

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 18TH DAY OF MAY 2021 / 28TH VAISAKHA, 1943

Mat.Appeal.No.523 OF 2019

AGAINST THE ORDER IN OP 344/2017 DATED 18-01-2019 OF FAMILY
COURT, THRISSUR

APPELLANT/PETITIONER:

[REDACTED]

BY ADVS.
SRI.ASWIN GOPAKUMAR
SRI.ANWIN GOPAKUMAR
SMT.KALA G.NAMBIAR
SRI.RENOY VINCENT
SRI.NIRANJAN SUDHIR

RESPONDENT/RESPONDENT:

[REDACTED]

R1 BY ADV. SRI.K.R.ARUN KRISHNAN
R1 BY ADV. SMT.DEEPA K.RADHAKRISHNAN

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
23.03.2021, THE COURT ON 18.05.2021 DELIVERED THE FOLLOWING:

"C.R."

JUDGMENT

Dated this the 18th day of May 2021

Kauser Edappagath, J.

The husband in a marital dispute is the appellant. The original petition filed by him against his wife (respondent) for divorce on the ground of cruelty was dismissed by the Family Court, Thrissur (for short 'the court below') vide impugned order.

2. The marriage between the appellant and the respondent was solemnized on 27/12/2009 at Sree Krishna Temple, Guruvayoor as per the Hindu religious rites. In the wedlock, a daughter named, [REDACTED] [REDACTED] was born on 9/3/2011.

3. The appellant was working at Singapore as a bank manager at the time of marriage. After a few days of marriage, the respondent went to Singapore along with the appellant and both of them resided together there. According to the appellant, immediately after the commencement of the marital relationship, serious matrimonial problems developed between them, which despite his earnest and sincere effort, kept growing and intensified. It was alleged that the respondent was extremely bad tempered and belligerent in nature, constantly using filthy language and arguing with the appellant. She

showed complete disinterest in all household functions and refused to attend her duties as a wife. Not only was the respondent distancing himself from the appellant, but there were regular instances of outrage and resentment, causing serious mental agony and pain to him, it was alleged.

4. The appellant further alleged that the respondent refused to show any signs of love and care towards his parents especially his ailing father and other family members which caused deep mental pain and misery on him. He highlighted an instance wherein the father of the respondent physically hurt his parents causing serious injuries on the hand of his mother which resulted in registration of a criminal case against the respondent and her father at the Town West Police Station, Thrissur. As a counterblast to the same, the respondent filed a complaint raising false allegations against the appellant and his parents resulting in registration of a crime against them. On hearing about the same, the father of the appellant suffered a sudden paralytic stroke and was admitted to the hospital. The intention of the respondent and her parents was only to harass, cause loss, mental agony and pain to the appellant and his family, it was alleged.

5. The appellant and the respondent made a short visit for 12 days to their native place in the month of May 2010. According to the appellant, during the said visit, the respondent refused to reside in his

residence and when he requested her to reside or even visit his residence, she started to pick up quarrel with him. Thereafter, the respondent became pregnant while they were residing together in Singapore and even at that point of time, the respondent continued her reckless and inattentive behaviour. In December 2010, the appellant and the respondent came to their native place so as to drop the respondent at her residence for delivery as per the local custom. During the said stay, the appellant and his mother regularly attempted to visit the respondent at her residence. However, the respondent and her parents refused to permit them to visit the respondent and tried to detach her from the appellant and his parents. During every such attempt, the respondent and her parents began insulting and quarreling with the appellant and his family which deeply hurt him. It was further alleged that he was informed about the delivery of his own child through his family friends on the date of delivery. Even though he rushed to the hospital, he was not permitted to see the child and forcefully obstructed from entering the hospital by the respondents' relatives and strangers on the instruction of the respondent and her parents. It was also alleged that the appellant and his parents were completely isolated from the child and the respondent even refused to send a photo of the child. Hence, the parents of the appellant were forced to file a complaint before the District Legal Service Authority,

Thrissur and it was only with intervention of the authority, they could see the child. In these circumstances, the appellant filed OP No. 1091/2011 for restitution of conjugal rights and GOP No.154/2012 to get the custody of the child before the Family Court, Thrissur. Even though the respondent came to the residence of the appellant for showing the child to his parents, after counselling in OP No.1091/2011, immediately upon arrival, she began scolding, insulting, abusing and quarreling with his parents leaving them devastated and traumatized, it was alleged.

