

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 08.11.2019

Pronounced on : 27.11.2019

Coram:

THE HONOURABLE MR.JUSTICE R.PONGIAPPAN

C.R.P.(NPD)No.1598 of 2013
and M.P.No.1 of 2013

M.S.Tamilnathan

..

Petitioner /
Respondent

versus

G.Shymala Ranjini

..

Respondent /
Appellant

PRAYER: Civil Revision Petition filed under Article 227 of the Constitution of India, against the judgment and decree dated 15.10.2012 made in C.M.A.No.19 of 2008 on the file of the learned Principal District Judge, Salem.

For Petitioner : Mr.N.Manokaran
for Mr.K.S.Karthik Raja

For Respondent : Mr.N.A.Nissar Ahmed

ORDER

This Civil Revision Petition is directed against the judgment and decree dated 15.10.2012 made in C.M.A.No.19 of 2008 on the file of the learned Principal District Judge, Salem.

2. Brief facts leading to the filing of this Petition are that, the respondent in C.M.A.No.19 of 2008 on the file of the learned I Additional District Judge, Salem, is the petitioner herein. Originally, the petitioner has filed a Petition under Section 13(1)(i)(a) of the Hindu Marriage Act in H.M.O.P.No.96 of 2004 as against the revision petitioner, seeking the relief to pass a decree of divorce by dissolving the marriage solemnized between the petitioner and the respondent, which was held on 19.01.1997.

3. After an elaborate enquiry, by a judgment and decree dated 22.01.2008, the learned Subordinate Judge, Mettur, had allowed the application filed by the revision petitioner and passed a decree in favour of the petitioner and ultimately, divorce was granted.

4. Aggrieved over the same, the respondent herein has filed a Civil Miscellaneous Appeal in C.M.A.No.19 of 2008 before the I Additional District Judge, Salem.

5. Before the Court below, the petitioner has raised preliminary objection stating that the appeal before the District Court is not maintainable. After an elaborate enquiry, by an order dated 15.10.2012, the learned I

Additional District Judge, Salem, rejected the contentions raised by the petitioner.

6. Aggrieved over the same, the petitioner is before this Court with the present Civil Revision Petition.

7. Today, when the Civil Revision Petition is taken up for hearing, the learned counsel appearing on behalf of the petitioner would contend that, as per Sections 3(b) and 28 of the Hindu Marriage Act, 1955, the appeal filed by the respondent before the trial Court is not maintainable. According to the petitioner, Section 3(b) defines the District Court and the petitioner has filed H.M.O.P.No.96 of 2004 before the learned Subordinate Judge, Mettur, by invoking the delegation of power of this Court and the Sub Court at Mettur has exercised the jurisdiction as a District Court and since the Sub Court has exercised the jurisdiction as a District Court, appeal under Section 28 can be filed only before the High Court.

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8. On the other hand, the learned counsel appearing for the respondent herein would contend that the claim made by the revision petitioner as only by invoking powers stated in Section 3(b) of the Hindu

Marriage Act, 1955, the then State Government by G.O.Ms.No.221, Home, dated 29th January, 1957 empowered the Subordinate Judge to hear the proceedings arising under the Act within their respective jurisdiction. In the year 1959, for the same clause, batch of cases were filed before this Court with regard to the maintainability of appeals before the High Court and clarification was also sought for by the High Court and the same was listed before the High Court on 03.03.1959.

9. Ultimately, this Court settled the issue with regard to the jurisdiction of the Subordinate Judge and the appellate jurisdiction of the High Court and held that, if by virtue of the notification under Section 3(b), a Court other than the District Court is given jurisdiction under the Act, it is only an extension of jurisdiction of that Court and appeals under Section 28 of the Act would lie only to that form to which appeals generally lie from the decree and orders of that Court. Since Civil Miscellaneous Appeal is filed against the order passed by the Sub Court, the I Additional District Court, has got jurisdiction to try the same.

