

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Reserved on : 21.12.2016

Delivered on : 20.01.2017

CORAM

THE HONOURABLE MR.JUSTICE M.JAICHANDREN
and
THE HONOURABLE MR.JUSTICE T.MATHIVANAN

C.M.A.Nos.2355 and 2356 of 2015
and
M.P.Nos.1 and 2 of 2015

Suguna ... Appellant/Respondent

- Vs -

Kubendiran ... Respondent/Petitioner

Prayer : Civil Miscellaneous Appeals are filed Under Section 19 of Family Court Act, to set aside the common fair and decretal order dated 17.08.2015 and made in O.P.Nos.2853 of 2007 and 1288 of 2003 respectively, on the file of the I Additional Family Court, Chennai.

For Appellant : Mr.S.Krishnasamy

For Respondent : Mr.B.Vijay

JUDGMENT

T.MATHIVANAN., J.

These memorandums of Civil Miscellaneous Appeals have been directed against the common fair and decretal order dated 17.08.2015 and made in O.P.Nos.2853 of 2007 and 1288 of 2003 on the file of the learned I Additional Family Court at Chennai.

2. The appellant herein is the petitioner in O.P.No.1288 of 2003 which was filed by her under Section 9 of Hindu Marriage Act for restitution of conjugal rights. The respondent is none other than the husband of the appellant and he had also filed another petition in O.P.No.2853 of 2007 under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955 for dissolving their marriage which was solemnized on 23.09.1999 on the ground of cruelty and desertion.

3. The petition filed by the respondent herein (O.P.No.2853 of 2007) was allowed, granting the relief of divorce as prayed for, whereas the petition (O.P.No.1288 of 2003) filed by the appellant for restitution of conjugal rights was dismissed. Having been aggrieved by the common order dated 17.08.2015, these memorandums of Civil Miscellaneous Appeals have been filed by the appellant.

4. With the issue involved in both the appeals are one and the same and parties to the appeals are also one and the same, both the appeals have been consolidated together, heard jointly and disposed of in this common judgment.

5. Heard Mr.S.Krishnasamy, learned counsel for the appellant and Mr.B.Vijay, learned counsel appearing for the respondent.

6. The respondent being the husband had originally instituted the matrimonial proceedings in H.M.O.P.No.37 of 2003 on the file of the Subordinate Court, Mayiladuthurai, as against the appellant herein under Section 13(1)(i-a) of the Hindu Marriage Act and thereby sought the relief of divorce, by dissolving the marriage which took place between him and the appellant on 23.09.1999.

7. This petition was contested by the appellant by filing her counter statement. During the pendency of the above matrimonial proceedings, the appellant (being the wife) had filed another petition in H.M.O.P.No.1288 of 2003 on the file of the Family Court at Chennai, under Section 9 of the Hindu Marriage Act as against the respondent herein and thereby sought the relief of restitution of conjugal rights.

8. In view of the order passed by this Court on 18.07.2007 in Tr.C.M.P.No.238 of 2006, the petition in H.M.O.P.No.37 of 2003 which was filed by the respondent/husband was ordered to be withdrawn from the file of the Subordinate Court Mayiladuthurai and transferred to the file of Family Court, Chennai and re-numbered as O.P.No.2853 of 2007.

9. It is significant to note here that the respondent had originally filed the petition in H.M.O.P.No.37 of 2003 on the file of learned Subordinate Judge, Mayiladuthurai as against the appellant herein under Section 13(1) (i-a) of the Hindu Marriage Act, seeking the relief of divorce on the ground of cruelty.

10. After getting this petition transferred to the file of the I Additional Family Court, Chennai, the respondent/husband had filed an application in I.A.No.2656 of 2011 to amend the main petition in O.P.No.2853 of 2007 to incorporate the ground

of desertion in addition to the ground of 'Cruelty' for getting the decree of divorce. That petition was dismissed. In the revision preferred by the respondent/husband in C.R.P.(P.D.) No.1710 of 2012, this Court in its order dated 21.01.2013 had allowed the petition in I.A.No.265 of 2011 and accordingly, the ground of desertion was also incorporated in the main petition so as to avoid multiplicity of proceedings.

