

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.11.2019

CORAM

THE HON'BLE MRS.JUSTICE V.BHAVANI SUBBAROYAN

C.M.S.A.No.21 of 2019  
and

C.M.P.No.17763 of 2019

Vinodh Jayachandran ... Appellant

Vs.

Poorani.C ... Respondent

Prayer: Civil Miscellaneous Second Appeal is filed under Section 28 of the Hindu Marriage Act 1955 read with Section 100 of the Code of Civil Procedure, against the Judgment and Decree dated 03.06.2019 in C.M.A.No.52 of 2018 on the file of the District Court, the Nilgiris, Udhagamandalam, reversing the Judgment and Decree dated 05.04.2018 in H.M.O.P.No.39 of 2017 on the file of the Subordinate Court, Coonoor.

For Appellant : Mrs.Chitra Maragatham  
For Mr.T.R.Rajaraman

For Respondent : Mrs.Reshmi Christy  
For Mr.K.V.Sajeew kumar

Judgment

The Civil Miscellaneous Second Appeal is filed against the order of remand made in C.M.A.No.52 of 2018 dated 03.06.2019 on the file of the District Court, the Nilgiris, Udhagamandalam, reversing the Judgment and Decree dated 05.04.2018 in H.M.O.P.No.39 of 2017 on the file of the Subordinate Court, Coonoor.

2. The respondent/wife herein, originally filed H.M.O.P.No.37 of 2011 before the Subordinate Court, Udhagamandalam, seeking dissolution of marriage under Section 13

(1) (ib) of the Hindu Marriage Act 1955, which came to be dismissed by a fair and decreetal order dated 26.08.2015. Subsequently, the respondent filed H.M.O.P.No.39 of 2017 before the Subordinate Court, Coonoor, which also came to be dismissed by a fair and decreetal order dated 05.04.2018. As against the dismissal order dated 05.04.2018, C.M.A.No.52 of 2018 was filed by the respondent herein before the District Court, the Nilgiris, Udthagamandalam, wherein which, the District Judge upon hearing the arguments and perusing the records had remanded the case back to the Trial Court to incorporate the portion of the actual main counter and thereafter, to adjudicate the subject matter in accordance with law and the parties were permitted to adduce additional oral and documentary evidence, if necessary. As against the order dated 03.06.2019, the present Civil Miscellaneous Second Appeal has been filed on the following substantial questions of law :-

(1) When the provisions of Order 41 Rule 23 and 24 CPC are very clear in mandating to hear the Appeal on merits, still is the Learned District Judge without considering the merits of the case simply remanded the case merely on the submission made by Respondent that wrong counter considered by the Learned Subordinate Judge, hence remand the case?

(2) Is the Learned District Judge right in remanding the Original Petition without setting aside the findings of the Trial Court which alone gives power to remand?

(3) It is seen from the Respondent's pleadings the relief now sought for was available when earlier OP was filed, whether fresh present OP maintainable applying the principle enunciated under Order II Rule 2 CPC?

3. The learned counsel for the appellant has contended that the order of the District Judge is contrary to Order 41 Rule 23 and 24 of CPC which clearly speaks about an order of remand under what circumstances, it can be made. Further, the learned counsel for the appellant has contended that the counter affidavit filed by them in H.M.O.P.No.39 of 2017 was not taken into consideration by the Trial Judge and blindly it was reproduced in the order without any discussion, which made the District Judge to remand the matter back to the Trial Court. The very counter was available with the District Judge who ought to

have examined the same and could have passed an order on merits, instead of remanding the case before the Trial Court for fresh adjudication of evidence both oral and documentary. Moreover, the learned counsel for the appellant has contended that the cause of action is one and the same for both the H.M.O.P.No.37 of 2011 and H.M.O.P.No.39 of 2017 and the relief available to the respondent earlier omitted cannot be claimed in the subsequent original petition.

4. In support of her contention, the learned counsel for the appellant has relied upon a Judgment of this Court reported in the case of [Subramanian and another v. Kaliammal and others], wherein, it has been held that before an Appellate Court can remand a matter for fresh disposal to the Lower Court under Order 41 Rule 23, first it must come to a conclusion that the decision of the Trial Court is liable to be reversed or set aside. In the absence of such a conclusion, a power of remand is not available to an Appellate Court. Thus, where a remand order is passed whether in a case where a suit has been disposed of upon a preliminary point or in a case where a suit has been disposed of on merits, the condition precedent for the exercise of the power of remand is a finding by the Appellate Court that the Judgment and Decree of the Trial Court is erroneous on facts or on law and therefore liable to be reversed or set aside. So long as that finding has not been arrived at, there is no scope for the Appellate Court reversing or setting aside the Judgment and Decree of the Trial Court and as a consequence thereof remanding the suit for fresh disposal.

5. The learned counsel for the respondent in contrary to the arguments put forth by the learned counsel for the appellant has contended that Order II Rule 2 CPC will not be applicable to the present case as the appellant failed to raise any such issue when the second O.P. was filed by the respondent and such plea cannot be raised in the Appellate stage before this Court. Further, the learned counsel for the respondent has contended that the learned District Judge has set aside the original order passed in H.M.O.P.No.39 of 2017, when the original order is set aside, it would mean that the findings also inter alia set aside by the said Judge. Moreover, the learned counsel for the respondent has contended that there is no necessity for a specific statement in the order to set aside the findings of the Trial Court if the Court is convinced regarding the submissions made by the counsels.

6. Heard the learned counsel for the appellant and the learned counsel for the respondent, and perused the materials available on record.

