



C.M.S.A.No.39 of 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 07.08.2023

CORAM:

THE HONOURABLE MR. JUSTICE P.VELMURUGAN

Civil Miscellaneous Second Appeal No.39 of 2019
and
C.M.P. No.27306 of 2019

Santhanalakshmi

... Appellant

-Versus-

Ganesh

... Respondent

Prayer:- This Civil Miscellaneous Second Appeal is filed under Section 41 Rule 1 of CPC read with Section 151 of CPC against the Judgment and decree dated 03.07.2019 passed by the learned Principal District Judge, Namakkal, made in CMA No.9 of 2015 confirming the fair and decreetal order passed in H.M.O.P.No.140 of 2010 dated 11.03.2015 passed by the learned Sub Judge, Namakkal.

For Appellant : Mr.N.Umpathi

For Respondent : Mr.R.Amizdhu



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JUDGMENT

This Civil Miscellaneous Second Appeal is filed against the Judgment and decree dated 03.07.2019 passed by the learned Principal District Judge, Namakkal, made in CMA No.9 of 2015, confirming the fair and decretal order passed in H.M.O.P.No.140 of 2010 dated 11.03.2015 passed by the learned Sub Judge, Namakkal.

2. Unfortunately, the appeal is pending from the year 2019 without even complying with the provisions of Section 100 C.P.C. However because of the error committed by this Court, the poor litigants should not suffer.

3. The appellant is the wife and the respondent is the husband. Since this Court so far has not formulated the substantial question of law and since the parties are waiting from the year 2019 and agitating as to whether the decision of both the Courts below are within the purview of Section 3(1)(1-a) of Hindu Marriage Act or not, this Court heard both sides and



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perused the records. In order to dispose of this appeal, this Court has to find out as to whether any substantial question of law exists.

4. According to the learned counsel for the appellant/wife, both the Courts have traversed beyond the scope of pleadings and also shifted the burden to the respondent/wife. Therefore, substantial question of law exists to decide this appeal.

5. According to the learned counsel for the respondent/husband, both the Courts have not traversed beyond the scope of pleadings and also not shifted the burden from the appellant/wife to the respondent/husband in the O.P. and both the Courts have rightly appreciated the pleadings and oral and documentary evidence and therefore, there is no substantial question of law.

6. A reading of the entire pleadings, the evidence and the decisions of both the Courts below shows that the respondent/husband had filed a petition in H.M.O.P.No.140 of 2010 before the Sub Judge, Namakkal, for divorce under Section 13(1)(1-a) of Hindu Marriage Act 1955 on the ground



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of cruelty. The trial Court has held that the respondent/husband as a petitioner, has substantiated his grounds raised by him for cruelty and granted divorce by order dated 11.03.2015. Aggrieved by the same, the appellant/wife filed an appeal before the Principal District Court, Namakkal, in CMA No.9 of 2015. The learned Principal District Judge, re-appreciated the entire evidence and confirmed the order of the trial Court and has rendered the findings independently. Now, challenging the same, the appellant/wife has filed the present second appeal.

7. It is seen that the appeal was filed on 08.11.2019 and though in the grounds of appeal, the appellant has not raised any substantial question of law, subsequently, the appellant has filed a memo on 25.10.2021 showing certain substantial questions of law, which reads as follows;

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



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2. Whether, in the absence of specific pleadings regarding cruelty and desertion, evidence, the husband is entitled to get a divorce?

3. Is not the finding of the Courts below that the husband has proved his case based on no evidence or misreading of evidence? and

4. Is not the procedure adopted by the Trial Court in casting the burden of proof on the wife, caused grave miscarriage of justice?

8. The learned counsel for the appellant/wife submitted that the respondent/husband has not put forth his pleadings that the wife had made allegations against him that he was leading an immoral life with other woman and on that ground, she caused cruelty against him. When there is no pleadings in this regard, the trial Court unfortunately granted divorce on the ground that the appellant/wife, without having any substance, had caused mental cruelty against the respondent/husband based on false



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allegations. Further, he submitted that the appellate Court also had not properly appreciated the pleadings and oral and documentary evidence and went to the extent of granting divorce on the ground of desertion also, which ground was not even sought for by the respondent/husband. He also submitted that no specific issue was framed by the trial Court and no specific reason and findings were rendered for each issue. However, the trial Court and the appellate Court shifted the burden on the appellant/wife. It is settled proposition of law that only the petitioner who files the petition has to prove his case and he cannot take advantage of the averments made by the appellant/wife, which warrants interference by this Court. The learned counsel placed reliance on the judgment of the Hon'ble Apex Court in Civil Appeal No.5010 of 2007 (Gurbux Singh Vs. Harminder Kaur) dated 08.10.2010 in which the Hon'ble Apex Court has stated that since the husband has not pleaded the cruelty in the grounds, the allegations without any substance cannot be taken as a ground for cruelty. In this regard, he also placed reliance on the Judgement of the Hon'ble Supreme Court in Civil Appeal Nos.7114-7115 of 2014 (Suman Singh Vs. Sanjay Singh) dated



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08.03.2017. Therefore, the judgments of the Courts below are liable to be set aside.

