

Udayakumar Vs. Roopa

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Court : Kerala

Decided On : Nov-18-2013

Judge : Honourable Mr.Justice Antony Dominic

Appellant : Udayakumar

Respondent : Roopa

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE ANTONY DOMINIC & THE HONOURABLE MR. JUSTICE P.D.RAJAN MONDAY,THE18H DAY OF NOVEMBER201327TH KARTHIKA, 1935 WP(C).No. 3754 of 2009 (S) ----- AGAINST THE

ORDER

IN IA NO.1856/07 IN OP18572004 of FAMILY COURT,THIRUVANANTHAPURAM PETITIONER(S): ----- UDAYAKUMAR, S/O.LATE K.S.PILLAI, TC889, RAMA MANGALAM BANGLOW, THIRUMALA THIRUVANANTHAPURAM. BY ADVS.SRI.MURALI PURUSHOTHAMAN SRI.DEEPU LAL MOHAN SMT.LEENA MURALI RESPONDENT(S): ----- ROOPA, D/O.VELAYUDHAN NAIR, TC62399, ROOPASREE, KURUVIKKADU VATTIYOORKAVU, THIRUVANANTHAPURAM. BY ADV. SRI.B.RAGUNATHAN BY ADV. SMT.K.N.RAJANI BY ADV. SRI.R.SRINATH THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD

ON1811-2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: WP(c) NO.3754/09 APPENDIX PETITIONER'S EXHIBITS EXT.P1: THE PHOTOCOPY OF OP NO.1857/04 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, THIRUVANANTHAPURAM. EXT.P2: THE PHOTOCOPY OF THE OBJECTION FILED BY THE PETITIONER IN OP NO.1857/04. EXT.P3: THE PHOTOCOPY OF THE

JUDGMENT

DT118.2006 OF THE FAMILY COURT, THIRUVANANTHAPURAM IN OP NO.1857/04. EXT.P4: THE PHOTOCOPY OF IA NO.1856/07 TOGETHER WITH THE AFFIDAVIT DT164.2007 FILED BY SRI.MURALEEDHARAN NAIR IN OP NO.1857/04 ON THE FILES OF THE FAMILY COURT, THIRUVANANTHAPURAM. EXT.P5: THE PHOTOCOPY OF THE

ORDER

DT2312.2008 OF THE FAMILY COURT, THIRUVANANTHAPURAM IN IA NO.1856/07 IN OP NO.1857/04. EXTS.OF R1 EXT.R1(a): TRUE COPY OF THE

JUDGMENT

DT118.06 IN OP NO.1853/04 ON THE FILE OF THE FAMILY COURT, THIRUVANANTHAPURAM. EXT.R1(b): TRUE COPY OF THE COMPLAINT DT410.07 ADDRESSED TO THE ADDITIONAL DIRECTOR GENERAL OF POLICE. EXT.R1(c): TRUE COPY OF THE SUMMONS ALONG WITH THE COPY OF PETITION IN MC NO.533/05 ISSUED BY THE PRINCIPAL FAMILY JUDGE'S COURT, BANGLORE. EXT.R1(d): TRUE COPY OF THE OBJECTION DT1511.08. EXT.R1(e): TRUE COPY OF THE

JUDGMENT

DT32.2009 IN MC NO.2764/07 OF THE PRINIPAL JUDGE, FAMILY COURT, BANGALORE. //True Copy// PA to Judge Rp ANTONY DOMINIC & P.D.RAJAN, JJ.

===== W.P.(C) No. 3754
OF2009===== Dated this the 18th day of November, 2013

JUDGMENT

Antony Dominic, J.

Petitioner and the respondent were husband and wife and their marriage was on 21/4/2002. Soon, the relationship got strained and OP No.1853/04 was filed by the respondent wife for divorce. That was decreed by the Family Court, Thiruvananthapuram ex parte on 11/8/2006 and that decree has become final.

