

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 17TH DAY OF NOVEMBER 2015/26TH KARTHIKA, 1937

OP (FC).No. 447 of 2015 (R)

PETITIONER:

**PRADEEPKUMAR V.,
AGED 36 YEARS, S/O VELAYUDHAN PILLAI,
49/926C, MOTHER THERESA LANE,
CHANGANPUZHA ROAD, EDAPPALLY P.O.**

BY ADV. SRI.MANU ROY

RESPONDENT:

**BINDU K. PILLAI,
AGED 34 YEARS, D/O KUTTAN PILLAI,
49/926 C, MOTHER THERESA LANE
CHANGANPUZHA ROAD, EDAPPALLY P.O.**

**BY ADVS. SRI.K.R.VINOD
SMT.M.S.LETHA**

THIS OP (FAMILY COURT) HAVING COME UP FOR ADMISSION ON 17-11-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

AMG

APPENDIX

PETITIONER'S EXHIBITS

EXHIBIT P1: COPY OF PETITION FILED AS P.P.NO.127;2011.

EXHIBIT P2: COPY OF PETITION FILED AS O.P.NO.2363/2010.

EXHIBIT P3: COPY OF PETITION FILED AS O.P.NO:138/2011.

EXHIBIT P4: COPY OF JUDGMENT IN O.P.(FC)NO.504/2014.

EXHIBIT P5: COPY OF ORDER DATED 22.6.2015.

EXHIBIT P6: COPY OF PETITION FILED AS I.A.NO:2979/2015.

EXHIBIT P7: COPY OF ORDER DATED 11.8.2015.

EXHIBIT P8: COPY OF PETITION FILED AS I.A.NO.3385/2015.

EXHIBIT P9: COPY OF PETITION FILED AS I.A.NO.3384/2015.

EXHIBIT P10: COPY OF ORDER IN IA NO.3385/15 DATED 21.8.15.

EXHIBIT P11: COPY OF ORDER IN IA NO.3384/15 DATED 21.8.2015.

RESPONDENT'S EXHIBITS

NIL

True copy

P.A. To Judge

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

O.P (FC) No. 447 OF 2015

DATED THIS THE 17th DAY OF NOVEMBER, 2015

J U D G M E N T

Abdul Rehim, J:

In this original petition filed under Article 227 of the Constitution of India, the petitioner is challenging Ext.P7, P10 and P11 orders passed by the Family Court, Ernakulam in IA.No.2979/2015 in OP.No.127/2011, in IA.No.3385/2015 in OP.No.138/2011 and in IA.No.3384/2015 in OP.No.2363/2010.

2. The petitioner and the respondent are husband and wife. They are now living separated due to severe matrimonial discord. OP.No.127/2011 was filed by the respondent herein seeking for return of gold ornaments. OP.No.2363/2010 was filed by the petitioner herein seeking dissolution of marriage under section 13 of the Hindu Marriage Act 1955. OP.No.138/2011 was filed by the petitioner seeking partition of the plaint schedule properties

and the building situated therein. All the 3 cases were jointly tried by the Family Court and recording of evidence now stands closed. The cases are posted for final hearing. The petitioner herein had approached this court on an earlier occasion in OP(FC) 504/2014 seeking an early disposal of OP.No.2363/2010 and OP.No.138/2011 filed by him before the Family Court. It is stated that this court had passed a judgment in OP(FC) 504/2014 directing disposal of both the above said cases within a period of 4 months from 13.1.2015. Evidently, the time limit stipulated was subsequently extended, through order passed in an interim application filed by the petitioner before this court on 22.6.2015. The time stipulated was extended for a further period of 4 months. Now the time limit stipulated stands expired on 22.10.2015. It is stated that the court below had proceeded with trial of the cases and the petitioner was examined based on a proof affidavit filed by him. But according to him, he had adduced evidence only in OP.No.2363/2010 and OP.No.138/2011 and he had failed to adduce any evidence in OP.No.127/2011, filed by the

respondent herein. It is stated that only when the respondent had filed proof affidavit in the cases jointly tried together, that the petitioner had realised that the Family Court had ordered joint trial of all the 3 cases. Hence the petitioner filed IA.No.2979/2015 in OP.No.127/2011 seeking to reopen his evidence for the purpose of examining him for adducing evidence in OP.No.127/2011. But the Family Court had dismissed the said application through Ext.P7 order, without mentioning any reason.

3. The petitioner had also filed I.A. No.3385/2015 in OP No.138/2011 seeking to reopen the evidence in the said case, for the reason that the vendor from whom the property was purchased namely Sri. Cleetus has to be examined in the said case inorder to prove that the actual sale consideration for which the property was purchased is Rs.4,20,000/-, as contained in Ext.A4 agreement. According to the petitioner examination of the said person became necessary because the respondent herein had denied Ext.A4 agreement, while cross-examining her. Hence it is contended that inorder to prove the actual sale

consideration for which the property was purchased, examination of the above said person is necessary. The court below had dismissed the said application through Ext.P10 order observing that the petition is filed at a belated stage and that it cannot be allowed especially in view of time frame stipulated by this court for disposal of the cases.

