

THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 18.08.2023

CORAM:

THE HONOURABLE MR JUSTICE **R.SUBRAMANIAN**
AND
THE HONOURABLE MRS JUSTICE **R.KALAIMATHI**

C.M.A.No.2327 of 2016
and
C.M.P.No.16329 of 2016

B.Umamaheswari

...Appellant

Vs.

S.Gopalakrishnan

...Respondent

Prayer: Civil Miscellaneous Appeal filed under Section 19 of The Family Courts Act, 1984 against the judgment and decree dated 25.07.2016 made in H.M.O.P. No.76 of 2014 on the file of the Family Court, Erode.

For Appellant : Mr.N.Manokaran

For Respondent : Mr.P.K.Harinath Babu
for Mr.P.Muthukumarasamy

J U D G M E N T

(Judgment of the Court was delivered by **R.SUBRAMANIAN, J.**)

Challenge in this appeal is for a decree for divorce granted by the Family Court, Erode in a petition filed by the husband under Section 13(1)(i-a) of the Hindu Marriage Act, 1955 alleging that the respondent wife

had treated him with cruelty. The parties were engaged on 24.06.2009 and the marriage was held on 02.09.2009. According to the husband, even from the very first day of the marriage, the wife had claimed that she does not like him and she married him because of the compulsion of her parents.

2. It is the specific contention of the husband that the wife, who was working as a Teacher, agreed to quit the job before marriage. It is claimed that after marriage the wife wanted to rejoin and continue the job, which was not acceptable to the husband. This also created disharmony among the spouses. The wife conceived and ultimately delivered a baby boy on 17.11.2010. Though she came back to the matrimonial home on the 6th day after delivery, she stayed there only for a month and half. She took the child and went to her parents house and refused to come back. The husband would also claim that the wife had refused to return to the matrimonial home, since she does not like the parents of the husband. Even though the husband offered to set up a separate residence in his village itself, the wife did not agree and insisted the husband to live in her parents house. Since all the attempts to make the wife come back to the matrimonial home proved futile, the husband lodged a police complaint on 22.08.2011 with the All Women

Police Station at Erode. The wife was called for an enquiry, wherein she agreed and gave it in writing to the police that she will go with her husband from 30.08.2011. Since the wife did not come back even after the said date, the husband filed H.M.O.P.No.227 of 2011 before the Principal Subordinate Court, Erode for restitution of conjugal rights. The wife filed a counter containing false allegations. Since the wife expressed her unwillingness to live together, the husband withdrew the application for restitution of conjugal rights and filed the instant petition for divorce on the ground of cruelty.

3. The claim was resisted by the wife contending that the averments regarding the wife's refusal to live with the husband were false. It was contended that the in-laws treated her with cruelty and they demanded more money. The wife also accused the husband for demanding Rs.5 lakhs for establishing a drinking water unit. According to the wife, because of the demand for dowry and the cruel treatment meted out to her by the husband she was forced to leave the matrimonial home along with the child, who was only a month and half old at that time. It is the further contention of the wife that though she was ready to go with the husband on 30.08.2011, he did not

come to take her back. The sum and substance of the defence is that there was a demand for dowry, she was treated with cruelty and forced to leave the matrimonial home.

4. On the above rival contentions, the learned Family Judge framed the following issue:

'4. தீர்விற்குரிய பிரச்சனை - மனுதாரர் மனுவில் கோரியுள்ள பரிகாரம் அவருக்கு கிடைக்கத்தக்கதா?'

5. At trial, the petitioner was examined as P.W.1 and one Chinnasamy, a relative, was examined as P.W.2. Exhibits P1 to P8 were marked. No document was filed on the side of the respondent. Respondent was examined as R.W.1 and her father was examined as R.W.2 and paternal uncle one Rasu was examined as R.W.3.

