

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

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

THURSDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

Mat.Appeal.No. 611 of 2014 ()

AGAINST THE JUDGMENT IN OP 190/2013 of FAMILY COURT,
VATAKARA, DATED 28-03-2014

APPELLANT(S)/RESPONDENT:

VADAKKEMEETHAL ABDUL RAZAK, AGED 42 YEARS,
S/O.AMMATH, POST NOCHAD, NOCHAD AMSOM,
DESOM, KOYILANDY TALUK.

BY ADVS.SRI.NAGARAJ NARAYANAN
SRI.SAIJO HASSAN
SRI.PRATHAP PILLAI
SRI.BENOJ C. AUGUSTINE
SRI.SEBIN THOMAS
SRI.VIVEK V. KANNANKERI
SRI.VISHNU BHUVANENDRAN
SMT.J.KASTHURI

RESPONDENT(S)/PETITIONER:

VELLOLIPPIL FATHIMA, AGED 35 YEARS,
D/O. KUNHABDULLA, POST EARAVATTOOR, EARAVATTOOR AMSOM,
EDAVARAD DESOM, KOYILANDY TALUK-673 614.

BY ADV.SRI.K.P.SUDHEER

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
31-07-2014, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

SS

C.K. ABDUL REHIM &

K. RAMAKRISHNAN, JJ.

Mat. Appeal No.611 of 2014

Dated this the 31st day of July, 2015

JUDGMENT

K. Ramakrishnan, J

Respondent in O.P.No.190/2013 on the file of the Family Court, Vatakara, is the appellant herein. The original petition in the lower court was filed by the respondent herein for dissolution of marriage under the provisions of Dissolution of Muslim Marriages Act, 1939. It is alleged in the petition that the appellant and respondent are Muslims and their marriage was solemnized on 15.10.1992 in the presence of 'Kaipram Mahal Khasi'. At the time of marriage, respondent was given 12 sovereigns of gold ornaments and a sum of ₹10,000/- and all these ornaments were taken away by respondent/petitioner utilizing the ornaments belonged to respondent, appellant has put up a house in his own property. In the year 1996, 33 cents of land was

purchased in the name of respondent, utilizing money given by her father. Original documents of that land are in the custody of the respondent. Due to infertility of respondent, there was no issues in the wedlock. Though the respondent is unable to procreate child, he used to harass and humiliate the respondent saying that she was a barren lady. Subsequently in the year 2007, the appellant married one Jameela, without the knowledge or consent of the respondent. In that relationship also respondent failed to procreate a child. He was ill-treating and humiliating her both mentally and physically after his second marriage. He was not prepared to afford proper food or clothings to the petitioner/respondent at the instance of his second wife. About three years ago she left the matrimonial home as she was not treated as wife by the respondent/appellant in his house. He is not paying any maintenance for the last three years. On 24.01.2012, respondent issued a registered notice asking her to reside with him and the petitioner sent

a reply notice stating the reason for her separate residence from him. Since he had not paid the maintenance for the last three years and he has prevented her from enjoying usufructs from her own property and he failed to treat the wives equally and harassing her both mentally and physically, she is not intended to continue the relationship and she is entitled to get dissolution of marriage on the above grounds. Hence the petition.

2. Respondent/appellant appeared and filed counter denying the allegations. He had admitted the marriage, but denied the allegation of giving ten sovereigns of gold and cash at the time of marriage, as alleged in the petition. He also denied the allegation that, the gold ornaments were sold and the amounts were utilized for the purpose of the construction of the house. In fact, according to him he had constructed the house in his own property with his own funds. He had purchased, out of 33 cents originally belonging to the father of the respondent, 14

cents in the name of the petitioner by the respondent. Thereafter, 19 cents was also purchased in the name of the petitioner by the respondent. No amount was contributed for the purchase of the property either by the petitioner or her relatives. The allegation that, he was humiliating the petitioner stating that she is unable to procreate child and she is a barren lady etc., are denied as false. In fact the medical examination showed that she is unable to conceive a child. He admitted that, he married another lady by name Jameela in the year 2007, but he denied the allegation that the marriage was conducted without the consent and knowledge of the petitioner. They lived in the same house for about two years. He never harassed her as contended in the petition. The allegation of cruelty is not correct. He was treating both the wives equally. In fact she left the house voluntarily. She is not entitled to get the relief claimed. So he prayed for dismissal of the application.

3. The petitioner was examined as PW1 and

Exts.A1 to A4 were marked on her side. The respondent was examined as RW1 and no document was marked on his side. After considering the evidence on record, the court below found that the petitioner had established that she was treated cruelly both physically and mentally and she was not treated equally with the second wife and no maintenance was provided for more than two years, after she started residing separately and allowed the application, dissolving the marriage between the petitioner and the respondent. Aggrieved by the same, the present appeal has been preferred by the appellant/respondent before the court below.

