

Mat.Appeal Nos.236/13 & 277/13

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finding of fact by the trial Court is erroneous in so far as genuineness of Ext.A3 was not disputed at any point of time. The explanation offered against Ext.A3 cannot be believed taking into account the over all evidence of the parties to the lis.

In the result, these appeals are allowed as under:-

(i) Mat.Appeal No.236/13:- Judgment in OP No.604/2007 is set aside and the OP is dismissed.

(ii) Mat.Appeal No.277/13:- The judgment in OP No.327/2005 is set aside and the OP is decreed as under:-

(a) The marriage between the petitioner and the respondent shall stand dissolved by a decree for divorce.

Sd/-

**A.M. SHAFFIQUE**

**JUDGE**

Sd/-

**N.ANIL KUMAR**

**JUDGE**

Rp

True Copy

PS to Judge

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she has stated that the gold ornaments were with her. This letter seems to be sent by post and the date in the seal is seen as 17/7/2003, apparently, during the time when the parties separated. Though the Family Court found that the letter was genuine, Family Court accepted the version of RW1 and arrived at a finding that the said letter was sent at the instance of the husband. RW1 had admitted to have sent such a letter and the letter specifically indicates that the gold ornaments are retained by her. Even in Ext.A2 judgment, the learned Magistrate had placed reliance on the said letter and found that the claim put forward by RW1 cannot be believed. When Ext.A3 letter is admitted and there is absolutely no mention about Ext.A3 in the petition filed by the wife seeking return of gold ornaments and when contrary versions are spoken to by RW1 in various proceedings, there is no reason to believe the version of RW1. We are of the view that RW1 had failed to prove entrustment and appropriation of gold ornaments by PW1.

15. Under such circumstances, she is not entitled for return of gold ornaments as directed by the trial Court. The

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petitioner was entitled for a divorce and the Court below committed serious error in appreciating the evidence in the proper perspective. Court below ought to have considered the entire materials on record before arriving at the finding that cruelty was not proved. It is settled law that cruelty includes mental cruelty as well and harassing a family for a substantially long time by filing false complaints itself amounts to mental cruelty. That apart, the marriage has been irretrievably broken and there is no chance for reunion and coupled with the fact that the husband and his family members had to suffer cruelty at the hands of the respondent, this is a fit case in which divorce can be granted in favour of the petitioner/husband.

14. Now coming to the claim for recovery of gold ornaments, it is settled law that the wife while making a claim for gold ornaments will have to prove the entrustment of gold ornaments. It is her case that the gold ornaments were entrusted on the date of marriage itself to her husband who collected the same stating that the gold ornaments would be kept in the locker of his father. But in Ext.A3 letter which was admitted by the wife,

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before the Magistrate Court against the respondent, his father and mother was absolutely false and was intended to harass them. Ext.A2 is the judgment in CC No.1497/2004. The Court had come to a conclusion that there was no evidence to prove demand for any dowry as alleged in the complaint and that her evidence in the FI statement is totally contrary to the letter which she has written and marked as Ext.D2. Ext.D2 is Ext.A3 in this case.

13. From the totality of the aforesaid evidence, it is rather clear that the respondent/wife had been harassing the petitioner/husband and his parents and she had even gone to the extent of filing false complaints against them. Though such an aspect had not been pleaded since the Original petition was filed even before a case being charged against them, subsequent events which are part of record clearly proves her attitude against the petitioner and his parents. The entire case was set up to harass them and therefore, the contention of the petitioner/husband that the wife had been ill-treating him and his parents has to be believed. We are therefore of the view that the

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totally different contention that some of her gold ornaments were taken later, it is very difficult to believe her version. Apparently, she was giving false evidence before the Magistrate Court. While being examined as RW1, she was asked as to whether any of her gold ornaments were given to the father or mother of the petitioner, she answered that she did not give them anything. She further stated in cross-examination that her thali chain and another chain weighing 7 sovereigns were taken away by the petitioner/husband on 4<sup>th</sup> January, 2004 at her Quarters. Cross-examination further indicates that she made a complaint that the respondent was threatening her over telephone. Ext.A1 is the FI statement of the petitioner before the police. In the said petition, she stated that she was adorned with 58½ sovereigns of gold ornaments and on the next day of marriage, her husband, husband's father and mother together had taken away her gold ornaments stating that it will be kept in a locker. While giving evidence as RW1 she admits that father and mother of the respondent/husband had not taken any of her gold ornaments. Therefore, it is evident that the complaint filed by the petitioner

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No.1497/2004 before the JFCM Court, Aluva in which she has given evidence stating that the respondent and his parents had forcefully taken her thali chain and had stolen other gold ornaments kept by her and there was demand for dowry. It is argued by the learned counsel for appellant that in the said case he and his mother were acquitted on the ground that the complaint was false.

