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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 16.08.2017

CORAM

THE HON'BLE MR.JUSTICE M.M.SUNDRESH

AND

THE HON'BLE MR.JUSTICE N.SATHISH KUMAR

C.M.A. (MD) No.200 of 2016

and

C.M.P. (MD) No.2754 of 2016

M.Maharasi @ Santhi

... Appellant/Respondent

Vs.

I.Muthu Ganesh

... Respondent/Petitioner

Civil Miscellaneous Appeal filed under Section 19 of Family Court Act, praying to set aside the judgment and decree passed in H.M.O.P.No.227 of 2015 on the file of the Family Court, Tirunelveli, dated 09.02.2016.

For Appellant : Mr.R.T.Arivukumar

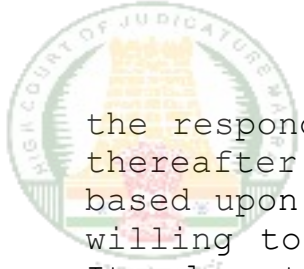
For Respondent : Mr.S.Navamani

JUDGMENT

(Judgment of the Court was delivered by **M.M.SUNDRESH, J**)

This Civil Miscellaneous Appeal has been preferred by the petitioner aggrieved over the ex-party order passed by the Family court on the premise that the petitioner was not ready to cross-examine P.W.1.

2.Earlier the petitioner filed a petition for restoration of conjugal rights in H.M.O.P.No.199 of 2009 as against the petition filed by the respondent in H.M.O.P.No.136 of 2008 to declare the marriage as null and void. The petition filed by the respondent was dismissed and consequently the petition filed by the appellant was allowed. As against which two H.M.C.As., namely, H.M.C.A.Nos.11 and 12 of 2015 was filed by the respondent. Pending disposal of the above said appeals, the appellant filed an application seeking interim maintenance. Thereafter, the respondent expressed his desire to withdraw both the appeals and it was not granted immediately in view of the objection made by the appellant that the petition seeking interim maintenance is pending. The respondent filed the present H.M.O.P.No.227 of 2015, seeking divorce on the ground of cruelty among other things. The Office has returned the papers. An endorsement has been made by

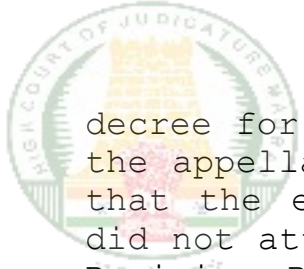


the respondent that he is ready to withdraw H.M.C.A.No.12 of 2014, thereafter it was numbered. Even in the petition filed for divorce based upon cruelty, the respondent has stated that he is ready and willing to make an endorsement to withdraw H.M.C.A.No.12 of 2014. It also transpires that the respondent has withdrawn both the appeals. Alleging that the petition itself ought not to have been numbered, a revision was filed by the petitioner in C.R.P.(MD) No.2649 of 2015. There was no interim stay granted by this Court. In the said revision petition, the petitioner has sought for striking off H.M.O.P.No.227 of 2015. During the pendency of the aforesaid Civil Revision Petition, the matter went before the Court below. The case was adjourned for cross-examination of P.W.1, namely, the respondent on 6 occasions. On the last occasion the petitioner filed a memo stating that Civil Revision Petition is pending. On the very same day, the petitioner was asked to produce the order of stay and accordingly, the matter stood adjourned to 08.02.2016. She did not appear. The matter stands adjourned to 09.02.2016. On that day, petition filed seeking to keep trial in abeyance till the disposal of C.R.P. The said petition was dismissed on 09.02.2016. On the very same day, an order was passed granting divorce holding that the petitioner was not ready to cross-examine P.W.1.

3.The learned counsel for the appellant submitted that the petitioner was not given sufficient opportunity. The appellant did appear on 09.02.2016. Therefore, granting of the order in favour of the respondent by way of a decree for divorce cannot be sustained in the eye of law. There is no discussion on merits in the order.

4.The learned counsel appearing for the respondent would submit that the grounds raised in H.M.O.P.No.227 of 2015 would certainly constitute a case of cruelty. The appellant has given criminal complaints against the respondent of which two have been closed. That was the basis on which the petition was filed. The objection raised by the office was withdrawn by taking into consideration the affidavit filed by the respondent. The respondent was ready and willing to give up the appeal filed against the dismissal of the petition to declare the marriage as null and void. At that point of time it was felt that the appeal filed as against restoration of conjugal rights is necessary. The petitioner was given sufficient opportunities. Even after filing of H.M.O.P.No.227 of 2015, the respondent has withdrawn both the appeals. Hence, no interference is required.

5.Coming to the order passed by the Family Court, on a perusal of the same, we are of the view that it was passed on the ground that appellant was not ready and willing to cross-examine P.W.1. <https://hccservices.courts.gov.in/hccservices/> that, nothing has been stated on merits. Consequently, petition filed by the appellant was dismissed on 09.02.2016. On that day, admittedly the appellant was present. The



decree for divorce was granted on the very same day. The fact that the appellant's application was dismissed on 09.02.2016 would show that the earlier non-appearance has been condoned. The appellant did not attend the Court only because of the pendency of the Civil Revision Petition. Though a mere pendency of the Civil Revision Petition per se cannot be a ground, the petitioner bonafidely thought that having filed the revision to strike off the very petition filed, it would not be proper to go on with the trial. Further, the Court below ought not to have passed the order on 09.02.2016, especially when the petitioner was present and after dismissing the application seeking the trial to be kept in abeyance till the disposal of C.R.P. In other words, the Court below ought to have given one more opportunity to cross-examine P.W.1 by the petitioner.

6. On the issue pertaining to the maintainability, as stated above, the order was passed not on merits and only on the ground of non cross-examination of P.W.1. Therefore, even the principles governing the ex parte decree has not been complied with as the Court has to satisfy itself that there are materials available for granting a decree, even it being ex parte.

7. Coming to the other issue, we are of the view that the petition filed by the respondent is maintainable. As narrated above, the respondent made his intention to withdraw both the appeals. Earlier petition was filed in the year 2008 on the ground that there was no marriage on the eye of law. Now the respondent wants to take a different stand. Merely because a stand was taken earlier that there was no marriage, it cannot be stated that in the second petition the ground of cruelty can never be raised and decided. Similarly, the decree granted for restoration of conjugal rights also cannot be a ground to non-suit the respondent from getting a decree of divorce on merits. The issue of cruelty as against the appellant was not available in the earlier proceedings. Accordingly, we hold that the present petition filed by the respondent is maintainable especially when he has withdrawn both the appeals and seeks divorce on totally a different ground.

8. We are constrained to note that the dispute is pending for nearly a decade. Therefore, in the interest of parties it would be appropriate to have an early adjudication.

9. Accordingly, while setting aside the order passed by the Court below dated 09.02.2016, we remand the matter to the Family Court and direct the Family Court, Tirunelveli to dispose of H.M.O.P.No.227 of 2015 on merits and in accordance with law within a period of 3 months from the date of receipt of a copy of this order. The appellant and respondent are directed to cooperate with



10. Accordingly, this Civil Miscellaneous Appeal is allowed.
No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar (RTI)

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/True Copy/

Sub Assistant Registrar

To

The Judge,
Family Court,
Tirunelveli.

+1cc to Mr.N.Ga.Natraj, Advocate Sr.No.72826
+1cc to Mr.S.S.Thesican, Advocate Sr.No.72848

SJ

VB/KP/SAR1/03.10.2017/4P/4C

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and
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