



*C.M.S.A(MD)No.5 of 2014*

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

WEB COPY

Dated: 25.03.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

**C.M.S.A(MD)No.5 of 2014**

**and**

**M.P(MD)No.1 of 2014**

Udaya Marthandan

... Appellant/Respondent  
Petitioner

Vs.

T.Selvi

... Respondent/Appellant  
Respondent

**Prayer :** This Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act, r/w Section 100 of CPC, against the fair and decreetal order passed by District Court, Kanyakumari District at Nagercoil in A.S.No.38 of 2011, dated 29.11.2013 reversing the fair and decreetal order passed by Principal Sub Court, Nagercoil in H.M.O.P.No. 55 of 2004, dated 22.06.2011.

For Appellant : Mr.K.P.Narayanakumar

For Respondent : Mr.D.Saravanan



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

## **JUDGMENT**

This Civil Miscellaneous Second Appeal has been preferred as against the order passed in H.M.O.P.No.55 of 2004 on the file of the Principal Sub Court, Nagercoil, dated 22.06.2011. Before the Trial Court, the appellant herein has filed a petition for seeking divorce as against the respondent herein and the said petition was allowed and as against the order passed by the Trial Court, the respondent herein has preferred the first appeal before the District Judge and the First Appellate Court has reversed the order of the Trial Court and allowed the appeal. As against the order passed by the First Appellate Court, the respondent therein has preferred this Civil Miscellaneous Second Appeal.

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status / ranking in the Tribunal.

### **3. The brief averments of the petition filed before the Trial Court are as follows:**

The marriage between the petitioner and the respondent took place on 22.01.1997 at Parvathipuram. After marriage, due to the harassment



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

made by the respondent, the petitioner left from his own house and residing in the rental house at Parvathipuram and Tharavillai. Due to the wedlock, the petitioner and the respondent have three female children. The respondent threaten to kill him through her relatives and she also mentally affected and thereby, he gave treatment to her. Further the petitioner lodged a complaint as against the respondent before All Woman Police. Thereafter, the respondent neglected the petitioner and left from the matrimonial home and resided with her parents. Thereafter, the respondent gave a complaint alleging that the petitioner assaulted her. Thereafter, the respondent started to give torture to the petitioner and his relatives through her sister's husband. Further, the respondent threatened that she would commit suicide after killing him. Thereafter, the petitioner apprehends to live with the petitioner and unable to lead family life with the respondent. On 08.04.2004, the petitioner issued notice to the respondent. After receipt of the said notice, the respondent gave a false reply. The respondent very often abused with filthy language and without knowledge of the petitioner, left from the matrimonial home and thereafter, the petitioner used to take back her to his house. When the petitioner asked about the same, the respondent told that he is not beauty and she disliked him. Further, she



*C.M.S.A(MD)No.5 of 2014*

threatened that she is living along with her sister's husband. Thereby, she caused cruelty to the petitioner.

**4. The gist of the counter filed by the respondent are as follows:**

The averments made in paragraph No.1 of the petition are all admitted. Paragraph No.2 of the petition are all denied as false. At present, the respondent is residing with her parents. It is true that after the marriage, three children born to them. It is false to state that she was mentally affected. The averments made in the petition that she threatened the petitioner along with her sister's husband is denied as false. The petitioner already gave a complaint as against the respondent and the same was closed as false. She gave a complaint against the petitioner, since he assaulted her. Already, the respondent has issued reply for the notice issued by the petitioner. The averments made in paragraph Nos.8 to 11 are all denied as false. She only maintaining the children. The petitioner only neglected the respondent due to the ill-advice of his sister Anbumathi. Therefore, the petition is liable to be dismissed.



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

5. Before the Trial Court, on the side of the petitioner, he examined P.W.1 and P.W.2 and marked Exhibits P.1 to P.6. On the side of the respondent, R.W.1 was examined and no documents were marked.

6. After considering the evidences adduced on both sides, the Trial Court has allowed the petition and granted divorce. Aggrieved by the said order, the respondent wife has preferred an appeal before the District Court, Nagercoil and the First Appellate Court allowed the appeal and dismissed the petition filed by the petitioner. Aggrieved by the said order, the present Civil Miscellaneous Second Appeal has been preferred by the petitioner in the main petition.

