IN THE HIGH COURT OF KERALA AT ERNAKULAM
PRESENT
THE HONOURABLE MR. JUSTICE ANIL K. NARENDRAN
&
THE HONOURABLE MR.JUSTICE VIJU ABRAHAM
FRIDAY, THE 22ND DAY OF DECEMBER 2023/1ST POUSHA, 1945
MAT.APPEAL NO.1028 OF 2018

AGAINST THE JUDGMENT DATED 02.08.2018 IN OP.NO.157 OF 2015
OF FAMILY COURT, PATHANAMTHITTA

APPELLANTS/RESPONDENTS:

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RESPONDENT/PETITIONER:

BY ADVS.
SRI.JACOB P.ALEX
SRI.JOSEPH P.ALEX
SHRI.MANU SANKAR P.

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 05.09.2023 AND THE COURT ON 22.12.2023 DELIVERED THE FOLLOWING:

JUDGMENT

Anil K. Narendran, J.

The appellants are the respondents in O.P.No.157 of 2015 on the file of the Family Court, Pathanamthitta, an original petition filed by the respondent herein-petitioner, the wife of the 1st appellant, for realisation of 13.2 sovereigns of gold ornaments or its present value from the appellants and also for compensation. On receipt of notice, the appellants entered appearance and filed objection denying the allegations contained in the original petition and disputing the claims made therein. On the side of the respondent, PWs 1 and 2 were examined and Exts.A1 and A2 were marked. On the side of the appellants, RW1 was examined. After considering the pleadings and evidence on record, the Family Court arrived at a conclusion that the respondent is entitled to get a decree for recovery of 13.2 sovereigns of gold ornaments or its value from the appellants and also Rs.2,00,000/- from the 1st appellant as compensation. Accordingly, by the judgment and decree dated 02.08.2018, the Family Court allowed in part O.P.No.157 of 2015 and directed the appellants to give 13.2 sovereigns of gold ornaments or its present value to the respondent within 60 days from the date of that judgment. The 1st

appellant is directed to pay a sum of Rs.2,00,000/- to the respondent as compensation. It was ordered that the decretal amount shall have a charge on the property attached and that the respondent will be entitled to get her cost from the appellants.

2. Challenging the judgment and decree of the Family Court, Pathanamthitta in O.P.No.157 of 2015, the appellants are before this Court in this appeal, invoking the provisions under Section 19(1) of the Family Courts Act, 1984.

3. On 08.11.2018, when this appeal came up for admission, this Court admitted the matter on file and issued notice to the respondents by speed post. In I.A.No.1 of 2018, this Court granted an interim stay against execution of decree in O.P.No.157 of 2015 of the Family Court, Pathanamthitta, pending disposal of this appeal, subject to the condition that the appellants will satisfy the Family Court that the property under attachment with respect to which a charge has been created in the impugned judgment and decree is having sufficient valuation to satisfy the decree debt; the proof regarding the above aspect shall be furnished before the Family Court within a period of six weeks from the date of that order.

4. Though the matter was referred for mediation before

the Ernakulam Mediation Centre attached to this Court by the order dated 29.07.2022, the matter could not be settled and the report dated 31.08.2022 of the Mediator is placed on record.

5. Heard the learned counsel for the appellants and also the learned counsel for the respondents.

6. The learned counsel for the appellants would contend that the finding of the Family Court that there is no specific denial of the pleadings in the original petition, in the objection filed by the appellants is legally unsustainable. The Family Court went wrong in concluding that the claim made in the original petition for return of 13.2 sovereigns of gold ornaments stands admitted in the objection filed by the respondents, in view of the provisions under Order VIII Rule 5 of the Code of Civil Procedure, 1908. Before arriving at such a conclusion, the Family Court ought to have considered the effect of the proviso to Order VIII Rule 5 of the Code. As admitted by PW2, there is no entry in the SNDP register that gold ornaments or cash were given at the time of marriage. The respondent, who was examined as PW1 has no information with regard to the pledging of 9¼ sovereigns of gold ornaments. There is no evidence to show that the appellants demanded gold and that the 1st appellant manhandled PW1. The

Family Court, after recording a finding that "even though the petitioner averred cruelty, both physical and mental, suffered from the 1st respondent, she did not adduce any supportive evidence", went wrong in awarding a compensation of Rs.2,00,000/- to the respondent. PW2 has deposed that on 20.09.2013, the uncle of the 1st appellant, who was examined as RW1, did not come to his house on 20.09.2013. In addition to this, there is no medical evidence to prove the alleged cruelty.

