

XXXXX vs XXXXX

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Court : Kerala

Decided On : May-31-2021

Judge : Honourable Mr. Justice a.Muhamed Mustaque,Honourable Dr. Justice Kauser Edappagath

Appeal No. : Mat.Appeal/67/2015

Appellant : XXXXX

Respondent : XXXXX

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE & THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 31ST DAY OF MAY 2021 / 10TH JYAISHTA, 1943 MAT.APPEAL NO. 254 OF 2015 AGAINST THE ORDER IN OP 2091/2011 OF FAMILY COURT,THRISSUR APPELLANT/RESPONDENT IN OP NO.2091/2011: XXXXX BY ADVS. P.GOPAKUMARAN NAIR B.BINDU N.K.SUBRAMANIAN RESPONDENT/PETITIONER IN OP NO.2091/2011: XXXXX BY ADVS. K.N.ABHILASH SUNIL NAIR PALAKKAT THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 18.05.2021, ALONG WITH

Mat.Appeal.67/2015, THE COURT ON 31.05.2021 DELIVERED THE FOLLOWING: Mat.Appeal Nos.67 & 254/2015 :2:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE & THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH MONDAY, THE 31ST DAY OF MAY 2021 / 10TH JYAISHTA, 1943 MAT.APPEAL NO. 67 OF 2015 AGAINST THE ORDER IN OP 1113/2012 OF FAMILY COURT,THRISSUR

APPELLANT/PETITIONER IN OP NO.1113/2012: XXXXX BY ADVS. P.GOPAKUMARAN NAIR B.BINDU N.K.SUBRAMANIAN
RESPONDENT/RESPONDENT IN OP NO.1113/2012: XXXXX BY ADVS. K.N.ABHILASH SUNIL NAIR PALAKKAT THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 18.05.2021, ALONG WITH Mat.Appeal.254/2015, THE COURT ON 31.05.2021 DELIVERED THE FOLLOWING: Mat.Appeal Nos.67 & 254/2015 :3: C.R.

JUDGMENT

[Mat.Appeal Nos.67/2015 & 254/2015] Dated this the 31st day of May, 2021

Kauser Edappagath, J.

Two young medical graduates tied the knot with the hope that

the bond between them would last for ever with love and joy. But, their hope did not last even the first night. For both, much anticipated wedding night was disappointing, if not pretty terrible - the husband found the wife drowsy, lethargic, abnormal and not being excited as a normal newly wedded bride would be; the wife found the husband emotionless and suffering from erectile dysfunction. Initially, the couple lived together just for a week without consummation and left to their respective colleges where they were pursuing post graduation. After a short while, they stayed together for twenty five days. During this period, the marital feud existed between them was further intensified. They started living together two

years thereafter on the husband completing his post graduation. By that time the gap between them was much widened; their relationship further deteriorated. The wife was still willing to patch up and continue the relationship, but the husband was not. Eventually, the spouses ended up initiating legal proceedings against each other - the husband, for divorce and the

Mat.Appeal Nos.67 & 254/2015 :4: wife, for restitution of conjugal rights.

2. The appellant and the respondent in both appeals are husband and wife respectively. They are doctors by profession. The

appellant is a General Physician and the respondent is an Ophthalmologist. Their marriage was solemnized on 30/6/2008 at St.Martin De Pores Church, Palarivattom, Ernakulam as per the Christian religious rites. There are no issues in the wedlock.

3. The appellant filed Original Petition (OP No.1113/2012)

against the respondent to declare his marriage with the respondent as null and void or, in the alternative, to pass a decree of dissolution of marriage. The respondent filed Original Petition (OP No.2091/2011) against the appellant seeking a decree for restitution of conjugal rights. Both original petitions were jointly tried by the court below. After trial, the Court below, by the impugned common order, dismissed the original petition filed by the appellant and allowed the original petition filed by the respondent granting her a decree for restitution of conjugal rights. The appellant challenges both the orders in these appeals.

4. We have heard Sri. N.K.Subramanian, the learned counsel for the appellant and Sri. K.N.Abhilash, the learned counsel for the respondent.

5. The appellant sought for decree of nullity on the ground Mat.Appeal Nos.67 & 254/2015 :5:

that his consent to the marriage was obtained by fraud perpetrated by the respondent in suppressing material facts regarding her mental condition under Section 18 and the proviso to Section 19 of the Divorce Act, 1869 (for short the

Act). He also, in the alternative, prayed that the marriage be dissolved on the grounds of incurable unsound mind and cruelty on the part of the respondent under Section 10(1)(iii) and 10(1)(x) of the Act.

