

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 15TH DAY OF JULY 2015/24TH ASHADHA, 1937

Mat.Appeal.No. 675 of 2015 ()

AGAINST THE JUDGMENT IN OP 563/2015 of FAMILY COURT,ERNAKULAM

APPELLANT/PETITIONER IN O.P.563/2015:

SHENNY DEVASSY @ SHENNY, AGED 42 YEARS,
S/O.DEVASSY MAMMINISSERY, THOKKADAM HOUSE,
P.O.MOORKKANAD, THRISSUR-680711, MUKUNDAPURAM TALUK,
THRISSUR DISTRICT.

BY ADV. SRI.SAM ISAAC POTHYIIL

RESPONDENT/RESPONDENT IN O.P.563/2015:

RESHMY MANUEL,, AGED 31 YEARS,
D/O.MANUAL, CRISTAL PROPERTIES, KOYILPARAMBIL HOUSE,
KAKKANAD.P.O, KUSUMAGIRI, ERNAKULAM DISTRICT-682030.

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

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
15-07-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Mat.Appeal.No. 675 of 2015 ()

APPENDIX

APPELLANT'S ANNEXURES:

ANNEXURE A1 COPY OF OP.NO.1745/14 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, ERNAKULAM.

ANNEXURE A2 COPY OF THE AGREEMENT ENTERED INTO BETWEEN THE APPELLANT AND THE RESPONDENT'S FATHER ON 24.3.2015.

ANNEXURE A3 COPY OF IA.NO.1214/15 FILED BY THE RESPONDENT BEFORE THE FAMILY COURT, ERNAKULAM FOR RECORDING ANNEXURE A2 COMPROMISE.

ANNEXURE A4 COPY OF OP.NO.563/15 FILED BY THE APPELLANT BEFORE THE FAMILY COURT, ERNAKULAM ON 24.3.2015

RESPONDENT'S EXHIBITS:NIL

/TRUE COPY/

P.S TO JUDGE

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

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Mat.A.No.675 of 2015
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Dated this the 15th day of July, 2015.

JUDGMENT

Ramakrishnan, J:

The petitioner in OP.No.563/2015 on the file of the Family Court, Ernakulam is the appellant herein.

2. The appellant filed OP.No.563/2015 under section 25 of the Special Marriage Act for a declaration that the marriage between the petitioner and the respondent registered on 2.4.2013 as per the provisions of the Special Marriage Act is null and void. It is alleged in the petition that it was a second marriage for both of them and after conducting the marriage from the church, they registered the marriage under the Special Marriage Act also on 2.4.2013. Thereafter there was no consummation of marriage and as such, the marriage has to be declared as null and void. Hence this petition.

3. The respondent entered appearance and filed objection stating that she has no objection in allowing the petition. The petitioner filed proof affidavit reiterating the contentions mentioned in the petition. But the court below came to a

conclusion that earlier also the same petitioner filed OP.No.1745/2014 for divorce in which there was no allegation of non consummation of marriage and thereby it is hit by constructive resjudicata and dismissed the application on that ground. Aggrieved by the same, the present appeal has been preferred.

4. Since the respondent appeared through counsel and submitted that an error has been committed by the court below and the judgment is erroneous and proceeded on the basis that both the applications were filed by the petitioner, the appeal will have to be allowed and it will have to be remitted to the court below for fresh disposal in accordance with law. So we felt that the appeal can be admitted and in order to avoid delay in disposal of the case, dispose of the same today itself after hearing both sides.

5. Both the counsel submitted that the court below erroneously found that an earlier petition for divorce also filed by the same petitioner against the wife in which there was no allegation of non consummation of marriage. Later, that was withdrawn and in collusion with the respondent, the present original petition has been filed. But in fact there is no collusion

and even in the earlier petition filed by the wife, there is nothing mentioned about consummation of marriage and it is only mentioned that they lived together.

6. It is an admitted fact that there was marriage between the petitioner and the respondent was solemnized as per Christian rites from the church and thereafter the marriage was registered under the provisions of the Special Marriage Act on 2.4.2013. It is also an admitted fact that there was an earlier petition for divorce filed by the respondent/ herein as OP.No.1745/2014 on the ground of cruelty and also another original petition was filed for return of gold ornaments and while those petitions were pending and the matter was referred for mediation and as per mediation, the petitions filed by the respondent herein were allowed to be withdrawn and they have decided that the petition filed by the present petitioner for declaring the marriage as null and void can be proceeded with. It was on that basis that the earlier petitions were withdrawn. It is seen from paragraph 5 of the judgment that lower court had proceeded on the basis that earlier OP.No.1745/2014 was filed by the present petitioner for divorce on the ground of cruelty and there was no allegation of consummation of marriage made

in that petition and later that was withdrawn and the present petition was filed for declaring the marriage as null and void on the ground on non consummation of marriage and arrived at a finding that it will be hit by constructive resjudicata. But in fact it will be seen that the earlier petition was not filed by the petitioner but that petition was filed by the respondent herein for dissolution of marriage. In fact no objection was filed in that case and the matter was referred for mediation and the matter was settled between the parties. So there was no occasion for the present petitioner to raise the contention of non consummation of marriage in the counter that ought to have been filed in that petition. So the observation made by the court below that the present petition is hit by constructive resjudicata is not sustainable in law and the same is liable to be set aside. Further there was no finding by the court below on appreciation of evidence as to whether the appellant is entitled to get decree for nullity and that matter has to be considered by the court below on the basis of evidence adduced by the parties. So under the circumstances the order passed by the court below dismissing the application on the ground that it will be hit by constructive resjudicata is set aside and the matter is remitted

to the court below for fresh disposal in accordance with law.

Accordingly this petition is allowed and the order passed by the court below is set aside and the matter is remitted to the court below for fresh disposal in accordance with law.

Sd/-

C.K.ABDUL REHIM, JUDGE.

Sd/-

K. RAMAKRISHNAN, JUDGE.

/true copy/

P.S to Judge

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