



C.M.A(MD).Nos.38 of 2024, 457 of 2020 and 203 of 2022

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 25 .09.2024

CORAM:

THE HONOURABLE **MR.JUSTICE P.VELMURUGAN**
AND
THE HON'BLE **MR.JUSTICE K.K.RAMAKRISHNAN**

C.M.A(MD).Nos.38 of 2024, 457 of 2020 and 203 of 2022
and C.M.P(MD).Nos.801 of 2022, 5212 of 2020 and 1833 of 2022

C.M.A(MD).No.38 of 2024

P.Wise Light

... Appellant

Vs.

D.Jesu Sharmila

... Respondent

PRAYER: Civil Miscellaneous Appeal has been filed under Section 47 of Guardian and Wards Act, 1890, to set aside the judgment and decree dated 13.07.2018 in GWOP.No.146 of 2018 on the file of the Family Court, Kanyakumari at Nagercoil.

For Appellant
For Respondent

: Mr.P.Wise Light (party-in-person)
: Mr.K.N.Thambi
for Mr.G.Cenil

C.M.A(MD).No.457 of 2020

D.Jesu Sharmila

... Appellant

Vs.



C.M.A(MD).Nos.38 of 2024, 457 of 2020 and 203 of 2022

P.Wise Light

... Respondent

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PRAYER: Civil Miscellaneous Appeal has been filed under Section 47 of Guardian and Wards Act, 1890, to set aside the judgment and decree dated 13.07.2018 in GWOP.No.146 of 2018 on the file of the Family Court, Kanyakumari at Nagercoil.

For Appellant	: Mr.K.N.Thambi for Mr.G.Cenil
For Respondent	: Mr.P.Wise Light (party-in-person)

C.M.A(MD).No.203 of 2022

D.Jesu Sharmila

... Appellant

Vs.

P.Wise Light

... Respondent

PRAYER: Civil Miscellaneous Appeal has been filed under Section 19 of Family Court Act, 1869, to set aside the judgment and decree dated 13.09.2021 in IDOP.No.287 of 2018 on the file of the Family Court, Kanyakumari at Nagercoil.

For Appellant	: Mr.K.N.Thambi for Mr.G.Cenil
For Respondent	: Mr.P.Wise Light (party-in-person)



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COMMON JUDGMENT

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(Judgment of the Court was made by **P.VELMURUGAN,J.**)

Since the parties in all three appeals are one and the same and the subject matter of the appeals also same and interlinked with each other, they are disposed of by this common judgment.

2. For the sake of convenience, the parties are referred to as per their ranking in C.M.A(MD).No.203 of 2022.

3. The appellant is the wife and the respondent is the husband. The appellant filed a petition in DVOP.No.287 of 2018 before the Family Court, Kanniyakumari District at Nagercoil, under Section 10 (ix) & (x) of the Indian Divorce Act, for dissolution of marriage, which was solemnized on 25.04.2012 between the appellant and the respondent.

4. The brief facts of the case as mentioned by the appellant before the Family Court are as follows:

4.1 The marriage between the appellant and the respondent was solemnised on 25.04.2012 and they started living as husband and wife at the parental house



of the respondent at James Town. At the time of marriage, the respondent was working at Bangalore and the appellant was doing her project work for her M.E degree course. After the marriage, the appellant was taken to Bangalore on 40th day of marriage and both of them were residing at Bangalore as husband and wife in a rental house, where the respondent used to keep the appellant inside the house and locked the door till the arrival of the respondent.