11. Common facts which are germane for the better disposal of these appeals are as under:

The marriage of the respondent and the appellant was solemnized on 23.09.1999 at Meenakshi Kalyana Mandapam, Tiruvannamalai. After their marriage, they had been living together as husband and wife at Kathiruppu village. According to the respondent/husband, his marital life with the appellant/wife was not peaceful from the beginning as she was very adamant in her character. It is alleged that the appellant used to abuse the respondent as well as his parents and after used to pick up quarrel with the respondent/husband even on trivial issues. She used to leave the matrimonial home and would be brought back after mediation. She had even gone to the extent of threatening the respondent/husband, that she would commit suicide by pouring kerosene and set her on ablaze.

12. The insult and torture gone to the extent of irretrievable breaking down of their marital life. As the respondent was unable to live with the appellant any longer as husband and wife, a notice was caused to be issued on the appellant on 19.02.2003 requesting her to give her consent in writing for divorce. Despite the receipt of the said notice on 26.02.2003, she did not give any reply nor complied with the demand of the respondent.

13. Even after filing of the original petition, the appellant had caused various troubles which resulted in the sufferance of mental cruelty to the petitioner as well as to his parents.

14. In fact, the appellant had written several letters threatening the respondent/husband and his parents with dire consequences.

15. According to the respondent/husband there is no possibility of his re-union with the appellant as his marital relationship with the appellant was irretrievably broken down.

16. While refuting all the allegations made in the petition filed by the respondent/husband, the appellant in her counter statement as well as in her petition in O.P.No.1288 of 2003 has

stated that she had not caused any cruelty to the petitioner or to any one of his family members. According to her, the marital relationship with the respondent/husband was not irretrievably broken down as alleged by the respondent/husband and that the respondent/husband could not take advantage of his un intentional act of not taking her back to the marital homage.

17. She has also stated that she was always willing to join with her husband, and that she had not voluntarily left the matrimonial home and she equally never deserted her husband. According to her, she went to the house of the respondent/husband on several occasions and requested him to take her back. But, he had never respected her intention of joining with him which would lead to presume that the respondent/husband had voluntarily discarded her without any of her fault.

18. In her counter statement she has fairly admitted that the letters were written out of her ignorance and due to deep love and affection towards the respondent/husband and that the respondent had been trying to take advantage of such unfortunate letters which were written by her out of blind love towards him. She has also stated that all the letters were written subsequent to the filing of the petitions and that such letters should not be taken into account for deciding the legal dispute between her and the respondent.

19. In order to substantiate their respective cases, both the appellant as well as the respondent were directed to face the trial. The respondent/husband had examined himself as PW1. During the course of his examination as nearly as ten documents were exhibited. On the other hand, the appellant had examined herself as RW1, however no document was exhibited on her side.

20. On meticulous analysis of the evidences both oral and documentary, the learned I Additional Family Court Judge had proceeded to allow the petition filed by the respondent/husband (O.P.No.2853 of 2007) granting the relief of divorce on the ground of cruelty, and insofar as the ground of desertion is concerned, this petition was dismissed. The petition filed by the appellant/wife (O.P.No.1288 of 2003) seeking the relief of restitution of conjugal rights was dismissed.

21. As aforesated the appellant/wife stands before this Court with these appeals impugning the order of the court below.

22. Based on the materials placed before us, we may place it on record that the concept of Marriage is necessarily the basis of social organisation and the foundation of important legal rights and obligations. The importance and imperative character

of the institution of marriage needs no comment. In Hindu Law, marriage is treated as a samskara or a sacrament.

23. As per Baker's evangelical Dictionary of Biblical Theology, the primary or literal meaning of the pithy expression MARRIAGE is: "An intimate and complementing union between a man and a woman in which the two become one physically, in the whole of life. The purpose of marriage is to reflect the relationship of the God head and to serve him. Although the fall has marred the divine purpose and function of marriage, this definition reflects the God -ordained ideal for marriage from the beginning".

24. Divorce however is a thorny question. With reference to the concept of divorce different conditions had arisen and fair and equitable solutions had to be found in case of matters affecting formation as well as dissolution of marriage. While marriage for life is the most natural form of marriage and best adapted to a civilised society, there can be little justification for legally insisting upon the union as indissoluble, even under circumstances of exceptional hardship or cases of exceptional depravity on the part of one of the spouses.

25. A decree of divorce dissolving marriage, whether solemnised before or after the commencement of the Act, may be obtained by the husband or the wife on the grounds set out in s.13 of the Act. The grounds are:

(i) that the other spouse has committed adultery; or (ii) treated the petitioner with cruelty; or (iii) has deserted the petitioner for a period of two years; or (iv) has ceased to be a Hindu by conversion to another religion; or (v) has been incurable of unsound mind or suffering from mental disorder as set out and explained in that section; or (vi) has been suffering from a virulent and incurable form of leprosy; or (vii) has been suffering from venereal disease of a communicable form; or (viii) has renounced the world by entering any religious order; or (ix) has not been heard of as being alive for a period of seven years or more.

