

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 18.08.2016

CORAM

THE HON'BLE MR. JUSTICE T.MATHIVANAN

C.M.A.No.89 of 2002
&
C.M.P.No.818 of 2002

Nirmala

... Appellant

Vs.

Moorthy

... Respondent

Civil Miscellaneous Appeal filed under Section 173 of the Motor Vehicles Act, 1988 against the judgment and decree dated 22.09.2000 and made in O.P.No.46 of 1989 on the file of the District Court of Nilgiris at Ootacamund.

For Appellant : Mr.Srinath Sridevan

For Respondents : Mr.R.Subramanian

JUDGMENT

This memorandum of Civil Miscellaneous Appeal is directed against the fair and decretal order dated 22.09.2000 and made in

H.M.O.P.No.46 of 1989 on the file of the learned District Judge, Nilgiris at Uthagamandalam. The appellant herein is the respondent in H.M.O.P.No.46 of 1989, whereas the respondent herein is the petitioner.

2. The parties are husband and wife. Their marriage was solemnised on 11.09.1983 at Mattakandi village. During the course of their wedlock, the appellant had delivered a male child on 01.12.1984. Thereafter, a fissured crack developed in their matrimonial relationship and on account of this reason, they had parted their way.

3. It is revealed from the records that the respondent herein, being the husband of the appellant, had filed the above petition in O.P.No.46 of 1989 under Section 13 (1-A) (ii) of the Hindu Marriage Act, 1985 as against the appellant herein seeking the relief of dissolving the marriage solemnised between them. The said petition was contested by the appellant by filing a counter statement.

4. The learned District Judge, Nilgiris, had, however, based banking heavily on the evidences, both oral and documentary, proceeded to allow the petition granting the relief as prayed for by

the respondent herein and thereby the marriage which was solemnised between the appellant and respondent on 11.09.1983 was dissolved. Having been aggrieved by the impugned order dated 22.09.2000, this Civil Miscellaneous Appeal is preferred by the appellant.

5. Heard Mr.Srinath Sridevan, learned counsel appearing for the appellant and Mr.R.Subramaniam, learned counsel appearing for the respondent.

6. The scope of this Civil Miscellaneous Appeal is very very limited. It is revealed from the records that originally the appellant herein had filed a petition in O.P.No.42 of 1985 for restitution of conjugal rights as against her husband. The respondent herein had also filed another petition in O.P.No.43 of 1985 as against the appellant herein seeking the relief of judicial separation. That on 24.08.1987, a common judgment was pronounced by the learned District Judge, Nilgiris at Uthagamandalam and by the said judgment, the petition filed by the appellant in O.P.No.42 of 1985 seeking the relief of restitution of conjugal rights was allowed and the petition filed by the respondent/husband for judicial separation was dismissed.

7. The materials available on record would further manifest that challenging the common order dated 24.08.1987, the respondent herein had preferred two Civil Miscellaneous Appeals in C.M.A.Nos.1035 and 1036 of 1987 on the file of this Court. In the interregnum, the appellant had filed a petition in M.C.No.1 of 1988 on the file of the learned Judicial Magistrate, Uthagamandalam claiming maintenance. This Court is able to understand from the records that the said petition in M.C.No.1 of 1988 was allowed on the joint endorsement made by both the parties and a sum of Rs.250/- per mensem was ordered towards the maintenance of the appellant and her child. After filing the maintenance case in M.C.No.1 of 1988, the Civil Miscellaneous Appeals filed by the respondent/husband on the file of this Court were withdrawn.

8. It is also brought to the notice of this Court that the appellant had subsequently filed another petition in M.C.No.11 of 1998 on the file of the Judicial Magistrate, Uthagamandalam seeking enhancement of maintenance. After hearing both sides, this petition was also ordered on 02.03.1989 and the maintenance amount of Rs.250/- per mensem was enhanced to Rs.600/-. This order was challenged by the respondent herein by way of revision before this

Court in CrI.R.C.No.170 of 1989. It is also brought to the notice of this Court that criminal revision in CrI.R.C.No.170 of 1989 was dismissed by this Court on 02.04.2002. Only after the dismissal of the criminal revision in CrI.R.C.No.170 of 1989, the matrimonial proceedings under H.M.O.P.No.46 of 1989 was filed by the respondent herein before the District Court, Nilgiris.

