

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 6TH DAY OF OCTOBER 2015/14TH ASWINA, 1937

OP (FC).No. 401 of 2015 (R)

PETITIONER :

FINY SUSAN FRANCIS
DAUGHTER OF FRANCIS ABRAHAM, METHODATHUMALAYIL HOUSE
ERAVIPEROOR P.O., THIRUVALLA, PATHANAMTHITTA DISTRICT

REPRESENTED BY HER FATHER AND POWER OF ATTORNEY
FRANCIS ABRAHAM, METHODATHUMALAYIL HOUSE
ERAVIPEROOR P.O., THIRUVALLA, PATHANAMTHITTA DISTRICT.

BY ADV. SRI.JACOB ABRAHAM

RESPONDENT :

BINU PHILIP PAUL
S/O M.C.PHILIP, METTUMPURATH HOUSE, VELLIYARA P.O.
AYROOR VILLAGE, PATHANAMTHITTA DISTRICT-689612.

R BY ADVS. SRI.P.HARIDAS
SRI.P.C.SHIJIN

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 06-10-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

OP (FC).No. 401 of 2015 (R)

APPENDIX

PETITIONER(S)' EXHIBITS

EXHIBIT P1: TRUE COPY OF O.P.NO.976/2013 FILED BEFORE THE FAMILY COURT,
TIRUVALLA.

EXHIBIT P2: TRUE COPY OF I.A.NO.874/2015 IN O.P.NO.976/2013 FILED BEFORE THE
FAMILY COURT, TIRUVALLA.

EXHIBIT P3: TRUE COPY OF THE ORDER OF THE FAMILY COURT, THIRUVALLA DATED
10.8.2015 IN I.A.NO.874/2015 IN O.P.NO.976/2013.

RESPONDENT(S)' EXHIBITS : NIL

/TRUE COPY/

P.A TO JUDGE

AV

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

O.P (FC) No. 401 OF 2015

DATED THIS THE 6th DAY OF OCTOBER, 2015

J U D G M E N T

C.K. Abdul Rehim, J:

This original petition under Article 227 of the Constitution of India is filed seeking to quash Ext.P3 order of the Family Court, Thiruvalla, issued in IA No.874/2015 in OP (Div) No.976/2013. The case before the Family Court was instituted by the parties herein jointly, seeking divorce under Section 10 A of the Indian Divorce Act, 1869. The original petition was instituted before the Family Court as early as in October 2013. The petitioner is working in Australia and the respondent is working in Kuwait. The petitioner herein is represented both before the Family Court and this court through her father, as Power of Attorney holder. Since both the parties are working abroad, they could not undergo counselling together before the Family Court on any date. It is stated that the petitioner had

appeared before the counsellor of the Family court on 3 specific posting dates, on 26-06-2015, 30-06-2015 and 03-07-2015. But the respondent could not be present for counselling on those days. It is stated that, after expiry of the statutory period of 6 months, the Family Court had posted the case for appearance of the parties on 10-08-2015. On that date the parties have jointly filed IA No.874/2015 requesting the Family Court to direct the Counsellor to conduct counselling through 'Video Conference'. But the Family Court had declined the request, through Ext.P3 order, stating that the respondent herein had never appeared for counselling. It is also mentioned that there is no materials available on record to show that the parties have undergone counselling in any other connected cases. The court below opined that the parties have deliberately failed to appear despite given repeated opportunities. It is observed that no proof has been produced with respect to identity of the parties. Finding that the counselling is mandatory in the case of this nature

and also finding that no facilities are available in the court for conducting counselling through 'Video Conference', the petition was dismissed. It is aggrieved by Ext.P3 order this original petition is filed.

2. Heard; Counsel appearing on both sides.

3. Question 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 marriage sought under Section 13B of the Hindu Marriage Act or under Section 10 A of the Indian Divorce Act, was dealt with by this court in a decision rendered in OP (FC) No.174/2015 (judgment dated 15-09-2015). Referring to Section 9 (1) of the Family Courts Act this court observed that, settlement contemplated thereunder need not invariably be that of a re-union of the spouses. It is found that the wordings of Section 9 (1) stipulates the court to endeavour for a settlement, "where it is possible to do so consistent with the nature and circumstances of the case". It is found that the assistance to

be rendered or the persuasion to be made by the court is only 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 stands irretrievably broken and where the parties are living separated since for a period as stipulated in the statute, and when the parties have arrived at mutual decision to have the legal relationship dissolved through the court, the nature and circumstances would clearly indicate that parties have decided to have a judicial dissolution of the marital tie. In such cases any settlement with respect to the subject matter of the petition, need not invariably be that of a re-union of the spouses. But it can also be by way of a legal dissolution and thereby relieving the parties from the matrimonial tie. Therefore it is held that, “settlement” in the case of a joint petition for divorce need not always be by way of a reconciliation or re-union of the spouses.