4. Heard both sides.

5. The counsel for the appellant submitted that, court below has not properly appreciated the evidence and in fact the allegation that he was not treating both the wives equally is not correct. Further the allegation that, she was given gold ornaments and money etc., is not correct. The

observation made by the court below to that effect is not proper. It cannot be said that he had willfully neglected her to maintain. So the court below was not justified in allowing the application.

6. On the other hand, the counsel for the respondent submitted that, the evidence adduced on the side of the petitioner and also the circumstances made out justifies the order passed by the court below granting a decree for dissolution of marriage.

7. It is an admitted fact that the appellant married the respondent as per custom and they lived together as husband and wife and there was no issue in the wedlock. It is also an admitted fact that during 2007, the appellant married another lady by name Jameela, and they were living together in the house for some time. The allegation of the respondent was that, the marriage was conducted without her consent and both the appellant and his 2nd wife were humiliating her and harassing her and she

was not treated equally there. Though she was cross examined at length, nothing was brought out to discredit her evidence regarding this aspect. Further the fact that she left the house and thereafter no maintenance was given is also admitted by the appellant. It is true that he had sent a notice asking her to come and live with him. She had sent a reply to the same, stating the reasons for her not coming and living with him in the matrimonial home. But he had not taken further steps to bring her back to matrimonial home. The evidence of PW1 will go to show that she was treated cruelly by the appellant while they were living together in the house after he contracted the 2nd marriage with Jameela. Further the evidence also will go to show that, he was not treating her equally with the 2nd wife as provided in 'Quran'. The court below had relied on the decision reported in **(Abdurahiman v. Khairunneesa) 2010(1) KLT 891**, in which it was observed that, equal treatment of all wives but not equitably, is no defence in a

claim for divorce under Section 2(viii)(f). But in this case it was specifically averred and also proved by PW1 that she was not equally treated with the 2nd wife. So under the circumstances, court below was perfectly justified in coming to the conclusion that she was not treated equitably in accordance with injunctions of 'Quran', which is a ground under Section 2(viii)(f) of dissolution of Muslim Marriages Act, which for divorce to be claimed by the wife against the husband and rightly granted the relief on that ground.

8. Further under Section 2(ii) of the Dissolution of Muslim Marriages Act, if the husband had neglected or failed to provide wife maintenance for a period of more than two years, then that will be a ground for dissolution of marriage. In this case, admittedly the respondent was residing separately for more than three years and there is no case for the appellant that he had provided any maintenance during that time. Merely because he had sent a notice for restitution of conjugal rights, is not a ground for

denying the relief under that section. In the decision reported in **(Kunhayi Suhara v. Hamsa) 1985 KLT 35**, it has been held that, in order to claim that the husband has maintained his wife, it has to be clearly established that he had attended to the food, clothing, shelter and other reasonable comforts of life of the wife, of course, consistent with his capacity and the standards of the couple. An occasional visit or half hearted offer of some clothes or some money at long intervals would not in law amount to maintenance of wife. In the decision reported in **(Muhammed Ashraf v. Nadeera) 2000(3) KLT (S.N.) 15**, the Division Bench of this Hon'ble Court has held that, mere failure to the maintenance would be sufficient for the wife to claim a decree for divorce. It is not necessary for the wife to prove that maintenance is not being granted without reasonable cause. So, if the petitioner had proved that, no maintenance was given for more than two years, then that will amount to neglect to pay maintenance by the husband

entitling the wife to get dissolution of marriage. So court below was perfectly justified in granting divorce on that ground as well. Court below was perfectly justified in coming to the conclusion on the basis of the evidence that she was treated cruelly both physically and mentally making her living in the house impossible, entitle her to get dissolution on that ground as well.

9. Though there were references made regarding the pleadings, in respect of giving of gold ornaments and cash, purchase of property in her name, no finding has been arrived at the court below on this aspect in this case. Further finding on that aspect is not a germane for deciding the case as well. The court below had only observed there is no evidence to show that, she was prevented from taking income from the property in her own name so as to enable her to get divorce on that ground. So the apprehension of the appellant that, that may affect his defence in the case pending between the parties regarding

the title to the property is without any basis. The right of the parties in respect of the property etc., has to be considered by the court below in that proceeding on the basis of evidence available.

In view of the above discussion, we find that there is no merit in the appeal and the court below was perfectly justified in granting divorce to the respondent for the reasons stated above and the appeal deserves dismissal. So the appeal is dismissed. Considering the parties are directed to bear the respective costs in the appeal.

Sd/-

C.K. Abdul Rehim, Judge

Sd/-

K. Ramakrishnan, Judge

//True Copy//

P.A. to Judge