4.2 While so, the appellant got some problem in her uterus. Therefore, for treatment, they returned to their native place on 18.03.2013 in a critical situation and the appellant was hospitalized immediately and underwent surgery at the private hospital, Nagercoil, on 19.03.2013. The doctor, who gave treatment to the appellant, instructed them to have a child after six months of the said surgery. On compulsion of the respondent, the appellant was taken to the Bangalore, where the respondent used to have forcible sexual relationship with the appellant as against the advice of the doctor and due to that, the appellant became pregnant within two months of the said surgery of uterus. Whenever, the respondent got sexual arousing, he used to have brutal sexual relationship with the appellant under the influence of drugs meant for sexual arousing. Therefore, the appellant returned to her parental house in the first week of June-2013, considering her health condition and had a medical check up with the same doctor, who gave



treatment for uterus, found that the appellant was pregnant and the same was informed to the respondent. The respondent came to the parental house of the appellant and insisted the appellant come back to Bangalore. Since the appellant showed some reluctance to travel due to her pregnancy, the respondent caused physical as well as mental cruelty to the appellant. The appellant was so fear about the abnormal behavior of the respondent and after, despite having difficulty, she traveled to Bangalore along with the respondent and reached there on 04.08.2013.

4.3 Thereafter also, the respondent again adopted the same way of locking house and keeping the appellant inside of the house and also he forged to have a sexual intercourse with her even during the pregnancy period. When the appellant shows some resistance, the behavior of the respondent became abnormal. On 20.08.2013, the appellant was again brought to the paternal house of the appellant for medical checkup, thereafter, she did not return back to bangalore, due to fear for health of the child in the womb as well as her life. Consequently, the respondent stopped to visit the appellant at her parental house except having only threatening call to her over cellphone and the respondent caused physical as well as mental cruelty towards the appellant. In the meanwhile, the appellant was hospitalized in a private nursing home for delivery



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on 21.01.2014 and she gave birth to a male child and the same was duly informed to the respondent. The respondent and his parents came to the hospital only on the next day of the delivery. The Doctor advised the appellant and the respondent that they should not have any sexual relationship for the period of one year, however, within 48 days of the child birth, the respondent forced the appellant to have a sexual relationship. When the appellant refused to accept, he behaved rudely and caused physical as well as mental cruelty . Therefore, the appellant felt that it would be harmful or injurious to live with the respondent and decided to leave her matrimonial home from bangalore and return to her parental house. Thereafter, she received lawyer notice on 04.02.2015 as if she fails to come to the matrimonial home, he will divorce her. The appellant replied the same. Thereafter, the respondent filed a petition for restitution of conjugal rights in IDOP.No.93 of 2015, in which, the appellant remained *ex-parte* mainly for the reason of being physically incapacitated to continue her marriage life as a wife to the respondent and the said petition was allowed as *ex-parte*. The appellant is continuously residing in her parental house from the date of delivery. Since the respondent caused physical as well as the mental cruelty and also behaved rudely, the appellant filed a petition in IDOP.No.287 of 2018 for divorce under the ground of manual cruelty.



5. The brief facts of the case of the respondent as per the counter affidavit filed by him before the Family Court are as follows:

5.1 After the marriage both the appellant and the respondent were living at Bangalore happily, as husband and wife in individual matrimonial home at bangalore. He never kept the appellant in the locked house. Whenever the appellant feeling unwell, immediately the respondent take care of her and also took her to the hospital for treatment. Upon advice of the Doctor, they went to the parental house of the appellant and took treatment in a private hospital for uterus problem and discharged on 23.03.2013 and thereafter, the appellant was staying her parental house, which is nearby to the hospital. All the treatment expenses relating to uterus surgery were paid by the respondent. The doctor, who gave treatment to the appellant, never gave any instructions to them to have a child after six month from the date of the above said treatment. Considering the health condition of the appellant, the respondent did not insist her to come to bangalore, after surgery. He never had any forcible sexual relationship with the appellant. The appellant became the pregnant not because of the forcible sexual relationship, but it has mutually agreed between them to have a child and the respondent never took any drugs for sexual relationship. The appellant never took the respondent to Bangalore during the pregnancy period. During the



