

Mat.Appeal.No.1066 OF 2017

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MR.JUSTICE C.S.DIAS

FRIDAY, THE 05TH DAY OF FEBRUARY 2021 / 16TH MAGHA,1942

Mat.Appeal.No.1066 OF 2017

AGAINST THE JUDGMENT IN OP 669/2016 DATED 18-07-2017 OF
FAMILY COURT, IRINJALAKUDA

APPELLANT/PETITIONER NO.1:

BENNY
S/O.MALIYEKKAL MALAKKARAN VARGHESE, AGED 43,
PUTHENCHIRA VILLAGE AND DESOM, CHALAKUDY
TALUK, REPRESENTED BY HIS MOTHER AND POWER OF
ATTORNEY HOLDER, SISILY, AGED 73 YEARS,
W/O.MALIYEKKAL MALAKKARAN VARGHESE.

BY ADVS.
SRI.K.M.FIROZ
SRI.E.C.AHAMED FAZIL
SMT.M.SHAJNA
SMT.UMMUL FIDA

RESPONDENT/PETITIONER NO.2:

MINI
D/O.EDASSERY CHANGAN XAVIER, AGED 38, EDASSERY
CHANGAN HOUSE, PAZHOOKKARA, ANNALLUR P.O.,
THRISSUR-680307,NOW RESIDING AT C/O.VARGHESE,
EDASSERY CHANGAN HOUSE, VIJAYANAGAR, KALAYAN,
MUMBAI.

R1 BY ADV. SRI.G.SREEKUMAR (CHELUR)

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
05.02.2021, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

JUDGMENT

Dated this the 5th day of February 2021

C.S.Dias,J.

Is it permissible to withdraw one's consent in a petition filed for dissolution of marriage by mutual consent, filed pursuant to a compromise, is the point that emanates for consideration in the appeal?

2. The appellant (husband) and the respondent (wife) are Christians. They were married on 10.9.2003. Two children, Anliya and Blessin, were born in the wedlock. The marriage ran into rough weather, forcing the respondent to file O.P.No.1133/2010, seeking a decree for return of money and gold ornaments and M.C 349/2010, seeking an order for maintenance, before the Family Court, Thrissur. The appellant filed O.P. 433/2010 before the same court, seeking a decree of divorce. The cases were later transferred to the Family Court, Irinjalakuda. The

parties were referred to mediation and they settled all the disputes arising out of the marriage by executing a memorandum of settlement. The couple, inter alia, agreed that custody of the children would be with the respondent; that the appellant would pay a compensation of Rs.10,00,000/- to the respondent; that all the pending cases would be withdrawn and that they would file a joint petition under Section 10A of the Divorce Act, 1869, to dissolve their marriage by mutual consent. The memorandum of settlement was recorded by the court and all the cases were dismissed as withdrawn. The parties filed O.P.669/2016. As a condition precedent, on the date of filing of the joint petition, the appellant paid an amount of Rs.2,00,000/- to the respondent. The balance amount of Rs.8,00,000/- was agreed to be paid on the date the joint petition was posted for inquiry after the statutory waiting period of six months. On 20.2.2017, the date of second motion, the

appellant and the respondent filed their respective proof affidavits in lieu of chief-examination. The appellant paid the respondent the balance amount of Rs.8,00,000/-, which was acknowledged by the respondent. The Family Court referred the parties for counselling, and thereafter, conducted the inquiry. Both parties expressed their consent for divorce in unequivocal terms. The case was posted for judgment to 20.4.2017.

3. On 9.3.2017, the respondent filed I.A Nos. 573/2017 and 574/2017, seeking to withdraw the proof affidavit and to withdraw her consent. She averred in the affidavits in support of the applications that she was withdrawing her consent considering the welfare and future of the children. The appellant filed counter affidavits to the applications. The applications were taken up for consideration on 11.7.2017. The parties were again referred for counselling. The respondent stuck to her stand. Consequently, the

Family Court by the impugned common order allowed the applications and dismissed the original petition.

4. Heard Sri.Firoz K.M, the learned counsel appearing for the appellant and Sri.G.Sreekumar (Chelur), the learned counsel appearing for the respondent.

