

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.01.2020

Coram

The Hon'ble Mr.Justice M.M.Sundresh
and
The Hon'ble Mr.Justice Krishnan Ramasamy

C.M.A.No2853 of 2018
and
C.M.P.No.21704 of 2018

Jayanthi ... Appellant/Respondent

Vs.

Saravanan ...Respondent/Petitioner

Prayer:-

Civil Miscellaneous Appeal filed under Section 19 of the Family Court, Act, 1984 against the order and decree, dated 10.09.2018, in F.C.O.P. No.164 of 2016, on the file of the Judge, Family Court, Vellore, Vellore District.

For Appellant : Mr.T. Karunakaran

For Respondent : Mr.S.Santhan

JUDGMENT

(Judgment of the Court was pronounced by Krishnan Ramasamy, J.)

The present Civil Miscellaneous Appeal has been filed by the appellant/wife challenging the order and decreetal dated 10.09.2018, passed in F.C.O.P.No.164 of 2016, on the file of the Family Court, Vellore.

2. The brief facts of the case, which led to the filing of this Appeal are as follows:-

i) The respondent/husband filed a Petition for divorce under Section 13 (1) (i) (i-a) and (i-b) of Hindu Marriage Act to dissolve the marriage solemnised between himself and his wife, the appellant, dated 21.04.1996, under the ground of

adultery, cruelty and desertion in H.M.O.P.No.44 of 2014, on the file of the Sub Court, Gudiyatham, and the same stood transferred to Family Court, Vellore and re-numbered as F.C.O.P.No.164 of 2016.

ii) Similarly, the appellant/wife also filed H.M.O.P.No.58 of 2013, before the Sub Court, Gudiyatham for restitution of conjugal rights, and the same was transferred to the Family Court, Vellore and re-numbered as F.C.O.P.No.165 of 2016.

iii) The Court below, after hearing both the parties, vide a common order, allowed F.C.O.P.No.164 of 2016 filed by the husband for dissolution of marriage and dismissed F.C.O.P.No.165 of 2016, filed by the appellant/wife for restitution of conjugal rights.

iv) Aggrieved over the order of dissolution of marriage passed in F.C.O.P.No.164 of 2016, the wife has filed the present Appeal.

3. Mr.T. Karunakaran, the learned counsel appearing for the appellant contended that, originally, the respondent/husband filed H.M.O.P.No.112 of 2011 for divorce on the ground of cruelty on the file of the Sub Court, Gudiyatham. However, the said Petition was withdrawn by the respondent/husband with liberty to file a fresh Petition and the Sub Court, Vellore also granted liberty to the respondent/husband to file fresh Petition with the same cause of action. Subsequently, the respondent herein filed H.M.O.P.No.44 of 2014, before the Sub Court, Gudiyatham, for divorce and the same was transferred to the Family Court, Vellore and re-numbered as F.M.O.P.No.164 of 2016. The said F.C.O.P.No.164 of 2016 was filed for divorce on the ground of adultery, cruelty and desertion. Therefore, the learned counsel contended that the present F.C.O.P.No.164 of 2016, was filed by the respondent/husband only to fill up the lacunae in H.M.O.P.No.112 of 2011. Hence, the learned counsel contended that the order passed in H.M.O.P.No.112 of 2011 will operate as res judicata since the present F.C.O.P. 164 of 2016 was also filed on the same cause of action.

3.1 Further, the learned counsel contended that the respondent/husband never used to stay in the matrimonial home and the said fact was clearly admitted at the time of cross-examination, and therefore, it is clear that only the respondent/husband deserted the appellant/wife and her children and he is living elsewhere. Though the respondent/husband deserted the appellant/wife, the appellant/wife is still residing in the respondent's mother house from the date of marriage and till date, i.e. for the past 22 years. The learned counsel further contended that though the respondent/husband raised a plea of adultery, stating that the appellant/wife had

relationship with one Satish, the said Satish was not impleaded as party in F.C.O.P.No.164 of 2016 nor does the allegation of adultery was proved before the Court below. All these facts, were not considered by the Court below, and wrongly granted decree of divorce, which is liable to be set aside.

4. On the other hand, the learned counsel for the respondent/husband would contend that it is no doubt true that initially, the respondent/husband filed a Petition for Divorce, in H.M.O.P.No.112 of 2011, on the ground of cruelty. Subsequently, the respondent/husband sought withdrawal of the said the Petition by filing I.A.No.63 of 2013, and the Court below, vide order, 20.12.2013, allowed the said I.A.No.63 of 2013, thereby, dismissing the H.M.O.P.No.112 of 2011 as withdrawn and also granted liberty to file fresh Petition for the same cause of action. Thereafter, no challenge has been made by the appellant/wife against the said order. Subsequently, the respondent/husband filed F.C.O.P.No.164 of 2016, for divorce on the ground of adultery, cruelty, and desertion. The appellant/wife also filed Petition for restitution of conjugal rights, vide F.C.O.P.No.165 of 2016. The Court below after hearing both the parties, allowed the Petition filed by the husband for divorce, viz., F.C.O.P.No.164 of 2016, and dismissed the Petition filed by the wife for restitution of conjugal rights, viz., F.C.O.P.No.165 of 2016.