6. According to the appellant, the respondent was suffering

from incurable unsoundness of mind and mental disorder prior to the marriage and his consent to marriage was obtained by suppressing the said fact. In order to prove the same, the appellant relied on his own oral testimony. Though it was alleged by the appellant, and practically admitted by the respondent, that two psychiatrists viz., Dr. K.P. Raghavan and Dr. K.S. Rajeev treated the respondent, no steps were taken by the appellant to examine them or to produce the treatment records. It is true that the respondent has admitted that she was suffering from some kind of delusion disorder. The essential ingredient to be proved for securing an order of dissolution of marriage under Section 10 (1) (iii) of the Act, 1869 is that the respondent has been incurably of unsound mind for a continuous period of not less than two years immediately preceding the presentation of the petition; but there is no convincing evidence on record to prove that the respondent

Mat.Appeal Nos.67 & 254/2015 :6:

has been suffering from any mental disease of incurable nature. No medical opinion of a medical expert is coming forth in this case to establish that the illness which the respondent has allegedly been suffering from is incurable. The doctors mentioned above, who treated the respondent, were not examined. Further, nowhere in the pleadings also, there is any definite allegation that the mental disease attributed to the respondent was incurable in nature.

7. The consent in relation to a marriage must be the result of a

free will. In case the consent of one spouse is obtained by the other, through force or fraud, law recognizes the same as basis for annulment of marriage. As stated already, there is nothing on record to show that the respondent was suffering from incurable unsoundness of mind at the time of marriage. The respondent has admitted in the pleadings as well as in the evidence that she had delusion

disorder. Admittedly, the respondent or her parents did not disclose the said fact to the appellant. The submission of the learned counsel for the appellant is that though delusion disorder may not be a disease that warrants divorce, the respondent has suppressed vital information about her health condition at the time of settlement of marriage and that itself is sufficient for annulment of the marriage.

8. The proviso to Section 19 of the Act gets attracted only when the consent was obtained through force or by playing fraud. The Mat.Appeal Nos.67 & 254/2015 :7:

word 'suppression' does not occur in S.19 of the Act. The Parliament has employed the words 'force' and 'fraud'. Before a party gives consent for the marriage with the other, there is bound to be exchange of information. This Section cannot be treated as a provision placing burden upon a spouse to the marriage, to reveal the entire information about him or her to the other. This provision can not at all be operated vis a vis the suppression of information. No doubt, a particular information, knowing it to be false is presented as true, it amounts to fraud and on proof of fraud, a marriage can certainly be annulled under the proviso to Section 19 of the Act. In the instant case, the allegation is about suppression and failure to inform a particular fact cannot be treated as fraud, unless the person failing to mention it was under legal obligation to state it. Delusion disorder, even if exists in a

spouse, is not a ground for divorce under the Act. Thus, the non disclosure by the wife before marriage that she was suffering from delusion disorder is not a suppression of material fact. Hence, it cannot be said that there was any active concealment on the part of the respondent and her parents in non disclosure of the fact to the appellant before the marriage amounting to fraud in obtaining his consent for the marriage. That apart, fraud or other related acts and omissions, wherever pleaded as the basis for the relief in a suit or a petition, must be stated with necessary details, so that the party

Mat.Appeal Nos.67 & 254/2015 :8:

accused of it, is provided with an opportunity to accept or contradict the same. R.4 of Order VI of Code of Civil Procedure make this obligatory. The original petition

filed by the appellant is totally silent about the details. Except stating that the respondent did not inform the appellant and his parents that she was suffering from unsoundness of mind and mental illness, no other act of fraud or use of force was mentioned. For these reasons, we find no reason to interfere with the findings of the court below that the appellant is not entitled to get a decree of nullity of his marriage under the proviso to S.19 of the Act or a decree of dissolution of marriage u/s 10(1)(iii) of the Act.

9. The next question arises for consideration is whether the

appellant is entitled to the decree for dissolution of marriage on the ground of cruelty. A bare reading of the impugned order would show that the court below bestowed all its attention on the plea of unsoundness of mind and mental disorder canvassed by the appellant to grant a decree of nullity of marriage under the proviso to S.19 or of dissolution of marriage under Section 10(1)(iii) of the Act. The court below did not consider or appreciate correctly the various instances of cruelty stated by the appellant. There is absolutely no discussion of the evidence adduced by the appellant in this regard. The evidence adduced by the appellant regarding cruelty was simply discarded holding that the wordings in the Act are reproduced in the original

Mat.Appeal Nos.67 & 254/2015 :9: petition by the appellant and that there is no evidence to show that the respondent has behaved in any way which may cause reasonable apprehension in the mind of the appellant that it would be harmful or injurious for him to live with her.