2. She also filed OP No.1857/04 for maintenance and for recovery of money and gold. A copy of the OP is Ext.P1. In that OP, the petitioner filed Ext.P2 objection. During the pendency of the OP, petitioner also filed MC No.533/05 before the Family Court, Bangalore for restitution of conjugal rights. The said MC was also dismissed subsequently for default. We are also told that during the pendency of the OPs before the Family Court, Thiruvananthapuram, petitioner contracted a second marriage on 15/4/2006, which also ended up in divorce as per Ext.R1(e) W.P.(C) No.3754/09 :

2. : judgment dated 3/2/2009, rendered by the Principal Judge, Family Court, Bangalore.

3. In so far as OP No.1857/04 is concerned, after filing the objection, the petitioner remained absent and finally the Family Court declared him ex parte, allowed the OP and passed Ext.P3 ex parte order on 11/8/2006. Later, his power of attorney holder filed IA No.1856/07, a copy of which is Ext.P4, on 16/4/2007, seeking to set aside Ext.P3 judgment and to condone delay of 214 days in filing the application.

4. Respondent wife filed her objections, enquiry was held and the power of attorney holders for both sides were examined as PW1 and RW1. Finally, by Ext.P5 order passed by the Family Court on 23/12/2008, IA No.1856/07 was dismissed. It is this order, which is challenged in this writ petition filed by the petitioner, invoking the supervisory jurisdiction of this Court under Article 227 of the Constitution of India.

5. We heard the learned counsel for the petitioner and the learned counsel appearing for the respondent.
6. Learned counsel for the petitioner contended that though there occurred a delay of 214 days, the same was not deliberate and that there was no mala fides on the part of the W.P.(C) No.3754/09 :
3. : petitioner. Therefore, according to him, the Family Court should have taken a liberal view on his application and the delay should have been condoned. To substantiate his aforesaid contention, learned counsel also placed reliance on the judgments of the Apex Court in G.P.Srivastava v. R.K.Raizada [(2000) 3 SCC54, Ram Nath Sao v. Gobardhan Sao [(2002) 3 SCC195, the judgments of this Court in Nirmala Devi Porwal v. Director of State Lotteries (2006)3 KLT S.N. 96) and Basheer M. Picha v. Indian Bank (2013(2) KLT951.
7. However, the contention raised by the learned counsel for the respondent was that there is absolutely no bona fides in the prayer made. According to him, as has been found by the Family Court, Bangalore, in Ext.R1(e) judgment itself, that petitioner made frequent trips to Thiruvananthapuram and in spite of it, though the decree was passed on 11/8/2006, Ext.P4 application was made only on 16th April, 2007 and that too on the strength of Power of Attorney given on 14/8/2006. He also contended that there is absolutely no explanation for the delay and that no sufficient cause has been made out for condonation. Counsel also took very strong objection to Ext.P4 affidavit filed by the power of attorney holder, which according to him, could not W.P.(C) No.3754/09 :
4. : have been taken cognizance of in view of the principles laid down by this Court in Rekharani v. Prabhu (2007(3) KLT917. Reference was also made to the Apex Court judgment in Parimal v. Veena [(2011) 3 SCC545 to substantiate the plea that there was no sufficient cause made out.
8. In this case, we are concerned with the correctness of Ext.P5 order passed by the Family Court, Thiruvananthapuram dismissing IA No.1856/07 filed by the petitioner seeking to set aside Ext.P3 order dated 11/8/2006 by condoning delay of 214 days in submitting the application. From the judgments relied on by the

learned counsel for the petitioner and the respondent, law seems to be settled that if sufficient cause has been made out and if the petitioner is not guilty of mala fides in causing the delay, irrespective of the length of the delay that is involved, the Court should take a liberal view while considering the application made for condonation of delay.

9. Before examining that issue, we shall deal with the contentions raised by the learned counsel for the respondent that in view of the principles laid down by this Court in the judgment in Rekharani's case (supra), Ext.P4 affidavit should not have been W.P.(C) No.3754/09 :

