2023/KER/63369

C.R

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN
&
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
MONDAY, THE 18TH DAY OF SEPTEMBER 2023 / 27TH BHADRA, 1945

MAT.APPEAL NO. 148 OF 2014

AGAINST THE JUDGMENT DATED 19.11.2013 IN OP(HMA) 1161/2013 OF FAMILY COURT, ATTINGAL

APPELLANT/PETITIONER:

, AGED 34 YEARS,

BY ADVS.
SRI.M.R.ANANDAKUTTAN
SRI.MAHESH ANANDAKUTTAN
SMT.M.A.ZOHRA

RESPONDENT/RESPONDENT:

, AGED 33 YEARS,

BY ADVS.
SRI.V.SURESH
SRI.G.SUDHEER

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 18.09.2023, ALONG WITH Mat.Appeal.245/2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ANIL K.NARENDRAN
&
THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
MONDAY, THE 18TH DAY OF SEPTEMBER 2023 / 27TH BHADRA, 1945

MAT.APPEAL NO. 245 OF 2014

AGAINST THE JUDGMENT DATED 19.11.2013 IN OP(HMA) 1161/2013 OF FAMILY COURT, ATTINGAL

APPELLANT/COUNTER-PETITIONER:

,

BY ADVS.
SRI.V.SURESH
SRI.G.SUDHEER

RESPONDENT/PETITIONER:

,

BY ADVS.
SRI.M.R.ANANDAKUTTAN
SRI.MAHESH ANANDAKUTTAN
SMT.M.A.ZOHRA

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 18.09.2023, ALONG WITH Mat.Appeal.148/2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

C.R

JUDGMENT

Sophy Thomas, J.

These appeals arise out of the judgment in OP(HMA) No.1161 of 2013 on the file of Family Court, Attingal. The husband filed the OP for dissolution of marriage under Section 13(1)(ia) of the Hindu Marriage Act, 1955, on the ground of matrimonial cruelties. The Family Court dismissed the OP, but granted a decree for judicial separation. Moreover, without any pleadings or prayer, the Family Court declared that the petitioner is the biological father of the child and awarded compensation of Rs.10 lakh to the child, though the child was not a party to the proceedings. Aggrieved by the impugned judgment and decree, the husband filed Mat.Appeal No.148 of 2014, and aggrieved by the decree for judicial separation, the wife filed Mat.Appeal No.245 of 2014.

2. The brief facts could be stated as follows, referring the husband as the appellant and the wife as the respondent:

The marriage between the appellant and respondent was solemnised on 29.02.2008 as per Hindu rites and custom. They were familiar to each other even prior to their marriage, as their families were residing in the same housing colony. After marriage, they started living together in the house of the husband at Chirayinkeezhu. The respondent refused to consummate the

marriage on one reason or the other, and later the appellant realised that, she was having an illicit relationship with her own brother. After marriage, when the couple reached the house of the wife, she slept in the room of her brother, and the husband was asked to sleep in a separate room. She left her matrimonial home, refusing sexual relationship with him, and after about one month, she came back and declared that she was pregnant. Since their marriage was not consummated, he was not willing to accept her pregnancy, and then she told him that, she married him for namesake, to get a father for her child. On the next day morning, she threw away the thali chain at his face, and left the house. Since he was not able to bear the cruel nature and attitude of the respondent, he went abroad on 10.01.2009 and before going, she came to his house and told him that, after delivering the child, she would agree for mutual divorce and she would never claim paternity of the child on the appellant. But, she did not keep her word, and was not ready for a joint petition for divorce even after delivery. So, he approached the Family Court for getting divorce, on the ground of matrimonial cruelties.

3. Even before the respondent filed her written statement, the appellant filed IA No.2242(a) of 2012 for conducting a DNA test to prove that, he was not the biological father of the child delivered

by the respondent. Ext.C1 report was received from Rajiv Gandhi Centre for Biotechnology stating that, the appellant is the biological father of the child and the respondent is the biological mother.

4. The respondent filed written statement contending that, the allegations of matrimonial cruelties are absolutely false, and she had no illicit connection with her brother, and the child was the child born in her lawful wedlock with the appellant. The respondent is a Doctor by profession, and she was a loving wife and she wanted to lead a happy married life with her husband. Only due to the unwanted interventions from the part of the mother of the appellant, they could not live peacefully, and still, she hopes that, if the appellant comes out of his misunderstandings, there is every chance for them to lead a happy family life.

