

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 04.06.2019

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A. No.36 of 2014
and M.P. No.1 of 2014

Suguna ... Appellant/Respondent

-vs-

Nallaperumal ... Respondent/Petitioner

Prayer: Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act read with 100 of C.P.C. against the fair and decretal order dated 23.06.2014 in C.M.A. No.39 of 2013 on the file of the Principal District Judge, Cuddalore confirming the fair and decretal order dated 01.07.2013 in H.M.O.P. No.4 of 2009 on the file of the Principal Sub Judge, Vridachalam.

For Appellant : Mr.R.Selvakumar

For Respondent : No appearance

JUDGMENT

The Civil Miscellaneous Second Appeal has been filed against the concurrent findings given by both the Courts below, namely, against the fair and decretal order dated 23.06.2014 in C.M.A. No.39 of 2013 on the file of the Principal District Judge, Cuddalore confirming the fair and decretal order dated 01.07.2013 in H.M.O.P. No.4 of 2009 on the file of the Principal Sub Judge, Vridachalam.

2.Assailing the concurrent findings given by the Courts below, learned counsel appearing for the petitioner would submit that the Courts have committed error in considering the fact that the opportunities given to the appellant for appearance before the Trial Court for herself to be cross examined is insufficient and the matter ought to have been remanded back to the Trial Court giving one more fair opportunity to the

appellant for conducting the case. Learned counsel appearing for the appellant would further submit that when P.W.2, the child witness has been in custody of the respondent husband, the Courts below have committed error in relying upon the testimony of P.W.2 the child witness, who has been tutored by the respondent father. Explaining further, learned counsel appearing for the appellant would further submit that the reliance on the testimony of P.W.2 alone, for deciding the cruelty, is unsustainable both on facts and law.

3.To answer the above arguments, it is relevant to summarise the brief facts as below:

The marriage between the appellant and the respondent, who was working as Teacher in a private school at Mettur, Salem District, was solemnised on 24.10.1994 in the respondent's house at Theevalur Village, Thittakudi Taluk. Through the wedlock, they got three male children namely, 1.Sivakathiravan 2.Kaviarasu and 3.Balasingam. After the marriage, the appellant often pick up quarrel with the respondent and insulted him very much. More over, she was not even taking proper care of her husband, his aged parents and their children. The appellant, having usual practice, left the matrimonial home, by picking up quarrel either with the respondent or his parents. The respondent husband suffered a mental agony with the attitude of the appellant. The appellant also lodged a false complaint before the All Women Police Station, Vridhachalam and she withdrawn the same on the advice of the police. On 24.11.2008, she left the matrimonial home, scolding the respondent and his aged parents and leaving all the three children.

4.The main grievance of the respondent as could be seen from the records is that the appellant wants to live separately from her in laws and the respondent refused to accept the said proposal and therefore, she left the matrimonial home on 24.11.2008. Thereafter, she did not even bother to visit the matrimonial home. Moreover, when a legal notice issued by the respondent on 15.12.2008, in spite of receipt of such notice, she has not sent any reply. However, the appellant demanded to transfer the properties stands in the name of the respondent to her name or otherwise she would send the respondent to jail by preferring a false complaint. Therefore, the respondent filed Hindu Marriage Original Petition No.4 of 2009 before the Principal Subordinate Judge, Vridhachalam under Section 13(1) (1a) of the Hindu Marriage Act to grant a decree of divorce and set aside the marriage solemnised between the appellant and the respondent on 24.10.1994 on the ground of cruelty.

5.The learned Trial Judge, after taking up the case, listed the matter for hearing on various dates namely, 19.04.2013, 06.06.2013, 14.06.2013, 20.06.2013 and 24.06.2013. When the case was posted for hearing and for appearance of the appellant for cross examination, the appellant did not even bother to appear before the Trial Court. Moreover, she has not even come forward to face the respondent's cross examination. Therefore, the Trial Court has closed the appellant's side evidence on 14.06.2013 and posted the matter 'for arguments' on 20.06.2013. Again on 20.06.2013, both the parties have not come forward to argue the case. Hence, the Trial Court adjourned the case 'for arguments' to 24.06.2013. Again on 24.06.2013, the Trial Court has posted the matter 'for orders' on 01.07.2013 and on the said date, orders were pronounced and the petition was allowed setting aside the marriage solemnised between the parties on 24.10.1994 by granting a decree of divorce, taking note of the evidence adduced by P.W.2, who is the son of both the appellant and respondent.

6.P.W.2 has clearly deposed about his mother that she has not even maintained him and his brothers. Moreover, it was amply proved before the Trial Court that the appellant did not even maintain her husband and she used to scold her husband and his family members for the reasons best known to the appellant. The evidence of P.W.2. has been corroborated by the evidence of P.W.4, the mother in law of the appellant. The learned Trial Court opined that P.W.2, being the son of the appellant, deposed against his own mother that she failed to maintain the children and also used to pick up quarrel for the frivolous reasons best known to her. The Trial Court has come to the conclusion that the appellant has not proved that the respondent made cruelty and due to cruelty she left out from the matrimonial house voluntarily.

