



C.M.A.(MD)Nos.725 and 832 of 2019
Cross Obj.(MD)No.23 of 2019

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

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Date of Reserving the order	Date of Pronouncing the order
01.02.2023	15.02.2023

CORAM:

**THE HONOURABLE DR.JUSTICE G.JAYACHANDRAN
and
THE HONOURABLE MR.JUSTICE SUNDER MOHAN**

**C.M.A.(MD)Nos.725 and 832 of 2019
and
Cross Objection (MD)No.23 of 2019 in C.M.A.(MD)No.725 of 2019
and
C.M.P.(MD)No.12364 of 2019 in Cross Obj.(MD)No.23 of 2019**

C.M.A.(MD)No.725 of 2019:-

S.M.J.Naveena

... Appellant

vs.

C.Gipson Villavarayer

... Respondent

Prayer :- Civil Miscellaneous Appeal filed under Section 55 of the Indian Divorce Act read with Section 19 of the Family Courts Act, against the judgment and decree, dated 23.04.2019, passed in I.D.O.P.No.50 of 2018, on the file of the Family Court, Kanyakumari at Nagercoil.

For Appellant

: Mr.Isaac Mohanlal
Senior Counsel
for Mr.T.Cibichakaraborthy

For Respondent

: Mr.J.Barathan



C.M.A.(MD)Nos.725 and 832 of 2019
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C.M.A.(MD)No.832 of 2019:-

C.Gipson Villavarayer

... Appellant

vs.

S.M.J.Naveena

... Respondent

Prayer :- Civil Miscellaneous Appeal filed under Section 55 of the Indian Divorce Act read with Section 19 of the Family Courts Act, against the judgment and decree, dated 23.04.2019, passed in I.D.O.P.No.127 of 2018, on the file of the Family Court, Kanyakumari at Nagercoil.

For Appellant

: Mr.J.Barathan

For Respondent

: Mr.Isaac Mohanlal
Senior Counsel
for Mr.T.Cibichakaraborthy

Cross Obj.(MD)No.23 of 2019:-

C.Gipson Villavarayer

... Appellant

vs.

S.M.J.Naveena

... Respondent

Prayer :- Cross Objection filed under Order 41 Rule 22 of the C.P.C., read with Section 55 of the Indian Divorce Act, 1869, in C.M.A.(MD)No.725 of 2019 filed against the judgment and decree, dated 23.04.2019, passed in the Petition for



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divorce in I.D.O.P.No.50 of 2018, on the file of the Family Court, Kanyakumari at Nagercoil.

For Appellant : Mr.J.Barathan
For Respondent : Mr.Isaac Mohanlal
Senior Counsel
for Mr.T.Cibichakaraborthy

COMMON JUDGMENT

DR.G.JAYACHANDRAN, J.

C.Gipson Villavarayer and S.M.J.Naveena are husband and wife. They got married on 11.11.2016 as per Christian marriage law and customs. They are the parties in these two Civil Miscellaneous Appeals and the Cross Objection. Hence, for the sake of brevity and clarity, they are referred to as husband and wife respectively.

2. The point for consideration before this Court is whether the Family Court right in ordering judicial separation for two years while deciding the divorce petition filed by the wife and the petition for restitution of conjugal right filed by the husband.

3. The undisputed facts on either side are:-

The marriage between the parties was solemnized on 11.11.2016. A month later, the husband left India to take up a job in Saudi Arabia. The wife went to her



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parents' house. The husband returned back in the month of August 2017, but could not resume their conjugal marital life. On 05.10.2017, the wife filed petition for divorce before the District Court, Nagercoil, under Section 10(1)(vii) and (x) of the Indian Divorce Act, 1869. The same was taken on file as I.D.O.P.No.449 of 2017. After establishment of Family Court, it was transferred and renumbered as I.D.O.P.No.50 of 2018. The divorce petition filed by the wife contested by filing counter and also a separate petition in I.D.O.P.No.28 of 2018, seeking restitution of conjugal rights before District Court, Nagercoil, after establishment of Family Court, it was transferred and renumbered as I.D.O.P.No.127 of 2018.

