



C.M.S.A.No.24 of 2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.03.2024

Coram:

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

C.M.S.A.No.24 of 2014

Sivabalan

.. Appellant

Vs.

Maheswari

.. Respondent

Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act, read with Section 100 of the Code of Civil Procedure (i.e. CPC) against the judgment and decree dated 29.01.2014 in C.M.A.No.36 of 2012 on the file of the I Additional District Court, Cuddalore, allowing the appeal, setting aside the fair and decretal order dated 13.10.2011 in H.M.O.P.No.60 of 2009 on the file of the Principal Subordinate Court, Cuddalore.

For appellant : Mr.R.Gururaj

For respondent : No appearance

JUDGMENT

Civil Miscellaneous Second Appeal is filed against the judgment and decree dated 29.01.2014 in C.M.A.No.36 of 2012 on the file of the I Additional



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District Court, Cuddalore, allowing the appeal, setting aside the fair and decretal order dated 01.10.2011 in H.M.O.P.No.60 of 2009 on the file of the Principal Subordinate Court, Cuddalore.

2. The appellant herein is the husband and the respondent herein is the wife.

3. The husband has filed H.M.O.P.No.60 of 2009 before the trial Court under Sections 13(1)(i) and 13(i)(ia) of the Hindu Marriage Act, 1955, to dissolve the marriage between himself and the respondent herein solemnized on 07.09.2007, stating as follows:

The appellant herein married the respondent on 07.09.2007 in Cuddalore and out of their wed-lock, a child was born. The father of the appellant herein, was an Ex-serviceman and owns ancestral land(s). The father of the respondent herein, was a Mason. The husband is doing contract work in SIPCOT complex earning a sum of Rs.3,000/- per month. After marriage, both of them lived with the parents of the husband, but the wife did not like the marriage and she picked up quarrel often with the husband and his parents. The wife's parents are in Chennai and she often go out without informing anyone. She spent most of her life in her maternal aunt's house at Chidambaram. There arose suspicion in the conduct of the wife leading to misunderstanding. In some occasions, the

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wife had mixed poisonous substance in the cooked food and he was saved. The respondent/wife threatened that she would give false complaint to Police. The appellant/husband believed that the respondent/wife, even prior to their marriage, was having a relationship with some other person. She had failed to contact the appellant/husband. Due to torture by the wife, the appellant/husband suffered great mental cruelty and physical strain. It is also alleged that even the husband and his parents were called to the Police Station under threat and coercion. On the ground that the respondent/wife had voluntarily sexual intercourse with a person other than the appellant, the divorce is sought for by him.

4. The respondent/wife has filed counter before the trial Court stating as under:

The marriage between both the appellant and the respondent was not cordial from the pre-natal stage. The appellant's mother is poisoning the mind of the appellant. It is only the husband who has no respect for elders and had dislike for her mother-in-law. It is the wife, who on her own will, without even informing the husband or his family members, went out from the appellant's house. The respondent/wife is not aiming for second marriage as alleged by him. She is prepared to live with the appellant, provided the safety of the respondent/wife and the child is assured.

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5. Before the trial Court, the appellant/husband examined himself as P.W.1 and the respondent/wife was examined as R.W.1, apart from R.Ws.2 and 3. On the side of the appellant/husband, the marriage invitation was marked as Ex.P-1.

6. The trial Court, on an analysis of the oral and documentary evidence, granted divorce, dissolving the marriage between the appellant and the respondent, against which, the respondent/wife preferred appeal, which was allowed, setting aside the order of the trial Court. Challenging the judgment of the first appellate Court, the present appeal is filed by the husband.

7. This appeal was admitted by this Court on 30.10.2014 on the following substantial questions of law:

(i) Would not long desertion without reasonable cause itself amount to mental cruelty ? and

(ii) Is not the failure to file an appeal against dismissal of counter-claim constitute res-judicata ?

8. Learned counsel for the appellant submitted that the appellant/husband filed H.M.O.P.No.60 of 2009 before the trial Court for divorce

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on the ground of adultery and cruelty. On receipt of summons, the respondent/wife filed counter-claim and also filed a petition for restitution of conjugal rights in H.M.O.P.No.62 of 2010. Both the above H.M.O.Ps. were taken up together for disposal by the learned trial Judge and the petition filed by the husband for divorce was allowed and the petition filed by the wife for restitution of conjugal rights, was dismissed. Though the divorce petition filed by the husband was allowed only on the ground of cruelty, however, the learned trial Judge found that the appellant/husband has not proved the ground of adultery. The respondent/wife challenged the order of divorce passed by the trial Court by filing appeal before the District Court in C.M.A.No.36 of 2012, which was heard by the appellate Court and allowed, by setting aside the order passed by the trial Court, and as against the same, the appellant/husband has filed the present appeal before this Court.