5. After formulating the issues, the parties went on trial by examining PW1 from the side of the appellant and DW1 from the side of the respondent. Exts.A1 and A2 series and Ext.C1 were marked.

6. On analysing the facts and evidence, the Family Court found that the matrimonial cruelties alleged against the respondent were not proved. The allegation of illicit relationship for the

respondent with her own brother, was found baseless. So, his prayer for divorce was rejected, but a decree for judicial separation was granted. Based on Ext.C1 report, the Family Court declared the appellant as the biological father of the child , and awarded compensation of Rs.10 lakh, as the child was put to mental trauma, by denying its paternity.

7. In Mat.Appeal No.148 of 2014, the appellant is impugning the judgment and decree in OP (HMA) No.1161 of 2013 saying that it is illegal, unjust and against the facts and circumstances. According to him, the DNA test report could not have been accepted by the Family Court without examining the expert. Though he had filed objections to the report, the Family Court did not allow him to examine the expert. Even after finding that their marriage was irretrievably broken, the Family Court refused to grant a decree for divorce. Though there was no prayer for declaration as to the paternity of the child, or for any amount as maintenance or compensation to the child, the Family Court erroneously declared him as the biological father of the child, and awarded compensation of Rs.10 lakh to the child, who was not a party to the proceedings. So, according to him, the judgment and decree impugned are liable to be set aside.

8. The wife filed Mat.Appeal No.245 of 2014 on the ground

that, when the appellant could not make out a case for divorce, the Family Court could not have granted a decree for judicial separation. Adultery was not taken up as a ground for divorce by the appellant and the adulterer was not made a party in the petition. Even then, the Family Court granted a decree for judicial separation as a consolation prize to the appellant/husband. The finding of the Family Court that there was an impasse in their relationship is illegal, and not founded on materials. She wants to continue the marriage as she still loves her husband, and the child wants her father. She hopes that matters will improve with time. Even after finding that there is scope for a reunion, the Family Court ought not have granted a decree for judicial separation, and according to her, that decree is liable to be set aside.

9. We are called upon to answer whether there is any illegality, irregularity or impropriety in the impugned judgment and decree, warranting interference in this appeal.

10. Heard learned counsel for the appellant and learned counsel for the respondent.

11. Though the appellant has got a definite case that the respondent was having illicit relationship with her own brother, and she got pregnant from that relationship, it is strange to note that, divorce was not claimed on the ground of adultery, and the

adulterer was not made a party in the OP. He filed the OP under Section 13(1)(ia) of the Hindu Marriage Act, on the ground of cruelty alone. The cruelty alleged was the illicit relationship for his wife with her own brother, and her pregnancy, even when their marriage was not consummated.

12. According to the appellant, after four days of marriage, she insisted to see her brother and the appellant took her to a hotel to meet her brother and there, they had some private talks and they insulted the appellant. On the fifth day of marriage, when the appellant and respondent reached the paternal house of the respondent, the appellant was asked to sleep in a separate room, and the respondent slept with her brother in another room. The very case put forward by the appellant seems to be irrational and illogical. He further stated that, their marriage was never consummated, and she returned to her paternal house and on one fine morning, she came back and declared that she was pregnant. When the appellant disowned her pregnancy, she asked him to continue as her husband till her delivery. As he was not willing, she threw away the thali chain at his face and returned to her house. That statement also is not inspiring confidence of this Court.

13. The appellant himself filed I.A No.2242(a) of 2012 before the Family Court, for DNA test to prove that he was not the biological father of the child delivered by the respondent. In that petition, what he had alleged in paragraph 3 is that, he had no conscious sexual relationship with the respondent. If he had a case that their marriage was never consummated, he could have specifically stated that he never had any sexual relationship with her. The respondent readily agreed for the prayer for DNA test and she filed an affidavit also to that effect. Accordingly, DNA test was conducted in Rajiv Gandhi Centre for Biotechnology and Ext.C1 report was issued from that institution. The 'conclusion' of that report reads as follows:

> "The DNA test performed on the exhibits provided is sufficient to conclude that the source of exhibit C ( ) is the biological father of the source of exhibit B ( ). The source of exhibit A ( ) is the biological mother of the source of exhibit B ( )".

