

M. Vs. R.

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Court : Kerala

Decided On : Oct-20-2000

Reported in : II(2001)DMC556

Judge : Mrs. D. Sreedevi, J.

Acts : [Indian Divorce Act, 1869](#) - Sections 10, 13(1), 18 and 19

Appeal No. : O.P. No. 2769

Appellant : M.

Respondent : R.

Advocate for Def. : A.X. Varghese, Adv.

Advocate for Pet/Ap. : K.G. George and; Sebastian Champapilly, Adv.

Disposition : Petition Allowed

Judgement :

D. Sreedevi, J.

1. Petition under Ss. 10, 18 and 19 of the Indian Divorce Act. Petitioner is the wife and the respondent is the husband. The petitioner is a member of the Church of South India and the respondent is a member of Syrian Jacobite Christian Community.

2. At the time of marriage, the petitioner was practising Gynaecologist after having passed her M.B.B.S. and D.G.O. and at present she is employed at S.U.T. Hospital, Trivandrum. The respondent is an Engineer employed in Traco Cables Ltd., a Public Sector undertaking of the Government of Kerala. Their marriage was solemnized on 29th November 1993 at Syrian Jacobite Puthen Church, Kundara as per the religious customs prevailing among the member of the Syrine Jacobite Church. It was an arranged marriage. The proposal for the marriage appeared in the matrimonial column of the Malayala Manorama, on behalf of the respondent. This was followed by negotiation among the members of the petitioner's and respondent's families and the marriage was later settled.

3. At the time of negotiation, it was represented to the petitioner that the respondent had already secured a highly paid job in Saudi Arabia that he would take the petitioner with him to that country immediately after the marriage and that the respondent would secure for the petitioner a suitable job there. The respondent has also shown certain papers and documents written in arabic to show that he secured a job in Saudi Arabia. The respondent and his parents also represented to the petitioner and her parent that he had to join duty in Saudi Arabia by the middle of December, 1993 and on that ground, he urged the petitioner and her parent to get the marriage solemnized within the shortest possible time. It is alleged in the petition that believing the representations of the respondent and his parents the marriage was hurriedly solemnized dispensing with the usual religious practice of announcing three banns of marriage on three consecutive Sundays in the Church. The negotiation for the marriage started during the second week of November 1993 and the betrothal was fixed on 18th November 1993 and the marriage was solemnized on 29th November 1993.

4. After marriage they lived together at the residence of the petitioner at Trivandrum for three days. During the period they spent one day at Kovalam and thereafter they lived at the residence of the respondent at Kundara. According to the petitioner, even during the first night, the respondent preferred to sleep all alone in his bed and the petitioner was directed to sleep on another bed. On the second day they spent their night at the Guest House at Kovalam. The petitioner would allege that on that day she found that the respondent was having anxiety

neurosis and he was literally shivering in front of the petitioner. It was also alleged that even though the petitioner took initiative, the respondent did not show any inclination to consummate the marriage. Therefore, the petitioner suspected that the respondent was impotent.

5. The petitioner gradually discovered that the respondent was playing fraud on her. The story of having secured employment in Saudi Arabia and the related matters were all utter falsehood. The papers and documents shown at the time of negotiation, before marriage, were all fabricated. The petitioner's father was a senior I.A.S. Officer under the Government of Kerala. Only after the marriage she has come to know that the respondent did not have an adequate income from his employment to support his family as his two brothers were students at that time. The petitioner has agreed to marry the respondent on the specific assurance given to him that he has secured a lucrative job in Saudi Arabia. The respondent was deliberately cheating the petitioner and her parents. Therefore, she prays for a decree declaring that the marriage is a nullity on the ground that her consent was obtained by fraud. She has also prayed for a decree of divorce on the ground that the respondent has treated her with cruelty and refusing to consummate the marriage. She also alleged that the respondent had demand Rs. 10 lakhs, viz., 5 lakhs for paying off his debts and another Rs.5 lakhs for seeking employment abroad afresh. As the money was not paid, the petitioner has alleged, that she was treated with cruelty by the respondent by abusing and insulting her.

6. She was even subjected to physical torture and as the life of the petitioner became miserable and unbearable she was forced to leave the matrimonial home on 5th December 1993 and thereafter she has been living separately along with her parents. She issued a lawyer notice on 23rd June 1997 to the respondent demanding for return of the amount of Rs.5 lakhs paid and also the ornaments. He had also threatened the petitioner with dire consequences if she does not return to his house. Therefore, the petitioner also prays for a decree of divorce on the ground on cruelty, desertion and impotency.