6. Admittedly, a mediation was taken place in the proceedings before the Family Court wherein the matter was settled and both parties agreed to live together on the basis of agreed terms and conditions. The parties agreed to withdraw all pending criminal cases filed against each other. It was further agreed that whenever the appellant comes down from Singapore, he can reside with the respondent and their child at Bangalore where she was employed at that time. According to the appellant, just two weeks after the said compromise, when he attempted to visit the respondent and the child in Bangalore, she refused to even open the door and kept him waiting, without giving him a chance to see his own daughter. Again in January, 2017, the appellant went to the workplace of the respondent at Thrissur and tried to meet her. But the respondent refused to meet him

and insulted him causing mental agony to him. It is the case of the appellant that after the compromise, the respondent never came to his residence. She did not even contact him over the phone. Even after the compromise, they did not reside together on a single day. It was also alleged that after the compromise, the respondent continued to exercise the mental cruelty on him as before and she has even alienated the child from the appellant. The appellant specifically asserted that the respondent committed breach of the terms of the agreement and, hence, the compromise did not materialise. It was in these circumstances, the appellant preferred the original petition for dissolution of marriage on the ground of cruelty.

7. The respondent entered appearance before the court below and filed detailed counter statement. She specifically denied various instances of cruelty allegedly exercised by her on the appellant and pleaded in the original petition. According to her, it was the appellant who often quarreled with her and failed to discharge marital obligations. It was contended that the appellant pledged her gold ornaments without her consent and 25 sovereigns of gold ornaments were taken by the appellant and kept with him. It was further contended that the appellant did not pay any amount to maintain her or the child and even did not meet the hospital expenditure when she was admitted for delivery. The respondent has admitted the

compromise that has taken place at the Family Court and its terms. According to her, it was the appellant who committed breach of the terms of the compromise. It was contended that even though the appellant agreed to withdraw the criminal case pending against the respondent and her father, he did not do so. She asserted that she is ready to reside with the appellant and discharge her marital obligations even now. The respondent sought for the dismissal of the petition.

8. As stated already, the appellant has also filed GOP No.154/2012 for the custody of the child. The respondent has filed another original petition as OP No.983/2017 against the appellant for a decree of permanent prohibitory injunction restraining the appellant from entering into her residence and causing any inconvenience to her or her child's peaceful life or from taking the child by force. All these three cases were tried together and a common order was passed. The appellant was examined as PW1 and Exts. A1 to A34 were marked on his side. The respondent was examined as RW1 and Exts. B1 to B13 were marked on her side. After trial, the court below found that all the allegations of cruelty raised by the appellant till the date of filing the compromise petition were actually condoned by him. The court below further found that the appellant failed to comply with the terms of the compromise by not withdrawing the criminal case filed against the

respondent and her father and, hence, the respondent cannot be blamed for her refusal to live with him even after the compromise. The court below further found that the cruelty alleged till the date of filing the compromise in earlier case cannot be revived since the theory of revival of cruelty cannot be applied to the facts of the case. The Court below also observed that no instance of cruelty after the compromise has been established by the appellant. Accordingly, it was held that the appellant was not entitled to get a decree for divorce on the ground of cruelty and the original petition was dismissed as per the impugned order. Challenging the said order, the appellant preferred this appeal.