4. The petition for divorce within one year of the marriage by the wife filed for the following reasons:-

(i) The marriage not consummated. When her husband's refusal to cohabit was informed to her husband's parents. They scolded her vulgarly.

(ii) The husband and his family members never respected her. No love or affection shown to her. She was put to unbearable torture and mental agony.

(iii) In spite of giving dowry of 150 sovereigns of gold jewels, Rs.5,00,000/- cash, household articles worth Rs.2,50,000/-; 5 cents of land and a Maruti car at the time of marriage, the mother-in-law demanded additional dowry of Rs.10 lakhs to start a business. When she informed them that her father cannot afford to meet her demand, her husband got angry and abused her verbally and also



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physically assaulted her. He threatened to murder her parents and make her orphan.

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(iv) At the time of marriage, the husband claimed he is an Mechanical Engineering Graduate earning more than Rs.1,00,000/- per month as salary at abroad. However, it was later found he is not even a graduate or holding a job.

(v) The husband wilfully abandoned her on 12.12.2016.

5. The divorce petition was contested by the husband stating that the marriage was consummated and till he left for Saudi Arabia, they were living happily cohabiting. When he left India on 12.12.2016, the petitioner along with her parents came to Trivandrum Airport to see him off. After he left for Saudi Arabia, his wife went to her parents' house to pursue her studies. They used to talk over phone regularly. His wife on the eve of New year and during the local church festival, visited the matrimonial home and stayed with his parents for few days. While so, during the month of June 2017, trouble brewed at the instigation of her father. Sensing trouble his wife called him over phone and asked to return back to India since her father has advised her to file divorce petition. Immediately, he returned to India on 11.08.2017 and tried to contact his wife and her father. Her father agreed to send his daughter on condition that if he transfer the property in his name worth of Rs.2 Crores to the name of his wife. He refused to concede the greedy demand made by his wife and her father. The allegation of dowry given at the time of marriage and further demand of additional dowry are denied. There was no cruelty in any manner



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as alleged in the divorce petition. No false promise or statement made about his educational qualification or income. At the time of marriage, he has not completed his B.E. Degree. He had few papers in arrears. However, he was gainfully employed in Saudi Arabia as Project Associate in Samil Coolcare with salary of 4009 Rials.

6. Apart from filing counter in the divorce petition, on the same averments, he also filed I.D.O.P.No.127 of 2018 for restitution of conjugal rights, claiming that he is forever in love and affection with his wife. He wants reunion to lead a happy life. For the sake of saving the marriage, he is ready to leave the job at Saudi Arabia and stay in India.

7. The Family Court took up both the petitions for joint trial. Deposition and documents were marked in I.D.O.P.No.50 of 2018 filed for divorce by the wife.

8. Wife was examined as P.W.1. Ex.P.1 to Ex.P.4 are relied by wife in support of her divorce petition.

9. Husband was examined as R.W.1, Ex.R.1 was marked during the cross examination of P.W.1 and Ex.R.2 to Ex.R.4 were marked during the chief examination of R.W.1.



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10. The Family Court framed the following points for consideration:-

"1. Whether the petitioner-wife proved the plea of non-consummation of marriage as prayed for?

2. Whether the petitioner-wife proved the plea of cruelty?

3. Whether the petitioner-wife is entitled for the relief of divorce as prayed for?

4. Whether the respondent-husband is entitled for the relief of restitution of conjugal rights?

5. To what other relief the parties are entitled?"

11. The Court below disbelieved the contention of the wife that the marriage never consummated and she was subjected to cruelty and torture. To arrive at this conclusion, the trial Court has considered the evidence of P.W.1 admitting that she and her husband went to Velankanni after marriage, she and her mother went to Trivandrum to send off her husband, who was leaving to Saudi Arabia. She went to the matrimonial home for passport verification. In the cross examination, initially, she denied that she went to the matrimonial home to participate in the Church festival, that was disproved through Ex.R.1 Photos and CD showing P.W.1 and her mother-in-law together. The inclusion of her name in the family card of her husband and the fact that they both lived together only for 31 days and during the period between the date of marriage and the date on which the husband left to Saudi Arabia for job, there was no single incident to indicate that the wife was subjected to cruelty



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or torture. No evidence to indicate that there was a demand of dowry at the time of marriage or thereafter. The admission of the husband that they presented a Maruti Car at the time of marriage also taken into consideration and accepted the plea of the husband that it is a gift given voluntarily.