10. Upon considering the arguments advanced by either side, though the Courts below relied on various decisions for arriving at the correct

conclusions, it is necessary and useful to consider the judgment of Mysore High Court in **MALLAPPA vs. MALLAV** reported in **AIR 1960 MYSORE 292**, in which, it has held as follows;

"7. A recent Bench decision of the Bombay High Court in Gangadhar Rakhamaji v. Mahjulal Gangadhar, AIR 1960 Bom 42, is on all fours with the facts of the present case. An appeal from an order on petition for divorce passed by the Civil Judge, Senior Division of Ahmadnagar was filed in the Bombay High Court. Similar contentions were raised to the effect that the High Court had jurisdiction to hear the appeal as the Court of the Civil Judge should be deemed to be a District Court. Repelling that contention their Lordships of the Bombay High Court held as follows :

"The Court of the Civil Judge, Senior Division, which is notified by the State Government as having jurisdiction in matters dealt with under the Hindu Marriage Act, is a 'District' Court within the definition of S.3(b) of the Hindu Marriage Act, but it is not principal civil Court of original jurisdiction, nor does it exercise its jurisdiction as such principal civil Court of original jurisdiction. Section 28 of the Hindu Marriage Act leaves the forum of appeal to

be determined under the law for the time being in force which, in the present case, is the Bombay Civil Courts Act. The forum of appeal from the order or decree of the Court of the Civil Judge, Senior Division under the Bombay Civil Courts Act is the Court of the District Judge of the District. In the present case, therefore, which was decided by the Civil Judges, Senior Division, the appeal lies to the Court of the District Judge and not to the High Court."

Similar in effect is a recent decision of the Madras High Court of Valliammal Ammal v. Periaswami Udayar, AIR 1959 Mad 510. It was held that both under the provisions of S.28 of the Act as well as the general principles of law, an appeal lies against the decree in matrimonial cause to that Court to which appeals generally lie when a decree or order of the Court to which jurisdiction is granted. In another part of the judgment this is what his Lordship Ramachandra Iyer, J., says :

"The definition of the 'District Court' under S.3(b) does not mean that a Court which is notified by the State Government becomes a District Court. What the section provides is that ordinarily it is the

Civil Court or the District Court that would have jurisdiction to adjudicate disputes under the Act. But power is given to the State Government to designate by notification other Courts as well. By virtue of the notification other Courts will have jurisdiction as such Courts and not as a District Court, and it cannot be held that for the purpose of the Act, Courts other than the District Court would by virtue of the notification become a District Court. It would, therefore, follow that if by virtue of the notification under S.3(b) a Court other than the District Court is given jurisdiction under the Act, it is only an extension of jurisdiction of that Court and appeals under S.28 of the Act would lie only to that forum to which appeals generally lie from the decree and orders of that Court."

11. Accordingly, the definition of the expression "District Court" given in Section 3(b) of the Hindu Marriage Act says which Courts are meant and included within that expression as used in the Act. It says that by the expression "District Court" are meant in the first place a City Civil Court in the area, in which, there is such Court and in any other area the Principal Civil Court of original jurisdiction. The Principal Civil Court of original jurisdiction in the areas, which are Districts is the Court of the District Judge of the District.

Thus under this part of the definition all City Civil Courts and all Courts of the District Judges have jurisdiction to deal with matters under the Hindu Marriage Act. The definition then proceeds to say that in addition to these Courts other Civil Courts will also be included in the expression "District Court" if such other Civil Courts are notified by the State Government in the Official Gazette as having jurisdiction in respect of matters dealt within the Act.

12. When notified by the State Government as having jurisdiction in matters dealt with under the Hindu Marriage Act, becomes a "District Court" as meaning the Principal Civil Court of original jurisdiction for the purposes of the Hindu Marriage Act by virtue of the definition given in Section 3(b) of the Act. It is the Court to which petitions under the Hindu Marriage Act lie and which has jurisdiction in respect of matters dealt within the Act. Section 28 of the Hindu Marriage Act leaves the forum of appeal to be determined under the law for the time being in force which, in the present case, the learned I Additional District Judge, Salem is the forum of appeal from the order or decree of the Sub Court, Mettur. Accordingly, the appeal lies to the Court of District Judge, Salem.