9. We heard the learned counsel for the appellant as well as the respondent.

10. The marriage between the appellant and the respondent took place on 27/12/2009. After eleven days of marriage, they went to Singapore where they stayed together for about four months. During this period, matrimonial disputes developed between them which were further intensified by passage of time. After four months' stay at Singapore, they came down to the native place for fifteen days. Thereafter, they again went back to Singapore where the respondent became pregnant. In December 2010, on the seventh month of pregnancy, the appellant and the respondent came to their native

place so as to drop the respondent at her residence for delivery as per the local custom. By that time their relationship has been further deteriorated. The appellant alone went back on 5/1/2011. After the delivery, the respondent did not go back to Singapore to join the appellant. It appears that the marriage did not result in a bond being created between the couple as expected. Admittedly, the appellant and the respondent are living apart since 5/1/2011.

11. The definite case of the appellant is that over the course of marriage with him, the respondent has perpetrated various iniquitous acts, ranging from several mental agony by constantly using filthy language, abdicating all shared household duties, causing his parents to be physically assaulted, filing false and malicious prosecution to entrap him and his family, and depriving him his right to visit and assist in raising their child despite a settlement, making his life a living hell. According to the appellant, in spite of various acts of cruelty committed by the respondent, he, in the best interest of the child, opted to file the original petition for restitution of conjugal rights as OP No.1091/2011 before the Family Court, Thrissur. But, still, the respondent repeated the matrimonial cruelty and even dragged his parents to matrimonial controversy and they were even physically assaulted. A false and frivolous criminal prosecution was also launched against them. Even then, he acceded to a settlement in a mediation

held at Family Court and executed a settlement agreement which was marked as Ext. A24. It was alleged that the respondent committed breach of the settlement by not resuming the marital relationship and continued with her acts of cruelty.

12. The court below did not care to consider or appreciate on merits the various instances of cruelty alleged by the appellant till the date of filing Ext. A24 compromise holding that those were condoned by the appellant. Before examining the correctness of the finding of the Court below regarding condonation of cruelty, we will examine whether the appellant has established the cruelty pleaded.

13. The evidence consists of oral evidence of the appellant alone. Normally, the matrimonial cruelty – be it physical or mental – takes place within the four walls of the matrimonial home and, therefore, independent witnesses may not be available. Thus, the court can act upon the sole testimony of the spouse if it is found convincing and reliable. The various acts of cruelty, both physical and mental, as well as harassment, meted out by the appellant at the hands of the respondent at Singapore as well as at the native place have been spoken to in detail by the appellant. Even though the appellant has been cross-examined in length, nothing tangible has been brought out in the cross-examination to discredit his testimony. It has come out in the evidence of the appellant that the respondent has

caused innumerable mental stress and pain by constantly showering abusive words and filthy language towards him while they were living in Singapore and also during their short stays at the native place. Regular instances of outrage and resentment on the part of the respondent has been spoken to by the appellant. He deposed that apathy and indifferent conduct of the respondent made him completely distressed which even affected his concentration on the work. It has also come out in evidence that the respondent has neglected and even physically assaulted his parents. Ext. A20 would show that a crime was registered against the respondent and her father on the allegation that they physically assaulted the appellant's parents. It has also come out in evidence that after the delivery of the child, the appellant and his parents were denied access to the child by the respondent and her parents. The appellant specifically deposed that right from the first day of marriage, there has been a sustained course of abusive and humiliating treatment and reprehensible conduct on the part of the respondent.

14. It is settled that physical violence is not absolutely essential to constitute cruelty. It is equally settled that mere bickering, coldness, austerity of temper, petulance of manners, rudeness of language, lack of affection, trivial irritations, quarrels, or normal wear and tear of the married life which happens in day to day life cannot amount to cruelty.

At the same time, to constitute cruelty, the conduct complained of need not necessarily be so grave and severe so as to make cohabitation virtually unendurable or of such character as to cause danger to life, limb or health. It must be something more serious than "ordinary wear and tear of the married life". It is sufficient if the conduct and behaviour of one spouse towards the other is of such a nature that it causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the marital tie. The feeling of deep anguish, disappointment, frustration and embarrassment in one spouse caused by the sustained course of abusive and humiliating conduct of other may sometimes lead to mental cruelty. Mental cruelty may also consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party. Malevolent intention is not essential to cruelty, if by ordinary sense in human affairs, the act complained of could otherwise be regarded as cruelty.

