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Joy John vs Shelly

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Court : Kerala

Decided On : Oct-29-2019

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

Appeal No. : Mat.Appeal/792/2016

Appellant : Joy John

Respondent : Shelly

Judgement :

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR.JUSTICE K.HARILAL & THE HONOURABLE MRS. JUSTICE ANNIE JOHN TUESDAY, THE 29TH DAY OF OCTOBER 2019 / 7TH KARTHIKA, 1941 Mat.Appeal.No.792 OF 2016 AGAINST THE JUDGMENT DATED 05-07-2016 IN OP 195/2014 OF FAMILY COURT, ERNAKULAM APPELLANT/ RESPONDENT : JOY JOHN, S/O JOHN, AGED 54 YEARS, VARIKKASSERY HOUSE, MUTHRATHIKKARA, PARAPPUKKARA P.O., THRISSUR- 680 310 BY ADVS. SRI.N.L.BITTO SEBY JOSEPH RESPONDENT/ PETITIONER :

SHELLY, W/O JOY JOHN, AGED 46 YEARS, VARIKKASSERY HOUSE, GOLDEN NEST RESIDENTS, INFANT JESUS ROAD, PERUMPADANNA, NORTH PARUR, ERNAKULAM - 683 513 R1 BY ADV. SRI.MVS.NAMBOOTHIRY THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 03-07-2019, ALONG WITH Mat.Appeal.793/2016, THE COURT ON 29-10-2019 DELIVERED THE FOLLOWING :

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JUDGMENT

Annie John, J.

The averments in Mat.Appeal No.792 of 2016 is as follows :- The appellant was the respondent and the respondent herein was the petitioner in OP.No.195/2014 on the file of the Family Court, Ernakulam. The said OP was filed by the

respondent seeking a decree for divorce on the ground of cruelty. The case of the respondent is that her marriage with the appellant was registered on 16.06.2004 under the Cochin Christian Civil Marriage Act.

A boy child was born in their wedlock on 08.11.2005. Itwas her

respondent fell ill and it was diagnosed as blood cancer and she has been undergoing treatment for the same. From 2006 onwards, the the relationship between the appellant and the respondent became strained due to his drunkenness. He used to quarrel with her after taking liquor. The appellant resigned his job in Switzerland in June 2013 and began to demand money from her for his

extravagance. When she objected, he used tomanha

intoxication and she was admitted in Lakeshore Hospital

on 27.12.2013. He alleged illicit relationship of therespond

trespassed into her house and committed theft of valuables.

2. The appellant filed objection denying the

allegations made by the respondent. He specifically denied the allegation of mental and physical cruelty. He resigned his job in order to take care of her as she became sick. Her brother and sister are trying to separate them in order to obtain financial benefits from

her. The appellant is ready to take care of therespondent. T

case was jointly tried with OP.No.1388/2015 filed by the appellant for restitution of conjugal rights.

3. After taking evidence, the court below erroneously allowed the OP filed by the respondent granting a decree of divorce on the ground of cruelty. Being highly aggrieved by the judgment of the court below, this appeal has been preferred.

4. According to the appellant, the court below failed to consider the fact that no specific pleading and evidence had adduced by the respondent to prove the

alleged cruelty against the appellant except the vagueand

the fact that up to 24.12.2013, there was no matrimonial dispute between the appellant and respondent with respect to any issue. The court below without analysing the evidence properly straight away came to the

conclusion that the marital life of the respondent with

the appellant is found to be injurious for her. The lower court ought to have considered the fact that the alleged incident of cruelty occurred on 24.12.2013 and she was admitted in Lakeshore Hospital only on 27.12.2013. Except the incident allegedly occurred on 24.12.2013, there is no evidence to prove the matrimonial cruelty on the part of the appellant. On the grounds as urged

above, the appellant prays for setting aside the judgment

dated 05.07.2016 in OP.No.195/2014 of the Family Court, Ernakulam and to dismiss the said OP filed by the respondent. The averments in Mat.Appeal No.793/2016 is as follows :-

This appeal has been filed against the judgment

dated 05.07.2016 in OP.No.1388/2015 of the Family Court, Ernakulam. The said OP was filed by the appellant seeking a decree for restitution of conjugal rights.

2. The case of the appellant in brief is that his marriage with the respondent was registered on 16.06.2004 under the Cochin Christian Civil Marriage Act. A boy child was born in their wedlock on 08.11.2005. It

was the 2nd marriage of the respondent. In 2011, the respondent fell ill and it was diagnosed as blood cancer and she has been undergoing treatment for the same. The respondent had deserted the appellant on 23.12.2013 without any reason. The appellant resigned his job in

order to take care of her as she became sick. Her

brother and sister are trying to separate them in order to obtain financial benefits from her. The respondent filed objection contending that the appellant filed the OP as a counter blast to OP.No.195/2014 filed by her for divorce. Based on the pleadings, the court below has taken evidence in this matter. After conclusion, the court below has dismissed the OP filed by the appellant for restitution of conjugal rights. Highly aggrieved by the same, this appeal has been preferred.

