

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 16.11.2016

CORAM
THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU
AND
THE HONOURABLE MR.JUSTICE M.SUNDAR

C.M.A.Nos.3366 and 3367 of 2009
and
M.P.No.2 of 2009

G.Kanniappan ... Appellant in both the Appeals

Vs.

Saroja ... Respondent in both the Appeals

Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act, 1984 against the judgment and decree in F.C.O.P.No.1046 of 2001 and F.C.O.P.No. 1099 of 2004 respectively dated 18.09.2009 on the file of Principal Judge, Family Court, Chennai.

For Appellant : Mr.J.Saravanel

For Respondent : Dr.Krishnamurthy
for Mr.J.B.Solomon Peter Kamaldoss

C O M M O N J U D G M E N T
(The judgment of the Court was delivered by
K.RAVICHANDRABAABU,J.)

C.M.A.No.3366 of 2009 is filed against the order of the Family Court, dismissing the divorce petition filed by the appellant/husband against the respondent/wife. C.M.A.No.3367 of 2009 is filed by the appellant/husband against the order made in F.C.O.P.No.1099 of 2004 allowing the application filed by the respondent/ wife for restitution of conjugal rights.

2. The parties to the litigation namely, husband and wife have gone before the Family Court and made their rival allegations, one by the husband seeking for divorce and the other by the wife seeking for restitution of conjugal rights. The allegations and counter allegations in both the proceedings are almost one and the same.

3. The case of the husband, who is the appellant before this Court, in short, is as follows:

He married the respondent on 24.08.1986 and out of their wedlock, two male children were born and they were at the age of 14 and 9 at the time of filing the application for divorce. The respondent was not regular in attending her domestic obligations and often she fought with the appellant and abused him with filthy language. She made several false complaints against the appellant before the police and consequent upon such complaints, the appellant and his sister along with his children were dragged to the police station on several occasions and made to sit there for several hours. They were beaten by the police officials. The respondent also gave life threat to the appellant once by allowing the gas cylinder open and by closing the windows in the kitchen. The respondent made threats on several occasions to commit suicide and thereby caused mental cruelty to the appellant.

4. The case of the respondent in short, is as follows:

The petitioner used to come to the house late in the night hours and she came to know that he had an illegal affair with a married women. Because of such illegal affair, he started quarreling with the respondent day by day and it became worse at one point of time. She also denied the other allegations made by the husband in the petition seeking for divorce.

5. The Family Court heard and disposed of both the matters together thereby dismissing the divorce petition and allowing the application filed for restitution of conjugal rights, by a common order. Challenging the above common order passed by the Family Court, the present appeals are filed before this Court.

6. Mr.J.Saravanel, learned counsel appearing for the appellant in both the appeals submitted that though the appellant has established his case for granting divorce by letting in evidence in support of the pleadings, the Family Court failed to consider any of the evidence let in by the appellant and on the other hand mechanically disposed of the appeal by one paragraph order, without there being any discussion and finding of facts and circumstances and the evidence let in by the parties. However, he contended that this Court, as an Appellate Court, can appreciate the evidence in its entirety and decide the matter.

7. Per contra, Dr.Krishnamurthy, learned counsel for the respondent submitted that the order passed by the Court below need not be interfered with in view of the facts and circumstances involved in the case. However, he fairly conceded to the fact that the Family Court has not at all adverted to the

evidence let in by the parties and made any discussion followed by giving a finding thereon. Therefore, he submitted that the matter may be remitted back for fresh consideration.

8. We heard the learned counsel appearing on either side and perused the common order passed by the Family Court.

9. We are not inclined to go into the details of the allegations and the counter allegations of the parties in view of the fact that we are convinced to allow these Appeals not on the merits of the matter but on the simple reason that the Court below has not at all appreciated the evidence let in by the respective parties while coming to the conclusion for rejecting the divorce petition and granting the relief of restitution of conjugal rights. There is no dispute to the fact that the petitioner, apart from examining himself as P.W.1 has also examined one Paulraj, uncle of the petitioner as P.W.2. He, in support of his case, marked Exs.P1 to P5. The respondent/wife, apart from examining herself as R.W.1 has examined one Muthulakshmi as R.W.2. She has not marked any document in support of her case. A perusal of the evidence of P.W.1 and P.W.2 would show that they have been examined in chief and cross by the respective parties. So also the case of R.W.1. When that being the factual position and that the petitioner has marked Exs.A1 to A5 in support of his case, unfortunately, the learned Judge, except reiterating the rival contentions of the parties, has not at all discussed the evidence let in by them in support of their respective pleadings and given any finding before arriving at such conclusion for refusing the divorce and granting restitution of conjugal rights, except saying in one line that the petitioner has not proved the mental and physical cruelty. Both sides admit that the learned Judge has not given any finding or reasoning, based upon the evidence let in by the parties. Needless to say that the Court of first instance being the fact finding Court apart from considering the respective pleadings, is required to appreciate the evidence let in by the parties in detail. Only based on such appreciation, findings followed by the conclusion should be given. In this case, all these things are totally absent and hence, we find that the order passed by the court below, is liable to be set aside, though not on the merits of the matter but only on the reason that the same came to be passed without discussing the evidence let in by the parties and without giving any finding thereon. Thus, such an order resulted out of non-application of mind cannot be sustained.

10. No doubt, this Court being the first Appellate Court is entitled to go into the facts and re-appreciate the evidence, while deciding the appeal. But the question is when and under what circumstances such exercise has to be done. When admittedly

there is no appreciation of evidence at all by the trial Court and such exercise is totally absent, we do not think that the exercise of re-appreciation of evidence would arise for this Court so as to decide the matter on merits based on the evidence let in by the parties.

11. Needless to say that the appellate Court, while deciding the appeal, cannot take the role of the trial Court and appreciate the evidence as the first time, since such mandatory exercise is within the exclusive domain of trial Court. Therefore, without expressing any view on the merits of the contentions of the rival parties, we set aside the judgment and decree of the Principal Family Court, Chennai, made in F.C.O.P.No.1046 of 2001 and F.C.O.P.No. 1099 of 2004 dated 18.09.2009. Accordingly, both the Appeals are allowed and the matter is remitted back to the trial Court for consideration of the evidence already let in by the parties and also any fresh evidence to be let in by the parties after remand and to pass order afresh on merits and in accordance with law. Such exercise shall be done by the Family Court within a period of three months from the date of receipt of a copy of this order. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

vsi

To

The Principal Judge,
Family Court,
Chennai.

+1cc to Mr.J.Saravanavel, Advocate, S.R.No.66317
+2cc's to Mr.J.B.Solomon Peter Kamaldoss, Advocate,
S.R.Nos.66942 & 66943

C.M.A.Nos.3366 and 3367 of 2009

ALA(CO)
CA(03/01/2017)