7. On the other hand, the learned counsel for the respondent would contend that on a proper appreciation of the pleadings and evidence on record, the Family Court arrived at a conclusion that the respondent is entitled to get a decree of 13.2 sovereigns of gold ornaments or its value from the appellants and also a compensation of Rs.2,00,000/- from the 1st appellant. The said finding of the Family Court is neither perverse nor patently illegal, which warrants no interference in this appeal.

8. Order VIII of the Code of Civil Procedure, 1908 deals with written statement, set-off and counter-claim. As per Order VIII Rule 3, denial to be specific. As per Rule 3, it shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant

must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

9. Rule 4 deals with evasive denial. As per Rule 4, where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof, or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

10. Rule 5 deals with specific denial. As per sub-rule (1) of Rule 5, every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be admitted except as against a person under a disability. As per the proviso to sub-rule (1), the court may, in its discretion, require any fact so admitted to be proved otherwise than by such admission.

11. As per sub-rule (2) of Rule 5, where the defendant has not filed a pleading, it shall be lawful for the court to pronounce

judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the court may, in its discretion, require any such fact to be proved. As per sub-rule (3), in exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader. As per sub-rule (4), whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

12. In the original petition, the 1st appellant filed an objection through his power of attorney holder (uncle of the 1st respondent), who was examined as RW1. In paragraph 5 of the objection, the 1st appellant denied the allegations contained in paragraph 3 of the original petition regarding the entrustment of 82 sovereign of gold ornaments. In the objection, it is stated that, the allegation that at the time of the marriage, the parents of the petitioner gave 82 sovereigns of gold to her as part of her parental share is a cock and bull story. No such gold ornaments had ever been given to the petitioner or entrusted to the respondents. In paragraph 6 of the objection, it is stated that the averments in

paragraph 4 of the original petition are utter falsehood and the respondents did not receive any gold ornaments from the petitioner or her father. In paragraph 9 of the counter, it is stated that the averments and allegations in paragraph 7 of the original petition are totally false and hence denied. The allegations raised by the petitioner against the 1st respondent are mere malafide stories to cater weight to her petition. The respondents never demanded any amount of gold from the petitioner or her father. In paragraph 12 of the objection, it is stated that the respondents did not receive any amount from the petitioner or her parents. The respondents did not subject her to any sort of cruelty. The petitioner is not entitled for any compensation. The respondents are not liable to pay any compensation to the petitioner. The petition is only an experimental one and is liable to be dismissed.

13. A reading of the provisions under Order VIII Rule 5 of the Code of Civil Procedure would show that a judgment and decree in favour of the plaintiff is not automatic on the failure of the defendant to put his defence. The court can grant a decree in favour of the plaintiff only upon consideration of the case of the plaintiff, including appreciation of the pleadings and evidence on record. When the defendant has denied the averments made by

the plaintiff in each and every paragraph of the plaint, even if there is no denial of any particular fact, it cannot be said that the defendant had admitted the same.

14. Section 14 of the Family Courts Act, 1984 deals with the application of the Evidence Act, 1872. As per Section 14, a Family Court may receive as evidence any report, statement, documents, information or matter that may, in its opinion, assist it to deal effectually with a dispute, whether or not the same would be otherwise relevant or admissible under the Indian Evidence Act, 1872.

15. Section 15 of the Act deals with record of oral evidence. As per Section 15, in suits or proceedings before a Family Court, it shall not be necessary to record the evidence of witnesses at length, but the Judge, as the examination of each witness proceeds, shall, record or cause to be recorded a memorandum of the substance of what the witness deposes, and such memorandum shall be signed by the witness and the Judge and shall form part of the record.

16. Section 16 of the Act deals with evidence of formal character on affidavit. As per sub-section (1) of Section 16, the evidence of any person where such evidence is of a formal

character, may be given by affidavit and may, subject to all just exceptions, be read in evidence in any suit or proceeding before a Family Court. As per sub-section (2) of Section 16, the Family Court may, if it thinks fit, and shall, on the application of any of the parties to the suit or proceeding summon and examine any such person as to the facts contained in his affidavit.

