

Jacob Mathew Vs. Mrs. Maya Philip Alias Annama and anr.

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Court : Kerala

Decided On : Sep-15-1998

Reported in : AIR1999Ker192

Judge : K.A. Mohammed Shafi, J.

Acts : [Divorce Act, 1869](#) - Sections 10, 15, 18 and 43; Guardian and Wards Act, 1890 - Sections 25

Appeal No. : O.P. (Div.) No. 14435 of 1996-R

Appellant : Jacob Mathew

Respondent : Mrs. Maya Philip Alias Annama and anr.

Advocate for Def. : P. Sukumaran Nair (Sr.);, Mohan Pulikkal and; A.S.P. Kur

Advocate for Pet/Ap. : George Cherian, Adv.

Judgement :

ORDER

K.A. Mohammed Shafi, J.

1. This petition is filed by a Christian husband under Sections 10 and 34 of the Indian Divorce Act for dissolution of his marriage with the 1st respondent on the ground of her adultery after the marriage and for compensation of Rs. 2.5 lakhs as

damages from the 2nd respondent for the adultery committed by him.

2. The petitioner has also filed C.M.P. 12768/ 97 for custody of the minor child from the 1st respondent.

3. It is the common case that the petitioner and the 1st respondent belong to Syrian Christian community of Roman Catholic Sect and their marriage which was an arranged one was solemnized on 16-9-1990 at Vimalamatha Church, Kadalikkad according to Christian rites and ceremonies and after marriage they have been living together in the house of the petitioner. It is also admitted that a child was born in the wedlock on 9-8-1991 and after delivery the 1st respondent joined the petitioner at his residence in Thevara in early October, 1991. It is also the common case that difference of opinion developed between the petitioner and the 1st respondent thereafter and from 5-1-1992 onwards the petitioner and the 1st respondent have parted the company and have been residing separately.

4. According to the petitioner, though the marital relationship between the petitioner and the 1st respondent was very cordial till December, 1991, thereafter difference of opinion developed between them mainly regarding the style of living. According to him, the 1st respondent wanted to lead a very luxurious life and praised city life and hotel food and condemned the agricultural operations carried out by the petitioner in his properties. According to him, at the instigation of the father of the 1st respondent she left the house of the petitioner on 5-1-1992 without his consent and began to live with her parents. The 1st respondent did not return to the petitioner in spite of efforts made through mediation. The 1st respondent filed a petition before the Ecclesiastical Court, Ernakulam for a declaration of nullity of marriage with the petitioner making false and baseless allegations. A decree for separation is granted by the Ecclesiastical Court on the ground of incompatibility of marriage. The matter is pending in suo motu appeal before the Eparchial Tribunal. The 1st respondent filed O.S. 825/93 before the Sub Court, Kottayam for return of money and gold ornaments and that suit was settled in March, 1995. Since the child was in the custody of the 1st respondent, O.P. No. 99/ 96 filed by the petitioner before the District Court, Kottayam under the Guardian and Wards Act for custody of the minor child is pending. Though the

petitioner and the 1st respondent are governed by the provisions of the Indian Divorce Act, for the purpose of divorce no petition is filed in any competent Court for a decree of nullity of marriage under the Indian Divorce Act. The Ecclesiastical Court has no jurisdiction to entertain a petition for dissolution of marriage. In July, 1996 the petitioner came to know that the respondents developed illicit intimacy and they are living in adultery. The adultery committed by the respondents is without the consent and connivance of the petitioner. The marriage between the petitioner and the 1st respondent subsists. The 2nd respondent has got wife and two children living. The respondents are living together and having willing sexual intercourse with each other. Therefore, the petitioner is entitled to a decree dissolving the marriage with the 1st respondent due to the adultery of the respondents. The adulterous living of the 1st respondent with the 2nd respondent has tarnished the image and, reputation of the petitioner who is an advocate practising in Ernakulam. The fact that the 1st respondent is living in adultery with the 2nd respondent has become a topic of discussion among the advocates and others in Ernakulam. Therefore, the petitioner is entitled for damages of Rs. 2.5 lakhs from the 2nd respondent. Since the respondents are living in adultery it will not be conducive to keep the minor son of the petitioner with the respondents. Though a petition is pending before the District Court for custody of the child, the petitioner has filed a separate petition in this O.P. C.M.P. 12768/97 for custody of the minor child from the 1st respondent.

5. The respondents resisted the O.P. by filing separate counter-affidavits. The 1st respondent has contended as follows. The continued harassment and cruelty to which the 1st respondent was subjected to by the petitioner and his mother is the reason for the difference of opinion that arose between the petitioner and the 1st respondent which ultimately became irreconcilable. Being the only child of the mother, she had an all pervasive influence and hold on the petitioner which overwhelmed all other considerations including his duties as husband. The mother of the petitioner had been interfering and influencing the normal personal and marital affairs of the petitioner and the 1st respondent. When difference of opinion arose between them, the petitioner always sided with his mother and both of them used to abuse and humiliate her. The petitioner occasionally assaulted the 1st respondent from Kadalikkad as well as from Ernakulam. When the physical and

mental cruelty assumed unbearable proportions the 1st respondent had to leave the petitioner for good. The Ecclesiastical Tribunal found the contentions of the 1st respondent true and declared her marriage with the petitioner as null and void. The allegations that the 1st respondent is living in adultery with the 2nd respondent and that the petitioner knew about that fact by the end of July, 1996 are not true. After the marriage with the petitioner was declared ab initio void by the Ecclesiastical Court on 17-10-1994 the 1st respondent is not at all the wife of the petitioner and they are living separately for years since the relationship between them had irretrievably broken down. The earlier marriage of the 2nd respondent was already nullified as per the Canon Law, Therefore the marriage between the respondents was arranged and they were declared and blessed as husband and wife in a Church in Kottayam on 14-4-1996 attended by friends and relations. Ever since the marriage the respondents are living as husband and wife. On the bona fide belief that the earlier marriages of the respondents are nullified as per Canon Law, they have entered into the marital life. Therefore, the allegation that the respondents are living in adultery is unsustainable. The petitioner was informed of that proposed marriage well in advance through third parties and he in fact, welcomed the same. Therefore, the contention that the petitioner had no knowledge of the marriage between the respondents is not true. Therefore, the petitioner is not entitled to a decree for divorce of the marriage with the 1st respondent on the ground of adultery.

6. The 1st respondent filed an additional counter-affidavit contending that the above O.P. under Section 10 of the Indian Divorce Act is not maintainable before this Court since the proceedings ought to have been initiated before the Family Court under the provisions of Section 15 of C.P.C., in the absence of any allegation of fraud made in the petition seeking relief under Section 19 of the Indian Divorce Act.

7. In the counter-affidavit filed by the 2nd respondent similar contentions raised by the 1st respondent are raised. The 2nd respondent further contended that his earlier marriage was declared as null and void with effect from 7-4-1994 by the Arch Diocesan Tribunal, Ernakulam and the matter is pending at Rome. He has also contended that before deciding to marry the 1st respondent he had

approached the petitioner more than once through persons known to all the parties to know about the response of the petitioner to the proposal. He knew through those persons -that the petitioner had absolutely no objection to his marrying the 1st respondent and in fact, he welcomed the same. The petitioner and his associates knew about the decision of the respondents to marry and the date of marriage before the marriage. Therefore, the allegation that the petitioner knew about that fact only by the end of July, 1996 is not true. The claim for damages made by the petitioner is absolutely unsustainable. The allegation of adultery made against the 2nd respondent with the 1st respondent is absolutely untenable.

