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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 08.02.2021

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

C.M.S.A.No.4 of 2013

K.A.Palanisamy ..Appellant/Respondent/Petitioner

Vs.

P.Thulasimani ..Respondent/Appellant/Respondent

Prayer : Civil Miscellaneous Second Appeal filed under Section 28 (1) of Hindu Marriage Act, 1955 read with Section 100 of C.P.C., against the judgment and decree dated 29.10.2012 made in C.M.A.No.22 of 2012 on the file of the First Additional District Court, Erode reversing the judgment and decree dated 28.06.2010 made in H.M.O.P.No.1 of 2010 on the file of the Sub Court, Sathyamanagalam.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.I.C.Vasudevan

J U D G M E N T

The judgment and decree dated 29.10.2012 passed in C.M.A.No.22 of 2012 reversing the judgment and decree dated 28.06.2010 passed in H.M.O.P.No.1 of 2010 is under challenge in the present Civil Miscellaneous Second Appeal.

2.The substantial question of law mainly raised by the appellant is that whether the first Appellate Court is erred in law in reversing the well considered judgment of the trial Court and whether the judgment of the First Appellate Court is vitiated for not advertng to the reasonings given by the trial Court while reversing the findings, in compliance with Order 41 Rule 31 of CPC?

3.The appellant/husband filed a petition under the Hindu Marriage Act, 1955 seeking dissolution of marriage mainly on the ground of cruelty and desertion. The trial Court adjudicated the issues with reference to the allegations and granted decree of divorce in favour of the husband. The said judgment and decree was challenged by the respondent/wife in C.M.A.No.22 of 2012.



The first Appellate Court reverses the judgment and dismissed the petition. Thus, the appellant is constrained to move the present Civil Miscellaneous Second Appeal.

4.The learned counsel appearing on behalf of the appellant mainly contended that the marriage between the appellant and the respondent was solemnized on 28.08.1985 as per the Hindu Rights and Customs. Two children were born from and out of the wedlock and the appellant was working as a driver in Tamil Nadu State Transport Corporation. He was transferred to Karumathampatti, Coimbatore District and he was unable to travel from Puliampatti to Karumathampatti daily. Thus, he requested the respondent/wife to join the matrimonial home in a rental house at Karumathampatti and the respondent/wife declined to accept the proposal of the appellant/husband and was living separately. With this allegation, the petition is filed seeking divorce on the ground of desertion.

5.The learned counsel for the appellant states that the appellant and the respondent left matrimonial home in the year 1992 and living separately from the past about 28 years. Notice was issued, suit was filed, HMOP was filed seeking dissolution of marriage. The respondent/wife filed O.S.No.270 of 2004 for maintenance and the appellant is paying maintenance. It is contended that the Trial Court is decreed the HMOP by granting the dissolution of marriage on the following grounds:

"(i)Respondent had refused to go and live with the appellant in the place of his employment.

(ii)Respondent had admitted the panchayat held for reunion in December, 1992 and she refused to live with the appellant. The said fact has been proved through PW2.

(iii)Respondent filed O.S.No.270 of 2004 for maintenance, but, not filed any petition for restitution of conjugal rights.

(iv)Respondent has alleged bigamy against the appellant without any iota of evidence.

(v)Appellant has not committed any cruelty or harassment against the respondent at any point of time.

(vi)Respondent had refused cohabitation and failed to perform her matrimonial obligations towards her husband for more than 10 years.

(vii)Respondent has not examined her parents to prove her case.



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(viii) Thought the appellant had expressed his willingness to live with the respondent, she had refused for reunion.

(ix) Parties are living separately from 1992 and no purpose could be served by keeping relationship alive."

6. The wife preferred an appeal in C.M.A.No.22 of 2012 and the first Appellate Court passed a judgment and decree on 29.10.2012 without assigning any reason. The learned counsel for the appellant states the first Appellate Court committed an error in not assigning any reason in the findings of the Trial Court and further not given any independent finding with reference to the grounds of cruelty and desertion, therefore, the judgment of the first Appellate Court is liable to be scrapped.

7. The learned counsel appearing on behalf of the respondent disputed the contentions raised by stating that absolutely there is no allegation which was established. The first Appellate Court has rightly dismissed the petition for dissolution of marriage filed by the appellant. The appellant had not established the ground on cruelty or the desertion. Therefore, the appeal is to be dismissed.

8. The findings of the first Appellate Court reveals that the appellant and respondent were living together in the matrimonial home till the year 1991 and the appellant requested the respondent/wife to join matrimonial home in Coimbatore District. However, the respondent refused to join in the matrimonial home and thereafter they have separated and the first Appellate Court itself made a finding that the evidence of the respondent itself establishes that the desertion is only on the part of the husband and not on the part of the wife.

9. This Court is of the considered opinion that whether the desertion is at the instance of the husband or at the instance of the wife, the fact remains that the husband and wife are living separately for more than 28 years and the desertion by anyone of the party is a ground for dissolution of marriage under the provisions of the Hindu Marriage Act. It is not as if the husband not deserted the wife or the wife not deserted the husband. The desertion was accepted by the parties during the course of the desertion. The first Appellate Court committed an error on declining to grant decree of divorce and therefore, this Court has no hesitation in arriving a decision that the judgment and decree passed by the first Appellate Court is perverse as per the Hindu Marriage Act as the desertion is wrongly interpreted. Desertion of any one of the spouse is sufficient to grant the decree of divorce.



10. This being the principles to be followed, the judgment and decree dated 29.10.2012 passed in C.M.A.No.22 of 2012 reversing the judgment and decree dated 28.06.2010 passed in H.M.O.P.No.1 of 2010 is set aside and consequently, C.M.S.A.No.4 of 2013 stands allowed. No costs.

s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

Pns

To

1. The First Additional District Judge, Erode.

2. The Subordinate Judge, Sathyamanagalam.

+1 CC to Mr.N.Manokaran, Advocate sr 6935.

+1 CC to Mr.I.C.Vasudevan, Advocate sr 7114.

C.M.S.A.No.4 of 2013

GMR(CO)
SP(06/09/2021)