17. In **Bexy Michael v. A.J. Michael [2010 (4) KHC 376]** a Division Bench of this Court held that it is trite beyond the pale controversy that the burden rests on the shoulders of a person claiming a decree to prove the claim satisfactorily. He has to establish his case on the touchstone of probabilities. Unlike in a criminal case in civil litigation, it is not as though the respondent has no burden at all. Where both parties have chosen to advance their pleadings and adduce evidence, in fact, the concept of burden of proof loses its paramount significance. The totality of inputs will have to be taken into reckoning by any prudent mind to decide whether the claim has been established and the claimant is entitled to a decree as prayed for. The standards of a prudent man are paramount in the appreciation of evidence under Section 3 of the Evidence Act. Section 3, which has often been referred to as the Bible of a court of facts mandates that the court must either

believe in the existence of a fact on the basis of matters before it or it should entertain the satisfaction that a prudent person on the basis of the matters before it would have acted on the supposition that such fact exists. The standards of a prudent person in the community are of great relevance and significance.

18. In **Rangammal v. Kuppuswami [(2011) 12 SCC 220]** the Apex Court held that Section 101 of the Indian Evidence Act, 1872 defines 'burden of proof' which clearly lays down that whosoever desires any court to give judgment as to any legal right or law dependent on the existence of facts which he asserts, must prove that those facts exist. When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person. Thus, the Evidence Act has clearly laid down that the burden of proving fact always lies upon the person who asserts it. Until such burden is discharged, the other party is not required to be called upon to prove his case. The court has to examine whether the person upon whom the burden lies has been able to discharge his burden. Until the court arrives at such a conclusion, it cannot proceed on the basis of the weakness of the other party.

19. In the original petition, one of the reliefs sought for was realisation of 13.2 sovereign gold ornaments or its present value

from respondents. Before the Family Court, the petitioner was examined as PW1, who filed a proof affidavit in lieu of chief examination. During cross-examination, PW1 admitted that the office bearers of SNDP Union attended the marriage. However, the gold ornaments for the marriage were not mentioned in the marriage register. The father of the petitioner was examined as PW2. During cross-examination, PW2 stated that he heard from PW1 that 94 sovereign gold ornaments of PW1 were pledged by the 1st respondent at Hyderabad. The uncle of 1st respondent (who was his power of attorney holder) was examined as RW1. Ext.A2 photo album of the wedding was shown to RW1 during cross-examination. RW1 admitted that those photographs were taken at the time of the marriage. None of the respondents mounted the box to swear that they did not take 13.2 sovereigns of gold ornaments of the petitioner, as alleged in the original petition.

20. In **Shinu P.K. v. Dhanya Madhavan [2013 (3) KHC 735]** a Division Bench of this Court was dealing with a case in which the respondent contended that her father had given 35 sovereigns of gold ornaments. Though in Ext.A17 invoice, the purchase of 46.71 grams on 29.10.2008 alone was mentioned, Exts.A6 to A15 and Exts.B1 and B2 showed that the respondent

was wearing more than 35 sovereigns of gold. Therefore, the Division Bench held that the claim of the respondent has been rightly upheld by the Family Court. To prove the gift of 12.4 sovereigns, the relatives or other witnesses were not examined in the Family Court. Moreover, no proof regarding the dresses mentioned in A Schedule was also adduced. In the absence of convincing evidence, the Division Bench held that the claim for 12.4 sovereigns of gold and the various items of dresses, is not allowable.

21. In **Shinu P.K. [2013 (3) KHC 735]** the Division Bench noticed that in judicial proceedings, the construction 'burden of proof' has two frequently confused and conspicuous meanings. Firstly, the burden of establishing a case and secondly, the burden of introducing evidence. In the first sense, the burden of proof is fixed at the beginning of the trial by way of pleadings, which will never shift in any manner, which is embodied in Section 101 of the Evidence Act, 1872 in proving a case. But in Section 102, the burden of proof is used in the sense of introducing evidence which is the second stage. Here, it is called 'burden of proof' or 'onus of proof', which shifts from party to party when the trial proceeds. On the facts of the case on hand, the Division Bench

noticed that, this initial onus of introducing evidence was always on the respondent, who was the petitioner before the Family Court. This initial burden or right to begin is called 'onus probandi'. Here, the respondent had discharged her initial burden. Then, the court has to examine what is the evidence of the appellant. No oral evidence with regard to the denial is made in the written objection. The marriage photos, Exts.B1, B1(a), B1(b) B2 partly support the evidence of the respondent. There was no effective cross-examination of PW1 and other witnesses on that point. Therefore, the Division Bench concluded that, when the respondent wife discharged her onus and makes out a prima facie case, the onus shifted to the appellant to prove the circumstances. He was silent at that moment. Therefore, the appellant who failed to prove his part cannot claim merit on the basis of the weakness of the other party.

