



C.M.S.A.(MD).No.35 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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DATED : 12.07.2024

CORAM:

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.S.A(MD)No.35 of 2019

Shanmugavalli

... Appellant/Respondent/
Respondent

-vs-

1. Chidambaram (died)

... Respondent/Appellant/
Petitioner

2. Vadivel

3. Rajkumar

4. Jeevanandam

5. Hitlar

... Proposed Respondent 2 to 5

(Respondents 2 to 5 are brought on record as Legal Heirs of the deceased sole respondent vide order of this Court dated 15.04.2024 made in C.M.P(MD) No.9650 of 2021 in C.M.S.A.(MD) No.35 of 2019)

PRAYER: Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act, r/w. Section 100 of C.P.C, challenging the judgment and decree passed in C.M.A.No.3 of 2017, dated 16.02.2018, on the file of the Principal District Judge, Pudukkottai, reversing the order in H.M.O.P.No.177 of 2014 on the file of the Sub Court, Pudukkottai, dated 12.09.2016.



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For Appellant : Mr.N.Balakrishnan
For Respondents : No appearance

J U D G M E N T

The present Civil Miscellaneous Second Appeal has been filed by the wife, challenging the judgment and decree in C.M.A.No.3 of 2017, on the file of the Principal District Court, Pudukkottai, wherein the appellate Court had granted divorce in favour of the husband, reversing the fair and decreetal order in H.M.O.P.No.177 of 2014, on the file of the Sub Court, Pudukottai.

2. The respondent herein as the petitioner has filed the above petition for divorce, on the ground of desertion and cruelty. According to the divorce application, the petitioner and the respondent got married on 17.05.1979 and they are blessed with four sons. Out of the four sons the elder of two sons are already married. All the four sons are employed abroad.

3. The husband has further contended that the wife used to doubt his fidelity and often used to pick up quarrel with him. She has never led a normal life as a wife. She used to abuse the husband and through away articles upon him. He had further contended that from the date of marriage, he was living in his in-law's house along with his wife. In the year 1995, he was



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chased away by his wife. When he refused to go, the wife had attempted to attack her with stone and therefore he had immediately left the in-laws house and is residing away from his wife for the past 20 years.

4. The husband has further contended that several attempts were made to bring back the wife to the matrimonial home by conducting several panchayats. However, she was not amenable. Hence, he had prayed for granting divorce on the ground of mental cruelty and desertion.

5. The wife had filed a counter contending that the husband used to take loans from third parties and compelled her father to repay the said loans. All the four sons were brought up by her out of her own income and the husband has not chosen to spend any amount for the bringing up the four sons. She has further contended that the husband had intended to marry a lady, who was working in his Xerox shop, and when she had refused to give consent for the same, problem arose and the husband has left the matrimonial home. She has further contended that she was always ready to live with him. Hence, she has filed a counter claim for restitution of conjugal rights.



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6. The trial Court, after considering the evidence on either side, had arrived at a finding that the wife has not deserted the husband. But the husband alone has started living away from his wife. Based upon the said finding, the trial Court has dismissed the divorce application and allowed the counter claim filed by the wife for restitution of conjugal rights.

7. Challenging the same, the husband has filed C.M.A.No.3 of 2017 before the Principal District Court, Pudukkottai. The learned first appellate judge reversed the judgment and decree of the trial Court on the ground that the wife has not taken any steps for reunion with the husband for more than 20 years. The first appellate Court has also commented upon the wife to the effect that she never wanted reunion with her husband. Only for the benefits from the husband now she has filed a counter claim for restitution of conjugal rights. The first appellate Court was carried away by the fact that the husband and wife are living separately for more than 25 years and has proceeded to allow the application for divorce and rejected the counter claim. Challenging the same, the present second appeal has been filed by the wife.



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8. The Civil Miscellaneous Second Appeal was admitted by this Court on the following substantial questions of law:-

“(a) In the absence of appeal against counter claim granting restitution of conjugal rights whether the appeal against the dismissal of divorce petition alone is not maintainable as being hit by rule of resjudicata, and therefore the judgment and decree of the Lower Appellate Court is tainted with illegality?

