

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM

&

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

WEDNESDAY,THE 06TH DAY OF MARCH 2019 / 15TH PHALGUNA, 1940

Mat.Appeal.No. 383 of 2016

AGAINST THE ORDER IN I.A.NO.2706/2014 IN O.P.NO.1921/2013 of  
FAMILY COURT,THIRUVANANTHAPURAM, DATED 12.1.2016

APPELLANT/COUNTER PETITIONER IN I.A.NO.2706/2014/  
PETITIONER IN O.P.NO.1921/2013:

SUNIL KUMAR K.,  
AGED 48 YEARS,  
S/O.KRISHNANKUTTY NAIR,T.C-7/1377(3),MANCHIMA,  
VETTAMUKKU,THIRUMALA.P.O.,THIRUVANANTHAPURAM.

BY ADVS.  
SMT.S.SINDHU  
SRI.A.D.SHAJAN

RESPONDENTS/PETITIONER AND SECOND COUNTER PETITIONER IN IA  
NO.2706/2014/COUNTER PETITIONERS 1 AND 2 IN O.P.NO.1921/2013

1 PRASOBHA DEVI D.,  
AGED 49 YEARS,  
D/O.SMT.DEVAKI AMMA,DEVI KRISHNA,KP-IV/826,  
DREAM VILLAS,SAGARA,KUDAPPANAKKUNNU.P.O.,  
PEROORKADA(VIA),THIRUVANANTHAPURAM-695043.

2 GIREESH KUMAR,  
AGED 50 YEARS,  
PRAMOD BHAVAN,THARANGINI JUNCTION,  
KRISHNA LANE,KUDAPPANAKKUNNU.P.O.,  
PEROORKADA, THIRUVANANTHAPURAM-695043.

R1 BY ADVS.  
SRI.BRIJESH MOHAN  
SMT.RESMI G. NAIR  
R2 BY ADVS.  
SRI.K.JAJU BABU (SR.)  
SRI.SHAJIN S.HAMEED

Mat.Appeal.No. 383 of 2016 : 2 :

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON  
22.2.2019,THE COURT ON 06.03.2019 DELIVERED THE FOLLOWING:

**C.R.**

**C.K.ABDUL REHIM  
&  
T.V.ANILKUMAR, JJ.**

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**Mat.Appeal No.383 of 2016**  
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**Dated this the 6<sup>th</sup> day of March, 2019**

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

T.V.ANILKUMAR, J.

The appellant is the husband, the petitioner in O.P.No. 1921/2013 filed by him before the Family Court, Thiruvananthapuram, for dissolution of his marriage with the 1<sup>st</sup> respondent, the wife, by invoking the grounds of cruelty, desertion and adultery, under provisions of the Hindu Marriage Act, 1955 (for short 'the Act, 1955'). The 1<sup>st</sup> respondent, after entering appearance, questioned maintainability of the O.P. on the ground of bar of res judicata, because of the dismissal of the former O.P.No.687/2012 filed by him before the Family Court,

Nedumangad on identical grounds. O.P.No.687/2012 was dismissed on 11.7.2013 by the Family Court on merits. Accepting the objection raised against maintainability of the original petition, I.A.No.2706/2014 filed by the 1<sup>st</sup> respondent assailing maintainability of the O.P. and seeking dismissal of the O.P. itself on a preliminary issue, was allowed. The impugned order, dated 12.1.2016 in I.A.No.2706/2014 is challenged before us in this appeal by the aggrieved husband.

2. The 1<sup>st</sup> respondent/wife was married to the appellant on 7.5.2006. A child was born to the spouses. When their relationship strained, the appellant filed O.P.No.640/2009 before the Family Court at Thiruvananthapuram for dissolution of marriage, invoking the grounds of cruelty and desertion under the Act, 1955. Later, O.P.No.640/2009 was transferred to the Family Court, Nedumangad, where it was re-numbered and tried as O.P.No.687/2012. The 2<sup>nd</sup> respondent in this appeal is the husband of 1<sup>st</sup> respondent's own sister, who is the so called adulterer. He had not, however, been impleaded in the

O.P.No.687/2012.