26. The above grounds apart, either party to a marriage, whether solemnised before or after the commencement of the Act, may obtain a decree of divorce on the ground that there has been no resumption of cohabitation between them for a period of one year or upwards after the passing of a decree for judicial separation, or that there has been no restitution of conjugal rights between them for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

27. The court may have to pass a decree for divorce by mutual consent of the parties, as now enacted by the Amending Act of 1976 in s 13B of the Act. This is where the requirements of that section are satisfied and not otherwise.

28. On coming to the given case on hand, Section 13(1) (i-a) and (i-b) are very much relevant as the respondent/husband had sought the decree of divorce on the ground of cruelty and desertion.

29. As observed in the opening paragraphs, though the petition in H.M.O.P.No.2853 of 2007 was filed under Section 13 (1)(i-a) and (i-b) i.e., on the grounds of cruelty and desertion that petition in respect of the ground of cruelty alone was allowed. However, it was dismissed in respect of the ground of desertion. Obviously, the respondent/husband has not chosen to file any cross-objection as against the dismissed portion of the petition. Therefore, we restricts the discussion with respect to cruelty alone.

30. The legal conception of cruelty and the kind of degree of cruelty necessary to amount to a matrimonial offence has not been defined by any statute of the Indian legislature relating to marriage and divorce; nor has the expression been defined in the Matrimonial Causes Act, 1950, or any later enactment in England. The law on the subject had hitherto been gathered from decided cases and courts in India had accepted and adapted to the conditions in India, the principles underlying the judge-made law on the subject in England. The accepted legal meaning in England, as also in India, of this expression, which is rather difficult to define, had been 'conduct of such character as to have caused danger to life, limb or health (bodily or mental), or as to give rise to a reasonable apprehension of such danger'. This principle is laid down in Russell v. Russell, (1897) AC 395; Kallan v. Kallan, AIR 1933 Lah 728.

31. The respondent/husband has alleged :

(a) The appellant/wife used to quarrel with him without any valid reason and used to abuse him and his parents.

(b) She had even gone to the extent of threatening him that she would douse her with kerosene and set her on ablaze and thereby would commit suicide and he would be blamed for her act.

(c) The appellant/wife had written several letters 'viz' Exs.P2 to P9, threatening him and his parents with dire consequences.

(d) The appellant/wife had written a letter under Ex.P2 dated 05.03.2005 and thereby threatened that she would cause a paper publication and thereby she would publish that the respondent/husband and his uncle's wife are going to get married

soon. It has to be noted that the respondent/husband's uncle's wife is aged about 60 years.

32. The appellant/wife had made an attempt to set fire and had also assaulted his parents and on account of this reason, he had lodged a criminal complaint on 09.06.2005 on the file of All Women Police Station, Mayiladuthurai. Based on his complaint, an enquiry was conducted by the Police Officials and ultimately, the appellant/wife was warned strictly.

33. Doubtless, burden must lie on the respondent/husband to establish his case of cruelty, as contemplated under Sections 3, 101 to 104 of the Indian Evidence Act, 1872. Ordinarily the burden lies on the party who affirms a fact, and not on the party to deny it. This principle accords with a common sense as it is so much easier to prove a positive than a negative. The respondent/husband must therefore, prove that the appellant/wife had threatened him as well as his parents with cruelty within the meaning of Section 13(1)(i-a).

34. In *Dr.N.G.Dastane, v.Mrs.S.Dastane* (AIR 1975 SC 1534), Hon'ble Mr.Justice Y.V.Chandradrachud has spoken on behalf of a three Judges Bench of the Apex Court, with reference to the burden which lies on the person who alleges cruelty, in the following manner:

'The belief regarding the existence of a fact may be founded on a balance of probabilities. A prudent man faced with conflicting probabilities concerning a fact-situation will act on the supposition that the fact exists, if on weighing the various probabilities he finds that the preponderance is in favour of the existence of the particular fact. As a prudent man, so the court applies this test for finding whether a fact in issue can be said to be proved. The first step in this process is to fix the probabilities, the second to weigh them, though the two may often intermingle. The impossible is weeded out at the first stage, the improbable at the second.'

