



WEB COPY BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 12.09.2024

CORAM:

**THE HONOURABLE MR.JUSTICE P.VELMURUGAN
AND
THE HON'BLE MR.JUSTICE MOHAMMED SHAFFIQ**

C.M.A(MD)No.102 of 2024

S.Alex ... Appellant/Respondent

.Vs.

S.Sushmitha Jabamalar ... Respondent/Petitioner.

PRAYER: Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act praying this Court to set aside the order made in I.D.O.P.No.308 of 2020, dated 17.10.2023, on the file of Family Court, Madurai.

For Appellant : Mr.Y.Jacob

For Respondent : Mr.Romeo Roy Alfred

JUDGMENT

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

The Civil Miscellaneous Appeal is filed seeking to set aside the order made in I.D.O.P.No.308 of 2020, dated 17.10.2023, on the file of Family Court,



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Madurai.

2.The appellant is the husband and the respondent is the wife. The respondent wife filed a petition for divorce in I.D.O.P.No.308 of 2020, on the file of Family Court, Madurai on the ground of cruelty and desertion. After fulfilled enquiry, the petition for divorce is allowed. Challenging the same, the husband has filed the present Civil Miscellaneous Appeal before this Court.

3.The case of the respondent/wife is that the marriage between the appellant and respondent was solemnised on 11.07.2018 at St.Thomas Church, Madurai according to Christian rites and customs and after marriage, they lived together at Madras as husband and wife happily for some time. After that, the appellant used to speak in abusive language and he spent all his earnings in consuming alcohol and also quarrelled with the respondent. They have no issues through the marriage. The appellant used to lock the door whenever he left the house. When they cohabited with each other, the appellant had shown the obscene videos and compelled the respondent to act accordingly. Hence the respondent left the matrimonial home and went to her parental home. Thereafter



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when the respondent tried to contact the appellant, he failed to respond to the same. Several attempts made by the respondent to live with the appellant ended in vain. Hence the respondent has filed the Petition for divorce.

4.The case of the appellant/husband is that the Petition filed by the Petitioner is unsustainable in law. It is further stated that the appellant belongs to Christian community and he used to attend work on rotation basis both day and night time and at that time, he used to go to work on his own. The house in which they lived has two keys one with the Petitioner and another one with the respondent. The respondent would further state that he placed the Petitioner comfortably, however, she used to go to her brother's house at Tambaram often without intimating the respondent. On 1.3.2019, when the Petitioner went to her brother's house for a function, thereafter she went to her parents house at Madurai and thereafter she refused to come and live with the respondent. He would further submit that even though he contacted the respondent through phone, she refused to come to the matrimonial home, however, the appellant is ready and willing to live with the respondent. Hence the appellant prays for dismissal of the divorce petition filed by the respondent.



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5. During trial, on the side of the respondent herein, two witnesses were examined as P.W.1 and P.W.2 and seven documents were marked as Ex.P1 to Ex.P7 and on the side of the respondent, the appellant himself examined as R.W.1 and four documents were marked as Ex.R1 to Ex.R4.

6. After enquiry, on considering both the oral and documentary evidence, the Judge, Family Court allowed the Petition for divorce filed by the respondent wife. Aggrieved by the same, the husband, as appellant, has filed the present Civil Miscellaneous Appeal.

7. The learned counsel for the appellant/husband would submit that though the respondent filed petition for divorce, but she has not made out any ground and the respondent has not proved the allegation of cruelty and she has not examined any other independent witnesses and she has deposed many things in her evidence which has not been pleaded in her petition and the respondent also did not examine any other witness except herself. After recording of the evidence of P.W.1 and R.W.1, posted for arguments and at that point of time, the respondent herein examined her brother as P.W.2 in order to fill up the lacunae.



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The respondent has not proved the ground of cruelty and the learned Judge, Family Court unfortunately failed to consider the averments made in the Petition and also in the chief affidavit and evidence. Many of the facts mentioned in the evidence has not been pleaded in the Petition and without averments, no amount of evidence can be let in and if it is done so, the Court shall not go into the same. As far as the ground of desertion is concerned, the respondent has not proved that the appellant deserted her wife for more than the statutory period of two years and therefore, the appeal has to be allowed.