3. There was an M.C.No.375/2012 filed by the 1<sup>st</sup> respondent against the appellant under Section 125 of the Code of Criminal Procedure (hereinafter referred to as 'the Cr.P.C.')

where the appellant denied paternity of the child and disowned the liability to maintain the mother and the child. During the course of trial of O.P.No.687/2012, the appellant made allegations against the 1<sup>st</sup> respondent that she was leading an adulterous life with the aforesaid brother-in-law. The Family Court, Nedumangad, after appreciating the evidence on record, dismissed O.P.No.687/2012 refusing to accept the contentions of the appellant based on any of the grounds including adultery. The court specifically held in paragraph 9 of the judgment, dated 11.7.2013 that, the mere act of her travelling along with the brother-in-law in a car in connection with the illness of her mother by itself will not constitute adultery.

4. The appellant, being aggrieved by the judgment dated 11.7.2013, filed a Mat.Appeal before this court captioned as Mat.Appeal No.606/2013, and that too was

dismissed on 24.9.2013 confirming the decision of the lower court. But while confirming the finding of the lower court as to adultery, this court held that, so long as the issue of adultery did not arise from the pleadings of the parties for consideration, the finding entered thereon was quite uncalled for and erroneous especially when the adulterer was not impleaded as co-respondent in compliance with Rule 7 of the Hindu Marriage (Kerala), Rules, 1963. The finding of the trial court as to adultery was impliedly undone in the Mat.Appeal aforesaid. This court, however, refused to interfere with the dismissal of O.P. probably because finding entered on other grounds did not warrant any interference.

5. Insofar as no definite finding on the issue as to adultery survived after disposal of the Mat.Appeal No.606/2013, we fail to understand as to how the trial of the subsequent O.P.No.1921/2013 could be said to be barred by res judicata. A subsequent proceeding could be said to be barred by res judicata only when a definite finding on an issue which directly and substantially arose in the former proceeding was finally decided by the court. When no such

final decision has been arrived at in the former proceeding on a matter which, in fact did not arise out of the pleadings of the parties, no bar of res judicata can apply to the subsequent proceeding in which the same matter is dealt with. The decision cited by the learned counsel for the 1<sup>st</sup> respondent in **Rithwik Energy Generation Pvt. Ltd. v. Bangalore Electricity Supply Co. Ltd. [2018 (2) KLT 3039 (SC)]** which held that bar of res judicata would apply to a decision on collateral issue also in a former proceeding, has thus no relevance to the facts of the case before us.

6. The court below, in so far as the ground of adultery is concerned, expressed the view that subsequent O.P. is barred at least by the principle of constructive res judicata arising from Section 11 Explanation IV as well as bar arising from Order II Rule 2 of the C.P.C. We have already held that subsequent O.P. is not barred by any principle of res judicata since no adjudication or any definite finding as to adultery was entered into in the former O.P.No.687/2012.

7. The contention of the respondents is that the

appellant knew right from the institution of O.P.No.640/2009 (later re-numbered as O.P.No.687/2012) that the 1<sup>st</sup> respondent was allegedly maintaining close access and voluntary sexual intercourse and when the cause of action to sue on adultery existed right from 2009, his omission to urge adultery as a ground for dissolution would by itself operate as a bar to the later institution of O.P. on the same ground by virtue of Order II Rule 2 of the Code. We are not inclined to accept this argument, because under provisions of the Act, 1955, a suitor or petitioning party has the absolute freedom to choose any one of the statutory grounds for dissolution of the marriage, available to him, no matter cause of action for dissolution accrued to him on various other grounds such as cruelty, desertion, adultery also.

8. Even assuming that ground for adultery existed and accrued to the appellant at the time of institution of the former O.P. also, no law could compel him to sue for dissolution of marriage on the ground of adultery, besides the other grounds of cruelty and desertion, against his choice. Whether a particular statutory ground ought to be



invoked in a proceeding for divorce or reserved or postponed is left to the absolute choice of the party suing for the relief. Many reasons may weigh with the spouse seeking dissolution for choosing or not choosing a particular ground in the proposed proceeding. The ground being within the absolute wisdom of the parties, he or she is not bound to explain the reason for his choice to anyone including the matrimonial court. If he avoids to sue on any one of the grounds for his own reasons, we do not think that Order II Rule 2 of the Code will step in and bar subsequent institution of a proceeding for dissolution upon a new ground.