7. The respondent filed a counter denying the allegation of fraud, cruelty, desertion, and impotency. He would contend that in the advertisement the

respondent had specified both the options of higher studies and Gulf employment by stating 'doing Computer Postgraduation', 'holding Chartered Gulf employment on leave provision'. In the lawyer notice, dated 21st July 1997 the petitioner sought for a decree of divorce on the ground on cruelty, desertion and impotency of the respondent and there was no allegation regarding cheating on fraud. Therefore, the allegation of fraud in the Original Petition is an after thought introduced to suit the allegations in the petition. The points to be decided in this case are the following:

1. Whether the consent of the petitioner was obtained by fraud?
2. Whether the petitioner was treated with cruelty and
3. Whether the petitioner was deserted for a period of two years and upwards?
4. Reliefs and costs.

8. The evidence consists of the oral evidence of PWs. 1 to 4 and Exts. A1 to A7 on the petitioner's side and the evidence of RWs 1 to 4 and Exts. B1 to B12 on the respondent's side. At the time of hearing, Dr. Sebastian Champappilly, learned counsel for the petitioner, submitted that he does not press for the allegation regarding impotency and his prayer is only for a decree on the ground of fraud, cruelty and desertion, Points 1 to 3 can be discussed together.

9. Admittedly, the marriage proposal appeared in the matrimonial column in Malayala Manorama, dated 3rd October 1993, which is marked as Ext. A1. The advertisement reads as follows:

'Jacobite, well built, Kerala Government Engineer, 30/163, doing Computer Post-graduation, holding Chartered Gulf Employment on leave provision prefer M.B.B.S (background immaterial) employed Professionals/Gulf cases. Thomas Madathimparambi, Thiruvalla- 689103.'

According to the petitioner, pursuant to the advertisement, her father replied and thereafter the respondent and his parents came to the petitioner's residence and told her father that he is an Engineer working in Traco Cables, that he has secured

a job as an Engineer in Riyadh Cables in Saudi Arabia and is about to join there and the petitioner also would get an appointment there as a Gynaecologist. Ext.B1 is the reply, dated 11th October 1993, wherein the respondent's father states:-

'Roy, has successfully completed 1 year training and 1 year probation in Traco Cables, Thiruvalla on 15th May 1993, and Engineer (Production). Being permanent now, he is eligible for Higher Studies/Employment Abroad/ Deputation to any Government Firm, maintaining the lean. he has channelised an Overseas Employment, since long leave for Employment Abroad is permitted by the Company.

In RIYAD CABLES (a Jelly Filled Telephone Cables Project) Saudi Arabia as PRODUCTION PLANNING ENGINEER for 4500 Riyals, he has submitted his documents. His joining date being expected on December 1993'.

On the basis of the above data, the petitioner and her parents decided to go ahead with the proposal and the engagement was celebrated on 18th November 1993. admittedly the respondent was asked his willingness to go for a training in Spain. He would contend that after training in Spain, two Engineers employed in Traco Cables got overseas employment. The petitioner as PW1 states that the respondent and his people represented to her that he has secured an employment in Gulf. It is submitted by the counsel for the petitioner that the respondent is the only earning member of his family and the income for the livelihood of the respondent's family is the income of the respondent. His father being a retired teacher he had to meet the education expenses of the respondent's two brothers. So attracted by the statement that he has secured an employment in Gulf, the petitioner's parents decided to settle the marriage. The petitioner states that after due enquiry, her father came to know that the respondent has only a temporary job in the Traco Cables Ltd. He has secured a No Objection Certificate for M.B.A. course at T.K.M. Engineering College, Kollam. The engagement was celebrated one and a half months after the letter, dated 4th November 1993. In the reply Ext.B1, the respondent's father has stated that he is working as an Engineer in the Traco Cables. Therefore, the statement that he was a Government Engineer cannot be said to have been made with intent to defraud the petitioner. The

petitioner could have ascertained whether the respondent was a Kerala Government Engineer or not. Regarding the allegation that he is doing Computer Postgraduation also she could have collected the details especially when her father was working as a senior I.A.S. Officer under the State of Kerala.

