

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED 03.02.2021

CORAM

THE HONOURABLE MR.JUSTICE T.RAJA
and
THE HONOURABLE MR.JUSTICE G.CHANDRASEKHARAN

C.M.A. No.2398 of 2018

S.Senthilkumar

... Appellant

-vs-

Suseela

... Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 19 of Family Court Act against the order and decretal order dated 10.01.2018 passed in H.M.O.P. No.32 of 2017 on the file of the Subordinate Judge, Gingee.

For Appellant : Mr.R.Thanjan

For Respondent : Mr.Ravindran Rangarajan

JUDGMENT

This appeal has been directed against the judgment and decree dated 10.01.2018 passed by the Subordinate Judge, Gingee in H.M.O.P. No.32 of 2017 wherein the prayer for granting divorce was dismissed.

2.Learned counsel appearing for the appellant submitted that the appellant and the respondent got married on 15.02.2013 at Gingee Town as per Hindu rights and customs and thereafter, the appellant filed H.M.O.P. No.32 of 2017 on the file of the Sub Court, Gingee seeking divorce. Aggrieved by the impugned judgment and decree the appellant has filed this Appeal before this Court.

3.It is seen from records that during the pendency, the respondent wife has filed a memo dated 01.02.2021 raising a preliminary objection on the maintainability of the appeal stating that as against the decree passed by the Sub Judge, Gingee, the statutory appeal remedy would be available to the parties concerned under Section 28 of the Hindu Marriage Act, 1955 only before the District Court of the concerned jurisdiction, hence the appellant has no right to file an Appeal before this Court under Section 19 of the Family Courts Act,

1984. It is useful to refer Section 28 of the Hindu Marriage Act, 1955 and Section 19 of the Family Courts Act, 1984 as under:

'19.Appeal-

(1)Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law...'

28.Appeals from decrees and orders - (1)All decrees made by the Court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

(2)Orders made by the Court in any proceeding under this Act under section 25 or section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders, and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3)There shall be no appeal under this Section on the subject of costs only.

(4)Every appeal under this Section shall be preferred within a period of ninety days from the date of the decree or order.'

4.In the present case, the appellant husband has filed the above H.M.O.P. No.32 of 2017 before the Sub Court, Gingee and the same was dismissed on 10.01.2018 by the Sub Court, Gingee. Since the appeal remedy would be available to the parties concerned under Section 28 of the Hindu Marriage Act, 1955 only before the District Court of the concerned jurisdiction, the appellant cannot file this Appeal before this Court under Section 19 of the Family Courts Act, 1984.

5.A careful reading of Section 28 of the Hindu Marriage Act dealing with the appeals from decrees and orders passed by the original civil jurisdiction clearly shows that all decrees made by the Court in any proceeding under this Act shall be appealable, to which the appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction, except on the subject of costs. In the instant case, the Sub-Court, Gingee, has dismissed the divorce petition, therefore, the appeal provisions under Section 28 of the Act will govern the situation and thus, we are of the considered view that the appeal will lie only before the District Court as against the judgment and decree passed by the

Sub-Court.

6. At this juncture, learned counsel appearing for the appellant requested this Court to transfer the matter to the District Court, Villupuram, since the respondent already remained *exparte* before the Trial Court and there has been a delay in view of wrongly choosing this Court as an Appellate Court instead of the District Court, otherwise, the appellant would be put to face huge prejudice.

7. In this regard, it is also relevant to extract Section 24 of the C.P.C.

'24. General power of transfer and withdrawal - (1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage - (a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or (b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and (i) try or dispose of the same; or (ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or (iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.'

8. A careful perusal of the above Section undoubtedly shows that the High Court has got ample powers and jurisdiction to transfer the proceedings from the Family Court to a Subordinate Court since the same is comprehensive and discretionary. Therefore, the power of transfer of the High Court cannot be whittled down or taken away. More particularly, in the matrimonial proceedings, when the parties are already having mental as well as physical cruelty and untold hardships at the instance of other party, if for any reason, any poor counsel, who is not conversant with provisions of law, instead of filing appeal before the competent Appellate Court, erroneously files appeal before any other Appellate Court, the High Court has enormous power to do justice without causing more prejudice to the parties.

9. An argument was advanced by the learned counsel for the respondent that the matter may be directed to be re-presented by taking away the same from this registry. If the said contention is accepted, then the power of High Court under Section 24 of CPC will be crippled. Since the same would cause un-necessary hardships to the parties and also to the Courts, we do not agree for such argument. The reason being that Section 24(1)(a)

clearly shows that on an application made by one party, the High Court or the District Court may transfer any suit or Appeal or other proceedings pending before it for trial or disposal to any court Subordinate to it and competent to try or dispose of the same or even withdraw any suit, appeal or other proceedings pending in any Court Subordinate to it. Therefore, when objection has been raised by the respondent that after an order is passed by the Subordinate Court, Gingee under Section 19 of the Family Courts Act 1984, appeal remedy is available to the persons concerned under Section 28 of the Hindu Marriage Act, 1955 only before the District Court of the concerned jurisdiction, we are of the considered view that the Appellant has to file appeal under Section 28 of the Hindu Marriage Act 1955 only before the District Court, Villupuram and he cannot maintain any Appeal under Section 19 of the Family Court Act 1984 because this Court has no jurisdiction to entertain the present Appeal against the decree passed by the Sub Court, Gingee as the District Court, Villupuram is the Appellate Court under Section 28 of the Hindu Marriage Act.