12. In the case on hand, while the petitioner/wife does not have a case in the petition that any of her gold ornaments were appropriated by her in-laws, her case is that all the gold ornaments were handed over to the respondent/husband for safe keeping in his father's bank locker immediately after marriage i.e., on 28/8/2001 itself. But when she filed a complaint before the police, and when she was examined before the Magistrate Court, she had given evidence stating that some of her gold ornaments were taken while she was residing in the NGO Quarters and that too by the respondent and his parents. When the petitioner/wife had a case that her gold ornaments were entrusted on the very same day of marriage and in other proceedings, she takes up a

made any demand for dowry and there is no evidence to prove that she was tortured in any manner as alleged. Therefore, the only conclusion that could be arrived is that wife was not willing to live with her husband. She opted for separate residence. The case of desertion could not have been raised since even according to the petitioner/husband, she left the matrimonial home during the 5<sup>th</sup> month of the birth of the child that was during July, 2003 and he filed OP No.40/2004 immediately after their separation. What is to be considered in this case is whether the acts of the wife/respondent amounts to cruelty.

11. In ***Samar Ghosh v. Jaya Ghosh*** [(2007) 4 SCC 511], a three Judge Bench of the Apex Court had held that long separation itself amounts to cruelty. In this case, evidence further indicates that wife has filed criminal complaint against her husband and in-laws alleging matrimonial cruelty which came to be dismissed. The deposition given by her before the Magistrate Court has been produced as Annexure A along with IA No.936/2013 in Mat.Appeal No.236/2013 in order to show that his wife had filed a complaint which was registered as CC

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examination, he stated that his father and mother were living with them. His father was a Doctor, a Pediatrician, who retired from the Kerala Health Service and he was doing consultancy work. One of the questions asked was that petitioner/husband was living as a parasite at the expense of his wife. In the evidence of RW1, she stated that the respondent and his family members were physically and mentally torturing her demanding more dowry. But it appears that there is absolutely no evidence in this regard. A perusal of her evidence in cross-examination would further prove that the parties have been on loggerheads for quite sometime and she is not at all interested to have a matrimonial relationship with the petitioner. According to her, her husband had taken away all her ornaments and money. She admitted the fact that she was living separately, but she has not stated the actual reason for her separation other than the vague allegation that she was being tortured. From the totality of the evidence, it appears that the wife was not interested to live in the matrimonial home, probably due to the presence of husband's father and mother. There is no evidence to prove that they had



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husband after the marriage, husband cannot be held liable to return the same.

10. PW1 in his affidavit in lieu of chief examination has stated that the respondent used to behave improperly to the petitioner and other members of the family and he was being mentally and physically tortured on several occasions. She had left the matrimonial home on her own and used to come back on her own wish. She was married to another person earlier which also ended in divorce. After birth of the child, she was insisting that there was no space in their house and insisted that they should shift to a rented building. After five months of the birth of the child, without any reason, she left the matrimonial home. After the said incident, in July 2003, she informed that she was in her uncle's house and that no complaint should be filed before the police. She had also stated that she had taken away her gold ornaments and a letter was also sent stating the said facts. On several occasions, though he attempted to bring her back, she had not come back and she is residing with her sister. He filed the Original Petition in the year 2004 for divorce. During cross-

Kakkanad. It was found that there was no evidence to prove the alleged cruelty.

8. With reference to the gold ornaments, though the husband had produced photocopy of a letter as Ext.A3, the contention raised by RW1 was that she had written the said letter at the instance of PW1. However, it was observed that from Ext.A3 letter it cannot be presumed that she had taken away all her gold ornaments. Therefore, it was held that Ext.A3 will not help PW1 to deny the claim for return of gold ornaments to RW1.

9. Learned counsel for the appellant placed reliance on two judgments of this Court.

(i) ***Pankajakshan Nair v. Shylaja & Another*** (2017 (1) KLJ 739). This judgment was cited to emphasise that the initial burden of proving entrustment of gold ornaments is on the plaintiff.

(ii) ***Abubakker Labba and Another v. Shameena K.B. and another*** (2018 (3) KLJ 398). This judgment was cited to emphasise that unless there is sufficient evidence from the side of the wife to prove entrustment of gold ornaments with the

the matrimonial home. She was not permitted to meet the family members or to call them over phone. She was treated as a maid servant and she was forced to do all household works and there was demand for more dowry as well.

6. In OP No.604/2007 wife claimed that she was adorned with 51 sovereigns of gold ornaments at the time of marriage and 48 sovereigns belonging to her was entrusted to the respondent/husband for safe keeping which he had taken away. The respondent/husband in his objection denied the said fact. According to him, he was not entrusted with any gold ornaments and in July, 2003, when she left the house, she had written a letter to him stating that the entire gold ornaments are available with her.

