

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE ANTONY DOMINIC

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 16TH DAY OF AUGUST 2013/25TH SRAVANA, 1935

Mat.Appeal.No. 324 of 2013 (C)

**AGAINST THE ORDER/JUDGMENT IN OP 256/2011 of FAMILY COURT,
THALASSERY**

DATED 28-02-2013

APPELLANT(S)/PETITIONER:

P.V.PRAKASH, AGED 41 YEARS

S/O BALAN, KARIPPADY VATHIKKAL HOUSE, TEMPLE GATE

THIRUVANGAD.P.O, THALASSERY,KANNUR DISTRICT.

BY ADVS.SRI.A.JAYASANKAR

SRI.MANU GOVIND

SRI.JOPHY POTHEN KANDANKARY

RESPONDENT(S)/RESPONDENTS:

1. R.BINDU,, AGED 37 YEARS

D/O.RAGHAVAN, VINOD VILLA, KUNDILTHADAM

PAYANGADI.P.O, KANNUR DISTRICT-670303.

2. SUNEESH.P.K., AGED 40 YEARS

**RESIDING AT KARIKKINKULAM, PAPPINISSERY EAST.P.O
KANNUR DISTRICT-670561.**

R1 BY ADV. SRI.SUNIL NAIR PALAKKAT

R1 BY ADV. SRI.K.N.ABHILASH

R1 BY ADV. SMT.R.LEELA

R1 BY ADV. SMT.N.K.SHEEBA

R1 BY ADV. SRI.K.K.ANIL KUMAR

**THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON
25.07.2013 ALONG WITH MA NO.385/13 THE COURT ON 16-08-2013
DELIVERED THE FOLLOWING:**

ANTONY DOMINIC & P.D.RAJAN, JJ.

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Mat. Appeal Nos. 324 & 385 OF 2013

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Dated this the 16th day of August, 2013

J U D G M E N T

Antony Dominic, J.

**Mat.Appeal No.324/13 and Mat.Appeal No.385/2013 are filed by the petitioner
and respondent respectively in OP No.256/11 on the file of the Family Court,**

Thalasserry. For convenience, the appellant in Mat.Appeal No.324/13 is referred to as the husband and the appellant in Mat.Appeal No.385/13 is referred to as the wife.

2. OP No.256/11 was filed by the husband seeking a decree of divorce urging grounds under Section 13(1)(i) and (ia) of the Hindu Marriage Act. From the evidence, it is seen that the husband and wife are the children of brothers and were in love for a period of 10 years. Thereafter, much to the dislike of the members of their family, their marriage was solemnized on 29/1/2001 at Sree Krishna Temple, Guruvayoor. It is also stated that after considerable treatment, the wife gave birth to twins, two female children, who are aged about 6 years now. The relationship between the couple became strained during 2008 February, and since then, the wife and the kids are residing in her paternal house.

3. The OP was filed alleging that the wife was living in adultery with the 2nd respondent and was guilty of cruelty towards the husband. Before the Family Court, on behalf of the husband, himself and another witness were examined as PWs 1 and 2 and the wife and her father were examined as RWs 1 and 2. Exts.A1 to A9 were marked on behalf of the husband and Exts.X1 and X1 (a) are the court exhibits. By its judgment dated 28th of February, 2013, the Family Court declined to accept the case of adultery urged by the husband but however held that the evidence proved that the attitude of the wife towards the husband was cruel in nature. Thereafter, instead of granting a decree of divorce, Family Court ordered judicial separation. It is challenging this judgment of the Family Court that the husband filed MA No.324/13 and the wife has filed MA No.385/13.

4. Before the Family Court, the 2nd respondent, the alleged adulterer remained ex parte and though notice issued in MA No.324/13 was served on him, the 2nd respondent did not choose to enter appearance before this Court also.

5. Learned counsel for the husband contended that the Family Court having accepted that the attitude of the wife was cruel to him, he was entitled to have been granted a decree of divorce instead of judicial separation. On the other hand, learned counsel for the wife contended that except that the wife had made certain phone calls, there was absolutely no evidence to accept the case of cruelty canvassed by the husband. According to him, the Family Court also concluded that the totality of the evidence of Rws 1 and 2 proved that they had no acquaintance with the 2nd respondent, the alleged adulterer and that it was the husband who had foisted such allegations against her in order to have a divorce. He therefore

contended that in the light of these findings, the only course which was open to the Family Court was to dismiss the petition.

6. We have considered the submissions made and have also gone through the pleadings and the evidence adduced by the parties.

