

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 21.10.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.No.26 of 2009

V.Ravi Kumar

... Appellant

Vs.

K.A.Anandhi

... Respondent

Prayer: Civil Miscellaneous Second Appeal is filed under Order 41, Rule 1 r/w Section 100 of Civil Procedure Code to set aside the Judgment and Decree of Additional District Cum Fast Track Court No.1, Erode in C.M.A.No.8 of 2009 dated 29.04.2009 and uphold the decree in H.M.O.P.No.39 of 2007 dated 25.08.2008 passed by learned Principal Subordinate Judge, Erode.

For Appellant : Mr.C.Kasirajan

For Respondent : No Appearance

J U D G M E N T

The appellant has filed the present Civil Miscellaneous Second Appeal seeking to set aside the Judgment and Decree dated 29.04.2009 passed in C.M.A.No.8 of 2009 on the file of Additional District cum Fast Track Court No.1, Erode reversing the Judgment and Decree passed in H.M.O.P.No.39 of 2007 on the file of learned Chief Subordinate Judge, Erode dated 25.08.2008.

2. The case of the appellant / husband is that he got married to the respondent on 18.05.2001 at Salem Rathinavel Gounder Kalayanamandapam, as per Hindu Rites and Customs. They were living together till December 2004 at Salem. In November, 2004, the respondent had severe stomach pain and after the scan was taken, it was found that the baby was formed in the fallopian tube. In consequence, an operation was performed and the respondent's life was saved. The respondent stayed in the appellant's house after the operation and her mother left the respondent immediately and proceeded to job stating there will be loss of pay and did not take care of the respondent. The appellant only took care of his wife. In the meantime, since his sister delivered a child, the appellant's parents had to

take care of his sister. The appellant, took care of respondent all along. The statement made that due to anguish, the respondent left the appellant's house and went to her parents house, is false and denied. As the respondent did not come back immediately, the appellant and the respondent used to talk over phone. Further, the respondent informed over phone to the appellant that there was some dosham in her Jathagam [horoscope] and the parents of the respondent advised her to be separated from the husband for atleast two years. The appellant agreed for the same because of his love towards his wife and they were talking over phone with the knowledge of their parents. The respondent had sent a greeting card to the appellant stating 'sorry'. The appellant had also met the respondent in the year 2006, at that time, she had informed him that if she gets a baby, it will be fatal to her life and hence she wanted to avoid getting pregnant. Further, it is stated by the appellant that the respondent has informed to her mother that even without child, they can live happily. Thereafter, to the surprise to the appellant, the respondent has sent a legal notice on 01.08.2006 seeking consent for mutual divorce, but the appellant expected only love and affection from the respondent and hence he prayed for dismissal of the erroneous order passed by the lower appellate court in C.M.A.No.8 of 2009.

3. The trial court, after hearing both the parties, has observed that the appellant / husband used to have suspicious mind, used to torture his wife/respondent and used to connect the respondent with some other persons working with her and by scolding her personally. He did not like the respondent giving treatment to male patients by touching their hands and he did not allow her to go to college where she was working and had erroneously dismissed the petition filed by the respondent/wife on the ground that there was no reasons made out on the ground of cruelty and separation.

4.The lower Appellate Court, viz., the Additional District Court cum Fast Track Court No.1, Erode, by taking note of the various averments in the petition as well as the order passed by the trial court, reversed the findings of the trial court and granted divorce to the wife on 29.04.2009 in C.M.A.No.8 of 2009. Aggrieved by the order passed by the lower appellate Court, the appellant / husband has filed the present Civil Miscellaneous Second Appeal.

5. This Court while admitting the present appeal on 10.09.2009 has raised the following Substantial Questions of Law:

'(i) Whether the first appellate Court has erred in allowing the CMA No.8 of 2009 without taking into consideration of non filing of Section 5 petition by the wife under the Limitation Act.

(ii) Whether the appellate court has erred in allowing the CMA No.8 of 2019 based on assumption that the husband has not taken any steps for reunion.

(iii) Whether the first appellate Court has misconstrued the evidence and documents filed before the trial court.'

