

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH**

TUESDAY, THE 15TH DAY OF SEPTEMBER 2015/24TH BHADRA, 1937

OP (FC).No. 174 of 2015 (R)

IN OP 50/2015 of FAMILY COURT, IRINJALAKUDA

PETITIONER(S):

**BLESSY VARGHESE EDATTUKARAN, AGED 26 YEARS
D/O.EDATTUKARAN VARGHESE, MALA DESOM
VADAMA VILLAGE, THRISSUR DISTRICT.**

BY ADV. SRI.T.N.MANOJ

RESPONDENT(S):

**SONU, AGED 28 YEARS
S/O.ELAMKUNNAPUZHA KUNNATTHUPARAMBIL SUNNY
KALLUR VADAKKUMURI VILLAGE, VYNTHALA DESOM
THRISSUR DISTRICT. 680 741**

R1 BY ADV. SRI.SUMAN CHAKRAVARTHY

**THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 15-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

VS

OP (FC).No. 174 of 2015 (R)

APPENDIX

PETITIONER(S)' EXHIBITS

- EXT.P1. TRUE COPY OF THE OP 50/2015 BEFORE THE FAMILY COURT, AT
IRINJALAKUDA.**
- EXT.P2. TRUE COPY OF IA NO.810/2015 FILED IN OP 50/2015 PENDING ON THE
FILES OF THE FAMILY COURT, AT IRINJALAKUDA.**
- EXT.P3. TRUE COPY OF THE ORDER DATED 22/4/2015 IN IA NO.810/2015 IN OP
NO.50/2015 ON THE FAMILY COURT, IRINJALAKAUDA.**

RESPONDENT(S)' EXHIBITS

NIL

/TRUE COPY/

PA TO JUDGE

VS

**C.K.ABDUL REHIM, &
MARY JOSEPH, JJ.**

O.P.(FC).No.174 of 2015

Dated this the 15th day of September, 2015

JUDGMENT

C.K.Abdul Rehim, J.

An intrinsic legal question arises in the above case as to whether the duty cast upon the Family courts to make efforts for settlement through counselling is mandatory in cases of joint petitions for dissolution of marriages filed either under Section 13B of the Hindu Marriage Act, 1955 or under Section 10A of Indian Divorce Act, 1869.

2. The petitioner herein is the wife of the respondent. They jointly filed OP.No.50/2015 before the Family court, Irinjalakuda seeking dissolution of the marriage, under Section 10A of the Indian Divorce Act, 1869. At that time of filing the original petition the respondent/husband was employed abroad. Shortly after

filing of the case the petitioner/wife also got employment as a Nurse in Kuwait. Since the petitioner had to join duty at Kuwait on or before 29.04.2015, she filed an application before the Family court to advance the posting of the case, along with another interim application seeking permission to allow her to undergo counselling independently. Ext.P2 is the application filed for permitting independent counselling, as IA.No.810/2015. The respondent has not raised any objection to the said application. But the learned judge had declined the request through Ext.P3 order, observing that going by Rules 22, 24 and 26 of the Family Court(Kerala) Rules, 1989 (hereinafter referred to as 'the Rules' for short), the 'Parties' shall attend the counselling 'together'. It is found that the purpose of the counselling is to help the parties for arriving at a reconciliation and in such process the presence of both the parties are essential. Having observed that the relief sought for in the interim application to have separate counselling is against the

spirit of the Rules, the interim application was dismissed. It is challenging the said order, this original petition is filed by invoking the supervisory jurisdiction vested on this court under Article 227 of the Constitution of India.