8. The petitioner filed a replication controverting the allegations made by the respondents in their counter-affidavits and reiterating the very same contentions raised by him in the O.P.

9. The 1st respondent has filed C.M.P. No, 8956/97 under Section 15 of the Indian Divorce Act to pass a decree for dissolution of her marriage with the petitioner on the ground of cruelty.

10. PW1 and RWs. 1 to 3 are examined. Exts.A1 to A5 and B1 to B6 are marked.

11. The issues that arise for consideration in this O.P. are : (1) Whether the petitioner is entitled to dissolution of his marriage with the 1st respondent on the ground of adultery with the 2nd respondent. (2) Whether the 1st respondent is entitled to a decree for dissolution of her marriage with the petitioner on the ground of cruelty. (3) Whether the petitioner is entitled to any and what damages from the 2nd respondent. (4) Whether the petitioner is entitled to the custody of the minor child.

12. The preliminary objection raised by the 1st respondent regarding maintainability of this petition under Section 10 of the Indian Divorce Act before this Court was considered by this Court and by order dated 30-7-1997 held that the above O.P. is maintainable and can be tried before this Court. That order passed by this Court was challenged by the 1st respondent before a Division Bench of this Court in M.F.A. No. 951/ 97. By judgment dated 9-12-1997 the Division Bench of this Court confirmed the order passed by this Court regarding

maintainability of the above petition before this Court and dismissed the appeal.

13. Issue No. 1 : It is admitted that the petitioner and the 1st respondent are Syrian Christians belonging to Roman Catholic sect, that their marriage was betrothed on 8-9-1990 and the marriage was solemnized on 16-9-1990 at Vimalamatha Church, Kadalikkad in accordance with the Christian rites and ceremonies and that the petitioner and the 1st respondent lived together in the petitioner's house at Kadalikkad. They shifted their residence from Kadalikkad to Ernakulam in May, 1991 and stayed in the petitioner's house at Thevara. A male child was born to the petitioner and the 1st respondent in their wedlock on 9-8-1991. The 1st respondent was taken to her parental house at Kottayam some days before delivery and after delivery she returned to the petitioner in early October, 1991 and they lived together till 5-1-1992. On 5-1-1992 the 1st respondent left the petitioner and went along with her father. Thereafter they are living separately.

14. In February, 1992 the 1st respondent filed a petition for declaration of nullity of marriage with the petitioner before the Ecclesiastical Court and a decree declaring the marriage between the petitioner and the 1st respondent as null and void on the ground of incompatibility is passed by the Ecclesiastical Court on 17-10-1994 as evidenced by Ext. B 6 order. It is admitted that the matter is pending in appeal before the Eparchial Tribunal and no order is passed so far by the appellate authority.

15. The 1st respondent sent a registered notice claiming Sthreedhanam and ornaments from the petitioner on 15-3-1992 to which the petitioner sent a reply dated 28-3-1992 denying Sthreedhanam and custody of jewels. Then the 1st respondent filed O. S. 825/93 before the Subordinate Judge's Court, Kottayam claiming Sthreedhanam and ornaments against the petitioner and his mother. A certified copy of the plaint is Ext. B1. The petitioner and his mother filed written statement dated 20-7-1994 denying their liability to pay the Sthreedhanam and gold ornaments. Ext. B 2 is the certified copy of the written statement. Subsequently the suit was compromised and Ext. B 3 is the certified copy of the compromise petition filed by the 1st respondent, the petitioner and his mother before the Sub Court, Kottayam in O. S. 825/93 dated 30-3-1996. Exts. B 4 and B

5 are the certified copies of judgment and decree passed by the Sub Court, Kottayam in O. S. 825/93 on 30-3-1996 in accordance with Ext. B 3 compromise.

16. The petitioner has contended that after the 1st respondent deserted him on 5-1-1992 illicit intimacy developed between the respondents and they are living in adultery and they are living together as husband and wife fully conscious of the fact that the marriage between the 1st respondent and the petitioner is subsisting and the 2nd respondent has got his wife and two children living.

17. The 1st respondent has contended that when the petitioner and the 1st respondent withdrew from cohabitation on 5-1-1992 their matrimonial life ended and after the decree of nullity of marriage was passed by the Ecclesiastical Court on 17-10-1994 and the compromise in O. S. 825/93 was entered into between the petitioner and the 1st respondent settling all monetary claims and ending their status as husband and wife. According to the 1st respondent, when Ext. B1 suit was filed the intention was to terminate the marital ties with the petitioner and in the written statement filed by the petitioner and his mother in that suit evidenced by Ext. B 2 there was no contention that the marriage was subsisting and they only contended that no Sthreedhanam is paid nor any ornaments are to be given by them to the 1st respondent. Therefore, according to her, in view of the fact that the Ecclesiastical Court declared her marriage with the petitioner as null and void and all monetary claims were settled and the marital status as husband and wife between the petitioner and herself was severed as evidenced by Exts. B 3 to B 5, compromise petition, judgment and decree, she married the 2nd respondent on 14-4-1996. According to her, the petitioner was aware of her activities and whereabouts and he was intimated about her marriage with the 2nd respondent before the actual solemnization of the marriage and in fact the petitioner was instrumental or connived to the marriage with the 2nd respondent. Therefore, according to the respondents, their marriage is legal and valid and the allegation that the petitioner knew that the respondents are living in adultery only by the end of July, 1996 is absolutely false.

18. The word 'adultery' as understood in common parlance and dictionary meaning means voluntary sexual intercourse of a married person with a person to whom he

or she is not married or willing sexual intercourse between the husband or wife with a third person while the marriage subsists. Therefore the subsistence of the marriage against whom adultery is alleged is the most important factor to be decided.

19. Even though the 1st respondent has contended that at the time of filing of the suit evidenced by Ext. B 1 plaintiff the marital ties between the petitioner and the 1st respondent was terminated, it is not stated either in the plaintiff Ext. B1 or in the compromise petition Ext. B3 that the marital bond between the petitioner and the 1st respondent is severed though in the plaintiff it is alleged that the marriage between the 1st respondent and the petitioner is illegal, null and void and therefore the 1st respondent has filed a petition before the Archdiocesan Tribunal for declaring that the marriage is invalid. Admittedly the 1st respondent has filed O. P. 352/97 before the Family Court, Ernakulam and that O. P. was dismissed for default by the Family Court by the order dated 6-2-1998. Ext. A 4 is the certified copy of the order passed by the Family Court in O. P. 352/97. Ext. A 5 is the certified copy of B diary maintained by the Family Court, Ernakulam in respect of O.P. 352/97. It is seen from Ext. A 5 that the 1st respondent presented the plaintiff in O.P. 352/97 before the Family Court, on 7-6-1997 and the O.P. was dismissed on 6-2-1998 as the 1st respondent, the petitioner therein was absent in Court. Even though the respondents have filed separate counters contending that the 1st respondent is not the wife of the petitioner in this O.P., subsequently the 1st respondent has filed C.M.P. No. 8956/97 on 19-3-1997 praying for dissolution of marriage with the petitioner on the ground of cruelty. If in fact, there was no marital relationship between the petitioner and the 1st respondent and their marital tie was severed by filing the suit before the sub-Court, Kottayam and the compromise decree therein evidenced by Exts. B 3 to B 5 and the decree of nullity passed by the Ecclesiastical Court, there is absolutely no reason for the 1st respondent to file O.P. 352/97 before the Family Court or to file C.M.P. 8956/97 before this Court for dissolution of her marriage with the petitioner. Therefore, these facts establish that the contention of the respondents that the marital tie between the petitioner and the 1st respondent was severed when they decided to live separately and by passing of the order by the Ecclesiastical Court declaring the marriage between the 1st respondent and the petitioner as null and void as evidenced by Ext. B 6, is

not at all sustainable and the 1st respondent was aware that the marriage between the petitioner and the 1st respondent is subsisting and should be dissolved under due process of law.