12. In the impugned judgment at more than one place, the trial Court has recorded that attempts to bring the parties to an amicable settlement pending trial ended in futile. Taking note of the fact that the husband has not first come forward to get the relief of restitution of conjugal rights and he has filed the petition for restitution of conjugal rights only after receipt of the summon in the divorce petition, the Family Court held that his *bona fide* for seeking the relief of restitution is doubtful.

13. As a result, the trial Court dismissed the petition for restitution of conjugal right filed by the husband. Modified the relief in the divorce petition filed by the wife. It ordered judicial separation for two years.

14. The husband has preferred C.M.A.(MD)No.832 of 2019 being aggrieved by the dismissal of his petition, seeking restitution of conjugal rights. The wife has preferred C.M.A.(MD)No.725 of 2019 being aggrieved by the modified order of judicial separation. In her appeal, cross objection is filed by the husband



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questioning the wisdom of ordering judicial separation in spite of his readiness to reunite and live with his wife.

15. The learned Senior Counsel appearing for the wife - the appellant in C.M.A.(MD)No.725 of 2019; the Respondent in C.M.A.(MD)No.832 of 2019 and Petitioner in the Cross objection filed in C.M.A.(MD)No.725 of 2019 referring to the judgments of the Hon'ble Supreme Court submitted that the marriage has reached a point of no return. It has broken irretrievable. The marriage lasted only for 31 days and thereafter, all attempts at all level for amicable settlement, failed. Therefore, at this length of time, it has become obvious that the marriage cannot be saved. Hence, it is appropriate to dissolve the marriage granting divorce.

16. Per contra, the learned counsel representing the husband submitted that the husband is still in fond hope to rejoin his wife and start a new life. Soon after the marriage, he took steps to get passport for his wife. Included her name in the Family card and when discard surfaced due to instigation of his father-in-law, to save the matrimonial bond and for the sake of his wife, he left the job held at Saudi Arabia and returned to India. Neither the law nor the judgments cited endorses falsehood made by a party in a divorce petition. The wife, who has voluntarily withdrawn from the society of the husband, for no valid reason, cannot be permitted to take advantage of her own fault. The Court should not be swayed away by the fact that the spouses



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are living separately for more than 4 years in spite of a decree of judicial separation for two years. It will amount to giving premium for falsehood and unreasonable desertion.

17. The primary allegation by the wife is that the marriage was not consummated and her husband deserted her on 12.12.2016. The burden to prove non-consummation of marriage is upon the wife, who pleads non-consummation. Except her own self-serving statement, nothing to infer non-cohabitation placed before the Court. The wife has not taken any steps to prove this contention either explicit or implicit. No doubt to prove non-consummation is very difficult, but having taken that plea, no material is placed to infer non-cohabitation. Contrarily, in the cross-examination, she admits that till her husband left to Saudi Arabia she was living with him. She continued to have talk over phone till August 2017. She was staying with her parents, but visited the matrimonial home twice when her husband was in abroad. It is also proved that she along with her mother-in-law attended Church festival. These facts indicate that the allegations that marriage was not consummated, she was put to torture and treated with disrespect are all invented for the sake of getting divorce.

18. Regarding the allegations of dowry harassment and demand of additional dowry, we find no substantive evidence is available. She ought to have



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examined at least her father, from whom the dowry alleged to have demanded. No evidence to support that 150 sovereigns of gold jewels given as dowry or Rs.5 lakhs cash given to the husband as dowry. Though it is claimed that 5 cents of land given to her husband as dowry, no document produced in support of this allegation. Her father, who is maintaining his estranged daughter, not called to give evidence to prove the cruelty and the dowry demand.