22. In **Rajesh P.P. and another v. Deepthi P.R. [2021 (4) KHC 242]**, before a Division Bench of this Court, the learned counsel for the appellants contended that the documentary evidence such as Exts.A1 to A4 wedding photographs produced to prove that the respondent was wearing gold ornaments on the wedding day could not have been even admitted in view of the

provisions of Sections 61 to 65 of the Evidence Act, 1872. The Division Bench held that the technicalities of the Evidence Act could not be imported to proceedings before the Family Court. Section 14 of the Act provides for an exception to the general rule of evidence regarding the admissibility of statements and documents. It is clear from the Section itself that the technicalities of the Evidence Act regarding the admissibility or relevancy of evidence are not strictly applicable to proceedings before the Family Court. In matrimonial disputes, discretion has been given to the Family Court to rely on documents produced if the court is satisfied that it is required to assist the court in effectively dealing with the dispute, whether or not the same would be otherwise relevant or admissible under the Evidence Act. The rigor of the Evidence Act, therefore, is not applicable in a proceeding before the Family Court.

23. As already noticed, before the Family Court, none of the respondents mounted the box to swear that they did not take 13.2 sovereigns of gold ornaments of the petitioner, as alleged in the original petition. The uncle of 1st respondent (who was his power of attorney holder) was examined as RW1. Ext.A2 photo album of the wedding was shown to RW1 during cross-

examination. RW1 admitted that those photographs were taken at the time of the marriage.

24. In **Kesari Hanuman Goud S. v. Anjum Jehan and others [(2013) 12 SCC 64]** the Apex Court held that it is a settled legal proposition that the power of attorney holder cannot depose in place of the principal. Provisions of Order III Rules 1 and 2 of the Code of Civil Procedure, 1908 empower the holder of the power of attorney to 'act' on behalf of the principal. The word 'acts' employed therein is confined only to 'acts' done by the power of attorney holder in the exercise of the power granted to him by virtue of the instrument. The term 'acts', would not include deposing in place and instead of the principal. In other words, if the power of attorney holder has preferred any 'acts' in pursuance of the power of attorney, he may depose for the principal in respect of such acts, but he cannot depose for the principal for acts done by the principal, and not by him. Similarly, he cannot depose for the principal in respect of a matter, as regards which only the principal can have personal knowledge and in respect of which the principal is entitled to be cross-examined. See: **Vidhyadhar v. Manikrao [AIR 1999 SC 1441]**; **Janki Vashdeo Bhojwani v. Indusind Bank Ltd. [(2005) 2 SCC**

217]; **M/s. Shankar Finance and Investment v. State of A.P. [AIR 2009 SC 422]**; and **Man Kaur v. Hartar Singh Sangha [(2010) 10 SCC 512]**.

25. The Family Court, after analysing the pleadings and evidence on record and taking note of the provisions under Order VIII Rule 5 of the Code of Civil Procedure, arrived at a conclusion that the respondent herein has succeeded in her claim for return of 13.2 sovereign of gold ornaments. The said reasoning of the Family Court cannot be said to be either perverse or patently illegal, in view of the provisions contained in Section 14 of the Family Courts Act and the law laid down in **Shinu P.K. [2013 (3) KHC 735]**, **Rajesh P.P. [2021 (4) KHC 242]** and **Kesari Hanuman Goud S. [(2013) 12 SCC 64]**.

26. Another relief sought for in the original petition was for realisation of an amount of Rs.15,00,000/- as compensation from the respondents, jointly and severally and from their assets, both movable and immovable.

27. The learned counsel for the appellants would raise the question of maintainability of such a claim in an original petition filed before the Family Court, relying on the provisions under Section 7 of the Family Courts Act.

