



CM.S.A (MD)No.8 of 2014

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Dated: 15.02.2024

CORAM:

THE HON'BLE MR.JUSTICE **P. DHANABAL**

CM.S.A (MD)No.8 of 2014

P.Subburam

..Appellant/Appellant/Petitioner

.vs.

Seeniammal

..Respondent/Respondent/Respondent

Prayer : This Civil Miscellaneous Second Appeal filed under Section 28 of the Hindu Marriage Act and Section 100 of Civil Procedure Code, against the judgment and decree dated 10.12.2012 made in HMCMA No.17 of 2010 on the file of the Principal District Judge, Virudhunagar at Srivilliputhur confirming the fair and decreetal order dated 19.10.2009 made in HMOP No. 106 of 2008 on the file of the Subordinate Judge, Sivakasi

For Appellant : Mr.P.Arunjayatram

For Respondent : No appearance



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JUDGMENT

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This Civil Miscellaneous Second Appeal has been filed as against the order passed in H.M.C.M.A.No.17 of 2010 on the file of the Principal District Judge, Virudhunagar at Srivilliputhur, confirming the judgment and decree of the trial Court in HMOP No. 106 of 2008 on the file of the Subordinate Judge, Sivakasi, in which the petition filed by the appellant was dismissed through an order dated 19.10.2009

2. For the sake of convenience and brevity, the parties herein after will be referred to as per their status/ranking in the Tribunal.

3. The brief facts of the petition before the Trial Court are as follows:

The marriage between the petitioner and the respondent was solemnized on 02.02.1996 as per Hindu rites and customs. After marriage the petitioner and the respondent along with his parents living in as joint family. The respondent demanded for separate house but the same was refused by the petitioner due to that reason the respondent made frequent quarrel with the petitioner. In the meantime, the respondent got conceived three months and her



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health condition was too weak, hence she frequently showed angry towards him. Further the respondent threatened to commit suicide. In the meantime the parents of the respondent made an attempt to sent the petitioner to Singapore but they were cheated by somebody and they lost the amount. Due to that there was some misunderstanding between the respondent and her parents. Thereafter the respondent requested to send her to her parents house. Prior to marriage the respondent was affected with epilepsy and the same was suppressed by the respondent. After giving birth of child when the petitioner asked the respondent to come to his house her parents along with the respondent refused and demanded for separate house and the same was declined by the petitioner. Since the petitioner refused for separate house the respondent used to go her parents house and the respondent not even attended the marriage of the petitioner's brother, thereby the petitioner filed a petition in HMOP No. 86 of 2003 on the ground of cruelty and desertion. Now the petitioner and respondent are living separately for more than 12 years. The parents of the respondent suppressed the epileptic seizure, thereby caused mental cruelty to the petitioner. Hence they filed petition for divorce.



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4. The brief facts of the counter filed by the respondent are as follows:

The marriage between the parties and the relationship are admitted. Due to wedlock between the petitioner and the respondent a male child was born to them and now he is aged about 12 years. It is false to state the respondent was affected by epilepsy. Further it is false to state that the respondent demanded for separate house. Infact the petitioner wanted to go to Singapore and demanded Rs. 2,00,000/- from the respondent but the said demand was refused. Due to that there was misunderstanding between the parents of the respondent and the petitioner and also the petitioner sent the respondent to her parent's house. Already the petitioner filed HMOP No.86 of 2003 for divorce and the same was dismissed and thereafter another petition was filed in HMOP No. 120 of 2007 and the same was also withdrawn. Therefore the petition is liable to be dismissed.

5. Before the Trial Court, on the side of the petitioner, he has examined P.W.1 to P.W.3 and marked exhibits Ex.P.1 and P.2 and on the side of the respondent, R.W.1 was examined and exhibits Ex.R.1 and R.2 were marked and documents Ex.x.1 to X5 were also marked.



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6. After hearing both sides and perusing the documents available on record, the Trial Court has dismissed the petition. As against the dismissal order the petitioner in the original petition preferred an appeal before the learned Principal District Judge, Virudhunagar at Srivilliputhur in HMCMA No.17 of 2010 and the first appellate court also dismissed the petition by confirming the order of the trial Court.

7. Being aggrieved by the dismissal order of the first appellate Court, the present Civil Miscellaneous Second Appeal has been filed on various grounds including the following substantial questions of law:

i)Whether the judgment and decree of the lower appellate Court is in conformity with Order 41 Rule 31 of CPC wherein the lower appellate Court has not framed necessary issues for determination and failed to render finding on each issue separately?

ii)Whether the lower appellate court is not justified in holding that irretrievable break down of the marriage is valid ground to grant divorce?

iii) Whether the principles of res-judicata applicable in the matrimonial proceedings?



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8.The learned counsel appearing for the appellant would contend that the appellant has filed petition before the trial Court for granting divorce on the ground of cruelty as well as desertion and in order to prove the case he has examined P.W. 1 to P.W.3 and marked exhibits Ex.P.1 and P.2. P.W.1 has categorically deposed about cruelty by the respondent to the petitioner and also without any valid reason she left the matrimonial home for more than five years. Now the parties are living separately for more than 12 years, but the trial Court without considering the evidence adduced on the petitioner side erroneously dismissed the petition. Further the first appellate Court without framing necessary issues for determination confirmed the order of the trial Court and failed to consider the irretrievable breakdown of marriage is valid ground to grant divorce. Further the trial Court dismissed the petition on one of the ground that the petition is barred by the principle of *res judicata*. As far as matrimonial disputes are concerned *res judicata* will not be applicable therefore without considering the above said aspects the trial Court as well as the first appellate Court dismissed the petition filed by the appellant/petitioner.



