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CMA NO.3541 OF 2017 & CROSS OBJ. NO.51 OF 2019

IN THE HIGH COURT OF JUDICATURE AT MADRAS

JUDGMENT RESERVED ON : 06 / 11 / 2024

JUDGMENT DELIVERED ON : 12 / 11 / 2024

CORAM:

THE HON'BLE MRS. JUSTICE J.NISHA BANU

AND

THE HON'BLE MR. JUSTICE R.SAKTHIVEL

CMA NO.3541 OF 2017

AND

CROSS OBJ. NO.51 OF 2019

CMA NO.3541 OF 2017

B.Vijaya @ Vijayalakshmi

... Appellant /
Petitioner

Vs.

R.Balakrishnan

... Respondent /
Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act, 1984 praying to set aside the Judgment and Decree dated November 7, 2017 made in H.M.O.P.No.1445 of 2015 on the file of the Principal Family Court, Coimbatore.



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CMA NO.3541 OF 2017 & CROSS OBJ. NO.51 OF 2019

For Appellant : Mr.C.Munusamy
For Respondent : Mr.D.Shanmugavel

CROSS OBJ.NO.51 OF 2019

R.Balakrishnan ... Cross Objector /
Respondent

Vs.

B.Vijaya @ Vijayalakshmi ... Respondent /
Petitioner

PRAYER: Cross Objection filed under Order 41 Rule 22 of Code of Civil Procedure, 1908 praying to set aside the Judgment and Decree dated November 7, 2017 made in H.M.O.P.No.1445 of 2015 on the file of the Principal Family Court, Coimbatore.

For Cross Objector: Mr.D.Shanmugavel
For Respondent : Mr.C.Munusamy

COMMON JUDGMENT

R.SAKTHIVEL, J.

These Civil Miscellaneous Appeal and Cross Objection are at the instance of the petitioner / appellant and the respondent respectively. In both the cases, challenge is to the Judgment and Decree dated November 7,



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2017 passed by the 'Principal Family Court, Coimbatore' ['Family Court' for short], in H.M.O.P.No.1445 of 2015. This Common Judgment will govern both of them.

2. For the sake of convenience, henceforth, the parties will be referred to as per their array before the Family Court.

PETITIONER'S CASE:

3. The marriage between the petitioner - Wife and the respondent - Husband was solemnized on August 28, 1998 in accordance with Hindu religious rites and customs. In their wedlock, they were blessed with a female child born in 1999, followed by a male child born in 2002. After their marriage, the petitioner resided in her matrimonial home in Keelthalaityattumandhu, Udthagamandalam. Being new to the locality, the petitioner admired the surrounding nature, which led to the respondent's mother accusing the petitioner of observing passers-by, thereby arousing suspicion in the mind of the respondent. The respondent, driven by such



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suspicion, began consuming alcohol and physically assaulting the petitioner.

3.1. During their stay in Udhagamandalam, the petitioner's mother visited for the Pongal festival with *Thalai Pongal Seer*, which the respondent's mother claimed to be insufficient. In a fit of rage, the respondent's mother tossed and scattered the items, and verbally insulted the petitioner and her mother, and sent them out of the house as well, while the respondent did not object or intervene. Later, the respondent's brother and sister-in-law mediated, assuring that such behaviour would not recur and brought the petitioner back home.

3.2. Then, while living in a rented house at Aruvangadu, when the petitioner was pregnant, the respondent would leave for work and return only after 10 days. Upon returning, he would engage in frequent quarrels and also assault her, questioning her fidelity. They had to frequently vacate their rental houses because of the respondent's recurrent



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quarrels with the petitioner. Once, the respondent assaulted the petitioner and broke her nose leading to her hospitalisation for three days during which period the respondent offered no assistance or care.

3.3. Even after they shifted to Coimbatore in 2011, the respondent continued to quarrel and assault the petitioner out of suspicion. The respondent's frequent drunken altercations adversely impacted the children's education, prompting the petitioner to enroll them in a boarding school. The respondent had consented for the same.