6. It is the contention of the learned counsel for the appellant that the trial court has passed the order in H.M.O.P.No.39 of 2007 [petition filed by the respondent /wife for grant of divorce and the same was dismissed] on 25.08.2008. The certified copy of the decree was made ready on 06.09.2008, but the appeal petition was filed by the respondent herein on 19.01.2009 i.e., about 106 days without filing any application to condone the delay. The lower appellate court has not considered this aspect and taken up the appeal, which is barred by limitation.

7. Apart from the above, it is contended on behalf of the appellant that in the lower appellate court, the first hearing was on 02.04.2009 and the decree was passed in just 27 days, i.e., 29.04.2009 within the short period, the court would not have assessed the case properly and had not taken any steps for reunion. It has been disposed of in a quick manner to prevent any possibility for reunion and no counselling was given to both the parties. Further, the salient features of counselling were overlooked by the lower appellate court and without giving a chance for reunion with preconceived notions and without giving any reasons, had decided the issue.

8. It is also brought to the notice of this Court that the respondent has completed Bachelor Degree of Physiotherapy and in fact, notice was sent by the appellant in response to the notice sent by the respondent on 3.10.2006 (Ex.3). However, misrepresentation was made by the respondent's side and the court has held that the appellant and the respondent were not in contact with each other and concealed the facts in the trial court.

9. It is contended on behalf of the appellant that the lower appellate court has failed to assess the lack of credibility of the respondent with regard to the contrary statements about FIR filed for the sake of obtaining duplicate certificates; regarding her completion of master's degree in Physiotherapy and working at college in Maharashtra; but the appellant was crippled by the alleged cruelty. Also, the respondent has sought for divorce, the trial court stating that no cruelty was committed by the appellant/husband had clearly considered the issue and dismissed the petition of the respondent without any error. The appellant seeks to re-unite

with the respondent and hence, prays to set aside the order of the lower appellate court.

10. Heard the learned counsel for the appellant and perused the documents placed on record. Though the name of the respondent is printed in the cause list, there is no representation for the respondent either in person or through learned counsel.

11. It is pertinent to note that without condoning the delay, the Civil Miscellaneous Appeal would not have been numbered and there is no material to show that Limitation Petition under Section 5 was not filed. Mere averments is not sufficient. Also, there is no material to show that there was any petition filed by the appellant / husband to dismiss the same for not filing the said appeal within time. The delay is only few months and can be condoned and further, there is no materials produced to show that delay petition was filed or not filed. Apart from the above, it is immaterial for the counsel to connect the arguments and disposal done by the concerned Judge. It is prerogative of the Judge to take up the case.

12. On a perusal of the documents placed on record it is seen that the respondent has left the matrimonial house and had stayed with her parents for long period, viz., from 2004 onwards. Even though appellant has submitted that they were in talking terms in the year 2006, there is no material to show the same. In the year 2007, the respondent / wife has filed a petition for divorce, i.e., after three years of their separation. The respondent has sent a notice also and the appellant has also replied. But, the case of the respondent/wife was that the appellant was always suspecting her for each and every thing and the appellant was of 'suspicious nature'. The appellant used to harass the respondent to 'say sorry' for silly things and for no fault on the part of the respondent. While the respondent was working at Shanmuga Physiotherapy, she used to go outside with regard to official work, at that time, appellant used to connect her with all the persons. If the respondent keeps flowers in her head, the appellant used to scold by stating that she is keeping those flowers for somebody and due to which, the respondent stopped keeping flowers. The appellant has stated to his close relative that he does not like the respondent touching patients and giving treatment and even for treating the patients the appellant had suspected the respondent, which has not tolerated by the respondent, who is a qualified physiotherapist.

13. Further, the appellant has stated that he likes a girl, namely, Ramya and only because she has shown way by giving alms to the respondent, he has married the respondent, otherwise,

Ramya would have been his wife. Also, the appellant did not allow the respondent to go for work and he used to torture her, due to which, the respondent had been to her parents house and she did not turn back. The appellant's statement that he had taken care of the respondent is not proved by any supporting materials. The appellant has not given any evidence regarding any steps taken for reunion with the wife.

14. In matrimonial issues, proper trust between the parties is a must and if one person does not trust another person and have suspicion over their character or any other thing, and torture is made, there cannot be a life carried on by both the parties. If cruelty is made inadvertently and affects one person, the other person repents and if it is accepted, there can be chances of reunion. When the husband does not trust a wife, who is a qualified physiotherapist and whose job itself is to help patients for a effective movements of body, she has no other choice, rather than filing a petition for divorce. There is no material to show that cruelty has been committed by the respondent/wife. From the evidence of the respondent / wife it is clear that she has undergone cruelty and due to unbearable mental torture, she has proceeded to her parents house. The respondent has completed her master's degree and in her own evidence she has averred that she has no inclination to live with the appellant/Husband, therefore, this Court cannot compel the respondent/ wife to live with the husband after a long period of 15 years. It is also seen that that she is residing at Maharastra and not in Tamilnadu to knew her present status of mind. The life between two persons is like a glass bowl filled with oil to be handled carefully. If the same breaks, it cannot be united and spilled oil cannot be filled back. As the mutual love and trust is not showed equally, the life will be withered like a tree in fall season. The substantial questions of law raised are answered in favour of the respondent.

In view of the above reasons and in the light of the Judgment stated supra, the present C.M.S.A.No.26 of 2009 filed by the appellant stands dismissed and the order passed by the learned Additional District Cum Fast Track Court No.1, Erode in C.M.A.No.8 of 2009 dated 29.04.2009 stands confirmed. No costs.

Sd/-

Assistant Registrar (CS-V)

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Sub Assistant Registrar

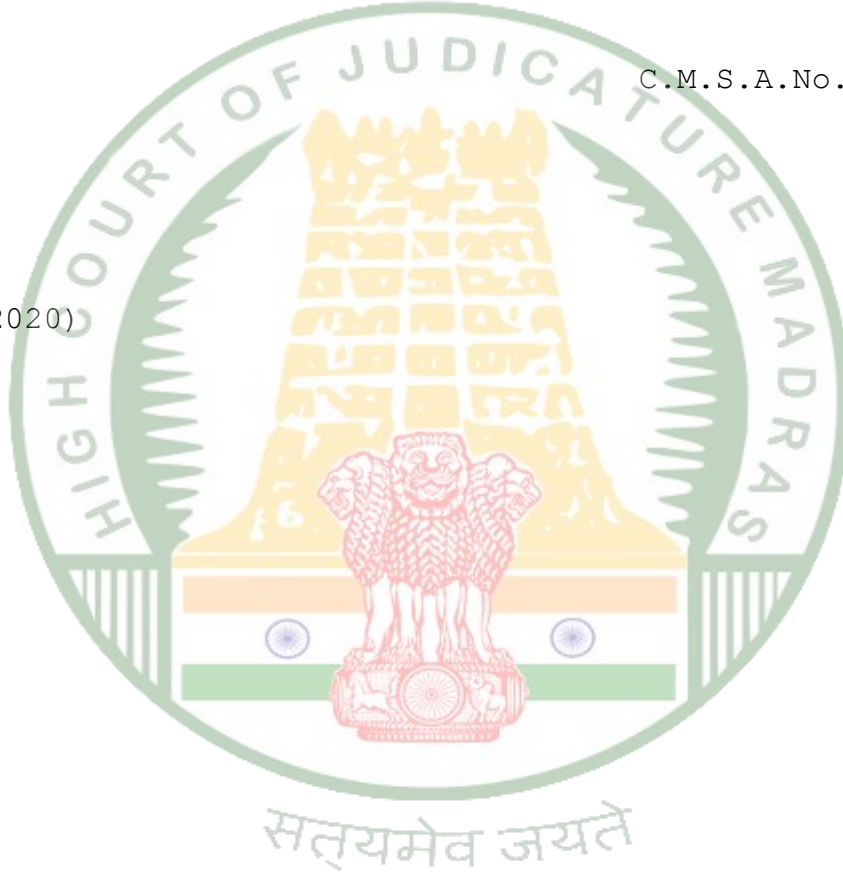
ssd

To

1. The Additional District Cum Fast Track Court No.1,
Erode
2. The learned Principal Subordinate Judge,
Erode
3. The Section Officer,
VR Section,
Madras High Court,
Chennai.

C.M.S.A.No.26 of 2009

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