

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE K.RAMAKRISHNAN**

MONDAY, THE 20TH DAY OF JULY 2015/29TH ASHADHA, 1937

Mat.Appeal.No. 48 of 2015 ()

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AGAINST THE ORDER IN OP 1756/2011 of FAMILY COURT, ERNAKULAM
DATED 02-07-2014
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APPELLANT(S)/RESPONDENT:

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VIMAL SAGAR M, AGED 38 YEARS
S/O.LATE VIDHYASAGAR, SIVA SAKTHI
NEAR KANDESWARAM TEMPLE, CHELOOR,
IRINJALAKUDA P.O.
THRISSUR - 680 121.**

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT(S)/PETITIONER:

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REMYA K, AGED 32 YEARS
D/O.VALIAPARAMBIL RAGHUNANDHANAN, RAM MANDHIR
MADATHUMPADI, MALA, RESIDING AT 4D RAMALAYAM II
RAMAVARMA LANE, OPPOSITE KRISHNA NURSING HOME
ERNAKULAM, KOCHI 11.**

**BY ADV. SRI.T.M.RAMAN KARTHA
ADV. SMT.SYAMA MOHAN**

**THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
20-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VS

**C.K.ABDUL REHIM &
K.RAMAKRISHNAN, JJ.**

Mat.Appeal.No.48 of 2015

Dated this the 20th day of July, 2015

JUDGMENT

K.Ramakrishnan, J.

The respondent in OP(FC).No.1756/2011 on the files of Family Court, Ernakulam is the appellant herein. The respondent herein filed OP(FC).No.1756/2011 on the files of Family Court, Ernakulam seeking a decree for divorce.

2. It is alleged in the petition that the petitioner married the respondent on 28.01.2007 and in the said wedlock a girl child was born to them. Thereafter, she was subject to cruelty at the hands of the appellant and his parents. It was not possible to live in the house. So she was compelled to leave the matrimonial house and thereafter, filed an application for divorce on the ground of cruelty. Appellant appeared in person and submitted that he is not admitting the allegations and said that she is not entitled for divorce on the grounds alleged, but he

has no objection to grant divorce on mutual consent by a joint petition for divorce. No attempt for counseling was made. He had filed an undertaking that he is ready for a mutual divorce with the respondent, if the respondent expressed her willingness to move the joint petition for divorce. The respondent herein filed a proof affidavit and the court below allowed the application granting divorce on the ground of cruelty. This order is being challenged by the appellant by filing this appeal.

3. Considering the nature of dispute and also the way in which the court below has disposed the matter and to avoid the delay in passing final orders in the appeal, we felt that the matter can be admitted, heard and disposed of after hearing both sides today itself.

4. Heard the learned counsel for the appellant and the respondent. The matter is admitted.

5. The learned counsel for the appellant submitted that he never wanted a decree to be passed as ex parte on the ground of cruelty but the respondent expressed her willingness to have a divorce on mutual consent. The court below had not followed the mandatory

procedure for sending the parties for counseling and also for mediation, which is a pre-requisite in a matrimonial case before the trial of the case is started. That has not been done in this case. So according to him, the order passed by the court below is unsustainable in law and is liable to be set aside.

6. On the other hand, counsel for the respondent submitted that having consented for a divorce, filing an undertaking, he is not entitled to challenge the same by filing the appeal.

7. It is an admitted fact that the appellant married the respondent on 28.01.2007 and a girl child was born to them in the said wedlock. It is also an admitted fact that they were residing separately for sometime, which resulted in filing the application for divorce by the respondent herein, alleging that her living in the house become impossible due to the cruelty met by her at the hands of the appellant and his parents. It is also an admitted fact that the respondent appeared and did not want to pursue the relationship, but filed a memo stating that he is ready for a divorce on mutual consent and not

on the ground of cruelty and if the decree is passed accepting the petition, serious hardships will be caused to him. In such circumstances, the court below should not have proceeded with the matter, directing the petitioner to file a proof affidavit and passed the impugned order. Further, it is only stated that they are ready to settle the matter. What is the manner in which the matter was agreed to be settled also not made clear in the order. The court cannot convert the petition for divorce on the ground of cruelty into one under mutual consent, merely on the basis of the memo filed by the appellant seeking divorce on mutual consent. Even in a case of divorce by mutual consent, the Family court is expected to follow the procedure for mandatory counseling and mediation. That has not been done in this case. Further there is nothing mentioned in the order as to how the court below had come to the conclusion that the respondent is entitled to get divorce on the ground of cruelty. There is no express finding recorded on this aspect as well. So under the circumstances, there is some force in the submission made by the learned counsel for the appellant that the

order will not survive and the same has to be set aside and remanded to the court below for fresh disposal in accordance with law. So the judgment and decree passed by the court below, allowing the application for divorce on the ground of cruelty is set aside and the matter is remitted back to the court below for fresh disposal in accordance with law, after complying with the statutory formalities of directing the parties to undergo counseling and also referring the matter for mediation and then giving opportunity to the parties to adduce evidence, if they want on this aspect.

In above mentioned directions and observations, the appeal is allowed and disposed of accordingly.

Sd/-

C.K.ABDUL REHIM, JUDGE

Sd/-

K.RAMAKRISHNAN, JUDGE

VS