10. The next question is whether the respondent is holding a chartered gulf employment. The respondent as RW1 stated that he had disclosed all his education qualifications and job to the petitioner and her parents. Ext.B5 is the letter issued by the General Manager of Traco Cables asking his willingness to undergo training in Spain on condition to serve the Company for five year after training. This would go to show that there was a proposal to sent Engineer of Traco Cable Ltd., including the petitioner, for training abroad. According to him, it is a stepping stone for seeking employment abroad. He has also stated that if he gets an order for training in Spain, that will be a preference for getting employment in Saudi Arabia as Production Planning Engineer. He would also state that two senior Engineers in his Company have already obtained job in Senior Arabia. Even Diploma holders were sent abroad. Regarding his experience, he states that he had worked in the Kerala Water Authority and in Industrial Training Department at Kollam as Guest Lecturer and he was asked to join Saudi Arabia by one of his friend Najeeb, who is now working there and so he had a fair chance to go abroad. Ext.B6 is the No Objection Certificate for joining the M.B.A. course. So, the statement that he was selected for M.B.A. cannot be said to be an incorrect statement. Ext.B7 is the Admission Card for MBA Entrance Test. He was selected and completed two Semesters and paid fee for the 3rd Semester also, for which he had produced Ext.B8 pay-in-slip. The respondent as RW 1 has deposed that with the consent of his father-in-law he went for the MBA entrance test.

11. PW 2, the father of the petitioner, deposed that the respondent insisted that the marriage should be performed immediately in November itself on the allegation that he is likely to lose his job in Saudi Arabia if there is delay in joining duty and hence he was forced to apply for exemption from three banns on three consecutive Sundays. After getting licence from the Church, the marriage was solemnized. PW.3 is the Parish Priest, who proved Ext.A7 letter issued by Rev. Dr. T.M. John. It was a letter of recommendation to issue to perform the marriage

without three bans on three consecutive Sundays. P.W. 3 has stated that the request came from the father of the petitioner. From the evidence of PWs. 2 and 3, I can very well conclude that there was a request for solemnisation of marriage without any delay and that too, exempting the three bans.

12. In order to prove fraud on the part of the respondent, Dr. Sebastian Champappilly, counsel for the petitioner, submitted that even though the advertisement was given with his address as 'Thomas Madathiparambil Thiruvalla', the address of the respondent's father was given in Ext.B1 on 11th October 1993 as 'C.I. Thomas Tharakan, Tomland, Hospital, Junction, Kundara'. The respondent has stated that Thomas Madathiparambil is the owner of Engineer Quarters to whom he is paying rent. The respondent has confessed that he does not know whether a person by name Thomas Madathiparambil really exists or not. According to the petitioner, the respondent adopted this mode of concealment of real identity as people who knows him would understand that he has issued a false matrimonial advertisement.

13. Simply because the advertisement was given with a different address it cannot be said to be a fraud because in response to the advertisement when the petitioner's father sent a letter, the respondent's father gave a detailed reply, wherein his address has been correctly noted. Therefore, a false address given in the advertisement cannot be said to be a fraudulent act.

14. Another argument advanced is that the respondent has represented to the petitioner that he was drawing a salary of Rs.6,000 per mensem. PW4 is the Chairman and Managing Director, Traco Cables, who has deposed that the respondent joined the Company as Assistant Engineer and was confirmed after one year in the regular service with one year probation. His pay was Rs.3,618 per mensem. R.W.4 is the Manager (Personnel and Administration) of the company. He proved Ext.B12. He has also deposed that he was entitled to certain perquisites in addition to salary and that the total salary including perquisites comes to Rs.6,000 per mensem. Therefore, the statement that he was getting Rs.6,000 p.m. cannot be said to be a false statement.

15. Admittedly the respondent is a Graduate Engineer. Regarding his qualification and salary there was no misrepresentation. Another representation he made to the petitioner is that he has chartered for gulf employment. The dictionary meaning of the word 'chartered' is a written document delivered by the sovereign legislature granting privileges to or recognizing rights of the people or of certain class or individual. From this what one can understand is that he has secured an employment. But, in Ext.B1 reply the respondent's father has clearly noted his education qualification and employment, wherein what he has stated is that he has channelised an overseas employment. The word 'channelised' can only mean channelled. Therefore, the statement that the respondent has told the petitioner that he has secured an employment in Riyadh Cables cannot be correct. The respondent as RW1 has deposed that he was planning to go abroad, that he was asked to express his willingness to go for training in Spain and that if he was sent for training, that will be a stepping stone for an employment abroad. The respondent also deposed that Traco Cables has technical collaboration with a company in U.S.A. and as they purchased machinery from West Germany, Spain and France the Company had a contract with Spain to engage Engineers in Traco Cables in Spain and accordingly his willingness was asked by the General Manager as seen in Ext.B5. The statement that two senior Engineer and also a Diploma holder have gone abroad also gave him a hope that he can also get a job. Therefore, if at all the respondent had made any statement that he is expecting to go abroad it cannot be said to be a fraudulent statement. The statement that two senior Engineers of his company have obtained foreign employment is not challenged by the petitioner. Therefore, the statement of the respondent that he had channelised for Gulf employment cannot be said to be fraudulent representation.

