

C.M.A.(MD).No.1121 of 2017

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on : 21.11.2023

Pronounced on : 22.12.2023

CORAM:

**THE HONOURABLE MR.JUSTICE RMT.TEEKAA RAMAN
AND
THE HONOURABLE MR.JUSTICE P.B.BALAJI**

**CMA(MD) No.1121 of 2017
and CMP(MD) No.11414 of 2017**

...appellant/
Respondent

Vs.

... Respondent/
Petitioner

PRAYER: Civil Miscellaneous Appeal is filed under Section 19 of the Family Courts Act r/w Section 28(4) of the Hindu Marriage Act against the fair and decretal order dated 13.10.2017 in H.M.O.P.No.780 of 2014 on the file of the Family Court Judge, Tiruchirappalli.

For Appellant : Ms.T.Banumathy

For Respondents : Mr.N.Madhava Govindan



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JUDGMENT

RMT.TEEKAA RAMAN, J.

These Civil Miscellaneous Appeal is directed against the fair and decretal order dated 13.10.2017 made in H.M.O.P.No. 780 of 2014 by the Family Court Judge, Tiruchirappalli.

2.The appellant is the wife and the respondent is the husband. For the sake of convenience, the parties are referred to as 'husband' and 'wife'.

3.The husband filed HMOP No.780/2014 for dissolution of marriage on the ground of cruelty and under Section 13(1)(ia) of the Hindu Marriage Act. The wife filed counter statement stating that due to civil dispute in respect of undivided share in the house at the instance of the brother of the husband, the case has been filed and MC No.11 of 2015 and maintenance was awarded to her and two daughters, however, the husband has not paid the same.



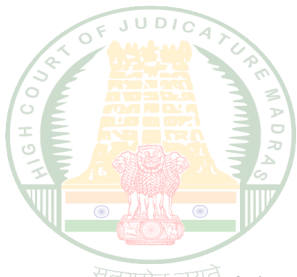
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4. Before the trial Court, the husband examined himself as P.W.1 and marked Ex.P1 marriage invitation, Ex.P2 – legal notice and Ex.P3-postal acknowledgment. The wife examined herself as R.W.1, however, she has not marked any documents.

5. On considering both the oral and documentary evidence, the family Court, Trichy has come to the conclusion that the parties are living separately for more than 12 years and she has made false allegation that the husband is having an illicit relationship with one of his co-employee by name Chamundeeswari working in a particular department and also uttered that he is also having another relationship with another lady by name Senthilvadvu and hence, the family Court observed that levelling allegation of illicit relationship against the husband or spouse, as the case may be, amounts to mental cruelty and granted the relief on the ground of irretrievable breakdown of the marriage.

6. The wife has preferred the appeal primarily on the ground that irretrievable breakdown of marriage is not a ground stated under the Hindu Marriage Act, instead, contended that the High Court in exercise



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of its power under Article 142 of the Constitution of India can do so. Furthermore, the plea of desertion was not taken by the husband, however, the family Court has chosen to discuss the same in detail and further stated that the reason of levelling of allegation of illicit relationship with two named persons in the railway department, where the husband works is not the case of the petitioner, however, the same was taken as a ground only by the judicial officer for granting the relief.

7. The learned counsel for the respondent/husband made submissions in support of the order passed by the family Court dated 13.10.2017.

8. Heard the learned counsel for the appellant and the learned counsel for the respondent and perused the materials available on record.

9. After hearing both sides, we find that the respondent/husband filed HMOP No.780/2014 seeking dissolution of marriage, which was solemnized between the parties on 13.09.2000. They begotten two children in the year 2001 and 2004 respectively. As the elder daughter



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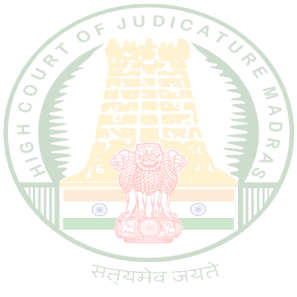
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attained puberty, as per the family customs, they have arranged for a function, in which, it is alleged that there was a quarrel ensued between the parties, which was resulted in filing of the above petition on the ground of cruelty. Certain averments were also made regarding desertion and that they are living separately for about 12 years.

