



CMSA(MD).No.1 of 2013

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

RESERVED ON : 13.04.2023

PRONOUNCED ON : 27.04.2023

CORAM

THE HONOURABLE MR.JUSTICE R.VIJAYAKUMAR

C.M.S.A(MD)No.1 of 2013

and

CMP(MD).No.122 of 2022

P.Jegatheesan (died)

2.P.Jayalakshmi

(2nd appellant is impleaded vide Court order
dated 15.11.2021)

... Appellants

VS.

Gomathi

...Respondent

PRAYER:- Civil Miscellaneous Second Appeal filed under Section 28 of Hindu Marriage Act read with Section 100 of C.P.C, to allow this Civil Miscellaneous Second Appeal against the Judgment and Decree in CMA.No.74 of 2012 on the file of the Principal District Court, Tiruchirapalli, dated 03.12.2012 reversing the Judgement and Decree in HMOP.No.669 of 2010 on the file of the Principal Sub Court, Tiruchirapalli, dated 10.07.2012.



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For Appellant : Mr.S.Ramesh

For Respondent : Mr.A.Haja Mohideen

J U D G M E N T

The appeal was originally filed by the husband challenging the order of concurrent dismissal of the divorce petition by the Courts below. Pending appeal, the husband had passed away and his mother has been substituted in his place as a legal heir in order to prosecute the second appeal.

2.Factual Matrix:

(i).One P.Jegatheesan got married to Gomathi as per Hindu Rites and their caste customs on 08.09.1994 at Vasavi Mahal Contonment, Trichy. A son was born to them on 06.06.1995 and a daughter was born to the couple on 01.02.2000. Due to matrimonial dispute, the husband had filed HMOP.No.669 of 2010 on the file of the Principal Subordinate Court, Tiruchirappalli for the relief of dissolution of marriage.

(ii).The Trial Court after considering the oral and documentary evidence on either side, allowed the petition and granted a decree for divorce.



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(iii).The wife had filed CMA.No.74 of 2012 before the Principal District Court, Trichy. The District Judge after hearing both the parties, had allowed the appeal and dismissed the divorce petition filed by the husband. Challenging the said order of the Principal District Judge, Trichy, a second appeal was filed by the husband in CMSA.No.1 of 2013 before this Court. Pending CMSA No.1 of 2013, the appellant/husband had died in an accident on 08.11.2016.

(iv).On 21.11.2016 the second appeal was closed by this Court citing death of the husband. However, the mother of the husband had filed CMP.No.11620 of 2017 to condone the delay and CMP.No.11627 of 2017 to implead herself as the appellant. Both the petitions were allowed. Thereafter, CMP.No.121 of 2022 was filed by the mother of the deceased to restore the appeal and the same was also allowed and hence, CMSA.No.1 of 2013 has now been restored and listed for hearing.

(v).The learned counsel for the respondent/wife had objected to the maintainability of the appeal after the death of her husband. Therefore, this Court had directed both the parties to make their submissions on the maintainability of the appeal.



3.Contentions of the learned counsel appearing for the appellant/husband:

(i).A divorce petition could be dismissed as abated only in the trial stage where no evidence has been recorded. But in the present case, both the parties have let in oral and documentary evidence in support of their respective case. The Trial Court had considered the issue on merits and has granted divorce. The First Appellate Court had reversed the decree and dismissed the divorce petition. Therefore, there is no impediment on the part of the Second Appellate Court to consider the appeal again on merits despite the death of the husband.

(ii).The learned counsel for the appellant had further contended that the husband was granted a divorce decree by the trial Court and it has been reversed by the First Appellate Court. The mother of the husband would like to prosecute the appeal only to establish the status between the parties. Any status that is decided by this Court would have consequence with regard to the property dispute between the mother-in-law and the daughter-in-law. Therefore, it is essential to decide the appeal on merits without considering the objection relating to the maintainability of the appeal.



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(iii).As per Order 22 Rule 1 of C.P.C, death of one of the parties

shall not cause the proceedings to abate if the right to sue survives.

According to the learned counsel for the appellant, after the death of the husband, right to sue survives only to decide the status between the parties. The mother being a class-I heir of the deceased husband has been substituted as a legal heir of her son and therefore, she is entitled to prosecute the appeal as against her daughter-in-law.