16. The learned counsel for the petitioner submitted that even though he has raised impotency, desertion and cruelty for a declaration that the marriage is a nullity, he has limited his relief to declaration of nullity of marriage on the ground of fraud and in case there is no fraud, he prays for a decree of divorce on the ground that the petitioner was treated with cruelty by her husband and that there was constructive desertion on his party.

17. The petitioner as PW.1 has deposed that the respondent subjected her to torture, both physically and mentally. She states that the respondent demanded Rupees Ten lakhs from her, ie., Rupees Five lakhs for paying off his debts and Rupees Five Lakhs for seeking fresh employment abroad. She testified that as the amount was not paid, she was put to physical and mental torture and her life was made miserable in the house of the respondent. It is also stated by her that on 4th December 1993 he picked up a quarrel with her and so she wanted to inform her parents. Then the respondent caught hold of her and twisted her hand causing severe pain and thus she could not inform her parents about the till-treatment of the respondent. She states that her mother-in-law has opined that she would hand herself. According to her, as her life in the matrimonial home was made miserable, she was forced to leave the house and, accordingly, she left the house on 5th December 1993. The respondent denied all the above statements regarding cruelty.

18. The respondent in his counter has stated that the petitioner was abnormal and she has some mental illness. He has stated that at the time of marriage, the petitioner was in an irritative mood and she was resisting the photographers and videographers from taking the photographs of the petitioner. He doubt the mental condition of the petitioner when two lady doctors, who were present at the time of marriage, had told him that the petitioner is innocent. According to him, on hearing this, he came to know that she has some mental disorder....He has also stated that the two lady doctors came to his room along with the petitioner at the late hours of night and informed him that the petitioner is not well and hence to pardon her and, therefore, the petitioner separated his bed from that of her at the instance of her parents and this continued for three days. It is also contended by the respondent that the petitioner was not willing to consummate the marriage. He states that he has seen the petitioner taking medicines at night and after taking medicine, she used to fall asleep avoiding his company. He has also stated that the behaviour of the petitioner caused a suspicion in his mind that the petitioner has some psychic problem and he, within a few days after marriage, enquired about her pre-material and came to know that she had a love affair while she was undergoing her M.D. Course at Jipner and that he had cheated her. He had also raised an allegation that the petitioner's father is facing vigilance enquiry regarding misappropriation of

money. According to him the petitioner lived with him-till 14th January 1995. To prove this he relies on an application for telephone connection signed by her on the 26th December, 1993. He has examined RW 3 Senior Manager. He has deposed that the petitioner's father met him 3 or 4 months after the marriage in the factory and asked him to arrange a shift duty in such a way as to enable the respondent to join M.B.A. course. Relying on this it is submitted that the allegation that she left the house in 1993 itself is wrong.

19. According to the respondent, the marriage was consummated on the fourth day of the marriage. He states that at the time of sexual intercourse the petitioner was in semi-conscious mood as she was consuming medicine. The petitioner would allege that because of the abnormal behaviour of the respondent the marriage could not be consummated. Even if it is admitted that there was an imperfect and partial intercourse, it cannot amount to consummation. The petitioner's definite allegation is that the respondent was suffering from some kind of neurosis and hence the marriage could not be consummated. The respondent has produced a certificate, Ext.B9, to show that he is sexually fit. Further, the respondent refused to undergo medical examination. The certificate produced by him does not show that he is potent. It only shows that there is no clinical evidence to suggest that he is impotent. It further states that it is being investigated. He may be potent, but according to the petitioner, he is impotent. The doctor has deposed that he has advised further investigation, for which the respondent has not turned upon. Dr. Sebastian Champapilly submitted that the respondent refused to undergo medical examination and so it has to be found that he has avoided the examination and therefore, Court can draw an adverse inference. So, If there was no consummation of marriage, that will amount be cruelty. To prove that there was no consummation of marriage, the petitioner has produced a certificate issued by Dr. Lalitha, Gynaecologist. This certificate shows that she is still a virgin. The statement that she is a virgin is not denied by the respondent. The medical Officer who issued the certificate was not examined.