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pregnancy time, the respondent traveled from Bangalore to Nagercoil, once in a month to visit the appellant and give nutrition food and also for accompanying her for medical check up, but she refused the respondent. Even the information of child birth was only informed on the next day of birth. Thereafter, he came to see his child. Even after delivery, the appellant did not come to the matrimonial home. Therefore, only he sent a gentle notice to the appellant to come back to bangalore for matrimonial home. Even after receiving notice, since the appellant did not come to the matrimonial home, the respondent filed petition for restitution of conjugal rights in IDOP No.93 of 2015 on the file of the District and Sessions Court, Nagercoil, in which, the appellant filed a counter and did not appear before the Court and thereafter, despite sufficient opportunity was given to her, however she has not chosen to cross-examine the respondent. After several adjournment for cross-examination, since the appellant failed to co-operate for the restitution of conjugal rights, *ex-parte* order was passed. Thereafter also, the appellant refused to come with the respondent. Therefore, the respondent filed a petition for custody of the child in GWOP No.164 of 2007. Subsequently, it was renumbered as GWOPNo.146 of 2018. The learned Judge granted visitation right. Since the appellant has not complied with the order of the Court regarding visitation right, the respondent filed execution petition for appointing Commissioner and considering the case, the Family Court granted visitation right



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and that was also not duly complied with by the appellant. Thereafter, the appellant has filed petition for divorce without any valid ground or reason.

6. On completion of pleadings, during enquiry, on the side of the appellant, the appellant herself examined as P.W.1 and seven documents were marked as Ex.P.1 to Ex.P.7 and on the side of the respondent, the respondent himself examined as R.W.1 and nine documents were marked as Ex.R1 to Ex.R9.

7. After considering the oral and documentary evidence and hearing the arguments on both sides, the learned Judge, Family Court, dismissed the petition for divorce filed by the appellant and partly allowed the petition for custody of child granting only visitation right.

8. Now, the wife has filed an appeal in C.M.A(MD).No.203 of 2022 challenging the dismissal order in the divorce petition and also filed an appeal in C.M.A(MD).No.457 of 2020 as against the visitation right granted to the respondent in G.W.O.P.No.146 of 2018 and as against the dismissal of the custody, the respondent has filed appeal in C.M.A(MD).No.38 of 2024.



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9. The learned counsel appearing for the appellant would submit that after the marriage on 25.04.2012, since the respondent was working in bangalore, on 40th day of marriage, both the appellant and the respondent went to bangalore, where the respondent behaved violently by using drugs for sexual relationship. Due to the health condition, the appellant returned to her parental house and on medical check up, she came to know that she was pregnant. Thereafter, the respondent came to the parental house of the appellant and insisted her to come back to bangalore and even though the doctor advised not to have any sexual relationship, during pregnancy time also, the respondent behaved rudely and sexual torture to the appellant. When the appellant refused the same, the respondent attacked the appellant and even after the birth of the child, the respondent gave sexual torture to the appellant. When the respondent failed to consider her health condition and he caused life threat and also attacked the appellant. The respondent has treated the appellant as a sex object and for that, the appellant was subjected to cruelty physically, mentally and psychologically by the respondent, to that impact, the appellant decided that it would be harmful or injurious to her life to live with the respondent any more. Further, the respondent did not show any sincere love and affection, which normal women expects from her husband towards his wife and also he was acting against the interest of the minor child. However, the trial Court failed to consider the material and oral and



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documentary evidence and erroneously dismissed the petition for divorce filed by the appellant and also failed to consider that the interest of the minor child would be paramount consideration. The respondent, who filed petition for custody without seeking the relief of declaration as a guardian and therefore, the application filed by the respondent under Section 25 of the Guardian and Wards Act is not maintainable. The respondent has not met out the requirement under Section 25 of the Guardian and Wards Act. Therefore, the order passed by the Family Court in both the petitions for divorce and for custody are liable to be set aside and appeals are to be allowed.

10. In support of his contention, the learned counsel for the appellant relied upon the judgment reported in AIR 2011(NOC)133(KER), (2007) 4 SCC 511, (2001) 4 SCC 71 and AIR (39) 1952 Mad 284.