20. The argument advanced by the learned senior counsel for the 1st respondent that under Travancore Christian Succession Act Sthreedhanam is the money given by the father to the daughter at the time of the marriage and the husband is only a trustee for the wife in respect of her Sthreedhanam, relying upon the decision in *George Lonan v. Arthur Peter Hoogwerf* (1924) 14 TLJ 1 and therefore the recitals made in Ext. B 1 plaint and B 2 written statement in O. S. 825/ 93 of the sub Court, Kottayam and the compromise evidenced by Ext. B 3 settling all monetary claims between the 1st respondent and the petitioner, and the 1st respondent returned even the wedding ring given by the petitioner establish that the marital relationship between the petitioner and the 1st respondent did not subsist after the decree passed by the Ecclesiastical Court as evidenced by Ext. B 6, is of no force since it is well settled that the marriage between a Christian husband and wife can be dissolved or annulled only by a decree of the civil Court.

21. A single Judge of this Court by judgment in *Kurian v. Alphonsa* 1986 Ker LT 731 held that the law of divorce as far as members of the Christian community are concerned, is governed by the provisions of the Divorce Act and the rights accrued out of a legal marriage cannot be adjudicated by the Epharchial Tribunal.

22. In the decision in *Jose v. Alice* (1988) 2 Ker LJ 740 : (1989 Cri LJ 1527) a Division Bench of this Court held that the decision of the Archdiocesan Tribunal and the Epharchial Tribunal do not in any way affect the Civil rights of the parties arising out of the marriage between them duly solemnized in accordance with Section 5(1) of the Indian Christian Marriage Act, 1872 by a minister of the church who had received episcopal ordination and the marriage becomes null and void only on the passing of the decree of nullity by the Court.

23. By the decision in *George Sebastian v. Molly Joseph* (1994) 2 Ker LT 387 : (AIR 1995 Kerala 16) a Full Bench of this Court held that the rights flowing out of a legal marriage cannot be interfered with by Epharchial Tribunal and the marriage cannot be dissolved except by resort to statutory provisions of law. It is also held

by the Full Bench that even if the Ecclesiastical Court grants annulment or divorce the church authorities will still continue under disability to perform or solemnise a second marriage for any of the parties until the marriage is dissolved or annulled in accordance with the statutory law in force in that regard.

24. In the decision in Molly Joseph v. George Sebastian (1996) 6 SCC 337 : (AIR 1997 SC 109) the Supreme Court confirmed the judgment of the Full Bench of this Court reported in (1994) 2 Ker LT 387 : (AIR 1995 Kerala 16) and held that the provisions of the Divorce Act exclude jurisdiction of Ecclesiastical Tribunal or any Tribunal other than the Courts envisaged by it to annul a marriage.

25. The contention of the respondents that as the judgment of the Full Bench of this Court reported in (1994) 2 Ker LT 387 : (AIR 1995 Kerala 16) was stayed by the Supreme Court at the time their marriage was solemnized on 14-4-1996, either the decision of the Full Bench of this Court or the subsequent ruling of the Supreme Court will not nullify their marriage, is not sustainable, since long before the judgment passed by the Full Bench reported in (1994) 2 Ker LT 387 : (AIR 1995 Kerala 16) there were other judgments of this Court including that of the Division Bench reported in (1988) 2 Ker LJ 740 ; (1989 Cri LJ 1527) stating the correct law on the point. Likewise, the contention of the respondents that they entered into the marriage bona fide believing that the decree of nullity of their marriage passed by the Ecclesiastical Court is valid and binding, is also not sustainable as it is against the settled position of law enunciated by this Court as well as the Canon Law. 26. As already noted, even though the Ecclesiastical Court has passed a decree declaring the marriage between the 1st respondent and the petitioner as null and void due to incompatibility as evidenced by Ext. B 6 order, admittedly the matter is pending in appeal before the Epharchial Tribunal and so far no order is passed by the Tribunal.

27. The contention of the 2nd respondent is that his marriage with his earlier wife is dissolved by the Ecclesiastical Court and the matter is pending before Rome now.

28. Canon No. 780 in the Code of Canons of the Eastern Churches lays down that the marriage of Catholics is regulated not only by Divine Law but also by Canon

Law, with due regard for the competence of the civil authorities concerning the merely civil effects of such marriage. Therefore, Canon No. 780 establishes that the marriage of Catholics is subject to civil law with regard to civil effects of marriage. Canon No. 789 (2) stipulates that a marriage which cannot be recognised or entered into according to the norms of the civil law cannot be blessed. Canon No. 802 (2) lays down that even if the first marriage is invalid or dissolved for any reason, it is not licit to celebrate another marriage before the invalidity or dissolution of the first is legitimately and certainly established. Canon No. 841 deals with the registration of marriage in the prescribed form as soon as possible after the celebration of the marriage. Canon No. 842 lays down that if a marriage is convalidated in the external forum, declared null or in legitimately dissolved other than by death, the pastor of the place of celebration of the marriage must see to it that a notation is made in the marriage and baptismal registers. Canon No. 1370 lays down that after the sentence which first declared the nullity of marriage has been confirmed at the appellate level either by decree or by another sentence, those persons whose marriage was declared null can contract new marriages immediately after the decree or the second sentence has been made known to them unless a prohibition is attached to his sentence or decree, or it is prohibited by a determination of the local hierarchy. Canon No. 1504 lays down that civil laws to which the law of the Church defers should be observed in canon law with the same effects, insofar as they are not contrary to divine law and unless it is provided otherwise in canon law.

29. From the above provisions of the Canon Law it is clear that the marriage between the respondents is not legal or valid but illegal and void since their marriage is against the civil law as well as the Canon Law referred to above, especially due to the fact that the decree of nullity passed at the first instance by the Ecclesiastical Court is not confirmed by the appellate tribunal and the same is pending consideration before the appellate tribunal.

30. The respondents have admitted that they have undergone the marriage on 14-4-1996 and they are living as husband and wife thereafter and a child is born in their relationship. As already found, the alleged marriage between them is contrary to the provisions of the Canon Law and their contention that their marriage is valid

under Canon Law is not sustainable and since the marriage between the 1st respondent and the petitioner is not annulled or dissolved under the provisions of the Indian Divorce Act, their marriage still subsists. Hence the alleged marriage between the respondents is null and void and their relationship and cohabitation is living in adultery.