6. Having heard the parties and having considered the documents that were produced, the learned Family Judge came to the conclusion that the wife was guilty of cruelty. He found that the wife had insisted that the husband has to set up a separate house for them and he should not live with his parents. The learned Family Judge also found that the conduct of the wife

in not attempting to live together even after giving an undertaking with the police on 22.08.2011, would show that she is not interested in continuing the marriage. The learned Family Judge found that the action of the wife in lodging a complaint under the Domestic Violence Act, after institution of H.M.O.P.No.227 of 2011 for restitution by the husband and its dismissal and the acquittal of the husband of the charges therein would definitely amount to cruelty. The learned Family Judge also took note of the fact that the husband was always trying to preserve the marriage while the wife was always bent upon destroying it. On the above said findings, the learned Family Judge allowed the O.P. and granted divorce. Aggrieved by the same, the wife is on appeal.

7. We heard Mr.N.Manokaran, learned counsel appearing for the appellant and Mr.P.K.Harinath Babu, learned counsel appearing for the respondent.

8. Mr.N.Manokaran, learned counsel for the appellant would vehemently contend that the Family Court erred in concluding that the wife has committed cruelty on the basis of very vague allegations made in the

petition and uncertain evidence that was let in. The learned counsel would point out that divorce under Section 13(1)(i-a) of the Act could be granted for the fault of either of the spouses and if the Family Court does not render a finding to the effect that one of the spouses is at fault, a decree for divorce cannot be granted.

9. The learned counsel would invite our attention to the evidence on record to contend that the allegations made even if they are true, would not constitute a ground for divorce under Section 13(1)(i-a) of the Act. The learned counsel would also rely upon the judgment of the Hon'ble Supreme Court in ***Darshan Gupta vs. Radhika Gupta*** reported in ***(2013) 9 SCC 1*** wherein the Hon'ble Supreme Court pointed out that Section 13(1) of the Act is based on the fault of the party against whom dissolution of marriage is sought. The provision being based on the matrimonial offence or fault theory, unless the same is made out the Court cannot grant a decree for divorce. The learned counsel would rely upon the following passage from the judgment of the Hon'ble Supreme Court referred to *supra*:

'A perusal of the grounds on which divorce can be sought under Section 13(1) of the Hindu Marriage Act, 1955, would

reveal that the same are grounds based on the "fault" of the party against whom dissolution of marriage is sought. In matrimonial jurisprudence, such provisions are founded on the "matrimonial offence theory" or the "fault theory". Under this jurisprudential principle, it is only on the ground of an opponent's fault, that a party may approach a court for seeking annulment of his/her matrimonial alliance. In other words, if either of the parties is guilty of committing a matrimonial offence, the aggrieved party alone is entitled to divorce. The party seeking divorce under the "matrimonial offence theory" / "fault theory" must be innocent.'

10. Relying upon the above observations of the Hon'ble Supreme Court, the learned counsel would submit that the husband who is also guilty cannot seek divorce invoking matrimonial offence theory or fault theory on which Section 13(1) of the Act is based upon.

11. Contending contra, Mr.Harinath Babu, learned counsel appearing for the respondent would submit that from the evidence available on record it has been made out that (i) the wife had insisted upon a separate residence; (ii) Having agreed to live with her husband on 22.08.2011 she had not honoured that commitment and had given very flimsy excuses for not resuming cohabitation and (iii) she had chosen to lodge a very belated

complaint against the husband under the Domestic Violence Act for which the husband was forced to undergo ordeal of trial and ultimately he was acquitted of the charges. These three facts which have been proved beyond doubt by themselves would constitute mental cruelty in order to enable the husband to be favoured with the decree for divorce.