8. The learned counsel for the respondent would submit that the appellant used to keep the respondent in the house and whenever he is going out of the house for job or any other purpose, he used to lock the door and she is unable to go out and get anything from outside and also he used to harass her sexually in an unnatural manner and also he has not given any money for her own expenses. Further the appellant treated the respondent both physically and mentally and used to consume alcohol and quarrel with the respondent and also assaulted her some time physically. Since she could not tolerate the behaviour of the appellant, she filed a petition for divorce and the Family Court also rightly considered both



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oral and documentary evidence and granted divorce and as such, there is no merit in the appeal filed by the appellant.

9. Heard the learned counsel appearing on either side and perused the materials placed before this Court.

10. Though the respondent filed a petition for divorce on two grounds, one on the ground of desertion and another on the ground of cruelty, As far as the allegation on the ground of desertion is concerned, since the respondent herself has admitted that in the month of March 2019, she left from the matrimonial home, however, she filed the Petition for divorce in the year 2020 itself within completion of one year. When the Petition itself is filed in the year 2020, therefore the ground of desertion under Section 19(1)(ix) does not arise and there must be two year period from the date of last meeting and that of filing the Petition. Therefore the respondent herself has admitted in the petition that in the month of March, 2019 ie., on 1.3.2019 she left the matrimonial home, whereas, this Petition for divorce was filed in the year 2020 itself and as such, the respondent has not made out the ground of desertion for granting divorce.



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However, the learned Judge, Family Court failed to consider the statutory provision which mandate two years period and hence, the divorce granted on the ground of desertion is set aside.

11.As far as the divorce granted on the ground of cruelty is concerned, the respondent wife has made allegations against her husband and in order to substantiate her allegations, she herself examined as P.W.1 and she has filed proof affidavit for chief examination, wherein, she reiterated the allegations made in the petition and nothing was elucidated in the cross examination. Further in order to substantiate the same, she examined her brother as P.W.2 and he has narrated certain allegations in his proof affidavit and chief examination and during the cross examination, he has stated that sometimes the appellant used to lock the wife into the house and on certain occasions, his sister was kept into the locked house and he could not reach the sister since she was inside the house and he could not open the lock and therefore the evidence of P.W.1 and P.W.2 and the allegations levelled in the Petition has not been proved. As far as the sexual assault is concerned, it is a matter between the spouses within four walls and no independent witness can be expected for the cruelty met out in the



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matrimonial life within four walls of the bed room. Therefore independent witnesses cannot be expected and in this regard, the learned counsel relied on the decision rendered in the case of **Deepak Bakshi and Mrs. Anitha Mariene Faria Bakshi reported in AIR 1985 Punjab and Haryana 111 Special Bench**. The Honourable Supreme Court time and again reiterated that as far as the cruelty committed to the spouses within four walls of bed-room, no independent witness can be expected. However, for proving some of the allegations, the brother of the respondent was examined and for some of the allegations, within the four walls of the house, the respondent herself has to depose about the same. Though the appellant has stated that certain allegations have been invented for filing of the divorce petition. However the respondent wife has not examined any other witness to substantiate the said allegations. Therefore, in these circumstances, a perusal of the Petition, counter, , proof affidait of witnesses and evidence both oral and documentary, this Court, as an appellate Court, on reappreciating the evidence available on record, has come to the conclusion that the respondent has not proved the ground of desertion but however she is able to demonstrate the ground of cruelty caused by the appellant. In these circumstances, this Civil Miscellaneous appeal is allowed on the ground of desertion but however divorce



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granted on the ground of cruelty is confirmed.

12. Therefore the Civil Miscellaneous Appeal is partly allowed and the marriage solemnized between the appellant and respondent on 11.7.2018 at St. Thomas Church, Madurai according to Christian rites and customs is dissolved by a decree of divorce on the ground of cruelty under Section 10(1)(x) of the Indian Divorce Act. No costs.

(P.V.,J.) (M.S.Q.,J.)
12.09.2024

NCS : Yes/No

Index : Yes / No

Internet : Yes / No

vsn

To

The Judge,
Family Court,
Madurai.



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Copy to

The Record Keeper,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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P.VELMURUGAN,J.
and
MOHAMMED SHAFFIQ,J.

vsn

JUDGMENT MADE IN
C.M.A(MD)No.102 of 2024

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