(iv).The learned counsel for the appellant had relied upon the judgement of the Hon'ble Supreme Court reported in **(1996) 6 Scc 371 (A.Lakshmi Vs. K.Saraswathi Ammal)** wherein the Hon'ble Supreme Court has held that where the husband had died after obtaining an exparte divorce, the wife is entitled to prosecute Order 9 Rule 13 C.P.C application as against the legal heirs of her husband. In the said judgment, the Hon'ble Supreme Court has held that the application under Order 9 Rule 13 C.P.C has to be decided on merits. The wife has got sufficient *locus standi* and right to contest the divorce proceedings even after the death of her husband. He had further pointed out that in the said case, the Hon'ble Supreme Court has allowed the appeal and remitted the matter back to the trial Court with a direction to dispose of the



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application under Order 9 Rule 13 C.P.C on merits and in accordance with law. Therefore, according to the appellant, the legal heirs of the deceased husband is entitled to prosecute the second appeal only to determine the matrimonial status between the deceased husband and the wife. Therefore, he prayed for hearing the appeal on merits.

4.Contentions of the learned counsel for the respondent/wife:

(i).The learned counsel for the respondent had contended that the right to obtain a decree for divorce is personal in nature and if one of the spouses had died, the cause of action does not survive. The pending proceedings should be dismissed as abated. He had further contended that in the present case, the decree for divorce that was granted by the trial Court has been reversed by the First Appellate Court and hence, on the date of death of the husband, there is no decree for divorce. Therefore, pending second appeal, the status between the parties had continued as husband and wife. The said status cannot be disturbed after the death of one of the spouses.

(ii).The learned counsel had further contended that the mother-in-law has no *locus standi* whatsoever to prosecute the divorce petition filed by her deceased son as against her daughter-in-law. The decree for



divorce being personal in nature, the mother-in-law cannot get a decree for divorce for the purpose of his deceased son.

(iii).The learned counsel had further contended that the mother-in-law is attempting to prosecute this second appeal only to deprive the property rights of the daughter-in-law and two of her grandchildren.

(iv).He had further contended that after the death of his son, the mother-in-law had executed a sale deed on 18.09.2017 with regard to the property of her deceased son. In the said sale deed, she had alienated her own share, without disturbing the share of her daughter-in-law or minor grandchildren. Therefore, it is clear that she has admitted the status of her daughter-in-law as wife of her son and restricted the alienation to her own share.

(v).The learned counsel for the respondent had further contended that the judgement relied upon by the learned counsel for the appellant reported in **(1996) 6 SCC 371 (A.Lakshmi Vs. K.Saraswathi Ammal)** has conferred rights only for the purpose of prosecuting Order 9 Rule 13 C.P.C application as against the legal representative of the deceased husband. The Hon'ble Supreme Court has not given any finding with regard to the fact that what would be the cause of further proceedings,



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once Order 9 Rule 13 C.P.C petition is allowed and the divorce petition is restored. Therefore, according to the learned counsel for the respondent, the judgement of the Hon'ble Supreme Court has to be interpreted to mean that only a limited right is conferred upon the living spouse to challenge the exparte decree as against the legal representative of the deceased spouse. However, in the present case, on merits, the First Appellate Court had dismissed the divorce petition and therefore, the said judgement is not applicable to the present second appeal seeking divorce. Hence, he prayed for dismissing the appeal on the ground that it has become abated and the mother of the deceased husband is not entitled to prosecute the appeal against the dismissal of the divorce petition.

5.I have considered the submissions made on either side and perused the materials available on record.

6.There is no dispute that the trial Court has granted a divorce decree in favour of the husband, but the same has been reversed by the First Appellate Court. It is also not in dispute, pending second appeal, the husband had passed away in an accident. The mother of the deceased husband has got impleaded herself as appellant on the ground that she is



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the legal representative and now seeks to prosecute the appeal on merits in order to determine the status between her deceased son and the daughter-in-law.

7.The learned counsel for the appellant had relied upon the judgement of the Hon'ble Supreme Court reported in **(1996) 6 SCC 371 (A.Lakshmi Vs. K.Saraswathi Ammal)** to contend that the Hon'ble Supreme Court has held that the wife has got *locus standi* and right to prosecute Order 9 Rule 13 C.P.C application challenging the exparte decree as against the legal heirs of the deceased husband.