12. The learned counsel would invite our attention to the judgment of the Hon'ble Supreme Court in *Narendra vs. K.Meena* made in *Civil Appeal No.3253 of 2008* dated 06.10.2016 wherein the Hon'ble Supreme Court after adverting to the custom and the practice of Hindus, concluded that wife insisting the husband to separate from his family by itself would amount to cruelty. The Hon'ble Supreme Court while disagreeing with the view of the High Court to the effect that wife has legitimate expectation that the entire income of the husband belongs to her held that there cannot be such expectation even if it is there, they cannot be legitimate. Learned counsel would draw our attention to the following observations of the Hon'ble Supreme Court:

'11. The Respondent wife wanted the Appellant to get separated from his family. The evidence shows that the family was

virtually maintained from the income of the Appellant husband. It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married, at the instance of the wife, especially when the son is the only earning member in the family. A son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income. In India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her. In the instant case, upon appreciation of the evidence, the trial Court came to the conclusion that merely for monetary considerations, the Respondent wife wanted to get her the Respondent husband separated from his family. The averment of the Respondent was to the effect that the income of the Appellant was also spent for maintaining his family. The said grievance of the Respondent is absolutely unjustified. A son maintaining his parents is absolutely normal in Indian culture and ethos. There is no other reason for which the Respondent wanted the Appellant to be separated from the family the sole reason was to enjoy the income of the Appellant. Unfortunately, the High Court considered this to be a justifiable reason. In the opinion of the High Court, the

wife had a legitimate expectation to see that the income of her husband is used for her and not for the family members of the Respondent husband. We do not see any reason to justify the said view of the High Court. As stated hereinabove, in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case, we do not find any justifiable reason, except monetary consideration of the Respondent wife. In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the Respondent wife to constrain the Appellant to be separated from the family would be torturous for the husband and in our opinion, the trial Court was right when it came to the conclusion that this constitutes an act of 'cruelty'.

13. Learned counsel would draw our attention to the judgment of the Hon'ble Supreme Court in ***Rani Narasimha Sastry vs Rani Suneela Rani*** reported in ***(2020) 18 SCC 247*** to contend that the very fact of the wife chose to lodge a false complaint of which, the husband was acquitted, would amount to cruelty. Our attention is drawn to paragraph 13 of the said judgment which reads as follows:

'13. In the present case, the prosecution is launched by the respondent against the appellant under Section 498-A IPC making serious allegations in which the appellant had to undergo trial which ultimately resulted in his acquittal. In the prosecution under Section 498-A IPC not only acquittal has been recorded but observations have been made that allegations of serious nature are levelled against each other. The case set up by the appellant seeking decree of divorce on the ground of cruelty has been established. With regard to proceeding initiated by the respondent under Section 498-A IPC, the High Court made the following observation in para 15: (Rani Narsimha Sastry Case, SCC OnLine Hyd)

“15. ... Merely because the respondent has sought for maintenance or has filed a complaint against the petitioner for the offence punishable under Section 498-A IPC, they cannot be said to be valid grounds for holding that such a recourse adopted by the respondent amounts to cruelty.”

The above observation of the High Court cannot be approved. It is true that it is open for anyone to file complaint or lodge prosecution for redressal of his or her grievances and lodge a first information report for an offence also and mere lodging of complaint or FIR cannot ipso facto be treated as cruelty. But, when a person undergoes a trial in which he is acquitted of the allegation of offence under Section 498-A IPC, levelled by the wife against the husband, it cannot be accepted that no cruelty has been meted out on the husband.'

14. We have considered the submissions of the counsel on either side. Adverting to the evidence on hand we find that the marriage happened in the year 2009, a child was born on 17.11.2010. After the birth of the child the wife went back to the husband's house. She however chose to leave the matrimonial house during December 2010. Since she did not return despite efforts the husband lodges a complaint with the police on 22.08.2011 under Ex.P5. The wife gives an undertaking that she would go and live with him under Ex.P6. Despite such undertaking, she does not get back. No doubt in the evidence of R.W.1, R.W.2 and R.W.3 all of them would in unison depose that she did not go back because the husband did not come and take her back. This appears to be a very lame excuse. Thereafter the husband initiates proceedings for restitution in H.M.O.P No.227 of 2011. After the initiation of the restitution proceedings, the wife lodges a complaint on 27.12.2011 against the husband accusing him of all sorts of things including the demand for dowry and physical violence. Having left the matrimonial home in December 2010, the wife did not move the little finger till 27.12.2011 for nearly a year before she lodged a complaint under the Domestic Violence Act. This conduct of the wife in our opinion speaks volumes. If only the evidence of the wife and her father to the effect that she was beaten up and

