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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 16.10.2018

Pronounced on : 26.10.2018

CORAM

THE HONOURABLE MR.JUSTICE M.V.MURALIDARAN

C.R.P. (MD) (PD) No.2335 of 2018

S.Srinath

... Petitioner

-vs-

J.Kalpana

... Respondent

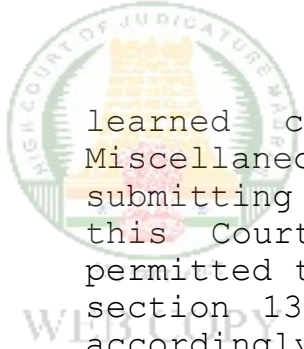
PRAYER: Civil Revision Petition filed under Section Article 227 of the Constitution of India, against the original suit filed by the Petitioners in HMOP.No.14 of 2018, pending on the file of the learned Subordinate Judge, Aruppukottai, Virudhunagar District.

For Petitioner : Mr.C.M.Arumugam

O R D E R

The instant Civil Revision Petition is preferred as against the original petition filed between the Petitioner and respondent as petitioners in H.M.O.P.No.14 of 2018 and the same is pending before the learned Subordinate Judge, Aruppukottai, Virudhunagar District.

2.According to the learned counsel for the petitioner that the aforesaid Original Petition was filed by the Petitioner herein and the respondent under section 13(B) of the Hindu Marriage Act,1955 for the relief of dissolution of their marriage under mutual consent which was solemnized on 26.01.2015, at L.S.Mahal, Aathipatty Village, Thiruchuli Road, Aruppukottai, Virudhunagar District. The learned Counsel further submitted that due to strained relationship between the spouses, for the past three years they are living separately, and there is no possibility for their re-union as the marital relationship between them has irretrievably broken down. So, the husband has earlier preferred a petition through his mother as Power Agent under section 13 (1) (i-a) (i-b) of the Hindu Marriage Act, 1955. Thereafter, the wife filed a Tr.C.M.P.(MD)No.173 of 2018 in this Court and on 19.09.2018, when the said Tr.C.M.P.No.173 of 2018 was taken up for hearing, it was informed this Court that the marriage has irretrievably broken down and the

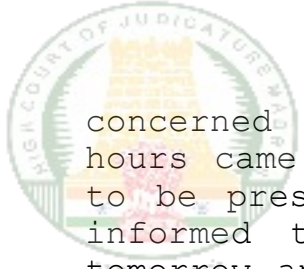


learned counsel for the petitioner in the Transfer Civil Miscellaneous petition, having a memo signed by the wife for submitting to decree. It is brought to the notice of this court that this Court in the proceedings in Tr.C.M.P.(MD)No.173 of 2018 permitted the petitioner and the respondent to file a petition under section 13 (B) of the Hindu Marriage Act to get their redressal accordingly order was passed as follows:

"This Court permits the respondent's mother cum power agent, namely Saraswathy and the petitioner herein to file an application for converting the H.M.O.P No.14 of 2018 into a petition under section 13(B) of the Hindu Marriage Act. Since, the H.M.O.P was filed way back in December 2017, the question of waiving the six months period may not really arise in this case. Of course, the court below will have to satisfy itself that the respondent, namely, the husband, is also willing for such a mutual consent divorce. His evidence can be taken through the video conference, the counsel appearing for both the parties should authenticate the identity of the person giving evidence through video conference facility. Upon being satisfied that both the parties are consenting for mutual consent divorce, the court below shall, allow the amended H.M.O.P as prayed for".

3.It is seen from the records that thereafter the matter was taken up by the learned trial court on 25.09.2018 for hearing and after sending information to the parties concerned, the matter was adjourned to 26.09.2018. As per the direction of the learned trial court, the parties concerned with their respective learned counsels appeared before the learned trial court on 26.09.2018 and on the same day amendment petition along with Amended Petition Copy was filed by putting their signatures and the same was allowed. At the same time, in order to ascertain the consent of the husband, since he is in the United States, for video conferencing the case was adjourned to 27.09.2018. Accordingly, the petitioner and the respondent were present before the learned trial court, but due to the failure in video conferencing in the Aruppukkottai Court, all the parties concerned were directed by the learned trial court to be present at the District Court complex, Srivilliputhur server room for video conferencing.

4.It is further brought to the notice of this Court, in respect of the proceedings recorded by the learned trial court on 27.09.2018, where the learned trial judge has confirmed and recorded as follows: "Video conferring recording was done in camera at video conferring centre at the District Court complex, Srivilliputhur. It took hardly 10 to 15 minutes for recording after the connection. At the end of video conference I have confirmed that the husband and wife are willing for mutual divorce" So, it is clear that on 27.09.2018 itself, the learned trial judge has recorded the consent of the husband and wife about their willingness to go for divorce on mutual consent. Further, it is the fact that the wife also signed in the proof affidavit and entrusted the same to the learned Counsel