15. The Supreme Court in ***Dr. N. G. Dastane v. Mrs. S. Dastane*** (AIR 1975 SC 1534) has held, the standard of proof in matrimonial cases would be same as in civil cases, that is, the Court has to decide the cases based on preponderance of probabilities. Therefore, the Court 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. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other and inference can be drawn from the attending facts and circumstances taken cumulatively. From the kind of attitude, conduct and treatment discussed in the preceding paragraphs, it can readily be inferred that the appellant has every reason to apprehend that it is not safe for him to continue the matrimonial relationship with the respondent.

16. Yet another facet of mental cruelty on the part of the respondent canvassed by the learned counsel for the appellant is regarding the parental alienation. The learned counsel for the appellant submitted that the respondent intentionally alienated the child from the appellant depriving his parental right to be loved by the child. It amounts to nothing but mental cruelty, argued the counsel. We find some force in the said argument.

17. Parental alienation describes a process through which a child becomes estranged from a parent as the result of the psychological manipulation of another parent. It occurs when one parent undermines or prejudices the contact and relationship between the child and the other parent without well-founded reasons. It is a strategy whereby one parent intentionally displays to the child

unjustified negativity aimed at the other parent. The purpose of this strategy is to damage the child's relationship with the other parent and to turn the child's emotions against the other parent. A child has right to the love and affection of both parents. Similarly, the parents have the right to receive the love and affection of the child. Any act on the part of the one parent calculated to deny the love and affection of the child to the other parent by alienating the child from him/her amounts to mental cruelty.

18. Coming to the merits, the appellant has given evidence that he and his parents were completely isolated from the child and the respondent even refused to send a photo of the child. Hence, his parents were forced to file a complaint before the District Legal Services Authority, Thrissur and it was only with intervention of the authority, they could see the child. He further gave evidence that the respondent did not even inform him about the delivery of the child and he came to know of the birth of the child through his family friends on the date of delivery. Even though he rushed to the hospital, he was not permitted to see the child and forcefully obstructed from entering the hospital by the respondents' relatives and strangers on the instruction of the respondent and her parents, the appellant added. The appellant further deposed that the respondent did not inform him about the name laying ceremony of the child and never disclosed anything about

the child including its health condition. The appellant also deposed that just two weeks after the said compromise, when he attempted to visit the respondent and the child in Bangalore to celebrate the birthday of the child, she refused to even open the door and kept him waiting, without giving him a chance to see the child. Finally, he had to leave the birthday gifts and cake in front of the flat and returned. He specifically stated that after the compromise, the respondent completely alienated the child from him. There is nothing on record to disbelieve this evidence. The respondent as a mother breached every duty she owed as the custodial parent to the non-custodial parent of instilling love, respect and feeling in the child for its father. Nothing can be more painful than experiencing one's children—one's own flesh and blood—rejecting him/her. The above acts of the respondent willfully alienating the child from the appellant, no doubt, constitute mental cruelty.

19. The next question for consideration is whether the appellant had, at any time, condoned the respondent/wife's cruelty? It was contended that even assuming that this Court comes to the conclusion that the above mentioned incidents amount to cruelty in matrimonial law, in the facts of the present case, there was clear condonation on the part of the appellant. As stated already, all the disputes between the parties were settled in mediation at the Family Court by executing

a compromise agreement which was marked as Ext. A24. The court below held that all the allegations of cruelty till the date of filing of Ext. A24 compromise were actually condoned by the appellant. The court below further held that the appellant committed breach of compromise by not withdrawing criminal case against the parents of the respondent since the breach was on his side, the cruelty alleged to have been committed prior to the filing of the compromise petition will not be revived and he cannot press into service the theory of revival of cruelty. The contentions of the appellant that even after the said condonation, the act of cruelty was repeatedly committed by the respondent, matrimonial life was not restored and, hence, the past acts of cruelty stood revived was not accepted by the court below.

