



C.M.S.A.(MD)No.52 of 2016

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 11.12.2023

PRONOUNCED ON : 25.03.2024

CORAM:

THE HONOURABLE MRS.JUSTICE L.VICTORIA GOWRI

C.M.S.A.(MD)No.52 of 2016

P.Thirumeni

... Appellant / Appellant / Petitioner

Vs.

B.Mallika

... Respondent / Respondent/ Respondent

PRAYER: Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act, 1955 read with U/S 100 of CPC, against the order and decretal order dated 18.07.2016 passed in C.M.A.No.2 of 2013 on the file of the Principle Additional District Court, Dindigul confirmed the order and decretal order dated 19.11.2012 passed in H.M.O.P.No.88 of 2005 on the file of the Principle Subordinate Judge, Dindigul.

For Appellant : Mr.H.Lakshmi Shankar

For Respondent : No appearance



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JUDGMENT

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This Civil Miscellaneous Second Appeal has been preferred against the order and decretal order dated 18.07.2016 passed in C.M.A.No.2 of 2013 on the file of the Principle Additional District Court, Dindigul confirmed the order and decretal order dated 19.11.2012 passed in H.M.O.P.No.88 of 2005 on the file of the Principle Subordinate Judge, Dindigul.

2. For the sake of convenience, the parties are referred herein as per their rank before the Trial Court.

3. The petitioner is the husband and the respondent is the wife. The petitioner / husband filed a petition under Section 13 (1) (i-b) of Hindu Marriage Act, 1955, seeking to dissolve the marriage between the petitioner / husband and the respondent / wife by decree of divorce.

4. The case of the petitioner:

(i) The Marriage between the petitioner and respondent was



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solemnized on 08.09.2002 at Chinnalapati, Rajamani Ammal Marriage Hall. At the time of marriage, since the petitioner worked as Engineer at Bangalore, after one week of marriage, the petitioner and the respondent commenced their matrimonial life at Ramasamipuram, Bangalore. Thereafter, with an intention of doing his own business the petitioner resigned his job at Bangalore and came to Chinnalapati and started his own business from 25.12.2002 onwards. During 2003, the respondent got pregnant and she went to her maternal home during March. On 10.03.2003, the petitioner was informed of her pregnancy and that she was suffering from illness. The parents of the petitioner had been to Kasi on Pilgrimage on 05.05.2003, before that they had been to respondent's house and found that respondent was admitted for treatment for a problem in her Kidneys. After the parents of the petitioner returned from Kasi, the petitioner went to the respondent's house calling her back to her shared matrimonial home. However, the respondent refused to come with the petitioner and expressed her inability to cohabit with the petitioner. While so, the respondent gave a police complaint before All Women Police Station, Dindigul to handover all her belongings, alleging dowry harassment. During the enquiry by the police, the respondent expressed her unwillingness to cohabit with the petitioner and required her belongings back.



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(ii) Accordingly a mediation was conducted in the presence of elders. In their presence, the respondent received all her belongings and jewels, acknowledging the receipt for the same in writing. The petitioner further submitted that the respondent never informed the child birth either to the petitioner or to his parents. The petitioner reliably learnt that the respondent has been suffering from kidney problem right from her birth and her doctor advised her not to marry. The petitioner further understood that her kidney ailment was not curable and there was no possibility for improvement in her health. The respondent deserted the petitioner for the past two years for the above said reasons and has been living separately. Since there had been no possibility for reunion in future, the petitioner issued a legal notice dated 20.05.2004 calling upon the respondent to snap the marital ties, which was duly received by the respondent but neither replied nor complied. Hence, the petitioner filed H.M.O.P.No.88 of 2005 on the file of Sub Court, Dindigul seeking divorce.

5. The case of the respondent:

(i) The respondent had filed a counter refuting each and every allegations put forth by the petitioner in his divorce petition and submitted that the petition was not maintainable either in law or on facts and the



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same liable to be dismissed. The respondent denied each and every allegations made in the petition except those that were specifically admitted and had put the petitioner to strict proof of the rest of the averments. The fact that the marriage between the petitioner and respondent was solemnized on 08.09.2002 at Chinnalapati, Rajamani Ammal Marriage Hall and at the time of marriage, since the petitioner worked as Engineer at Bangalore, after one week of marriage, the petitioner and the respondent consummated their marriage at Ramasamipuram, Bangalore were admitted. Thereafter, with an intention to do his own business the petitioner came to Chinnalapati and started his own business from 25.12.2002 onwards. Denying that the parents of the petitioner had been to respondent's house and found that respondent was admitted for treatment for a problem in the respondent's kidney and that they went to the respondent's house after returning from Kasi, back to her matrimonial home was denied. The allegation that the respondent refused to come with the petitioner and expressed her inability to cohabit with the petitioner was utter false. The respondent further submitted that she delivered a male child on 19.10.2003 and the child birth was properly informed to the petitioner and his parents. During the pregnancy of the respondent, the parents and sisters of the petitioner harassed and tortured



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the respondent in many ways by demanding dowry and even they attempted to kill the respondent by setting her ablaze.