9. Learned counsel for the appellant submitted that the trial Court rightly appreciated the evidence of the respondent's side witnesses and found that the appellant/husband has proved the ground of cruelty and granted divorce and dismissed the petition filed by the wife for restitution of conjugal rights. The respondent/wife has not filed any appeal before the appellate Court challenging the dismissal of the petition filed for restitution of conjugal rights and she had challenged only the order of divorce. Since she has not challenged the dismissal

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of the petition for restitution of conjugal rights and that the order operates as res-judicata. The counter-claim filed by the respondent-wife was dismissed, but she has not filed any appeal as against the same, and therefore, it operates as res-judicata. In support of his submissions, the learned counsel for the appellant relied on a decision of the Supreme Court reported in AIR 1966 SC 1332 (Sheodan Singh Vs. Daryao Kunwar), wherein the Apex Court observed as follows:

"20. A consideration of the cases cited on behalf of the appellant therefore shows that most of them are not exactly in point so far as the facts of the present case are concerned. Our conclusion on the question of res judicata raised in the present appeals is this. Where the trial Court has decided two suits having common issues on the merits and there are two appeals there-from and one of them is dismissed on some preliminary ground, like limitation or default in printing, with the result that the trial Court's decision stands confirmed, the decision of the appeal court will be res judicata and the appeal court must be deemed to have heard and finally decided the matter. In such a case the result of the decision of the appeal Court is to confirm the decision of the trial Court given on merits, and if that is so the decision of the appeal court will be res judicata whatever may be the reason for the dismissal."

10. It is the contention of the respondent/wife before the Courts below that though the appellant/husband filed the divorce petition on two grounds, one is adultery and another is cruelty, and though the ground of adultery was dis-



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allowed, the appellant/husband has not filed any appeal and only the wife had filed appeal against the order of divorce and in both the H.M.O.P. and the counter-claim and the restitution of conjugal rights, they have pleaded the same and the appellant who has filed the petition for divorce, has filed a counter-claim for restitution of conjugal rights based on the allegations made in the petition. Therefore, mere non-filing of any appeal against the dismissal of the counter-claim, will not operate as res-judicata. The issue involved is as to whether the appellant is entitled for divorce on the ground of adultery and also cruelty. As far as the adultery is concerned, the trial Court dis-allowed it and there was no further appeal. As far as the cruelty is concerned, the trial Court failed to appreciate the evidence and the trial Court also misconceived the evidence of R.W.2 and granted divorce as if the respondent-wife caused mental cruelty. But the appellate Court being the final Court of fact-finding, rightly re-appreciated the evidence and set aside the order passed by the trial Court.

11. Heard the learned counsel for the appellant and perused the materials available on record.

12. As far as the first substantial question of law is concerned, the appellant/husband has stated that the wife went for delivery and later on, she did not turn up and without any valid reason, she had left the matrimonial home

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and had never turned up and therefore, long desertion would cause mental cruelty, and therefore, the appellant/husband is entitled for divorce, whereas the respondent/wife has clearly stated that she loved the appellant and also the mother-in-law who was the cause for their separation and she was also doing all sorts of tricks between the appellant and respondent, and in this case, when the appellant filed the petition for divorce on the ground of adultery and cruelty, whereas the appellant/husband has not impleaded the persons said to have been involved in the allegation of adultery and even he has not mentioned name of the person and has not even examined any witness in that regard. Therefore, the trial Court rightly dis-allowed the petition for restitution of conjugal rights and that the appellant has also not challenged the same.

13. As far as the cruelty is concerned, the appellant-husband has pleaded that the respondent mixed poison in the food and had threatened/black-mailed him that she would give false complaint against him, which caused him cruelty. Though the respondent has stated that there is no problem with the appellant and only the mother is the cause for their separation and the appellant/husband was only examined as a witness, but the appellant has not examined his mother and he has also not examined any person to show that the respondent only mixed poison. The appellant has also not stated that only the wife had mixed the poison in the presence of anybody. Only he suspected her and R.W.2 stated that