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9. Further the learned counsel appearing for the petitioner argued that the principles of *res judicata* proceedings will not be applicable to the HMOP proceedings and to support his contention he produced judgment of this Court in the case of ***Shanthakumari @ Shanthi .vs. Venkatasubramani*** in ***CRP No.3753 of 2019***. On careful perusal of the above order, it will not be applicable to the present facts of the case since the facts of the case are distinguishable. Even in the judgment, this Court observed that even if the same grounds are taken in the subsequent proceedings for divorce no bar of *res judicata* could apply as long as cause of action for the subsequent proceedings remains to be different. Therefore the said case law will not be helpful to the petitioner to decide the case in favour of the appellant/petitioner.

No representation for the respondents.

Substantial Question of Law No.1

10. In this case it is an admitted fact that the petitioner and the respondent are husband and wife and a male child was born to them. The appellant/petitioner has filed a petition before the trial Court for granting divorce on the ground of desertion as well as cruelty. In order to prove the case, on the side of the petitioner, he has



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examined P.W.1 to P.W.3 and marked exhibits Ex.P.1 and P.2 and on the side of the respondent, R.W.1 was examined and exhibits Ex.R.1 and R.2 were marked and documents Ex.x.1 to X5 were also marked. The trial Court after elaborate discussion dismissed the petition by holding that the allegation regarding epilepsy seizure was not pleaded in the previous application and when the case of the petitioner is proved to be false by referring his own previous petition his act of bringing the erstwhile husband and two other witnesses has to be taken to establish the untruth making the proceedings as mockery. Hence the proceedings about the cruelty has become final in HMOP No. 86 of 2003 itself. After which there is no chance for any cruelty as they have not reunited subsequently and the petitioner is not entitled to bring new petition stating that he omitted to say few of the cruelties. Hence the decision taken in HMOP No. 86 of 2003 become final and also the trial Court holding that the petitioner has stated as if the respondent is living separately for 12 years whereas the testimony cited in Ex.R.1 reveals that the respondent was in cordial terms with the petitioner till the marriage of his brother. Therefore the desertion also not proved. The appellate Court after elaborate discussion dismissed the appeal by confirming the order of the trial Court. The first appellate Court framed the point that whether the dismissal order passed by the Sub



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Court, Sivakasi in HMOP No. 106 of 2006 is sustainable in law.

Therefore the first appellate Court has framed point for determination and also answered the point. Therefore the contention of the appellant that the appellate court has not framed any point for determination in terms of order 48 Rule 31 of C.P.C is not acceptable one. Thus the first substantial question of law is answered.

Substantial Question of law No.2

11. The appellant/petitioner has filed petition under the Hindu Marriage Act and in Section 13 of the Hindu Marriage Act, the grounds are mentioned for filing petition to grant divorce. The irretrievable break down is not the ground under the Hindu Marriage Act . Even the Hon'ble Supreme Court in number of case cases granted divorce on the ground of irretrievable break down under Article 142 of the Constitution of India. Therefore, unless the act is amended and irretrievable break down is brought as one of the ground for divorce the Courts other than Hon'ble Supreme Court cannot grant divorce on the ground of irretrievable break down of marriage. Thus the substantial question of law is answered.

Substantial question of law No.3



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12. According to the appellant/petitioner the trial Court had dismissed the petition by holding that already ground of cruelty was pleaded in the earlier proceedings in HMOP No.83 of 2006 and the same was dismissed by disbelieving the case of the appellant/petitioner. Thereafter no evidence to prove the reunion of the parties. Therefore the ground of cruelty was not proved by the petitioner. A careful perusal of the order passed by the trial Court reveals that the petition was not dismissed on the ground of *res judicata* but earlier a petition was filed by the petitioner on the ground of under cruelty and the said cruelty was not proved by the appellant/petitioner and thereby the petition was dismissed. Thereafter no reunion between the parties then again without reunion the cruelty cannot be proved that is the version of the trial Court. Therefore the question of applicability of *res judicata* will not arise. However this Court framed substantial question of law in respect of *res judicata*. No doubt as far as matrimonial proceedings are concerned the principles of *res judicata* will be applicable if the conditions of Section 11 of C.P.C are satisfied. The procedure followed by the Courts for hearing application and HMOP are under the Code of Civil Procedure only. As per Section 141 of C.P.C the procedures provided in the Code of Civil Procedure regarding the suits shall be followed as far as it can be made applicable in any



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proceedings in any court of civil jurisdiction. Therefore for the HMOP proceedings the Code of Civil Procedure will apply and thereby principles of res judicata is also applicable to the matrimonial disputes. Thus the substantial question of law is answered.

13. In view of the above discussions and the answers made in the substantials question of law this Civil Miscellaneous Second Appeal stands dismissed.

15.02.2024

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

1. The Principal District Judge, Virudhunagar at Srivilliputhur
2. The Subordinate Judge, Sivakasi
3. The Record Keeper,
Vernacular Section,
Madurai Bench of Madras High Court,
Madurai.



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P. DHANABAL,J.

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