10. No doubt, the burden to prove the accusation of cruelty is

on the part of the person alleging it and, in the present case, is upon the appellant. The evidence consists of the oral testimony of the appellant alone. Normally, the matrimonial cruelty - be it physical or mental - takes place within the four walls of the matrimonial home and, hence, independent witnesses may not be available. Thus, the court can act upon the sole testimony of the spouse if it is found convincing and reliable. The Supreme Court in *Dr. N. G. Dastane v. Mrs. S. Dastane* (AIR 1995 SC 1534) has held that the standard of proof in matrimonial

cases would be the same as in civil cases, i.e, the court has to decide the cases based on preponderance of probabilities. The concept of proof beyond the shadow of doubt, is to be applied to criminal trials; not to civil matters and certainly not to matters of such delicate personal relationships as those of husband and wife. Therefore, it is the duty of the court to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omission of the other.

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11. The various acts of cruelty as well as harassment, meted

out by the appellant at the hands of the respondent have been spoken to in detail by the appellant. He deposed that, on the first night, the respondent was found to be drowsy, lethargic and showing abnormal postures with her hands and she did not show any signs of being excited as a newly married bride. He further stated that even though he thought that it might be out of respondents anxiety and nervousness, all throughout the week, she behaved in the same manner and did not have the initiative to do anything independently. She was deadly scared of loneliness and darkness and insisted on switching on the lights even while sleeping. Admittedly, after a week, the appellant left to Karaikkal, Tamil Nadu where he was doing his M.D course and a week thereafter, the respondent left for Coimbatore to join her DNB Course. In August 2008, when the appellant got a special posting at Medical Trust Hospital, Ernakulam, the respondent also came down and they stayed together for about 25 days. The appellant deposed that during this period also, the respondent was very sleepy, lethargic and behaving in an irrational and immature manner. He further deposed that she was least interested in reading newspapers or watching television and she used to talk uninhibitedly and had a gluttonous appetite. The appellant completed his M.D and joined Lourdes Hospital as a Consultant Physician in July, 2010. Thereafter,

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the appellant and the respondent lived together till December, 2010. The appellant deposed that during this period also, the respondent behaved in a bizarre manner. She used to suddenly scream that a gang was going to attack her, had a phobia for darkness, used to stare at people, had a mouth odour and was unhygienic, he added. He also deposed that the respondent remained a complete stranger in matrimonial home and she did not bother to give helping hand in the household chores. It has also come out in evidence that the respondent was caught red handed by the appellant while she was trying to take medicines in the second week of October, 2010. On examining the respondents bag, the appellant found that she was taking two drugs Risperidone, and Benzhexol which are usually prescribed for treating mood disorders and psychotic depression. The respondent and her parents admitted to the appellant that she had a mental breakdown during diploma course and she has been taking medicines for the same. After the said incident, admittedly, the

respondent was taken for consultation to Dr.K.P.Raghavan, a psychiatrist and on his advice to Dr.K.S.Rajeev. Both of them stated that the respondent had been suffering from delusion disorder. Even though the respondent was taking anti-depressant medicines even before her marriage and post marriage, it was never disclosed to the appellant. The appellant specifically deposed that right from the first

Mat.Appeal Nos.67 & 254/2015 :12: day of marriage, there has been a sustained course of strange, indifferent and abnormal behaviour, humiliating treatment and reprehensible conduct on the part of the respondent and on account of this, he was convinced that it was impossible for him to continue with the marital relationship.

12. Cruelty as a matrimonial offence is the conduct in relation

to or in respect of matrimonial duties and obligations. Physical violence is not absolutely essential to constitute cruelty. The cruelty may be mental or physical. If it is physical, it is a question of fact and degree. If it is mental, the enquiry must be as to the nature of the cruel treatment and the impact of such treatment in the mind of the spouse.

What acts would constitute mental cruelty depend upon the circumstances of each case and upon the type of life the parties are accustomed to or their economic, educational and social status and conditions. A set of facts stigmatized as cruelty in one case may not be so in another case.

