

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 09.07.2018

Pronounced on : 19-07-2018

CORAM :

THE HONOURABLE MR. JUSTICE R. SUBBIAH
and
THE HONOURABLE MR. JUSTICE C. SARAVANAN

Civil Miscellaneous Appeal No. 2902 of 2017
and
C.M.P. No. 17068 of 2017

S. Rohini ... Appellant/Petitioner

Versus

M. Rajavel Mohan ... Respondent/Respondent

Appeal filed under Section 19 of The Family Courts Act against the fair and decreetal Order dated 24.10.2016 made in I.A. No. 1501 of 2016 in O.P. No. 1507 of 2014 on the file of Principal Family Court, Chennai.

For Appellant : Mrs. Inthu Karunakaran
For Respondent : Ms. B. Maheswari
Legal Aid Counsel

JUDGMENT

R. Subbiah, J

This appeal is filed by the appellant questioning the validity and/or correctness of the order dated 24.10.2016 passed in I.A. No. 1501 of 2016 in O.P. No. 1507 of 2014 on the file of Principal Family Court, Chennai. The said application was filed by the appellant to modify the Judgment and Decree dated 09.12.2014 passed by the Court below in O.P. No. 1507 of 2014, which was filed under Section 13-B of The Hindu Marriage Act for dissolution of marriage by mutual consent. The Court below refused to entertain the application for modification and dismissed it which gave rise to the filing of the present Civil Miscellaneous Appeal by the appellant.

2. The marriage between the appellant and the respondent was solemnised on 20.01.2002 at Indira Nagar Women Association Hall, Indira Nagar, Chennai. After the marriage, the appellant

and the respondent resided together at the residence of the respondent at No.C-2, Lakshmi Apartments, No.25, 4th Main Road, Kasturibai Nagar, Chennai - 600 020. Due to the wedlock between the appellant and the respondent, a male child was born to them on 12.07.2006. Since matrimonial disputes cropped up between the appellant and the respondent, they were living separately from 12.01.2013. In order to patch up the differences between them, several mediations had taken place but it was of no avail. Ultimately, the appellant and the respondent decided to dissolve the marriage solemnised between them by mutual consent. Accordingly, the appellant and the respondent have filed OP No. 1507 of 2014 before the Family Court, Chennai under Section 13-B of The Hindu Marriage Act. The Family Court, by accepting the terms and conditions on which the appellant and the respondent want to dissolve their marriage, has passed the Decree and Judgment dated 09.12.2014 dissolving the marriage solemnised between the appellant and the respondent by mutual consent. As per the Judgment passed by the Family Court, based on the agreement entered into between the parties, the respondent agreed to pay a sum of Rs.25,000/- by 5th of every calendar month to the appellant and the minor son towards their monthly maintenance. The respondent also agreed to pay the school fee of the minor son as and when it was required to be paid. Further, it was agreed that the custody of the minor son shall vest with the appellant and that the respondent shall have unlimited visitation rights of the minor child and the timing for such visit shall be mutually fixed between the appellant and the respondent.

3. According to the appellant, in the decree and Judgment dated 09.12.2014 in HMOP No. 1507 of 2014, no modalities were made with regard to the manner in which the payment was to be made or the specific period during which the respondent can visit the minor child. Further, the sum of Rs.25,000/- which the respondent agreed to pay towards monthly maintenance for the appellant and the minor son is insufficient and inadequate to meet the present day cost of living and expenses and therefore it has to be enhanced to Rs.50,000/- per month. As regards the visitation rights, it is submitted that the respondent started demanding the custody of the minor child at odd hours at his whims and fancies. The respondent is seeking the custody during school examination of the minor son and thereby his studies are affected. In such circumstances, the appellant has filed the application seeking to modify the conditions imposed in the order dated 09.12.2014 in HMOP No. 1507 of 2014 in so far as it relates to the visitation rights of the minor. In the application in I.A. No. 1501 of 2018, the appellant prayed for the following relief:-

"(i) Specify the days and timings for the visitation of the child

(ii) include the educational expenses instead of the term school fees and

(iii) Directing the respondent to pay Rs.50,000/- (Rupees Fifty Thousand Only) per month to the petitioner by account transfer on 5th of every month forever instead of paying Rs.25,000/- in cash and the balance as school fee and other fees."