9. The learned counsel for the respondent/husband submitted that the husband had filed the petition on the ground of cruelty and stated various reasons, whereas the appellant/wife in her counter statement, made certain allegations against the respondent/husband. He pointed out that in the proof affidavit filed by the respondent/husband, the husband has stated the reasons for cruelty and that the wife has made false allegations against the husband even to the children about him. Further, the wife has specifically stated that one Lathip, co-worker of the respondent/husband, had informed her that the respondent/husband was having illegal intimacy with another woman, whereas the appellant/wife has not examined the said Lathip, or any person and substantiated the allegations. Unless the allegation is substantiated either with oral or documentary evidence, that remains as only allegations, which means that they are not proved. Both the Courts have rightly appreciated the evidence and the first appellate Court, as a final Court of fact finding, re-appreciated the entire evidence independently and



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considering the plea of the appellant/wife and also the admission made by the appellant/wife that she was residing separately for more that 6 to 7 years and since the cohabitation was denied by the appellant/wife which also lead to mental cruelty, the first appellate Court confirmed the order of the trial Court. The learned counsel placed reliance of the Judgment of a Division Bench of this Court in C.M.A. No.3829 of 2019 dated 20.01.2021 (Mrs.Bhuvaneswari Vs. Mr.S.K.Jayakumar).

10. On a perusal of the records, this Court finds that no substantial question of law exists on the ground that though the learned counsel for the appellant/wife canvassed before this Court for maintainability of the appeal, that there is no pleading regarding the allegation of illegal intimacy of the husband with another woman and therefore, in the absence of pleading and no amount of proof affidavit can be taken and even if it is taken, the Court need not look into it. The other ground is that no specific issue was framed by the trial Court and answered for each and every issues and therefore, the order of the trial Court is vitiated. Further, he has taken the other stand that the appellate Court, without considering the pleadings and oral and



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documentary evidence and also the error committed by the trial Court, has given additional ground which the respondent/husband had not sought for.

Since the appellant/wife deserted the respondent/husband which caused mental cruelty to him, which also is vitiated for which the learned counsel for the respondent/husband has clearly stated that the pleadings not only form part of the petition/claim, the counter statement /written statement also including the pleadings, will form part of the pleadings. The wife has stated in her counter alleging about her husband. Therefore, the contention raised by the learned counsel for the appellant/wife regarding no pleadings on the said facts and also he submitted that the wife herself admitted the desertion and also even in the evidence also, she has admitted that the husband was leading immoral life and she has also filed a complaint before the Paramathi, Vellore Police Station about the whereabouts of her husband and one of the co-worker of the respondent/ husband, namely Lathip had informed her over phone that the respondent/husband was living with another woman, it is clear that the said allegations have not been proved.



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11. Further since the appellant/wife admitted that she was not living with her husband at the time of filing of the complaint and admitted that for more than 6 to 7 years, she deserted her husband, the trial Court rightly appreciated and given finding that deserting the husband without any valid reason and depriving of cohabitation will also amounts to cruelty. Therefore, there is no perversity in appreciation of the evidence. The appellate Court which is a final Court of fact finding has also independently re-appreciated the pleadings and oral and documentary evidence and clearly stated the reasons for granting divorce. Therefore, there is no perversity. Hence, there is no substantial question of law arises for consideration.

12. Admittedly, the respondent/husband filed the petition for divorce on the ground of cruelty under Section 13(1)(1-a) of the Hindu Marriage Act and he has stated some reasons, for which the appellant/wife had filed counter. As stated by the learned counsel for the respondent/husband, even the counsel for the appellant/wife has also admitted that CPC would also be applicable to the matrimonial proceedings. Though it is a one word expressed about the pleadings and says CPC is applicable to all the civil



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proceedings, however the proceedings are for the limited purpose. The pleadings mean the petition filed by the petitioner and the counter statement filed by the respondent. Both can be treated as pleadings. The respondent/husband has stated various reasons. Though the learned counsel for the appellant/wife vehemently contended that the said reason of illegal intimacy has not been specifically pleaded and proved, for which the learned counsel for the respondent/husband pointed out the counter statement filed by the appellant/wife. Since it is undisputed fact that both the averments made in the petition and the allegations made in the counter can be treated as pleadings and therefore, it has to be seen as to whether the said facts have been proved or not.