(ii) The respondent further pleaded that unable to tolerate the tortures, the respondent left the matrimonial home to her parents house. Hence, the respondent gave a police complaint regarding the dowry harassment. During the enquiry, it was decided that after the delivery, the petitioner and respondent would reside in a separate house at Chinnalapatti. The respondent was with the fond hope of living in separate nuclear family arrangement with the petitioner. However, the petitioner was attempting to remarry his sister's daughter. The respondent further pleaded that she never had any kidney problem at any point of time and she has been living a healthy life till date. That apart, the petitioner who voluntarily neglected the respondent had filed a false petition for divorce. The petitioner had illegal intimacy with several women which was admonished by the respondent and irked by the same the petitioner had filed this petition. The respondent was always willing to cohabit with the petitioner and by all means she is not ready for a divorce and sought for dismissal of the petition seeking divorce.



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6. Reply counter statement by the petitioner:

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The petitioner or his parents have not demanded any dowry from the respondent and they have not harassed and tortured the respondent as alleged in the counter. The respondent gave a false police complaint against the petitioner and his family members. After knowing the pregnancy of respondent, she took treatment at Chinnalapatti Kasthuriba Hospital, as out patient. The respondent's father took the respondent to Madurai for treatment promising to send her back in the evening but the respondent never returned to the matrimonial home. Thereafter, the respondent came to the matrimonial home and again left the matrimonial home voluntarily after taking her belongings without heeding the words of elders and the petitioner.

7. The learned Trial Court had framed one issue. Following which, three witnesses including the petitioner were examined as P.W-1 to P.W-4 and Ex.A-1 to Ex.A-6 were marked on the side of the petitioner. Two witnesses including the respondent were examined as R.W-1 and R.W-2 and one document was marked on the side of the respondent.

8. On the basis of the evidence and the arguments submitted by the



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respective parties, the learned Trial Court proceeded to observe that the petitioner had miserably failed to prove the allegations, namely,

(i) The respondent had kidney failure issues;

(ii) The respondent voluntarily deserted the petitioner;

Though it is submitted by the petitioner that the respondent had kidney failure issues and due to that she was unable to cohabit with the petitioner, the birth of child would disprove the same. On that basis, the learned Trial Court proceeded to conclude that the petitioner / husband had miserably failed to prove that the respondent suffered kidney failure issues.

9. The second question is one of desertion. The contention is that the respondent voluntarily deserted the petitioner. However, the petitioner miserably failed to prove the same with appropriate oral and documentary evidence. On consideration of pleadings, oral and documentary evidence of both parties and after hearing the arguments, the learned Principal Subordinate Judge, Dindigul had dismissed the petition without cost by his fair and executable order dated: 19.11.2012. Aggrieved by the said fair and



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executable order the respondent had preferred civil miscellaneous appeal No. 2 of 2013 on the file of Additional District Judge, Dindigul.

10. The learned First Appellate Court proceeded to conclude that regarding the desertion, except a vague concluding part of the petitioner that the respondent deserted the petitioner for 2 years, nothing was pleaded, with specific particulars as to the date and year of desertion by the respondent. Therefore, the petitioner has not, first of all, made it clear before the trial court whether there was a continuous 2 years period of desertion by the respondent as on the date of presentation of the petition. However, the fact remains that the respondent has been living separately with her parents. The learned First Appellate Court observed that Ex. R.1 clearly reveals that the respondent / wife was in the matrimonial home till 29.08.2003 and thereafter only she left the matrimonial home. However, it seemed that the respondent went to her parents house only for her first delivery which is a customary practice, and the same cannot be construed as a voluntary desertion. The present petition was presented before the trial court on 12.07.2005 which means the petition was presented even before the expiry of two years from the date on which the respondent left the matrimonial home. Therefore, even assuming that the respondent deserted



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the petitioner voluntarily was true, still the petitioner cannot maintain a petition for divorce on the ground of desertion before expiry of two years from the date of the alleged desertion.

11. The learned First Appellate Court further proceeded to conclude that the petitioner had not filed any documents to prove the date on which the respondent left the matrimonial home. The trial court miserably failed to consider this aspect. Therefore, the petition for dissolution of marriage on the ground of desertion was premature and the same was not maintainable. Desertion for the purpose of seeking divorce under the Act means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. In other words, it is a total repudiation of the obligations of marriage. The four important elements required for desertion are

- (i) Factum of separation
- (ii) Necessary intention to put an end to matrimonial consortium and cohabitation permanently
- (iii) Want of reasonable cause and
- (iv) Want of consent or against the wish of others spouse.



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In the instant case, as stated earlier, the petitioner had not stated in the petition that the respondent herself deserted the petitioner. Even though the respondent admitted in the cross examination that she has been living separately with her parents the period of alleged desertion as on date of filing of petition was not more than 2 years.