8.A perusal of the said judgement of the Hon'ble Supreme Court will clearly indicate that the Hon'ble Supreme Court has upheld the locus standi of the wife only on the ground that the decree obtained by the husband is effective in law and has determined the status of the wife. Therefore, even though the husband had passed away, the decree is operating as against the wife and therefore, she will be entitled to prosecute Order 9 Rule 13 C.P.C petition even after the death of her husband as against the legal representatives of her husband. The Hon'ble Supreme Court has further directed the trial Court to dispose of the



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application under Order 9 Rule 13 C.P.C on merits and in accordance with law.

9.The Hon'ble Supreme Court has not indicated about the survival of cause of action to prosecute the main case, in case Order 9 Rule 13 C.P.C application filed by the wife is allowed. Therefore, the said judgement is not applicable to the facts of the present case.

10.The Hon'ble Supreme Court had an occasion to consider the said legal issue in an another judgement reported in **(1997) 11 SCC 159 (Yallawwa Vs. Shantavva)**. In the said proceedings, the husband had obtained an exparte decree for divorce. Before the wife could file an application to set aside the exparte decree, the husband had passed away. Therefore, the wife had filed Order 9 Rule 13 C.P.C application to implead the mother of her deceased husband with a delay. The trial Court dismissed the Order 9 Rule 13 application on the ground of delay. The wife had filed a revision before the High Court and the High Court had allowed the revision and set aside the exparte decree. This order was challenged by the mother of the deceased husband before the Hon'ble Supreme Court. The Hon'ble Supreme Court was pleased to confirm the said order after unholding the preposition of law that Order 9 Rule 13



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C.P.C would not get abated and the wife would be entitled to prosecute the said application. After unholding the allowing of Order 9 Rule 13 C.P.C application, the Hon'ble Supreme Court proceeded to further hold that once HMOP is restored to the file of the trial Court, it becomes obvious that the original petitioner seeking decree of divorce as against the wife is no longer available to pursue the proceedings, the proceedings will certainly observe the character of a personal cause of action for the deceased husband and there is no decree culminating into any crystallized rights and obligations, the said proceedings would obviously stand abated on the ground that the right to sue would not survive for the other heirs of the deceased husband to get any decree for divorce.

11. Therefore, in view of the judgement of the Hon'ble Supreme Court, the preposition of law could be summarised as follows:

(a). When the divorce petition is pending before the trial Court, on the death of one of the spouses, the petition should be dismissed as abated.

(b). When there is an exparte decree for divorce, the aggrieved spouse (or his/her legal heir) would be entitled to file an application under Order 9 Rule 13 of C.P.C as against the decree holder/spouse



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(or his/her legal representatives) and prosecute or defend the same as the case may be.

(c).Once the exparte decree is set aside by the trial Court, there is no decree for divorce and the proceedings have to be dismissed as abated.

(d).When a spouse had filed an appeal challenging the dismissal of divorce petition, then the appeal should be dismissed as abated.

(e).When a spouse had filed an appeal challenging the grant of divorce, then the appeal could be prosecuted or defended by the legal heirs of the deceased spouse.

12.In view of the judgement of the Hon'ble Supreme Court reported in **(1997) 11 SCC 159 (Yallawwa Vs. Shantavva)**, there is no divorce decree in favour of the husband or against the wife, when the husband had passed away. Therefore, seeking divorce is a personal cause of action for the appellant and therefore, the right to sue no longer survives to the legal heirs of the deceased husband. Hence, the present second appeal stands abated on the death of the appellant/husband.

13.The impleading of the mother of the deceased husband for the purpose of restoration of the appeal would not confer any right upon her



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to prosecute the appeal on merits in view of the judgement of the Hon'ble Supreme Court. Since the appeal is dismissed as abated, this Court is not going into the merits of the matrimonial dispute between the parties.

14. In view of the above said deliberations, this Civil Miscellaneous Second Appeal stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

27.04.2023

Index : Yes/No
Internet : Yes/No
NCC : Yes/No
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To

- 1.The Principal District Judge, Tiruchirapalli,
- 2,The Principal Sub Judge, Tiruchirapalli
- 3.The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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R.VIJAYAKUMAR,J.

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Pre-delivery Judgement made in
C.M.S.A(MD)No.1 of 2013
and
CMP(MD).No.122 of 2022

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