

Abaid Kumar vs Nisi

Abaid Kumar vs Nisi

SooperKanoon Citation : sooperkanoon.com/1901649

Court : Kerala

Decided On : Jul-05-2019

Judge : Honourable Mr.Justice a.M.Shaffique,Honourable Mr.Justice N.Anil Kumar

Appeal No. : Mat.Appeal/647/2011

Appellant : Abaid Kumar

Respondent : NISI

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFIQU & THE HONOURABLE MR.JUSTICE N.ANIL KUMAR FRIDAY, THE 05TH DAY OF JULY 2019 / 14TH ASHADHA, 1941 Mat.Appeal.No.646 of 2011 AGAINST THE ORDER IN OP 1085/2010 of FAMILY COURT,KOZHIKODE DATED 20-07-2011 APPELLANT/RESPONDENT: ABAID KUMAR AGED 39 YEARS, S/O.DHANANJAYAN (LATE), 'DHANUSH', 33/2943, PAROPPADY PO, MERIKKUNNU, KOZHIKODE-12. BY ADVS. SRI.P.SANJAY SMT.A.PARVATHI MENON SRI.BIJU MEENATTOOR SRI.GLEN ANTONY RESPONDENT/PETITIONER: NISI AGED 33 YEARS, D/O P.VIJAYAN 'NEELABHAM' HOUSE, PO

MALAPARAMBA, KOZHIKODE-9. BY ADV. SRI.M.P.VIJAYAN THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 05.07.2019, ALONG WITH Mat.Appeal.647/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE & THE HONOURABLE MR.JUSTICE N.ANIL KUMAR FRIDAY, THE 05TH DAY OF JULY 2019 / 14TH ASHADHA, 1941 Mat.Appeal.No.647 of 2011 AGAINST THE ORDER IN OP 769/2010 of FAMILY COURT,KOZHIKODE APPELLANT/PETITIONER: ABAID KUMAR AGED 39 YEARS, S/O.DHANANJAYAN (LATE), 'DHANUSH', 33/2943, PAROPPADY PO, MERIKKUNNU, KOZHIKODE-12. BY ADVS. SRI.P.SANJAY SMT.A.PARVATHI MENON SRI.BIJU MEENATTOOR RESPONDENT/RESPONDENT: NISI AGED 33 YEARS, D/O P.VIJAYAN 'NEELABHAM' HOUSE, PO MALAPARAMBA, KOZHIKODE-9. THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 05.07.2019, ALONG WITH Mat.Appeal.646/2011, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING: -:3:-

JUDGMENT

A.M.Shaffique, J.

These two appeals arise out of a common order passed

by the Family Court, Kozhikode in O.P. Nos 1085 of 2010 and 769 of 2010. Mat. Appeal No.647 of 2011 has been filed by the petitioner/husband challenging an order of the Family Court dismissing his petition for divorce. The wife had also filed O.P. No.1085 of 2010 seeking restitution of conjugal rights, which was allowed by the Family Court, against which the husband has preferred Mat. Appeal No.646 of 2011.

2. The short facts of the case are as under: The parties are described as shown in O.P. No.769 of 2010 unless otherwise stated. The parties got married on 27.12.2006. No children were born in the wedlock. They lived together

only till 30.7.2007. It is stated by the petitioner/husband that after marriage the couple were living at Bangalore. His mother was bed-ridden long back on account of a train accident. He had to send his wife back during February, -:4:-

2007. However, the respondent/wife was not interested to spend time at the matrimonial house. Her house was very

near to the matrimonial home. She used to come to his house only during evening hours, spending the entire day time at her house. He further contended that as his mother was bed-ridden on account of a train accident which occurred in the year 2001, his cousin and other family members used to visit his house for helping his mother. The respondent/wife does not like any of the family members and she used to abuse them. The marital life was not at all peaceful on account of such abuse and he had to suffer severe mental cruelty. Ultimately, she left the matrimonial

home on 30.7.2007. Thereafter she was remaining away without any valid cause and she was not interested in the matrimonial life. Accordingly, he sought for divorce on the ground of desertion as well as cruelty.

3. In O.P. No.1085 of 2010 filed by the wife, she contended that her husband remained away without any valid cause and therefore, she is entitled for restitution of conjugal rights. -:5:-

4. Before the Family Court, evidence consisted of oral testimony of PW1, the petitioner, and RW1 and RW2. Ext.X1 is the report of the Psychiatrist that had been marked in

evidence. The Family Court found that no evidence was forthcoming to prove cruelty and desertion and accordingly dismissed the petition. Consequently on a finding that the husband had no valid reason to remain away from co- habitation, directed restitution of conjugal rights.

5. It is settled law that in a matrimonial case when there is allegation of cruelty, specific allegations of cruelty are to be mentioned and the same is to be proved.

6. The learned counsel appearing for the petitioner

submitted that the mental cruelty exerted on the petitioner was clearly evident from the facts and circumstances involved in the case and the oral testimony of PW1, but the court below had failed to consider the same. That apart, it was a clear case where the wife had deserted him on account of the fact that he was taking care of his mother. Thereafter she had not come back.

7. On the other hand, learned counsel appearing for -:6:-

the wife submitted that there is no reason to interfere with the judgment of the Family Court. The alleged cruelty has not been proved and the allegation of desertion is without any basis.

8. It is not disputed that the parties were living

separately since 30.7.2007. According to the petitioner, the respondent had left the house along with her sister after taking away all her gold ornaments and dresses. Thereafter she had not come back. The factual aspects involved in the case would disclose that the petitioner's mother is laid up on account of the accident aforesaid and she requires constant care and attention. One of the reasons for the respondent to remain away from the matrimonial home, according to the petitioner, is that she does not want to take care of his mother. He had a specific case that she used to go during morning hours to her house which is nearby and used to

come back only at night. In other words, she was not interested to remain at the matrimonial home during day time and after 30.7.2007 she had not returned at all.

9. Apparently, this is a case in which the parties are -:7:-

residing separately since 30.7.2007. Though they were residing very near, there is no matrimonial relationship between the couple and there is no contact between them. The wife had also filed a case under the Domestic Violence Act claiming recovery of money and return of gold ornaments, which came to be dismissed.

Therefore, there is reason to conclude that the marriage is irretrievably broken and there is no chance for union. No children were born in the wedlock as well. Under such circumstances, there is justification on the part of the petitioner to contend that the

wife had deserted him.

In fact, the court below had notco

the court below did not consider the reason for the wife to

remain away from the matrimonial house. She does not have an allegation that she had to remain away from the matrimonial home on account of the cruelty of her husband. She sought for restitution of conjugal rights only after the husband filed a petition for divorce. Her contention is that her husband had abandoned her. She did not take any steps

-:8:- seeking restitution of conjugal rights beforehand and continued to remain separate.

10. Learned counsel appearing for the petitioner has

placed before us the judgment of the Apex Court in Samar Ghosh v. Jaya Ghosh (2007(2) KHC 231) wherein the Apex Court has laid down certain principles narrating certain instances which would amount to mental cruelty. In the above case, the Apex Court has also held that 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 situations, it may lead to mental cruelty.

11. This is also a case in which the husband had filed

original petition after three years from the date of separation and therefore, there is sufficient reason to conclude that the long separation itself amounts to cruelty. -:9:- In such circumstances, we are of the view that this is a case in which the petitioner ought to have been granted a decree in his favour on the ground of desertion.

In the result, these appeals are allowed. The judgment

in O.P. No.769 of 2010 is set aside and the original petition is allowed. The marriage between the petitioner and the respondent shall stand dissolved by a decree of divorce. The judgment in O.P. No.1085 of 2010 is set aside and the original petition is dismissed. Sd/- A.M.SHAFIQUE, JUDGE Sd/- N.ANIL KUMAR, JUDGE vps /True Copy/ PS to Judge

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