13. In this occasion, it is also necessary to consider the judgment of our Hon'ble Apex Court in **DAYARAM vs. SUDHIR BATHAM AND OTHERS** reported in **(2012) 1 SCC 333** wherein, it has held as follows;

"Re: Question (iii) : Whether a right of appeal can be taken away by way of judicial order?"

37. Direction 13 in *Madhuri Patil v. Commr., Tribal Development* (1994) 6 SCC 241 directs that when a writ petition challenging the decision of the Scrutiny Committee is decided by a Single Judge of the High Court, no further appeal would lie against that order to the Division Bench and the decision of the learned Single Judge would only be subjected to special leave under Article 136 of the Constitution.

38. The State of Madhya Pradesh enacted the *Uchcha Nyayalaya (Khand Nyayapeeth Ko Appeal) Adhiniyam, 2005* which is deemed to have come into force from 1-7-1981. The said Adhiniyam confers a right of appeal before a Division Bench against the judgment of the Single Judge exercising jurisdiction under Article 226 of the Constitution of India. The relevant provision is as follows:

"2. Appeal to the Division Bench of the High Court from a judgment or order of one Judge of

the High Court made in exercise of original jurisdiction.- (1) An appeal shall lie from a judgment or order passed by one Judge of the High Court in exercise of original jurisdiction under Article 226 of the Constitution of India, to a Division Bench comprising of two Judges of the same High Court."

39. A remedy by way of appeal, provided expressly by a statute cannot be taken away by an executive fiat or a judicial order. In South Asia Industries (P) Ltd. v. S.B.Sarup Singh (1965) 2 SCR 756 this Court held:

"11. ... Under the rules made by the High Court in exercise of the powers conferred on it under Section 108 of the Government of India Act, 1915, an appeal under section 39 of the Act will be heard by a single Judge. Any judgment made by the Single Judge in the said appeal will, under Clause 10 of the Letters Patent, be subject to an appeal to that Court. If the order made by a Single Judge is a judgment and if the appropriate legislature has, expressly or by necessary implication, not taken away the right of appeal, the conclusion is inevitable that an appeal shall lie from the judgment of a Single Judge under Clause 10 of the Letters Patent to the High Court."

40. In *A.R. Antulay v. R.S. Nayak* (1988) 2 SCC 602, an earlier Bench had transferred the criminal trials pending before the Special Judge to the High Court of Bombay. A Bench of seven Judges while overruling the earlier decision held that Section 7(1) of the Criminal Law Amendment Act, 1952 created a condition that notwithstanding anything contained in the Code of Criminal Procedure or any other law, the offences under Section 6(1) of the said Act to be tried by Special Judges only; and therefore the order dated 16-2-1984 reported in *R.S. Nayak v. A.R. Antulay* (1984) 2 SCC 183 transferring the cases to the High Court was not authorized by law. It was also submitted that if the case was tried by a Special Judge, the accused had a right of appeal to the High Court and by transferring the trial to the High Court the said vested right of appeal was taken away which was impermissible in law. This Court held that Parliament alone can take away vested right of appeal and no court whether inferior or superior can take away the said vested right. The following observations in that context are relevant:

"39. ... The power to create or enlarge jurisdiction is legislative in character, so also the power to confer a right of appeal or to take away a

right of appeal. Parliament alone can do it by law and no court, whether superior or inferior or both combined can enlarge the jurisdiction of a court or divest a person of his rights of revision and appeal."