11. The learned counsel appearing for the respondent would submit that the appeal has been filed with bald allegation. After the marriage between the appellant and the respondent, they were living the matrimonial life happily at Bangalore and both are mutually had a sexual relationship, out of that, the appellant became pregnant. The respondent never acted against the advice of the doctor and only after the delivery, the ill-advice of the parents of the appellant,



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the appellant refused to come with the respondent. Even after one year of the delivery, the respondent patiently waiting for arrival of his wife and also asked the appellant and their parents gently to come and live the matrimonial life. But, she never had given complaint regarding the forcible sexual relationship as well as using of the drugs. The respondent was not informed about the child birth on the same day. Only the next day of delivery, he was informed and immediately, the respondent went to see her wife and child. Thereafter, when the appellant refused to come with the respondent for living matrimonial life, he sent a gentle notice on 04.02.2015 only to get back the wife and not for any other intention. Since after the notice, she did not return, the respondent filed petition for restitution of conjugal right and got *ex-parte* decree. Even thereafter, she did not allow to see the child and hence, he was forced to file GWOP for custody of his son and thereafter, he received notice for divorce which was laid by the appellant. There is no valid ground for divorce. Even now, the respondent is showing love towards his wife and child and he is ready to live with his wife. The Family Court dismissed the petition for divorce and granted visitation right to the respondent. Since the visitation right was also not properly providing to the respondent, he has filed the present appeal against the order passed in the petition for custody and both the appeals filed by the appellant are liable to be dismissed.



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

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13. The marriage between the appellant and the respondent was solemnised on 25.04.2012 and at the time of marriage, the respondent/husband was working in bangalore and on 40th day of marriage, both the appellant and the respondent went to bangalore to live their matrimonial life and out of their wedlock, they blessed with a male child. Those facts are not in dispute. The main ground taken by the appellant for divorce is, the respondent behaved rudely by using drugs for sexual relationship and also caused physical, mental and psychological cruelty towards the appellant and he was also acting against the interest of the child. Therefore, she filed a petition for divorce. The same was denied by the respondent.

14. On a perusal of the entire records the main allegation as against the respondent is that the respondent under the influence of drugs, he went to the extent of having forcible sexual intercourse and he is not concerned with the welfare of the appellant /wife and child. On these grounds, the appellant has filed these civil miscellaneous appeals.



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15. A careful perusal of the averment, the allegations levelled in the complaint and also the counter affidavit reveals that the marriage between the appellant and the respondent was solemnised on 25.04.2012 and they were blessed with a male child on 21.01.2014. Till the birth of child, there was no complaint. From the date of giving birth to the child on 21.01.2014 and till receiving notice by the appellant on 04.02.2015, the appellant was residing at her paternal home and after gave birth to the child, the appellant has not taken any steps to go and live with her husband . Therefore, the husband was waiting more than a year and sent a notice asking the appellant to come and live with him. If she failed to come, he would go for divorce. But even after that also, the respondent did not file any petition for divorce that itself shows that the respondent is having love and affection with his wife and child. In order to bring his wife to the matrimonial home, he sent notice dated 04.02.2015 and given complaint before the All Women Police Station. On the side of the appellant, no independent witness was examined and no doctor was examined to prove that the allegation of the appellant that the doctor adviced not to have a sexual relationship for a period of six months after the surgery. Therefore, in the absence of medical records and evidence from any of the medical officer or the doctor, who gave treatment and other medical records that not to have any sexual relationship for a particular period, the contention of the appellant cannot be



accepted. The appellant refused to extend conjugal relationship, therefore, the respondent filed application for restitution of conjugal rights and the same was also granted *ex-parte*. The appellant did not contest the same. Therefore, a careful perusal of both oral and documentary evidence, this Court finds that the appellant has not made out any ground for granting divorce before the Family Court and the learned Judge, Family Court, has rightly appreciated both the oral and documentary evidence and refused to grant divorce.