14. Ext.C1 DNA report is prima facie sufficient to negate the allegation made by the appellant that the respondent had illicit relationship with her own brother, and she got pregnant from that relationship, and delivered a child. The case of the appellant is that, she wanted to have a father for her illegitimate child, and that was the only purpose for her to marry him, and she expressed

her willingness to dissolve their marriage on mutual consent, after her delivery. If that be the case, there was no chance for the respondent to throw away the thali chain, as she herself wanted to continue as his wife, till she delivers the child. The story put forward by the appellant is unrealistic and without any logic, and that may be the reason for the Family Court also to observe that, the appellant might have some psychological problems to put forward such untenable, and fanciful stories, to claim divorce from his wife. Anyhow, the Family Court was not pleased to grant a decree of divorce, as he could not make out his case of matrimonial cruelty, against the respondent.

15. Now let us see whether the Family Court was justified in granting a decree for judicial separation.

Section 13A of the Hindu Marriage Act reads as follows:

> "13-A. Alternate relief in divorce proceedings.—In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation".

16. From the reading of the Section, it is clear that even when the party seeking divorce is able to prove the grounds, which makes him eligible to get a decree of divorce, then also if the

circumstances warrant preservation of the marital bond for a further period, so as to enable the parties to have a retrospection, so as to mend their ways, if possible, for the sake of family and children, the court can grant a decree for judicial separation, instead of a decree of divorce.

17. Now the question posed before us is, if no grounds for a decree of divorce under Section 13 of the Hindu Marriage Act is made out, is the Family Court can grant a decree for judicial separation based on the same set of facts. Going by the provisions in Section 13A, the court may, if it considers it just so to do, having regard to the circumstances of the case, instead of a decree of divorce, pass a decree for judicial separation, in a petition for dissolution of marriage.

18. According to the respondent, the appellant was making baseless and unnecessary allegations of illicit relationship against her, with her own younger brother, and he utterly failed to prove any such allegations. So, the matrimonial cruelties alleged on that ground, are liable to be put into the trash.

19. In **Snigdha Chaya Devi v. Akhil Chandra Sarma [AIR 1992 Gau 95 : 1992 SCC Online Gau 1]**, a Division Bench of the Gauhati High Court held that, as the relief of judicial separation under Section 13-A is an alternate relief in a petition for divorce, it

is sine-qua-non that the grounds for divorce must be made out, to grant that relief, that too when the court considers it 'just' to do so. When the grounds for judicial separation under Section 13-A of the Hindu Marriage Act are the same as that for divorce, under Section 13 (founded on grounds other than excluded) and when the grounds for divorce under Section 13 of the Hindu Marriage Act are not made out, there cannot be a decree for judicial separation as an alternate relief. If the grounds, on which the petition for divorce was founded, were not made out, then the alternate relief of judicial separation also cannot be granted. Paragraph 13 of the said decision reads as follows:

> "13. The law after amendment in 1976 provides the same grounds on which divorce or judicial separation may be sought and it appears that Section 13-A only enables the court to pass a decree for judicial separation as an alternate relief in a petition for divorce (founded on grounds other than excluded). Section 13-A commences with the words "alternate relief in divorce proceedings" and provides power to the court in a petition for divorce, if it considers it just so to do, taking into consideration the circumstances of the case, to pass a decree for judicial separation. The question is that whether even when no ground for divorce, which also means after amendment in 1976, for judicial separation is made out, the Court may grant judicial separation. If the answer be in the affirmative then the Court now has very wide powers in a petition for divorce to grant judicial separation. On a careful consideration, we are not

> inclined to prefer this view of the matter, firstly because, had it been so it could have been easily so expressly said, particularly when in the law as it now stands grounds for judicial separation are the same as for divorce, secondly Section 13-A only gives power to grant alternate relief in a petition for divorce, which should mean that where though ground for divorce is made out, the Court in the circumstances of the case considers it just to grant judicial separation, and lastly because if this view is accepted the grounds on which judicial separation (which are the same as for divorce) may be sought, need not be established, and yet judicial separation as an alternative relief may be obtained. We, therefore, think that, the better view should be that, only when ground on which divorce is sought is made out, then the Court in the circumstances of the case may grant judicial separation".