4. In the decision of this court in **Saji T. Vargheese V. State of Kerala (2010 (3) KLT 804)** it was held that,

personal appearance of the spouses in joint applications 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. It is held that the parties can make the second motion through their counsel by submitting chief affidavits in order to state their case on oath before the court. In the said case this court further observed that, a ritualistic insistence for personal presence of the parties for conciliation/counselling need not be made by the court in a joint application for divorce filed on the basis of mutual consent, if the court is otherwise satisfied about genuineness of the application.

5. In our judgment in OP (FC) No.174/2015 (mentioned above) it is held that, the intention of the legislature in incorporating Section 9 (1) in the Family Courts Act, is not meant for the Family Courts to direct the parties to undergo the process of counselling invariably in all the cases as a mandatory requirement. Giving emphasis to the wordings of 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 to assist and to persuade the parties to arrive at a settlement is required only if it is possible to do so consistent with the nature and circumstances of the case and it is intended only to facilitate the parties to arrive at a settlement “in respect of the subject matter of the suit or proceedings”. It is found that in cases of joint applications for divorce filed on mutual consent, it is evident that the parties have already arrived at a settlement with respect to the issue regarding dissolution continuance of the marital relationship, and it is on that basis that the joint application is filed. Therefore there is no necessity existing in the circumstances of the case to persuade the parties to arrive at a settlement in respect of the subject matter of the suit or proceedings, because settlement in all the matrimonial cases need not invariably be that of a reconciliation or re-union of the spouses. But it can also be by way of a peaceful dissolution of the marriage. Hence it is found that the endeavour which

should be made by the Family Court under the mandate of Section 9 (1) need not be that of a compulsory procedure of counselling of the parties together in cases of joint applications for divorce on mutual consent. In the decision in OP (FC) No.174/2015 this court had prescribed guidelines to be followed with respect to the conciliation/counselling in the matter of joint applications for divorce, which is extracted hereunder.

“We feel that a clarification in the procedure to be adopted by the Family Courts is required 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 persuade the parties for a reconciliation or for a 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

such other valid reasons incapacitating their personal appearance, it will be left open the Family courts to consider such applications and to allow exemption from undergoing counselling, either with respect to one of the parties or to both of them as the case may be. In such situation it is also not necessary 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, and the guiding principles settled as above.

6. Evaluated on the basis of the above quoted decisions, circumstances prevailing in the case at hand would reveal that, the joint application was filed much earlier and the statutory waiting period had expired long back. Insisting upon the parties to have counselling together at this stage, cannot be termed as a procedure which is strictly mandatory. However, we notice that the interim application in which the impugned order was issued by the Family Court is one seeking permission to have the counselling done through 'video conferencing'. Learned

counsel had drawn out attention to a decision of the High Court of Madras in **Sudha Ramalingam V. Registrar General and others (2015) 1 MLJ 540**. It is held therein that a discretion is vested with the Family Court itself to record evidence through 'video conferencing' especially because of the fact that Section 10 (3) of the Family Courts Act empowers the Family Court to lay down its own procedure to arrive at a settlement or to get the truth of the matter. So also in a decision of the Bombay High Court in **Mukesh Narayan Shinde V. Palak Mukesh Shinde Nee Palak D. Patel (2012 (3) ALL MR 521)** a direction was issued to the Family Court to arrange a 'video conference' of the Marriage Counsellor with the respondent/wife in the court premises, with the help of a Computer/ Laptop or by using a Webcam. Learned counsel had also pointed out a decision rendered by this court in W.P (c) No.7400/2008 (judgment dated 04-12-2008) directing recording of evidence of a witness in a civil case through 'video conferencing' by appointing an Advocate

Commission.

6. Taking note of the above decisions, we are of the considered opinion that the court below had not considered feasibility of the counselling being done through 'video conferencing' with the help of a Computer/ Laptop or through a Mobile phone having facilities for the said purpose. So also this court is of the considered opinion that the Family Court ought have considered the question of dispensing with procedure of counselling, considering the fact that the joint application was filed much earlier and that the statutory waiting period had already expired. In this regard it is necessary for the Family Court to take an appropriate decision taking note of the directions issued by this court in OP (FC) No.174/2015.

8. Under the above mentioned circumstances the original petition is allowed. Exhibit P3 order of the Family Court is hereby quashed. It will be left open to the parties to approach the Family Court court seeking to dispense with the process of counselling or else to seek permission for

arranging counselling through 'video conferencing' by offering to provide necessary facilities for the same. If any such approach is made, the Family Court shall take an appropriate decision, in view of the observations contained hereinabove and also considering the fact that the joint petition for divorce was filed as early as in the year 2013. An early disposal of the case is highly solicited. Hence the Family Court is directed to take all earnest efforts to dispose of the original petition at the earliest possible.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

AMG

True copy

P.A. to Judge