

Mat.Appeal No.325/11 & conn.cases

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

[ **Mat.Appeal.325/2011, RPFC.75/2013, CO.92/2013, Mat.Appeal.153/2013, RPFC.286/2019** ]

### **Shaffique, J.**

All these cases concern matrimonial dispute between the couple and hence heard and decided together. The short facts of the case relating to the aforesaid cases are as under:-

2. Mat.Appeal No.325/2011 arises from OP No.152/2008 of the Family Court, Kannur. The first respondent/wife has preferred the appeal challenging the order passed by the Family Court dissolving the marriage between the petitioner/husband and the 1<sup>st</sup> respondent/wife. The marriage between them has been solemnized as per Hindu religious rites and custom on 11/4/1990. Two children were born in the wedlock. Petitioner/husband is a coolie worker. He used to go for work in the early morning and return to their house only by night. According to the petitioner, 1<sup>st</sup> respondent was leading a life of her own way even from the initial days of marriage. His complaint was that, without his consent, she used to go away

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from the matrimonial home and comes back only after a considerable period. Even when the elder son was nine years, she had gone to her house without his consent and stayed there for 1½ months. That apart, he got information from the neighbours that a police constable used to visit the 1<sup>st</sup> respondent in their house when the petitioner was not available. Initially he did not respond to the same. On 20/1/2008, he had gone to attend a marriage fixation ceremony. When he returned at about 2.30 p.m, he heard a male voice from his bed room. The front door was found locked from inside. He peeped through the window of the bedroom and he saw that the 1<sup>st</sup> respondent was having sexual intercourse with the 2<sup>nd</sup> respondent. He made a hue and cry and neighbours came there and the door of the house was opened. Respondents 1 and 2 came out. The neighbours identified the 2<sup>nd</sup> respondent as the police constable who used to visit their house occasionally. Police came to the spot and the respondents were taken to the police station. Disciplinary action was taken against the police constable. The said news item was published in local dailies as well. Thereafter, it was understood that the 2<sup>nd</sup> respondent is residing near Pariyaram Medical College where the

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1<sup>st</sup> respondent was working as a sweeper. They maintained illicit relationship for the last many years and was living in adultery. Petitioner issued a lawyer's notice on 24/1/2008 for filing a joint petition for divorce which was countered by a reply notice raising untenable contentions. Hence, he sought for a decree for dissolution of marriage on the ground of adultery.

3. The 1<sup>st</sup> respondent in her counter statement denied the allegations that she was caught red handed on 20/1/2008 and that they were taken to the Payangadi Police station. According to her, it was a cooked up story. She complained that even from the very inception of marriage, she was subjected to cruelty and she was brutally manhandled. The petitioner is an alcoholic and he used to assault her on all days. She was suffering physical and mental torture. She further stated that on 20/1/2008 when she was brutally manhandled, her brothers had come and taken her to the hospital. The 2<sup>nd</sup> respondent also filed a counter statement denying the allegations. According to him, he is falsely implicated in the case.

4. As evidence in the case, on the side of the petitioner, AW1 to AW3 were examined and the 1<sup>st</sup> respondent was

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examined as RW1. 2<sup>nd</sup> respondent did not enter the box. Exts.A1 to A11 and Exts.B1 and B2 were the documents relied upon by either side. AW1 is the petitioner who had given evidence in accordance with the averments pleaded by him. AW2 is a neighbour who also supported the version of AW1. AW3 is the son of the petitioner and the 1<sup>st</sup> respondent. He also deposed that the respondents were taken by the police in a police vehicle from their house on 20/1/2008. 1<sup>st</sup> respondent was examined as RW1 who denied the allegations. According to her, she does not know the 2<sup>nd</sup> respondent at all. She also denied the fact that both of them were taken into custody by the police from their house on 20/1/2008. The oral testimony of AW1 to AW3 supported by Ext.A2 which is an order dated 25/3/2008 of the Superintendent of Police, Kasaragode would indicate that disciplinary proceedings were initiated against the 2<sup>nd</sup> respondent in connection with the incident that occurred in the house of the petitioner on 20/1/2008. He was also imposed a punishment of withholding of increment for three years with cumulative effect for the alleged misconduct. Apparently this is a case in which 1<sup>st</sup> and 2<sup>nd</sup> respondents were found together in suspicious circumstances

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inside the bedroom in the house of the petitioner. AW1 had seen them indulging in sexual intercourse and the fact that they were inside the house were supported by AW2 and AW3. Therefore, sufficient evidence is available to prove the aforesaid fact. Though it was contended by the respondents that a false case had been put up, sufficient evidence is available in the case to arrive at a conclusion that the 1<sup>st</sup> respondent was indulging in adultery. The news item also appeared in local dailies and publications as evident from Exts.A6 to A9. Family Court was therefore justified in granting a decree. There is no reason to interfere with the said judgment.