4. In OP No.2363/2010 which is filed by the petitioner seeking dissolution of marriage. I.A. No.3384/2015 was filed seeking amendment incorporating additional ground and relief to the extent of nullifying the marriage on the allegation of impotency of the respondent and that the consent of the petitioner was obtained by fraud. The said application was dismissed through Ext.P11 order of the Family Court observing that a similar petition already filed earlier was dismissed as not pressed. It is also observed that the amendment could not be allowed at a belated stage when the evidence is over.

5. Exhibits P7 & P10 are orders rejecting the application for re-opening of evidence for examination of

the petitioner and for examination of a witness on behalf of him. The reason mentioned is that the petitioner had failed to adduce evidence in one of the case when he was examined as PW1. Further he is seeking permission of the court to examine one more witness in this behalf, on the basis that Ext.A4 agreement has to be proved through him. Going through the impugned orders, Ext.P7 & P10, it is evident that the Family Court has not considered those applications on merits. In other words, the orders impugned in this regard does not reflect a proper application of mind and a proper consideration of the relief sought for, based on the rival contentions. Learned counsel appearing for the respondent argued that the reason mentioned is that the petitioner was not aware of the joint trial of all the 3 cases together, is not true and correct. He has pointed out that on an earlier occasion the petitioner had filed an application to detach OP No.138/2011 from the joint trial and it was dismissed. But it is to be noticed that the specific case put forth by the petitioner that he was not aware of the joint trial of OP No.127/2011 alongwith two other cases.

However, we are not fully convinced about such a contention, because it is evident that all the 3 cases were posted together and continued with the trial on the basis of an Advocate Commissioner appointed for recording evidence. At the most the petitioner could have been aware of the joint trial of all the 3 cases together, when he was cross-examined on behalf of the respondent on the fact of all the 3 cases. Evidently the petitioner could have sought for further examination of himself, before starting evidence on the side of the respondent. So also, in the case of OP No.138/2011, he could have cited the witness and examined him since he had produced Ext.A4 agreement and marked the same in evidence. There is no merit in the contention that examination of such a witness became necessary only because the respondent had denied the execution of Ext.A4. However, we take note of the larger principle that the trial courts should not deny opportunity to any of the parties to adduce all available evidence. It is true that the petitioner has not filed proof affidavit in OP No.127/2011. Therefore to protect interest of justice it is necessary to permit him to

adduce evidence in the said case also. Definitely the respondent will get an opportunity to further cross-examination. So also it is for the court below to decide whether re-opening of the evidence for the purpose of examination of the additional witness need to be permitted or not. Since it is a joint trial of 3 cases, once the evidence is reopened it will be left open to the Family Court to decide as to whether the petitioner can be permitted to examine one additional witness. At any rate, from Exts.P7 & P10 orders it is not evident that the Family Court had appreciated the above aspects in its real perspective. As observed above, it is always obligatory on the part of the trial court to permit adduction of all best available evidence in all the cases for having a proper adjudication of the issues involved. Hence we are inclined to direct the Family Court to allow IA No.2979/2015 in OP No.127/2011 and IA No.3385/2015 in OP No.138/2011. But due to the belated filing of the application the respondent will be prejudiced which we feel need to be compensated in terms of cost.

6. Therefore the above original petition is allowed in part to the extent of quashing Exts.P7 & P10 orders. The interim applications which were dismissed through those orders will stand allowed, subject to condition of the petitioner herein paying cost of Rs.3,500/- to the counsel appearing for the respondent before the court below, within a period of 2 weeks from the date of receipt of a copy of this judgment. If the direction is complied with and if the evidence is reopened, the Family Court is directed to proceed with the trial and to dispose of the case at the earliest, de hors the time limit stipulated by this court in Ext.P4 judgment and Ext.P5 order.

7. With respect to the application seeking amendment filed in OP No.2363/2010, it is evident that the case was filed seeking dissolution on the ground of cruelty and desertion. Trial was proceeds on that basis. Now the petitioner is coming up with a new set of allegations regarding impotency of the respondent and that the consent of the marriage was obtained by fraud. Such a totally inconsistent plea cannot be allowed through an amendment.

The facts sought to be incorporated and the relief sought through amendment are totally different and contradictory to the case set up earlier. Such an amendment if allowed will definitely cause prejudice to the respondent. More over it is evident that an application filed for the same purpose on an earlier occasion was dismissed as withdrawn. Therefore we find no ground to interfere with Ext.P11 through which IA No.3384/2015 in OP No.2363/2010 was dismissed. Hence the relief sought for to the above extent will stand dismissed.

Sd/-

C.K. ABDUL REHIM, JUDGE.

Sd/-

MARY JOSEPH, JUDGE.

Pmn/AMG

True copy

P.A. to Judge