HON'BLE SRI JUSTICE R.SUBHASH REDDY
AND
HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

F.C.A.No.106 of 2005 and C.M.A.No.4466 of 2004

COMMON JUDGMENT : (per Hon'ble Sri Justice R.Subhash Reddy)

Since the appellant in both the appeals is one and the same and the issue involved in both the appeals is inter-related, they are heard together and being disposed of by this common judgment.

2. F.C.A.No.106 of 2005 under Section 19 of the Family Courts Act, 1984 is filed by the appellant-wife aggrieved by the order and decree dated 27.05.2004 in H.M.O.P.No.83 of 1998 passed by the Family Court-cum-V Additional District Judge, Tirupati, Chittoor District, allowing the petition filed by the respondent-husband under Section 13 (1)(ia) of Hindu Marriage Act, 1955 (for brevity "the Act") seeking dissolution of marriage between them by granting a decree of divorce.

3. The respondent-husband filed the aforesaid O.P., seeking dissolution of marriage on the ground of cruelty. As the appellant-wife failed to contest the proceedings, she was set exparte. The Court below, after recording the evidence of respondent-husband as P.W.1 and marking documents under Exs.A.1 and A.2, has passed the impugned order dated 27.5.2004 granting a decree of divorce by dissolving the marriage between the parties.

Aggrieved by the same, F.C.A.No.106 of 2005 is filed.

4. As exparte order dated 27.5.2004 was passed, challenging the same, the appellant-wife has filed an application being I.A.No.814 of 2004 in H.M.O.P.No.83 of 1998 under Order IX, Rule 13 of C.P.C., seeking to set aside the said exparte order. The Court below after considering the evidence and the material on record, dismissed the said application by order and decree dated 7.10.2004. Aggrieved by the same, C.M.A.No.4466 of 2004 is filed.

5. Though notice is served on the respondent-husband in both the appeals, there is no appearance on his behalf.

6. It is submitted by the learned counsel for appellant-wife that the impugned order dated 27.5.2004 is passed without there being any finding with regard to the allegation of cruelty as contemplated under Section 13(1)(ia) of the Act. The learned counsel contended that though the Court below has passed the impugned order merely on the ground that there are long pending disputes and both the parties are living separately for a long time, that itself is not a sufficient ground for granting a decree of divorce. It is further contended that though the petitioner is set exparte, unless there is a finding with regard to the alleged cruelty, the Court below ought not to have allowed the petition filed by the respondent-husband for dissolution of marriage.

7. Heard learned counsel for the appellant-wife and perused the impugned orders.

8. A perusal of the impugned order dated 27.5.2004 shows that the Court below has recorded a finding that there are disputes between the parties since 1993 and though they lived together intermittently for some time, in view of the long pending material disputes and also because both the parties are living separately, there is no scope for re-union of the parties.

9. It is to be seen that except referring to the examination of the respondent-husband as P.W.1 and marking of documents under Exs.A.1 and A.2, no finding is recorded by the Court below with regard to the alleged cruelty by the appellant-wife. Even if appellant-wife failed to appear before the Court and was set exparte, it is obligatory on the part of the Court below to record a finding on the aspect of cruelty alleged against the appellant-wife. Unless a specific finding is recorded on the allegation of cruelty basing on the pleadings and the evidence on record, it cannot be construed that the impugned order is in accordance with Order XX r/w. Section 2 (9) of C.P.C.

10. For the aforesaid reasons, the impugned order dated 27.5.2004 is set aside and the matter is remanded to the Court below for fresh consideration and to pass appropriate orders in accordance with law after recording the evidence of both the parties. It is open to the

appellant-wife to file counter affidavit in the aforesaid O.P., and adduce evidence on her behalf.

11. Subject to the above directions, F.C.A.No.106 of 2005 is disposed of.

12. In view of the disposal of F.C.A.No.106 of 2005, the cause in C.M.A.No.4466 of 2004 does not survive for adjudication and the appeal is dismissed as infructuous.

13. As a sequel, miscellaneous petitions pending, if any, in both the appeals shall stand closed. No order as to costs.

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JUSTICE R. SUBHASH REDDY

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Dr. JUSTICE B.SIVA SANKARA RAO

25.02.2015.
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