20. The respondent when examined as DW1 deposed that, she intends to continue her matrimonial life with the appellant, and her child wants to have her father. She would say that, if the appellant is ready, to come out of his misunderstandings, there is every possibility for a reunion. The Family Court also found that, the allegations of illicit relationship, throwing away of the thali chain etc. etc. were cock and bull stories, and the Family Court even doubted psychological disorder, for the appellant.

21. When a husband makes baseless allegations of unchastity against a wife, it amounts to mental cruelty from his part, making the wife eligible to seek divorce, on that ground alone. But, here

the wife wants to continue her matrimonial life with her husband, and according to her, only because of the misunderstanding, and interference from the mother-in-law, they could not live together, and there is every chance for a re-union if he is ready to mend his ways. But, the husband would say that, from 2009 onwards they are living separate and due to long separation, their marriage is dead practically and emotionally. The wife also is admitting that, from 2009 onwards, they are living separate and the appellant has not even come to see his child.

22. In **Uthara v. Sivapriyan [2022 (2) KLT 175]**, this Court held that long separation is not a ground to find that, there is irretrievable breakdown of marriage. When one spouse deliberately avoids the other, without any valid reasons, and the other spouse is still ready for a re-union, the one who is at fault, cannot unilaterally walk out of the marriage saying that there is irretrievable breakdown of marriage. Moreover irretrievable breakdown of marriage is not a ground for divorce under Section 13 of the Hindu Marriage Act. Paragraph 54 of the said decision reads as follows:

> "54. The period of non-co-habitation however long it may be, if it was due to deliberate avoidance or due to pendency of cases filed by one party, the other party cannot be found fault with, when the other party is still ready to continue his/her

> matrimonial life, and no grounds recognized by law are established against the other party to break their nuptial tie. So legally, one party cannot unilaterally decide to walk out of a marriage, when sufficient grounds are not there justifying a divorce, under the law which governs them, saying that due to non-co-habitation for a considerable long period, their marriage is dead practically and emotionally. No one can be permitted to take an incentive out of his own faulty actions or inactions."

23. The case on hand reveals that, the appellant was entertaining some fanciful doubts against his wife with her own younger brother, and he was making all sorts of wild allegations against her, and he even challenged the paternity of the child, born in their lawful wedlock. He even sought for DNA test to prove that he was not the biological father of the child delivered by the respondent. So the long separation, if any, happened only due to the fault of the appellant.

24. Since no grounds were made out under Section 13(1)(ia) of the Hindu Marriage Act to grant a decree for divorce, the appellant was not entitled to get a decree for judicial separation also, as an alternate relief. So, the appeal filed by the husband challenging dismissal of his OP for divorce is liable to be dismissed, and the appeal filed by the wife challenging the decree for judicial separation is liable to be allowed.

25. The appellant contended that though there was no

pleadings or prayer for declaration of paternity of the child Neelina, or any prayer for maintenance or compensation for the child, the Family Court exceeded the prayers, and granted a decree declaring him as the biological father of the child, and awarded compensation of Rs.10 lakh, to be deposited in the name of the child. The OP filed by him was, only for dissolution of his marriage with the respondent. The matrimonial cruelties alleged by him, were on the ground of illicit relationship of his wife with her own brother. In that OP, the husband filed a petition for DNA test to prove that he was not the father of the child, thereby to establish his case that, she was having illicit relationship with her brother. There was no prayer from either side for a declaration as to the paternity of the child. But, the Family Court went one step further, and declared that the appellant is the biological father of the child. It is true that Ext.C1 DNA test report could have been relied on by the Family Court, to discredit the testimony of the appellant. The Family Court ought not have ventured into granting a decree declaring the appellant as the biological father of the child, without any pleadings or prayer from either side. Likewise, the child was not a party to the proceedings and there was no prayer for any maintenance or compensation to the child. Even then, the Family Court awarded compensation of Rs.10 lakh to be deposited by the

appellant, in the name of the minor child. That also was in excess of the jurisdiction expected to be exercised by the Family Court in a divorce petition filed by the appellant against his wife, on the ground of matrimonial cruelties.