3.4. Further, the respondent did not contribute financially to household expenses. The petitioner managed the household and medical expenses through her beauty parlour business. Due to insufficient income therefrom, the petitioner with her mother's assistance set up a textile shop which was eventually closed as the petitioner feared that the respondent would cause trouble.



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3.5. Further, when the house owner at Coimbatore forced her to vacate the house, the respondent did not lend any help. When she contacted the respondent, he refused to communicate and switched off his phone. It was with her mother's support, the petitioner arranged to move to a new rented house in Narasimmanaicken Palayam.

3.6. The respondent's consistent acts of cruelty, involving physical violence, baseless suspicions, and abandonment of responsibilities towards the petitioner and their children, constitute the basis for filing petition under Section 13(1)(i-a) of the 'Hindu Marriage Act, 1955' ['H.M. Act' for short]. Consequently, she seeks divorce on the grounds of cruelty and life-threatening conditions.

RESPONDENT'S CASE:

4. The respondent – Husband filed a Counter whereby he admits his marital tie with the petitioner. He states that after marriage, they lived together in Nilgiris till 2011. The respondent, being a lorry driver,



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used to travel to various districts for work and returned home

approximately once in every ten days.

4.1. The claim that the respondent suspected the petitioner's behaviour is false, as is the assertion that the respondent physically abused the petitioner under the influence of alcohol. In 2011, the petitioner and the respondent shifted their matrimonial home to Coimbatore. The claim that the respondent did not support the petitioner and the children is false. The respondent always took good care of his family. The respondent never consented to enroll their children in a boarding school. A few months after enrolling their children there, the respondent's daughter refused to stay there, and hence, the respondent brought her back home and has been taking care of her since then with the help of his 87 years old mother. His son still stays there.

4.2. Thereafter, the petitioner deserted her family without informing anyone due to which their daughter experienced mental distress



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at a tender age, for which the respondent provided treatment. The petitioner took away important documents including bank passbooks, jewellery, and clothes, *etc* while leaving the house. The whereabouts of the respondent are unknown. Further she is avoiding even their children when they try to contact her. The respondent still wishes to reconcile and live together with the petitioner for the well-being of their two children. Therefore, the respondent requests that the divorce petition filed by the petitioner be dismissed with costs, as it is not legally tenable.

EVIDENCE:

5. At trial, the petitioner was examined as P.W.1 and Ex-P.1 to Ex-P.4 were marked on the side of the petitioner. On the side of the respondent, the respondent was examined as R.W.1 and no document was marked.

6. The Family Court after analysing the oral and documentary evidence, concluded that the petitioner failed to prove the alleged cruelty.



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However, the respondent had physically assaulted the petitioner and hence the petitioner is entitled to reside separately. Accordingly, the Family Court granted a Decree of judicial separation.

7. Feeling aggrieved with the Judgment and Decree passed by the Family Court, the petitioner / appellant has preferred the Civil Miscellaneous Appeal and the respondent / respondent has preferred the Cross Objection.

ARGUMENTS:

8. Mr.C.Munusamy, learned Counsel for the petitioner – Wife would submit that the Family Court failed to appreciate the oral evidence of the petitioner as P.W.1, in the right perspective. Further, the Family Court failed to consider the fact that the marriage between the petitioner and the respondent had broken down irretrievably. Till date, there is no resumption of cohabitation between the parties. Further, the respondent did



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not file for restitution of conjugal rights, which along with cumulative facts and circumstances would show the intention of the respondent to cause cruelty to the petitioner in all possible manner. Accordingly, he would pray to grant a decree of divorce, by allowing the Civil Miscellaneous Appeal and dismissing the Cross Objection.