7. The learned Counsel appearing for the appellant / respondent / petitioner would contend that the appellant has filed a petition before the Trial Court for granting divorce as against the respondent / appellant / respondent and the marriage took place on 22.01.1997 and thereafter, three children born to them. Thereafter, she caused cruelty by abusing the petitioner with filthy language and also threatened along with her sister's husband and also she lodged a false complaint against the appellant /



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

respondent / petitioner and she refused to live with the petitioner. Without any valid reasons, she left from the matrimonial home and also she threatened to commit suicide after killing him. Therefore, the petitioner filed by the petition before the Trial Court. The respondent was affected from mental illness and thereby, she scolded the petitioner with filthy language. For that also he gave a treatment through Doctor. Before the Trial Court, in order to prove the same, the petitioner had examined P.W.1 and P.W.2. The petitioner P.W.1 has deposed about the cruelty caused by the respondent and the P.W.2 Doctor has deposed about the treatment and counselling given to the respondent. The evidence of P.W.1 and P.W.2 have not been denied by the respondent and the respondent failed to cross-examine the witnesses and thereby, the evidence of P.W.1 and P.W.2 are accepted by the Trial Court. Even the respondent in the proof affidavit levelled allegations as against the petitioner without any pleadings and the evidence of P.W.1 is totally contrary to the pleadings and thereby, the Trial Court has correctly granted divorce based on the evidences on both sides. But the First Appellate Court without considering the evidences adduced on both sides, only set aside the order by holding that the petitioner has failed to prove the mental illness and failed to prove the illegal contact



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

with the respondent's sister's husband and also the respondent ready to live with the petitioner, but the petitioner neglected the respondent, since no male child was born to them. The above said allegations are not proved by the respondent. However, the First Appellate Court erroneously set aside the order passed by the Trial Court and dismissed the petition. Further, the First Appellate Court failed to consider that the petitioner and the respondent are residing separately for more than 15 years and the marriage between the spouses irretrievably broken down. Therefore, the order passed by the First Appellate Court is liable to be set aside by allowing this appeal.

**7.1.** The learned Counsel appearing for the appellant also ready to deposit each Rs.10,00,000/- to the daughters. After marriage, three children born to them and now one child is residing along with the appellant and two children are residing along with the respondent and he is ready to deposit a sum of Rs.10,00,000/- each to the daughters, who are residing with the respondent. Therefore, the order passed by the First Appellate Court is liable to be set aside and the order of Trial Court is to be restored.



C.M.S.A(MD)No.5 of 2014

WEB COPY

**7.2.** The respondent / appellant / respondent has not stoutly denied the averments of the petition and only filed formal counter and the denial is only evasive denial. Therefore, she admitted the averments made in the petition and the petitioner's side evidences also not cross-examined. Thereby, the contention of the petitioner are admitted by the respondent. The First Appellate Court has not considered the above said aspects and erroneously dismissed the petition by allowing the appeal.

**7.3.** The learned Counsel appearing for the appellant has relied following judgments:

***i) Jahuri Sah and Others Vs. Dwarika Prasad Jhunjunwala and Others reported in 1967 0 AIR SC 109,***

***ii) Muddasani Venkata Narsaiah (Dead) Through Legal Representatives Vs. Muddasani Srojana reported in 2016 (12) SCC 288 and***

***iii) Pankaj Mahajan Vs. Dimple @ Kajal reported in 2011 (12) SCC 1.***



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

8. The learned Counsel appearing for the respondent would contend that the marriage between the petitioner and the respondent is admitted and after the marriage, three children born to them and the petitioner has filed the petition with false allegations. In fact the petitioner wanted to have a male child and thereby, the petitioner only neglected the respondent and the petitioner harassed the respondent at the instigation of his sister and thereby, she left from the matrimonial home. Further, the petitioner gave a complaint against the respondent and the petitioner assaulted the respondent and thereby, she had given a complaint as against the petitioner. The complaint given by the petitioner was enquired and it was closed as false. Therefore, the real intention to file this application is, the petitioner wanted to have male child. Further, the petitioner levelled false allegations as against the respondent that she had illicit intimacy with other persons and the same has not been proved. Further, he levelled the false allegation that she is mentally affected and the same was also not proved. The Trial Court has not considered the above said aspects and without considering the evidences adduced by the respondent side, erroneously granted divorce and allowed the petition.



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

**8.1.** The First Appellate Court after analyzing the evidences adduced on both sides, came to a conclusion that the petitioner failed to prove the allegations levelled against the respondent, correctly allowed the appeal and dismissed the petition. Therefore, the present appeal is liable to be dismissed. Further the learned Counsel appearing for the appellant also after instructions from the respondent, they are not ready to receive the maintenance amount of Rs.10,00,000/- each to the daughters. Therefore, the appeal is liable to be dismissed.

**9.** This Court had heard both sides and perused the records. At the time of admitting the appeal, this Court has framed the following substantial questions of law:

"1) Whether the First Appellate Court is right in allowing the appeal without considering the settled proposition of law that the material evidence deposited by the appellant can be considered as admitted one if it has not been cross examined?