31. The further question to be considered is whether the petitioner was instrumental, consenting or connived at the marriage of the 1st respondent with the 2nd respondent. The fact that the petitioner and the 1st respondent had been living separately from 5-1-1992 onwards is admitted. The Ecclesiastical Court passed Ext. B 6 order declaring the marriage between the petitioner and the 1st respondent as null and void due to incompatibility, on 17-10-1994. The suit filed by the 1st respondent claiming Sthreedhanam and ornaments before the sub Court, Kottayam was compromised and a compromise decree was passed on 30-3-1996 as evidenced by Exts. B 3 to B5. This O.P. for dissolution of marriage with the 1st respondent on the ground of adultery is filed by the petitioner on 12-9-1996 alleging that he knew about the adultery in July, 1996.

32. The senior counsel for the 1st respondent argued that the petitioner is not entitled to a decree for dissolution of marriage on the mere allegation of adultery and he should prove that he is really aggrieved since the adultery deprived him of his marital status. Therefore, according to him, if the respondents could establish before Court that there is connivance or acquiescence on the part of the petitioner in the adultery between the respondents or there is long delay in filing the above O.P. for dissolution of marriage, the petitioner is not entitled to a decree for dissolution of marriage on the ground of adultery.

33. The senior counsel for the 1st respondent further submitted that after the compromise decree in O. S. 825/93 on 30-3-1996 the marital relationship between the petitioner and the 1st respondent ended for ever and the petitioner as PW 1 has deposed that he has been enquiring about the 1st respondent. Therefore, according to him, the contention of the petitioner that he did not know about the marriage between the respondents till July, 1996 cannot be accepted and knowledge of the marriage between the respondents should be imputed to the

petitioner from the very date of marriage viz. 14-4-1996. Therefore, according to him, long delay in filing the above O. P. for dissolution of marriage with the 1st respondent by the petitioner till 12-9-1996 establishes that the petitioner has connived and acquiesced in the marriage between the respondents.

34. The learned senior counsel for the 1st respondent also argued that the respondents have contended that RW 3, an advocate and a relation of the 2nd respondent was sent to the petitioner to ascertain the views of the petitioner with regard to the 1st respondents marriage with the 2nd respondent and he welcomed the same. RW3 has deposed that in February, 1996 he went to the house of the petitioner and enquired him about the marriage of the respondents 1 and 2 and the petitioner welcomed the same. The learned senior counsel argued that there is absolutely no reason to disbelieve RW3 and therefore, the evidence on record establishes that the petitioner welcomed the marriage between the respondents and connived at their marriage so that he can also marry again.

35. The learned senior counsel further argued that the marriage between the respondents was a ' public marriage in a Church well attended by friends and relations and RW1 has deposed that the petitioner was aware of her marriage with the 2nd respondent immediately after the marriage. He further argued that PW 1 has deposed that he has been making enquiries about the 1st respondent after she left him on 5-1-1992 and there were attempts at mediation. Therefore, according to him, there is every possibility for the petitioner to come to know about the marriage between the respondents immediately after it was contracted on 14-4-1996. He further argued that considering the fact that the petitioner and the respondents are highly placed in society, the petitioner and the 2nd respondent being practising advocates in Ernakulam, the 1st respondent being the daughter of an advocate who was practising in Kottayam till his death and she has brother and other relations who are advocates practising in Kottayam, the acquiescence and connivance of the petitioner at the marriage of the respondents is established and as such the petitioner is not entitled to a decree for dissolution of marriage with the 1st respondent on the ground of adultery with the 2nd respondent.

36. According to the 1st respondent as RW1 the marriage with the 2nd respondent was arranged and settled by her father in April, 1996. Even though the respondents have contended that their marriage was contracted on 14-4-1996, apart from the allegations made by them in their counter-affidavits no evidence is adduced by them to show that their marriage was performed on 14-4-1996. Though the petitioner has filed C.M.P. 8713/98 to call upon the respondents to produce the marriage certificate of the 1st respondent with the 2nd respondent from Peroor Matha Church as alleged by the 1st respondent and this Court directed the 1st respondent to produce the documents or to file an affidavit, no such marriage certificate is produced or affidavit is filed by the 1st respondent. In the counter-affidavits filed by the respondents apart from alleging that their marriage was blessed in a Church in Kottayam on April 14, 1996, neither the name of the Church from which the marriage was contracted nor the minister who blessed them is mentioned. RW1 has deposed that her marriage with the 2nd respondent was fixed in March, 1996, that she does not know whether there were marriage bands, that her marriage with the 2nd respondent was solemnized from Peroor Matha Church and Fr. Mani solemnized the marriage. But apart from the ipse dixit of RW1, no evidence is adduced by the respondents regarding the solemnization of their marriage. Neither Fr. Mani who according to RW1 has blessed her marriage with the 2nd respondent nor any responsible person from the Peroor Matha Church to prove that such a marriage between the respondents was solemnized from the Church on 14-4-1996 as alleged by the respondents is examined in this case. No person who participated either in the betrothal or the marriage is examined. Therefore, it is clear that there is absolutely no acceptable evidence on record to prove that the marriage between the respondent was solemnized on 14-4-1996 from Peroor Matha Church and Fr. Mani had blessed them as husband and wife. Therefore, the contention of the respondents that the marriage between the respondents was a public marriage attended by their friends and relations and it was known to the public on the day of its solemnization, is not acceptable.

37. In the counter-affidavit filed by the 1st respondent in Para 9 it is only stated that the petitioner was informed of their proposed marriage well in advance through third parties and he in fact, welcomed the same and therefore, the

contention that he had no knowledge thereof is untrue and unsustainable.

Apart from stating that the petitioner was informed through third parties, the names of the persons through whom the petitioner was allegedly informed about the proposed marriage between the respondents are not mentioned in the counter-affidavit. In the counter-affidavit filed by the 2nd respondent in Para 5 it is stated that before deciding to marry the 1st respondent he had approached the petitioner on more than one occasion through persons known to all the parties to know about the response of the petitioner to the proposal and he learnt through those persons that the petitioner has absolutely no objection to his marrying the 1st respondent and in fact he welcomed it. It is also stated that the facts that the respondents have decided to get married and its date were well known to the petitioner and his associates before hand. In the counter-affidavit filed by the 2nd respondent also it is not stated through whom the petitioner was allegedly informed by the 2nd respondent about his proposed marriage with the 1st respondent. At the stage of evidence the respondents have contended that it is through RW3, a relation of the 2nd respondent that the petitioner was informed about the proposal for the marriage between the respondents and the petitioner welcomed the same.

38. RW3 has deposed that the 2nd respondent is his father's cousin and he practised in Ernakulam along with the 2nd respondent's father, as advocate. According to RW3. he met the petitioner and talked to him regarding the matter in February, 1996 and the petitioner replied that he welcomes the 2nd marriage of the 1st respondent so that he can also marry.

39. The petitioner has vehemently contended that RW3 never talked to him regarding the proposal for the marriage between the respondent in February, 1996 or at any time and RW3 being a close relation of the 2nd respondent has come and deposed before this Court with the only deliberate intention to help the respondents. RW3 has deposed that he has not informed anybody regarding the enquiry made by him with the petitioner in February, 1996 about the proposed marriage between the respondents.