10. Wife filed counter stating that she is willing to join with the husband and hence, sought for counter relief of restitution of conjugal rights in the very same petition. We have perused Ex.P2 - legal notice. The legal notice was issued on behalf of the husband on 12.06.2014. The submissions made in Ex.R2 - notice is that the wife is living separately for about 12 years in Boothalur village and she had converted her religion to Protestant and also pressurizing to convert the family members of the husband to Christianity and thereby they are subjected to cruelty.

11. The husband as P.W.1 in the cross-examination had admitted as follows:

“எனது மனைவி இரண்டாவது குழந்தை
கருவுற்றபோது எதிர்மனுதாரரை துன்புறுத்தியதாக
அனைத்து மகளிர் கா.நி. திருவரம்பூரில் புகார் கொடுத்து



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விசாரணை நடந்ததா என்றால் விசாரணை நடந்தது. அந்த புகார் மீண்டும் கண்டோன்மென்ட் அனைத்து மகளிர் கா.நி. வந்து விசாரணை நடந்தது என்றால் அது சரிதான். காவல்நிலையத்தில் நடந்த விசாரணைக்கு எங்கள் இருவரையும் தனிகுடித்தனம் நடத்த அறிவுறுத்தினார்கள். அதன் அடிப்படையில் திருவரம்பு ஞரில் தனியாக வீடு எடுத்து குடும்பம் நடத்திவந்தோம்.

...

என் முதல் மகள் பூப்பெய்த சமயம் அந்த விழாவை எனது வீட்டில் கல்கண்டார்கோட்டையில் வைத்துக்கொள்ளலாம் என்று மனைவி குழந்தைகளை அழைத்து வந்தேன் என்று சொன்னால் அது சரியல்ல. 2.5.14ல் எனது மகள் பூப்பெய்தது உண்மை. அது தொடர்பாக நிகழ்ச்சிகள் எல்லாம் எனது சகோதரர் வீட்டில் நடந்தது.

...

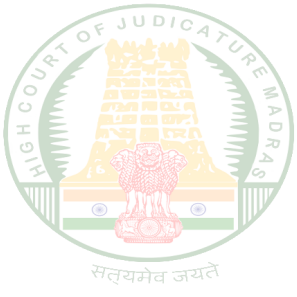
அந்த நிகழ்ச்சியில் நான் கலந்து கொண்டேன். என் மனைவி குழந்தைகள் இருவரும் நான் வசிக்கும் என் தம்பி வீட்டில் இருந்தார்கள் என்றால் அது சரிதான்.

...

எனது மனைவியும் பிள்ளைகளும் எங்கள் குடும்ப வீட்டில் உரிமைகோரக்கூடாது என்பதற்காக அந்த வீட்டை எனது தம்பி பெயரில் மாற்றிவிட்டு பொய்யாக நான் வாடகைக்கு குடியிருக்கிறேன் என்று சொன்னால் அது சரியல்ல.

...

எனது மனைவியும் மகள்களும் எனது தம்பி



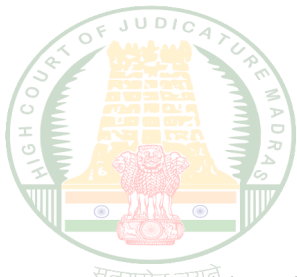
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வீட்டில் குடியிருந்தபோது அவர்கள் வீட்டைவிட்டு வெளியே மாட்டார்கள் என்று எனது தம்பி திருவரம்பூர் அனைத்துமகளில் கா.நி. புகார் கொடுத்து விசாரணை நடத்தப்பட்டது என்றால் அது சரிதான். அந்த விசாரணையில் நான் ஆஜராகி எனது மனைவியும் குழந்தைகளையும் அழைத்துக்கொண்டு தனியாக குடும்பம் நடத்துகிறேன் என்று உத்தரவாதம் கொடுத்து எழுதிகொடுத்தேன் என்றால் அது சரிதான். அதற்கு பிறகு நான் எனது மகள்களையும் மனைவியும் அழைத்துக்கொண்டுவந்து குடும்பம் நடத்தவில்லை. ஏன் என்றால் அதற்கு முன்பாக நான் விவாகரத்து மனுவை தாக்கல் செய்துள்ளதால் நான் அவ்வாறு குடும்பம் நடத்தவில்லை. காவல் அதிகாரியால் நெருக்கடியால்தான் நான் அவர்களை அழைத்துசென்று குடும்பம் நடத்துகிறேன் என்று நான் எழுதிகொடுத்தேன்.□

