

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

FRIDAY, THE 25TH DAY OF SEPTEMBER 2015/3RD ASWINA, 1937

OP (FC).No. 290 of 2015 (R)

AGAINST THE ORDER IN I.A. NO.170/2015 AND I.A. NO.451/2015 IN
O.P.88/2014 OF FAMILY COURT, TIRUR.

PETITIONER/RESPONDENT:

NISHA,
D/O. CHANDRAN, KOYATTIL HOUSE, THRIKANDIYUR AMSOM
MUTHUR DESOM, TIRUR TALUK, MALAPPURAM DISTRICT

BY ADVS.SRI.THIYYANNOOR RAMAKRISHNAN
SRI.ARUN KUMAR.P
SMT.AMBIKA RADHAKRISHNAN

RESPONDENT/PETITIONER:

M.SUNIL DATT
S/O. GOVINDAN, MANKUZHI HOUSE, THANALUR AMSOM
MEENADATHUR DESOM, TIRUR TALUK
MALAPPURAM DISTRICT 680 581

R1 BY ADV. SMT.N.DEEPA

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON
25-09-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 290 of 2015 (R)

APPENDIX

PETITIONER'S EXHIBITS :

EXHIBIT P1: TRUE COPY OF THE PETITION IN O.P 88/2014 ON THE FILE OF
FAMILY COURT,TIRUR

EXHIBIT P2 : TRUE COPY OF THE COUNTER FILED BY THE PETITIONER HEREIN
DATED 21-01-2015 IN O.P 88/2014

EXHIBIT P3:, TRUE COPY OF THE PETITION FILED BY THE PETITIONER IN I.A NO
170/2015 IN O.P 88/2014

EXHIBIT P4: TRUE COPY OF THE COUNTER TO EXHIBIT P3 FILED BY THE
RESPONDENT

EXHIBIT P5: TRUE COPY OF THE PETITION FOR AMENDING EXHIBIT P1
PETITION FILED BY THE RESPONDENT AS I.A 451/2015

EXHIBIT P6: TRUE COPY OF THE COUNTER TO EXHIBIT P5 AMENDMENT
PETITION FILED BY THE PETITIONER HEREIN

EXHIBIT P7: TRUE COPY OF THE ORDER DATED 02-05-2015 IN I.A 170/2015 IN
O.P 88/2014

EXHIBIT P8: TRUE COPY OF THE ORDER DATED 02-05-2015 IN I.A 451/2015 IN
OP. 88/2014

RESPONDENT'S EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

smv

**ABDUL REHIM
&
SHAJI P. CHALY, JJ.**

O.P.(F.C) No.290 of 2015

Dated this the 25th day of September, 2015

JUDGMENT

C.K. Abdul Rehim,J.

The respondent before the Family Court, Tirur in O.P. No.88/2014 is the petitioner herein. Original Petition before the Family Court was instituted by the respondent herein, seeking dissolution of the marriage existing between the parties, on the grounds provided under Section 13(1) (i) and 13(1)(ib) of the Hindu Marriage Act, 1955. The petitioner herein filed objections before the court below inter alia challenging maintainability of the petition. Ext.P1 is the Original Petition and Ext.P2 is the written statement (objections) filed. Ext.P3 is an interim application filed by the petitioner herein before the Family Court seeking dismissal of the case based on the question of maintainability. The respondent herein filed Ext.P4 objection to the said interim application, which is filed as I.A. No.170/2015. Subsequently the respondent herein filed another interim application seeking amendment of the Original Petition,

by deleting sub-section (ib) of Section 13 (1) and incorporating sub-section (ia). Ext.P6 is the objections filed by the petitioner herein to the said interim application, which is filed as I.A No.451/2015. The Family Court considered both the above interim applications and passed Ext.P8 order allowing the amendment. Consequently, I.A. No.170/2015 is dismissed stating that, in the light of the amendment allowed the said petition need not be considered. It is aggrieved by Exts.P7 and P8 orders, the petitioner is approaching this Court by invoking its supervisory jurisdiction vested under Article 227 of the Constitution of India.

