citation: Yes/no

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To

1. The Fourth Additional District and Sessions Judge, Coimbatore.
2. The Subordinate Judge, Pollachi.
3. The Section Officer, VR Section, High Court, Madras.

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P.VELMURUGAN, J

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