

Andhra High Court

C. Meena vs C. Suresh Kumar on 29 December, 1992

Equivalent citations: 1993 (1) ALT 1, I (1993) DMC 559

Author: R Raju

Bench: S S Quadri, P R Raju

JUDGMENT Ramakrishnam Raju, J.

This Civil Miscellaneous Appeal is filed under Section 28 of the Hindu Marriage Act by the wife who is the respondent in the lower Court, questioning the decree passed for judicial separation under Section 10 of the Hindu Marriage Act in O.P. No. 209 of 1986, filed by the husband respondent herein, seeking divorce under Section 13(l)(ia) of Hindu Marriage Act, by dissolving the marriage between the appellant and the respondent.

1. The case of the respondent as stated in the Original Petition, filed before the lower Court is as follows :- He married the appellant in the year 1977 at the house of the appellant's parents at Shah Inayat Gunj, Hyderabad according to Vedic rites and the customs of the community to which the parties belong. A daughter and a son were born in lawful wedlock. They are named, Vandana and Raghavender respectively. The appellant is the daughter of the maternal uncle of the respondent. His maternal uncle is doing of Transport business and he has got lorries. He is financially sound, whereas he is working as a lorry driver and financially weak. Therefore, the appellant was always complaining that she has no amenities like T.V., Refrigerator at her husband's house. She was also visiting Cinema Houses frequently for seeing pictures. He also worked as A.P.S.R.T.C. Bus Driver for sometime and his services were terminated as he had participated in strike. Thereafter, he worked with his father-in-law for sometime on the promise that he would be made a share-holder. But, when he demanded his share. He was assured that he would be given a cash of Rs. 25,000/- which was also not given. Eventhough he tried his best as a lorry driver to keep his wife happy with the meagre income he was getting, the appellant was not happy and she quarrelled with him and as a result of which, on 27-4-1986 her father came, abused him and took her away and inspite of his best efforts to get her back, he could not succeed. When all his efforts failed, he sent a lawyer's notice on 10-5-1986 and filed the petition seeking dissolution of marriage thereafter.

2. The appellant filed her counter in the lower Court denying all the above allegations. The marriage and birth of two children were admitted by her. Her case is that her father gave her jewellery worth Rs. 26,000/- and other articles worth Rs. 9,000/-. In addition to the above, he spent Rs. 15,000/- towards marriage expenses on behalf of both sides. After the marriage, they lived happily till 1980, by which time two children were born. Afterwards, she noticed change in the attitude and behaviour of her husband and he used to pick up quarrels over trifling matters, thereby abusing and beating her mercilessly for no fault of hers. The reason behind this attitude and ill-treatment was that he had fallen in love with a girl by name Santha, working as a teacher in a private school Lal Bahadur Shastri School at Nim-boliadda, Hyderabad and on account of this love-affair, her husband started neglecting her from 1980 onwards. The intimacy of her husband with Santha developed to the extent that the said girl frequented her visits to their house in her presence and she had been spending most of the day time with her husband. She resented her visits and requested her husband to prevent her. But, he never liked it. He beat her and drove her out of the house. Then, she came to

her parents house from there, she wrote personally a letter to the said girl on 4-8-1981 dissuading her from developing intimacy with her husband. She also wrote a letter to father of the girl Sri K.K. Parameswaran with the same request. The said Santha also wrote a letter dated 13-1-1983 and the house of her husband has become a hell for her and she had tolerated this with patience but there was no change in the attitude of her husband and other family members. She denied having received any notice issued by her husband. She finally stated that the petition is filed by her husband to cover up his own wrongs and to avoid her. Therefore, it has to be dismissed.

3. The respondent-husband examined himself as P.W. 1 besides examining his mother as P.W. 2. He also filed Exs. A-1 to A-3 documents-the alleged notices and the returned covers. The appellant herein, has examined herself as R.W.1. and marked Exs. B-1 to B-4 documents. The lower Court framed the point viz., whether the petitioner is entitled for divorce on the ground of cruelty ? The learned trial Judge found that the behaviour of the appellant cannot be termed as amounting to mental cruelty, but there is desertion by her from 27-4-1988. He also found that the demand of the appellant for purchase of T.V. and Refrigerator appears to be unreasonable and unfair, but however, he expressed that he is not prepared to accept the contention of the respondent that there is irretrievable break down of the marriage and it is not difficult for them to retrieve themselves and come together. Therefore, he rejected the relief for dissolution of marriage by divorce, but however, he granted judicial separation as the appellant has deserted the petitioner and as the petition was filed within two months of the respondent leaving her matrimonial house. This order is challenged by wife in this Appeal.

4. Now, the question that falls for consideration in this Appeal is, whether the respondent is entitled for Judicial separation ?