20. Under S.23(1)(b) of the Act, in any proceeding under the Act whether defended or not, the relief prayed for can be decreed only and only if "where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty". The above section casts an obligation on the Court to consider the question of condonation and obligation which has to be discharged even in undefended cases. The relief prayed for can be granted only if the Court is satisfied that the petitioner has not, in any manner, condoned the cruelty. In the present case, respondent altogether denied allegation of cruelty in her counter statement. She did not advance the plea of condonation as a defence

to such allegation. Nonetheless, learned trial Court considered the contention relating to condonation and rejected the same upon reference to evidence on record in accordance with law laid down in **Dr. N.G. Dastane** (supra) to the effect that even though condonation is not pleaded as defence by the respondent, it is Court's duty, in view of the provisions under S.23(1)(b) of the Hindu Marriage Act, 1955, to find whether the misconduct alleged to be the basis for seeking decree of divorce was condoned by the appellant.

21. As to what constitutes condonation as envisaged under Section 23(1)(b) of the Act has nowhere been elaborated under the Act. 'Condonation' is a word of technical import, which means and implies wiping of all rights of injured spouse to take matrimonial proceedings. In a sense, condonation is reconciliation, namely, the intention to remit the wrong and restore the offending spouse to the original status which in every case deserves to be gathered from the attending circumstances. Ordinarily, as a general rule, condonation of matrimonial offence deprives the condoning spouse of the right of seeking relief on the offending conduct. However, condonation cannot be taken to be an absolute and unconditional forgiveness. Therefore, in case the matrimonial offence is repeated even after an act of condonation on the part of the spouse, it gets revived on the commission of subsequent act resulting in matrimonial disharmony.

Past acts of cruelty even after condonation are grounds to seek divorce if revived by later acts of cruelty.

22. The Supreme Court has very succinctly and elaborately summarised the law regarding condonation in **Dr. N.G. Dastane** (supra) and has observed thus:

“Condonation means forgiveness of the matrimonial offence and the restoration of offending spouse to the same position as he or she occupied before the offence was committed. To constitute condonation there must be, therefore, two things: forgiveness and restoration. But condonation is always subject to the implied condition that the offending spouse will not commit a fresh matrimonial offence, either of the same variety as the one condoned or of any other variety. No matrimonial offence is erased by condonation. It is obscured but not obliterated. 'Since the condition of forgiveness is that no further matrimonial offence shall occur, it is not necessary that the fresh offence should be ejusdem generis with the original offence. Condoned cruelty can, therefore be revived, say by desertion or adultery. 'Condonation' under S.23(1)(b), therefore, means conditional forgiveness, the implied condition being that no further matrimonial offence shall be committed.”

The Division Bench of this Court in **Chathu v. Jayasree** (1990 (1) KLT 604) has held that the condonation is conditional forgiveness and there cannot be condonation if offending spouse continues in matrimonial offence. It was observed thus:

“Condonation of matrimonial transgression involves conditional forgiveness of such transgression as is known to or believed by the

offended spouse, so as to restore the status quo ante as between the spouses. To constitute condonation there must be two things: Forgiveness and restoration. The real import of condonation is conditional waiver of the right of the injured spouse to take out proceedings. The condition is revival of the normal married life. There cannot be condonation if the offending spouse continues to indulge in the matrimonial offence. Forgiveness is meaningless unless there is contrition in the person who seeks or pleads for forgiveness. Condonation rests on some assurance to the offended spouse of retracement of the offending spouse from the wrong path hitherto followed."

Recently, the Division Bench of this Court in **Santhosh Kumar v. Jayasree Damodaran** (2020 (2) KLT 111) has held that an act of cruelty once condoned could certainly revive and give rise to a cause of action for dissolution of marriage, when the offending spouse exploits and takes unfair advantage of the generosity or the benevolence shown by the wronged spouse and takes to matrimonial misdeeds over again.