40. Even though the respondents vehemently contended that the evidence of RW3 who is a practising advocate regarding this aspect has to be accepted, since he

has got nothing against the petitioner in this case, as it is admitted by RW3 himself that he is a close relation of the 2nd respondent and was practising along with the father of the 2nd respondent, I find considering the peculiar nature and circumstances of the case that it is not at all safe or advisable to accept the testimony of RW3 in this regard without any material corroboration from other sources. Therefore, the contention of the respondents that the petitioner was informed about the proposed marriage in February, 1996 itself and he was aware of the marriage between the respondents much in advance of the marriage and their marriage was solemnized on 14-4-1996 from Peroor Matha Church and they were blessed by Fr. Mani, cannot be accepted.

41. The senior counsel for the 1st respondent submitted that Sections 12 - 14 of the Indian Divorce Act lay down that in order to get a decree for dissolution of marriage the petitioner has to satisfy the Court on the evidence that the case of the petitioner is proved and according to him, the petitioner has not discharged that burden in this case. He argued that the long delay in filing the above petition for dissolution of marriage after the petitioner came to know about the relationship between the respondents establishes the lethargy and active connivance of the petitioner or at least his passive connivance to the continuation of the relationship between the respondents.

42. Though very lengthy argument was addressed by the learned senior counsel for the 1st respondent with regard to lethargy, active connivance, passive connivance etc. relying upon the various English and Indian decisions including the decisions in *Lloyd v. Lloyd & Leggeri* (1938) 2 All ER 480, *Munir v. King-Emperor*, AIR 1926 All 189 and in *re C. S. Subramaniam*, AIR 1953 Madras 422, those decisions have no application to the facts of this case.

43. In the decision reported in (1938) 2 All ER 480 the husband cohabited with the wife frequently even after he knew about the adultery of the wife. In the subsequent decision in *Churchman v. Churchman* (1945) 2 All ER 190 the principle laid down in (1938) 2 All ER 480 is not followed, regarding the burden of proof though the principle regarding connivance is not disputed, at page 195 their Lordships have observed as follows :

'In our opinion it is of the utmost importance to bear in mind that the issue is whether on the facts of the particular case the husband was or was not guilty of the corrupt intention of promoting or encouraging either the initiation or the continuance of the wife's adultery; and that the Court should not allow its judgment to be affected by importing, as principles of universal application, pronouncements made with regard to wholly different circumstances and so be led to a conclusion contrary to the justice of the case.'

44. In the decision reported in AIR 1926 All 189 (Munir v. King-Emperor) relied upon by the learned senior counsel for the 1st respondent it is held that the connivance of the husband must be specific and mere negligence is not connivance.

45. In support of the contention that the longy delay in filing the above petition alleging adultery after the 1st respondent left him on 5-1-1992 established that there is connivance and implied consent of the petitioner for her living with the 2nd respondent as his wife, the learned senior counsel for the 1st respondent relies upon the decision in Krushna Chandra Patra v. Tanu Patra (1992) 2 DMC 20 (Orissa). The above decision has no application to the facts of this case since in that case there was evidence on record to establish that the wife after leaving the husband on 2-10-1978 has been living with another person as his wife one month after she left the husband and the criminal complaint alleging adultery under Section 497 of I.P.C. was filed only on 11-3-1982. Therefore, in that case the Orissa High Court correctly found that there is connivance on the part of the husband.

46. In the decision in K.J. v. K., AIR 1952 Nagpur 395 a Full Bench of the Nagpur High Court has held that to be guilty of connivance the husband should by voluntary deliberate acts have encouraged the commission of marital offence by the wife. It is further held that the act of the husband, who had to move about the country frequently, leaving his wife during his absence from home, alone in the company of the guest may be an imprudent one and may under certain circumstances amount to connivance. But no presumption of connivance can be raised against the husband from that fact.

47. In the decision in *B. D. Charles v. Nora Benjamin*, AIR 1979 Raj 156 a Special Bench of the Rajasthan High Court held that connivance in a case of adultery is such conduct by one spouse as intentionally or recklessly allowing adultery on the part of the other. It is also held that the delay operates as a bar to the grant of relief of divorce, is the delay which could be described as either unnecessary or improper or as culpable delay.

48. In the decision in *Manning v. Manning. Fellows v. Fellows* (1950) 1 All ER 602 the Court of Appeal upheld the finding of the single Judge that there was connivance on the part of the husband since the two petitioners therein, suspecting their spouses of forming an adulterous association, and knowing that that association would almost inevitably lead to adultery, if, indeed, adultery had not already taken place, not only made no effort to stop the association, not only acquiesced in its continuance, but actually took part in promoting and encouraging it, for the purpose of secretly spying on their spouses to obtain evidence for divorce, while at the same time deceiving them by maintaining a false facade of normal married life.

49. In the decision in *Mudge v. Mudge and Honeysett* (1950) 1 All ER 607 it was held that the act of the husband who was living apart from the wife who had reason to believe that she was living in adultery, engaging certain detectives who concealed themselves outside the house where the wife was living and on looking through the window finding the wife and the co-respondent in the act of adultery, had not connived in the act of adultery since he had failed to intervene and prevent the commission of the act.

50. In the decision in *E. J. White v. Mr. K. Order White*, AIR 1958 SC 441 the apex Court while interpreting Section 14 of the Indian Divorce Act regarding satisfaction of the Court on evidence, held that when the Court is to be satisfied on the evidence in respect of matrimonial offences the guilt must be proved beyond reasonable doubt and it is on that principle that the Courts in India would act and the reason for adopting this standard of proof is the grave consequence which follows a finding of guilt in matrimonial causes.

51. But the Supreme Court has departed from the strict view regarding satisfaction on evidence mentioned in Section 14 of the Indian Divorce Act of proof beyond reasonable doubt to preponderance of probability in the subsequent rulings. In the decision in *Dastane v. Dastane*, AIR 1975 SC 1534 the Supreme Court has observed as follows :

'25. Proof beyond reasonable doubt is proof by a higher standard which generally governs criminal trials or trials involving inquiry into issues of a quasi-criminal nature. A criminal trial involves the liberty of the subject which may not be taken away on a mere preponderance of probabilities. If the probabilities are so nicely balanced that a reasonable, not a vacillating, mind cannot find where the preponderance lies, a doubt arises regarding the existence of the fact to be proved and the benefit of such reasonable doubt goes to the accused. It is wrong to import such considerations in trials of a purely civil nature.

26. Neither Section 10 of the Act which enumerates the grounds on which a petition for judicial separation may be presented nor Section 23 which governs the jurisdiction of the Court to pass a decree in any proceeding under the Act requires that the petitioner must prove his case beyond a reasonable doubt. Section 23 confers on the Court the power to pass a decree if it is 'satisfied' on matters mentioned in Clauses (a) to (e) of the section. Considering that proceedings under the Act are essentially of a civil nature, the word 'satisfied' must mean 'satisfied on a preponderance of probabilities' and not 'satisfied beyond a reasonable doubt'. Section 23 does not alter the standard of proof in civil cases.'

Though the above dictum is laid down by the apex Court while considering Sections 10 and 23 of the Hindu Marriage Act, the principles are applicable to Section 14 of the Indian Divorce Act.