5. The marriage between the parties was performed in the year 1977. Till 1980 both the spouses lived happily and they were also blessed with two children. Thereafter, differences arose. The case of the respondent-husband is that his wife is pestering him for providing amenities like T.V., and refrigerator etc., and as he is not in a position to provide them, she was unhappy. She used to compare the status of her father and the amenities available in her fathers' house with that of her husband and used to feel unhappy. As she was not happy in his house, although he tried his best to make her happy, she left his house on her own accord and deserted him, thereby leaving the children also. On the other hand, it is the case of the appellant that they were happy till 1980, by which time two children were born and thereafter, he developed intimacy with one Santha, a teacher working in a private school and she also frequented her visits to their house and she was spending long time, eventhough the appellant was present in the house and the appellant did not like this attitude and as she complained, the respondent became furious and started ill-treating her. On 27-4-1986 the respondent beat the appellant severely and drove her out of the house with clothes on her person. As the respondent's brother had also beat her, she gave a police complaint. The respondent and her other family members made her life miserable and she has no other go except to take shelter in the house of her father.

6. In view of these rival contentions, the question whether the appellant has deserted the respondent or the respondent has made the appellant's life miserable and drove her out, has to be seen in the

light of the evidence and other circumstances.

7. It may be noticed that the Original petition was filed under Section 13(1)(ia) of the Hindu Marriage Act, which sets out the ground of cruelty after the solemnisation of the marriage. There is absolutely no evidence adduced by the respondent establishing that the appellant had treated him with cruelty. It is seen that the Original Petition was filed within a period of two months of the respondent leaving her matrimonial home. Therefore, evidently, the respondent could not seek dissolution of marriage on the ground that she has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition as envisaged under Section 13(1)(ib) of the Hindu Marriage Act.

8. The respondent as P.W. 1 stated that on 27-4-1986 the appellant left the house with all her belongings to the house of her father and when he went there and asked her to come, the father of the appellant stated that he had committed a mistake by giving his daughter in marriage to a beggar and therefore, he returned home. In Ex. A-1, Notice issued by the respondent, he did not mention that the appellant left the house with all her belonging or that her father stated that he had committed a mistake in giving his daughter in marriage to a beggar. What all he had stated in the petition and in the evidence adduced is about the conduct of the appellant in insisting to purchase a T.V. and Refrigerator, etc., The appellant in her evidence denied that she started demanding the respondent to purchase a Refrigerator or a T.V. but she stated that the root cause for their fall out is the intimacy of her husband with Santha.

9. The learned Judge has stated in para-13 of his judgment as follows :

"I have already observed that the demand for purchase of T.V. and Refrigerator does not amount to cruelty". Having found that the respondent failed to establish cruelty, he should have dismissed the petition. The learned Judge further observed that he is not prepared to accept the contention of the Counsel for the respondent that there is irretrievable break down of the marriage and it is not difficult for both of them to retrieve themselves and come together. But the learned Judge felt that the respondent herself went away to her parents house and therefore, there is desertion by the appellant from 27-4-1988. Hence curiously the learned Judge has granted Judicial separation. He lost sight of the ingredients which should be made out before granting the relief of judicial separation under Section 10 of the Hindu Marriage Act. If the learned Judge is of the opinion that the appellant has deserted the petitioner, even to grant the relief of Judicial separation, desertion by the appellant must be for a continuous period of not less than two years immediately preceding the presentation of the petition. The learned Judge observed that the petition was filed within two months from the date of leaving of the house by the appellant. In view of the evidence and the findings of the learned Judge, grant of relief under Section 10 of the Hindu Marriage Act is misconceived and unwarranted. No doubt, Section 13-A provides for grant of alternative relief of decree for Judicial separation, when a petition for dissolution of marriage by a Decree of divorce is filed, if the Court considers it just to do so, having regard to the circumstances of the case. But this Section should be read with Section 10 of the Hindu Marriage Act. The grounds on which a decree for Judicial separation can be passed are the same as that of a decree for divorce. So unless a case for divorce is made out, the question of granting Judicial separation does not arise. Therefore, on a

petition for divorce, the Court has discretion in respect of the grounds for divorce, of course other than those mentioned in Clauses (ii), (vi) and (vii) of Sub-section (1) of Section 13, to grant restricted relief of judicial separation instead of divorce straightaway, if it is just, having regard to the circumstances. This provision is only intended to help the erring spouse to realise the mistake and the other spouse to condone the lapses and have reconciliation during the period of separation as every opportunity should be provided for amicable settlement, more so, in the interest of minor children who cannot be deprived of love and affection as well as care and protection of both the parents. The Courts while dealing with the applications under the Marriage Laws (Hindu Marriage Act) should bear in mind the specific grounds raised for grant of relief claimed and insist of strict proof to establish those grounds and shall not grant some relief or the other as a matter of course. For all the above reasons, we are satisfied that there is absolutely no proof of cruelty meted out by the appellant to the respondent.