7. Evidence of PW1 shows that at the time of marriage and even now, he is employed in Saudi Arabia. While the relationship between the couple was cordial and peaceful, he started receiving anonymous phone calls from a person claiming that he had illicit relationship with his wife. When he received such calls during August, 2007, he made enquiries about the caller and came to know that it was a person from Pappinissery, which is near to Pazhayangadi, where the wife's parental house is situated. He says that he was surprised when the caller revealed some private matters which is known only to the husband and wife and that he also used to reveal the details about the matters which took place in the bed room of the couple.

8. During November 2007, the husband came on leave and was in his house till February, 2008. At that time, the wife had two mobile phones with Nos.9895296217 and 9447690214. The husband found that most of the calls received by the wife and most of the outgoing calls were to a specific number and when he asked about it, the wife had no reasonable explanation except stating that the person concerned was a staff of the school where she is employed. He also stated that during February to May, 2005, the wife stayed with his mother in his parental home. During that period, the telephone bills were very high and therefore his brother obtained call details from the BSNL, which revealed that most of the outgoing calls were to a particular number viz., 9447371797. The details thus obtained also revealed that most of the calls continued for long and were made during mid night and odd hours.

9. It is stated that during February, 2008, the husband used to get anonymous calls repeatedly. When he informed this to his brother and also told him about the nature of the messages that he used to get, his brother gave him the call details obtained by him during 2005. Thereupon the husband made enquiries about the holder of phone number 9447371797 and it was revealed that it was the number of the 2nd respondent. At that time, the husband asked the wife about the 2nd respondent and the wife confessed that they were in good relationship for several years and that the relationship started from their school days. According to the husband, it was thereupon that he realised that his wife was still maintaining illicit

relationship with the 2nd respondent and that it was she who was sharing the details of their relationship between the husband and wife. This according to the husband caused great mental pain and disgrace. The call details received from BSNL has been produced before the Family Court as Ext.A2 and Ext.A3 is the reply obtained from the BSNL under the Right to Information Act regarding the name and address of the owner of mobile phone bearing No.9447371797.

10. PW2 Sreekanth is a neighbour and a friend of the husband. Both of them have worked together in Saudi Arabia. He has deposed that during 2007 August, they were together in Damam. At that time, the husband had received anonymous phone calls and that the husband had informed him about the same. According to him, he advised him to ignore the phone calls. He has also stated that husband was surprised that the caller used to describe about what took place in the bed room of the husband and that the husband had shown him Ext.A2 call details during 2008 February, when he reached his house. He has also stated that both Sreekanth and the husband and his relatives had gone to meet the 2nd respondent and enquired about the details of the phone calls. Thereupon the 2nd respondent revealed that he was in love with the wife since from school days. He also stated that even after the marriage, their relationship continued and that recently the wife started keeping distance from him giving rise to enmity in him. He stated that it was therefore that he called to her husband and disclosed the details. PW2 also stated that when the details of what was revealed by the 2nd respondent were revealed to the wife, the wife admitted her relationship with the 2nd respondent and requested the husband to apologize her.

11. However, the case of RW1, the wife was that after marriage only she came to know that the husband was a selfish man who did not even like her talking to other men or her relatives. She also stated that he is not providing any maintenance to her or the children and that when he constructed a house, her relatives had contributed lakhs and lakhs of rupees and had given entire wooden articles necessary for the house. She alleged that after accepting lakhs and lakhs of rupees and her 50 sovereigns of gold ornaments, husband filed this petition for dissolution of marriage to marry another lady. According to her, the 2nd respondent is a close acquaintance of the husband and they colluded together to file this petition for dissolution of marriage.

12. In general, the above was the evidence that was available before the Family Court and evaluating the evidence available, the Family Court held that although the husband and PW2 were subjected to detailed cross examination, there

was nothing to discredit either their testimony or to conclude that they fabricated a case for getting the marriage dissolved as alleged by the wife.

13. As far as the ground of cruelty urged by the husband is concerned, the Family Court has referred to the evidence adduced and found that maintaining a relationship with another person during the subsistence of the marriage with the husband has caused mental cruelty to the husband. In so far as this case is concerned, Exts.A2 and A3 and the oral evidence of PW1 and PW2 proved the subsistence of an illicit relationship between the wife and the 2nd respondent or else she would not have made calls to him for long durations and at odd hours and he would not have come to know the details of the sexual acts between the husband and the wife.