9. It may be relevant to note here that after the dismissal of the matrimonial proceedings in H.M.O.P.No.46 of 1989 originally on 02.04.1993, a Civil Miscellaneous Appeal in C.M.A.No.846 of 1993 was filed by the respondent before this Court. After hearing both sides, this Court, while allowing the Civil Miscellaneous Appeal on 11.02.2000, had remitted back the petition in H.M.O.P.No.46 of 1989 to the file of the trial Court viz., District Court, Nilgiris at Uthagamandalam with a direction for fresh disposal.

10. During the pendency of the H.M.O.P.No.46 of 1989, an interlocutory application in I.A.No.53 of 2000 was filed under Section 23(2) of the Hindu Marriage Act, 1955 and thereby the appellant herein had sought the relief of convening a resolution enquiry between her and her husband and to make them to live together by giving right advise to the respondent herein and direct him to take

her and live in peaceful life. This petition was contested by the respondent/husband. Thereafter, the main petition in H.M.O.P.No.46 of 1989 was allowed by the District Judge, Nilgiris on 22.09.2000 granting the relief of dissolving their marriage which took place on 11.09.1983. Impugning the said order, the appellant stands before this Court.

11. Mr.Srinath Sridevan, learned counsel appearing for the appellant has mainly focused his argument on the singular point of res judicata. In this connection, he would submit that out of two petitions i.e. O.P.No.42 and O.P. No.43 of 1985 filed by both the parties, one was for restitution of conjugal rights and the other one for judicial separation. The petition in O.P.No.43 of 1985 filed by the respondent/husband seeking the relief of judicial separation was dismissed. The other petition, as observed in the forgoing paragraphs, was allowed granting the relief of restitution of conjugal rights in favour of the appellant.

12. This Court again take the risk of reiteration that two Civil Miscellaneous Appeals were filed by the respondent viz., C.M.A.Nos.1035 and 1036 of 1987 challenging the common order passed in O.P.Nos.42 and 43 of 1985. Subsequently, both the Civil

Miscellaneous Appeals were dismissed as withdrawn. In this connection, Mr.Srinath Sridevan has submitted that the order passed in H.M.O.P.No.43 of 1985 on 24.08.1987 operate as a constructive res judicata and thereby the present petition in H.M.O.P.No.44 of 1989 was squarely barred. He has also submitted that the judicial separation sought by the respondent/husband was rejected by the learned District Judge, Nilgiris, at Uthagamandalam and the appeal in C.M.A.No.1036 of 1987 challenging the order of rejection of judicial separation was also dismissed as withdrawn. Therefore, Mr.Srinath Sreedevan has added that the earlier order of rejection dated 22.09.1987 made in O.P.No.43 of 1985 operates as res judicata and that when the earlier order of rejection of the same prayer was left unchallenged, another application for the same prayer could not be maintained and therefore, he has submitted that the Court below, without considering this aspect, had erroneously proceeded to allow the petition in H.M.O.P.No.46 of 1989 granting the relief of dissolving the marriage and the same is absolutely against the settled principles of law and also in total negation of the principles laid down under Section 11 of the Code of Civil Procedure.

13. It is an undisputed fact that the marriage between the appellant and the respondent was solemnized in the year 1983 and a

male child was born to them on the next year i.e., on 01.12.1984. During the hearing of this appeal, this Court was informed that the male child born to the parties to the appeal got married. Even after the marriage of their child, their matrimonial dispute has been lingering. As aforestated in the opening paragraphs, the scope of this petition is very limited and since the H.M.O.P.No.46 of 1989 is affected by the principle of res judicata, the impugned order itself is not sustainable and therefore, liable to be set aside.

Keeping in view of the above fact, the appeal is allowed and the impugned order date 22.09.2000 is set aside and the petition in H.M.O.P.No.46 of 1989 is dismissed. However, there shall be no order as to costs. Consequently, the connected miscellaneous petition is closed.

18.08.2016

Index: Yes
Internet : Yes
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To

The District Court
Nilgiris at Ootacamund

T.MATHIVANAN.J.,

gpa

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