10.As the learned counsel appearing for the appellant has wrongly chosen this Court instead of choosing the District Court, for the fault on the part of the counsel, no litigant shall be put to prejudice. The Hon'ble Apex Court in Rafiq and others vs. Munshilal and Others reported in (1981) 2 SCC 788 has held that due to the inaction, deliberate omission or misdemeanor of the counsel, parties should not be put to suffer. In yet another decision in Hetram Kashinath Shende vs. Sangeetha reported in MANU/MH/1713/2012, the Bombay High Court (Nagpur Bench) has held that the innocent litigant should not suffer for the mistake either deliberate or intentional on the part of the advocate.

11.Taking note of the fact that the appeal has been filed within the statutory limit, accepting the legal position that no litigant shall be put to face any prejudice, this Court is inclined to transfer the appeal, accordingly, exercising power under Section 24 (1)(a) of the Code of Civil Procedure, this appeal stands transferred to the District Court, Villupuram for expeditious disposal, on merits. On such transfer, learned District Judge, Villupuram is directed to take up the matter and dispose of the same on merits and in accordance with law as expeditiously as possible.

12.In fine, for the reasons stated above, the appeal stands dismissed. No costs.

Sd/-

Assistant Registrar (CS-VIII)

//True Copy//

Sub Assistant Registrar

vga

To

1.The Subordinate Judge, Gingee.

2.The District Judge,
Villupuram.

3.The Section Officer,
V.R.Section,
High Court, Madras.

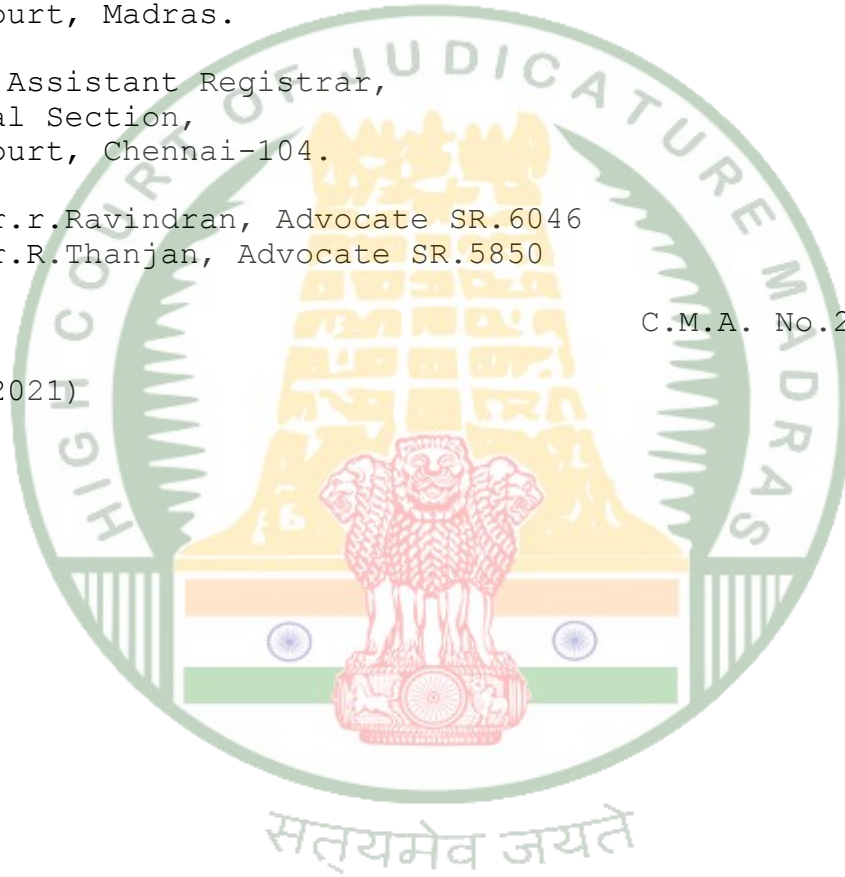
4.The Sub Assistant Registrar,
Judicial Section,
High Court, Chennai-104.

+2cc to Mr.r.Ravindran, Advocate SR.6046

+1cc to Mr.R.Thanjan, Advocate SR.5850

C.M.A. No.2398 of 2018

PVS (CO)
CB(24/03/2021)



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