

Seema a vs S. Biju

Seema a vs S. Biju

SooperKanoon Citation : sooperkanoon.com/1470944

Court : Kerala

Decided On : Jun-30-2022

Judge : Honourable Mr. Justice a.Muhammed Mustaque,Honourable Mrs. Justice Sophy Thomas

Appeal No. : Mat.Appeal/195/2017

Appellant : Seema a

Respondent : S. BIJU

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A.MUHAMMED MUSTAQUE & THE HONOURABLE MRS. JUSTICE SOPHY THOMAS
THURSDAY, THE 30TH DAY OF JUNE 2022 / 9TH ASHADHA, 1944
MAT.APPEAL NO. 774 OF 2013 OP 865/2011 OF THE FAMILY COURT, KANNUR

APPELLANT/PETITIONER: S. BIJU, S/O.SREEDHARAN.P.K,
PLAMPARAMBIL HOUSE, VAYAKKARA, PERINTHADAM, POST
PRAPPOYIL, THIRUMENI VILLAGE, TALIPARAMBA TALUK, KANNUR
DISTRICT. BY ADVS. SRI.M.SASINDRAN SRI.P.K.SUBHASH

RESPONDENT/RESPONDENT: SEEMA.A., D/O.KRISHNAN KAZHAKKARAN, THIRUMENI AMSOM, VAYAKKARA, KAKKODE, POST PRAPPOYIL, CHERUPUZHA VIA, TALIPARAMBA TALUK, KANNUR DISTRICT. THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 30.06.2022, ALONG WITH MAT.APPEAL NO.195/2017, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: & 195/2017 2

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE & THE HONOURABLE MRS. JUSTICE SOPHY THOMAS THURSDAY, THE 30TH DAY OF JUNE 2022 / 9TH ASHADHA, 1944 MAT.APPEAL NO. 195 OF 2017 OP 228/2014 OF THE FAMILY COURT, KANNUR APPELLANT/PETITIONER: SEEMA A, AGED 37 YEARS, D/O.KRISHNAN KAZHAKAKKARAN, THIRUMENI AMSOM, VAYAKKARA, KAKKODE, PRAPOYIL P.O., CHERUPUZHA VIA, TALIPARAMBA TALUK, KANNUR DISTRICT, REPRESENTED BY HER POWER OF ATTORNEY HOLDER KAZHAKAKKARAN KRISHNAN, S/O.RAMAN. BY ADV SRI.C.P.PEETHAMBARAN

RESPONDENT/RESPONDENT: S. BIJU, AGED 43 YEARS, S/O.SREEDHARAN P.K., PLAMPARAMBIL HOUSE, VAYAKKARA, PERINTHADAM, PRAPOYIL P.O., KANNUR DISTRICT-670511. BY ADV SRI.M.SASINDRAN THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 30.06.2022, ALONG WITH MAT.APPEAL.NO.774/2013, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: & 195/2017 3

JUDGMENT

A.Muhamed Mustaque, J.

These appeals have preferred by the same parties. The marriage between parties was solemnized on 23.11.2002. In the wedlock, a boy child was born. The parties

are referred with their marital status hereinafter:

2. The husband filed a petition for divorce in the year

2011. He was granted an ex parte decree. After the ex

parte decree, he married another person. Thereafter, wife filed an application to set aside the ex parte decree. That was allowed. The matter went for trial. After trial, the Family Court dismissed the petition for divorce. The petition for divorce was filed under Section 13(1)(iii) of the Hindu Marriage Act. The above provision reads as follows: 13. Divorce

(1) Any marriage solemnized, whether before or after the

commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party--

[(i) xxx xxx xxx

(ia) xxx xxx xxx & 195/2017 4

(ib) xxx xxx xxx

(ii) xxx xxx xxx

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent. Explanation: In this clause--

(a) the expression mental disorder means mental illness, arrested or incomplete development of mind, psychopathic disorder or any other disorder or disability of mind and includes schizophrenia;

