

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : **07.02.2017**

CORAM

THE HON'BLE MRS.JUSTICE **PUSHPA SATHYANARAYANA**

CRP PD.No.3710 of 2016
and
C.M.P.No.18835 of 2016

D.Vidya

.. Petitioner

vs

R.Saravanakumar

.. Respondent

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 20.09.2016 passed by the learned Subordinate Judge, Harur in I.A.No.35 of 2016 in HMOP No.95 of 2015.

For Petitioner : Mr.R.Neelakantan

For Respondents : Mr.R.Jayaprakash

ORDER

The petitioner/wife, in a matrimonial dispute has preferred the above revision, aggrieved by the order refusing to frame a

preliminary issue to decide the question of maintainability of HMOP No.95 of 2015.

2. The facts of the case would run thus:

(i) The respondent/husband has filed the HMOP No.95 of 2015 on the file of the Sub Court, Harur under Section 12(a)(b) of the Hindu Marriage Act, 1955 for a declaration declaring that the marriage dated 06.02.2012 that took place between the petitioner and the respondent as nullity and for other reliefs. The main allegation in the HMOP is that the marriage was not consummated and that the wife is suffering from psychiatric disorder.

(ii) In I.A.No.35 of 2016 filed by the wife, it is stated that the husband has filed the HMOP for annulment of the ground of psychiatric disorder and the said petition is not maintainable as she has been arrayed as a party, without showing any guardianship. Secondly, when it is not specifically alleged that the marriage was not consummated owing to the impotency of

the petitioner/wife, the main HMOP has to be dismissed for want of cause of action.

(iii) The said application after contest, was dismissed by the Trial Judge.

(iv) Challenging the same, the present revision has been preferred.

3. Heard both sides.

4. From the records, it could be seen that originally the respondent/husband filed HMOP before the Sub Court, Dharmapuri; later it was transferred to Family Court at Dharmapuri and at present the same was transferred to Sub Court, Harur by virtue of orders passed by this Court. In the counter filed in the main HMOP, the allegation as set out in this interim application are absent. Therefore, it is an after thought to introduce such statements to protract the proceedings.

5. Admittedly, the wife is a graduate and was capable of understanding. However, she is alleged to be suffering from a kind of mental disorder, which makes her unfit to discharge the duties in the matrimonial home. This is the reason why guardianship was not specifically sought for. Secondly, it is stated that the HMOP is filed under Section 12(1)(c) of the Hindu Marriage Act, and it is typographically written as Section 12(1)(a), for which the amendment application was filed and the same is pending. It is also the case of the respondent/husband that the marriage was never consummated owing to the physical condition of the wife. Hence, the annulment of the marriage was sought for.

6. Both the above said issues raised by the respondent/husband are the main grounds on which, the annulling of the marriage is sought for. While so, the same cannot be tried as a preliminary issue. For trying a issue, as a preliminary issue the same must relate to the jurisdiction of the Court or the fact of the suit created by any law in force. Even, if the Court is of the opinion that the case or any part thereof can

be disposed of on any issue of law only, even then it is not obligatory on the part of the Court to try the same as a preliminary issue. Power to try a preliminary issue is only discretionary because, the pure legal issue may turn to be the mixed question of law and fact. Subject to this power only, the Court has to decide all the issues at one and the same hearing. When trying the preliminary issue depends on a detailed evidence, which were almost identical to the main case, the Courts cannot take up the issue as a preliminary issue.

7. The issues with respect to the mental status of the petitioner/wife and the other issue with respect to the non consummation of marriage, both involve a factual evidence and it cannot be tried only as a pure question of law. Therefore, the above said issues cannot be tried as a preliminary issue without giving a finding to the other issues, which may arise for consideration in the main petition.

8. At this juncture, I would like to recollect the judgment of the Hon'ble Apex Court reported in **(2006) 5 SCC 638 [Ramesh**

***B.Desai and others vs. Bipin Vadilal Mehta and others*].**

The relevant portion reads as follows:

"13. Sub-rule (2) of Order XIV Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in [Major S.S. Khanna vs. Brig. F.J. Dillon](#) AIR 1964 SC 497, and it was held as under:-

"Under Order 14 Rule 2, Code of Civil Procedure where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depend

upon the decision of issues of fact, would result in a lop-sided trial of the suit."

Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the [Amending Act](#), 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

14. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. [In O.N. Bhatnagar vs. Smt. Rukibai Narsindas and others](#) (1982) 2 SCC 244 (para 9) it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by respondent 1 under [Section 91\(1\)](#) of the Act and those allegations must be taken to be true. [In Roop Lal Sathi vs. Nachhattar Singh Gill](#) (1982) 3 SCC 487 (para 24), it was observed that a preliminary objection that the election petition is not in conformity with [Section 83\(1\)\(a\)](#) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in

deciding the question the Court has to assume for this purpose that the averments contained in the election petition are true. Reiterating the same principle in [Abdulla Bin Ali v. Galappa](#) (1985) 2 SCC 54, it was said that there is no denying the fact that the allegations made in the plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In [Exphar SA v. Eupharma Laboratories Ltd.](#) (2004) 3 SCC 688 (para 9), it was ruled that where an objection to the jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law. In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of Delhi High Court and also that the respondent No. 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in [Indian Mineral & Chemicals Co. and others vs. Deutsche Bank](#) (2004) 12 SCC 376 (paras 10 and 11), it was observed that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer."

9. In view of the above, the Court below is correct in dismissing the application, which warrants no interference in this revision. Accordingly, the revision fails and the same is

dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

07.02.2017

vj2

Index : Yes/No

Internet: Yes

To

The Subordinate Judge, Harur

PUSHPA SATHYANARAYANA,J.,

vj2

CRP PD.No.3710 of 2016

07.02.2017

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