



C.R.P.(MD)No.2385 of 2018

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Dated : 17.07.2023

CORAM:

THE HONOURABLE **MR.JUSTICE C.KUMARAPPAN**

C.R.P.(MD)No.2385 of 2018

Maheswari

... Revision Petitioner/Petitioner/
Respondent

Vs.

Ayyappan @ Kumar

... Respondent/ Respondent / Petitioner

Prayer: Civil Revision Petition filed under Article 227 of the Constitution of India, to call for the records and to set aside the fair and decretal order, dated 13.07.2018, in I.A.No.18 of 2018, in H.M.O.P.No.140 of 2015, on the file of the District Judge, Family Court, Kanyakumari Division at Nagercoil.

For Petitioner : Mr.S.Vasik Ali
for Mr. R.M.Sivakumar

For Respondent : Mr.L.Shaji Chellan

ORDER

The instant Civil Revision Petition has been filed, against the order, dated 13.07.2018, in I.A.No.18 of 2018, in H.M.O.P.No.140 of 2015, on the file of the District Judge, Family Court, Kanyakumari Division at Nagercoil.



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2. The revision petitioner herein is the wife and the respondent herein is the husband.

3. For the sake of convenience, the parties are referred to according to their litigative status before the trial Court.

The respondent herein / husband has filed an application, seeking a relief of divorce to dissolve the marriage dated 27.08.2006. Since the petitioner herein / wife has not filed counter statement and in pursuance thereof, an *ex parte* decree of divorce was granted by the Court below on 21.10.2016. When the petitioner / wife filed an application to set aside the *ex parte* decree, there was a delay of 417 days. But, the respondent / husband filed a counter statement resisting the petitioner's contention. Wherein, he has pleaded that after having waited for 14 months from the date of *ex parte* decree, he married one Shanmugavadivu, D/o. Petchuvel, at Tiruchendur Arulmighu Subramaniaswamy Thirukoil. Therefore, the respondent / husband would submit that if the delay is condoned, it would prejudice his valuable rights and would put his second wife's status at peril. Hence, prayed to dismiss this application.



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4. The learned counsel for the petitioner would fairly concede the factum of second marriage of the respondent / husband, after the *exparte* decree. However, he would submit that since the petitioner is having daughter, and that she is willing to live with the petitioner, prayed this Court to condone the delay.

5. I have given my anxious consideration to the either side submission.

6. From the perusal of the records, it is an admitted fact that the respondent / husband has re-married, after the statutory period for setting aside the *exparte* decree. It is relevant to refer Section 15 of the Hindu Marriage Act. The same is as follows:-

“ Section 15. Divorced persons when may marry again:-

When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been



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dismissed, it shall be lawful for either party to the marriage to marry again.”

7. As per Section 15 of the Hindu Marriage Act, 1955, it shall be lawful for either party to re-marry, if no appeal has been filed within a statutory period. In this case, though *exparte* decree was passed on 21.10.2016, the petitioner did not think it fit to file an application to set aside the *exparte* decree. In the meanwhile, the respondent / husband has married one Shanmugavadivu. Eventually, now, third party right has also involved in this matter. This Court is of the firm view that the conduct of the petitioner has conferred valuable right upon the respondent, and such valuable right of remarriage cannot be lightly dealt under Section 5 of the Limitation Act.

8. The learned counsel for the respondent also relied upon the judgment of the High Court of Delhi made in ***MAT.APP(F.C.) No.189 of 2022, (Seema Devi V. Shree Ranjit Kumar Bhagat)***. Wherein it has been held that, it is lawful for the ex-spouse to re-marry, when there is a delay in filing the appeal, and it would further held that the appeal becomes infructuous from the inception. The relevant portion of the judgment



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reads as follows:-

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*“30. The provision of Section 15 of the Act has been subject matter of a recent decision of the Supreme Court in **Krishnaveni Rai v. Pankaj Rai and Signature Not Verified Digitally Signed ASWAL Signing Date:21.04.2023 14:58:35 N.C. No. 2023:DHC:2686-DB Anr., (2020) 11 SCC 253.** In that case the ex-husband of appellant wife remarried as no appeal was filed within period of limitation. The appeal was preferred by the appellant wife almost one year after the expiry of period of limitation. In this factual backdrop, the Supreme Court held that bar of Section 15 was not attracted, it was lawful for the ex-husband to remarry and the appeal was infructuous from the inception. The relevant extract of the judgment reads as under:*

"28. Section 15 clarifies that when a marriage has been dissolved by a decree of divorce, and there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed, it shall be lawful for either party to the marriage to marry again. Had it been the legislative intent that a marriage during the pendency of an appeal should be declared void, Section 11 would expressly have provided so.

*29. As held by this Court in **Anurag Mittal v. Shaily Mishra Mittal [Anurag Mittal v. Shaily Mishra Mittal, (2018)***



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9 SCC 691 : (2018) 4 SCC (Civ) 550] , the object of Section 15 is to provide protection to the person who had filed an appeal against the decree of dissolution of marriage and to ensure that such appeal was not frustrated. The protection afforded by Section 15 is primarily to a person contesting the decree of divorce. As observed by Bobde, J. in his concurring judgment in *Anurag Mittal* [*Anurag Mittal v. Shaily Mishra Mittal*, (2018) 9 SCC 691 : (2018) 4 SCC (Civ) 550] : (SCC pp. 702-703, paras 31 & 33) "I am in agreement with the view taken by Nageswara Rao, J. but it is necessary to state how the question before us has already been settled by the decision in *Lila Gupta v. Laxmi Narain* [*Lila Gupta v. Laxmi Narain*, (1978) 3 SCC 258] . Even when the words of the proviso were found to be prohibitory in clear negative terms -- "it shall not be lawful", etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of *Lila Gupta* [*Lila Gupta v. Laxmi Narain*, (1978) 3 SCC 258] . It is all the

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more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like "it shall be lawful". Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 and 10 of *Lila*



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Gupta case [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258]

33. What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as "it shall not be lawful" or an incapacity imposed by positive language like "it shall be lawful (in certain conditions, in the absence of which it is impliedly unlawful)". It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it was contracted under an incapacity. Obviously, this would have no bearing on the other conditions of a valid marriage. The decision in Lila Gupta case [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] thus covers the present case on law."

(Emphasis supplied by this Court)

9. Therefore, this Court is of the view that when an opportunity was available to the petitioner / wife, to file an application to set aside the exparte decree within the reasonable time, having failed to file within the



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statutory period and filed after 14 months would make the very Section 5 of Limitation Act application become infructuous, as the respondent has remarried in the interregnum is with in the frame work of Section 15 of the Hindu Marriage Act. It is pertinent to mention here that the delay only indicate that the petitioner do not have any interest to pursue the life with the respondent herein.

10. Therefore, this Court is not inclined to allow this Revision petition. In the result, the instant Civil Revision Petition is **dismissed**. There shall be no order as to cost.

NCC : Yes/No
Index :Yes/No
Ls

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To

- 1.The District Judge,
Family Court,
Kanyakumari Division at Nagercoil.

2. The Section Officer,
VR Section,
Madurai Bench of Madras High Court,
Madurai.



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C.KUMARAPPAN.,J.

Ls

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