2. Heard; both sides. Learned counsel for the petitioner raised contention that the Original Petition is not maintainable because necessary pleadings fulfilling statutory requirements under the relevant Rules are not made out. It is pointed out that, despite the specific allegation that the petitioner had illicit and voluntary sexual intercourse with many persons, the respondent has not impleaded any of such persons, as required under Rule 7 (4) of the Hindu Mariage (Kerala) Rules, 1963 (hereinafter referred as "the said Rules"). It is also pointed out that, under

Rule 11 of the said Rules, such persons need to be necessary parties in the application for dissolution of marriage, unless the situation falls under the specific categories enumerated in sub-Rule (d) of Rule 11, wherein such requirement can be dispensed under leave of the Court. Since there is violation of the mandatory provisions contained in the Rules, the Original Petition is still not maintainable despite the amendment, is the contention.

3. Learned counsel had also placed reliance on a decision of this Court in **Soya v. A.K. Mohanan [2005 KHC 1933]**. It is held therein that, in terms of Rule 11(a) it is mandatory that a co-adulterer shall be a party in a petition for divorce on the ground of adultery and that such requirement can be dispensed with only in any of the circumstances mentioned in Clause (d) of Rule 11 is existing. It is stated that, when the name of the alleged adulterer is known to the petitioner, he has a duty to implead him. The situation under the (iv)th option in clause (d) of Rule 11 arises only if the situation does not come within the fold of clauses (i) to (iii) of sub-clause (d) of Rule 11.

4. It is also pointed out that the necessity to implead the

adulterer as co-respondent in a petition for divorce has been reiterated by a Division Bench of this Court in an earlier decision in **Ayyappan v. Vasantha** [1987(1) KLT 504].

5. Per contra, learned counsel appearing for the respondent contended that, the allegations in the Original Petition are to the effect that the petitioner is leading an immoral life having voluntary sexual intercourse with many persons. It is also contended that on the basis of such a life lead by her, the petitioner had shown cruelty to the respondent. Therefore, it is submitted that, the Original Petition is filed also on the ground of cruelty. According to the respondent, the provision quoted as Section 13(1)(ib) was a mistake and the appropriate provision of Section 13(1) (ia) was subsequently incorporated through the amendment.

6. While appreciating the rival contentions we take note of the fact that, the question regarding maintainability of Ext.P1 was not considered by the Family Court in its proper perspective. The Family Court in Ext.P7 order proceeded on the basis that, by virtue of amendment effected, the defects pointed out by the petitioner with respect to maintainability of the

Original Petition stands rectified. We are of the opinion that such an approach was not correct. In view of the fact that the petitioner had raised contentions regarding non-maintainability based on specific provisions contained in the Rules, especially as contemplated under Rule 7 and Rule 11, the court below ought to have adjudicated the issue taking note of such contentions. Evidently, relevant provisions of the Rules and the settled legal precedents were not seen considered. We are of the considered opinion that the impugned order (Ext.P7) lacks from proper exercise of jurisdiction vested on the court. Hence we are inclined to remit the matter back to the Family Court for a re-consideration. However, we make it clear that we are not inclined to interfere with respective Ext.P8 order, through which the amendment is allowed, since it does not suffer from any sort of infirmity. We also make it clear that we are not arriving at any conclusion regarding the question of maintainability of the Original Petition, which is left open for independent adjudication by the Family Court.

7. Under the above mentioned circumstances, the Original Petition is allowed in part. Ext.P7 order of the Family Court

passed in I.A. No.170/2015 in O.P. No.88/2014, dated 02.05.2015 is hereby set aside. The Family Court is directed to restore I.A. No.170/2015 on its files and to dispose of the same afresh, after affording opportunity of hearing to both sides. Needless to observe that further steps in O.P. No.88/2014 shall be proceeded only after disposing I.A No.170/2015.

8. The Family Court shall take all earnest endeavour to take a decision on the question of maintainability, at the earliest possible.

Sd/-

C.K. ABDUL REHIM
JUDGE

Sd/-

SHAJI P. CHALY
JUDGE

smv
25.09.2015