4.1 The learned counsel further submitted that the present Appeal has been preferred by the appellant/wife only as against the decree of divorce granted in F.C.O.P.No.164 of 2016, but she has not chosen to file any Appeal against the dismissal of the Petition filed by her for restitution of conjugal rights, that too, when the order passed by the Court below is a common order, covering both F.C.O.P.Nos.164 and 165 of 2016. Therefore, the learned counsel pointed out that the appellant/wife cannot chose to file appeal against the dissolution of marriage and refrain from filing any appeal against the dismissal of the Petition filed by her for restitution of conjugal rights. On this ground alone, the present Appeal is liable to be dismissed.

4.2 The learned counsel further submitted that since the respondent/husband obtained leave of the Court below, (Sub Court, Gudiyatham) for filing fresh Petition in respect of same cause of action, the order passed in H.M.O.P.No. 112 of 2011 will not operate as res judicata and there is no impediment for the respondent/husband to file F.C.O.P.No.164 of 2016 and the Court below has rightly considered this aspect and dealt with the same. Further, the learned counsel contended that the appellant/wife deserted her husband (respondent herein) and children, contrary to the same, she has stated that her husband

has deserted. In this regard, the learned counsel for the respondent/husband also fairly submitted that he is ready to produce both the children of the respondent/husband so as to ascertain the fact as to who is deserting who and sought a direction from the Court for production of children. Therefore, we have directed for appearance of the children before the Court and as per the Court's order, children appeared before the Court and stated before us that only the appellant (mother) has deserted the respondent (father) and the father is taking care of them. Therefore, he contended that there is no iota of truth on the contention of the appellant/wife that the respondent/husband deserted the appellant/wife and is living elsewhere, and the Court below has appreciated all these facts and rightly ordered for divorce. Therefore, he contended that there is no merit in the Appeal and the same is liable to be dismissed.

5. Heard the learned counsel appearing for the both sides and perused the materials on record.

6. On perusal of the record, we have seen that, originally, the respondent/husband filed H.M.O.P.No.112 of 2011, on the file of the Sub Court, Gudiyatham, and the same was withdrawn with liberty to file fresh Petition on the same cause of action, and said withdrawal was owing to the fact since the said H.M.O.P.No.112 of 2011 was filed only on the ground of cruelty, subsequently, the respondent/husband has filed detailed Petition in F.C.O.P.No.164 of 2016 for divorce on the ground of cruelty, adultery and desertion. The Court below after hearing both the parties and appreciating the evidence on record, rightly granted decree for divorce by allowing F.C.O.P.No.164 of 2016. We are of the view that since the Court below granted liberty to the respondent/husband to file fresh Petition, the order will not operate as res judicata in hearing F.C.O.P.No.164 of 2016. Similarly, we cannot deem such Petition filed by the respondent for divorce was to fill up the lacunae in the earlier Petition No. H.M.O.P.No.112 of 2011 and the said contention of the appellant cannot be accepted and is brushed aside.

6.1 Further, this Court, in order to find out as to who is deserting who, as rightly suggested by the learned counsel for the respondent/husband, directed both the children of the appellant and the respondent to appear before the Court. Accordingly, the daughter, who is studying B.Com degree in a College and the son, who is working at Mumbai appeared before the Court and stated before us that only the appellant (mother) has deserted the respondent (father) and only the father is taking care of them. Therefore, it is clear that the due to desertion by the appellant/wife, the respondent/husband filed Petition in F.C.O.P.No.164 of 2016 for divorce and the said

Petition was rightly allowed by the Court below and though the appellant/wife filed F.C.O.P.No.165 of 2016 for restitution of conjugal rights and same was dismissed, the appellant/wife has filed appeal only against the order, granting divorce and not chosen to file any appeal against the dismissal of F.C.O.P.No.165 of 2016, for restitution of conjugal rights. Therefore, we are of the view that, if really, the appellant/wife is aggrieved over the order of divorce, she would have obviously preferred Appeal against the dismissal of her petition also. Therefore, as rightly contended by the learned counsel for the respondent, the present Appeal is liable to be dismissed. Therefore, we are of the view that there is no merit in the appeal. Accordingly, the Civil Miscellaneous Appeal fails and stands dismissed. No costs. Consequently, connected Miscellaneous Petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sd

To

The Judge,
Family Court,
Vellore, Vellore.

Copy to

The Section Officer,
VR Section,
High Court, Madras-600 104.

+lcc to Mr.T.Karunakaran, Advocate Sr.5476

+lcc to Mr.S.Santhan, Advocate Sr.6020

C.M.A.No.2853 of 2018

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srg 28/08/2020