IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.BHAVADASAN

THURSDAY, THE 6TH DAY OF AUGUST 2015/15TH SRAVANA, 1937

RSA.No. 645 of 2003 (B)

AGAINST THE JUDGMENT IN AS 8/2001 of SUB COURT, KASARAGOD.
AGAINST THE JUDGMENT IN OS 369/1999 of PRINCIPAL MUNSIFF, KASARAGOD.

APPELLANT(S)/RESPONDENT/PLAINTIFF:

C.H. HAJIRA, AGED 22 YEARS,
W/O. SULAIMAN AND
D/O. C.H. ABDULLA, MUSLIM,
HOUSEHOLD, RESIDING AT ETHRUTHODE HOUSE,
NEKARAJE VILLAGE, KASARAGOD TALUK,
P.O. EDANEER VIA CHENGALA.

BY ADV. SRI.KODOTH SREEDHARAN

RESPONDENT(S)/APPELLANT/DEFEDNDANT:

1. K.M. SULAIMAN, AGED 29 YEARS,
S/O. KAZI MOHAMMED, MUSLIM,
COOLIE, RESIDING NEAR RUFAYAI MOSQUE,
CHERIYA ALAMPADY IN MUTTOTHODAY
VILLAGE OF KASARAGOD TALUK,
P.O. ALAMPADY.

BY ADV. SRI.D.KRISHNA PRASAD
BY ADV. SRI.JOJI VARGHESE
BY ADV. SRI.M.HARISHARMA

THIS REGULAR SECOND APPEAL HAVING BEEN FINALLY HEARD ON 06-08-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

P. BHAVADASAN, J.

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R.S.A. No. 645 of 2003

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Dated this the 6th day of August, 2015.

JUDGMENT

The wife, who was able to secure a decree for dissolution of marriage from the trial court, but failed to get it sustained from the lower appellate court, is the appellant.

2. The marriage between the plaintiff and the defendant was solemnized on 12.4.1999. Thereafter they took up residence in the house of the husband. The allegation in the plaint is that on 13.7.1999 the plaintiff was deserted by her husband and he had demanded Rs.One lakh in cash and gold as dowry. The plaint also mentions about the gold ornaments and cash given at the time of marriage. It is alleged that subsequent demands were not met by her father which resulted in the husband being cruel to the wife and torturing her both physically and mentally. She was not given the comforts of a wife and she was not allowed a

dignified life of a wife. It is also alleged that the marriage was never consumated and the defendant had failed to perform his marital obligation. It is also alleged that he had developed illicit relationship with his brother's wife and they together began to harass the petitioner. Alleging all these grounds and various other grounds of ill-treatment, the plaintiff pointed out that the marriage had irretrievably broken and she sought for a decree of dissolution of marriage.

3. The defendant resisted the suit. He denied the allegation of cruelty and the demand for money and gold ornaments as alleged in the plaint and contended that these are all figments of her imagination. He denied the allegation of cruelty both mental and physical. He claimed that his wife was very well looked after in the matrimonial house. However, he admitted that the marriage was not consumated, but attributed the blame to the wife. He denied the illicit relationship with his

sister-in-law and contended that it is a defamatory statement made only for the purpose of the petition. He pointed out regarding the infirmity of the plaintiff and the fraudulent claims made by the father of the plaintiff and also pointed out that they had concealed the true facts from him. It is conceded in the written statement that the defendant had no objection in the annulment of the marriage, but not on the ground mentioned in the plaint. He pointed out that at any rate the marriage is vitiated by fraud and is void in law.

4. The defendant in the suit in turn filed O.S. 91 of 2000 for damages on the allegation that defamatory statement is made against him that he is having illicit relationship with his sister-in-law.

5. The plaintiff in O.S. 369 of 1999 resisted O.S. 91 of 2000 by denying the allegations made in the plaint.

6. On the above pleadings, issues were raised and parties went to trial. The evidence

consists of the testimony of P.Ws. 1 to 3 and documents marked as Exts. A1 to A4 from the side of the plaintiff. The defendant examined D.Ws.1 to 3 and had Exts.B1 and B2 marked. Exts. C1 and C2 are the medical examination report of the plaintiff in O.S. 69 of 1999.

7. The two suits were jointly tried and O.S. 369 of 1999 was treated as the leading case. The trial court though found that the allegation of physical and mental ill-treatment were not established, however found that the allegation of non-consumation of marriage due to the defect of the wife is not justified and proved and it is contrary to the evidence on record and came to the conclusion that such an allegation amounted to cruelty and granted dissolution of marriage. O.S. 91 of 2000 filed for damages was dismissed.

8. Aggrieved by the grant of dissolution of marriage in O.S. 369 of 1999, the defendant went up in appeal as A.S. 8 of 2001.

9. The lower appellate court found that the allegations of cruelty and ill-treatment, both physical and mental have been denied by the plaintiff while she was examined as P.W.1. Holding that in the light of the evidence adduced, none of the grounds urged by the plaintiff in O.S. 369 of 1999 were proved to entitle her to dissolution of marriage, the lower appellate court reversed the finding of the trial court and dismissed O.S. 369 of 1999. That brings the plaintiff in the said suit before this Court.