(b) Is the reasoning of the lower Appellate Court that appellant/wife has not taken steps for rejoining her husband long number of years and therefore, the respondent/husband is entitled for getting a decree of divorce is against the provisions of the Hindu Marriage Act and therefore untenable in law?.”

9. The husband, who was arrayed as sole respondent in the appeal had passed away and the sons have been impleaded as respondents 2 to 5 in the appeal. Though they have been served, they have not chosen to appear either in person or through their counsel to defend the appeal filed by their mother.



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10. The learned counsel appearing for the appellant had contended that the very reading of the divorce petition would show that the husband and wife were living together in the wife's house and only her husband had left the said house. The wife had never deserted the husband. In fact, the wife had brought up all the four sons and all are employed abroad. The first appellate Court has erroneously granted divorce to the husband on the ground that wife has not initiated any steps for reunion for the past 20 years. In fact, the husband has also not taken any steps for reunion. He further contended that merely residing away from the husband for long number of years would not result in break down of marriage or it can be a ground for granting divorce. In such circumstances, he prayed for allowing this appeal.

11. I have carefully considered the submissions made by the learned counsel for the appellant and perused the materials available on record.

12. In paragraph No. 3 of the divorce application, the husband has specifically admitted that from the date of his marriage, namely, from 17.05.1979 till 1995 he was residing in his in-laws' house along with his wife. Only in the year 1995, he had left the house on the allegation that the wife had committed mental cruelty. Therefore, it is clear that at no point of time the



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wife had left the matrimonial home. But, only the husband had left the matrimonial home and had been living in an independent residence.

13. The petition for divorce has been filed in the year 2014, nearly, 20 years after the husband had left the matrimonial home. A perusal of cross examination of P.W.1 (husband) will clearly indicate that he used to borrow money from his wife and his mother-in-law in order to settle various loans. He had never spent any money to take care of his four sons. All the four sons were brought up by the wife out of her income by working as an Anganwadi Worker. The husband has not chosen to make any attempt for the marriage of his two sons. The sons, who have been impleaded as respondents, have not chosen to defend the appeal filed by their mother. It is also an admitted fact that all the sons have been are living with their mother and they were brought up by the mother. When the husband deserted the wife, their children were at an early age. Therefore, the husband cannot get an order of divorce on the basis of his own fault. The first appellate Court, without appreciating the said facts has proceeded to grant an order of divorce merely on the ground of husband and wife are living separately for more than 25 years without considering the fact that who was responsible for separation. As far as the plea relating to mental cruelty is concerned, admittedly, the husband is living



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away from his wife from the year 1995 onwards and divorce application has been filed in the year 2014. There is no oral or documentary evidence to establish that the husband was subjected to mental cruelty between 1995 and 2014, while he was residing separately.

14. The appellant has raised a question of law that when the trial Court has dismissed the divorce petition and allowed the counter claim, a second appeal filed by the husband, challenging the rejection of divorce petition alone is not maintainable. However, a perusal of the records indicate that the dismissal of divorce and granting for restitution of conjugal rights are part of a single decree. Challenging the single decree an appeal has been filed by the husband raising grounds, challenging the dismissal of divorce petition as well as granting of restitution of conjugal rights. Therefore, in such circumstances, the said substantial question of law does not arise for consideration in the present Civil Miscellaneous Second Appeal.

15. However, it is clear that the first appellate Court has granted divorce merely on the ground that the husband is residing away from his wife for more than 25 years without deciding on whose fault separation has happened. Therefore, this Court is of the considered opinion that for granting



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of divorce and dismissal of the restitution of conjugal rights prayer by the first appellate Court are clearly unsustainable in law, and the second substantial question is answered in favour of the appellant.

16. In view of the above said deliberations, the judgment and decree passed by the first appellate Court is hereby set aside and the judgment and decree passed by the trial Court is restored. Accordingly, this Civil Miscellaneous Second Appeal stands allowed. There shall be no order as to costs.

12.07.2024

NCC : Yes/No
Index : Yes / No
Internet : Yes / No
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To

1. The Principal District Judge,
Pudukkottai,
2. The Sub Court,
Pudukkottai,
3. The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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