12. We find from the admission made by the husband that the case of the wife in the cross-examination assumes significance. As stated supra, it is the specific case of the wife that few weeks before the filing of the divorce petition, the first daughter's puberty function was conducted in the house and that at that time, after the function, his wife along with his two children continued to live in the house, however, her husband has not returned home. While so, his brother filed a police complaint against

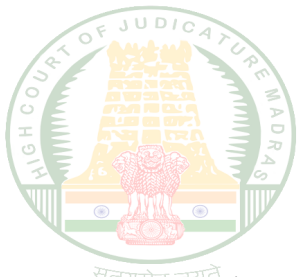


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his wife to send her out of the matrimonial home and during enquiry in the police station, the husband came and compromise the situation to set up a separate house and thus, from the admission of P.W.1, in the cross-examination, we find that the wife and her two daughters were sent out of the matrimonial home forcibly. Therefore, we find that the husband, who had caused cruelty on the wife. Furthermore, it is her specific evidence that in the said house, her husband is having one undivided share and loan was taken by both parties and only with a view to not to give any share in the newly constructed house, the husband is siding with his brother and instigated to give a case.

13. It remains to be stated that the wife has taken a specific stand both in her pleadings as well as in her evidence as R.W.1 that she has admitted her children at Thiruverumbur School by transferring them from Boothalur and resided in the new house built by her husband, who is paying the loan. This fact was not denied by the husband assumes significance. It is her specific evidence that her husband is not coming home to live with them and he never helped her and even the children for their education resulted in filing of the maintenance case No.85/2015.



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The maintenance was awarded, which was not paid by the husband.

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14. It is also to be noted that the wife is working as a Teacher. The husband is working as a Kalaasi in the Railways. Even at the time of marriage, the salary difference between them is high and the husband has entertained an inferiority complex and such averment in the affidavit as well as the pleadings was not denied/disputed nor explained by the husband/P.W.1 also gains importance. By way of defence, as to the attitude of the husband in not coming to the matrimonial home, she has named two persons in her evidence and the same was not proved in the manner known to law. The allegation of adultery and proving of adulterous life of the husband is very difficult to prove in the judicial proceedings. It is also to be stated that the trial court has proceeded to pick up a hole in the case of the wife and granted a decree. We are not in a position to appreciate the approach adopted by the family Judge. The husband, having come to the Court seeking the relief of dissolution of marriage on the ground of cruelty, has to plead the alleged act of cruelty of the wife committed upon him and thereafter prove the same in the manner as established by law.

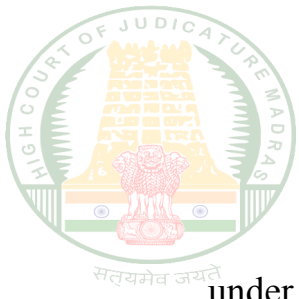


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15. In the instant case, the family Court Judge appears to have considered the case of the husband, however taken a loophole in the written statement of the wife and held that she has not proved her pleadings. This approach is erroneous and liable to be set aside. Accordingly, the finding of the trial Court that the wife has not proved the illicit relationship, on the facts and circumstances of the case, stands hereby set aside.

16. The case was instituted by the husband on the ground that the wife is living separately for about 12 years. Thus, no relief was sought on the ground of desertion. The family Court has taken pains to discuss at length about the alleged desertion forgetting the fact that after every panchayat, it is the wife and children, who have joined him and it is the husband, who left the matrimonial home leaving the wife and children at Boothalur next at Thiruverumbur and finally at the newly constructed house on the joint family property of the husband and giving complaint by his brother assumes significance and hence, we find that the desertion of the wife is proved. The continuous desertion over a period of 12 years

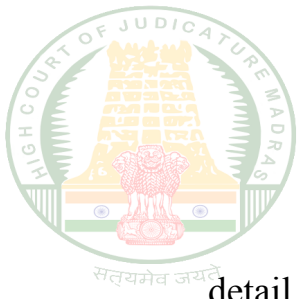


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under Section 13(1)(b) of the Hindu Marriage Act for the reasons cited, the family Court has gone to an extent of discussing the fact, which was not even pleaded in the petition.