5. : taken cognizance. In the judgment relied on by the learned Counsel, in para 5 thereof, it has been held thus; "5. The Supreme Court in Janki Vashdeo v. Indusind Bank (2005 (2) KLT265(SC)) also has reiterated that a power of attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge. It was also held therein that the power of attorney ... "cannot depose for the principal in respect of the matter, which only the principal can have a personal knowledge and in respect of which the principal is entitled to be cross-examined." A Division Bench of this Court in Ummer Farooque v. Naseema (2005 (4) KLT565 on a question as to which sect a party to a marriage belongs to, held that "Power of Attorney can give evidence only in respect of acts done by him in the exercise of powers granted by the instrument, but he cannot depose for the principal in respect of the matter on which the principal alone can have personal knowledge." In Ratheesh Kumar v. Jithendra Kumar (2005 (2) KLT669 in the matter arising under the Buildings (Lease and Rent Control) Act, 1965, another Division Bench of this Court held that "A general power of attorney holder cannot be allowed to appear as a witness on behalf of the plaintiff in the capacity of the plaintiff. The power of attorney holder of a party can appear only in his personal capacity and cannot appear on behalf of the party in the capacity of that party." Thus the law is well settled that in matters requiring personal knowledge, evidence cannot be adduced through a power of attorney." 10. Reading of the aforesaid paragraph of the judgment would therefore show that in a case where the petitioner is represented by his power of attorney

holder, power of attorney holder is incompetent to swear to matters which are within the personal knowledge of the petitioner. In so far as this case is W.P.(C) No.3754/09 :

6. : concerned, reading of Ext.P4, the affidavit filed in support of the prayer to set aside the ex parte order and to condone delay, shows that according to the petitioner, he was in Bangalore, that on account of the setbacks that he suffered in his matrimonial life, he could not even concentrate on his job. He has also stated that he had entrusted the case to an Advocate and also authorised a relative to take care of his interest and that both of them had committed default. It is also averred that in December, 2006, he came to Kerala and when enquiry was made with his relative, he was assured that there was nothing to worry for him. It is stated that it is thereafter that he gave the power of attorney and that he came to know of the decree passed only when notice was received by his mother on the execution petition filed by the wife.

11. Therefore, these averments in the affidavit would make it amply clear that every claim made by the power of attorney holder in the affidavit filed by him, are matters which are exclusively within the personal knowledge of the appellant. If that be so, in the teeth of the principles laid down by the Division Bench in the judgment in Rekharani's case (supra), his power of attorney holder was incompetent to swear to those facts. This therefore also shows the failure of the petitioner in making out W.P.(C) No.3754/09 :

7. : sufficient cause, which is a condition precedent, for entertaining a request for condonation of delay.

12. That apart, in paras 9 and 10 of the affidavit, it is stated that in December, 2006, the petitioner came to Kerala and that his relative gave him the assurance that everything is being properly taken care of. It is stated that it is thereafter that the petitioner gave power of attorney to the deponent of the affidavit. This averment of the deponent of the affidavit was also factually erroneous, in as much as, admittedly, the power of attorney in question was executed by the petitioner on 14/8/2006, and that too, in the context of the judgment, that was rendered on 11/8/2006.

13. We are also constrained to observe that the evidence of the power of attorney holder could not have established the case of the petitioner for more than one reason. First of all, the matters were fully within the knowledge of the petitioner and therefore, the power of attorney holder did not have any knowledge of the issues. Secondly, the petitioner should have examined the relative, who according to him, committed default, which resulted in the ex parte order. Thirdly, the petitioner did not W.P.(C) No.3754/09 :

8. : even file an affidavit either of himself or his relative or the lawyer, who is alleged to have committed default.

14. On an overall consideration of the entire matter in issue, we are satisfied that the petitioner has neither made out a sufficient cause either for condonation of delay or for setting aside the ex parte order passed against him. Therefore, we confirm Ext.P5 order passed by the Family Court and the writ petition will therefore stand dismissed. The respondent has filed IA No.14041/13 seeking a prayer to modify the decree of the Family Court and to direct the petitioner to return either 75 sovereigns of gold scheduled in OP No.1857/04 or to pay its current market value. Although according to the counsel, on account of the delay, there was steep increase in the market value and therefore, this request is reasonable, in our view, this relief cannot be granted to the respondent in the writ petition in the absence of an appeal filed by her against the order passed by the Family Court. Therefore, IA No.14041/13 is dismissed. Sd/- ANTONY DOMINIC, Judge Sd/- P.D.RAJAN, Judge Rp

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