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only the mother of the appellant alone informed that the respondent/wife mixed poison in the food. Based on that, the appellant has asked about the same from the respondent and she denied the same. Further, in this case, the food also was not sent for Forensic Laboratory for analysis and there was no eye-witness to the incident relating to mixing of poison. Already the respondent made allegation against her mother-in-law (ie. the mother of the appellant) who was playing tricks between the appellant and the respondent, but the appellant has not examined his mother and no eye-witness was examined to prove that only the respondent mixed poison. Moreover, the said suspected food also was not sent for Forensic Department for analysis to find out that as to whether there was any poison in the suspected food that would be served on the appellant and also that no Police complaint was given, and therefore, the trial Court, based only on the evidence of R.W.2 that during the cross-examination, he was told about the same by the mother of the appellant, especially the mother of the appellant was not examined and no other independent witness or eye-witness was examined to prove that the respondent-wife mixed poison in the food which would have been served on the appellant. Therefore, the trial Court failed to appreciate the evidence in the absence of any materials and found that the respondent had caused mental cruelty to the appellant-husband, whereas, the first appellate Court rightly re-appreciated the evidence and finds that the appellant has not proved the same. The appellant has not also proved that the respondent-wife

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threatened/black-mailed that she would give false complaint. The appellant though suspected the character of the respondent-wife, and he pleaded adultery, but admittedly, out of their wed-lock, one child was born and the appellant has not given any DNA test for denying the paternity of the child.

14. Therefore, in the above circumstances, when the ground of adultery was also dis-allowed, the appellant-husband has not filed any appeal or cross appeal/objection. Thus, this Court finds that the respondent has left the matrimonial home only due to the reason that she was conceived and she went to the paternal home only for delivery of the baby and not for any other purpose. Later on, there was misunderstanding between them and it is not the evidence of the appellant that he persuaded her to come back and she refused to come. No independent witness was examined and even the mother of the appellant has not stated that they have taken effective steps to bring her back to matrimonial home. The main allegation of the respondent is that even the appellant suspected her character and either the appellant or his mother came to her parental home even for seeing the child. As the appellant has not examined any independent witness either for the allegation of mixing of poison in the food and also with regard to the threat/black-mail of giving a false complaint and she left the matrimonial home without any valid reason. The respondent/wife examined herself as R.W.1 and denied all the allegations made

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by the appellant and she also examined R.Ws.2 and 3. R.W.3 is the father and though he has deposed in his chief examination that he has only supported the case of the respondent, during cross-examination, the appellant has put a suggestion that he asked about the mixing of poison and the mother of the appellant has not stated that she saw the respondent while mixing the poison or threatened/black-mailed the appellant. R.W.2 admittedly stated that the appellant suspected her and there was some misunderstanding and the husband suspected the fidelity of the wife and adultery allegation was not proved and the appellant has not challenged that finding and even the trial Court failed to appreciate the evidence in right perspective and the first appellate Court re-appreciated the evidence and allowed the appeal, though the appellant has not proved that the respondent/wife left the matrimonial home without any valid reason and there was a long desertion without any valid reason. The first substantial question of law is answered accordingly against the appellant/husband.

15. As far as the second substantial question of law is concerned, though the appellant filed the petition for divorce, counter-claim was filed by the wife and she also filed a petition for restitution of conjugal rights, the counter-claim was dismissed, but the petition for divorce was allowed and the petition for restitution of conjugal rights was dismissed. The allegations are vice-versa. In

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the above circumstances, the trial Court granted divorce only on the ground of mental cruelty and not on the ground of adultery. The appellant did not challenge the findings of adultery. However, the respondent-wife challenged the findings of cruelty and the appellate Court allowed the appeal. Mere non-filing of the appeal against the dismissal of the counter-claim may not operate as res-judicata. Therefore, considering the facts and circumstances of the case, failure to file appeal against the dismissal of counter-claim, will not constitute res-judicata. The second substantial question of law is answered accordingly.

16. The decision of the Supreme Court relied on by the learned counsel for the appellant is not applicable to the facts of the present case on hand, as the facts are entirely different.

17. For the reasons stated above, there is no merit in the present CMSA, which is liable to be dismissed. Accordingly, the present CMSA is dismissed. There shall be no order as to costs.

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Index: Yes/no
Speaking Order: Yes/no
Neutral Citation: Yes/no
CS

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To

1. The Additional District Judge-I, Cuddalore.
2. The Principal Subordinate Judge, Cuddalore.
3. The Section Officer, V.R. Section, High Court, Madras.

P.VELMURUGAN, J

CS



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Pre-delivery Judgment in
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Judgment delivered
on 19.03.2024

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