5. Mat.Appeal No.153/2013 arises from judgment in OP No. 291/2011. The said case had been filed by the wife as petitioner seeking past maintenance. Cross Objection No.92/2013 had been filed by the wife dissatisfied with the quantum of maintenance granted in her favour. She also filed MC No.163/2011 for future maintenance as well. RP(FC) No.286/2019 has been filed by the wife challenging the order in MC No.163/2011. RP(FC) NO.75/2013 has been filed by the husband challenging the order in MC No.163/2011.

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6. The facts need not be reiterated in this case. According to the petitioner/wife, she has no source of income whereas the respondent is a construction worker and earning not less than ₹12,000/- per month. He has landed property and therefore she claims maintenance at the rate of ₹3,000/- per month from 6/5/2008 to 5/5/2011. In the MC also, she also claimed the same rate. Respondent/husband denied the allegation. According to him, she was indulging in extramarital relationship and was having sexual intercourse with her paramour. The Family Court had already granted dissolution of marriage on the ground of adultery and cruelty. He is only a coolie worker and his income is less than ₹1,200/-, whereas petitioner is employed and is getting a salary of ₹2,000/- per month. He also submitted that she is living in adultery and therefore she is not entitled for an order of maintenance.

7. In the case, petitioner was examined as PW1 and he placed reliance on Exts.A1 to A4 documents. Respondent was examined as RW1 and their son was examined as RW2. Exts.B1 to B9 are the documents relied upon by the respondents. The Family Court directed past maintenance to be paid @₹300/- per

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month from 6/5/2008 to 5/5/2011. The future maintenance was granted at the same rate as per order in MC No.163/2011. While arriving at the above conclusion, the Family Court held that in so far as there is no evidence to prove that she was living in adultery and was having continuous sexual relationship with the 2<sup>nd</sup> respondent in OP No. 152/2008 or any one else, she is entitled for maintenance. It was also found that with reference to the income of the husband, it was observed that being a coolie worker, it might be probable that he is earning at least ₹500/- a day and after meeting the necessary expenditure of himself and the children, payment of ₹200 will be appropriate. It was observed that the elder son is a polytechnic student and the second son is a plus two student. That apart, there is evidence to prove that RW2 is undergoing treatment as evident from Ext.B6. The respondent also had a case that petitioner was working and was earning sufficient income. He had produced Ext.B7 to indicate that she is enrolled as a construction worker under the Welfare Board. It is taking into consideration all these facts, the Family Court directed past maintenance @ ₹200/- per month. In the cross objection she claims past maintenance @ ₹3,000/- per

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month.

8. The learned counsel for the husband argued that in so far as there is evidence to prove that the divorce had been granted on the ground of adultery, there is a presumption that she was living in adultery and therefore there is no obligation to pay any maintenance.

9. The husband has also filed IA No.1/2019 in RP(FC) No.75/13 producing his treatment records stating that he was unable to do any manual work.

10. As far as past maintenance is concerned, which is the subject matter in Mat.Appeal No.153/2013, the husband has the obligation to maintain his wife during her lifetime in terms of S.18 of the Hindu Adoptions and Maintenance Act, 1956. However, sub section (3) of S.18 specifically states that a Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste. The provision applies until an order of divorce is passed, which in this case was on 8/2/2011, the date of the judgment in OP No.152/2008. When there is evidence in the case to prove that she was indulging in adultery and we have confirmed the said view of the Family Court in Mat.Appeal

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No.325/2011, her claim for past maintenance can only be negatived.

11. As far as future maintenance is concerned, reference has been made to S.125 of the Code of Criminal Procedure, 1973. There is no dispute about the fact that wife includes a divorced wife who has not remarried and there is an obligation on any person having sufficient means to pay his wife maintenance in the form of a monthly allowance if he neglects or refuses to maintain her. However, sub section (4) carves out an exception to the general rule, which reads as under:-

*“125(4) No Wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.”*

Sub section (4) indicates that the husband has no obligation to pay maintenance if the wife is living in adultery. Living in adultery according to the learned counsel for the wife means that she should continue to live in adultery despite the fact that the couple had been divorced on the ground of adultery. A single instance pointed out by the husband and proved before Court does not mean that she continues to live in adultery.