19. It is pertinent to note that the documents placed before the Court on the side to canvass relief of divorce are the marriage invitation, marriage photographs, marriage certificate and family ration card. They only prove the admitted facts and not the facts controverted. As far as her testimony before the Court, in the cross-examination, she admits that they lived together for 31 days and visited various places during that period. When her husband left for Saudi Arabia, she and her mother went to Trivandrum and send him off. She used to talk with her husband over phone till two months prior to filing the divorce petition. She visited the matrimonial house on few occasions.

20. No person, who has been subjected to cruelty and dowry demand, will visit the matrimonial home voluntarily and attend social gathering with her mother-in-law, against whom, much said in the petition. This Court neither from the oral and documentary evidence nor during our interaction with the wife, could reason out why



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she is averse towards her husband. Though the wife has made multiple allegations to get the relief of divorce, none of the grounds stand the test of judicial scrutiny. In fact, the falsehood of the wife alleging dowry demand and desertion been exposed.

21. Divorce cannot be granted simply for asking even after it is established that the allegations are false. The unreasonable withdrawal from the marital society, even if the separation is for a long period cannot be taken as a reason for granting divorce. If prolonged separation alone to be taken as criteria for dissolving the marriage, it will amount to giving premium to a person, who wilfully withdraw the companionship from his/her spouse and refuse to reunite in spite of a Court decree. Without any plausible explanation if marriages are dissolved, persons at fault will be in advantage position despite his fault.

22. By filing petition for restitution of conjugal rights and challenging the order of its dismissal along with the cross objection, it is obvious that the husband has returned back to India and eager to reunite with his wife. His attempt to get passport to his wife by including her name in the family ration card is a fact implicitly admitted by the wife in her cross-examination and the same also proved through Ex.R.3. The gainful employment of the husband is proved through Ex.R.4. The allegation of desertion by husband is disproved by the fact that he went to Saudi Arabia, leaving his wife at her parents house with her knowledge and for the purpose



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of taking a job. She admits that till two months prior to filing of the divorce petition, she was in talking terms with her husband. She also admits that she did not respond to his phone calls thereafter. Thus, the facts established through evidence disproves all the allegations made against the husband, while so, it is improper to dissolve the marriage for the reason that they are living separately for more than 5 years and the wife is adamant and not ready for reunion.

23. The following judgments cited by the Learned Senior Counsel for the wife:

1. **Naveen Kohli vs, Neelu Kohli** reported in **(2006) 4 SCC 558**
2. **K.Srinivas Rao vs. D.A.Deepa** reported in **(2013) 5 SCC 226**
3. **Christine Lazarus Menezes vs. Lazarus Peter Menezes** reported in **2017 SCC Online Bom 1155**
4. **Disha Kushwaha vs. Rituraj Singh** reported in **AIR 2019 Madhya Pradesh 217**

24. In all these cases, on facts, it is not only the prolonged separation indicating the spouses have reached a point of no return. Those are cases where mutual allegations of torture or/and cruelty, betrayal and mistrust exchanged. Further, in all the cases cited, there are materials to infer that the marriage has become dead, broken irretrievable and the marriage is in existence only as a shell without



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substance. As far as the instant case, divorce is sought on fake and frivolous ground.

While the wife has deserted her husband, false allegation of desertion is made against the husband. Plea of non-consummation is made for the sake of getting divorce. Allegation of dowry harassment is not proved. While so, the wife has challenged the order of judicial separation for a period of two years.

25. Section 10 of the Indian Divorce Act, enumerates the grounds for granting divorce.

"10. Grounds for dissolution of marriage.-(1) Any marriage solemnized, whether before or after the commencement of the Indian Divorce (Amendment) Act, 2001 (51 of 2001), may, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of the marriage, the respondent-

(i) has committed adultery; or

(ii) has ceased to be Christian by conversion to another religion; or

(iii) has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; or

[Clause (iv) omitted by Act 6 of 2019, s. 2 (w.e.f. 1-3-2019)].

(v) has, for a period of not less than two years immediately preceding the presentation of the



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petition, been suffering from venereal disease in a communicable form; or

(vi) has not been heard of as being alive for a period of seven years or more by those persons who would naturally have heard of the respondent if the respondent had been alive; or

(vii) has wilfully refused to consummate the marriage and the marriage has not therefore been consummated; or

(viii) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree against the respondent; or

(ix) has deserted the petitioner for at least two years immediately preceding the presentation of the petition; or

(x) has treated the petitioner with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the respondent.