52. In the decision in *Blyth v. Blyth* (1966) 1 All ER 524 the House of Lords has laid down as follows :

'In Section 4(2) of the Matrimonial Causes Act, 1950, the words 'is satisfied' do not mean satisfied beyond a reasonable doubt; so far as the grounds for divorce are concerned a case, like any civil case, may be proved by a preponderance of

probability, but the degree of probability depends on the subject matter, and in proportion as the offence is grave, so ought the proof to be clear. So far as the bars to divorce are concerned, like connivance or condonation, the petitioner need only show that on balance of probability he did not connive or condone.'

Therefore, it is clear that the petitioner need only to establish by preponderance of probabilities that he has not condoned or connived at the adulterous living between the respondents.

53. I have already found the contention of the respondents that the petitioner was aware of the proposed marriage between the respondents in February, 1996 itself much prior to their marriage on 14-4-1996 is not sustainable and there is no satisfactory evidence on record to prove that the marriage was solemnized on 14-4-1996. According to the petitioner, he knew about the marriage between the respondents only in July, 1996 and after making enquiry and satisfying himself about the truth of the fact since the 2nd respondent being a senior counsel, he filed the above petition on 12-9-1996. But the 1st respondent has contended that the marital relationship between herself and the petitioner was ended on 5-1 -1992 when she left the petitioner and after Ext. B 5 compromise decree was passed by the Sub Court, Kottayam on 30-3-96 whereby the petitioner returned her Sthreedhanam and ornaments and she returned even the wedding ring,' nothing is left out of the marriage between the 1st respondent and the petitioner and therefore, the contention of the petitioner that he was not aware of the marriage between the respondents till July, 1996 is not sustainable, especially when according to the petitioner he has been making enquiries about the whereabouts of the 1st respondent and attempting at mediation. I have already held that there is nothing on record to attribute knowledge to the petitioner regarding the marriage between the respondents on 14-4-1996. Even though the petitioner has not stated through whom he came to know about the relationship between the respondent in July 1996, either in the petition or in his evidence as PW 1 and even if the case of the respondents that the petitioner knew about their marriage on 14-4-1996 itself is accepted for the sake of arguments, it cannot be found that the petitioner had connived or acquiesced in their relationship or he has condoned the 1st respondent. The delay for some months cannot be construed as either express or

implied connivance on the part of the petitioner. Therefore, the contention of the respondents that the petitioner has either consented or connived at or condoned the relationship between the respondents, is not sustainable.

54. It is admitted by the respondents that they are living as husband and wife from 14-4-1996 onwards and a child is born in that relationship. The contention that they believed that the marriage between the 1st respondent and the petitioner came to an end and therefore they got married, is not acceptable. As already noted the allegation that the marriage between the respondents on 14-4-1996 is known to the petitioner and even though he has consented for or connived at the marriage between the respondents, he pretended ignorance of the same and as such adultery cannot be fastened upon the respondents, is also not sustainable. Likewise the contention of the respondents that in spite of the fact that the petitioner was aware of the marriage between the respondents, there was voluntary blindness on the part of the petitioner is also not sustainable, since there is no satisfactory evidence on record to establish that the petitioner was aware of the marriage between the respondents either before or on the date of the marriage or immediately thereafter.

55. The contention of the petitioner that even though he came to know about the adulterous relationship between the respondents in July, 1996, in order to confirm that fact and to file the above petition for divorce, he took some time since the 2nd respondent is a senior advocate in Ernakulam, is probable. The delay of 5 months from 14-4-1996, the date of the alleged marriage between the respondents to the date of filing of the above petition on 12-9-1996 cannot be construed as connivance or culpable delay on the part of the petitioner. It is also pertinent to note that though the petitioner and the 1st respondent withdrew from co-habitation from 5-1-1992 onwards, no petition for divorce can be filed under Section 10 or 19 of the Indian Divorce Act unless, the grounds available for dissolution of marriage under those provisions are available. It is clear from the evidence on record that the ground for divorce under the Indian Divorce Act was available to the petitioner only on the cohabitation of the respondents as husband and wife. Therefore, there is no delay much less culpable delay in filing the above O.P. for divorce by the petitioner. Therefore, the adultery alleged by the petitioner is satisfactorily proved

in this case by preponderance of probabilities and as such the petitioner is entitled to a decree for dissolution of marriage with the 1st respondent on the ground of adultery between the respondents.

56. Issue No. 2 : The 1st respondent has claimed a decree for divorce of her marriage with the petitioner on the ground of cruelty. The petitioner vehemently contended that the claim of the 1st respondent for divorce on the ground of cruelty cannot be considered in this O.P. and that allegation is made by the 1st respondent in this O.P. only as counterblast to the claim for divorce made by the petitioner on the ground of adultery of the 1st respondent. The counsel for the petitioner argued that absolutely no allegation of cruelty is made in the counter-affidavit filed by the 1st respondent and no relief of divorce is claimed on the ground of cruelty and the prayer in the counter-affidavit is only for dismissal of the O.P. He also submitted that though the petitioner and the 1st respondent had been living separately from 5-1-1992 onwards and the 1st respondent has contended that the marriage was irretrievably broken, no Court is moved for divorce on the ground of cruelty. According to him, the 1st respondent though literate and filed petition for dissolution of marriage before the Eparchial Court in the year 1992 and before the Family Court in the year 1997 and suit before the Sub Court Kottayam in the year 1993, no allegation of cruelty is made against the petitioner and therefore the allegation of cruelty made in this O.P. is only a clear afterthought and deliberately intended to harass the petitioner. But this contention of the petitioner is not sustainable since cruelty is alleged by the 1st respondent against the petitioner in Ext. B 1 plaint filed by the 1st respondent before the Sub Court, Kottayam in the year 1993. In para 4 of the counter-affidavit filed by the 1st respondent in this case she has also alleged cruelty against the petitioner. Moreover, Section 15 of the Indian Divorce Act enables the respondent to seek relief of divorce on the ground of cruelty against the petitioner by filing a petition seeking that relief. Hence the 1st respondent has filed C.M.P. 8956/97 alleging cruelty against the petitioner and seeking divorce on the ground of cruelty against the petitioner.

57. The further contention of the petitioner that though the 1st respondent filed draft issues and the issues were settled by this Court on 12-3-1997, no issue

regarding cruelty is raised as there was no plea and though subsequently C.M.P. No. 8956/97 was filed by the 1st respondent seeking divorce on the ground of cruelty, this Court recorded the petition and no issue is raised regarding divorce on the ground of cruelty, is also not sustainable, since though draft issues were filed by the 1st respondent no issue was raised by this Court and under Order XIV of the C.P.C. Issues can be settled by the Court at any time before the decree is passed. Therefore, the contention of the petitioner that the claim for divorce made by the 1st respondent on the ground of cruelty against the petitioner cannot be entertained, is not sustainable.