13. Admittedly, the appellant/wife admitted that at the time of filing the petition, she was not living with the respondent/husband and another undisputed fact is that she has not filed any petition for restitution of conjugal rights and the fact remains that she has not examined any independent witness to prove that she had taken effective steps to live with her husband. No doubt, the petitioner has to prove the fact that the wife left



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the matrimonial home without any valid reason. Of course, the respondent/husband, by nature of job, could not have been in the same place and since it is a transferable job, he might have gone here and there and it is beyond his control. That is the reason why they both are not living together. But the appellant/wife clearly admitted that the respondent/ husband is leading immoral life with another woman and the same was informed to her by one Lathip, who is the friend of the respondent/husband. But she has not filed any material to prove the same. Neither she summoned the said Lathip, nor any other person and substantiated the said allegation. Even in the evidence, she had clearly admitted that the respondent/husband was leading immoral life. But that has not been substantiated by her and she had not made any attempt to substantiate the same. Therefore the trial Court and the first appellate Court have held that the appellant/wife has made bald allegations against the respondent/husband without any materials. Even though she has admitted that she had filed a police complaint against the respondent/husband, the said complaint was not filed and marked and she has not summoned any of the concerned police official. Once the wife had made certain allegations against the husband, it is for her to prove the same.



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14. No doubt, the husband who filed the petition for divorce on the ground of cruelty, has to establish the fact that the wife caused mental cruelty, which led him to file the petition for divorce on the ground of cruelty. As already stated, the respondent/husband has filed the petition for divorce on the ground of cruelty and he was examined himself as P.W.1 and he has stated the reasons and in the cross examination of the appellant/wife, she has reiterated the allegations levelled against her husband. Once the husband who filed the divorce petition for cruelty has established the foundational fact, then the onus is shifted to the wife to substantiate that the allegation levelled against the husband is true, whereas in this case, the allegations levelled against the respondent/husband by the appellant/wife has not been substantiated and therefore, the contention raised by the learned counsel for the appellant/wife that there is no pleadings, is not acceptable, as the reason stated in both the petition and the counter statement, are pleadings. Therefore, the allegation levelled against the husband by the wife in the counter statement is also a pleading.



15. Further, the wife also admitted that prior to the filing of the petition, she was not living with her husband. Therefore, the admitted fact need not be proved. It is not the case that the petition was filed on the ground of desertion, where the husband has to state the date and time on which the wife deserted him. The fact remains that the petition was filed for divorce only on the ground of cruelty, which had been pleaded and further the strict rules of pleadings clearly says that the fact has to be pleaded and proved. The evidence need not be pleaded. Even otherwise, in case the fact has been pleaded and the manner of cruelty has also been established, then the onus will shift on the appellant/wife and it is for the appellant to prove that the allegation levelled against the husband is true as the allegation alone is not sufficient to get the relief but, it has to be proved in the manner known to law. In this case, the appellant/wife has not proved that the husband was leading immoral life with other woman, which amounts to cruelty. It is only allegation and the same was not proved. Therefore, both the Courts have rightly appreciated and re-appreciated and rendered the finding that the wife caused cruelty towards husband. Therefore, the husband is entitled for divorce.



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16. The decisions referred to by the learned counsel for the appellant/wife, are not applicable to the present case on hand. There is no quarrel with the proposition of law as laid down in the decisions referred to by the learned counsel for the appellant/wife and when there are no pleadings, no amount of the evidence can be taken up. Even otherwise, without pleadings, even if evidence was let in, no part of the evidence can be considered. Therefore, the Court need not give much importance to the evidence without any pleadings on facts.

17. As already stated, pleadings include both petition and written statement. As far as framing of separate issues for each facts is concerned, in this case, the only disputed fact is that the wife caused cruelty on the husband. Marriage is not in dispute. Paternity of the children is also not in dispute. At the time of filing of the petition, both the appellant and the respondent were living separately, which is also not in dispute. The husband sought divorce only on the ground of cruelty. Therefore, the husband has



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substantiated the grounds of cruelty, which is only a disputed fact. The trial Court has clearly raised points for consideration.

18. Further, the appellate Court has also taken the points for consideration while dealing the appeal and given answer for points for consideration. There is no disputed fact left without taking of points for consideration and left it with that.

19. Under the above circumstances, since the findings of both the Courts below are based on factual aspects and there is no violation of any law, this Court also finds that there is no perversity in appreciation of the evidence by the Courts below. Therefore, this Court does not find that substantial question of law exists. Hence, this Courts finds that the appeal does not fall under Section 100 CPC.

20. Accordingly, this Civil Miscellaneous Second Appeal is dismissed. Consequently, connected Miscellaneous Petition is closed. There shall be no order as to costs.



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Index : Yes / No

Speaking Order: Yes/No

Neutral Citation: Yes/No



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To

1. The Principal District Judge, Namakkal

2. The Sub Judge, Namakkal.

3. The Section Officer,
VR Section,
High Court,
Madras.



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P.VELMURUGAN. J.

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