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IN THE HIGH COURT OF JUDICATURE AT MADRAS

Judgment Reserved on :30.09.2021

Pronounced on :22.11.2021

CORAM :

THE HONOURABLE MRS.JUSTICE S.KANNAMMAL

Civil Miscellaneous Second Appeal No.5 of 2019
and C.M.P.No.1497 of 2019

Jayadeepa ... Appellant/Respondent/Respondent

Versus

Janagarajan ... Respondent/Appellant/Petitioner

Civil Miscellaneous Second Appeal filed under Section 13(1) (1A) of CPC read with Section 100 of the Code of Civil Procedure against the decree and judgment in C.M.A.No.15 of 2012 dated 28.11.2018 on the file of the Sessions Court, Nagapattinam, reversing the decree and judgment in H.M.O.P.No.65 of 2011 dated 30.04.2012 on the file of the Principal Subordinate Court, Mayiladuthurai.

For appellant : M/s.R.Shiva Kumar for
M/s. K. M. Vijayan Associates

For Respondent: R. C. Paul Kanagaraj

JUDGMENT

(This appeal was taken up for hearing through Video-conferencing)

This appeal has been directed against the order passed by the the Sessions Court, Nagapattinam in CMA No.15 of 2012 dated 28.11.2018 reversing the decree and judgment passed by the Principal Sub-Court, Mayiladuthurai in H.M.O.P.No.65 of 2011 dated 30.04.2012.

2.The appellant herein is the wife and the respondent is the husband. For the sake of convenience, the parties will be hereinafter referred as per their array in the main petition filed for divorce by the husband.



3. The facts which led to the filing of the present appeal, are as follows:

The marriage between the petitioner/husband and the respondent/wife took place on 20.01.2006, at Mayiladuthurai as per Hindu rites and customs. Out of their wedlock, a male child was born to them. It is the case of the petitioner/husband in the divorce petition, that his wife was suffering from health issues. The husband got treated his wife at various hospitals and that soon after the birth of the child, his wife refused to give mother's milk and also she did not take good care of the infant child. It is the further case of the husband that his wife suffered from depression and she was treated by a Psychiatrist. In the year 2009, disputes arose between the spouse which led the wife to leave the matrimonial home along with child. The husband prevented the same, however, after intervention of police, the child was handed over to the mother. Alleging that the acts of his wife amounted to cruelty, the husband has filed the original petition before the Principal Sub-Court, Mayiladuthurai, seeking for grant of divorce.

4. Resisting the petition filed by the petitioner/husband, the respondent/wife filed a counter affidavit denying the averments made in the petition and sought for dismissal of the same.

5. The parties have let in evidence and after a full-fledged trial, the trial Court dismissed the original petition on the ground that the petitioner therein has not made out the case for grant of divorce on the ground of cruelty.

6. Challenging the said order, an appeal was preferred before the Sessions Court, Nagapattinam by the petitioner/husband. The learned lower appellate Judge reversed the finding of the trial Court, holding that even though the ground of cruelty has not been made out for grant of divorce, there is a case made out for grant of divorce on the ground of desertion. Accordingly, the learned Sessions Judge reversed the finding of the trial Court and granted divorce on the ground of desertion.

7. Challenging the said judgment of the Sessions Court in granting divorce on the ground which was not pleaded, the wife, as appellant, has preferred this present Civil Miscellaneous Second Appeal.



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8. The appeal is admitted on the following substantial questions of law:

i) Whether the appellate Court granting divorce on the ground of Section 13(1)(ib) of the Hindu Marriage Act 1955 is valid?

ii) Whether it is mandatory for the appellate Court to frame issue under Order XIV Rule 1 of Civil Procedure Code consequently failure to follow will make the judgment invalid?

iii) Whether the appellate Court tested the facts for granting divorce under Section 13(1)(ib) of the Hindu Marriage Act 1955 by considering the essential factors of factum of separation and animus deserendi?

9. There is no dispute as regards the marriage between the petitioner and the respondent and a male child was born out of their wedlock. The grievance of the respondent/wife is that the first appellate Court granted the divorce on the ground of desertion, which was not even pleaded by the petitioner/husband and hence, it cannot be sustained and further no proper issue has been framed by the first appellate Court. It is further grievance of the respondent/wife that the first appellate Court has not considered the essential factors of factum of separation and animus deserendi.

10. The learned counsel for the respondent/wife would submit that though the petitioner/husband has not sought for divorce on the ground of desertion, the first appellate Court, without considering the well considered order of the trial Court, has erroneously granted divorce on the ground of desertion which calls for interference of this Court. Of course, the petitioner/husband has sought for divorce on the ground of cruelty by quoting the correct provision of law.

11. Per Contra, the learned counsel for the petitioner/husband would contend that the first appellate Court has framed the correct issue and granted divorce on the ground of desertion after having reappraised pleadings and the evidence let in by the parties which needs no interference. The learned counsel for the petitioner/husband would further contend that the first appellate Court has rightly discussed about the acts of cruelty on the part of the respondent/wife and held that it would not amount to cruelty but considering the voluntary separation of the respondent/wife from the petitioner/husband



without any valid reason for a period of more than two years, has rightly granted divorce. The learned counsel for the petitioner/husband would also contend that the essential factors of factum of separation and animus deserendi has been clearly established even from her own evidence.

12. On perusal of the judgment of the first appellate Court, it reveals that the first appellate Court has rightly observed in paragraph No.9, that there is no serious disputes or mis-understanding between the petitioner/husband and respondent/wife and all the alleged mis-understanding are normal wear and tear in a matrimonial life. The first appellate Court has also rightly observed that the respondent/wife stepped out of the matrimonial home by stating that she does not like to live with the petitioner. It has also been observed that the respondent/wife has not taken any steps for re-union. On considering the fact that the respondent/wife left the matrimonial home since she did not like to live with the petitioner/husband, and living separately without any valid reason for more than two years, granted divorce by setting aside the order of the trial Court.

13. Though the learned counsel for the respondent/wife relied upon the judgment of a Division Bench of this Court in C.M.A.No.3131 of 2013, the said judgment is not applicable to the present case on hand. Even though no specific provision of law has not been quoted by the petitioner/husband, seeking grant of divorce on the ground of desertion, it is pertinent to note that there is a specific pleading with regard to desertion by the respondent/wife. Since it is an admitted fact that the appellant had left the matrimonial home and living with her parents separately for more than two years, the petitioner/husband is entitled for divorce on the ground of desertion. This Court does not find any illegality or infirmity in the judgment passed by the lower appellate Court in order to interfere with the same.

14. In the result, the Civil Miscellaneous Second Appeal fails and it is dismissed. No costs. Consequently, connected C.M.P.No.1497 of 2019 is closed.

SD/-
ASSISTANT REGISTRAR

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SUB ASSISTANT REGISTRAR



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To

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1. The Sessions Judge,
Nagapattinam.

2. The Principal Subordinate Judge,
Mayiladuthurai.

Copy to

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

+1cc to M/s.K.M.Vijayan Associates, Advocate Sr.60225

CMSA No. 5 of 2019

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srg 05/01/2022