58. The 1st respondent as RW1 has deposed that she was not willing to marry the petitioner and she consented for the marriage only due to the compulsion of her father and other relations and she has disclosed that fact to the petitioner even before the marriage and therefore the petitioner began to behave cruelly towards her from the 1st day of the marriage. But apart from the testimony of the 1st respondent as RW1 there is absolutely no evidence to corroborate her testimony regarding the cruelty alleged against the petitioner. Though the 1st respondent as RW1 has deposed that the cruelty started from the 1st day after marriage in Ext. A 3 petition filed by her before the Family Court for dissolution of marriage with the petitioner, she has stated in paragraph 3 that the cruel treatment started about 4 months after the marriage. The 1st respondent has not made any allegation of cruelty to any person while living together with the petitioner after the marriage on 16-9-1990 till they departed on 5-1-1992. She has not made any complain of cruelty before any authority. O.P. 352/97 filed by the 1st respondent before the Family Court for divorce on better legal advice is allowed to be dismissed. PW 2, the brother of the 1st respondent has only deposed regarding cruelty after separation of the petitioner and the 1st respondent. PW 3 has not spoken about any cruelty meted out by the petitioner towards the 1st respondent. RW1 though deposed for the first time regarding cruelty, no details of manhandling by the petitioner is mentioned, though according to her she informed two neighbours about the cruelty meted out by the petitioner from his residence at Thevara, they are not cited or examined in this case. While the petitioner was examined as PW 1, no question is put to him in cross-examination with regard to the cruelty alleged against him by the 1st respondent.

59. It is well settled that the standard of proof to be applied in matrimonial cases alleging cruelty is not proved beyond reasonable doubt as in the case of criminal cases. It is sufficient to satisfy the Court on preponderance of probabilities. The above dictum is laid down by the Supreme Court in the decisions in Dr. N. G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534 and Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121. But in this case it is clear that even by applying the standard of proof of cruelty by preponderance of probabilities, the 1st respondent has not succeeded in adducing satisfactory evidence to prove the cruelty alleged against the petitioner in order to obtain a decree for divorce of her marriage with the petitioner. Therefore I find that the 1st respondent is not entitled to a decree for divorce of her marriage with the petitioner on the ground of cruelty.

60. Issue No. 3 : The petitioner has claimed damages of Rs. 2.5 lakhs from the 2nd respondent for committing adultery with his wife, the 1st respondent. The contention of the respondents that the marital relationship between the petitioner and the 1st respondent was severed long back and they are living as husband and wife on the basis of the valid marriage between them solemnized on 14-4-1996, is already negated by me.

61. Section 34 of the Indian Divorce Act provides for claim for damages from the adulterer. In the petition Rs. 2.5 lakhs is claimed as damages from the 2nd respondent. In cross-examination the petitioner as P.W. 1 has deposed that he has claimed Rs. 2.5 lakhs from the 2nd respondent only as a token compensation. In order to ascertain the quantum of damages sustained by the husband due to the adultery of the wife, the actual loss sustained by the husband is the only consideration.

62. In the decision in Mr. Thomas v. Mrs. Thomas, AIR 1925 Cal 585 a Full Bench of the Calcutta High Court has held that the object of awarding damages against an adulterer is not to punish him at all and all that the law permits to be given is compensation for the loss which the husband has sustained and that is the only guide to the amount of damages to be given. It is also held that if the adulterer did not seduce her away from her husband that makes a very material difference in considering the amount of damages to be given and for ascertaining the damages

the conduct of the husband must be looked into,

63. In the decision in B. D. Charles v. Nora Benjamin, AIR 1979 Raj 156 a Special Bench of the Rajasthan High Court has held as follows (at p. 162 of AIR):

'As there is no allegation about the damages in the petition and as there is no evidence about the injury which the husband had suffered as a result of the conduct of the adulterer, we hold that the learned District Judge was not justified in directing the adulterer to pay Rs. 1000/- as damages to the husband under Section 34 of the Act.'

64. In this case it is in evidence that the petitioner and the 1st respondent had been living apart from 5-1-1992 onwards. The petitioner has no case that the 2nd respondent has seduced his wife to live in adultery. There is absolutely no evidence of any injury caused to the petitioner by the 2nd respondent due to his adulterous living with the 1st respondent. Therefore, in the absence of any tangible evidence adduced by the petitioner to establish that he has sustained actual injury or loss due to the adultery committed by the 2nd respondent with the 1st respondent, the petitioner is not entitled to claim any damages from the 2nd respondent as adulterer as provided under Section 34 of the Indian Divorce Act. Therefore, I find that the petitioner is not entitled to any damages from the 2nd respondent in this case.

65. Issue No. 4 : it is the common case that a male child was born to the petitioner and the 1st respondent in their wedlock on 9-8-1991 and the child is residing with the 1st respondent. The petitioner has claimed custody of the minor child from the 1st respondent. The petitioner has contended that since the 1st respondent is living as concubine of the 2nd respondent and a child is also born in that relationship, it is not at all conducive for the welfare of the child to live with the 1st respondent since the child will be an alien in his own land. He has also contended that since the child is with the 1st respondent ever since the birth on 9-8-1991, it cannot exercise an intelligent option. Therefore, according to him, he being the natural guardian, is entitled to the custody of the child. According to him, he has got sufficient means to bring up the child in the best possible manner and to give him the best education possible and therefore, he is the best person for the

custody of the child.

66. The 1st respondent has contended that after 5-1-1992, the 1st respondent left the petitioner and went to her mother's house for good along with the child, the petitioner has not even seen the child at all nor he has made any attempt to see the child and therefore, the petitioner will be a total stranger to the child. She has also contended that though she was living with the child till November, 1997 in Ernakulam, the petitioner made no attempt to see the child and fondle him apart from filing O.P. 99/96 before the District Court, Kottayam for custody of the child. She has also contended that the petitioner is a busy lawyer living alone in Ernakulam and his only aged old mother is residing alone at his residence at Kadalikkad and she cannot take care of the child. Therefore, according to her, at this stage due to the tender age of the child the petitioner is not entitled to the custody of the child even if he is not disqualified to be the guardian.

67. Under Section 3 of the Travancore Christian Guardianship Act the legal guardian is father and if father is not alive mother is natural guardian. Section 43 of the Indian Divorce Act empowers the Court to make orders as to custody of children in suits for dissolution or nullity of marriage.

Admittedly Order.P. No. 99/96 filed by the petitioner before the District Court, Kottayam under Section 25 of the Guardians and Wards Act for the custody of the minor child is pending.

68. The 1st respondent has no case that the petitioner is not the natural and legal guardian of the minor child. Her only contention is that at this stage the petitioner though the legal and natural guardian and not disqualified to be the guardian of the minor child, is not entitled to the custody of the child. As already noted the minor child was born on 9-8-1991 and after delivery the 1st respondent returned with the child and resided with the petitioner in his house at Thevara till 5-1-1992 when she left for her parental house. The petitioner has no case that he has ever seen and fondled the child after the 1st respondent left him with the child on 5-1-1992. As P.W. 1 the petitioner has deposed that after the 1st respondent took the child with her he casually met the child at Ernakulam B.T.H. and Bimbis restaurant. But the 1st respondent did not permit him to meet the child and he was not permitted to

meet the child from the residence of the 1st respondent. He has also deposed that he has not made any attempt to pay maintenance to the child. Even from the above testimony of P.W. 1 it is clear that he has not made any serious or earnest attempt to meet, fondle and befriend with the child ever since the 1st respondent left him with the child on 5-1-1992. Even if the 1st respondent did not permit him to meet the child when he casually saw the child at B.T.H. or at Bimbis restaurant or from her residence, he could have taken legal steps to enable him to meet the child. Therefore, the contention of the 1st respondent that the child is a total stranger to the petitioner is of much force, especially when there is nothing on record to show anything prevented the petitioner from seeing and fondling the child from 5-1-1992 till November, 1997 when the 1st respondent left with the child to Delhi and while the child was in Ernakulam or Kottayam.