4. The application for modification was resisted by the respondent contending that the decree was passed by the Family Court by recording the mutual consent of the appellant and the respondent on certain agreed terms and conditions. The appellant, having obtained the decree of divorce by mutual consent, is estopped from filing the present application seeking modification without the consent of the respondent, who was also one of the petitioners in the Petition filed under Section 13-B of The Hindu Marriage Act for dissolution of the marriage by mutual consent. It is further contended that the respondent, inspite of his financial constraints, is complying with the payment of interim maintenance till date without any default, while so, the present application filed by the appellant for modification of the consent decree passed on 09.12.2014 in HMOP No. 1507 of 2014 has to be dismissed.

5. The Family Court, on considering the submission of counsel for both sides dismissed the application filed by the appellant by concluding that the modification sought is in the nature of granting a new relief, which does not form part of the order dated 09.12.2014 passed in HMOP No. 1507 of 2014 filed under Section 13-B of The Hindu Marriage Act by the appellant and the respondent. Aggrieved by the same, the present Civil Miscellaneous Appeal is filed by the appellant.

6. The learned counsel for the appellant would contend that in para No.6 of the Original Petition filed by the appellant and the respondent under Section 13-B of The Hindu Marriage Act, clear reference was made regarding the custody of the minor child with the appellant herein and the unlimited visitation rights conferred on the respondent. After passing such decree for dissolution of the marriage on the ground of mutual consent, certain modification is required in the best interest of the minor child and therefore, the petition for modification has been filed by the appellant. In such circumstances, it cannot be said that the relief prayed for by the petitioner in I.A. No. 1501 of 2016 would change the nature and character of the terms and conditions agreed between the appellant and the respondent. Furthermore, the respondent herein, taking advantage of the unrestricted limitation rights conferred upon him, is seeking the custody of the minor son on and off without taking note of the academic curriculum or

physical condition of the minor son and therefore, the petitioner cannot be expected to file a joint petition seeking modification of the terms and conditions on which the decree for dissolution of marriage by mutual consent was passed. Further, the prayer of the appellant to pay the maintenance and school fees directly into her Bank Account is fair and reasonable and therefore the learned counsel for the appellant prayed for allowing this appeal.

7. When the appeal was taken up for hearing, there was no representation for the respondent and therefore, this Court directed the Legal Services Authority to appoint a counsel to appear on behalf of the respondent herein. Accordingly, the counsel was appointed by the Legal Services Authority to represent the respondent in this case.

8. The learned counsel appointed by the Legal Services Authority for the respondent would vehemently contend that when once a decree was passed under Section 13-B on the basis of the consent given by the appellant as well as the respondent, the terms and conditions on which such decree was passed cannot be altered or modified. In the present case, the relief sought for by the appellant is beyond the terms and conditions which were agreed to by the appellant and the respondent at the time of filing the Petition under Section 13-B of The Hindu Marriage Act. The appellant, having agreed to the terms and conditions on which the petition under Section 13-B has been filed is estopped from filing the present application seeking modification. Further, in the petition for modification, the appellant seeks for enhancement of the monthly maintenance from Rs.25,000/- to Rs.50,000/- and if such prayer is entertained, it would amount to re-writing the terms on which the consent decree was passed. In any event, the application for modification of the decree passed in HMOP No. 1507 of 2014 by recording the consent given by the appellant and the respondent cannot be modified at the instance of the appellant and he prayed for dismissal of the appeal.

9. We have heard the counsel for both sides. Admittedly, on the basis of the consent given by the appellant and the respondent to dissolve the marriage solemnised between them by filing the petition under Section 13-B of The Hindu Marriage Act, the decree dated 09.12.2014 was passed by the Family Court by only recording the consensus arrived at between the appellant and the respondent. As rightly pointed out by the counsel for the respondent, the appellant had agreed to the terms and conditions relating to payment of monthly maintenance, visitation right of the child etc., and when once she had agreed to such terms and conditions with open eyes, she is estopped from turning around to say that the conditions are

required to be modified in view of certain stated circumstances. Such an act on the part of the appellant would squarely fall within the legal maxim consensus facit legem. When the appellant had given her consent for passing a decree in terms of certain conditions, in good faith, then such a consent will not only bind her but the Court will also insist for the terms and conditions incorporated therein to be scrupulously carried out.