10. The learned Counsel for the respondent has relied upon a decision reported in *N. Sreepadachar v. Vasantha Bai*, AIR 1970 Mysore, 232, to show that cruelty need not be only physical but there can be mental cruelty also. He also cited another decision reported in *Parihar v. Parihar*, , to show that cruelty is wilful and unjustifiable conduct of such a character as to cause danger to life, limb or health, bodily or mental or as to give rise to reasonable apprehension of such a danger and the behaviour may be such as to cause an extreme mental distress and consequent detriment to health. He further relied on another decision reported in *Gurcharan Singh v. Sukhdev Kaur*, . This and the above two decisions reported in *N. Sreepadachar v. Vasantha Bal* (supra) and *Parthar v. Parihar* (supra) have no application to the facts of the case. He also relied on another decision reported in *Dastane v. Dastane* ., wherein, it is stated as follows :-

"Under Section 10(l)(b), harm or injury to health, reputation, the working-career or the like, would be an important consideration in determining whether the conduct of the respondent amounts to cruelty. It is not necessary, as under the English law, that the cruelty must be of such a character as to cause 'danger' to life, limb or health as to give rise to a reasonable apprehension of such a danger. Therefore, what the Courts must determine is not whether the petitioner has proved the charge of cruelty having regard to the principles of English law, but whether the petitioner proves that the respondent has treated him with such cruelty as to cause a reasonable apprehension in his mind that it will be harmful or injurious to him to live with the respondent". But the facts of the present case do not take us anywhere near cruelty. Therefore, the respondent is not entitled to relief of either divorce or Judicial separation.

11. Before parting with this case, we deem it proper to consider the custody of children. As already stated, a daughter by name Vandana and a son by name Raghavender were born to the appellant and the respondent. In order to bring the spouses together we asked the parties to appear before us along with the children who are with the respondent to ascertain whether amicable settlement and reconciliation between them is possible. They accordingly, appeared before us on 1-12-1992. We have separately interviewed the parties including the children. The reconciliation 'failed' as the respondent is not willing to take back his wife.

12. Section 26 of the Hindu Marriage Act reads as follows :-

"In any proceeding under this Act, the Court may from time to time, pass such Interim orders and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, consistently with their wishes, wherever possible, and may, after the decree, upon application by petition for the purpose, make from time to time all such orders and provisions with respect to the custody, maintenance and education of such children as might have been made by such decree or interim orders in case the proceeding for obtaining such decree were still pending, and the Court may also from time to time revoke, suspend or vary any such orders and provisions previously made."

In view of the provisions contained in Section 26 of the Hindu Marriage Act, we deem it proper to consider the question of custody of children in this case.

13. A plain reading of Section 26 of the Hindu Marriage Act makes it abundantly clear that in any proceeding under this Act, the Court may make such interim orders and make such provisions in the decree with respect to custody, maintenance and education of minor children without separate application and after decree similar relief can be granted but on application for this purpose.

14. Ms. Vandana is a girl aged about 10 years. While determining the custody of children paramount consideration is the welfare of the children. It is not so much the right of the parties to have the custody of the minors that should weigh with the Court, in determining the same. The welfare and interest of the minors should be of prime concern for the Court. Vandana being a daughter requires the mother's care and protection at that stage of the age. It is common knowledge that boys would go out for most of the time, whereas girls remain in-doors. It is therefore absolutely necessary that the girl should be left in the care and protection of the mother so that she can develop and can be brought up with proper guidance under her mother as the father will be away for duty for most of the time and he will not be able to attend, on her. That apart, the girl will always look to the mother for everything she needs and not to the father. Under these circumstances. We feel that the interest of the minor daughter Vandana will be best served if she is entrusted to the custody, care and protection of the mother-the appellant herein, about whom nothing is alleged in order to show that she is not fit or suitable to have the custody of her daughter. Therefore, the respondent will handover the custody of the minor daughter- Vandana to the appellant within a period of two weeks from the date of this Judgment. The respondent is also directed to pay a sum of Rs. 200/- tentatively per month to the appellant towards the expenses for education and clothing of the minor girl-Vandana and the payment should be made by the 10th of every month, commencing from 10th February, 1993.

15. So far as the custody of minor son-Raghavender is concerned, for the present we do not propose to make any such order and he will continue to be in the custody of the father, the respondent herein.

16. In the result, the order of the lower Court is set aside and the appeal is allowed as indicated above with costs.