9. Mr.D.Shanmugavel, learned Counsel for the respondent - Husband would submit that the petitioner and the respondent were related to each other even prior to their marriage. The respondent never caused any cruelty to the petitioner. There is no sufficient evidence available on record to establish cruelty. The petitioner without any reason deserted the respondent and their two children. The respondent is ready and willing to reconcile and live along with the petitioner. When cruelty is not established, the Family Court ought not to have granted judicial separation, instead it ought to have dismissed the Original Petition. Accordingly, he would pray to allow the Cross Objection and dismissing the Civil



Miscellaneous Appeal and thereby dismiss the Original Petition for divorce.

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POINTS FOR DETERMINATION:

- (i) Whether the petitioner has made out a case under Section 13 (1) (i-a) of H.M. Act?
- (ii) Whether the Family Court's decision in granting a Decree for judicial separation while what was sought for is divorce on the ground of cruelty, is sustainable in law?

DISCUSSION:

10. This Court has heard on either side and perused the materials available on record.

11. The marriage between the petitioner - Wife and the respondent - Husband was solemnized on August 28, 1998. They both are relatives even before their marriage which is an arranged marriage. The respondent is an owner cum driver of a Lorry. In their wedlock, they were



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blessed with a female child in 1999, and a male child in 2002. After their marriage, the petitioner resided in her matrimonial home in Keelthalaiyattumandhu, Udhagamandalam. The petitioner and the respondent lived in Udhagamandalam till 2011, thereafter they relocated to Periyanyakampalayam, Coimbatore. After relocation, the petitioner was engaged in beauty parlour business and she also ran a textile shop at Peelamedu, Coimbatore for a short duration. In September 2015, they shifted to Narasimanaikanpalayam, Coimbatore. Until September 2015, the petitioner, the respondent as well their children were living under one roof. Now the children are living with the respondent while the petitioner is living separately at her mother's house. The aforementioned facts are admitted and lack disputation.

12. The petitioner has alleged that the respondent's mother tossed and scattered the *Thalai Pongal Seer* claiming them to be insufficient, then verbally insulted the petitioner and her mother, and also



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sent them out of the house, while the respondent remained a mute spectator. It is the respondent's brother and sister-in-law who later mediated, assuring that such behaviour would not recur, and convinced the petitioner to return to her matrimonial home. In order to prove the said averment, the petitioner has not examined any witness nor has she adduced any other evidence. Further, the alleged incident being on the occasion of their *Thalai Pongal*, would have happened around the year 1999. This petition has been filed in the year 2015 until when she was living under one roof with the respondent as husband and wife along with their children. Hence, this Court is of the view that the said incident of cruelty has not been established.

13. Further case of the petitioner is that the respondent began suspecting her fidelity while they were living as a nuclear family at Aravankadu, Udhagamandalam, and physically assaulted the petitioner. The Respondent in his evidence has deposed that the petitioner went for



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cinema without the respondent's permission, suffered a fracture in her leg, and that he consequently beat her. Relevant extract of the R.W.1's evidence is hereunder:

“ . . . மனுதாரரை நான் கோவையிலிருந்து அழைத்துவந்து அரவங்காட்டில் தனிக்குடித்தனம் இருந்தோம். தனிக்குடித்தனத்திலும் மனுதாரர் கருவுற்றிருந்தபோதும் இரவு காலதாமதமாகவும் இரண்டொரு நாட்கள் கழித்தும் வருவேன் என்றால் சரிதான். என்னுடைய வேலை அப்படி. மனுதாரரை நான் மருத்துவமனைக்கு அழைத்துச் சென்றிருக்கிறேன். அத்தியாவசிய தேவைகளுக்காக மனுதாரர் அப்பொழுது செல்லவேண்டிய அவசியம் ஏற்பட்டது என்றால் சரிதான். அதைப்பற்றி யாராவது கேட்டால் நான் மனுதாரரை அடித்திருக்கிறேன் என்றால் சாட்சி சரிதான் என்று கூறிவிட்டு பின்னர் அதைப்பற்றி நான் கேட்டதாக கூறுகிறார். மனுதாரர் என்னை கேட்காமல் சினிமாவிற்கு சென்றதால் கால் உடைந்தது. அதனால் நான் அவரை அடித்தேன். . . . ”