26. In **Trojan and Company v. RM. N.N Nagappa Chettiar [(1953) 1 SCC 456],** the Apex Court considered the issue as to whether the relief not asked for by a party could be granted and that too without having proper pleadings. The Court held as follows at paragraph 38:

> "...It is well settled that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint the court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate in it an alternative case...”.

27. In **Bharat Amratlal Kothari v. Dosukhan Samadkhan Sindhi [(2010) 1 SCC 234]**, the Apex Court held as follows at paragraph 30:

> “...Though the court has very wide discretion in granting relief, the court, however, cannot, ignoring and keeping aside the norms and principles governing grant of relief, grant a relief not even prayed for by the petitioner”.

28. In **Bachhaj Nahar v. Nilima Mandal [(2008) 17 SCC 491]**, the Apex Court vividly narrated the object and purpose of

pleadings, and issues, which makes the parties fully alive to the case of the other, the real questions to be answered, and also to let their evidence on the real issues involved. Paragraphs 12 and 13 of the said decision read as follows:

> "12. The object and purpose of pleadings and issues is to ensure that the litigants come to trial with all issues clearly defined and to prevent cases being expanded or grounds being shifted during trial. Its object is also to ensure that each side is fully alive to the questions that are likely to be raised or considered so that they may have an opportunity of placing the relevant evidence appropriate to the issues before the court for its consideration. This Court has repeatedly held that the pleadings are meant to give to each side intimation of the case of the other so that it may be met, to enable courts to determine what is really at issue between the parties, and to prevent any deviation from the course which litigation on particular causes must take.
>
> 13. The object of issues is to identify from the pleadings the questions or points required to be decided by the courts so as to enable parties to let in evidence thereon. When the facts necessary to make out a particular claim, or to seek a particular relief, are not found in the plaint, the court cannot focus the attention of the parties, or its own attention on that claim or relief, by framing an appropriate issue. As a result the defendant does not get an opportunity to place the facts and contentions necessary to repudiate or challenge such a claim or relief. Therefore, the court cannot, on finding that the plaintiff has not made out the case put forth by him, grant some other relief. The question before a court is not whether there is some material on the basis of which some relief can be granted. The question is whether any relief can be granted, when the defendant had no opportunity to show that the relief proposed by the court could not be granted. When there is

> no prayer for a particular relief and no pleadings to support such a relief, and when the defendant has no opportunity to resist or oppose such a relief, if the court considers and grants such a relief, it will lead to miscarriage of justice. Thus it is said that no amount of evidence, on a plea that is not put forward in the pleadings, can be looked into, to grant any relief."

29. The Family Court formulated issues No.2 and 3 as to the paternity of the child, and compensation to the child for causing mental trauma by denying its paternity. Those issues were unnecessary and unwarranted as far as the pleadings are concerned and there was no prayer for any such relief from either side. So much so, the parties could not resist or oppose such reliefs, or to adduce evidence in that regard. So the reliefs granted by the Family Court declaring paternity of the child and awarding compensation to the child are liable to be set aside.

30. In the result, Mat.Appeal No.148 of 2014 is allowed in part. Dismissal of the petition for divorce is upheld, and the decree declaring paternity of the child, and awarding of compensation to the child is set aside.

31. Mat.Appeal No.245 of 2014 is allowed, setting aside the impugned decree for judicial separation.

32. Considering the facts and circumstances of the case and taking into account the baseless allegations leveled against the

respondent/wife, the appellant/husband is ordered to pay cost to her in both the appeals.

Above Mat.Appeals are disposed of accordingly, with cost to the respondent/wife.

Sd/-

ANIL K. NARENDRAN, JUDGE

Sd/-

SOPHY THOMAS, JUDGE

smp

APPENDIX OF MAT.APPEAL No.245 OF 2014

ANNEXURES IN I.A. No.2439/2016

ANNEXURE A1	:	TRUE COPY OF THE LETTER SENT BY THE ACTING DIRECTOR, RECRUITMENT, KINGDOM OF BAHRAIN DTD.7.3.2016 TO THE PETITIONER.
ANNEXURE A2	:	TRUE COPY OF E-MAIL DETAILS SENT TO THE PETITIONER BY THE MINISTRY OF HEALTH, GOVERNMENT OF BAHRAIN.