16. Insofar as the relief of custody of the child is concerned, admittedly after delivery, the appellant did not return to the matrimonial home and she did not bring the child to the matrimonial home. From the oral and documentary evidence, the respondent visited the appellant house after the birth of child by travelling from his working place to Nagercoil to see his wife and child. Therefore, there is no evidence to show that the appellant took the child to the respondent house. The respondent could not succeed till then, though he got the order for restitution of conjugal rights, still he was patiently waiting.

17. There is no quarrel with the proposition of law that the case regarding the custody is concerned, interest of the minor child has to be considered as paramount consideration and there is no material to show that the



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respondent/father was acting against the interest of the child. Therefore, the citation of the learned counsel for the appellant is not applicable. There is no material to prove the allegation levelled as against the respondent in the petition for divorce on the ground of cruelty. Therefore, citation referred to by the learned counsel for the appellant is not applicable in the present case on hand.

18. A perusal of the records shows that the appellant has not proved that the respondent was acting against the interest of the child though the learned counsel for the appellant vehemently contended that the respondent was acting against the interest of the child and the interest of the child is paramount consideration while dealing with the petition for custody. Admittedly, there is no allegation and prior to passing the interim order in I.A.No.171 of 2018 in GWOP No.146 of 2018 dated 31.10.2018, there is no incident of misbehaviour on the part of the respondent. But however, after this order when the interim visitation right was given to the respondent in order to enjoy with interim visitation right, the respondent approached the appellant, but she did not co-operate to show the child. Since the appellant and the respondent both are natural guardian, the contention of the learned counsel for the appellant that the respondent has not filed application for the relief of declaration of appointing as guardian under Section 25 of the Act, does not arise, when the natural guardian is alive and when



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the natural guardian is seeking custody, no need to file an application for the relief of declaration. This Court is of the view that both the appellant and the respondent are the natural guardian and there was no need to get the relief of appointment of guardian. In this case, since the appellant has not proved that she has taken steps to go to the matrimonial home along with child or has not proved that she has extended cooperation to show the child to the respondent, as a father and as well as one of the natural guardians, the respondent is entitled to have the custody of his child.

19. However, considering the fact that at the time of filing the petition, the age of the child was three and the respondent was working in a far-away place from the appellant, the custody of the child could not be given to the respondent. Now the child, who has been growing up with the mother from the date of birth till today, aged about 10 years, at this stage, this Court do not want to interfere with the custody of the child with the mother. As a natural guardian the respondent is entitled for visitation right and therefore, the family Court has also considered all the aspects and also considered the interest of the minor child and has given only visitation right. Therefore, under these circumstances, the appeals filed by the appellant are liable to be dismissed. Accordingly, C.M.A(MD).Nos. 203 of 2022 and C.M.A(MD).No.457 of 2020 are **dismissed**.



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20. The custody of the child is concerned, since the respondent residing in a far away place, the respondent is entitled to have a visitation right of the child in the second Saturday of every Month and the appellant is directed to handover the child in the Morning at 9'O clock on second Saturday of every Month and the respondent is at liberty to have the child on whole day at any place, but however he has to hand over the child in the evening at 6'O clock to the appellant. The respondent is also entitled to have a custody of the child for 15 days during the vacation and the appellant is directed to hand over the child for 15 days to the respondent and the respondent can take the child for 15 days anywhere and after completing 15 days, he has to handover the child to the appellant, safely.

21. With the above direction and modification, the appeal filed by the respondent/husband in C.M.A(MD).No.38 of 2024 is **partly allowed**. No costs. Consequently, connected Miscellaneous Petitions are closed.

(P.V.,J.) (K.K.R.K.,J.)
25.09.2024

NCC : Yes/No
Index : Yes / No
Rmk



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To

The Judge, Family Court, Kanyakumari at Nagercoil.

2.The Section Office,

VR Section, Madurai Bench of Madras High Court,
Madurai.



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and
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