9. Though it is true that proceedings before the Family Court are to be regulated by provisions of the Code as mandated by Section 21 of the Act, 1955, the application of the Code is nevertheless limited subject to the anatomy and special scheme of the Act as provided by Section 21 itself. The bar under Order II Rule 2 of the Code arises under twin situations in a proceeding before an ordinary civil court. When a party entitled to make a claim fails to include

the whole claim in the former proceeding but sues for the omitted portion of the claim in a later proceeding, the bar certainly applies. The other situation where the bar applies is when the party entitled to sue, having omitted to sue for all or any of the reliefs without the leave of the court, later sues for the omitted relief on the same cause of action.

10. Dissolution is an independent and complete relief in itself under the Act, 1955. Therefore, we are of the opinion that bar under Order II Rule 2 of the Code can seldom apply to an action for dissolution of marriage unlike actions arising out of disputes between spouses relating to money and property claims. Dissolution is not a claim or relief identical with a claim or relief relating to money and property. Bar under Order II Rule 2 of the Code is therefore incapable of any application to a proceeding instituted for dissolution of marriage. Each independent and different ground under the Act, 1955 creates different causes of action for dissolution of the marriage. When the relief for divorce is the same in the former and subsequent proceeding, despite the grounds chosen by the party being

different, no question of bar under Order II Rule 2 could apply at all. Therefore, the view taken by the court below that ground of adultery should have been pursued in O.P.No.687/2012 after amending the pleadings and the failure of the appellant in this regard barred the subsequent institution of O.P. under Order II Rule 2 of the Code cannot be countenanced.

11. On hearing learned counsel appearing on both sides, we find that the court below failed to examine as to whether the objection to the maintainability of O.P. required a preliminary hearing under Order XIV Rule 2 of the Code. It is true that grounds of desertion and cruelty were over again urged as independent grounds for dissolution of marriage in the subsequent O.P. also. Even if same grounds are taken in the subsequent proceeding for divorce, no bar of res judicata could apply as long as the cause of action for the subsequent proceeding remains to be different.

12. So far as grounds for dissolution in matrimonial matters are concerned, they are of continuing or recurring nature. A spouse who suffered dismissal of original petition

for dissolution of marriage on the ground of cruelty, desertion and adultery is not precluded from suing again for dissolution on the same grounds, provided the relief is founded on new facts. Cause of action means a bundle of facts constituting the right of a party which he has to establish in order to obtain a relief from a court. The facts which constitute the grounds of cruelty, desertion or adultery as the case may be, are likely to vary giving rise to different causes of action depending on the facts and circumstances of each case. When cause of action is of continuing and recurring nature, the subsequent litigation for divorce brought on same grounds disregarding the dismissal of former O.P. will not be barred by res judicata.

13. Cause of action founded on acts of cruelty and desertion cannot be said to be always fixed or stable, preventing it from being a fresh ground for dissolution of the marriage. If incidents giving rise to cruelty and desertion are different, cause of action will also differ depending on facts and circumstances. Same is the principle when cause of action relates to adultery also. Even assuming that the

appellant failed to establish ground of adultery in the former O.P.No.687/2012, nothing precludes the appellant from urging the same ground of adultery in the subsequent O.P. on new set of facts constituting adultery.

14. The material question whether the grounds of desertion and cruelty being pursued in the subsequent O.P. are based on new facts and different from early incidents was not considered by the Family Court, Thiruvananthapuram. The impugned order does not disclose that the court below made any efforts to verify the pleadings of the appellant and find out whether the grounds for divorce are based on identical facts as in the previous O.P. or any new facts which came to light after disposal of O.P.No.687/2012. For all these reasons together, the impugned order cannot be sustained and is liable to be set aside as not sustainable under law.

15. In the result, we allow this O.P. and set aside the order dated 12.1.2016 in I.A.No.2706/2014 and direct the Family Court, Thiruvananthapuram to take up the O.P. for consideration and dispose it on merits after recording

evidence and giving opportunities to both parties.

Since the litigation as between these spouses started as early as in 2009, there will be a direction to the court below to dispose of O.P.No.1921/2013 as expeditiously as possible, at any rate, within a period of three months from the date of production of a certified copy of this judgment.

Sd/-

**C.K.ABDUL REHIM  
JUDGE**

Sd/-

**T.V.ANILKUMAR,  
JUDGE**

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*[True copy]*

*P.A to Judge*