

Bexy Michael. Vs. A.J.Michael.

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Court : Kerala

Decided On : Oct-06-2010

Reported in : ILR2010(4)Ker382

Judge : R. Basant; M.L. Joseph Francis, Jj.

Acts : Evidence Act - Section 3

Appeal No. : Mat.Appeal.No. 378 of 2008

Appellant : Bexy Michael.

Respondent : A.J.Michael.

Advocate for Def. : SRI.SURESH KUMAR KODOTH, Adv.

Advocate for Pet/Ap. : SRI.JAWAHAR JOSE, Adv.

Judgement :

1. What is the nature, extent and quality of evidence which a prudent person would expect and demand in the facts and circumstances of the case to come to a safe conclusion about ornaments and cash which had changed hands at the time of marriage? This is the crucial question, the answer to which must resolve the controversy in this appeal.

2. The parties are divorced spouses now. Their marriage took place on 6/9/03. The spouses started separate residence on 28/11/06. A girl child aged about 5

years on the date of the petition was born in the matrimony. It was an acrimonious marriage. The husband filed an application for divorce as O.P.No.117/07. The wife evidently did not think it worthwhile to fight in a court of law to salvage the marriage. She instead came to the Family Court with O.P.No.195/07 with a claim for return of money and gold. Be it noted that at that time the petition for divorce was also pending before the Family Court.

3. The contention of the wife, to put it in a nutshell, is that an amount of Rs.3 lakhs and 50 sovereigns of gold ornaments had changed hands at the time of marriage. Of this, she had taken back 40 sovereigns and 10 sovereigns were remaining in the custody of her husband. She specifically asserted that the gold and ornaments were handed over in the presence of Eeendickal Appachan - the direct paternal uncle of the husband. She prayed that the amount of Rs.3 lakhs may be ordered to be returned with interest at the rate of 10% per annum and the value of gold ornaments weighing 10 sovereigns which remained in the custody of the husband which he valued at Rs.66,000/- (at the rate of Rs.6,600/- per sovereign) may be ordered to be returned along with interest at such rate as may be fixed by the court.

4. The respondent/husband entered appearance and resisted the claim. It is significant that he did not admit that his wife had brought any amount or ornaments to the matrimonial home after marriage. It was a case of blanket denial. We find it relevant straightaway to advert to the fact that even though was a specific assertion that Eeendickal Appachan (P.W.3) - who is the brother of the father of the respondent was present and know about the property that had changed hands, this fact was not adverted to or denied in the counter statement. It was thus a simple case of blanket denial. No cash is liable to be returned. No ornament is liable to be returned, asserted the respondent.

5. Parties went to trial on these contentions. The appellant/wife examined herself as P.W.1. She took the risk of examining two brothers of the father of the husband as witnesses on her side. They gave evidence, at least, partly in favour of the wife. The husband examined himself as R.W.1. In the course of cross- examination, for the first time, he stated that his father's brothers have an animus against him. He

further admitted that his wife had gone back to her paternal home taking with her 40 sovereigns of gold. It is further seen that the husband made an admission that she was having 13 sovereigns gold ornaments when she came to the matrimonial home.

6. The court below, on an anxious consideration of the rival sides of oral evidence, surprisingly according to us, sailed to the conclusion that the evidence of P.Ws.1, 2 and 3 do all deserve to be rejected lock, stock and barrel. The plea of the husband in the written statement that no ornaments or cash was liable to be returned was accepted by the court below. Accordingly, the court below proceeded to pass the impugned order throwing over board the claim of the appellant/wife.

7. It is admitted that subsequently the divorce petition has been allowed and the marriage stands dissolved without contest. No settlement has been arrived at regarding properties, ornaments, maintenance etc., of the wife and child.