41. We may also refer to two other decisions dealing with the right of appeal vested in a litigant, on and from the date of commencement of the lis. Though in this case, we are not immediately concerned with interference with the vested right of appeal of a litigant, after the commencement of a lis, the principle underlying these two decisions are useful in understanding the right to appeal. A Constitution Bench of this Court in Hoosein Kasam Dada (India) Ltd.vs. The State of Madhya Pradesh and Ors. [1953 SCR 987] held that right of appeal is a vested substantive right. This Court held:

"8. The above decisions quite firmly establish and our decisions in Janardan Reddy v. State [1950 SCR 940] and in Ganpati Rai Hiralal v. Agarwal Chamber of Commerce Ltd. [1952 SCJ 409], uphold the principle that a right of appeal is not merely a matter of procedure. It is matter of substantive right. This right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first

initiated in, and before a decision is given by, the inferior court. In the language of Jenkins, C.J. in Nana bin Aba v. Sheku bin Andu [ILR (1908) 32 Bom 337] to disturb an existing right of appeal is not a mere alteration in procedure. Such a vested right cannot be taken away except by express enactment or necessary intendment. An intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention be clearly manifested by express words or necessary implication."

42. In *Garikapatti Veeraya v. N.Subbiah Choudhury* [1957 SCR 488], this Court held that the vested right of appeal can be taken away only by a subsequent enactment. The following principles were enunciated:

"(i) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.

(ii) The right of appeal is not a mere matter of procedure but is a substantive right.

(iii) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the

rest of the carrier of the suit.

(iv) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at the date of the filing of the appeal.

(v) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

14. The principle set out by our Hon'ble Apex Court is the correct preposition that the right of appeal cannot be taken away by way of judicial order. Therefore, I am of the considered view that the appeal preferred before the District Court, Salem, is maintainable and accordingly, the impugned order passed by the learned I Additional District Judge, Salem, is well considered one. However, during the time of disposing the appeal filed by the petitioner, the learned I Additional District Judge, has not entered into the factual aspects, he had disposed the appeal only after answering the preliminary

objections raised by the petitioner in respect to the maintainability of the appeal before the District Court. In this regard, it is necessary to remand the matter to the said Court for deciding the appeal on considering the factual aspects, which are found in the original petition filed by the petitioner.

15. Hence, Registry is directed to send back the original case records to the learned I Additional District Judge, Salem. On receipt of the same, the learned I Additional District Judge, Salem, is directed to dispose of the appeal in C.M.A.No.19 of 2008 as early as possible preferably within a period of three months from the date of receipt of case records.

16. In the light of the above submissions, this Civil Revision Petition filed by the petitioner stands dismissed. Consequently, connected Miscellaneous Petition is closed. However, there shall be no order as to costs.

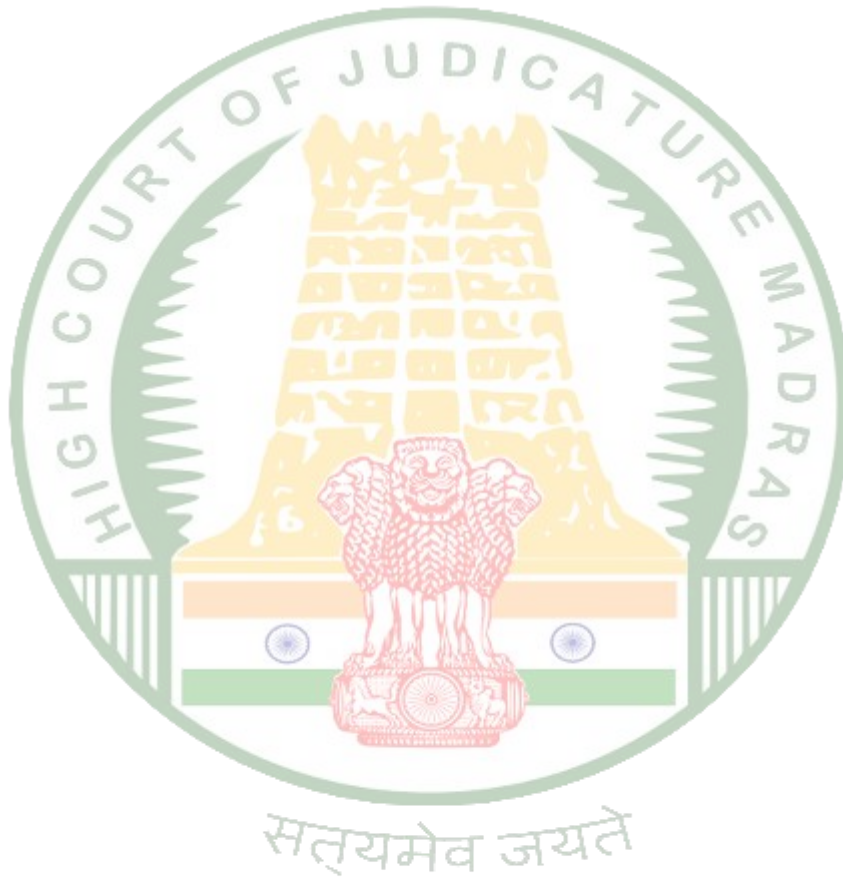
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Speaking Order/Non Speaking Order
Index : Yes
Internet : Yes