10. In the present case, admittedly, the respondent is complying with the condition relating to payment of monthly maintenance of Rs.25,000/- and it is also agreed by the appellant. When the respondent adhered to the terms and conditions as incorporated in the decree for dissolution of the marriage by mutual consent, the present application filed by the appellant is not maintainable. If the application filed by the appellant is entertained, it will enlarge the scope of the consent decree passed by the Family Court by recording the consent arrived at between the appellant and the respondent. In such circumstances, at the instance of the appellant, the terms and conditions on which the consent decree dated 09.12.2014 was passed by the Family Court cannot be re-written, altered or modified. If the respondent contravenes any of the terms and conditions incorporated in the decree dated 09.12.2014 passed in HMOP No. 1507 of 2014, it is always open to the appellant to file an execution petition in a manner known to law. In any event, we do not see any infirmity or perversity in the order passed by the Family Court refusing to modify the decree dated 09.12.2014.

11. In the result, the Civil Miscellaneous Appeal fails and it is dismissed. No costs. Consequently, connected CMP No. 17068 of 2017 is closed.

Sd/-

Assistant Registrar(CS-VIII)

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Sub Assistant Registrar

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To

The Principal Judge
Family Court, Chennai
Chennai.

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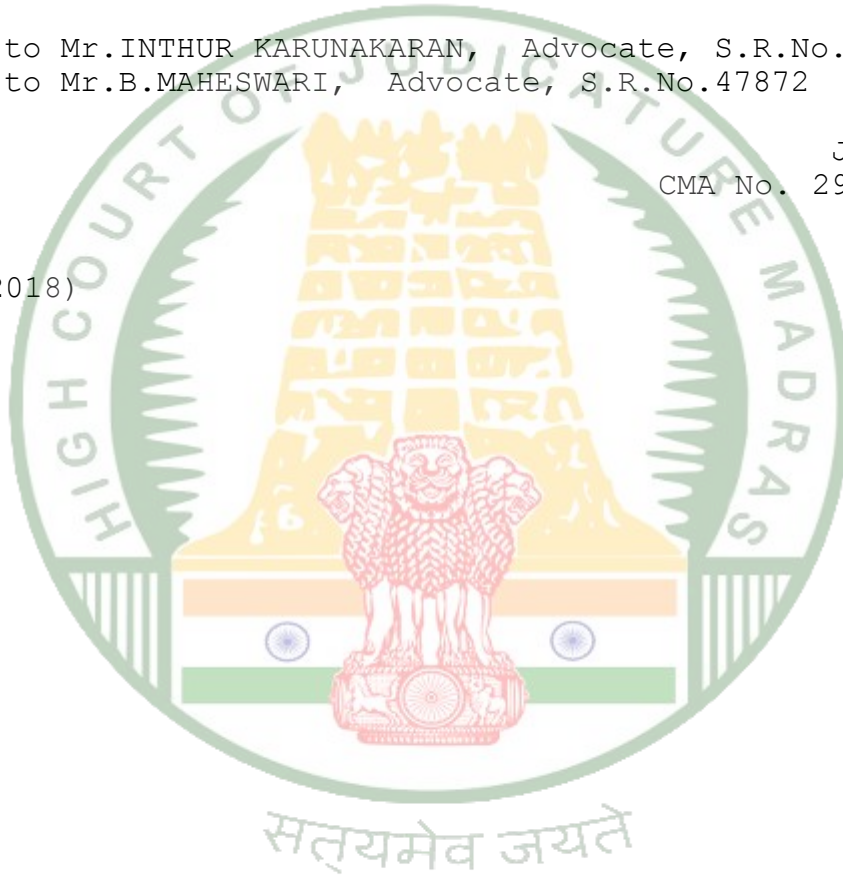
The Section Officer,
V.R. Section, High Court, Madras.(2 copies)

+1cc to Mr.INTHUR KARUNAKARAN, Advocate, S.R.No.48171

+1cc to Mr.B.MAHESWARI, Advocate, S.R.No.47872

Judgment in
CMA No. 2902 of 2017

MG(CO)
TR(02/08/2018)



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