2) Whether the First Appellate Court is right in allowing the appeal without analyzing and discussing the material ground of cruelty raised by the appellant as the ground for divorce?



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

3) Whether the First Appellate Court is right in allowing the appeal without considering the material facts that the marriage between spouses irretrievably broken down, hence the aspect of divorce is only way for further welfare of parties concerned?"

**10.** In this case, there is no dispute in respect of the relationship of the parties and children born to them. It is admitted fact that one child is residing with the petitioner and the two children are residing with the respondent mother and the petitioner also paying maintenance amount to the two children, who are residing along with the mother. The husband has filed a petition before the Trial Court for divorce alleging that the respondent caused cruelty by abusing filthy language and also the respondent had illicit intimacy with others and she left from matrimonial home and she had given false complaint as against the petitioner and she also mentally affected and thereby, abused filthy language and he also stated that she is not willing to live with the petitioner and living separately without any valid reasons. The said allegations have not been specifically denied by the respondent through counter. Moreover, the respondent has not cross-examined the petitioner side witnesses. However,



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

the respondent was examined as R.W.1 and in her evidence she stated that the petitioner after birth of third child, at the instigation of his sister Anbumathi, harassed the respondent and the sister of the petitioner very often came to the house and instructed him to harass the respondent and she also instructed to marry another lady and also the petitioner attempted to kill her and the petitioner left from the matrimonial home and the respondent along with her children resided separately. Therefore, she filed a petition for seeking maintenance. As per the complaint given by the respondent, police warned the petitioner and advised to live with the respondent and also she stated that the petitioner took her to the hospital, where they attempted to inject her. Thereby, they attempted to kill her. Hence, she left from the matrimonial home. The above said facts have not been pleaded in the counter. In the said background, this Court has to answer the substantial question of law.

**Substantial question of law No.1:**

**11.** The first substantial question of law framed by this Court is that whether the First Appellate Court is right in allowing the appeal without considering the settled proposition of law that material evidence deposed



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

by the appellant can be considered as admitted one if it has not been cross-examined. In this case, the petitioner levelled serious allegations as against the respondent in the petition but, she has not stoutly denied the same through the counter. In the counter, there is only evasive denial. Moreover, the evidence of P.W.1 and P.W.2 have not been cross-examined by the respondent. Therefore, it is presumed that the contention of the evidence of the petitioner side are admitted by the respondent. The Trial Court has elaborately discussed about the non cross-examination of the petitioner side witnesses by the respondent and the material allegations have not been denied by the respondent. Thereby, correctly came to a conclusion that the petitioner has proved the cruelty. But the First Appellate Court without considering the settled proposition of law that, material evidence deposed by the appellant can be considered as admitted one, if it has not been cross-examined dismissed the petition by allowing the appeal. Therefore, the order passed by the First Appellate Court by reversing the judgment of the Trial Court is not in accordance with law. Though the petitioner has not examined any witnesses to prove that the respondent has illicit intimacy the petitioner has not examined any witnesses to prove the alleged illicit intimacy. Further, the Doctor, who has examined as P.W.2



C.M.S.A(MD)No.5 of 2014

WEB COPY

also not stated about the mental disorder of the petitioner and he only stated that she refused for reunion with the petitioner in the counselling.

Though the said fact that the respondent is mentally ill has not been proved, the other grounds (i.e.,) the ill-treatment and the abuse of filthy language and long separation is also caused cruelty to the appellant has not been considered by the First Appellate Court. Therefore, the order of the First Appellate Court in allowing the appeal is erroneous.

12. The learned Counsel appearing for the appellant has relied judgment in *Jahuri Sah and Others Vs. Dwarika Prasad Jhunhunwala and Others reported in 1967 0 AIR SC 109*, wherein, the Hon'ble Supreme Court in paragraph No.10 held that Order 8, Rule 5 of CPC provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted to say that a defendant has no knowledge of a fact pleaded by the plaintiff is not tantamount to a denial of the existence of that fact, not even an implied denial.



C.M.S.A(MD)No.5 of 2014

WEB COPY

**13.** The learned Counsel appearing for the appellant further relied a judgment in *Muddasani Venkata Narsaiah (Dead) Through Legal Representatives Vs. Muddasani Srojana reported in 2016 (12) SCC 288*, wherein, the Hon'ble Supreme Court in para 14 has held that Order 8, Rule 5 of CPC require pleadings to be answered specifically in the written statement and if there was no effective cross-examination, it would be presumed that the witness account has been accepted.