20. In the counter filed by the respondent, he has alleged that the petitioner's suffering from mental illness. As RW 1, he has deposed that she has some mental problem. He casts aspersions on the mental condition of the petitioner. Admittedly

the petitioner is working as the Gynaecologist in the Uthradam Tirunal Hospital at Thiruvananthapuram. The respondent also depicted the petitioner as a person taking medicines every day during night. He has also alleged pre-marital love affair against the petitioner. To prove that she is suffering from mental disorder and that she has a love affair, no evidence has been let in by the respondent.

21. The respondent has also stated that the petitioner's father is facing a Vigilance enquiry. But, he could not produce any evidence to prove the same. Another allegation raised against her is that her brother tried to commit suicide. That was also denied by the petitioner and to prove this, the respondent has not produced, any evidence. In spite of the mental illness, previous love affair and drug addiction, the respondent wants to live with her. This also appears to be strange. The respondent has made false and scandalous statements against mental condition. IN *Gangadharan v. T.T. Thankam*, AIR 1988 Kerala 244 this Court held that false, scandalous, malicious, baseless and unproved allegation made by one spouse, whether by letters or written statement or by any other mode, amounts to cruelty. It reads as follows:

'Cruelty should be of such a nature as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent that it would be impossible for them to live together without mental agony, torture or distress to entitle the party to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning 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.'

The same view was affirmed by the Supreme Court in *V. Bhagat v. D.Bhagat*, AIR 1994 SC 710. The Court held as follows:

'Mental cruelty in S. 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such of nature that the parties cannot reasonable be expected to live together. The

situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party'.

The Delhi High Court in *Savitri v. Mulchand*, AIR 1987 Delhi 52, held that if false allegations are made in the written statement, that would amount to cruelty, as the Court has power to take into consideration of subsequent events. Irresponsible insinuations and allegations which were made during the course of litigation against the husband or wife and his or her family could not be brushed aside as held in *Pushpa Rani v. Krishna Lal*, AIR 1982 Delhi 107 and *Parihar v. Parihar*, AIR 1978 Raj. 140. The Delhi High Court in *Ashok Sharma v. Santosh Sharma*, AIR 1987 Delhi 63, reiterated the very same view expressed in the above decisions. A Full Bench of this Court in *Princy v. Varkey*, 2000 (1) KLT 756, held that inflicting mental agony is also cruelty.

22. Admittedly, the allegations of cruelty are not made in the counter. The respondent as RW 1 had deposed about the said allegations for which he could not adduce any evidence. It is open to the court to take into consideration events which had taken place subsequent to the filing of the petition. To prove cruelty there is only the interested testimony of the petitioner and her father. But the contentions in the counter that she is suffering from mental disorder, that she is impotent and that she is consuming drugs and that she had a previous love affairs are not supported by any evidence. What he has deposed is this: 'Even though she was a psychiatric patient I reposed confidence on her'. Therefore, the said allegations are baseless. Such allegations amount to cruelty. In order to subserve the interest of justice and to avoid multiplicity of another round of litigation and allow the precious period of their life to go waste, the court can take note of subsequent events and grant reliefs in matrimonial matters. Therefore, even though there is no evidence of physical assault, the malicious and false allegations made against the petitioner amounts to mental cruelty. On going through the pleadings and evidence in this case, I can find that the relationship between the parties had deteriorated to such an extent that it would be impossible to live together without mental agony, as he himself admits that as his relationship with the petitioner got strained, 3rd marriage anniversary was not celebrated. He also admits that from 1993 to 1998 as his relationship with the petitioner was strained,

he did not join M.B.A. Therefore, in order to subserve the interest to justice as the respondent has treated the petitioner with cruelty, she is entitled to get a decree of divorce.

23. It is also submitted by the counsel for the petitioner that the petitioner was forced to leave the matrimonial home because of the cruel behaviour of the respondent and his parents. To prove that there was desertion on the part of the petitioner even though there is no concrete evidence to prove the same, from the circumstances prevailed upon the parties it can be seen that there is constructive desertion in view of the cruelty mentioned above.

In the result, the Original Petition is allowed and the marriage between the petitioner and the respondent which was solemnized on 29th November 1993 at Syrian Jacobite Puthen Church, Kundara is dissolved by a decree nisi.

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