8. We have heard the learned counsel for the appellant/ wife and the respondent/husband. The learned counsel for the appellant assails the impugned order on the ground that the court below was unreasonable, unrealistic, irrational and perverse in the appreciation of oral evidence. The learned counsel for the appellant contends that no prudent person in the given circumstances could have expected the wife to place better and more satisfactory evidence in support of her claim. That is the only ground of challenge to be considered by us in this appeal.

9. The learned counsel for the appellant, first of all, places reliance on the observations in *Muhammed Davood and Another v. Hafsath and Another* (2009 (4) KHC 853) in paragraph-21 and contends that the court below had thrown these principles to the wind while appreciating the oral evidence adduced by the contestants. The learned counsel for the respondent, on the contrary, contends that the appellant was claiming a decree for money. The burden rests squarely on the shoulders of such a plaintiff to prove the claim satisfactorily as expected of a litigant in civil proceedings. The learned counsel urges that the appellant has miserably failed in discharging that burden. 10. Principles of appreciation of evidence and the burden of proof on the shoulders of a civil litigant deserve to be considered. It is trite beyond the pale controversy that the burden rests on the

shoulders of a person claiming a decree to prove the claim satisfactorily. He has to establish his case on the touch stone of probabilities. Unlike in a criminal case in a civil litigation it is not as though the respondent has no burden at all. Where both parties have chosen to advance their pleadings and adduce evidence, in fact, the concept of burden of proof loses its paramount significance. Totality of inputs will have to be taken into reckoning by any prudent mind to decide whether the claim has been established and the claimant is entitled to a decree as prayed for.

11. We will hasten to remind ourselves that the standards of a prudent man are paramount in the appreciation of evidence under Sec.3 of the Evidence Act. Sec.3 of the Evidence Act which has often been referred to as the Bible of a court of facts mandates that the court must either believe in the existence of a fact on the basis of matters before it or it should entertain the satisfaction that a prudent person on the basis of the matters before it would have acted on the supposition that such fact exists. The standards of a prudent person in the community are of great relevance and significance.

12. It would be puerile for this Court to ignore the reality that in a Christian marriage more often than not properties/ money changes hands at the time of marriage. This has traditional and historical reasons. It is not as though there can be no Christian marriage where property has not changed hands. A prudent person would certainly take note of the reality in raw life that property does change hands on the occasion of the marriage usually and normally in a Christian marriage. The instant one was a purely arranged traditional and conventional marriage. That fact is not disputed.

13. It is not as though the respondent/husband has a case that his marriage was any different. If we go by his version in the course of cross-examination, she had come with 13 sovereigns of gold ornaments. He further states that there was a stipulation/understanding regarding property changing hands. According to him, certain property was agreed to be given to him. What we reckon as important is that even according to him, it was not a case of a marriage where property changing hands was not contemplated by the spouses and their relatives. The admissions by R.W.1 - husband in cross-examination clearly indicates that in this

marriage between the contestants also, it rhymes well with probabilities that property must have changed hands.

14. Evidently he was compelled to admit in the course of cross-examination that gold ornaments were there and property was at least intended to change hands at the time of marriage. He does not take that plea honestly and in a straight forward manner in the counter statement.

15. On the touch stone of probabilities all matters will have to be considered and a decision has to be arrived at on a disputed question of fact by a court of facts. It would be unreasonable, irrational, puerile and perverse for a court in the given circumstances to look for documentary evidence regarding the ornaments and money that had changed hands at the time of marriage. The standards of a prudent man have to be adopted by the court and if a person insists on such documentary evidence to prove the transaction, he would undoubtedly be a very poor specimen of a prudent person. The absence of documentary evidence on which reliance has been placed heavily by the respondent, is thus found to be without any merit or substance.

16. The controversy in most, if not all cases, will have to be decided on the basis of oral evidence. It would be traversity of justice for a Family Court to throw its hands up and merely proceed to dismiss a claim for the simple reason that documentary evidence has not been made available. Strain if necessary, the court must decide whether the assertions and counter assertions made are true or false and which sets of assertions and counter assertions on oath can and need be safely accepted.

