

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

WEDNESDAY, THE 10TH DAY OF JUNE 2015/20TH JYASHTA, 1937

Mat.Appeal.No. 78 of 2015 ()

AGAINST THE JUDGMENT IN OP 69/2007 of FAMILY COURT,
TRIVANDRUM, DATED 19.08.2014.

APPELLANT(S):

SANTOSH RAJ,
S.S.BHAVAN, POWDIKONAM P.O., THIRUVANANTHAPURAM.

BY ADV. SRI.SASTHAMANGALAM S. AJITHKUMAR

RESPONDENT(S):

1. SUSMITHA,
D/O.YOVEL, REEJA BHAVAN, KALLAYAM P.O.,
THIRUVANANTHAPURAM.
2. SUMEESH (MINOR),
S/O.SANTHOSH RAJ, AGED 10 YEARS, RESIDING AT REEJA BHAVAN,
KALLAYAM P.O., THIRUVANANTHAPURAM,
REP. BY THE 1ST RESPONDENT.

R1-R2 BY ADVS. SRI.NIDHI BALACHANDRAN
SRI.D.JAYAKRISHNAN
SRI.S.RENOJ
SMT.SMITHA SUSAN THOMAS

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
10-06-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

C.K. ABDUL REHIM &

K. RAMAKRISHNAN, JJ.

Mat. Appeal No.78 of 2015

Dated this the 10th day of June, 2015

JUDGMENT

K. Ramakrishnan, J

This is an appeal filed by the counter petitioner in O.P.No.69/2007 on the file of the Family Court, Thiruvananthapuram. The O.P. was filed by the first respondent herein for return of gold ornaments or its value and realization of patrimony and other amounts given at the time of marriage and also for the maintenance of the child.

2. It is alleged in the original petition that the marriage between the first petitioner and the respondent in the lower court was solemnized on 13.05.2002 as per Christian rites and 2nd petitioner was also born to them in that wedlock. According to the first petitioner in the lower court, at the time of marriage hundred sovereigns of gold ornaments and 80 cents of property at Karakulam Village was given to the bride and ₹2,00,000/- in cash was also

given to the bridegroom for discharging his liabilities. In addition to that, valuable gifts were received by the bride in connection with the marriage were also given to her. After the marriage they lived in the matrimonial home. Thereafter, due to some difference of opinion, they fell apart and they were residing separately. The amounts were not paid and he is not paying any maintenance to the child and the child requires ₹1,000/- per month as maintenance. The petitioner also demanded for return of 64 sovereigns of gold ornaments and ₹2,00,000/- which was given by way of patrimony and ₹15,00,000/- spend by her father for constructing the building. So she filed this petition.

3. Though respondent appeared, it was submitted that a written statement was filed. But later it was seen that on the basis of that PWs 1 to 10 and CWs 1 and 3 were examined and Exts.A1 to A20 and B1 to B7 were marked through Advocate Commissioner, who was appointed for recording the evidence. Later when the case was taken up for hearing, it was revealed that, no written

statement was filed. Thereafter, the appellant filed I.A.No.1632/2014 under Order-47 Rule-1 of the Code of Civil Procedure. It revealed from the judgment that, no written statement was filed, but it was also mentioned that, the respondent was signed the then written statement long ago and that petition was dismissed later and the court below had proceeded with the case under Order-8 and Rule-10 of the Code of Civil Procedure and disposed of the matter decreeing the suit, directing the first petitioner to realize ₹4,48,000/- being the value of the gold ornaments entrusted to the respondent and also allowed to realize ₹15,00,000/- being the money spent for constructing the building in the property stands in the joint names of the husband and wife from the respondent and his assets and also allowed to realize maintenance for the second petitioner at the rate of ₹1,000/- per month from the date of petition namely 20.01.2007, till the second petition attains majority. The property was made charge for the amount. Aggrieved by the same, the present appeal has been

preferred.

4. We have issued notice on admission to the respondent and they appeared and on the request of the parties, the matter was referred for mediation, but mediation failed. Considering the manner in which the case was disposed of, this court felt that, an opportunity has to be given to the appellant to meet the case on merit, especially when the evidence has already been recorded. So this court felt that, it can be admitted and since the respondent also appeared through counsel, it can be disposed of on merit. So the appeal is admitted, heard and disposed of today itself.

5. The counsel for the appellant submitted that it was only by mistake that proper application could not be filed and the written statement could not be filed in time, though instructions were given to the counsel for doing the same.

6. It was opposed by the counsel for the respondent on the ground that false representation was

made before the court. Though maintenance was ordered from 2007, no amount has been paid to the child so far.

7. It is an admitted fact that the appellant and first respondent are man and wife and second respondent is born to them in that wedlock. It is also in away admitted that they resided together for some time and thereafter they fell apart, which resulted in filing the application for return of the gold ornaments and money that has been said to have been paid as patrimony and for construction of the house and claiming maintenance for the second petitioner in the lower court, as the first petitioner is employed and getting income. It is also seen from the judgment that, on the basis of the submission made by the parties and without verification of the records as to whether written statement is filed, the case has been proceeded with and it was sent for counselling and also referred to Adalat, but could not be settled and thereafter a commission was appointed for recording the evidence and PWs 1 to 10 were examined and Exts.A1 to A20 were marked on the side of the petitioners in

the lower court and CWs 1 to 3 were examined and Exts.B1 to B7 were marked on the side of respondents. When the case was posted for hearing, it was noticed that, no written statement was filed as submitted by the counsel and thereafter it is seen that, I.A.No.1632/2014 was filed under Order-47 Rule-1 of the Code of Civil Procedure by the appellant. In the affidavit it was not mentioned, as to when actually the written statement was filed and though the written statement was filed along with that, there was no application for sanction as required under Proviso to Order-8 Rule-1 of the Code of Civil Procedure. So it was on that basis that the case was happened to be disposed of under Order-8 Rule-10 of the Code of Civil Procedure on the basis that there was no written statement filed. It may be mentioned here that, though it was disposed of under Order-8 Rule-10 of the Code of Civil Procedure, especially when the evidence was recorded and cross examination was done, court below ought to have considered those matters as well in detail and then disposed of on that basis and that

was not done in this case.

8. However, considering the fact that the evidence had already been taken, we feel that an opportunity has to be given to the petitioner to file an application to receive written statement, if it is not filed in time and that will have to be received and for that purpose the order passed by the court below under Order-8 Rule-10 of the Code of Civil Procedure has to be set aside and remitted to the court below, but that can be done on condition that the appellant has to deposit the entire arrears of maintenance ordered by the court below in favour of the 2nd petitioner before the court below within two months in two equal monthly installments and also to pay a cost of ₹3,000/- to the respondents in the lower court, within one month and on production of proof of payment of such cost and filing an application for receiving the written statement under Provision to Order-8 Rule-1 of the Code of Civil Procedure, then court below is directed to allow the application and receive the written statement and proceed

with the case, after hearing both sides and raise necessary issues and if any evidence is required on the basis of the issues, permitting the parties to adduce further evidence if any required and dispose of the case on merit afresh in accordance with law.

If the appellant did not deposit the arrears of maintenance and pay the cost as directed by this court, then the decree and judgment passed by the court below will be restored and it will be deemed to be in force. On restoration of the case, the court below is directed to expedite disposal of the case. The arrears of maintenance if any deposited is permitted to be withdrawn by the first respondent herein on behalf of the second respondent.

Sd/-

C.K. Abdul Rehim, Judge

Sd/-

K. Ramakrishnan, Judge

// True Copy//

P.A. to Judge