13. Cruelty which constitutes a ground for divorce under the

Act, whether it be mental or physical in nature, is a question of fact. Determination of such a fact must depend on the evidence in the individual case being considered by the Court. No uniform standard can be laid down for guidance; behaviour which may constitute cruelty in one case may not be cruelty in another. There must be to a large

Mat.Appeal Nos.67 & 254/2015 :13:

extent a subjective as well as an objective aspect involved; one person may be able to tolerate conduct on the part of his or her spouse which would be intolerable to another. Under S.10(1)(x), the cruelty must be such as to cause reasonable apprehension in the mind of the petitioner spouse that it would be harmful or injurious for him/her to live with the respondent. The Division Bench of this court in A: Husband v. B: Wife (2010 (4) KHC 435), after analysing the nature of cruelty which would entitle a spouse in matrimony for divorce under different personal Laws, has held that that the expression harmful or injurious found in Section 10(1)(x) of the Act cannot be limited to physical harm or injury. Anything that would hinder the ability of the spouse to blossom into his/her fullness and to enjoy life in matrimony must be

held to fall within the sweep of S.10(1)(x), it was held.

14. It is settled that mere bickering, petty quibbles, trifling

differences, austerity of temper, petulance of manners, rudeness of language, lack of affection, trivial irritations, quarrels, or normal wear and tear of the married life which happens in day to day life cannot amount to cruelty. At the same time, to constitute cruelty, the conduct complained of need not necessarily be so grave and severe so as to make cohabitation virtually unendurable or of such character

as to cause danger to life, limb or health. It must be something more serious than "ordinary wear and tear of the married life". It is sufficient if the

Mat.Appeal Nos.67 & 254/2015 :14: conduct and behaviour of one spouse towards the other is of such a nature that it causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the marital tie. The Apex

Court in Samar Ghosh v. Jaya Ghosh [(2007) 4 SCC 511] has held

that the feeling of deep anguish, disappointment, frustration and embarrassment in one spouse caused by the sustained course of abusive and humiliating conduct of other may lead to mental cruelty.

15. We must take note of the fact that the spouses are highly

qualified educationally and both of them are medical professionals. Both do come from a highly respectable family background admittedly. The father of the appellant is a doctor. The father and brother of the respondent are also doctors. The appellant/husband being a doctor can easily differentiate the normal and abnormal behaviour on the part of his doctor wife. The crucial question whether the alleged indifferent, irrational, abnormal and reprehensible conduct by the respondent has caused reasonable apprehension in the mind of the appellant that it was not safe for him to continue the marital tie with her has to be analysed and evaluated in this backdrop. The Apex Court in Dr.(Mrs.)

Malathi Ravi, M.D v. Dr. B.V . Ravi M.D (AIR 2014 SC 2881) has held

that mental cruelty and its effect varies from individual to individual, from society to society and also depends on the status of the persons. In Samar Ghosh (supra), it was held that the concept of cruelty Mat.Appeal Nos.67 & 254/2015 :15:

differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system. It was further observed that in regard to mental cruelty, no uniform standard can ever be

laid down and the prudent and appropriate way to adjudicate the case would be to evaluate on its peculiar facts and circumstances. In *Naveen Kohli v. Neelu Kohli* (AIR 2006 SC 1675), it was held that the cruelty alleged may largely depend upon the type of life parties are accustomed to or their economic or social conditions and their culture and human values to which they attach importance. It was further held that the conduct of one of the spouse making it impossible for other spouse to live together and making false and defamatory allegations will amount to mental cruelty. In *A: Husband v. B: Wife* (supra), the Division Bench of this Court observed that matrimonial cruelty between educated spouses belonging to higher strata of society cannot evidently be expected to be proved by corroboration from independent sources. There is nothing to disbelieve the evidence given by the appellant that throughout the period they lived together, the respondent has perpetrated various acts, ranging from several mental agony by behaving in an immature, irrational and bizarre manner, being drowsy, lethargic and unhygienic always, showing abnormal postures with her

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hands, talking uninhibitedly, often screaming that some gang was going to attack her, staring at people, having a phobia for darkness, having bad mouth odour, abdicating all shared household duties etc., making his life a living hell. This evidence was not challenged in cross examination. No doubt, this kind of conduct is not expected from a doctor wife coming from a respectable family. There is no reason for the appellant for raising unnecessary false allegations against respondent.

16. Taking into account the social status, financial position,

educational, family and cultural background of the spouses, if the appellant reasonably apprehends, from the kind of attitude, conduct and treatment of the respondent discussed above, that it is not safe for him to continue the matrimonial relationship with the respondent, he cannot be found fault with. True, the conduct of the respondent mentioned above need not be intentional, may be because of her mild mental illness. But, malevolent intention is not essential to cruelty. There may be instances of cruelty by unintentional but inexcusable conduct of the party.

