



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 29.01.2018

(Reserved on 30.11.2017)

CORAM :

THE HONOURABLE MRS.JUSTICE J.NISHA BANU

CRP (NPD) (MD) No.1197 of 2017

WEB COPY

Balachitra

... Petitioner/Petitioner/
Respondent/Respondent
vs.

Kumaran

... Respondent/Respondent/
Petitioner/Petitioner.

Petition filed under Article 227 of the Constitution of India, to set aside the order of return dated 25.04.2017 passed in unnumbered I.A.Sr.No.1816 of 2017 in I.A.No.18 of 2017 in HMOP.No.66 of 2015 on the file of Subordinate Judge, Virudhunagar and to direct the lower court to take the application on file and number the same.

For Petitioner

: Mr.R.Raja

For Respondent

: Mr.L.Prabhu

ORDER

This Civil Revision Petition has been filed to set aside the order of return dated 25.04.2017 passed in unnumbered I.A.Sr.No.1816 of 2017 in I.A.No.18 of 2017 in HMOP.No.66 of 2015 on the file of Subordinate Judge, Virudhunagar and to direct the lower court to take the application on file and number the same.

2.Learned counsel for the petitioner would submit that the marriage between the petitioner and respondent had taken place on 11.06.1997. The petitioner has filed a petition in HMOP.No.66 of 2015 on the file of the Sub Court, Virudhunagar, under Section 13(1) (ib) of the Hindu Marriage Act, wherein, ex parte order of divorce was granted. The ground under which the petitioner sought divorce was that the respondent did not maintain the family and he left the matrimonial home without any information and on that ground, order of divorce was granted.

3.It is further submitted that the respondent has filed an application to set aside the ex parte order of divorce and when the said petition was pending, the petitioner filed an application under Section 24 of the Hindu Marriage Act for interim maintenance and the Court below returned the said petition stating that no HMOP is pending as on date. Against the said return, this revision petition has been filed. In support of his contention, learned counsel for the petitioner relied on the following judgments:-

(i) Jayesh Trillokumar Shah vs. Julie Jayash Shah (W.P.No.457 of 2017 Decided on 17.02.2017)

<https://hcservices.ecourts.gov.in/hcservices/>

(ii) Rishi Dev Anand vs. Devinder Kaur reported in AIR 1985 Delhi 40.



4. Learned counsel for the respondent would submit that the litigation is not pending and therefore, the wife is not entitled for maintenance.

5. Heard the learned counsel for the petitioner as well as the respondent and perused the materials available on record.

6. Perusal of the records shows that the petitioner has obtained exparte divorce stating that the respondent had left the matrimonial home and had been in the habit of drinking and was not supporting the family. Admittedly, the respondent has filed a petition to set aside the ex parte order and the petitioner has filed a petition for interim maintenance under Section 24 of the Hindu Marriage Act.

7. Now, the only question to be decided before this Court is whether the petitioner is entitled for maintenance when the petition for divorce has been ordered and whether the petition for maintenance under Section 24 of the Hindu Marriage Act is maintainable. In this regard, it is relevant to extract below Section 24 of the Hindu Marriage Act:-

''24. Maintenance pendente lite and expenses of proceedings:-- Where in any proceeding under this Act it appears to the court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may, on the application of the wife or the husband, order the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the court to be reasonable.''

8. Reading of the above provision will make one to understand the object behind the enactment of the Act and while considering the object behind the enactment, it will not be appropriate to hold that the phrase 'any proceedings under this Act' excludes from its sweep an application as that of the present application filed by the respondent to set aside the exparte order. In the present case, exparte order of divorce has been granted to the petitioner/wife and the respondent filed a petition to set aside the exparte order. That being the fact situation, one has to see whether divorce application filed by the wife was granted by her own act of desertion. Perusal of record shows that due to the activities of the respondent, the petitioner was forced to file a divorce application with his son namely, Prasanna Kumar aged 17 years who is mentally retarded and daughter namely, Prathibasri aged 13 years. Admittedly, the respondent has filed a petition to set aside the exparte order which is also pending. The petitioner has filed application under Section 24 of the Hindu Marriage Act stating that she is in requirement of money to maintain her son and daughter, one of whom is mentally retarded.