35. First as to the nature of burden of proof which rests on a petitioner in a matrimonial petition under the act. As observed by the learned Additional Family Court Judge, Chennai, marriage is not disputed. Fortunately or unfortunately the appellant as well as the respondent are not blessed with any child.

36. The respondent/petitioner has contended that the appellant/wife used to quarrel with him even for trivial matters

and she would also abuse him and his parents. She would leave the matrimonial home on her own accord, and after making strenuous effort, she would be brought back to the matrimonial home.

37. It is also his case that she had gone to the extent of threatening him that she would pour kerosene on her and set her on fire and thereby commit suicide and would put the blame upon him. In order to substantiate his case, ten documents were marked on his behalf. Ex.P1 is the legal notice dated 19.02.2003 and Exs.P2 to P9 are the letters said to have been written by the appellant/wife. Ex.P10 is the copy of the complaint lodged by him in C.S.R.No.181 of 2005 dated 09.06.2005 on the file of All Women Police Station, Mayiladuthurai.

38. The respondent/petitioner in his proof affidavit has stated that even after the filing of the matrimonial proceedings, the appellant/wife had caused various troubles with reference sufferance of mental cruelty to him.

39. We have also perused the letters ranging from Exs.P2 to P9 which are said to have been written by the appellant/petitioner. In her proof affidavit, the appellant/wife had initially denied those letters saying that she did not written those letters and even she had gone to the extent of denying her signature found place in the above said letters. However, in her cross-examination, she had admitted that all the letters were written by her. What she would state in her cross-examination with reference to the above letters is, that the main reason for writing those letters with the threat was that the respondent/husband's father-in-law had prevented her from living with her husband peacefully.

40. She had also admitted that she had made a threat to her husband's maternal uncle and that she had also admitted in her cross-examination that in Ex.P4 she had stated that she would murder her father-in-law by pouring kerosene on him. She has also deposed that all the letters were written by her, owing to her mental agony and threatened her husband that she would commit suicide. However, she has deposed in her cross-examination that the threat made by her in the above said letters could not be construed as mental cruelty to her husband.

41. It is also to be noted that the respondent/husband has stated in his evidence in chief that on one occasion the appellant/wife had attempted to set fire and assaulted him as well as his parents and therefore, he was constrained to lodge a complaint at All Women Police Station at Mayiladuthurai and based on his complaint, an enquiry was made by the concerned police officials and in that enquiry, she was warned strictly.

The lodging of police complaint was admitted by the appellant/wife. However, she would state that the allegation made in the complaints were not true. The police complaint lodged by the respondent/husband was marked as Ex.P10.

42. The appellant in her petition under Section 9 of the Hindu Marriage Act (H.M.O.P.No.1288 of 2003) has contended that her husband's parents had been running a provision store at Kathiruppu Village. While she was residing in the matrimonial home, her in laws had suspected her as if she had stolen a sum of Rs.1,500/- from the provision store on 02.06.2002. In fact, she had never stolen the said amount, but this matter was informed to her brother Venugopal, who was then living at Door No.9-10, East Street, Alagiri Nagar, Vadapalani, Chennai.

43. It is also her contention that at a later stage, i.e., on 15.06.2002, her husband came to the house of her brother and informed him that no such amount was missing and that he had realised the fact. Thereafter, she and her husband started living in a separate portion of her brother's house at Chennai from 15.06.2002 onwards and subsequently, he had voluntarily left her brother's house and never turned back to join with her. Ultimately, she had received a notice from the Advocate of her husband dated 19.02.2003 with false allegations against her. She had therefore filed the said petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights.

44. Mr.S.Krishnasamy, learned counsel for the appellant while advancing his argument has invited our attention to the provisions of Section 23(1)(b) of the Hindu Marriage Act. In this connection he would submit that the court below had failed to consider the provisions of Section 23 of the Hindu Marriage Act and that during the consideration proceedings the Mediators had advised the husband to live with the appellant for three months and report. But, this suggestion was abruptly turned down by the respondent/husband and refused to live with the appellant even for three months as suggested by the Mediators. This fact was also admitted by the respondent/husband in his cross-examination.

45. Mr.S.Krishnasamy has also adverted to that the appellant/wife had taken several efforts to join with the respondent. But, the respondent/husband had never evinced any interest in joining with the appellant to lead a peaceful family life.