(b) the expression psychopathic disorder means a persistent

disorder or disability of mind (whether or not including sub- normality of intelligence) which results in abnormally aggressive or seriously irresponsible

conduct on the part of the other party, and whether or not it requires or is susceptible to medical treatment or;]

3. Though the above ground was canvased, it appears

that substantially, the husband urged a ground of cruelty as well on account of unusual behaviour of the wife. Pleadings and evidence adduced by the parties in the petition clearly would show that husband alleges the ground of mental cruelty as well for seeking divorce. Mere non-incorporation of statutory provision will not dissuade the court from

& 195/2017 5

examining the ground for divorce, if the same is having a foundation in the pleadings. Therefore, we are of the view that this case also has to be examined from the perspective of cruelty to the husband as well. The Family Court after trial, dismissed the petition for divorce. Husband has come up with with Mat. Appeal No.774 of 2013. Wife also filed a petition for recovery of gold ornaments, past maintenance and also for return of gold ornaments. Her claim for past maintenance was declined. There is no challenge against that decree. The petition for return of gold ornaments has been declined. Aggrieved by the dismissal of the petition, the wife has come up with Mat.Appeal No.195 of 2017. For the convenience, we are of the view that both cases can be disposed of by a common judgment.

4. We shall now advert to the divorce case filed by the

husband. At the out set, we are of the view that the husband failed to make out a case of divorce under Section 13(1)(iii) of the Hindu Marriage Act, inasmuch as that there was no & 195/2017 6

sufficient evidence on record to prove unsound mind or such mental disorder, which would prevent husband continuing with the relationship.

On the other hand, the wife was also examined as RW1. The court did not form any opinion regarding unsound mind of wife. We also have to take note of the fact that there was no appointment of the guardian for the wife in the proceedings. Further, in the wedlock a child was born. That clearly would show that wife was not suffering any kind of mental disorder as alleged by the husband.

5. As we have proposed earlier it is appropriate to

examine this case from the perspective of alleged cruelty to the husband. The cruelty is in the form of a mental cruelty. Ext.A3 Medical Report of the Doctor shows that she has undergone treatment at Koyili Hospital. It is in fact her father-in-law took her to the hospital. The father-in-law reported to the Doctor that wife is having Social withdrawal, non-cooperation in all matters and she is argumentative and

& 195/2017 7

stubborn. This clearly would show that she was not suffering any mental disorder. However, it appear that there are some behavioural disorder. We are not classifying it as a personality disorder for want of evidence. It is to be noted that though the Doctor was examined prior to setting aside the ex parte decree, he was not examined after the decree was set aside. We note that the Family Court referred the examination of the Doctor as PW2 in the judgment. That, according to us, was not proper as a matter of fact that after setting aside the decree, there was no re-examination of the Doctor. The wife had not denied the treatment at Koyili Hospital.

6. According to the husband, the wife never changes

her dress and she used to keep knives beneath her pillow. It is alleged by him that the wife refused to attend her personal requirement like bathing, changing dress etc. and she failed to take care of the child. It is to be noted that the child is now

with the husband. It is also alleged by the husband that & 195/2017 8 wife threatened that she would commit suicide along with the child. The husband appears to have experienced the abnormal behaviour from the side of wife.

7. We cannot brush aside the allegations and oral

evidence given by the husband especially in the light of the fact that the wife had undergone treatment in a reputed hospital at Kannur. The cruelty as alleged in this case, especially, is a mental cruelty to the husband. The very reason for him for filing a petition for divorce invoking Section 13 (1) (iii) of the Hindu Marriage Act was that as the behaviour of the wife became unbearable to continue the relationship. If the attitude or behaviour of one of the spouses prevents the other spouse to continue the relationship, the Court can very well assume the mental cruelty. If the wife suffers from any kind of ailment, she has to acknowledge that ailment and she should make all attempts to cure such ailment.