17. We now come to the oral evidence. P.W.1 is the wife. She asserted that an amount of Rs.3 lakhs and 50 sovereigns of gold ornaments had changed hands. She staked a claim for the said amount of Rs.3 lakhs and only 10 sovereigns which were retained by the respondent. Undoubtedly, P.W.1 is interested. Her oral evidence, unless it is convincing cannot be meekly swallowed by any court. The same must be subjected to rigorous tests and must be assessed and evaluated on the touch stone of probabilities. The possibility of falsity and exaggeration must be alertly perceived. We need only mention that the oral evidence of P.W.1 rhymes

well with the probabilities. Gold and cash usually change hands on the occasion of betrothal/ marriage. The oral evidence of P.W.1 to that extent is consistent with probabilities.

18. Evidently, P.W.1 could not adduce any better evidence than oral evidence. It is stated before us that certain photographs were taken at the time of the marriage. They could not be proved as the negatives are not available. Even if the matter were sent back, the photographs cannot be proved as insisted by law, it is conceded. Of course, P.W.1 could have examined her father or her relatives to prove the quantum of money and ornaments which changed hands. At any rate, those pieces of evidence could not have commanded any better respectability or acceptability than the oral evidence of P.W.1 herself. So, according to us, it would be irrational for a court to find fault with P.W.1 for not examining any other witness (from her side) who participated in the betrothal or marriage to prove the property/cash that had changed hands. No one has a case that there is any record in the Church concerned of the property that had changed hands.

19. Driven to the wall, the claimant wife could only choose to attempt to prove her assertions by oral evidence. She did not choose to examine any witness on her side. Instead she took the risk of examining two witnesses as P.Ws.2 and 3, who are none other than the direct paternal uncles (father's brothers) of her husband. It is not as though she attempted to spring a surprise on the husband by examining his uncles. Even in the original petition filed by her she had clearly stated that ornaments and currency changed hands in the presence of Eeendigal Appachan examined as P.W.3.

20. Nay, to our mind it appears that any prudent person must have taken note of the bold assertion by wife that the husband's paternal uncle was a witness to the transaction. What is more important to us is that in the counter statement filed by the husband he did not at all refer to the presence of P.W.3, his direct paternal uncle, at the time when the deal was struck. There is no contention whatsoever in the counter statement that the brothers of his father had any animus against the husband or in favour of the wife. If that present assertion were true, certainly we would have expected the husband to plead in reply that this P.W.3 referred to in

the petition by the wife as a witness is not a worthy person and he has animus against the respondent. Significantly, there is no such plea raised at all.

21. We now look at the cross-examination of P.Ws.2 and 3. There is no denial that they are the direct paternal uncles of the respondent/husband. There is no specific attempt to show that there was any strain in the relationship between the respondent/husband and his paternal uncles on any specific ground. In fact, the husband admits that one of them at least had actually attended the marriage. He has no case that they attended the marriage at the invitation of the wife or her relatives.

22. An appreciation of the evidence of P.Ws.2 and 3 for its intrinsic worth appears to be crucial. Both P.Ws.2 and 3 did not show any eagerness or anxiety to support P.W.1. They only stated that they had seen an amount of Rs.2 lakhs changing hands. However, they had to admit that the deal was struck that 3 lakhs rupees and 50 sovereigns of gold ornament should change hands at the time of marriage. P.Ws.2 and 3 do not appear to be too eager to support the claimant/wife. They do not appear to be too unwilling to support the respondent/ husband to the extent that it was possible; they avoided direct statements which would inconvenience the respondent. No prudent person can afford to ignore the quality and nature of the oral evidence tendered by P.Ws.2 and 3. They were constrained to make admissions, it is very evident. Such evidence of P.Ws.2 and 3, we are surprised to note, was not taken into account by the court for any purpose and the claim was rejected on the sole reason that only oral evidence was available to support the claim of P.W.1.