3. Mat.Appeal No.792/2016 was filed for

getting divorce from the appellant. The lower court after analysing the entire evidence has granted decree of divorce by finding that the marital life of the respondent with the appellant is found to be injurious for the respondent and apprehension expressed by the respondent is genuine. Accordingly divorce was granted. Highly aggrieved by the judgment of the Family Court, this appeal has been preferred by stating that the respondent has no specific pleading and evidence to prove the alleged cruelty against the appellant except the vague and unbelievable story which was occurred on 24.12.2013. The court below went wrong in considering the fact that up to 24.12.2013, there was no matrimonial dispute between the appellant and the respondent with respect to any issue and the same has been admitted by the respondent as well as her sister, who was examined as PW2. The court below had failed to analyse the genuinety of the incident, which was allegedly occurred on 24.12.2013. The court below went wrong in disallowing the OP filed by the appellant for decree of restitution of conjugal rights in spite of the fact that during examination, the respondent admitted that she is very well know about the willingness of the appellant to look after her and the children. On the basis of the above grounds, the appellant prays for setting aside the

judgment passed by the court below.

4. In fact the marital status of the appellant and the respondent is admitted. In fact their marriage was registered on 18.06.2004 at the Marriage Office, Iringalakuda. Immediately after the marriage, the appellant was taken to Switzerland by

spending all expenses. Now the grievance of the respondent wife is that the appellant used to pick up quarrels with her after

consuming alcohol. The appellant used to demandmoney even

there occurred one incident that when the respondent returned from her work place, she saw that the appellant was heavily drunk, without caring the small child at home. When the respondent questioned this conduct of the appellant, he has beaten her severely. He used to pick up quarrels with her with an intention to harass her mentally and physically. Further the case of the respondent is that during the year 2010 and 2011, they have constructed a residential building at Paravoor. Later she fell sick and it was diagnosed that she was affected

with blood cancer. She has taken sick leave initially andconti

returned to native place in July 2013. The main complaint of the respondent/ wife is that the appellant husband has no income as he is not working. In fact the respondent has resigned in July 2013 due to ill health. But she was benefited by the pension granted by Austria and Switzerland Government on a condition that if she found

fit later on, she should join duty. It was further alleged that on 24.10.2013, while they were on native place, the appellant in a drunken condition, manhandled her physically and mentally in a cruel manner. She was escaped from the clutches of the appellant. But she was again dragged out by the appellant and he stamped and

kicked on her abdomen. Due to the attack on the side of the appellant, the respondent sustained serious chest pain and suffocation and she was admitted to Lakeshore Hospital since she was a patient of the said hospital. On the strength of the complaint, North Paravoor police registered crime No.2252/2013 under Section 294(b) and 323 of IPC. The whole incident was narrated in the FI statement which was given by the respondent.

5. In order to support her case, the respondent

has produced Ext.A6 discharge certificate issued from Lakeshore Hospital which would show that respondent has multiple contusions on her body. Ext.A7 is the copy of the FIR. Another allegation against the appellant was that while the respondent was undergoing treatment at Lakeshore Hospital, the appellant trespassed into her house and committed theft of all the certificates, passport of the son, the birth certificate and citizen certificate of her daughter, visa etc. and 50 sovereigns of gold ornaments, FD receipt for Rs.70 lakhs, and ATM cards etc. Further it was alleged by the respondent that the appellant by using the ATM card has withdrawn certain amount from the respondent's account. Immediately she has filed a complaint before the JFCM Court, Paravoor which was forwarded to North Paravoor police Station and Crime No.47/2014 incorporating Section 498A read with

Section 34 of the IPC and Section 380 IPC was registered. That FI Statement has been marked as Exts.A8 and A9 is the list of stolen articles recovered by the police and entrusted to the respondent allowing her interim custody. In addition to that, the respondent has made allegation that in order to harass the respondent with an ulterior motive, the appellant has filed OP.No.150/2014 for a declaration of right over the property and to restrain the

respondent from alienating the property. Further the appellant has filed another OP for partition.

6. Another argument advanced by the learned

counsel for the respondent was that if the respondent pre decease the appellant, he will get Rs. 2 lakhs as monthly pension which is 50% of the amount of pension now being drawn by the respondent from Switzerland and also a one time compensation of Rs.1,85,000/- Swiss Frank. So the respondent apprehends that the appellant may

resort to any means to do away with her. While so, the appellant has filed OP.No.1388/2015 for restitution of conjugal rights by expressing his intention to resume cohabitation with the respondent whereby the respondent has filed objection stating that if the respondent is permitted to live along with the appellant,

her life will be in

danger. So the learned counsel for the respondent has pointed out that on 24.12.2013, the respondent was brutally attacked by the appellant for that she was admitted in the hospital for the treatment of the same. When the respondent was examined as PW1, she has no case that she was ill treated by the appellant continuously for the purpose of getting dowry or any illegal demand.

