

Nancy Biju Vs. Biju Joseph

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Court : Kerala

Decided On : Jun-12-2014

Judge : Honourable Mr.Justice V.K.Mohanan

Appellant : Nancy Biju

Respondent : Biju Joseph

Judgement :

IN THE HIGH COURT OF KERALAAT ERNAKULAM PRESENT: THE HONOURABLE MR.JUSTICE V.K.MOHANAN & THE HONOURABLE MR. JUSTICE A.HARIPRASAD THURSDAY, THE12H DAY OF JUNE201422ND JYASHTA, 1936 Mat.Appeal.No. 207 of 2006 () -----
AGAINST THE

ORDER

IN OP3752001 of FAMILY COURT, KOTTAYAM ATETTUMANNOOR DATED3112-2005 APPELLANT(S)/PETITIONER.: ----- NANCY BIJU, AGED35YEARS, W/O. BIJU JOSEPH, VALLANATTU HOUSE, PAIGANA MUNDAKKAYAM, KANJIRAPPALLYTALUK, NOW RESIDING ATC/O. O.M.MATHEW, OLIKKAL HOUSE, NEAR OLD TELEPHONE EXCHANGE, KOOTTICKAL, MUNDAKKAYAM. BY ADV. SRI.BABU CHERUKARA RESPONDENT(S)/RESPONDENT.: ----- BIJU JOSEPH, AGED36YEARS, S/O. V.E.JOSEPH, VALLANATTU HOUSE, PAIGANA MUNDAKKAYAM, KANJIRAPPALLYTALUK. BY ADV. SRI.SIBY CHENAPPADY

THIS MATRIMONIALAPPEAL HAVING BEEN FINALLY HEARD ON1206-2014,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:
MAT.APPEAL NO.207/2006 APPENDIX APPELLANT'S EXHIBITS: EXT.A3
COPY OF THE REPLICATION FILED BY THE PETITION IN OP NO.4022/2000
DATED2106.2001 IN THIS COURT. RESPONDENT'S EXHIBITS: NIL //TRUE
COPY// V.K.MOHANAN & A.HARIPRASAD, JJ.

----- Mat. Appeal No.207 of 2006
----- Dated this the 12th day of June, 2014.

JUDGMENT

A.Hariprasad, J.

Feeling aggrieved by the denial of a part of the claims, the petitioner in O.P.No.375 of 2001 on the file of the Family Court, Kottayam at Ettumanoor, has come up in appeal. Respondent herein is the husband of the appellant.

2. Respondent married the appellant on 25.07.1998. On 20.07.1998, an amount of `1,15,000/- was paid by the father of the appellant to the respondent as patrimony. Respondent and his parents demanded more money and harassed the appellant. Her father was compelled to sell his property situated at Chenappady having an extent of 50 cents and pay `1,50,000/- on 30.05.2000 to the respondent, which was obtained as the sale consideration. Respondent did not take care of the appellant and her child. He even initiated proceedings for divorce. In the above circumstances, appellant approached the court below with the following prayers: "(a) pass a decree entitling the petitioner to recover a sum of Rs.2,65,000/- (Rupees Two lakhs Mat.Appeal No.207/2006 2 sixty five thousand) with interest at the rate of 12% per annum from the date of the suit till realisation in full from the respondent and his entire assets. (b) pass a decree entitling the petitioner to recover 6 = gold sovereigns or it's equivalent amount of Rs.26,000/- with interest at the rate of 12% per annum from the date of the above petition till realisation in full. (c) issue any other orders as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and also those are prayed for during the pendency of the case. (d) order the entire costs of the petitioner from the

respondent." 3. Respondent filed a counter statement disputing the claims raised by the appellant. Respondent contended that the appellant was suffering from an acute mental disorder, viz., paranoid schizophrenia. There was no legally reckonable marriage between them. The allegations that the appellant's father paid `1,15,000/- on 20.07.1998 and also paid a further sum of `1,50,000/- on 30.05.2000 are false. The parties were living separate from 29.03.1999 onwards. Respondent also contended that the appellant is not entitled to get any amount from him.

4. At the trial, the court below examined four witnesses on the side of the appellant and the respondent testified as RW1. Exts.A1 and A2 are the documents produced on the side of the appellant. Mat.Appeal No.207/2006 3 5. We heard the learned counsel appearing for the appellant. In spite of service of notice on the respondent, there was no representation for the respondent at the time of hearing. We have carefully perused the records.

6. Learned trial Judge allowed the appellant to recover an amount of `1,65,000/- with interest at the rate of 12% per annum from the date of petition from the respondent. Grievance of the appellant is that her claim for return of `1,50,000/- allegedly paid by her father to the respondent on 30.05.2000 was not allowed in full. Court below granted the relief only to an extent of `50,000/- denying the claim for return of a total sum of `1,50,000/-. It is also the case of the appellant that the court below without considering the oral evidence properly, disallowed her claim for return of 6 = sovereigns of gold ornaments.