The absence of intention should not make any difference in the case, if by ordinary sense in human affairs, the act

complained of could otherwise be regarded as cruelty. It has been held

by the Supreme Court in Samar Ghosh (supra) that intention is not a necessary element in cruelty and that the relief to the party cannot be Mat.Appeal Nos.67 & 254/2015 :17: denied on the ground that there has been no deliberate or willful ill-treatment.

17. Yet another facet of mental cruelty on the part of the

respondent canvassed by the learned counsel for the appellant is the false accusation made by the respondent against the appellant about his sexual capacity. In the counter statement, the respondent imputed that the appellant was suffering from erectile dysfunction and he was incapable of performing sexual activities. It has come out in evidence that a similar complaint was made by the respondent to her parents as well as to the parents of the appellant.

18. It is settled that the unsubstantiated accusation and

character assassination in a written statement would constitute mental cruelty. The Supreme Court in Vijaykumar Ramachandra Bhate v. Neela Vijaykumar Bhate (AIR 2003 SC 2462) has held that unsubstantiated disgusting accusations made by one spouse against the other in the written statement constitutes mental cruelty for sustaining the claim for divorce. In K. Srinivas Rao v. D. A. Deepa (AIR 2013 SC 2176), it was held that making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings amount to causing mental cruelty to the other spouse. In Gangadharan v. T. K. Thankam (AIR 1988 Kerala 244), this Court

held that false, scandalous, malicious, baseless and unproved

Mat.Appeal Nos.67 & 254/2015 :18: allegation made by one spouse, whether by letters or written statement or by any other mode, amounts to cruelty.

19. Apart from the bald allegations in the counter statement,

there is nothing on record to show that the appellant was suffering from erectile dysfunction. The respondent imputed that the appellant was suffering from erectile dysfunction, and thus, he was incapable of performing sexual activities, but at the same breath, she admitted that the appellant could get erections early in the morning and they used to have sexual intercourse in early morning. She further admitted that she had a satisfactory sexual relationship with the appellant after July,

2010. But, to a specific question during evidence, she answered that

she was still maintaining the stand that the appellant was suffering from erectile dysfunction. These are mutually contradictory stand. The appellant deposed during evidence that he was prepared to undergo a medical examination to disprove the contention of the respondent that he was having such a sexual incapacity. No such steps had been taken

by the respondent. The respondent has miserably failed to substantiate the imputation made by her that the appellant was suffering from erectile dysfunction. Casting aspersions of impotency or erectile dysfunction by one spouse against other in the counter statement in a matrimonial proceedings will undoubtedly constitute cruelty. Hence, we hold that the above act of the respondent making

Mat.Appeal Nos.67 & 254/2015 :19: unnecessary accusations against the appellant amounts to mental cruelty.

20. On an overall appreciation of the pleadings and evidence,

we find that the appellant and the respondent were at loggerheads right from the inception of their marriage. The marriage never took off. Regardless of the subsistence of the marriage for the last twelve years, the couple was unable to patch up their differences. The marriage is virtually shattered and has become a dead wood. The allegations and counter allegations levelled against each other establish that there is no further chance of a rapprochement. The appellant has pleaded and proved specific instances of cruelty meted out on him by the

respondent which have been discussed in the preceding paragraphs. Admittedly, they are residing separately since December, 2010. The Supreme Court of India in Samar Ghosh (supra) has held that the insistence by one spouse to preserve the dead marriage could be treated as an act of cruelty. It was observed thus:

Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situation, it may be true mental cruelty.

21. For the reasons stated above, we hold that the appellant has made out a case for granting a decree for dissolution of marriage Mat.Appeal Nos.67 & 254/2015 :20:

on the ground of cruelty u/s 10(1)(x) of the Act. Consequently, the prayer for restitution of conjugal rights by the respondent is only to be rejected. The impugned orders are liable to be interfered with to that extent. We do so. In the result;

(i) Both the appeals are allowed.

(ii) The order in OP No. 2091/2011 is set aside.

(iii) The order in OP No. 1113/2012 to the extent rejecting the claim for dissolution of marriage on the ground of cruelty is set aside.

(iv) OP No. 1113/2012 is allowed in part under Section 10(1)(x) of the Divorce Act, 1869.

(v) The marriage between the appellant and the respondent solemnized on 30/6/2008 at St.Martin De Pores Church, Palarivattom, Ernakulam stands dissolved.

(vi) OP No.2091/2011 is dismissed.

(vii) The parties shall bear their respective costs. Sd/- A.MUHAMED MUSTAQUE
JUDGE Sd/- DR. KAUSER EDAPPAGATH Rp True Copy JUDGE PS to Judge

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