7. From the above facts, it is not in dispute that the H.M.O.P.No.37 of 2011 and the H.M.O.P.No.39 of 2017 both were filed by the respondent herein was dismissed on 26.08.2015 and 05.04.2018 respectively.

8. It is seen from the records that after the dismissal of the H.M.O.P.No.39 of 2017 by a fair and decreetal order dated 05.04.2018, the plea raised in C.M.A.No.52 of 2018 before the learned District Judge, Udthagamandalam, that earlier H.M.O.P.No.37 of 2011 which was filed only on the grounds of desertion. However, H.M.O.P.No.39 of 2017 is filed on the grounds of cruelty. Further, it is seen that earlier to the H.M.O.P.No.39 of 2017, H.M.O.P.No.37 of 2011 was filed by the respondent on account of desertion which came to be dismissed on 26.08.2015. However, the second petition is filed by the respondent in H.M.O.P.No.39 of 2017 on the grounds of cruelty. There is no prohibition to file second HMOP as a cruelty caused by the husband on the wife is a continuous cause of action. On perusal of the petition filed in H.M.O.P.No.39 of 2017 before the Sub Judge, Coonoor, it is clear that the respondent/wife has filed second HMOP on the grounds of cruelty.

9. I do not find any reason as to why the second HMOP is not maintainable when facts and circumstances of the case pleaded in the second HMOP is different from that of the first H.M.O.P.No.37 of 2011. The plea raised by the appellant as one of the substantial questions of law that the second HMOP is hit by Order II Rule 2 CPC holds good in the present appeal as the same plea ought to have been raised by the appellant as a preliminary issue before the Sub Court, Coonoor, in H.M.O.P.No.39 of 2017, which chance, the appellant has failed to utilise before the Sub Court at Coonoor. As far as the plea raised by the appellant that the District Judge ought not to have remanded the case without considering the merits of the case by itself and simply remanding the case merely on the submission made by the respondent that wrong counter was considered by the learned Subordinate Judge warrants appreciation as to the pleadings raised by the respondent, especially the respondent.

10. The pleadings disclose great cruelty and in the counter filed by the appellant is on mere denial of such allegation made by the respondent wife. The Sub Court, Coonoor, while deciding H.M.O.P.No.39 of 2017, has verbatim copied down the counter and the pleadings. However, there is no discussion by the Sub Court, Coonoor, with regard to the allegations set out by the

respondent. The Sub Court, Coonoor, dismissed the HMOP mainly on the ground that the second HMOP is not maintainable in view of the reason that the respondent failed to plead the cruelty in the first HMOP. As the first HMOP was filed by the respondent/wife on the ground of desertion and subsequent HMOP was filed on the ground of cruelty, there is no bar under the law for the second HMOP being filed by the aggrieved party on different sets of facts, especially, when the ground of cruelty was not pleaded in the first HMOP. As a cruelty is a continuous cause of action and different cause of action, the second HMOP on different set of facts are maintainable. When the Sub Court at Coonoor asserted that the ground of cruelty was not pleaded in H.M.O.P.No.37 of 2011 and it was an after thought to file a second HMOP on the ground of cruelty. These facts, especially, the allegation of cruelty has to be tried before the learned Sub Court, Coonoor, by letting an evidence by both the sides.

11. No doubt, the District Judge, the Nilgiris, Udhagamandalam, on ascertaining the facts and the pleadings has come to the conclusion that the case has to be remanded for continuous question of trial and to pass fresh orders by the Sub Court, Coonoor, uninfluenced by the earlier order as well as the order passed in the appeal. This Court do not find any infirmity in the order passed by the District Judge when it is furnished before the District Judge that the H.M.O.P.No.39 of 2017 was merely dismissed on the ground that the second HMOP is not maintainable. The order of remand could only be the better order to meet the ends of justice.

12. It is also seen from the records that the counter filed in I.A.No.129 of 2016 seeking interim custody of the child has been taken as a main counter and the learned Sub Judge, Udhagamandalam, has not discussed or permitted the parties to let in evidence for the plea of cruelty. It is further seen that the respondent has clearly stated in the counter that the cruelties underwent was not at all discussed by the Sub Judge, Coonoor. Moreover, she has pleaded that the marriage has been irretrievably broken and the same has to be considered by the said Court while hearing the matter a fresh. In such circumstances, unless a fair trial is conducted by giving an opportunity to both the parties, the order passed by the Sub Judge, Coonoor, without taking into consideration of all vital facts would not meet the ends of justice. Further, this Court finds that the District Court, the Nilgiris, Udhagamandalam has considered the Judgment of this Court cited by the appellant's counsel and as per which, it has come to the conclusion that it is just and necessary to remand the matter back to the Trial Court to incorporate the portion of the actual main counter and

thereafter to adjudicate the subject matter in accordance with law. Hence, I find that the District Court is right in considering the all aspects and in the interest of justice, it has remanded the matter back to the Sub Court, Coonoor.

13. Under these circumstances, this Court is of the considered view that the order passed by the District Judge, the Nilgiris, Udhagamandalam, has to be sustained. Accordingly, this Civil Miscellaneous Second Appeal is dismissed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-  
Assistant Registrar(CS V)

//True Copy//

Sub Assistant Registrar

To

1. The Presiding Officer,  
District Court,  
Nilgiris, Udhagamandalam.
2. The Presiding Officer,  
Sub Court, Coonoor.

+1cc to M/s.T.R.Rajaraman, Advocate Sr.92578  
+1cc to Mr.K.V.Sajeev kumar, Advocate Sr.92432

C.M.S.A.No.21 of 2019

and

C.M.P.No.17763 of 2019

ssv[co]  
srg 02/03/2020

WEB COPY