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12. What exactly is the meaning of living in adultery has to be considered in order to decide the aforesaid issue. Under the Hindu Marriage Act, divorce can be granted u/s 13(1)(i) if after solemnization of the marriage, one spouse has voluntary sexual intercourse with any person other than his/her spouse. In order to obtain a divorce u/s 13(1)(i), even a single instance of voluntary sexual intercourse with another person is enough, whereas u/s 125(4), to deny the maintenance, the words used are "living in adultery".

13. Learned counsel for the wife had placed reliance upon the following judgments

(i) **Somasekharan Nair. v. Thankamma** (1987 (2) KLT 892):- This judgment is that of a learned Single Judge of this Court in which this Court had occasion to consider the words "living in adultery" prior to the amendment to S.13(1)(i) by Act 68 of 1976. Reference was made to paragraph 4 of the judgment which reads as under:-

*"4. Prior to the amendment the expression "is living in adultery" was subject to several decisions. It was held that a single or isolated act of adultery was not sufficient to have divorce under Section 13 of the Act, though it is a ground for judicial separation. However, after the amendment in 1976,*

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*the appellant need only prove that the respondent had voluntary sexual intercourse with any person other than the spouse. It need not be proved that the respondent has been living in adultery”.*

(ii) **Laxman Naik v. Nalita alias Lalita Naik** (2002 KHC 2604):- This is a judgment of the learned Single Judge of Orissa High Court wherein it was held that though an instance of single adultery is enough for the purpose of judicial separation, when considering an application u/s 125 Cr.P.C, one or more instances of lapses in the character of the wife is not sufficient to absolve the husband from his liability to pay maintenance to her.

(iii) **Valsarajan v. Saraswathy** (2003 (2) KLT 548). This was a case in which the learned Single Judge held that an application for maintenance by a divorced wife cannot be denied in terms of S.125(4) even if she is living in adultery. Reference was made to a judgment of the Apex Court in **Vanamala v. Ranganatha Bhatta** (1995 (2) KLT 397). That was a case in which maintenance filed by the divorced wife was resisted on the ground that divorce was by mutual consent and therefore divorced wife was not entitled to get maintenance. The Apex Court held that on a plain reading of Section 125(4), the expression wife in the sub-section does not have the extended

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meaning of including a woman who has been divorced. Yet another judgment relied upon is **Rohtash Singh. v. Smt.Ramendri and others** [(2000) 3 SCC 180] wherein the Apex Court held that even if a decree for divorce is passed on the ground of desertion by the wife after divorce, she is entitled for maintenance invoking Section 125 of the Cr.P.C.

14. In the case on hand, as rightly pointed out by the learned counsel for the wife, there is no pleadings to indicate that she is living in adultery. Therefore, the contention urged with reference to the judgment in **Valsarajan** (supra) and the judgments of the Apex Court relied upon in the said case may not apply to the fact situation. Therefore, after the divorce, wife will be entitled for maintenance.

15. The only other question is, whether the amount awarded as maintenance would be proper or not ? Family Court directed payment of ₹300/- per month as future maintenance. There is no evidence to prove the income of the husband. He is a coolie worker, who is presently around 55 years of age. There is some evidence to indicate that the wife is a member of Construction Workers' Welfare Board. Exts.B7 and B8 evidences

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the said fact. She is also an able bodied person. That apart, the husband has been taking care of the children who were studying. Under such circumstances, we are satisfied that the Family Court was justified in awarding future maintenance at the rate of ₹300/- per month with effect from the date of M.C.No.163/2011.

In the result:-

- (i) Mat.Appeal No.325/2011 is dismissed.
- (ii) Mat.Appeal No.153/2013 is allowed. The claim for past maintenance is rejected.
- (iii) Cross objection No.92/2013 in Mat.Appeal No.153/2013 is dismissed.
- (iv) RP(FC) Nos. 75/2013 and 286/19 are dismissed.

Sd/-

**A.M. SHAFFIQUE**

**JUDGE**

Sd/-

**N.ANIL KUMAR**

**JUDGE**

Rp

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PS to Judge