23. On probabilities we further note that the very specific case of the wife is that 50 sovereigns of gold ornaments were given to her at the time of marriage by her father and only 10 sovereigns remained with the respondent. The respondent who took up a blanket total denial in the counter statement was constrained to admit in the course of evidence that she had gone back with 40 sovereigns of gold ornaments. This rhymes well with her assertion that she came with 50 sovereigns and was constrained to go back leaving 10 sovereigns of gold ornaments. It will not be inapposite in this context again to note that contrary to his assertions in the

counter statement the husband admitted at the stage of evidence that the wife had 13 sovereigns of gold ornaments with her.

24. We have adverted to the nature of the pleadings and evidence. Would a reasonable and prudent person throw over board the evidence of P.Ws.1 to 3 and the admissions made by R.W.1 in cross-examination and reject the claim of the wife for return of ornaments and cash? This is the crucial question to be considered. We have no hesitation to agree that the courts cannot be pedantic and utopian in the matter of appreciation of oral evidence. The compelling indications available in this case must suggest to a prudent person that it is safer, reasonable, just and prudent to accept and act upon the oral evidence of P.W.1 which is convincingly supported by the pleadings and also the evidence tendered by P.Ws.2 and 3, the direct paternal uncles of the respondent. It would be a traversity of truth, justice and reasonableness to throw over board the entire evidence and reject the claim lock, stock and barrel for the only reason that still better evidence has not been placed before the court. Absolute certainty is not the requirement under Sec.3 of the Evidence Act. In a civil case rival contentions and rival evidence will have to be considered, assessed, evaluated and weighed to come to a conclusion whether the burden on the claimant has been discharged. Adopting that yardstick we find no hesitation to come to the conclusion that the court below had erred grossly in not accepting the case of the claimant/wife. No reasonable person could have insisted on better evidence. Better evidence may not be an absolute impossibility. If negatives were there, photographs could have been produced and proved to show the quantum of ornaments worn by the wife at the time of marriage. If there were some entry in the relevant Church records, they could have been produced to show that the properties had changed hands. If the marriage were settled in the presence of the mediators defining the terms of marriage such mediators could have been examined. Significantly, even the respondent does not have a case that such pieces of materials/evidence would be available in this case. If so, he could have produced it at least he could have pursued that aspect in the course of cross-examination of P.Ws.1 to 3.

25. We are, in these circumstances, of the opinion that the court below has gone wrong completely in rejecting the oral evidence of P.Ws.1 to 3 and choosing to

accept and act upon the oral evidence of R.W.1 unmindful of the gross contradictions which have been brought out between his pleadings and his evidence.

26. We do, in these circumstances, set aside the finding of the court below and conclude that 10 sovereigns of gold ornaments and an amount of Rs.3 lakhs are liable to returned by the respondent/husband to the appellant/wife. There is nothing to show that the ornaments are still available with the husband. An amount of Rs.6,600/- per sovereign is claimed as the value of the gold ornaments. Realistically taking note of the value of a sovereign of gold now we are compellingly persuaded to award satisfactory rate of interest so that the loss suffered by the wife can reasonably be compensated if not fully. Interest is claimed at such rates as the court may deem fit and proper to grant. We are satisfied that interest at the rate of 12% per annum must be ordered to be paid on the amount of Rs.66,000/- claimed as the value of 10 sovereigns of gold ornaments. So far as the amount of Rs.3 lakhs is concerned, we are satisfied that interest can be awarded at the rate of 10% per annum as claimed by the appellant/wife.

27. In the result:

(a) This appeal is allowed.

(b) The impugned order is set aside.

(c) O.P.No.195/07 shall stand allowed and the respondent shall pay to the appellant the amount of Rs.66,000/- (as the value of 10 sovereigns of gold ornaments) along with interest at the rate of 12% per annum from the date of the petition to the date of payment and an amount of Rs.3 lakhs along with interest at the rate of 10% per annum from the date of the petition to the date of payment.

(d) The respondent is further directed to pay the costs of the appellant throughout.

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