7.As against the said findings, dissolving the marriage between the appellant and the respondent, the appellant has preferred C.M.A. No.39 of 2013 before the learned Principal District Judge, Cuddalore. who also after examining the conduct of the appellant, has observed that when the case was posted for hearing from 19.04.2013, 06.06.2013, 14.06.2013, 20.06.2013 and 24.06.2013, the case was posted for appearance of the appellant for cross examination. But the appellant failed to appear before the Trial Court and more over failed to come forward to face the respondent's cross examination. Therefore, when the Trial Court posted the case on 14.06.2013, closing the respondent's evidence, posted the matter for arguments on 20.06.2013. Again

on 20.06.2013, finding that no one appeared to argue the case, the Trial Court adjourned the case to 24.06.2013 for arguments and finally, the Trial Court after hearing the arguments of both sides on 24.06.2013, posted the matter for orders on 01.07.2013 and on the said date, orders were pronounced.

8.The learned Judge further observed that the appellant was unable to appear before the Trial Court on 06.06.2013 and she got another opportunity to appear before the Court on 14.06.2013, but she has not appeared on that date. Even the appellant's side evidence was closed, she has not come forward to file any application for re-opening the case for her cross examination. Therefore, taking note of the above facts, the learned Judge has come to the conclusion that even after giving sufficient opportunity to re-open the case, she has not taken steps to do the same. Finding no merits on the claim made by the appellant, the appeal filed by the appellant was dismissed as bereft of any merit. As against the same, the present C.M.S.A. has been filed. This Court, while entertaining the appeal, has admitted the same by framing the following substantial questions of law:

'a)Whether the Courts below are right in relying upon the evidence of PW2, a child witness, having been tutored by the respondent?

b)Whether the Courts below are right in confirming cruelty, for the reason that the appellant did not visit the children, when admittedly the children were in forcible custody of the respondent, together with his mother?'

9.The submission made by the learned counsel appearing for the appellant shows that the Courts below ought not to have relied upon the evidence of P.W.2 because he is the child witness, who was tutored by the respondent father and based on the evidence of P.W.2, a minor son, decree of divorce ought not to have been granted.

10.It is seen from records that the marriage between the appellant and the respondent was solemnised on 24.10.1994 at the respondent's house and they have got three children. After the marriage, due to the distraught relationship, the appellant left the matrimonial home on 24.11.2008, leaving her own three children. The evidence recorded by both the Courts below clearly shows that the appellant did not even bother to visit her own three children. In view of the desertion, a legal notice was issued by the respondent on 15.12.2008. Although the said legal notice was received by the appellant, she has not even bothered

to respond by giving any reply. Therefore, the respondent filed H.M.O.P. No.4 of 2009 under Section 13(1)(1a) of the Hindu Marriage Act to grant decree of divorce and set aside the marriage solemnised between them on 24.10.1994 on the ground of cruelty.

11.When the case was taken up for hearing before the Trial Court, it was listed on various hearings, namely, 19.04.2013, 06.06.2013, 14.06.2013, 20.06.2013 and 24.06.2013. For the reasons best known to the appellant, when the case was posted for appearance of the appellant for cross examination, she had not appeared before the Trial Court. Moreover, she has not even come forward to face the respondent's cross examination. Therefore, the Trial Court closed the respondent's side evidence and posted the matter for arguments on 20.06.2013. As both the parties did not come forward to argue the case, the Trial Court adjourned the case to 24.06.2013 for arguments. After hearing the arguments on both sides, the Trial Court posted the case for orders on 01.07.2013 and on the said date, the Trial Court pronounced the orders, setting aside the marriage solemnised between the parties on 24.10.1994 by a decree of divorce.

12.When the respondent had issued legal notice on 15.12.2008, even after receipt of the said legal notice, the appellant had not even sent any reply. Secondly, when the Trial Court posted the matter on various hearings, namely, 19.04.2013, 06.06.2013, 14.06.2013, 20.06.2013 and 24.06.2013, for the reasons best known to her, she does not even choose to appear before the Trial Court. After the Trial Court closed the appellant's side evidence and posted the matter for arguments on 20.06.2013, the appellant did not even bother to re-open the case for further evidence. Thirdly, P.W.2 son of the appellant and the respondent came to the witness box and deposed heavily against the appellant stating that his mother has not maintained him and his brothers. When the appellant has not even bother to maintain her own children, looking the case of the appellant from any angle, the substantial questions of law raised by the appellant failed to carry any merit whatsoever. Therefore, finding no merit in the appeal, this Court is inclined to dismiss the same. Accordingly, the appeal fails and the same is dismissed. No costs. Consequently, M.P. No.1 of 2014 is closed.

Sd/-
Assistant Registrar

// True Copy//

Sub Assistant Registrar

vga

To

1.The Principal District Judge, Cuddalore.

2.The Principal Sub Judge, Vridachalam.

Copy to: The Section Officer, V.R Section,
High Court, Madras.

+1cc to Mr.R.Selvakumar, Advocate, SR.No.45468.

C.M.S.A. No.36 of 2014
and M.P. No.1 of 2014

MP (CO)
CSR: 17.02.2020