5. The learned counsel appearing for the appellant submitted that the respondent has perpetrated fraud not only on the appellant, but also on the court. It was on the basis of the memorandum of settlement executed by the parties in the mediation proceedings, all the litigations were withdrawn and the joint petition was filed. The appellant had paid the agreed compensation, which was accepted by the respondent. By filing the compromise and accepting the compensation, the respondent was estopped from withdrawing her consent. The Family Court ought to have rejected the applications and allowed the original petition. He relied on the decision of the High

Court of Bombay in **Prakash Alumal Kalandari v. Jahnavi Prakash Kalandari** [2011 KHC 2559] and the decisions of the Hon'ble Supreme Court in **Anil Kumar Jain v. Maya Jain** [2009 KHC 5184] and **Sureshta Devi v. Om Prakash** [1991 KHC 146] to fortify his submissions. He prayed that the appeal be allowed and the marriage between the parties be dissolved..

6. The learned counsel for the respondent argued that the law provides for either party to a joint petition to withdraw his/her consent at any time before the passing of the decree. He relied on the decision of this Court in **Rajesh R.Nair v. Meera Babu** [2014 (1) KHC 83]. He also contended that apart from the welfare of the children, the respondent had later found, on counting the money given by the appellant, a few thousand rupees short than the agreed amount. It was in the said situation that the respondent withdrew her consent. He prayed the

appeal be dismissed.

7. It is apposite to extract Section 10A of the Divorce Act, 1869 which reads as follows:

“10A. Dissolution of marriage by mutual consent:-

(1) Subject to the provisions of this Act and the rules made thereunder, a petition for dissolution of marriage may be presented to the District Court by both the parties to a marriage together, whether such marriage was solemnized before or after the commencement of the Indian Divorce (Amendment) Act, 2001 on the ground that they have been living separately for a period of two years or more, that they have not been able to live together and they have mutually agreed that the marriage should be dissolved.

(2) **On the motion of both the parties made not earlier than six months after the date of presentation of the petition, referred to in sub-section (1) and not later than eighteen months after the said date, if the petition is not withdrawn by both the parties in the meantime, the Court shall, on being satisfied, after hearing the parties and making such inquiry, as it thinks fit, that a marriage has been solemnised and that the averments in the petition are true,**

pass a decree declaring the marriage to be dissolved with effect from the date of decree.”

8. On a close scrutiny of sub-section(2) of Section 10A of the Divorce Act, it can be deciphered that either of the parties can withdraw the petition before the expiry of 18 months from the date of its presentation. However, the Court on being satisfied, after hearing the parties and making such inquiry and that the averments in the petition to be true, pass a decree declaring the marriage to be dissolved from the date of decree.

9. In **Hitesh Bhatnagar v. Deepa Bhatnagar** [2011 KHC 4390], the Hon'ble Supreme Court held that mutual consent to the divorce is a *sine quo non* for passing a decree for divorce, which should continue till the passing of the decree and is a positive requirement for the court to pass a decree of divorce. The consent must continue to decree nisi and must be

valid subsisting consent when the case is heard.

10. The Division Bench of this Court in **Rajesh R.Nair v. Meera Babu** (supra) has held that the right to withdraw consent is a qualified right and it is not for the Court to probe into the bona fides or reasonableness of withdrawal of consent. Once the consent is withdrawn, the only option available to the Court is to close the matter at that stage.

11. In a case of almost identical nature, the High Court of Bombay in **Prakash Alumal Kalandari** (supra) interpreting an analogous provision under Section 13B of the Hindu Marriage Act, 1955, held that when the parties agree to convert a pending petition for divorce to a petition for divorce by mutual consent, on the basis of a compromise, and on one of the parties fulfilling the terms of the compromise, the other party cannot unilaterally withdraw consent in view of Order XXIII of the Code of Civil Procedure (in short 'Code').

12. Now coming back to the facts of the present case. It is undisputed that the litigations filed by the parties before the Family Court were settled as per the terms of the memorandum of settlement dated 16.8.2016, pursuant to which the appellant withdrew the petition filed by him seeking a decree of divorce and entrusted the custody of the children to the respondent. He also paid an amount of Rs.2,00,000/- as a condition precedent to file the joint petition. Thereafter, the parties filed O.P No.669/2016 on 18.8.2016, seeking a decree of divorce on mutual consent. After the statutory waiting period of six months to move the second motion, on 20.2.2017, the appellant and the respondent filed their respective affidavits in lieu of their chief-examination and the respondent accepted Rs.8,00,000/- towards the balance compensation. The parties were referred for counselling on the same day and the Court conducted the inquiry.