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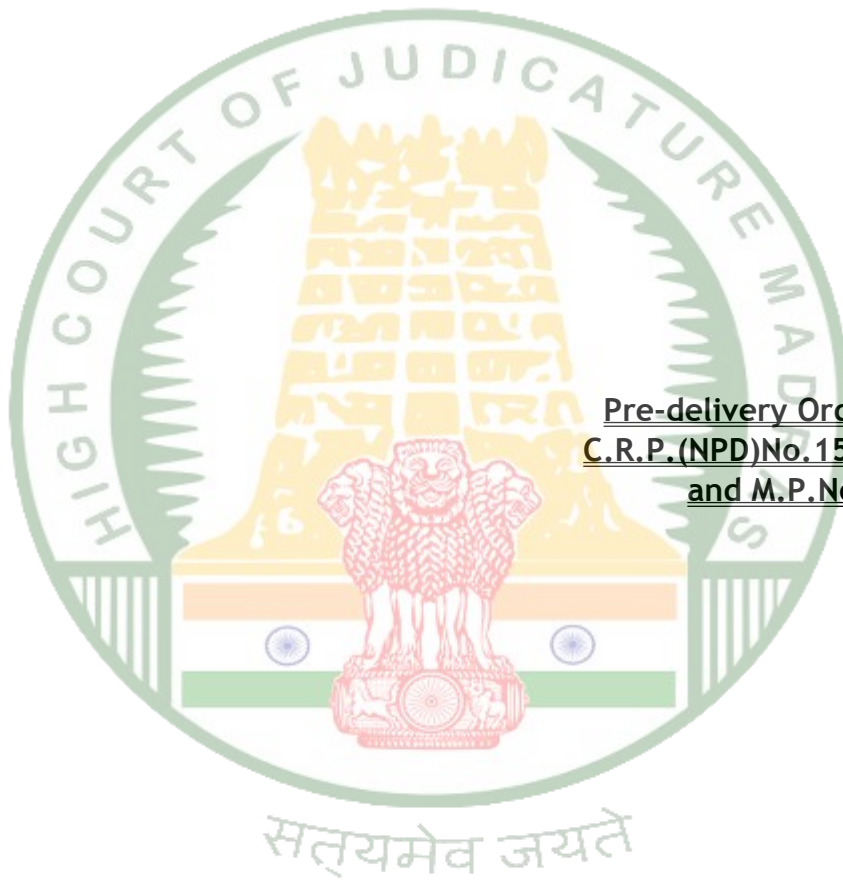
To

1. The Principal District Judge, Salem.
2. The I Additional District Judge, Salem.



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Pre-delivery Order made in
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