14. R.W.1 in his evidence has further deposed that in September 2015, the petitioner threw away her *thali* and deserted the respondent and their children. Relevant extract of R.W.1's evidence is hereunder:



“ . . . 3-10-25ல் மனுதாரருடைய தாலியை நான் எடுத்துச் சென்றுவிட்டேன் என்றால் சரியல்ல. மனுதாரர்தான் அதனை தூக்கி எறிந்துவிட்டு சென்றுவிட்டார். என்னுடைய கொடுமையால்தான் மனுதாரர் தற்பொழுது அவருடைய தாயார் வீட்டில் இருந்து வருகிறார் என்றால் சரியல்ல. . . .”

15. From cumulative reading of the evidence of P.W.1 and R.W.1, this Court is able to discern that the petitioner desired to pursue entrepreneurship and be independent which the respondent was not fond of. The same led to disharmony in their lives and marital discord, which eventually led to the petitioner deserting her family. In view of the admission made by the petitioner, the aforesaid alleged act of him beating the petitioner is proved. But, that alone, in isolation, though definitely condemnable, considering the facts and circumstances of the case, the societal standards of the locality where the parties reside and the social status and cultural norms of the parties, does not amount to cruelty.

16. However, in this case, as stated *supra*, the petitioner craves to be independent and stand on her own two feet, which the



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respondent appears to be opposed to. This a case where the wife wishes to be independent and pursue her aspirations, for which the husband acts as an obstacle. Every individual has the right to live independently, freely and pursue their desired profession or business. This Court is of the view that the respondent standing in the way of his wife hindering her from pursuing her aspirations, in the cumulative facts and circumstances of the case, amounts to mental cruelty. Though there is no physical cruelty, mental cruelty has been established by the petitioner. The Family Court is not right in concluding that cruelty is not made out by the petitioner.

Accordingly, Point No.(i) is answered in favour of the petitioner and against the respondent. On this ground, the Judgment and Decree of the Family Court is liable to be set aside.

17. As regards Point No.(ii), the petitioner filed the Hindu Marriage Original Petition under Section 13 (1) (i-a) of H.M. Act seeking divorce. There is no whisper about judicial separation in the Original Petition. The petitioner never sought for the relief of judicial separation



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under Section 10 of H.M. Act as an alternate relief. Nor did the respondent seek for judicial separation. In such a scenario, that too upon rendering a finding that no case for cruelty was made out, the Family Court ought not to have granted a Decree of judicial separation.

18. The concept of judicial separation has been elaborately discussed by our Hon'ble Supreme Court in ***Hirachand Srinivas Managaonkar -vs- Sunanda***, reported in ***(2001) 4 SCC 125***. This Court deems fit to extract the relevant portion hereunder:

“16.In this connection another question that arises for consideration is the meaning and import of Section 10(2) of the Act in which it is laid down that where a decree for judicial separation has been passed it shall no longer be obligatory for the petitioner to cohabit with the respondent, but the court may, on the application by petition of either party and on being satisfied of the truth of the statements made in such petition, rescind the decree if it considers it just and reasonable to do so. The question is whether applying this statutory provision to the case in hand can it be said that the appellant was relieved of the duty to cohabit with the respondent since the decree for



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judicial separation has been passed on the application filed by the latter. On a fair reading of sub-section (2) it is clear that the provision applies to the petitioner on whose application the decree for judicial separation has been passed. Even assuming that the provision extends to both the petitioner as well as the respondent it does not vest any absolute right in the petitioner or the respondent not to make any attempt for cohabitation with the other party after the decree for judicial separation has been passed. As the provision clearly provides, the decree for judicial separation is not final in the sense that it is irreversible; power is vested in the court to rescind the decree if it considers it just and reasonable to do so on an application by either party. The effect of the decree is that certain mutual rights and obligations arising from the marriage are as it were suspended and the rights and duties prescribed in the decree are substituted therefor. The decree for judicial separation does not sever or dissolve the marriage tie which continues to subsist. It affords an opportunity to the spouse for reconciliation and readjustment. The decree may fall by a conciliation of the parties in which case the rights of the respective parties which float from the marriage and were suspended are restored. Therefore the impression that Section 10(2) vests a right in the petitioner to get the decree of divorce notwithstanding the fact that he has not made any attempt for cohabitation with the