7. We have carefully gone through the evidence in this case. The court below has stated valid reasons for not granting the relief of return of 6= sovereigns of gold ornaments. The claim of appellant for return of 6= sovereigns of gold ornaments was specifically considered by the court below in the light of the evidence. We do not find any reason to hold that the court below committed an error in appreciating the evidence while rejecting the above claim of the appellant.

8. Learned counsel for the appellant mainly contended that the Mat.Appeal No.207/2006 4 claim of the appellant for return of `1,50,000/- was not properly considered by the court below. As mentioned earlier, it is an undisputed fact that

the court below granted `50,000/- in this head. Ext.A1 is the document relied on by the learned counsel for claiming return of `1,50,000/- allegedly paid by the father of the appellant (PW2) to the respondent (RW1) on 30.05.2000. In Ext.A1, it is specifically mentioned that the respondent received `1,50,000/- on 30.05.2000 towards the share of the appellant. It is also mentioned in Ext.A1 that the amount of `1,50,000/- was raised by PW2 by sale of land described therein situated at Chenappady Village. Learned counsel for the appellant submitted that the reasons stated by the court below for discarding Ext.A1 are not acceptable. It is true that both PW2, father of the appellant and PW3, an attester to Ext.A1 have given evidence to the effect that the sale deed had shown only `50,000/- as consideration, although the actual sale was for `1,50,000/-. Learned counsel further contended that in the divorce proceedings, the respondent had filed a replication in answer to the counter affidavit filed by the appellant. The said replication is produced in this appeal as an additional document under Order 41 Rule 27 of the Code of Civil Procedure. It is settled law that as a matter of course, an additional document cannot be received in appeal. It must be established by the party producing the document that it could not be produced before the trial court in spite of the Mat.Appeal No.207/2006 5 best efforts and due diligence. Considering the fact there is a clear admission in the replication affidavit that the respondent had received `1,50,000/- from PW2 on 30.05.2000, we are of the view that this could have been the best piece of evidence to corner the respondent. However, this was not produced before the trial court when RW1 was examined. It is seen from the deposition of RW1 that when a question relating to the alleged admission in the replication affidavit was put to him, he stoutly denied the admission regarding reception of `1,50,000/- on 30.05.2000 from the father of the appellant. According to the respondent's case, he did not give any such instruction to his lawyer, who prepared the replication affidavit. Nevertheless, the document should have been produced at the time of trial and attention of the witness should have been drawn to the replication now produced. Viewing from this angle, we are of the view that to meet the ends of justice, the additional document produced can be received, of course subject to proof in accordance with the provisions of the Evidence Act. Therefore we allow I.A.No.3516 of 2013 in this appeal and the document shall be marked as Ext.A3. However, we hasten to add that we do not

express any opinion in the probative value of the additional evidence and it has to be proved.

9. Learned counsel for the appellant took us through paragraphs 13 and 14 of the impugned judgment. Court below has stated reasons for Mat.Appeal No.207/2006 6 discarding Ext.A1. At one point of time, the respondent stated that the signature purported to be put by him on Ext.A1 appears to be that of him. At another breath, he would say that the signature seen on Ext.A1 is not that of him. Pointing out this aspect, learned counsel for the appellant submitted that if Ext.A1 had been sent to an Expert to identify the signature of the respondent along with his admitted signatures, it could have been seen that the respondent himself put the signature on Ext.A1. On this score also, learned counsel for the appellant seeks remand of the matter.

10. Court below mainly rejected the case of the appellant that there was payment of `1,50,000/- on 30.05.2000 to the respondent for the reason that the testimony of PWs 2 and 3 do not show that the sale was actually for `1,50,000/-. According to their testimony, the sale mentioned in Ext.A1 was for `50,000/-. Court below, therefore, posed a question as to what was the source of raising `1,00,000/- if the sale actually was for `50,000/-. Learned counsel for the appellant would submit that the entire sale consideration, viz., `1,50,000/- was paid to the respondent, although the sale deed was executed only for `50,000/-. Half-hearted denial of execution of Ext.A1 raised by the respondent could not have been fully accepted without comparing his signature seen on Ext.A1 with that on the admitted documents. Therefore, we are of the view that the appellant suffered prejudice on account of the lack of opportunity to adduce best Mat.Appeal No.207/2006 7 evidence to substantiate her case. In this context, we feel that the request made by the learned counsel on behalf of the appellant for a remand is legally justifiable. Hence, we do so. In the result, the appeal is allowed. The impugned judgment, to the extent that is appealed against, viz., denial of claim of an additional amount of `1,00,000/-, is set aside. The matter is remitted to the court below for deciding the sole question whether the appellant is entitled to get `1,00,000/- more allegedly paid by her father (PW2) to the respondent on 30.05.2000. The parties shall be permitted to adduce fresh evidence on this point. They shall appear before the

court below on 21.07.2014. V.K.MOHANAN, JUDGE. A. HARIPRASAD, JUDGE.
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