69. It is submitted that the child is with the 1st respondent who is now living in Delhi. According to the 1st respondent the child is now studying in second standard in a Delhi school. Even according to P.W. 1, he is residing alone in his residence at Thevara and his aged old mother is also residing alone in her house at Kadalikkad. Therefore, as the matter stands now there is nobody to look after the affairs of the young child in the residence of the petitioner at Thevara, he being a busy lawyer residing alone in his house at Thevara. It is also not possible for his aged old mother residing alone in her house at Kadalikkad to take care of the child of tender age. It is true that the 1st respondent is living as a concubine of the 2nd respondent and she has got a child in that relationship. The fact that the petitioner as well as the 1st respondent are financially sound and they are capable of looking after the child properly and providing best education to him, is not in serious dispute.

70. In the decision in *Rosy Jacob v. Jacob A. Chakramakkal* (1973) 1 SCC 840 : (AIR 1973 SC 2090) the Supreme Court has held that (at pp. 2099 and 2100 of AIR):

'Where there is no dichotomy between the fitness of the father to be entrusted with the custody of his minor children and considerations of their welfare, the father's fitness has to be considered, determined and weighed predominantly in terms of

the welfare of his minor children in the context of all the relevant circumstances. If the custody of the father cannot promote their welfare equally or better than the custody of the mother, then, he cannot claim indefeasible right to their custody under Section 25 merely because there is no defect in his personal character and he has attachment for his children which every normal parent has.'

71. In the decision in *Madhavan Nair v. Viswanathan* 1977 Ker LT 479, a Division Bench of this Court has observed as follows :

'5. No doubt the interest and welfare of the child are matters of paramount consideration. Only if the Court is convinced that it would be in the best interest of the child that he should be with the natural guardian, will the Court be inclined to accede to the prayer of the natural guardian for the custody of the minor by taking him away from his present custodians. However, there is a presumption in favour of the natural guardian as opposed to the claims of persons who are not considered to be natural guardians in law. Unless there is evidence to suggest that the natural guardian is not a fit person to be the guardian of his child or that for other reasons it will not be in the interests of the child's welfare to entrust his custody to the natural guardian, the Court would Ordinarily be inclined to accept his claim in preference to the claim of any other person.'

72. In the decision in *Pushpa Singh v. Inderjit Singh* 1990 (Supp) SCC 53 the Supreme Court has observed as follows :

'We are firmly of the view that the paramount interest of the child lies in giving his custody to the mother. The age of the child is admittedly less than five years. The child undoubtedly needs affection of his mother for which there is no adequate substitute.'

73. Though the above decisions are under the Hindu Minority and Guardianship Act, the principles laid down in those decisions are applicable to cases coming under the Guardians and Wards Act and Indian Divorce Act also.

74. The counsel for the petitioner vehemently submitted that since the 1st respondent is admittedly living as a concubine of the 2nd respondent and they

have begotten a child in their relationship, it is in the best interests and welfare of the child to give his custody to the petitioner, who is the legal and natural guardian of the child. In support of this contention he relied upon the decision in Kurian C. Jose v. Meena Jose (1992) 1 Ker LT 818 wherein a Division Bench of this Court has observed as follows :

'The sequence of events certainly would support the case of the respondent that, closely on the heels of the death of the father of the appellant he eloped with Sona Mammen and started to live with her treating her as his concubine. The awareness that the father lives with a concubine who is none else than the youngest sister of the mother certainly is capable of creating hostile impact in the outlook and character of the minor. That by itself would vitiate the right of the appellant to be the guardian of the minor. Therefore, we are unable to accept the contention of the learned counsel for the appellant to the effect that the fact that the appellant is residing with Sona Mammen is not a factor which needs consideration in deciding the welfare of the minor.'

75. The counsel for the 1st respondent submitted that the above decision of the Division Bench of this Court is not applicable to the facts of this case since the Division Bench has not taken into consideration that the paramount importance is the welfare of the minor which is laid down by various decisions of this Court as well as the Supreme Court. This argument advanced by the counsel for the 1st respondent cannot be accepted since in that case the Division Bench after considering the entire facts and circumstances of the case and the welfare of the minor child found that the custody of the minor child with the mother will be in the best interests of the child since the father has been living with the youngest sister of the mother of the child treating her as his concubine. But the dictum laid down in the above decision is of no help to the petitioner to get custody of the child at this juncture.

76. As already noted while deciding whether the custody of the minor child the paramount consideration is the welfare and well being of the child. Though it is clear from the evidence on record that the petitioner, father of the minor child is in a financially sound position to look after the child and there is no disqualification

against him to be the guardian of the minor child, the fact remains that he has absolutely no contact with the child ever since the 1st respondent left the petitioner on 5-1-1992 and he has not made any serious attempt to meet the child and to be friendly with him. Therefore, as the matter now stands, the child who is only aged about 7 years, is a total stranger to the petitioner. Even though the 1st respondent is living as a concubine of the 2nd respondent and she has got a child through the 2nd respondent and this fact is capable of creating a hostile impact in the outlook and character of the minor, I find transplanting the minor from the 1st respondent to the petitioner at this stage will not be conducive for the welfare of the minor, especially considering the fact that the petitioner is a total stranger to the minor and he is living alone in his house at Thevara without anybody to look after the child and that his aged old mother who is living alone in her house at Kadalikkad is also unable to look after the child. It is only after the petitioner meeting and fondling the child frequently and making him friendly and aware of his love and affection, the transplantation of the child from the 1st respondent-mother to the petitioner can be considered. Till that period it will be in the better interests of the child to continue to live with the 1st respondent-mother as at present. Under the circumstances I find that the petitioner is not entitled to the custody of the minor child at present.

77. The petitioner will be entitled to meet and fondle the child as and when he requires at appropriate and convenient places as agreed to and arranged by the parties before hand and the petitioner will also be entitled to the custody of the child for short periods during vacation of the school so that a cordial relationship between the petitioner and the child can be developed. The petitioner will also be entitled to approach the appropriate Court for custody of the minor child under changed circumstance.

78. In the result, on the basis of my findings in the issues, this O.P. is allowed in part. The marriage between the petitioner and the 1st respondent is dissolved on the ground of adultery of the 1st respondent with the 2nd respondent. The claim for damages made by the petitioner against the 2nd respondent and the prayer for decree for dissolution of the marriage made by the 1st respondent against the petitioner on the ground of cruelty are disallowed. The claim for custody of the

minor child made by the petitioner is disallowed. The petitioner will be entitled to meet the minor child as and when he requires at the mutual consent and pre-arranged place, date and time. The petitioner is also entitled to short custody of the child during vacations of the school. The petitioner is also entitled to move the appropriate Court for custody of the child when conditions are changed in his favour after befriending with the child. The parties are also entitled to approach this Court for any appropriate direction, if and when necessary. Considering the facts and circumstances of the case I direct the parties to bear their respective costs in this O.P.

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