3. Section 9 of the Family Courts Act mandates a duty on the court to make an endeavour to assist and persuade the parties in arriving at a settlement in respect of the subject matter of the suit or proceedings. The section mandates the Family Court to adopt any requisite procedure for the above said purpose, subject to the Rules made on that behalf by the High Court. The 'word' shall contained in Section 9(1) would indicate that it is mandatory on the part of the Family Court to make an endeavour to assist and persuade the parties in arriving at a settlement. Sub section (2) of Section 9 provides liberty to the Family court to adjourn any proceedings before that court for such period as it think fit to enable the attempts of such settlement, if it appears to that court at any stage of the proceedings that there is a reasonable possibility of

settlement between the parties. The procedure to be followed with respect to the endeavour to assist and persuade the parties in arriving at a settlement, is prescribed under the relevant Rules. Rule 22 provides that the Family court can direct the parties to consult any specified counsellor for the purpose of counselling. If any such direction is issued by the court, then the counsellor appointed is bound to fix the time and date for counselling, under Rule 24. On such date the parties are bound to consult the counsellor for the purpose of counselling. The procedure to be followed by the counsellor if one of the parties fails to attend the counselling is contemplated under Rule 25. All the above said provisions would indicate that it is mandatory on the part of the Family court to make an endeavour to settle the issues involved in any suit or proceedings before that court by assisting or persuading the parties in arriving at a settlement through appropriate procedure contemplated for such counselling.

4. At the first instance, question posed is as to whether the settlement need invariably be for a reunion of the spouses. In this regard the wordings of Section 9(1) assumes importance. It stipulates the court to endeavour for a settlement, “where it is possible to do so consistent with the nature and circumstances of the case”. The assistance to be rendered or persuasion to be made by the court is to help the parties to arrive at a settlement “in respect of the subject matter of the suit or proceedings”. In a case where the marital relationship stand irretrievably broken and the parties are living separated for a long period, the extent of which is beyond the period stipulated in the statute, and when the parties have taken a mutual decision to have the legal relationship dissolved through a verdict of the court, the nature and circumstances would clearly indicate that the parties are desiring for a dissolution of the marital tie. In such case the settlement with respect to the subject matter of the petition, need not invariably be that of a reunion of the spouses. But is

can also be by way of facilitating an easy legal dissolution and thereby relieving the parties from the matrimony tie to seek their future life with suitable other partners. Therefore, it cannot be found that the 'settlement' in a case of joint petition for divorce need not always be that of a reconciliation or reunion of the spouses.

5. In view of the above finding, the further question arising is to whether it is mandatory on the part of the Family court to insist the parties to undergo counselling, when the suit or proceedings is instituted jointly based on a mutual consent for the dissolution of the marriages, either under Section 13B of the Hindu Marriage Act, 1955 or under Section 10A of the Indian Divorce Act, 1869. Evidently, a joint petition for dissolution of the marriage can be filed only when the marital relationship stands irretrievably broken and only when the spouses have arrived at a settlement or an understanding to set apart from the marital tie. The legislature in its wisdom had prescribed a specific waiting

period of 6 months, after filing of such petitions, for allowing such petitions. It is pertinent to note that the statute insists upon certain conditions for entitling the parties to file such application on mutual consent. The spouses should have lived separately for a specific period and that a minimum specified period should have lapsed since the date of the marriage. Further the statutory insistence is that, after expiry of the waiting period from the date of filing of such application, the court should make an enquiry with respect to the attitude of the parties in adhering to their desire for the dissolution of the marriage. The court should at that stage make sure that the parties are sticking on to their earlier decision to have the marital relationship dissolved. It is now trite law that such waiting period insisted by the statute could not be dispensed with, but for exceptional circumstances invoking power vested on the honourable Supreme Court under Article 142 of the Constitution of India. The parties to such joint petition, after the lapse of the waiting period,

has to convince the court that they still stand by their decision to have the dissolution of the marital relationship, on the basis of the mutual understanding or agreement.