10. Notice was issued on the following substantial questions of law:

> A. In the instant case where the Muslim wife has succeeded in proving that the false allegations against her by the husband amounting to cruel treatment making her commubial life miserable; should not have the appellate court concurred with the trial court in granting a decree for divorce under section 2(viii)(a) of the Dissolution of the Muslim Marriage Act 1939 and as held in 1995 (2) K.L.T. 413.

B. The allegations regarding the malformation of the genital organ of the plaintiff having been established to be false, which would amount to mental cruelty entitling the plaintiff to a decree for divorce u/s 2(viii)(a) of the Dissolution of Muslim Marriage Act, 1939. Have not the appellate Court erred in setting aside the Trial court judgment despite affirming that finding.

C. The evidence adduced in the case having established the essence of mental cruelty, making the plaintiff's life miserable in terms of section 2(viii)(a) of the Dissolution of Muslim Marriage Act, 1939; have not the appellate court gone wrong in setting aside the well considered judgment of the trial court granting a decree for divorce under the Act.

D. The defendant having not filed an appeal against the judgment rendered in O.S. 91/2000 should not have the lower appellate court rejected the appeal invoking the principles of resjudicata in the light of the decision in 1979 SC 551 and 1993(2) K.L.T. 130 in view of the recording of the finding that the

allegations against the defendant are not defamatory in O.S.91/2000.

E. Is not the finding in the judgment in O.S.91/2000 to the effect that the allegations against defendants therein are not defamatory and therefore not false binding on him in view of Section 11 of C.P.C. And should not the lower appellate court rejected his appeal on that ground.

F. Should not the appellate court concurred with the trial court regarding irretrievable break down of marriage in the facts and circumstances of the case especially in the light of the plea raised by the husband that a decree for divorce can be passed but not on the grounds raised by the plaintiff.

11. Shri. Kodoth Sreedharan, learned counsel appearing for the appellant contended that the lower appellate court was not justified in holding against the plaintiff contrary to the finding of the trial court. Even assuming that the allegations of cruelty as alleged in the plaint in O.S. 369 of 1999 were not proved, the allegations

in the written statement regarding the infirmity of the plaintiff in the suit which was found against as per the medical evidence amounts to cruelty and that is sufficient to grant dissolution of marriage.

12. Learned counsel further contended that even assuming that the evidence is weak, it is very clear from the evidence on record that the marriage has irretrievably broken down and that constitutes a reason for dissolution of marriage under Section 2(9) of the Dissolution of Muslim Marriage Act, 1939. It is clear from the written statement that the husband is not interested in carrying on the marital relationship and infact reserved his right to file suit for declaration of marriage as null and void on the ground of fraud. Under these circumstances, the court below ought not to have interfered with the finding of the trial court.

13. Shri. D. Krishna Prasad, learned counsel appearing for the respondent on the other hand pointed out that the lower appellate court was justified in holding that there are no grounds to interfere with the finding of the lower appellate court. Referring to the plaint and the evidence adduced by the plaintiff as P.W.1, it is contended that the the allegation of cruelty is proved to be false. It is true, according to the learned counsel, that the respondent was not interested in continuing the marriage for some other reason. However, learned counsel pointed out that the grounds relied on by the trial court is not justified. There are no grounds to interfere with the finding of the lower appellate court.

14. After having heard learned counsel on both sides and having perused the records, it is felt that the matter is not as simple as put forward by the counsel on both sides. Of course, it is true that the plaintiff in O.S. 369 of 1999

made various allegations of the defendant's acts of cruelty both physical and mental, but she was unable to establish the same. As rightly pointed out by the learned counsel for the respondent, the evidence adduced by the plaintiff is contrary to what was stated in the plaint. However, one cannot omit to note that in the written statement the defendant has expressed his willingness for dissolution of marriage but not on the ground stated by the plaintiff. It is also stated that he is not interested in continuing the relationship. He also reserved his right to file a suit on the ground of fraud.

15. The question whether the defect and infirmity pointed out by the respondent, which were found on medical evidence to be false, can constitute cruelty is a different question.

16. This Court in two decisions, namely, **Mohammed v. Sainaba Umma** (1987 (1) K.L.T. 712) and **Siddhique v. Amina** (1995(2) K.L.T. 413), relying on

the residuary clause in Section 2 of Dissolution of Muslim Marriages Act considered the question as to whether a relief can be granted on any ground other than the one mentioned in the residuary clause. In both the decisions the court held that even assuming that none of the grounds mentioned in Section 2 is established, the residuary clause mentioned in Section 2(9) would enable the court to grant dissolution if the relationship has irretrievably broken down.

17. On going through the various allegations and counter allegations, it is clear that in the case on hand marriage is irretrievably broken down as contemplated under Section 2(9) of the Act.

Hence this appeal is allowed and the impugned judgment and decree are set aside and it is declared that the marriage between the plaintiff and the respondent is dissolved on the ground that the marital relationship between the parties has

irretrievably broken down. There will be no order as to costs.

P. BHAVADASAN,
JUDGE

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