

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 25.08.2015

CORAM

THE HONOURABLE Mr.JUSTICE S.MANIKUMAR
AND
THE HONOURABLE Mr. JUSTICE G.CHOCKALINGAM

CMA.No.1939 of 2015
and
M.P.No.1 of 2015

Kalaivani ...Appellant/Respondent

Vs

Santhosh Raj ...Respondent/Petitioner

PRAYER: Appeal filed under Section 19(1) of the Family Courts Act as against the order in I.A.No.2265 of 2014 in I.A.No.2688 of 2013 in O.P.No.4412 of 2011 on the file of the learned III Additional Principal Judge, Family Court, Chennai.

For Appellant : Mr.N.R.P.Ayyanar

For Respondent : Mr.C.L.Lalji

JUDGMENT

S.MANIKUMAR, J.

O.P.No.4412 of 2011 has been filed by the respondent, under Section 19(1) and 10(VII) of the Divorce Act, 1869, for declaring the marriage solemnized on 18.10.2009 between the inter se parties, as null and void. Respondent has sought for consequential reliefs.

2.Material on record further discloses that on 09.06.2013, for non appearance, the petitioner was set ex parte. Seeking to set aside the order, I.A.No.2688 of 2013 has been filed along with an application in I.A.No.2687 of 2013 to condone the delay of 51 days, in filing the application to set aside the ex parte order. The

latter has been allowed and accordingly, delay has been condoned.

3.Later on, I.A.No.2688 of 2013 filed to set aside the ex parte order, has been dismissed for default on 16.09.2014. For restoration, I.A.No.2265 of 2014 has been filed.

4.Reasons assigned for non-appearance on the hearing dates on 20.08.2014 and 16.09.2014 in I.A.No.2688 of 2013, are that she was suffering from typhoid and admitted in a hospital. Objection of the respondent/husband is that the said petition in I.A.No.2265 of 2014 has been filed only to drag on the proceedings in O.P.No.4412 of 2011 on the file of the learned III Additional Principal Judge, Family Court, Chennai.

5.Adverting to the above rival submissions, vide order dated 24.06.2015, the learned III Additional Principal Judge, Family Court, Chennai, has dismissed I.A.No.2265 of 2014 in I.A.No.2688 of 2013 in O.P.No.4412 of 2011, on the ground that the reasons assigned in the supporting affidavit, are not supported by any documentary evidence and hence, the petitioner is not entitled to get any relief prayed for under Order IX Rule 9 of the Code of Civil Procedure, for restoration.

6.Assailing the correctness of the same, Mr.N.R.P.Ayyanar, learned counsel for the petitioner submitted that the Court below, having allowed I.A.No.2687 of 2013, by condoning the delay in filing an application to set aside the ex parte order, ought to have given an opportunity, to the petitioner/wife, to contest the OP No.4412 of 2011, filed by the respondent, for declaration, to declare the marriage solemnized on 18.10.2009, as null and void. He further added that the parents of the petitioner are aged persons and that she has to take care of them. For the abovesaid reasons, he prayed to set aside the order impugned in this appeal.

7.Per contra, Mr.C.L.Lalji, learned counsel for the respondent/husband reiterated that the petition has been filed before the learned III Additional Principal Judge, Family Court, Chennai, is only to drag on the initial proceedings, instituted in the year 2011. Though the Court below has shown indulgence in condoning the delay in filing the petition to set aside the ex parte order, still, the petitioner has not shown any diligence or bonafides in prosecuting I.A.No.2688 of 2013 filed to set aside the ex parte order, on the other hand, chosen to remain absent on two occasions i.e., on 20.08.2014 and 16.09.2014, respectively and thus, after considering the rival contentions, the Court below has passed the reasoned order,

which does not require any interference.

8. Heard the learned counsel for the petitioner and the learned counsel for the respondent and perused the materials available on record.

9. O.P.No.4412 of 2011 on the file of the learned III Additional Principal Judge, Family Court, Chennai, has been filed for the following relief:

"Declaring the marriage that took place between the petitioner and respondent on 18.10.2009 as per the customs of Christian at No.37, Akbarabath I Street, Kodambakkam, Chennai-600 024, in the presence of Mr.S.Augustin, P.Damotharan and S.P.Muthuraman and was registered on 19.10.2011 before the Rev.A.M.Cedric Beno, ICM Marriage Registrar at No.37, Akbarabath I Street, Kodambakkam, Chennai-600 024, as null and void."

10. Respondent, has alleged cruelty as well as inability for consummation, besides other grounds, have been raised. Marriage between the inter se parties has been solemnized on 18.10.2009, as per the customs of Christians and it is stated to have been registered on 19.10.2011 before the Marriage Registrar, Chennai. Divorce proceedings have been instituted in the month of November 2011. Though the petitioner/wife, has remained absent on the earlier occasions i.e., on 20.08.2014 and 16.09.2014, respectively, and that she was also set ex parte, the learned III Additional Principal Judge, Family Court, Chennai, has condoned the delay in filing an application to set aside the ex parte order. However, I.A.No.2688 of 2013, on two occasions, i.e., on 20.08.2014 and 16.09.2014, the petitioner/wife had remained absent. Further, reason assigned in the supporting affidavit is that she was suffering from typhoid, due to which, she was hospitalized, but it is not supported by any documentary evidence.

11. While considering an application for condonation of delay, or restoration, Courts should consider the irreparable injury, likely to be caused in the event of not allowing a party, to adjudge the issues raised inter se, unless there is a deliberate and intentional absence, or lack of bonafide to protract the proceedings endlessly.

12. In the case on hand, the allegations levelled against the petitioner are cruelty and inability to consummate. Decree granted against the petitioner/wife on the above issues, without allowing the wife to participate in the proceedings in O.P.No.4412 of 2011 on the

file of the learned III Additional Principal Judge, Family Court, Chennai, would certainly affect her interest. Having condoned the delay in filing an application to set aside the expare order, the Court below could have allowed the consequential prayer. Considering the nature of relief sought by the husband against the petitioner/wife for dissolution of marriage on the ground of cruelty and inability to consummate, this Court is of the considered view that the petitioner/wife should be given an opportunity to adjudge the abovesaid issues.

13.Accordingly, we set aside the order in I.A.No.2265 of 2014 in I.A.No.2688 of 2013 in O.P.No.4412 of 2011 on the file of the learned III Additional Principal Judge, Family Court, Chennai. In the light of the observations made, the learned III Additional Principal Judge, Family Court, Chennai, is directed to dispose of I.A.No.2688 of 2013, within a period of two weeks from the date of receipt of a copy of this order. Consequently the connected Miscellaneous Petition is closed. No costs.

Sd/-
Assistant Registrar(CS-IV)

//True Copy//

Sub Assistant Registrar

mps

To

The III Additional Principal Judge,
Family Court,
Chennai.

1 CC to Mr.N.R.P.Ayyanar, Advocate SR.No. 44960

1 CC to Mr.C.L.Lalji, Advocate SR.No. 45076

CMA.No.1939 of 2015
and M.P.No.1 of 2015

KK (CO)
PSI (30.09.2015)