6. This Court in its decision in ***Saji T. Varghese v. State of Kerala* [2010 (3) KLT 804]** held that, personal presence of the spouses in such application for dissolution of marriage by mutual consent need not unnecessarily be insisted at the stage of its second motion, on the expiry of the waiting period. If it is felt that it is difficult for the parties to personally appear before the court, the parties can make the second motion through their counsel by submitting chief affidavit in order to state their case on oath, is the finding. But the question remains as to whether the parties to a joint petition for divorce filed on mutual consent need to be insisted to undergo the process of counselling, as a mandatory procedure in every case. In ***Saji T. Varghese's*** case (*supra*) a Bench of this Court observed that, a ritualistic

insistence on personal presence of the parties for conciliation/counselling need not be made by a court in a joint application for divorce on the ground of mutual consent, if the court is otherwise satisfied about the genuineness of the application.

7. While considering the issue, this Court is of the considered opinion that, the intention of the legislature contained in Section 9(1) of the Family Court Act does not insist upon the Family court to direct the parties to undergo the process of counselling invariably in all the cases as a mandatory requirement. The wordings contained in Section 9(1), “where it is possible to do so consistent with the nature and the circumstances of case” would clearly indicate that the endeavour by the Court to assist and to persuade the parties in arriving at a settlement is required only if it is possible to do so in consistent with the nature and circumstances of the case. It is intended only to facilitate the parties to arrive at a settlement “in respect of the subject matter of the suit or

proceedings". In a case of joint application filed on mutual consent seeking dissolution of the marriage, it is evident that the parties have already arrived at a settlement with respect to the issues relating to the matrimonial discord and regarding continuance of the marital relationship. It is on the basis of such a settlement that the joint petition is filed. Therefore there is no necessity existing in the circumstances of a case to persuading the parties to arrive at a settlement in respect of the subject matter of the suit or proceedings, because, as found above, the settlement in all the matrimonial cases need not invariably be that of a reconciliation or reunion of the parties to the marriage. But it can also be by facilitating a peaceful judicial separation by way of dissolution of the legal relationship. Hence we are of the considered opinion that the endeavour which should be made by the Family court under the mandate of Section 9(1) need not be followed as a compulsory procedure in the case of a joint application for divorce on mutual

consent. If the court is satisfied about the genuineness of the application, it can definitely dispense with the procedure of counselling in such cases. However, the insistence for the statutory waiting period and the subsequent ascertainment of the attitude of the parties with respect to their determination of getting the marital relationship dissolved, is totally mandatory and need to be strictly adhered. However, we make it clear that the above finding will not preclude the Family Court from making an endeavour for a settlement of reunion of the spouses, if it is found that there is a chance for such a settlement.

8. We feel that a clarification in the procedure to be adopted by the Family Courts need to be illustrated in view of the findings contained in the foregoing paragraphs. The Family courts should follow the normal procedure of referring the case for counselling in all matters of joint applications for dissolution filed either under Section 13B of the Hindu Marriage Act or under

Section 10A of the Indian Divorce Act. The attempt in the process of counselling should always be intended to persuading the parties for a reconciliation or reunion. But in cases where any one of the parties or both the parties makes an application to the court to dispense with the procedure of counselling due to their non-availability in the country or due to any other valid reasons incapacitating their personal appearance, then it will be left open to the Family courts to consider such applications and to allow the exemption from undergoing counselling with respect to either one of the parties or to both the parties, as the case may be. In such situation it is also not necessary in all the cases to insist upon both the parties to have counselling 'together'. It is left open to the Family Courts to take appropriate decisions in each case, taking note of the genuineness of such applications. Possibility for conducting the counselling through “video conferencing” using computer/laptop or mobile phones having requisite facility also can be explored and

permitted.

Based on the findings contained herein above, we are inclined to interfere with Ext.P3 order, which is impugned in the case at hand. The original petition is allowed and Ext.P3 is hereby quashed. The Family Court, Irinjalakkuda is directed to dispose of OP.NO.50/2015 on the expiry of the statutory waiting period of 6 months, in accordance with law, by following the statutory procedure. It is submitted by learned counsel appearing on both sides that the statutory waiting period is over by this time. Hence the Family court is directed to dispose of the case at the earliest possible.

Sd/-
C.K.ABDUL REHIM,
JUDGE

Sd/-
MARY JOSEPH,
JUDGE

VS