(2) A wife may also present a petition for the dissolution of her marriage on the ground that the husband has, since the solemnization of the marriage, been guilty of rape, sodomy or bestiality."



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26. The wife has chosen to challenge the common order of the Family Court, reiterating the allegations against her husband, which has been found to be false. If her appeal is allowed, it will tantamount to holding her baseless allegations against her husband as true.

27. Therefore, the principle of irretrievable break down of marital relationship cannot be applied to the facts of the case. The false allegations against the husband in fact a cruelty to the husband. When he is ready to condone that and wants to rejoin, the wife refused to rejoin. In **Samar Ghosh vs. Jaya Ghosh** reported in (2007) 4 SCC 511, the Hon'ble Supreme Court has illustrated cases where inference of mental cruelty can be drawn. Taking note of 16 ½ years long separation, it stated that the long period of continuous separation, may fairly be concluded that the matrimonial bond is beyond repair. Such a situation may lead to mental cruelty.

28. In this case, it is the wife, who is cause for separation. She cannot take advantage of her own fault, make baseless allegations and claim she is subjected to cruelty, therefore, the marriage tie must be severed. The trial Court on consideration of the facts and evidence, has arrived at a conclusion that though the wife has not proved her case for divorce, the alternate relief of judicial separation granted. In spite the husband establishing his interest in restoration of conjugal rights, the same been declined on the reason that husband filed the petition for restitution of conjugal



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rights only after he received summon in the divorce petition. The said reasoning is not a prudent reasoning. In a matrimonial dispute, when a young married couple face initial hiccup and teething problem to settle down in life, a prudent person will not rush to Court without exploring amicable settlement. In this case, within a year of marriage, the wife has filed her petition for divorce. This has prompted the husband to file petition for restitution of conjugal rights. Since his counter in the divorce petition is not sufficient to save the matrimonial bond, even, in case the divorce petition is dismissed.

29. We find that the trial Court erred in granting a decree of judicial separation, a relief not prayed by either of the parties. Having found the grounds raised in the divorce petition not proved, the trial Court ought to have dismissed I.D.O.P.No.50 of 2018, holding that the petition is devoid of merits. Further, taking note of the documents marked as Exs.R.1 to R.4, ought to have allowed I.D.O.P.No. 127 of 2018 filed by the husband for restitution of conjugal rights. When the grounds found in sub-Section (1)(vii) and (x) of Section 10 of the Indian Divorce Act, 1869 not made out and the material evidence shows that the wife wilfully withdrew from the matrimonial society, the Court ought to have granted restitution of conjugal rights.



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30. For the reasons stated above, the common order of the trial Court, dated 23.04.2019, is reversed as below:-

(i) The modified order in I.D.O.P.No.50 of 2018 filed for divorce, is set aside and I.D.O.P.No.50 of 2018 stands dismissed.

(ii) The order of dismissal of I.D.O.P.No.127 of 2018 filed for restitution of conjugal rights, is set aside and I.D.O.P.No.127 of 2018 stands allowed.

31. In fine, C.M.A.(MD)No.725 of 2019 is dismissed. C.M.A.(MD)No.832 of 2019 is allowed. Cross Objection(MD)No.23 of 2019 in C.M.A.(MD)No.725 of 2019 is allowed. No order as to costs. Consequently, connected Miscellaneous Petition is closed.

NCC : Yes
Index : Yes / No
Internet : Yes / No
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[G.J., J.] [S.M., J.]
15.02.2023

To

1. The Judge,
Family Court,
Kanyakumari at Nagercoil.



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2.The Section Officer,
V.R. Section,
Madurai Bench of Madras High Court,
Madurai.



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DR.G.JAYACHANDRAN, J.
and
SUNDER MOHAN, J.

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PRE-DELIVERY COMMON JUDGMENT MADE IN
C.M.A.(MD)Nos.725 and 832 of 2019
and Cross Obj.(MD)No.23 of 2019

DATED : 15.02.2023