28. Section 26 of the Protection of Women from Domestic Violence Act, 2005 deals with relief in other suits and legal proceedings. As per sub-section (1) of Section 26, any relief available under Section 18, Section 19, Section 20, Section 21 and Section 22 may also be sought in any legal proceeding, before a civil court, family court or a criminal court, affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act. As per sub-section (2), any relief referred to in sub-section (1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court. As per sub-section (3), in case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.

29. In **Juveria Abdul Majid Patni v. Atif Iqbal Mansoori [(2014) 10 SCC 736]** the Apex Court held that it is not necessary that relief available under Section 18, Section 19, Section 20, Section 21 and Section 22 can only be sought for in a proceeding under the Protection of Women from Domestic Violence Act, 2005. Any relief available under the aforesaid provisions may also be

sought for in any legal proceeding even before a civil court and family court, apart from the criminal court, affecting the aggrieved person whether such proceeding was initiated before or after commencement of the Protection of Women from Domestic Violence Act. This is apparent from Section 26 of the said Act. The Apex Court held further that an act of domestic violence once committed, subsequent decree of divorce will not absolve the liability of the respondent from the offence committed or deny the benefit to which the aggrieved person is entitled under the Protection of Women from Domestic Violence Act including monetary relief under Section 20, Child Custody under Section 21, Compensation under Section 22 and interim or *ex parte* order under Section 23 of the said Act.

30. In **Danial Latifi v. Union of India [(2001) 7 SCC 740]**, a decision relied on by the learned counsel for the respondents, in the context of the provisions under the Muslim Women (Protection of Rights on Divorce) Act, 1986, the Apex Court noticed that, in interpreting the provisions where a matrimonial relationship is involved, the court has to consider the social conditions prevalent in the society, whether they belong to the majority or the minority group. What is apparent is that there

exists a great disparity in the matter of economic resourcefulness between a man and a woman. Our society is male-dominated both economically and socially and women are assigned, invariably, a dependant role, irrespective of the class of society to which she belongs. A woman on her marriage very often, though highly educated, gives up her all other avocations and entirely devotes herself to the welfare of the family, in particular, she shares with her husband, her emotions, sentiments, mind and body, and her investment in the marriage is her entire life - a sacramental sacrifice of her individual self and is far too enormous to be measured in terms of money. When a relationship of this nature breaks up, in what manner could the court compensate her so far as an emotional fracture or loss of investment is concerned, there can be no answer. It is a small solace to say that such a woman should be compensated in terms of money towards her livelihood and such a relief which partakes basic human rights to secure gender and social justice is universally recognised by persons belonging to all religions and it is difficult to perceive that Muslim law intends to provide a different kind of responsibility by passing on the same to those unconnected with the matrimonial life such as the heirs who were likely to inherit the property from her or the

wakf boards. Such an approach appears to be a kind of distortion of the social facts. Solutions to such societal problems of universal magnitude pertaining to horizons of basic human rights, culture, dignity and decency of life and dictates of necessity in the pursuit of social justice should be invariably left to be decided on considerations other than religion or religious faith or beliefs or national, sectarian, racial or communal constraints.

31. Even though the petitioner averred cruelty, both physical and mental, suffered by her from 1st respondent, she did not adduce any supportive evidence. When asked during cross-examination, whether she lodged any complaint for the physical assault from the side of the 1st respondent, she stated that since the 1st respondent begged for pardon, she did not make any such complaint. As already noticed, the respondents have not chosen to mount the box. After considering the oral testimony of PW1 and RW1, the Family Court found that the 1st respondent brought PW1 from Hyderabad and she was sent with his parents to his house. When the parents of the petitioner could not arrange more gold ornaments, as demanded by the 1st respondent, she was sent back to her home after taking back the thali chain. Thus, the 1st respondent suffered much mental and physical cruelty entitling

her to get compensation from the 1st respondent and accordingly, the Family Court held that she is entitled to get a compensation of Rs.2,00,000/- from the 1st respondent. The said finding of the Family Court cannot be said to be either perverse or patently illegal, warranting interference in this appeal. Such a claim made in the original petition is maintainable before the Family Court in view of the law laid down in **Juveria Abdul Majid Patni [(2014) 10 SCC 736]** and **Danial Latifi [(2001) 7 SCC 740]**.

In the result, this appeal fails and the same is accordingly dismissed. No order as to costs.

Sd/-
ANIL K. NARENDRAN, JUDGE

Sd/-
VIJU ABRAHAM, JUDGE

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