

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.07.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A. No.11 of 2001
and C.M.P. No.6095 of 2001

L.Jayaraman

... Appellant/Petitioner

-vs-

V.Jayammal

... Respondent/Respondent

Prayer: Civil Miscellaneous Second Appeal filed under Section 100 of the Civil Procedure Code read with Section 13(1)(1-A)(1-B) of the Hindu Marriage Act, 1955 against the fair and final order passed by the II Additional District Court, Erode made in C.M.A. No.28 of 1997 dated 14.08.2000 confirming the fair and final order passed by the Sub Court, Bhavani dated 25.02.1997 made in H.M.O.P. No.5 of 1995.

For Appellant : Mr.S.Vijaya Kumar

For Respondent : No appearance

JUDGMENT

The appeal has been filed challenging the order dated 14.08.2000 passed by the II Additional District Court, Erode made in C.M.A. No.28 of 1997 confirming the order dated 25.02.1997 passed by the Sub Court, Bhavani made in H.M.O.P. No.5 of 1995.

2.Learned counsel appearing for the appellant husband would submit that when there was a marriage solemnised between the appellant and the respondent on 10.09.1986, after living only for five months, the respondent wife left the matrimonial house for valaikappu. After abortion took place, the respondent returned to the matrimonial home again and thereafter, she left the matrimonial house in the year 1988. Subsequently, she has not come back. Therefore, the appellant husband filed H.M.O.P. No.5 of 1995 under Section 13(1)(1a)(1b) of the Hindu Marriage Act seeking dissolution of marriage. During the pendency of the petition, the appellant husband has also moved an Application in I.A. No.44 of 1996 seeking direction against the respondent wife and her child to subject themselves for the medical examination

to identify the paternity of the child of the respondent including blood test, blood group, genetic test and other tests which are required for the medical report to be filed before this Court relating to the paternity of the child. The respondent filed counter opposing the above prayer stating that the child was born to the appellant. Thereafter, a notice has been given by the appellant to the respondent to undergo DNA test at the Kovai Medical Centre, Coimbatore with the request to produce the child at Kovai Medical Centre, on 28.09.1996 at 8.00 a.m.

3. Under this background, learned counsel appearing for the appellant argued that the Trial Court dismissed the divorce petition in H.M.O.P. No.5 of 1995 refusing to dissolve the marriage and as against the same, an Appeal was filed before the II Additional District Court, Erode. Finding no infirmity in the order passed by the Sub Court, Bhavani, the Appellate Court confirmed the order, refusing to grant divorce under Section 13 (1-a)&(1-b) of the Hindu Marriage Act 1955. As against the same, the present CMSA has been filed. This Court, while entertaining the appeal, has framed the following substantial questions of law:

- a) Whether the Lower Appellate Court is correct in dismissing the appeal when the lower appellate Court having allowed I.A. No.581 of 1997 and marked the birth certificate of the respondent's son as Ex-P7 failed to give any finding with regard to Ex-P7?
- b) Whether the Courts below are correct in dismissing the petition for divorce when it failed to take adverse inference against the wife when she was withholding the best evidence of the birth certificate of the child?
- c) Whether the Courts below are correct in dismissing the petition for divorce without taking into consideration the evidence of P.Ws?

4. The Trial Court and the Appellate Court, having consistently disagreed with the prayer of the appellant husband for dissolution of the marriage, dismissed the petitions filed by the appellant. When there was a plea taken by the appellant husband that the child was not born to him, he has to produce any evidence to substantiate his claim. When he was all the time insisting upon the respondent wife to go for DNA test, he has not done the same in any Hospital and that too, he was all the time insisted upon her to undergo the test only before the Kovai Medical Centre, Coimbatore. Therefore, the genetic test could not be undergone.

5. Learned Trial Court has given a finding that the story made by the appellant husband that the respondent was conceived because of another person has not been established since the

respondent pleaded that in the year 1988 she was living with the appellant at Gobichettipalayam. In view thereof, the Trial Court refused the prayer for dissolution of marriage and on appeal by the appellant, it was refused. As there was a concurrent finding of fact reached by both the Courts below refusing the prayer for dissolution of marriage under Section 13(1-a) & (1-b) of the Hindu Marriage Act, this Court is not able to find any merit in the appeal.

6. Merely marking the birth certificate of the respondent's son as Ex.P7, cannot improve or alter the case of the appellant as he should have produced reliable evidence to prove his case. Learned counsel appearing for the appellant argued that there was an order obtained from the Court below directing to undergo DNA test in the Government Hospital, but no order has been produced to prove his submission. More over, the appellant has not undergone the DNA test to establish the paternity of the child and no such efforts have been taken by the appellant to prove his case by producing sufficient materials to show that the child was not born to him. The concurrent findings of fact arrived at by both the Trial Court and the Appellate Court are in order. Thus, the substantial questions of law are answered against the appellant. Accordingly, the appeal is dismissed. No costs. Consequently, C.M.P. No.6095 of 2001 is closed.

s/d-
Assistant Registrar (CS V)

True Copy

Sub-Assistant Registrar

vga

To

1. The II Additional District Judge, Erode

2. The Subordinate Judge, Bhavani

Copy to

The Section officer

VR Section

High Court, Madras 104.

+1 CC to Mr.S.Vijaya Kumar, advocate sr 55531.

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SAI (CO)
SP(03/02/2020)