

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 12.12.2017

CORAM

THE HON'BLE MR. JUSTICE M.DURAISWAMY

C.M.A.No.156 of 2016

Sri Vidhya

... Appellant/Petitioner

Vs.

T.M.Kannan

.... Respondent/Respondent

Civil Miscellaneous Appeal filed under Order 43 Rule 1(t) of the Code of Civil Procedure against the fair and decreetal order dated 15.07.2015 made in I.A.No.55 of 2014 in C.M.A.No.17 of 2013 on the file of the Principal District Court, Namakkal.

For Appellant : Mr.P.Kavirinadan
for M/s.N.Manokaran

For Respondent : Mr.V.S.Kesavan

J U D G M E N T

Challenging the order passed in I.A.No.55 of 2014 in C.M.A.No.17 of 2013 on the file of the Principal District Court, Namakkal, the appellant, who is the wife of the respondent has filed the above appeal.

2.Heard Mr.P.Kavirinadan, the learned counsel for the appellant and Mr.V.S.Kesavan, the learned counsel for the respondent.

3.The respondent/husband filed H.M.O.P.No.56 of 2008 on the file of the Subordinate Court, Tiruchengode for divorce on the ground of cruelty. After contest, the trial Court passed a decree for divorce.

4.Challenging the order passed in H.M.O.P.No.56 of 2008, the appellant filed an appeal in C.M.A.No.17 of 2013 on the file of the Principal District Court, Namakkal. When the appeal was posted for arguments on 06.08.2014, since none appeared for the appellant, the Lower Appellate Court dismissed the appeal in C.M.A.No.17 of 2013 for default. Thereafter, the appellant filed an application in I.A.No.55 of 2014 on 28.08.2014 under Order 9 Rule 9 of the Civil Procedure Code to restore the appeal to file. In the affidavit filed in support of the petition, the appellant has stated that she has gone out of station,

therefore, she was not in a position to instruct her counsel to argue the matter. Though the respondent has not filed any counter, the Lower Appellate Court dismissed the petition finding that the appellant has given fictitious reasons.

5. On a perusal of the materials available on record, it could be seen that the appeal was dismissed for default on 06.08.2014. The application to restore the appeal was filed by the appellant on 28.08.2014. In the affidavit, the appellant has stated that she has gone out of station and therefore, she was not in a position to instruct her counsel to argue the matter. The respondent has not disputed the averments stated in the affidavit filed in support of the petition by filing a counter. In spite of the same, the Lower Appellate Court rejected the petition stating that the reasons are fictitious. When there is nothing on record to establish that the averments stated in the affidavit are fictitious, the Lower Appellate Court should not have disbelieved the averments stated in the affidavit.

6. In these circumstances, I am of the considered view that the appellant has satisfactorily explained the reasons for the non-appearance on 06.08.2014 in the affidavit filed in support of the petition in I.A.No.55 of 2014. In these circumstances, the fair and decreetal order passed in I.A.No.55 of 2014 are liable to be set aside. Accordingly, the same are set aside. The petition in I.A.No.55 of 2014 is allowed. Consequently, the appeal in C.M.A.No.17 of 2013 is restored to file. The Principal District Judge, Namakkal is directed to dispose of the appeal in C.M.A.No.17 of 2013 on merits and in accordance with law within six weeks from the date of receipt of a copy of this judgment.

7. With these observations, the Civil Miscellaneous Appeal is allowed. No costs.

Sd/-

Assistant Registrar (CS-)

//True Copy//

Sub Assistant Registrar

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To

1. The Principal District Judge,
Namakkal.

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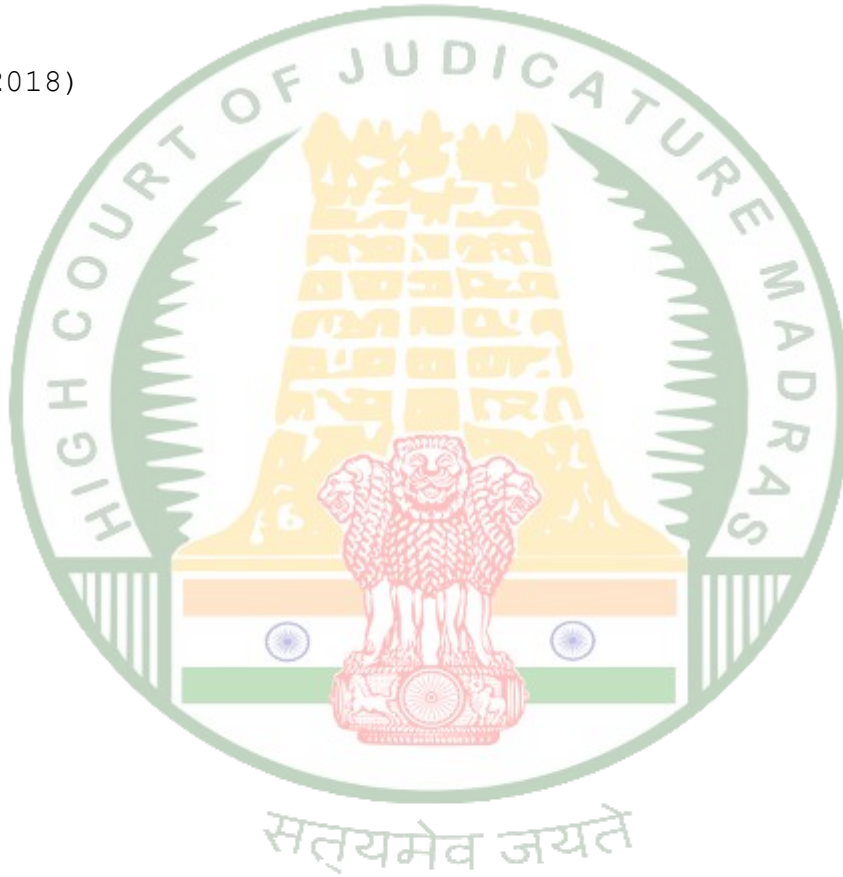
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The Section Officer,
V.R.Section, High Court, Madras.

+1cc to Mr.N.MANOKARAN Advocate, S.R.No. 88413
+1cc to Mr.V.S.KESAVAN Advocate, S.R.No. 88067

C.M.A.No.156 of 2016

SSI (CO)
TR(03/01/2018)



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