9. In Jayesh Trillokumar Shah vs. Julie Jayash Shah (W.P.No.457 of 2017 Decided on 17.02.2017), relied on by the counsel for petitioner, it has been held as follows:-

"Therefore, it would not be appropriate to give a restricted meaning to the phrase 'any proceeding under this Act' and to exclude from its sweep, proceedings for restoration of the main petition, particularly when the main petition has not been dismissed on merits as such, but on grounds of default on the part of a party or his advocate. The question as to whether any interim maintenance or expense of proceedings should be awarded or not is a matter which will have to be considered based upon the facts and circumstances of each case. However, to say that once the main petition stands dismissed, any proceedings for restoration of the main proceedings, do not even qualify to be regarded as 'any proceedings under this Act', is not a proposition which can be easily accepted."

10. In Rishi Dev Anand vs. Devinder Kaur reported in AIR 1985 Delhi 40, relied on by the counsel for petitioner, it has been held as follows:

"4..... The word "proceedings" used in Section 24 is a word of wide import and cannot be said to have a restricted meaning. It has been held in various authorities that the term "proceedings" in Section 24 is not confined only to substantive proceedings like restitution of conjugal rights, judicial separation, annulment of marriage and divorce proceedings. An application under Section 24 of the Act has been held to be maintainable even in proceedings under Section 25 thereof for permanent alimony and maintenance. It is also maintainable in execution proceedings.

5. Under the Act no provision has been made for setting aside the ex parte decree. Necessarily, therefore, recourse has to be taken to the provisions of the Code of Civil Procedure for this purpose. If a spouse has to make an application after a decree under the Act has been passed, provisions of Order 9 Rule 13 of the Code in view of Section 21 of the Act are attracted. The question is whether such a spouse, who has no means, is entitled to receive interim maintenance and litigation expenses during the pendency of the application.

6. An order passed by Avadh Behari J. on an interim application where he took a prima facie view that proceedings under Order 9 Rule 13 of the Code are under the Act, has been brought to my notice. That order was passed in C.M. application No. 1938 of 1978 in a pending Civil Revision Petition No. 654 of 1978. The facts in the said case were that an ex parte decree for divorce on the ground of desertion was passed against the wife on May 7, 1977. The judgment-debtor filed an application on February 28, 1978, under



Order 9 Rule 13 of the Code of Civil Procedure for setting it aside. She also filed an application under Section 24 of the Hindu Marriage Act. The trial Court while holding that the application was maintainable ordered the husband to pay a sum of Rs. 100.00 per month as alimony pendente lite and Rs.200.00 as litigation expenses. The said order is under challenge in that revision petition. On the application seeking stay of the operation of that order, after hearing counsel for the parties it was observed: "After hearing, the parties I do not think I should suspend the order of the court below. The wife has made an application under Order 9 Rule 13 Civil Procedure Code for setting aside the ex parte decree of divorce. Under S. 24 of the Hindi Marriage Act, she has to be maintained by the husband. Prima facie I am of the view that this is a proceeding under the Act....."

7.I further find that this Court has held that an application under Section 24 of the Act is also maintainable in proceedings for restoration of an application under Section 25 of the Act.''

11.Reading of Section 24 of the Hindu Marriage Act would clearly show that even a petition to set aside the ex parte order is also a proceeding under this Act and the judgments relied on by the learned counsel for the petitioner are also squarely applicable to the present case.

12.Therefore, the impugned order of return dated 25.04.2017 passed in unnumbered I.A.Sr.No.1816 of 2017 in I.A.No.18 of 2017 in HMOP.No.66 of 2015 on the file of Subordinate Court, Virudhunagar, is set aside and the revision petitioner is directed to re-present the petition in I.A.Sr.No.1816 of 2017 forthwith and the learned Sub Judge, Virudhunagar, is directed to number the same and to pass orders on merits and in accordance with law, after taking note of the judgments relied on by the petitioner herein.

With the above direction, this Civil Revision Petition is allowed. No costs.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To

The Subordinate Judge, Virudhunagar.

+1CC to Mr.R.Raja, Advocate, SR.No. 45018

+1CC to Mr.l.Prabhu, Advocate, SR.No. 44376

Copy to: The Section Officer, V.R.Section,

Madurai Bench of Madras High Court, Madurai(2 Copies)

order made in

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