



WEB COPY

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 18.11.2020

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA

C.M.S.A. No.14 of 2013
and M.P. No.1 of 2013

P.Suganya

...Appellant/Respondent

-vs-

N.Palanisamy

...Respondent/Petitioner

Prayer: Civil Miscellaneous Second Appeal filed under Section 28 (1) of the Hindu Marriages Act 1955 read with Section 100 of the Code of Civil Procedure against the judgment and decree passed by the 1st Additional District Court of Coimbatore in C.M.A. No.6 of 2009 dated 11.08.2009 in confirming the judgment and decree passed by the Sub Court at Tiruppur in H.M.O.P. No.126 of 2004 dated 12.11.2008 by allowing the present Civil Miscellaneous Second Appeal.

For Appellant : Mr.MA.P.Thangavel

For Respondent : Mr.K.Goviganesan

JUDGMENT

The Civil Miscellaneous Second Appeal has been directed against the judgment and decree dated 11.08.2009 passed by the 1st Additional District Court, Coimbatore in C.M.A. No.6 of 2009 in confirming the judgment and decree dated 12.11.2008 passed by the Sub Court, Tiruppur in H.M.O.P. No.126 of 2004.

2.Substantial questions of law have been framed by the appellant as under:

'a)Whether the Courts below are right in allowing the petition for divorce without assigning any convincing reasons in the presence of respondent/wife's indulgence to live together with her husband?

b)Whether the first appellate Court is right in dismissing the appeal, when the various apex Court dictums reiterate in the matrimonial matters, the



WEB COPY

paramount consideration is the benefit of wife and future life of children?

c) Whether the Courts below are right in granting a decree of divorce on the ground of cruelty and desertion when there is no pleading or evidence to that effect?

d) Whether the Courts below are right in granting a relief beyond the pleadings and evidence let in by the parties?

e) Whether the Courts below are right in granting a decree of divorce when the respondent had miserably failed to prove his case as contemplated on Section 101 of the Indian Evidence Act, 1872?

3. Mr. MA. P. Thangavel, learned counsel appearing for the appellant submitted that after the marriage was solemnised on 16.02.1998 at Kongu Vellalar Thirumana Mandapam, Somanoor between the petitioner and the respondent, they were blessed with two children, namely, a female child on 16.09.1999 and a male child on 28.08.2001. Due to some difference of opinion arising between themselves, the appellant wife left the matrimonial home and went to her parents' house. Therefore, the husband filed H.M.O.P. No.126 of 2004 for divorce on the ground of cruelty and desertion u/s.13 1(a) & 1(b) of the Hindu Marriage Act. But the Trial Court has wrongly come to the conclusion and allowed the petition filed by the respondent husband seeking divorce on the ground of desertion and cruelty, when some misunderstandings between the husband and wife visited them that trivial difference of opinion between husband and wife cannot be construed as a mental cruelty for granting divorce. Learned counsel for the appellant further submitted that when the appellant wife and her parents were not even informed about the admission of the respondent's mother in the Adayar Hospital, Chennai for taking cancer treatment, it is not possible for them to know about the admission of the respondent's mother in the said Hospital. Secondly, the Trial Court has wrongly come to the conclusion that the conduct of filing of the suit for partition and the filing of petition for maintenance shows that the appellant is not interested in reunion, which is not correct. The learned First Appellant Court ought to have interfered with the judgment and decree dissolving the marriage. Contrary thereto, it has wrongly come to the conclusion that the appellant wife has not acted as a dutiful wife because she left the matrimonial home at the crucial time when the respondent's mother was admitted in the Adayar Hospital, Chennai for taking treatment for cancer and struggling for her life. He also pleaded that since the appellant wife or her parents were not



aware of the treatment of the respondent's mother, the findings given by both the Courts are incorrect. Learned counsel appearing for the appellant also submitted that when the appellant wife has been staying along with her two children in her parents' house without any assistance from her husband due to the cruelty caused by the respondent, she has rightly filed a petition for maintenance before the learned Judicial Magistrate and has also filed a suit for partition, which cannot be construed that the appellant wanted to live separately and away from the matrimonial home.