7. Common evidence was taken in the case. The husband was examined as PW1 and the wife as RW1. Exts.A1 to A3 are the documents relied upon by the husband. The Family Court found that the allegation of desertion was not proved and that it was on account of the harassment and ill-treatment on the side of her in-laws that she had shifted her residence to NGO Quarters at

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the behaviour and conduct of the respondent was very bad from the very inception of the marriage and he was being harassed both physically and mentally. Same attitude was shown by her towards her in-laws. She left the matrimonial home on several occasions without his consent. This is her second marriage and first marriage also ended in a divorce. Later, she compelled him to shift his residence to a rented building stating that the facilities in the matrimonial home were not sufficient for her. After the child was born, on the 5<sup>th</sup> month, she went away along with the child. Her whereabouts were not known. In July, 2003, he came to know that she was staying with her maternal uncle. Though he tried his level best to bring her back, she was not willing and presently, she is residing with her sister. According to him, the marriage is irretrievably broken and there is no chance for a reunion and hence he sought for divorce on the ground of cruelty u/s 13 of the Hindu Marriage Act.

5. Respondent/wife having admitted the marriage and birth of the child, denied the fact that she had committed any acts of cruelty. According to her, she did not have any freedom in

## **J U D G M E N T**

### **Shaffique, J.**

Both these appeals are filed with reference to the matrimonial issues between the appellant and respondent and hence heard and decided together.

2. Mat.Appeal No.236/13 has been filed by the husband challenging an order passed by the Family Court in OP No.604/2007 by which petitioner/wife was permitted to recover 51 sovereigns of gold or its value from the respondent/husband.

3. Mat.Appeal No.277/13 has been filed by the husband/petitioner challenging order of dismissal passed by the Family Court in OP No.327/2005, a petition filed seeking divorce.

4. First we shall consider the petition for divorce. The parties are shown as described in the OP No.327/2005 unless otherwise stated. The petitioner and the respondent got married on 28/8/2001 as per Hindu religious rites and ceremonies. A male child was born in the wedlock on 6/1/2003. The allegation is that

Mat.Appeal Nos.236/13 & 277/13

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

THURSDAY, THE 05TH DAY OF SEPTEMBER 2019 / 14TH BHADRA, 1941

Mat.Appeal.No.277 OF 2013

AGAINST THE JUDGMENT IN OP 327/2005 DATED 06-09-2012 OF  
FAMILY COURT,ERNAKULAM

APPELLANT/PETITIONER:

BINOD, AGED 40  
YEARS, S/O.DIVAKARAN, MARATH, AYYANTHOLE,  
ARANATTUKARA, THRISSUR.

BY ADVS.  
SRI.REJI GEORGE  
SMT.ANUPAMA JOHNY

RESPONDENT/RESPONDENT:

SOPHY  
AGED 36 YEARS, D/O.ANIRUDHAN, MADATHILAZHIKAM,  
MAYYANADU VILLAGE, KOLLAM-691001.

R1 BY ADV. SRI.S.ASHOK KUMAR.  
R1 BY ADV. SRI.GEO PAUL  
R1 BY ADV. SRI.C.R.PRAMOD  
R1 BY ADV. SRI.SANU MATHEW

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON  
02-08-2019, ALONG WITH Mat.Appeal.236/2013, THE COURT ON  
05-09-2019 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

&

THE HONOURABLE MR.JUSTICE N.ANIL KUMAR

THURSDAY, THE 05TH DAY OF SEPTEMBER 2019 / 14TH BHADRA, 1941

Mat.Appeal.No.236 OF 2013

AGAINST THE JUDGMENT IN OP 604/2007 DATED 06-09-2012 OF  
FAMILY COURT,ERNAKULAM

APPELLANT/RESPONDENT:

BINOD  
AGED 40 YEARS S/O.DIVAKARAN, MARATH, AYYANTHOL,  
ARANATTUKARA, THRISSUR.

BY ADVS.  
SRI.REJI GEORGE  
SRI.GOPAKUMAR G. (ALUVA)  
SMT.ANUPAMA JOHNY

RESPONDENT/PETITIONER:

SOPHY  
AGED 36 YEARS D/O.ANIRUDHAN, MADATHILAZHIKAM,  
MAYYANAD VILLAGE, KOLLAM-691001.

R1 BY ADV. SRI.S.ASHOK KUMAR.  
R1 BY ADV. SRI.GEO PAUL  
R1 BY ADV. SMT.P.M.HRIDYA  
R1 BY ADV. SRI.C.R.PRAMOD  
R1 BY ADV. SRI.SANU MATHEW  
R1 BY ADV. SRI.R.VINU RAJ

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON  
02-08-2019, ALONG WITH Mat.Appeal.277/2013, THE COURT ON 05-  
09-2019 DELIVERED THE FOLLOWING: