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C.M.A.Nos.1258 of 2016 and 2391 and 2392 of 2017

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON :11.08.2022

PRONOUNCED ON : 12.10.2022

CORAM:

THE HONOURABLE MS.JUSTICE V.M.VELUMANI
and
THE HONOURABLE MR.JUSTICE S.SOUNTHAR
C.M.A.Nos.1258 of 2016 and 2391 and 2392 of 2017
and CMP.Nos.12528 and 12529 of 2016

CMA.No.1258 of 2016:

P.Arun ... Appellant

Vs.

Aruna ... Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19 of Family Courts Act, praying to set aside the fair and decretal order dated 01.02.2016, passed in F.C.O.P.No.251/2009, on the file of the Family Court, Salem.

For Appellant : Mr.M.Mohamed Riyaz

For Respondent : Mr.P.Jagadeesan



C.M.A.Nos.1258 of 2016 and 2391 and 2392 of 2017

CMA.No.2391 of 2017:

A.Aruna

... Appellant

Vs.

P.Arun

... Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19 of Family Courts Act, praying to set aside the judgment and decree dated 01.0.2016, passed in F.C.O.P.No.262/2008, on the file of the Family Court, Salem.

For Appellant : Mr.P.Jagadeesan

For Respondent : Mr.M.Mohamed Riyaz

CMA.No.2392 of 2017:

A.Aruna

... Appellant

Vs.

P.Arun

... Respondent

Prayer: This Civil Miscellaneous Appeal is filed under Section 19 of Family Courts Act, praying to set aside the judgment and decree dated 01.0.2016, passed in F.C.O.P.No.251/2009, on the file of the Family Court, Salem.

For Appellant : Mr.P.Jagadeesan

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For Respondent : Mr.M.Mohamed Riyaz

COMMON JUDGMENT

(Judgment of the Court was delivered by S.SOUNTHAR, J.)

These three appeals are arising out of matrimonial proceedings.

The respondent/husband filed a petition for divorce on the grounds of cruelty and desertion in FCOP.No.251 of 2009, on the file of Family Court, Salem. The appellant/wife filed a petition for restitution of conjugal rights in FCOP.No.262 of 2008, on the file of the same Court. The petition for restitution of conjugal rights was dismissed and in the petition for divorce, the Family Court refused to grant decree for divorce, however, granted a decree for judicial separation. Aggrieved by the decree granting judicial separation, both husband and wife filed two appeals in CMA.Nos.1258 of 2016 and 2392 of 2017 respectively. Aggrieved by the dismissal of the petition for restitution of conjugal rights, the wife has filed CMA.No.2391 of 2017. Since the issues involved in all the appeals are one and the same, these appeals are taken up together for hearing. For the sake of convenience, the appellant in CMA.No.1258 of 2016 and respondent in CMA.No.2391 and



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2392 of 2017 is referred as husband and the respondent in CMA.No.1258 of 2016 and appellant in CMA.Nos.2391 and 2392 of 2017, is called as wife in this judgment.

2. Case of the Husband:

The marriage was solemnized on 21.06.2000 and after marriage the parties lived together at Attur and through wedlock, a male child was born on 02.04.2001. The wife never respected the husband and her in-laws. She insisted property in the name of husband and mother-in-law have to be transferred to her name and when the said request was turned down, wife got wild and started trouble in matrimonial life. The wife treated the husband with disrespect and called him as inefficient person (*Vakkatravan*) by referring to his low income. The wife also refused to provide conjugal relationship with husband demanding that unless husband's mother and brother were sent out, she would not have conjugal relationship. The wife quarrelled with husband with the threat of suicide after killing the child and after preparing the suicide note implicating the husband. On 11.09.2005 at about 08.30 a.m., when the husband was about to leave his home in



connection with his professional activities, the wife demanded transfer of husband's properties in her name and when it was refused, she slapped the husband and attempted to beat him with broomstick. When husband rushed out of home to street in order to avoid such an eventuality, he was chased and beaten by wife, in the middle of the street in the presence of neighbours and friends. On the very same day, the wife withdrew from the matrimonial home. Thereafter, the wife issued a legal notice calling upon the husband to live with her. When she was approached for reunion, she refused but strangely filed a petition for restitution of conjugal rights in FCOP.No.262 of 2008. The husband and wife have been living apart for more than two years and in the facts and circumstances, the husband filed a petition alleging cruelty and desertion.

3. Case of the Wife:

The wife in her pleadings denied cruelty and ill-treatment alleged by husband. Each and every act of cruelty alleged by the husband were denied by wife in her pleadings specifically. The wife in her pleadings denied that she left the matrimonial home wilfully on her own. She submitted that



her husband assaulted her and dashed her head against the wall and had driven her and child out of matrimonial home after snatching all of her valuables. The wife alleged that she issued a legal notice calling upon the husband for re-union, but he did not give any reply for the same. Since he kept quite even after receipt of legal notice by wife, she was constrained to file a petition for restitution of conjugal rights. The wife expressed her willingness to live with husband in spite of allegation of physical violence attributed against him.

4. Proceedings before Family Court:

On these pleadings, the parties went to trial and both the Original Petitions were tried together. The evidence was recorded in petition for divorce filed by husband in FCOP.No.251 of 2009 and the husband examined himself as PW.1 and an independent witness was examined as PW.2. Exs.P1 to P3 were marked on the side of husband. On behalf of the wife, she examined herself as RW.1 and paternal uncle of wife was examined as RW.2 and on her behalf, Exs.R1 to R4 were marked. The trial Court after consideration of oral and documentary evidence found that though the



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husband suffered certain amount of mental agony at the hands of wife, there is nothing on record to show that the marital relationship between the parties had suffered beyond repair and hence refused the relief of divorce prayed for by husband. But, however, in order to give them a cooling period to come out of the misunderstanding, granted a decree for judicial separation. In view of its finding, husband suffered certain amount of mental agony at the hands of wife and there is no possibility for immediate resumption of co-habitation, the Family Court dismissed the petition for restitution of conjugal rights also. Aggrieved by the said common order, both husband and wife have come up with the above appeals as stated above.

5. Arguments of Counsel for Husband:

The learned counsel for the husband submitted that wife teased her husband by stating that his income was low and quarrelled with him, demanding transfer of properties standing in his name and in the name of his mother. The learned counsel further submitted that the evidence of PW.2 clearly established that the wife beat husband in the presence of neighbours and friends with broomstick and it caused immense pain in the mind of



husband. The learned counsel further submitted that the Family Court after giving a finding that husband suffered mental agony at the hands of wife erred in refusing the relief of divorce and granting decree for judicial separation. He further submitted that grant of decree for judicial separation even without a specific prayer is erroneous and therefore liable to be set aside. The learned counsel for the husband further submitted that the husband is entitled to get decree for divorce on the sole ground that there is no resumption of cohabitation even after expiry of six years from the date of decree for judicial separation.

6. Arguments of Counsel for Wife:

The learned counsel for the wife submitted that there is no direct evidence to support the plea of physical assault by wife. PW.2 in his evidence clearly deposed that he did not see the wife beating with a broomstick. The learned counsel submitted that various allegations made in the petition for divorce filed by husband are only pointing to normal wear and tear of marital life and those allegations are not sufficient to grant the extreme relief of divorce. The learned counsel for the wife submitted that



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failure to resume cohabitation is not due to the fault on the part of the wife and hence husband, who is the cause for separation cannot take advantage of his own wrong and press for decree for divorce on the ground of non-resumption of cohabitation.

7. Points arise for Consideration:

On the basis of the pleadings of the parties, the evidence available on record and contentions of the learned counsel, the following points are arising for consideration in this case:

- (i) Whether the husband is entitled to decree for divorce on the ground of cruelty and desertion?
- (ii) Whether the wife is entitled to decree for restitution of conjugal rights?
- (iii) Whether the decree for judicial separation granted by Family Court in the petition for divorce filed by husband is sustainable or not?

8. Points No.1 to 3:

The husband has come up with a petition for divorce by alleging



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cruelty on the part of the wife. He mainly alleged that wife criticized him for

his low income and refused conjugal rights, threatened to commit suicide after

killing child by preparing suicide note implicating the husband and on top of

it, he alleged on 11.09.2009 that wife beat him with broomstick by chasing

him down to the street in the presence of neighbours and friends and

withdrew from the matrimonial society without reasonable cause on the same

day. In order to prove the act of cruelty pleaded by the husband, he examined

himself as PW.1 and deposed in tune with his averments in his pleadings. To

corroborate his evidence an independent witness namely one B.Aravind

Kumar, was examined as PW.2. He is ocular witness to the incidence pleaded

by husband. He clearly deposed that at the relevant time, the husband did

not have permanent source of income and wife used to scold him by calling

him as an inefficient man and he is not competent to set up matrimonial home

(வக்கற்றவனே, சம்பாதிக்க துப்பில்லாத உனக்கு பொண்டாட்டி ஒரு கேடா என்று திட்டினார்.).