13. In the proceedings in the second motion, the respondent did not state either before the Court or before the Counsellor that she was withdrawing her consent or that she was concerned about the welfare of the children.

14. The Family Court, on being satisfied, that the parties had expressed their free consent for divorce, reserved the case for judgment to 20.4.2017. It was on the proposed date of pronouncement of judgment that the respondent moved the applications seeking withdrawal of her proof affidavit and consent.

15. The Family Court following the judgment in **Hitesh Bhatnagar v. Deepa Bhatnagar** [AIR 2011 SC 1637] held that the respondent was free to withdraw her consent at any time before the passing of the decree. Accordingly, the applications were allowed and the original petition was dismissed.

16. We have re-appreciated the pleadings, materials on record and the afore-cited decisions of

the Hon'ble Supreme Court and this Court.

17. Taking a cue from the subtle distinction drawn in **Prakash Alumal Kalandari** (supra), we are of the view that the same principles laid down in the decisions are applicable to the facts of this case. The High Court of Bombay held that consent given on the basis of a compromise to convert a petition for divorce to a petition for divorce by mutual consent cannot be resiled. In the case on hand, the only difference is the litigations were withdrawn, on the basis of a compromise agreement, and a fresh petition for divorce by mutual consent was filed.

18. The appellant and the respondent executed a memorandum of settlement agreeing that all disputes between them arising out of the marriage were harmoniously settled. On the strength of reciprocal promises, both parties withdrew the pending litigations and the custody of the children was

entrusted to the respondent, who also received an amount of Rs.10,00,000/- as compensation.

19. Section 2 (e) of the Indian Contract Act, 1872 states that every promise and every set of promises, forming the consideration for each other, is an agreement. There were reciprocal promises agreed by the parties, falling within the ambit of Section 51 of the Indian Contract Act, 1872, which was duly performed by the appellant. The respondent on getting the custody of the children and receiving the compensation was obliged to perform her part of the agreement, i.e, to give her consent for dissolution of the marriage.

20. This Court in **Gopakumar v. Sunithakumar** [2020 (3)KHC 147] has held that when the terms of an agreement are independent and self working, the parties cannot refuse to perform their obligations.

21. We had pin-pointedly asked the learned counsel appearing for the respondent whether the

respondent was willing to return the compensation amount received by her from the appellant. The answer was an empathetic “no”. We are constrained to hold that the respondent has taken advantage of her own wrong and is attempting to unlawfully enrich herself.

22. The submission of the learned counsel before this Court that the respondent found a few thousand rupees short in the compensation paid, is an hollow and untenable plea, which was never raised before the Court of first instance. Moreover, the flea bite defence that the respondent was withdrawing her consent for the welfare of the children is unfounded because she should have thought about the same at the time of executing the agreement. Further, the custody of the children was entrusted to her.

23. In the above factual and legal background, we hold that the respondent was precluded from withdrawing her consent by the principles of

promissory estoppel.

24. Following the judgment in **Prakash Alupal Kalandari** (supra), we hold that once the parties agree to file a joint petition, pursuant to an agreement/compromise in pending proceedings, then the parties are estopped from resiling from the agreement. Therefore, the unilateral withdrawal of consent by the respondent, especially after the appellant has performed his part of the terms in the memorandum of agreement, is only a sharp practice which cannot be permitted or tolerated for a moment as it would shatter the faith of the litigants in the justice delivery system and make a mockery of alternative dispute resolution mechanism.

25. We are of the definite opinion that the unilateral withdrawal of consent by the respondent is unsustainable in law and the Family Court erred by allowing the applications filed by the respondent and dismissing the original petition.

In the result, the Mat.Appeal is allowed as follows:

(i) The common order in I.A Nos.573/2017 and 574/2017 and the judgment in O.P.No.669/2016 are set aside.

(ii). We allow O.P. 669/2016 by passing a decree of divorce dissolving the marriage between the appellant and the respondent solemnised on 10.9.2003.

(iii) In the facts and circumstances of the case, the parties shall suffer their respective costs.

sd/-

A.MUHAMED MUSTAQUE
JUDGE

Sd/-

C.S.DIAS
JUDGE

ma/8/2/2021

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