8. On the other hand, wife refused to acknowledge that & 195/2017 9

she is suffering from any ailment, in spite of the fact that, she was taken to a hospital for treatment. Over all circumstances would clearly show that the marriage failed and it has now become a dead marriage for all practical purposes. Looking from the above angle, we are of the view that this is a fit case where this Court can dissolve the marriage invoking the ground of cruelty of the Hindu Marriage Act. Accordingly we granted decree of divorce in favour of the husband.

9. Coming back to the appeal filed by the wife, the

precise case of the wife was that husband took away her 80 sovereigns of gold ornaments out of 100 sovereigns of gold ornaments given to her at the time of marriage for the purpose of purchasing a property by the husband. Admittedly, the husband purchased the property on 01.04.2003 after the marriage. Though husband stoutly denied the utilisation of gold

ornaments, he never cared to provide the details of the source of purchase of the property.

& 195/2017 10

10. While in the cross-examination, he deposed that it

was his brother provided him the funds to purchase the property. The court cannot have a direct evidence in a matter like this. The court will have to weigh the oral evidence given by the parties. When husband gives a room for a suspicion with regard to the source of fund, the court will have to give credence to the case put forward by the wife. The property appears to have been purchased for Rs.35,000/- as shown in the document. It is common knowledge that in many purchases, the purchaser will not disclose actual consideration paid to the vendor.

11. There are two aspects that will have to considered

by this Court. First is the entrustment and the second is the misappropriation of the gold ornaments. Parties lived as husband and wife untill 20.03.2011. It is to be noted that the husband had a contention that wife's family is a rich family. This contention was raised to deny the maintenance claim made by the wife as against the husband in separate

& 195/2017 11 proceedings. That case was also tried along with the case for recovery of gold ornaments.

12. PW2 is the photographer engaged at the time of

wedding. He also deposed that large number of gold ornaments worn by the wife at the time of marriage. In all probable circumstances, there cannot be any disputes in this matter with regard to the gold ornaments adorned by the wife. Admittedly, she was staying at the house of the husband till 2011. The husband had no case that her entire gold

ornaments were kept at her own parental house or some other place. The probability would show that the entire gold ornaments were with her when she moved to husband's house. In such circumstances, there is every possibility that husband might have utilised the gold ornaments in the year 2003 when they were in good terms for purchasing properties.

13. Now the question is the quantum of the gold ornaments utilised by the husband. The value of the gold & 195/2017 12

ornaments in the year 2003 was around Rs.5,600/- as available from the internet. Based on the purchase consideration shown in the document, the total gold ornaments could have been used only 7 sovereigns gold ornaments. However, we cannot over look the fact that in many of the purchase dealings the actual value is not set out to defraud the State. The total extent of the land purchased is 22 cents located in important place in Kannur District. In all probability, we are of the view that at least 30 sovereigns of gold ornaments could have been utilised for the purchase of property. Court often resort to guess work in such matters to tilt the preponderance of probability, when party who knows the truth, detain the court from knowing the truth. In this case, we are sure that the husband was lying before this Court in regard to the source of fund. In such circumstances, even our guess works may cause some hardships to the husband, that is inevitable in this context. In all probability, we are of the view that at least 30

& 195/2017 13

sovereigns of gold ornaments could have been misappropriated by the husband. Therefore, we allow this appeal partly by granting decree of recovery of gold ornaments towards 30 sovereigns. The husband is directed to either return 30 sovereigns of gold ornaments or the value of 30 sovereigns of gold ornaments at the present market value. The husband is granted one month's time. If the husband failed to honour the

directions as above, the decree can be executed to recover 30 sovereigns with its value at the time of realisation. In the result, Mat.Appeal No.774 of 2013 is allowed and Mat.Appeal No.195 of 2017 is allowed in part. No costs.

Sd/- A.MUHAMED MUSTAQUE, JUDGE Sd/- SOPHY THOMAS, JUDGE
DSV/01.07.2022

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com