He further deposed that on one occasion when he went to matrimonial house

to call on husband, he had seen wife chasing down her husband to the street

with broomstick in her hands. During the process she shouted disrespectfully

that “convey the property to me”, the vernacular extract of the same reads as



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follows:

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2005ம் ஆண்டு செப்டம்பர் மாதம் ஒரு நாள் காலை சுமார் 8 1/2 மணிக்கு அவர் வீட்டிற்கு போகலாம் என்று அவர்கள் இருந்த தெருவிற்குள் சென்று அவர்கள் வீட்டை நெருங்கும் சமயம் மனுதாரர் அவர் வீட்டில் இருந்து அந்த தெருவில் இறங்கி ஓடி வந்தார். அவருக்கு பின்னால் அவர் மனைவி தனது துடப்பத்தை எடுத்துக்கொண்டு மனுதாரர் பின்னால் அவரை துரத்திக்கொண்டு வந்தார். சொத்தை எழுதிக்கொடுடா என்று சத்தம் போட்டுக் கொண்டே எதிர்மனுதாரர் மனுதாரரை துரத்திக்கொண்டு வந்தார்.

9. Though PW.2 stated that he had not seen wife beating her husband with broomstick, he clearly deposed that wife chased down the husband with broomstick in her hands in front of neighbours. He also deposed that wife demanded disrespectfully that the husband should convey his property to her (சொத்தை எழுதிக்கொடுடா). There is nothing culled out in the cross examination of PW.2 to disbelieve his evidence. In fact, the Family Court also accepted evidence of PW.2 as natural and had given a finding that husband suffered mental agony at the hands of wife. Having given such finding, the Family Court went on to hold that there was nothing on record to show that there had been possibility of reunion in future. In fact, the Family Court also had given a finding that immediately after the above said incident



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on 11.09.2005, the wife withdrew from the matrimonial society. Therefore, nearly 16 years have gone from the date of separation and there is no resumption of cohabitation. The incident talked about by PW.2 cannot be brushed aside as a normal wear and tear of matrimonial life. The learned Family Court Judge after coming to the conclusion that the husband suffered mental agony at the hands of wife ought to have granted a decree for divorce instead of judicial separation. The evidence available on record lead us to a definite conclusion that parties are living apart for more than one and half decades and there is no likelihood of repairing the marital tie which is damaged beyond repair. Hence, we hold that the husband is entitled to divorce on the ground of cruelty.

10. In this connection, we would like to rely on the observations of Division Bench of this Court reported in 2019 SCC online MAD 19831 in K.Suresh Vs. D.Kala, which is as follows:

This Court finds considerable force in the submission made. Having found that the respondent has deserted the appellant, the Family Court ought to have granted divorce. On the contrary, it has granted Judicial



separation which was neither asked for by the appellant nor the respondent. In such a case, there is no jurisdiction lies with the Family Court to pass such an order. We are of the view that the desertion has taken place in the year 2007 and more than a decade has gone by. We are not inclined to accept the reason given by the Family Court that only because of the litigation, the respondent could not join the appellant as if there is no material to substantiate the order supported by sufficient pleadings. Therefore, we are inclined to interfere with the order passed by the Family Court in ordering judicial separation as against the decree for divorce.

11. The learned counsel for the wife relied on the judgment reported in (2002) 2 SCC 73 in Savitri Pandey Vs Prem Chandra Pandey, for the proposition that the term cruelty used in Hindu Marriage Act has to be distinguished from the ordinary wear and tear of the family life. He contended that the strained relationship in the case on hand is only an ordinary wear and tear and the same cannot be termed as cruelty. We do not agree with the contention of the learned counsel for the wife, as we discussed above, the damage caused to the matrimonial tie by act of wife in the case on



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hand is beyond repair and incident talked about by PW.2 cannot be treated as an ordinary wear and tear in the matrimonial life. In addition to that the separation in this case had taken place in the year 2005 and there is no resumption of cohabitation for more than 16 years, that too, even after passing of decree for judicial separation.

12. The facts and circumstances narrated above suggest that the matrimonial tie is beyond repair and there is no scope for reconciliation and reunion. Hence, we hold the husband is entitled to decree for divorce on the ground of cruelty.

13.Conclusions:

In view of the discussions above, the Civil Miscellaneous Appeal No.1258 of 2016 filed by husband is allowed, setting aside the fair and decreetal order dated 01.02.2016 passed in FCOP.No.251 of 2009;

2. The appellant in CMA.No.1258 of 2016/husband is entitled to decree for divorce as prayed for;



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3.CMA.Nos.2391 of 2017 filed by wife is dismissed, confirming

the fair and final order passed in FCOP.262 of 2008;

4. CMA.No.2392 of 2017 preferred by wife is also dismissed, in view of allowing of CMA.No.1258 of 2016 preferred by husband granting divorce as prayed for;

5. In the facts and circumstances of the case, there shall be no order as to costs.

6. Consequently, connected miscellaneous petitions are closed.

(V.M.V., J) (S.S., J)

12.10.2022

Internet : Yes / No

Index : Yes / No

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V.M.VELUMANI,J.
and
S.SOUNTHAR,J.
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1.The Family Court, Salem.

2.The Section Officer
VR Section
High Court
Madras.

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12.10.2022