

T.Vijayan Pillai Vs. Anitha

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Court : Kerala

Decided On : Feb-04-2013

Judge : Honourable Mr.Justice Pius C.Kuriakose

Appellant : T.Vijayan Pillai

Respondent : Anitha

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE PIUS C.KURIAKOSE & THE HON'BLE MR. JUSTICE P.D.RAJAN MONDAY, THE 4TH DAY OF FEBRUARY 2013 15TH MAGHA 193 Mat.Appeal.No. 296 of 2011 ----- OP.372/2007 of FAMILY COURT,THRISSUR APPELLANT(S)/PETITIONER: ----- T.VIJAYAN PILLAI, AGED 4 YEARS, S/O.THANKAPPAN NAIR, "VIJAYA SADANAM", THEKKUMURY DESOM, CHERIYANADU VILLAGE, CHENGANNOOR TALUK ALAPPUZHA DISTRICT. BY ADV. SRI.SAJITH KUMAR V. RESPONDENT(S)/RESPONDENT: ----- ANITHA, AGED 4 YEARS, D/O. VASUDEVAN NAIR, KALIYIKKAL THEKKETHI HOUSE "VRINDHAVANAM" ANCHERY DESOM, OLLUR VILLAGE TRICHUR-680 006. R1 BY ADV. SRI.P.SANTHOSH (PODUVAL) R1 BY ADV. SMT.R.RAJITHA THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 04-02- 2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: I.A. NO. 320/2013 in Mat. Appeal No.296/2011 DISMISSED. SD/- PIUS C. KURIAKOSE, JUDGE. 4-

2-2013 SD/- P.D. RAJAN, JUDGE. /true copy/ P. S. to Judge. PIUS C. KURIAKOSE & P.D. RAJAN, JJ.

===== Mat. Appeal No. 296
of 2011 ===== Dated this the
4th day of January, 2013 JUDGMENT PIUS C. KURIAKOSE, J.

Read this Court's order dated 4-1-2013. This appeal is preferred by the appellant, who is the husband of the respondent, aggrieved by the order of the Family Court, Thrissur dismissing O.P. No.372/2007 filed by him seeking divorce of the marriage between him and the respondent on the ground of desertion. In fact the impugned order is a common order under which the Family Court has awarded maintenance to the respondent and the child and also directed the appellant to return the ornaments belonging to the respondent. The orders directing payment of maintenance and return of ornaments are not challenged. The order of the Family Court declining the decree of Mat.A.No.296/2011 2 divorce sought for by the appellant is challenged by him on various grounds.

2. According to Mr.Sajith Kumar, the learned counsel for the appellant, the court below did not properly appreciate the evidence adduced by the appellant.

3. There are two other litigations between the parties; one for restitution of conjugal right and other for return of money and maintenance. Those two cases were disposed of by the Family Court upholding the contentions of the respondent that it was on justifiable excuse that she was living separately and that pursuant to Ext.B1 the parties cohabited as husband and wife for sometime.

4. The learned counsel for the appellant argued that the present O.P. is instituted on the basis of subsequent cause of action. The matter to be considered by the court below was whether the cause of action stood established by the evidence adduced by the parties in the present case.

5. Sri.Santhosh P., the learned counsel for the respondent, submits that there is no infirmity in the Mat.A.No.296/2011 3 appreciation of evidence by the court below. The appellant miserably failed in proving that the respondent deserted him.

It is not correct to say that it is relying on Ex.B1 that the court below passed the impugned order. Ext.B1 was only one of the items of evidence before the court below.

6. We have given our anxious consideration to the submissions addressed at the Bar. We have carefully read the impugned order. We have made a re-appraisal of evidence on record, consisting of Exts.A1 to A15, Exts.B1 and B2 and the oral testimonies of PW1 and RW1. We take into account the impression which this court gathered while the parties appearing before this court on 4-1-2013. Now we notice I.A. No.320/2013 filed by the appellant two days before this day. The above I.A. seeks amendment of the O.P. so as to incorporate further averments in the O.P. constituting matrimonial cruelty. One of the averments sought to be introduced to the application is that the respondent is insisting that she will return to matrimonial home only after the death of the mother of the appellant. Mat.A.No.296/2011 4 Even on 2-2-2013 when the appellant contacted the respondent over telephone the respondent reiterated that position. In short, the purport of the amendment is to introduce the additional ground of cruelty. The learned counsel for the appellant requested that the impugned order be set aside and the matter to be remitted to the Family Court giving liberty to the appellant to move for amendment of the O.P. before the Family Court. The above request was stiffly opposed by Mr. Santhosh P., the learned counsel for the respondent, and submitted that the respondent and her 16 year old daughter may be allowed to have a quietus to the present litigation which is already six years' old.

7. On considering the averments, having re- appreciated the evidence and having gone through the impugned order, we are of the view that there is no serious infirmity in the appreciation of the evidence by the court below. The appellant was not successful in proving desertion. In that way the impugned order is sustainable. Mat.A.No.296/2011 5 Now that the application for amendment presently moved before this Court, we are of the view that the appellant can be given liberty on initiating fresh proceeding before the court below on the ground of matrimonial cruelty.

8. Result of the above discussion is as follows:- The appeal fails and impugned order declining divorce on the ground of desertion is confirmed. The appellant is permitted to initiate fresh proceeding, if so advised, on the ground of matrimonial cruelty or any other ground available for divorce. If any such O.P. seeking divorce on the ground of cruelty or other ground is instituted by the appellant before the Family Court that court shall give due priority to the O.P. However, before the O.P. is taken up for trial (after the statutory formalities, counselling etc. is over), the court shall explore the possibilities of a settlement between the parties taking into account the fact that the only Mat.A.No.296/2011 6 daughter of the parties is fast coming of marriageable age. PIUS C. KURIAKOSE, JUDGE. P.D. RAJAN, JUDGE. nkm.

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