**14.** In the case on hand also, the respondent has not specifically denied the allegations levelled in the petition and also plaintiff side witness have not been cross-examined.

**15.** In view of the above said judgments and discussions, this Court is of the opinion that the petitioner proved the case of cruelty and the evasive denial of the petition averments and non cross-examination of the petitioner side witnesses amounts to admissions. But the First Appellate Court failed to consider the said aspects and thereby, the order of First Appellate Court is un-sustainable and liable to be set aside. Thus the substantial question of law is answered.



*C.M.S.A(MD)No.5 of 2014*

WEB COPY

**Point No.2:**

16. The next substantial question of law is whether the First Appellate Court is right to allowing the appeal without analyzing and discussing the material ground of cruelty raised by the appellant as the ground for divorce? In this case, the appellant has filed the petition before the Trial Court for divorce on the ground of cruelty. The appellant / petitioner has categorically deposed about the acts of the respondent that she abused filthy language and thereby, insulted and further, she along with her sister's husband threaten to kill him and she gave a false complaint before the police and she without any valid reasons, left from the matrimonial home and thereby, caused cruelty. The above said acts were amply proved by the petitioner and moreover, the respondent has not cross-examined the petitioner side witnesses. Therefore, the First Appellate Court without analyzing and discussing the material grounds of the cruelty raised by the appellant, allowed the appeal and dismissed the divorce petition. Thereby, the order of the First Appellate Court is erroneous. Thus the substantial question of law is answered.



C.M.S.A(MD)No.5 of 2014

WEB COPY

**Point No.3:**

17. The next substantial question of law is whether the First Appellate Court is right in allowing the appeal without considering the material facts that marriage between spouses irretrievably broken down, hence, the aspect of divorce is only way for further welfare of the parties concerned? It is well settled law that irretrievable brake down of marriage is not a ground to grant divorce. The Hon'ble Supreme Court by invoking Article 142 of the Constitution of India only granted divorce on the ground of irretrievable brake down of marriage. Therefore, the Trial Court also not granted divorce only based on the irretrievable break down of marriage and the Trial Court discussed about the cruelty caused by the respondent to the petitioner and thereby, granted divorce. The First Appellate Court also has not considered about the above said ground of irretrievable break down of marriage. Thus the substantial question of law is answered.

18. The learned Counsel appearing for the appellant has relied jugment in *Pankaj Mahajan Vs. Dimple @ Kajal reported in 2011 (12) SCC 1*, wherein, the Hon'ble Supreme Court while allowing the appeal,



*C.M.S.A(MD)No.5 of 2014*

has directed the husband to pay maintenance amount to the children. In this case also, the appellant is willing to pay marriage expenses to the daughters, who are residing with the respondent by way of paying each Rs.10,00,000/-. Therefore, the said case is squarely applicable to the present facts of the case.

**19.** In this case, already this Court has decided in the substantial questions of law that the First Appellate Court has erroneously allowed the appeal and thereby, the order of the First Appellate Court is liable to be set aside and the Trial Court order is liable to be restored.

**20.** In the result, this Civil Miscellaneous Second Appeal stands allowed and the order passed by the First Appellate Court in A.S.No.38 of 2011 is set aside and the order passed by the Trial Court in H.M.O.P.No.55 of 2004 is restored and the marriage between the petitioner and the respondent, dated 22.01.1997 is dissolved. The learned Counsel appearing for the appellant has expressed the willingness of the appellant to pay a sum of Rs.10,00,000/- each to the daughters living along with the respondent but the respondent is not willing to receive the said amount.



*C.M.S.A(MD)No.5 of 2014*

Therefore, it is appropriate to direct the appellant to deposit Rs. 10,00,000/- each to the daughters, who are residing with the respondent and the said amount has to be deposited before the Trial Court and the daughters, who are living with the respondent are at liberty to withdraw the said amount, as and when they required. The time for deposit is one month from the date of receipt of copy of the order. After the deposit made by the appellant, the Trial Court shall deposit the same into a nationalized bank for interest. There shall be no order as to costs. Consequently, connected Miscellaneous Petition stands closed.

**25.03.2024**

NCC : Yes / No  
Index : Yes / No  
Internet : Yes  
BTR

To

- 1.The District Court,  
Kanyakumari District at Nagercoil.
- 2.The Principal Sub Court,  
Nagercoil.
- 3.The Section Officer,  
Vernacular Record Section,  
Madurai Bench of Madras High Court,  
Madurai.



WEB COPY



*C.M.S.A(MD)No.5 of 2014*

**P. DHANABAL, J.**

BTR

**C.M.S.A(MD)No.5 of 2014**

**25.03.2024**