4. Learned counsel for the respondent, opposing the above prayer sought for by the appellant, submitting that both the Courts below have correctly considered the case of the appellant, prayed for dismissal of the Appeal.

5. But this Court is unable to agree with the submission made by the learned counsel appearing for the appellant. The reason being that after the marriage was solemnised on 16.02.1998, they were blessed with a female child on 16.09.1999 and a male child on 28.08.2001 and they were living separately from 2001 till now. When the parties are not living together for the past 19 long years from 08.05.2001 and there was a direct allegation against the appellant wife that after leaving the matrimonial home with her second child, she has not visited the matrimonial home and the appellant has not even taken any effort for re-union by filing petition under Section 9 of the Hindu Marriage Act, 1955 seeking restitution of conjugal rights, the findings of the Courts below in dissolving the marriage cannot be found fault with since the appellant wife had deliberately deserted the matrimonial home long back. Secondly, when there was a criminal complaint filed before All Women Police Station, Tiruppur on 14.05.2001, she has not even come back and therefore, the police took up the case for enquiry and found false and closed the same. Thirdly, when the respondent's mother died due to cancer, unfortunately, neither the appellant nor the parents of the appellant attended the death ceremony, for which, no reasons have been assigned on the side of the appellant, who has simply stated that she was unaware of the treatment taken by the respondent's mother in the Adayar Hospital, Chennai. Moreover, the reason assigned by the appellant that the death was not informed to them cannot be taken as an acceptable reason for not attending the death ceremony of her mother in law. Fourthly, when she filed an application before the Judicial Magistrate seeking monthly maintenance for her and her two children and she has also filed a suit for partition of the property, it is not known why she has not filed a petition under Section 9 of the Hindu Marriage Act 1955 seeking restitution of conjugal rights. Such conduct vividly shows that she was not interested in restitution or re-union. Appreciating these facts,



the learned Trial Judge, accepting the cruelty and desertion suffered by the husband, has dissolved the marriage granting divorce in favour of the husband on the ground that the allegation of desertion and cruelty have been proved and the First Appellate Court also confirming the same, dismissed the Appeal filed by the appellant wife.

6.The first question of law raised by the appellant is not the substantial question of law. The reason being that as per the ratio laid down by the Hon'ble Apex Court in the case of Hero Vinoth (Minor) vs. Seshammal reported in 2006 (5) SCC 545, the alleged question of law cannot be considered as a substantial question of law, which has not been covered by any specific provisions of law or settled legal principle emerging from binding precedents. It is useful to extract the relevant portion as under:

'24...

(i)...

(ii)The High Court should be satisfied that the case involves a substantial question of law and not a mere question of law. A question of law having a material bearing on the decision of the case will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents and involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the Court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.'

7.In the light of the above ratio, since this appeal has not raised any question of law and none of the grounds raised and the questions of law raised are not even substantial questions of law, the C.M.S.A. is liable to be dismissed. Moreover, the findings of facts reached by the Courts below that the wife after deserting her husband in the year 2005, has not even come forward to file any application for restitution of conjugal rights and on the other hand, she has filed the suit for partition through their children, hence, looking at her conduct deserting the husband in the year 2005 and living separately, indeed has caused huge mental cruelty to the husband all these



15 long years. When both the Courts below have reached concurrent findings against the appellant, this Court, finding no justification to take a different view, is inclined to dismiss the CMSA. Accordingly, the CMSA fails and it is dismissed. Consequently, M.P. No.1 of 2013 is closed. No costs.

-s/d-

Assistant Registrar(CCC)

True Copy

Sub-Assistant Registrar

vga

To

1.The I Additional District Judge
Coimbatore.

2.The Subordinate Judge
Tiruppur.

+1 CC to Mr.K.Goviganesan, Advocate sr 37255.

C.M.S.A. No.14 of 2013 and M.P. No.1 of 2013

VD(CO)
SP(24/08/2021)