12. That apart, the respondent had stated reasonable cause for such desertion of her husband and the police complaint given by her and the follow up action on the basis of police complaint also would substantiate the respondent had separated from her husband was for a reasonable cause. The learned First Appellate Court observed that the respondent has expressed her willingness to resume cohabitation with her husband. However, it is only the petitioner herein which is intending to totally repudiate the matrimonial obligations and put an end to the matrimonial consortium. Therefore, even assuming that the respondent / wife has separated from the petitioner for more than 2 years, the same was for a reasonable cause and not with an intention to put an end to the matrimonial consortium permanently. Considering all these facts, the learned First Appellate Court had dismissed the C.M.A.No. 2 of 2013. Challenging the same, the present Civil Miscellaneous Second Appeal came to be filed.



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13. Heard the learned Counsel appearing for the petitioner. Carefully perused the materials available on record.

14. The substantial questions of law framed in this CMSA are as follows:

“a) Whether the courts below are correct and justified in rejecting the relief of divorce on the sole hyper-technical ground that the date of actual desertion is not mentioned in the petition, when the oral and documentary evidence on record clearly establish that the parties have been living separately for more than two years prior to the filing of the petition and that the respondent has voluntarily removed all her belongings from the matrimonial home?

b) Whether the courts below have committed error in completely ignoring the legal position that the repeated and unsubstantiated allegations by the respondent about demand for dowry, cruelty and attempt to murder her by the appellant and his family members and also her scandalous allegations about the appellant and his alleged wayward life, without there being any iota of proof, itself is a valid ground to grant divorce?



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c) *Whether the courts below are justified in ignoring the evidence of P.W-2, P.W-3, P.W-4, who are independent witnesses.*

d) *Whether the courts below are justified in ignoring the vital aspect in this case that the respondent has not pleaded or proved any reasonable or justifiable cause for living a way from the appellant so as to explain away the desertion, when admittedly she has voluntarily removed all her belongings from the appellant's home."*

15. Both the Trial Court and the First Appellate Court has concurrently found both the H.M.O.P.No.88 of 2005 and C.M.A.No.2 of 2013, were unfit for allowing, for the reason that the petitioner / husband miserably failed to prove the allegations of desertion. The Hon'ble Apex Court in the case of *Vishwanath Agrawal .Vs. Sarla Vishwanath Agarval reported in (2012) 7 SCC 288* has dealt with a case of concurrent finding by the Trial Court and the First Appellate court and has held that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the Courts below are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion. The relevant



portion of the same is extracted as follows:

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“36. In Major Singh v. Rattan Singh it has been observed that when the courts below had rejected and disbelieved the evidence on unacceptable grounds, it is the duty of the High Court to consider whether the reasons given by the courts below are sustainable in law while hearing an appeal under Section 100 of the Code of Civil Procedure.

37. In Vidhyadhar v. Manikrao it has been ruled that the High Court in a second appeal should not disturb the concurrent findings of fact unless it is shown that the findings recorded by the courts below are perverse being based on no evidence or that on the evidence on record no reasonable person could have come to that conclusion. We may note here that solely because another view is possible on the basis of the evidence, the High Court would not be entitled to exercise the jurisdiction under Section 100 of the Code of Civil Procedure. This view of ours has been fortified by the decision of this Court in Abdul Raheem v. Karnataka Electricity Board.”

16. Fully fortified by the judgment by Hon'ble Apex Court and fully satisfied by the concurrent findings of the facts as recorded by the learned Sub Court and the learned Additional District Court, Dindigul and the



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reasoning therein, holding that the decisions of both the lower Courts are fully supported by the evidence, I am not inclined to interfere with the Judgment and decree passed by the learned Additional District Judge in C.M.A.No.2 of 2013 and the learned Subordinate Judge, Dindigul in H.M.O.P.No.88 of 2005. Whenever a decree of divorce is sought for on the ground of desertion, the legal burden is upon the petitioner to establish by convincing evidence beyond any reasonable doubt that the respondent intentionally forsook and abandoned him without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bonafide attempt on the respondent's part to return to the matrimonial home. Here in this case, the learned Trial Court on the basis of available evidence concluded that, the respondent / wife was in her matrimonial home as on 29.08.2003 and that the date of filing of petition for divorce by the husband was on 12.07.2005. That apart, it is also recorded by the learned Trial Court that, in the meantime after 29.08.2003, she was in her maternal home for her delivery. Acknowledging the customary practise of Indian daughter's being taken care during delivery in their maternal home, the learned Trial Court rightly negated the allegation of voluntary desertion of matrimonial partner by the wife. Concurring with the finding of both the learned Trial Court and the 1st Appellate Court that,



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the petitioner has miserably failed to prove that the respondent had deserted him for a continuous period of not less than two years immediately proceeding the presentation of the petition for divorce, I have no hesitation to hold that the present CMSA is liable to be dismissed.

17. Accordingly, this Civil Miscellaneous Second Appeal is dismissed. There shall be no order as to costs.

25.03.2024

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

1.The Sub Judge,
Dindigul.

2.The Additional District Judge,
Dindigul.

Copy to

The Section Officer,
Vernacular Records,
Madurai Bench of Madras High Court,
Madurai.



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L.VICTORIA GOWRI, J.,

Sml

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