46. Section 23 of the Hindu Marriage Act contemplates that:

'Decree in proceedings.- Sub Section (1) enacts that: In any proceeding under this Act, whether defended or not, if the court is satisfied that-

(b) where the ground of the petition is the ground specified in clause(i) of sub-section (1) of section 13, the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty;

Section 23 contains some vital clauses of considerable importance and consequence relating to the power and duty of the court in the matter of granting any of the reliefs recognised under the Act.

The initial words of the section adopts the well-established principle of matrimonial law that decrees of dissolution of marriage are to be made only upon strict proof.

It is a firmly established rule that the ground for relief in a matrimonial cause should be strictly proved. The standard of proof in case of all proceedings under the Act is that the court must be satisfied on a preponderance of probability that the ground for relief is proved and normally, the court requires that the evidence of a spouse who charges the other spouse with a matrimonial offence should be corroborated. While the analogies and precedents of criminal law should have no authority in matrimonial causes, the court would ordinarily, be justified in requiring, not as a matter of law but as a rule of prudence, that where possible, corroborative evidence should be led in order to satisfy the court that the allegations made are well-founded.

47. Mr.B.Vijay, learned counsel for the respondent/petitioner has contended that the order passed by the I Additional Family Court was well within the bounds of law, and therefore, it did not require the interference of this Court either to set aside or to modify the decree passed by the court below. Further he would submit that the accusation of cruelty made by the respondent/husband as against the appellant/wife was unambiguously proved by him with the help of appropriate documentary evidences and therefore, the act of the appellant/wife had caused mental cruelty which resulted in irretrievable breaking down of his marital relationship with the appellant/wife and hence, the decree of divorce granted by the learned I Additional Family Court on the ground of cruelty did not require any disturbance.

48. In order to support his contention, he has placed reliance upon the following decisions:

1. Vinod Kumar Subbiah vs. Saraswathi Palaniappan ((2015) 8 SCC 336)

2. Pankaj Mahajan vs. Dimple Alias Kajal ((2011) 12 SCC 1.

3. Narendra vs. K.Meena (2016) 9 SCALE 681

4. Malathi Ravi, M.D. vs. B.V.Ravi, M.D. ((2014) 7 SCC 640.

49. Mr.B.Vijay, learned counsel for the respondent/petitioner has also contended that the letters which were marked as Exs.P2 to P9 were written by the appellant/wife, after the institution of the matrimonial proceedings in H.M.O.P.No.2853 of 2007 by the respondent/ husband. Though those letters were written by the appellant/wife subsequent to the filing of the matrimonial proceedings, the act of the appellant ought to have taken into consideration to grant the relief of divorce on the ground of cruelty. He has also submitted that the events which were taken subsequent to the filing of the petition for divorce could be taken into account as the subsequent events had established an undisputed material brought on record.

50. He would further submit that the letters as well as the conduct of the appellant/wife had caused mental cruelty to the respondent/husband and that these facts were considered in detail by the court below which resulted in well considered and well founded order which did not require the interference of this Court to exercise its appellate jurisdiction.

51. In this regard, we find that the decision of the Apex Court in Malathi Ravi, M.D. vs. B.V.Ravi, M.D. ((2014) 7 SCC 640 would be relevant to make reference. In the above cited decision a Division Bench of Apex Court has observed in paragraph Nos.33 and 38 as under:

33. In the said case, analysing the subsequent events and the conduct of the wife, who was responsible for publication in a newspaper certain humiliating aspects about the husband, the Court held as follows: (Viswanath Agrawal case, S.C.C. p.307, para 54)

54. "... In our considered opinion, a normal reasonable man is bound to feel the sting and the pungency. The conduct and circumstances make it graphically clear that the respondent wife had really humiliated him and caused mental cruelty. Her conduct clearly exposit that it has resulted in causing agony and anguish in the mind of the husband. She had publicised in the newspapers that he was a womaniser and a drunkard. She had made wild allegations about his character. She had made an effort to prosecute him in criminal litigations which she had failed to prove. The feeling of deep anguish, disappointment, agony and frustration of the husband is obvious."

38. We have already stated the legal position that subsequent events can be taken note of.

52. In Pankaj Mahajan vs. Dimple Alias Kajal ((2011) 12 SCC 1 cited supra while speaking on behalf of a Division Bench of Apex Court, Hon'ble Mr. Justice P. Sathasivam as he then was in paragraph No.35 has observed as under:

'35. It is well settled that giving repeated threats to commit suicide amounts to cruelty. When such a thing is repeated in the form of sign or gesture, no spouse can live peacefully. In the case on hand, the appellant husband has placed adequate materials to show that the respondent wife used to give repeated threats to commit suicide and once even tried to commit suicide by jumping from the terrace. Cruelty postulates a treatment of a spouse with such cruelty as to create reasonable apprehension in his mind that it would be harmful or injurious for him to live with the other party. The acts of the respondent-wife are of such quality or magnitude and consequence as to cause pain, agony and suffering to the appellant husband which amounted to cruelty in matrimonial law.'