17. Whether the wife has committed cruelty by levelling such allegation is the point for consideration. The wife is always ready and willing to live with the husband along with two children. It is the husband, who is running away from the matrimonial home without discharging his duty and responsibility as a husband. It is the specific plea of the wife as well as in her evidence that they have not even availed the facilities offered by the Southern Railway for the last 15 years. The husband has not even included the name of the wife and children in the Service Register so as to enjoy certain facilities offered by the railways to the staff of the family. This attitude of the husband assumes significance inasmuch as he never intended to lead a peaceful/joint life with the wife and children by taking care of them as a dutiful husband. In the absence of any specific plea regarding alleged desertion and in the absence of the proof with regard to desertion for continuous period of two years by the wife, without reasonable cause, the trial Court has gone and discussed in

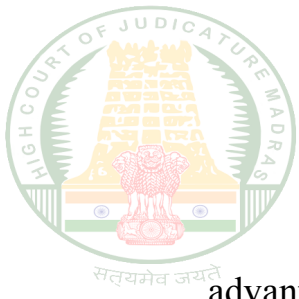


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detail and treated the same as cruelty. None of the allegation that was averred by the husband as cruelty and nor proved in the manner known to law. On the contrary, the wife has clearly demonstrated before this Court through her pleadings and her evidence and by way of suggestion during the cross-examination of P.W.1-husband that the husband has not discharged his duties and he is the one, who has not come to the matrimonial home, even when the wife is willing to lead a peaceful life and therefore, we find that she has demonstrated the cruelty at the hands of the husband to the effect that he is not interested to live with the wife and children by not giving any financial assistance and has not included the wife and children in the service register in the railways so as to enjoy the facilities as a family member. These admitted facts would go to show that it is the husband, who has committed cruelty and therefore, the wife was forced to live in the house of her father. The reason assigned by the wife is found to be reasonable and acceptable.

18. After perusing the evidence of P.W.1 and R.W.1 we find that the non resumption of the parties is true due to the act committed by the husband and not by the wife and hence, he cannot be allowed to take



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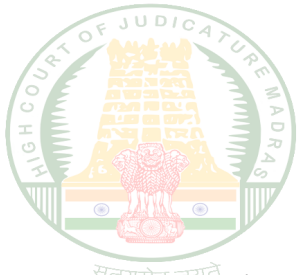
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advantage of his own wrong, which is prohibited under Section 23(1)(a) of the Hindu Marriage Act and therefore, the irretrievable breakdown of marriage and alleged cruelty leading to the irretrievable breakdown of marriage is not made out in this case and accordingly, the contention of the husband stands negatived.

19. As we find that the cruelty stated by the husband is not proved in the manner known to law and none of the allegations levelled in the pleadings or in the affidavit are proved in the manner known to law, we find that the order of dissolution of marriage passed by the family Court is legally unsustainable.

20. The trial Court as observed earlier has tried to take the weakness of the wife in granting decree in favour of the husband and hence, the decree of dissolution of marriage warrants interference.

21. For the foregoing reasons, the civil miscellaneous appeal is allowed and the fair and decretal order made in H.M.O.P.No.780 of 2014 by the Family Court Judge, Tiruchirappalli, stands set aside. However, there shall be no order as to costs. Consequently connected



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Miscellaneous Petition is closed.

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(T.K.R.,J.) (P.B.B.,J.)
22.12.2023

NCC : Yes/No
Index : Yes/No
RR

To

- 1.The Family Court, Tiruchirappalli.
- 2.The Section Officer,
V.R.Section,
Madurai Bench of Madras High Court,
Madurai.



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RMT.TEEKAA RAMAN,J.
AND
P.B.BALAJI, J.

RR

Pre Delivery judgment made in
CMA(MD) No.1121 of 2017

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