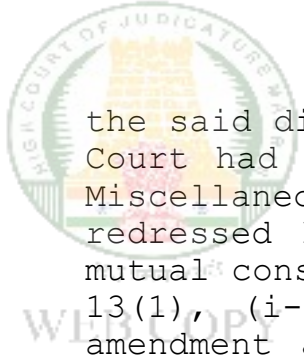


concerned in order to record her chief examination. As the court hours came to an end, the learned trial judge directed the parties to be present on the next day that is on 28.09.2018, but it was informed that the wife has to leave United States of America tomorrow and requested the learned trial court to take up the case on 27.09.2018 itself, but the request was not accepted and the case was adjourned to 28.09.2018. However, on that day the wife did not appear before the learned trial court, but her consent for divorce was ascertained even on the prior day by the learned trial court and the same was recorded. Further, on 29.9.2018, the petitioner has given her evidence through the power agent that is his mother and the same was recorded by the learned trial court. However, according to the learned counsel for the revision petitioner presently, the evidence of the wife is also available and the same may be permitted by the learned trial court by dispensing with her physical appearance. At the same time, it is the fact that the wife is unable to appear before the learned trial court in the near future as she is having no chance to come down to India. In this regard, the learned counsel for the petitioner has relied on the judgment of the Hon'ble Supreme Court reported in (2012) 2 MLJ page 595 in Rasiklal Manickchand Dhariwal and another -Vs- M.S.S. Food Products, wherein it is held as follows:

"Code of Civil Procedure (5 of 1908), Order 18, Rules 4 and 5- Recording of evidence-Examination- in -chief of witnesses through affidavits- whether to be treated as evidence without entry of deponent into witness box and confirmation of contents of affidavits-examination-in-chief by means of affidavit, always sworn before Oath commissioner/Notary-witnesses not required under order 18, rule 5 to enter witness box for production of his affidavit and formally prove it in appealable cases, as he is required to enter witness box in cross-examination-examination-in chief of Witness in form of affidavit entitled to be treated as evidence. Third, the subsequent paragraph 33 makes the legal position further clear. This court said, "Presence of a party during examination -in- chief is not imperative. If any objection is taken to any statement made in the affidavit, as for example, that a statement has been made beyond the pleadings, such an objection can always be taken before the court in writing and in any event, the attention of the witness can always be drawn while cross-examining him".

5.I heard Mr.C.M.Arumugam, learned counsel for the petitioner and the materials available on records are perused.

6.It is the case where the husband has filed a petition for divorce by invoking the provision under sections 13(1), (i-a) (i-b) of the Hindu Marriage Act, 1955. Later, the wife was ready to allow



the said divorce petition by submitting the same to decree, but this Court had an occasion to deal with the matter in a Transfer Civil Miscellaneous Petition and advised the parties concerned to get redressed by amending the prayer of dissolving their marriage on mutual consent instead of the grounds as contemplated under sections 13(1), (i-a) (i-b) of the Hindu Marriage Act, 1955. Accordingly, amendment application was filed before the learned trial court by the parties concerned especially by the wife also and the same was allowed. Thereafter, the consent of the husband was also recorded through video conferencing and the same is recorded in the proceedings of the learned trial judge on 27.09.2018. So, it is clear that the consent of the wife to go for divorce on mutual consent is ascertained by the learned trial court in person. But the evidence of the wife for the chief examination alone is to be completed and for that reason, the learned trial court directed the wife to be present and step into the witness box.

7.The findings of the Hon'ble Supreme Court in this regards is very clear. Apart from that it is admitted case that there cannot be any cross examination on the chief examination of the wife and no exhibit is required to be marked through the wife. Under these circumstances I am fortified with the judgment of the Hon'ble Supreme Court and that apart Order 18, Rule 1 of Code of Civil Procedure Code. In addition to that Section 33 of the Indian Evidence Act is very clear that "evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving the fact.

8.In the interpretation clause that is section 3 of the Indian Evidence Act 1872, "evidence means and includes; "all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry, such documents are called oral evidence. All documents including electronic records produced for the inspection of the court."

9.Here in the instant case on 27.09.2018 itself the learned trial judge has recorded the consent of the wife for mutual consent and the same would come under the definition of evidence. In addition to that the wife has put her signature in the proof affidavit and entrusted the same to her counsel. So, it is no need for her once again to come to the witness box to file her proof affidavit as the same is only her chief examination. For this reason, the learned trial court shall not direct the wife to be present in the court as the consent of the wife is already recorded by the learned trial court in the judicial proceedings on 27.09.2018 itself.

10.Therefore, for the above discussions and in the considered opinion of this Court, the physical presence of the wife in an



application filed for divorce on mutual consent is not required to file her evidence in the form of proof affidavit when no cross examination is warranted and no exhibit is proposed to mark. Accordingly, the civil revision petition is allowed and there is no order as to costs.

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11. Further, to meet the ends of justice the learned trial Court is directed to dispose of the H.M.O.P.No.14 of 2018 as expeditiously as possible by taking the proof affidavit of the wife into consideration and also in considering that her consent to go for divorce on mutual consent is already recorded would suffice for the disposal of the case in the manner known to law.

Sd/-

Assistant Registrar (T&P)

/True Copy/

Sub Assistant Registrar (CS-III)

vsv

To

The Subordinate Judge,

Aruppukottai, Virudhunagar District.

+1cc to Mr.C.M.Arumugam, Advocate in SR No.92980

C.R.P. (MD) No.2335 of 2018

NM/SKN/SAR III/30.10.18/5P/3C.