53. In the given case on hand also the main allegation against the appellant/wife is that she had made repeated threat to commit suicide by pouring kerosene on her by putting blame on her husband (respondent). This matrimonial offence as alleged by the respondent/husband has been proved sufficiently through his oral evidence as well as documentary evidences under Exs.P2 to P9. This kind of cruelty postulates a treatment of the appellant with such cruelty as to create reasonable apprehension in the mind of the respondent/husband that it would be harmful or injurious to him to live with her. Therefore, the acts of the wife (appellant herein) are of such quality or magnitude and consequence as to cause pain, agony and suffering to the respondent/husband which amounted to cruelty in matrimonial law.

54. We have carefully perused the materials placed before us including the grounds of appeals. We have also weighed and balanced the submissions made by both the learned counsels with the given fact situation and found that the learned I Additional Family Court has come to a correct conclusion which resulted in granting divorce to the respondent/husband on the ground of cruelty which according to our considered opinion does not require our interference to exercise our appellate jurisdiction.

55. In the result, both the appeals are dismissed and the impugned common order dated 17.08.2015 and made in

H.M.O.P.Nos.2853 of 2007 and 1288 of 2003 respectively, on the file of the I Additional Family Court, Chennai are confirmed. However, considering the nature of the case, there shall be no order as to costs. Consequently, connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CO)

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Sub Assistant Registrar

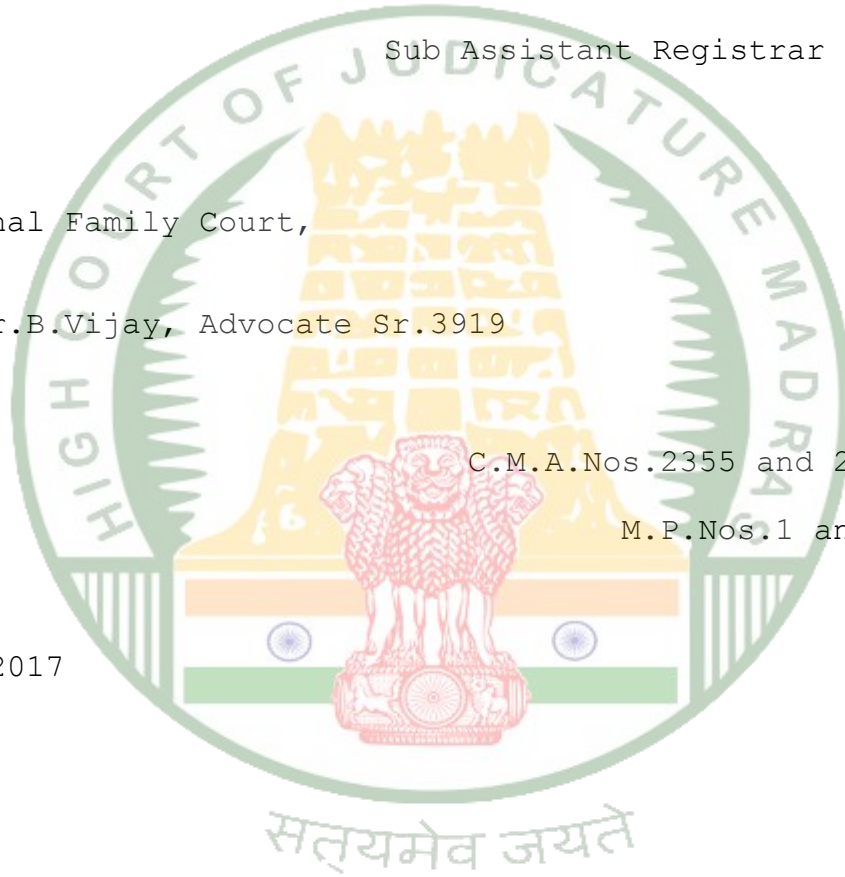
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To

I Additional Family Court,
Chennai.

+2cc to Mr.B.Vijay, Advocate Sr.3919

C.M.A.Nos.2355 and 2356 of 2015
and
M.P.Nos.1 and 2 of 2015

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