14. As far as the case of selfishness of the husband pleaded by the wife is concerned, his evidence amply demonstrated his concern for the wife and children. As far as the allegation that after obtaining lakhs and lakhs of rupees, husband has now fabricated a case for getting divorce is concerned, there again, the evidence of wife herself disproves this case. She has admitted before the Family Court that the husband used to send money to her account in SBI, Kannur from which she and her father used to withdraw substantial amounts. The husband had deposited `3,00,000/- in the Post Office, Pazhayangadi in her name from which she was getting `3,000/- per month. She also admitted that in Madayi Co-operative Bank, there is a Fixed Deposit of `5,00,000/- in her name made by the husband. She has also admitted that her children's birthday used to be celebrated in an extravagant manner. She has confessed that her mother-in-law and the sister-in-law were cordial to her. Her evidence also showed that the husband had given her 14 sovereigns of gold and that the children were given chains weighing 1 sovereigns each at the time of their birthday. This therefore showed that the husband was a generous man and a loving and affectionate father.

15. It is true that the counsel for the wife referred to the observations of the Family Court that "from a totality of the evidence of RW1, it can be seen that it was PW1 who has foisted such allegations against her in order to have a divorce". He also referred to the sentence "a totality of the evidence of RWs 1 and 2 proved that they have no acquaintance with the 2nd respondent."

16. According to him, in view of these findings, the Family Court could not have granted any relief to the husband. However, if these findings are read in the context in which these observations are made, it can very well be seen that all that

the Family Court was trying to convey was that this was the version of RWs 1 and 2 and were not findings arrived at by the Family Court.

17. This is a case where mental cruelty is pleaded and found by the Family Court. Concept of mental cruelty and the standard of proof that is required has come up for consideration of the Apex Court in *Jayachandra v. Aneel Kaur* (2005(1) KLT 26) and in para 10 to 13 of the judgment, the Apex Court has held thus;

10. The expression “cruelty” has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of his spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, a proof beyond the shadow of doubt, is to be applied to criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, Courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

11. The expression ‘cruelty’ has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It

is a question of fact and degree. If it is mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. However, there may be a case where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted {See Sobh Rani v. Madhukar Reddi (AIR 1988 SC 121)}.

12. To constitute cruelty, the conduct complained of should be “grave and weighty” so as to come to the conclusion that the petitioner spouse cannot be reasonably expected to live with the other spouse, It must be something more serious than “ordinary wear and tear of married life”. The conduct, taking into consideration the circumstances and background has to be examined to reach the conclusion whether the conduct complained of amounts to cruelty in the matrimonial law. Conduct has to be considered, as noted above, in the background of several factors such as social status of parties, their education, physical and mental conditions, customs and traditions. It is difficult to lay down a precise definition or to give exhaustive description of the circumstances, which would constitute cruelty. It must be of the type as to satisfy the conscience of the Court that the relationship between the parties had deteriorated to such an extent due to the conduct of the other spouse that it would be impossible for them to live together without mental agony, torture or distress, to entitle the complaining spouse to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of S. 10 of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.

13. The Court dealing with the petition for divorce on the ground of cruelty has to bear in mind that the problems before it are those of human beings and the psychological changes in a spouse’s conduct have to be borne in mind before disposing of the petition for divorce. However, insignificant or trifling, such conduct may cause pain in the mind of another. But before the conduct can be called cruelty, it must touch a certain pitch of severity. It is for the Court to weigh the gravity. It has to be seen whether the conduct was such that no reasonable person would tolerate it. It has to be considered whether the complainant should be

called upon to endure as a part of normal human life. Every matrimonial conduct, which may cause annoyance to the other, may not amount to cruelty. Mere trivial irritations, quarrels between spouses, which happen in day-to-day married life, may also not amount to cruelty. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be words, gestures or by mere silence, violent or non- violent.

18. If the evidence in this case is appreciated in the light of the principles laid down by the Apex Court, we are satisfied that the evidence clearly indicated that the conduct of the wife rendered it impossible for the husband to live with her without mental agony, torture or distress. It is true that the couple have twin daughters and it is unfortunate that their parents fell apart and that too for reasons which are not only stigmatic to the parents, but also to the children. However, the wife is an educated lady and she having maintained an illicit relationship cannot avoid the consequences nor can the husband be expected to suffer on the ground that he has two children.

19. In our view, the ground of cruelty having been proved, there was no reason for the Family Court to have declined divorce as prayed for by the husband.

20. In the result, MA No.324/13 filed by the husband will stand allowed. The judgment of the Family Court to the extent judicial separation is allowed is set aside. OP No. 256/11 will stand allowed and the marriage between the husband and wife solemnized on 29/1/2001 will stand dissolved by a decree of divorce with effect from today.

Mat.Appeal No.385/13 filed by the wife will stand dismissed.

Sd/-

ANTONY DOMINIC, Judge

Sd/-

P.D.RAJAN, Judge