At any point of time before 24.12.2013, the respondent has specifically pleaded only an incident alleged to have

occurred on 24.12.2013. Further it is very important tonote

27.12.2013 and there is no proper explanation on the part of the respondent why she waited till 27.12.2013 for the treatment. If the respondent was brutally attacked by the appellant, definitely she would have got admitted in the hospital on the same day itself. Further it is understood that there are several litigations pending between the

appellant as well as the respondent. It is an admitted fact that the respondent is a divorcee and she got married to the appellant, who was not married and out of the wedlock, a son was born.

7. During the examination, PW1 has stated that if the appellant continues as the life partner of the respondent, that will endanger the life of the poor child, who born out of the wedlock of the earlier marriage. But

this fact has not been pleaded by the respondent. In fact, the respondent was working in Switzerland as a staff nurse and after the death of her first husband, she got

married again to the appellant. Thereafter the appellant was taken to Switzerland and employed therein by getting 70% of the salary and accordingly the appellant's case is that immediately after the detection of the ailment of the respondent, he also resigned job and accompanied her to come back to the native place for the purpose of taking

care of his wife. During when the relatives, sister and brothers of the respondent had taken much efforts to change the mind of the respondent, so as to dispel the appellant from the marital relationship and according to the appellant, the intention of the relatives of the respondent is only to grab the property and the finance of the respondent.

8. Per contra, the respondent has alleged that the intention of the appellant is only to get 50% of the pension alleged to have admittedly received by the

respondent. So she apprehends that if the appellant continues as the life partner of the respondent, he will take any attempt to do away the life of the respondent and the Family Court has stressed on the incident narrated on 24.12.2013 and came to a conclusion that, that incident is more than sufficient to prove that the

respondent is in a dangerous condition. Accordingly the Family Court has granted decree of divorce as prayed for. During argument, the respondent filed a petition for accepting additional document. Annexures R1 to R3 are the true copy of the case diary. Annexure R4 is the true copy of the report of the Sub Inspector of North Paravoor

Police Station. Annexure R5 is the true copy of the CDcontaini

is the true copy of the plaint in OS.No.230/2018. Annexure R7 is the true copy of the plaint in OS.No.345/2018. The respondent's counsel has argued on the strength of the additional documents produced before this Court. When the respondent is very adamant in accepting the documents Annexures R1 to R7, we find that it is better to remand the matter to the same court for reconsidering the facts based on the documents produced by the respondent herein.

9. In Naveen Kohli Kochi v. Neelu Kohli, [AIR 2006 SC 1675] it was stated that conduct complained of should be grave and weighty, not ordinary wear and tear of married life. The conduct should be such that no reasonable person would tolerate it.

66. To constitute cruelty, the conduct complained of should be grave and weighty so as to come to the

conclusion that the petitioner-spouse cannot be reasonably

expected to live with the other spouse. It must be something more serious than ordinary wear and tear of married life. The conduct taking into consideration the circumstances and

background has to be examined to reach the conclusion

whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining-spouse to secure

divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony ad torture may well constitute cruelty within the meaning of Section 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

67. The Court dealing with the petition for

divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse's conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain

in the mind of another. But before the conduct can be called

conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be called upon to endure as a part of

normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non-violent.

10. So as far as the facts and circumstance of the case, we find that there is some discrepancy in the evidence adduced by the respondent. The sole incident as narrated on 24.12.2013 is not sufficient enough to

grant a decree for divorce. Further it was stated that

she has got a very much grievances against the appellant for the atrocity, definitely she would have made a complaint before the police as well as got admitted in the hospital. So it is revealed that the cruelty as attributed against the appellant in evidence is not sufficient to grant a decree for divorce.

11. Now the respondent's counsel has produced seven documents in order to establish that she was undergoing cruelty continuously. But no specific pleading

was mentioned in the petition. So we are inclined to set aside the judgment of the court below and remand the matter to the same court for reconsidering the same by

accepting additional documents and to pass a judgment

after reconsidering the facts along with the additional documents.

12. Since the decree of divorce was granted, the prayer on the side of the appellant to have restitution of conjugal right is dismissed by the court below since the

judgment granting divorce by the lower court is set aside,

we are inclined to set aside the judgment in OP.No.1388/2015. In the result, these appeals are allowed and the matter is remanded to the concerned Family Court for reconsidering the same, after affording an opportunity to both sides to adduce

evidence and disposed of the matter within three months from the date of receipt of the copy of this judgment. The parties shall appear before the Family Court on 14.12.2019. Sd/- K.HARILAL, JUDGE Sd/- ANNIE JOHN, JUDGE RKM

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