23. What we can gather from the above precedents is that condonation implies knowledge to the husband of being wronged by wife, conscious election by him not to exercise the legal right flowing therefrom, to forgive the wife conditionally and the same resulting in the resumption of normal relationship between the couple. Thus, it is resumption of normal marital ties with mutual understanding which assumes significance. As has been held in **Dr. N.G. Dastane** (supra), to constitute condonation, there must be two things: forgiveness and

restoration. If for constituting condonation, there must be forgiveness and restoration, it is obvious that bilateral acts of both parties will be required to be taken into account while considering the aspect of condonation. Forgiveness and restoration cannot be unilateral and for it to be effective and fruitful, it has to be bilateral.

24. Admittedly, Ext. A24 compromise agreement did not materialise. Both the appellant and respondent accuse each other for committing breach of the compromise agreement. At any rate, it is not in dispute that there was breach of the compromise agreement. The question is not one who has committed the breach. The question is whether the compromise has been adhered to by both parties and whether there was resumption of conjugal relationship. There is absolutely no material on record to indicate resumption of conjugal life between the appellant and the respondent after the compromise. Even the respondent has admitted that the conjugal relationship has not been resumed after the compromise. Her case is that the appellant failed to withdraw criminal case against her and her parents and, hence, she was justified in not resuming the conjugal life. The evidence on record would further show that their relationship remained even bitter and strained after the compromise. The appellant gave positive evidence that the respondent repeated her acts of cruelty even after the compromise by not resuming the normal marital relationship and

by wilfully alienating the child from him. The appellant has spoken two specific instances where his attempt to meet the respondent and the child was thwarted by the respondent. He deposed that on 9/3/2016, when he went to Bangalore where the respondent was residing with the child for celebrating the birthday of the child with birthday cake and gift, the respondent even did not open the door and made him to wait outside throughout the night. He stated another instance, that in January, 2017, when he went to the workplace of the respondent at Thrissur to meet her, she refused to meet him. Mere filing of compromise petition would not amount to condonation of cruelty unless and until the matrimonial life was restored. There is nothing on record to show that the matrimonial life was restored. There was no cohabitation admittedly. Thus, we have no hesitation to conclude that neither the pleading nor the evidence indicate any bilateral act or conduct so as to record a finding that there was forgiveness and restoration between the parties amounting to condonation of the cruelty on the part of the appellant. Therefore, the conclusion of the court below on this ground is not legally sustainable. The subsequent conduct of cruelty on the part of the respondent revived the earlier conduct of proved cruelty and completely negated the condonation.

25. On an overall appreciation of the pleadings and evidence, we find that the appellant and the respondent were at loggerheads

right from the inception of their marriage. The marriage never took off. Regardless of the subsistence of the marriage for the last twelve years, the couple was unable to patch up their differences. The marriage is virtually shattered and has become a dead wood. The allegations and counter allegations levelled against each other establish that there is no further chance of a rapprochement. The appellant has pleaded and proved specific instances of cruelty meted out on him by the respondent which have been discussed in the preceding paragraphs. Admittedly, they are residing separately since January, 2011. The Supreme Court of India in **Samer Ghosh v. Jaya Ghosh** [(2007) 4 SCC 511] has held that the insistence by one spouse to preserve the dead marriage could be treated as an act of cruelty. It was observed thus:

“Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situation, it may be true mental cruelty.”

26. The upshot of the above discussions is that the appellant has made out a case for granting a decree for dissolution of marriage on the ground of cruelty u/s 13(1)(a) of the Act. The court below went wrong in dismissing his original petition for dissolution of marriage.

The impugned order, thus, is not sustainable and is liable to be set aside. We do so.

In the result, the appeal is allowed. The impugned order is set aside. OP No.344/2017 on the file of the Family Court, Thrissur is allowed. The marriage between the petitioner and the respondent solemnized on 27/12/2009 at Sree Krishna Temple, Guruvayoor stands dissolved. No order as to costs.

Sd/-

A.MUHAMED MUSTAQUE

JUDGE

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

True Copy

PS to Judge