therefore she left the matrimonial home was true, they should have lodged a complaint with the police immediately. Admittedly, no complaint was lodged. It is also claimed that the mother of the wife committed suicide because of the matrimonial discord of a daughter. Even then there was no complaint to the police. This conduct, we find, is very strange.

15. A complaint is made for the first time in December 2011 that too after the husband launches proceeding under Section 9 of Hindu Marriage Act for restitution. This would go long way to show the mental status of the wife and her relatives. Even in cross examination of the husband a suggestion is made to him that the wife did not get back to the matrimonial house because the husband did not come and take her back as per custom. All the three witnesses, namely, the wife, her father and her paternal uncle have reiterated the same in their evidence. This establishes the mental frame of a superiority feeling which they did not want to shed even after being forced to visit a police station and being required to answer a claim for restitution of conjugal rights in a Court of law. The response of the wife to the police to the complaint under Ex.P6 is more intriguing. She had stated that the husband has agreed to establish a separate house for themselves and

she would go and live there. From this we could gather that the wife has been persistent in her demand that she would not live with her in-laws. Such an act by itself as pointed out by the Hon'ble Supreme Court in ***Narendra vs. K.Meena*** referred to *supra* would amount to cruelty.

16. Apart from the above, the wife has lodged a compliant under the Domestic Violence Act on 27.12.2011, based on which a miscellaneous case was registered in M.C.No.9 of 2012 against the husband which was disposed of by the District Munsif-cum-Judicial Magistrate, Perundurai on 07.01.2013 directing that the wife is entitled to residence under Section 19(8) of the Protection of Women from Domestic Violence Act, 2005. This order was challenged in Crl.A.No.9 of 2013 before the district Court. The learned Principal District Judge, Erode by order dated 27.03.2013 allowed the appeal and remitted the matter back to the trial Court for fresh consideration. Thereafter, in the year 2020 the husband was directed to pay maintenance. It is submitted by the learned counsel that the said M.C., which was remitted was disposed of directing the husband to pay maintenance as against which an appeal has been filed by the husband which is said to be pending. Therefore, it is clear that the other allegations made against the

husband by the wife were found to be false. This will also buttress the claim of the husband that the wife had lodged a complaint only to scuttle the proceedings in H.M.O.P.No.227 of 2011.

17. As rightly argued by the learned counsel for respondent, the Hon'ble Supreme Court in *Rani Narasimha Sastry vs Rani Suneela Rani* referred to above has held that forcing the husband to undergo the ordeal of trial on the basis of the false claim itself would amount to cruelty. From the averments in the petition and the evidence that is available on record, we find that what is alleged by the husband is mental cruelty. It is settled that mental cruelty cannot be proved by direct evidence and could be gathered from the circumstances and the preponderance of probabilities. As we have indicated above, the evidence on record shows that it was the wife who was unwilling to save the marriage and that she had persistently resisted attempts for resumption of cohabitation made by the husband. She had also indulge in lodging false complaint against the husband. The learned Family Judge had concluded that the demand by the wife that the husband should set up a private residence and persistent refusal to live with her husband despite his efforts would amount to cruelty.

18. In the light of the evidence which we had discussed above we do not find any reason to interfere with the conclusions of the learned Family Judge. The appeal therefore fails and it is accordingly **dismissed**. No costs. Consequently, the connected miscellaneous petition is closed.

(R.S.M.,J.) (R.K.M.,J.)
18.08.2023

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Speaking order
rsi

To

The Family Judge,
Erode.

C.M.A.No.2327 of 2016

R.SUBRAMANIAN, J.
and
R.KALAIMATHI, J.

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