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respondent and has even acted in a manner to thwart any move for cohabitation does not flow from a reasonable interpretation of the statutory provisions. At the cost of repetition it may be stated here that the object and purpose of the Act is to maintain the marital relationship between the spouses and not to encourage snapping of such relationship.”

19. This Court also deems fit to cite here the decision of a division bench of the Hon’ble Delhi High Court in ***Vinay Khurana -vs- Shweta Khurana***, reported in ***2022 SCC Online Del 517***, wherein in similar factual matrix, it was held that the scope and ambit of judicial separation under Section 10 and divorce under Section 13 of the H.M. Act are completely different and the said reliefs cannot be granted interchangeably or alternatively when not sought for. It is fruitful to extract Paragraph No. 37 thereat, which discusses the powers of the Family Court in this regard, hereunder:

“37.The approach of the Family Court in ordering judicial separation, instead of divorce is faulty, to our mind.



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What the Family Court failed to appreciate is that, firstly, it is for the petitioner who approaches the Family Court, to decide whether he/she wishes to obtain the relief of divorce, or of judicial separation. It is not for the court to decide to substitute the relief sought by the petitioner from divorce to judicial separation, or vice versa. If the petitioner is able to establish the ground to seek one or the other of these reliefs, the Family Court cannot decide for the petitioner, that it is better for him/her, or the other/respondent spouse, to accept the relief that he/she has not sought in his/her petition. The two reliefs of divorce or judicial separation are not in that sense, larger or lesser reliefs, respectively. To test the approach of the Family Court, one may ask : if the Family Court was of the view that the respondent wife may come out of the influence of her family, could the Family Court have granted a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, even though the same was never prayed for by the appellant? In our view, the Family Court could not have done it, for the simple reason, that the petitioner before it had not sought that relief. The powers of the Family Court to change the nature of the relief sought is absent. The Family Court cannot be heard to tell the petitioner before it, what is “good” for him/her. It may render its advice to the parties when the matter is pending before it, but when it comes to adjudication, the Family Court is



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bound to bear in mind the relief sought by the petitioner. If the petitioner has established the grounds for seeking the relief as sought, he/she should be granted the same. If not, he/she should be denied the relief sought. Conversely, the Family Court cannot grant a relief, the statutory grounds for seeking which, are not established, merely because it feels that that would be “good” for the parties.”

20. From the above, it is clear that the Family Court is not justifiable in granting judicial separation when it was not sought for at all by either of the parties. **Point No.(ii) is answered accordingly.** On that score also, the Judgment and Decree of the Family Court is liable to be set aside.

CONCLUSION:

21. Resultantly, the Civil Miscellaneous Appeal is allowed and consequently, the Cross Objection is dismissed. The Judgment and Decree passed by the Family Court is set aside and the Hindu Marriage Original Petition is allowed and thereby divorce is granted in favour of the



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petitioner by dissolving the marriage between the parties held on August 28, 1998 at Parish Hall, Mettu Charry, Udhagamandalam. Considering the facts and circumstances of the case, there shall be no order as to costs in both, the Civil Miscellaneous Appeal and the Cross Objection. Connected Civil Miscellaneous Petition is closed.

[J.N.B., J.]

[R.S.V., J.]

12 / 11 / 2024

Index : Yes
Neutral Citation : Yes
Speaking Order : Yes
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To



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The Principal Family Court
Coimbatore.

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J.NISHA BANU, J.

AND

R.SAKTHIVEL, J.

TK

PRE-DELIVERY COMMON JUDGMENT MADE IN

CMA NO.3541 OF 2017

AND

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12 / 11 / 2024