IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

WEDNESDAY, THE 1ST DAY OF DECEMBER 2021 / 10TH AGRAHAYANA, 1943

MAT.APPEAL NO.431 OF 2021

AGAINST THE ORDER/JUDGMENT IN OP 41/2019 OF FAMILY COURT, THALASSERY

APPELLANT/S:

RAMLA, AGED 50 YEARS,
D/O. USMAN, RESIDING AT 'MEETHALE KATTIL' HOUSE,
P.O.ERUVATTY, KAPPUMMAL, ERUVATTY AMSOM,
KOZHUR DESOM, THALASSERY TALUK.

BY ADVS.
C.IJLAL
UMMUL FIDA

RESPONDENT/S:

ABDUL RAHUF C.K., S/O.MAMMOOTTY,
AGED 51 YEARS, RESIDING AT KUNNUMMAL HOUSE,
P.O.MAMBARAM PATHIRIYAD AMSOM PARAMBAYI DESOM,
KANNUR DISTRICT-670741.

BY ADVS.
T.P.SAJID
SHIFA LATHEEF

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 01.12.2021, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

JUDGMENT

A.Muhamed Mustaque, J.

The appellant is the petitioner in O.P.No.41/2019 on the file of the Family Court, Thalassery. The above petition was filed on enumerated grounds of the Dissolution of Muslim Marriages Act, 1939, (for short, the 'Act') for divorce. The parties are Muslims and they married in accordance with the personal law applicable to them on 04.08.1991. In the petition for divorce, the grounds under the specific head of Section 2(ii), 2(iv) and 2(viii) of the Act alone were referred. However, the pleadings in the petition indicate the ground for divorce under Section 2(viii) (f) as well.

2. The Family Court dismissed the petition as the appellant wife failed to make out a case under Sections 2(ii), 2(iv) and 2(viii) (f) of the Act.

3. The brief facts are as follows:

The parties married on 04.08.1991. In the wedlock, three

children were born. The respondent was abroad. He contracted another marriage with a lady namely Hajira during the subsistence of marriage with the appellant. That has been specifically averred in the petition and not denied in the written statement. According to the respondent, he contracted second marriage as the appellant refused to have a sexual relationship with him.

4. We will refer first to the grounds urged in the petition for divorce.

Section 2(ii) states as follows:

> *"that the husband has neglected or has failed to provide for her maintenance for a period of two years."*

Section 2(iv) states as follows:

> *"that the husband has failed to perform, without reasonable cause, his marital obligations for a period of three years."*

Section 2(viii) (a) and (f) states as follows:

> *"that the husband treats her with cruelty, that is to say–*
> *(a) habitually assaults her or makes her life miserable*

by cruelty of conduct even if such conduct does not amount to physical ill-treatment, or

(f) if he has more wives than one, does not treat her equitably in accordance with the injunctions of the Qoran."

4. The Family Court formulated the points for consideration on three different heads except with reference to sub clause (f). It has come out in the evidence that the respondent used to provide maintenance. Ext.B1 series clearly indicates that the maintenance provided by him. The statutory provision clearly states that it is only on failure to provide maintenance for a continuous period of two years, the ground for divorce is attracted on that ground. The appellant has a case that the above amount was in fact the money collected from abroad due to the intervention of local politicians to meet the marriage expenses of the daughter and not the maintenance provided. There was no evidence to that effect. Ext.B1 series would show that the amounts have been credited in the account on different occasions during

the years 2017 and 2018. We need not interfere with the impugned order to the extent rejecting the claim for divorce on that ground.

5. Section 2(iv) refers that the husband has failed to perform marital obligations for a period of three years. The appellant had stated in the petition that from 21.02.2014 onwards, the respondent husband stopped visiting her. This fact has not been denied in the written statement. On the other hand, according to the respondent, he was forced to marry another lady for the reason that the appellant failed to co-operate with him on his physical needs. We are not persuaded to believe the version of the respondent in this regard. Three children were born in the wedlock. Two of them got married. Absolutely, there was no evidence to show that the respondent was willing to cohabit with the appellant. That means, he failed to perform the marital obligations. The petition for divorce was filed in the year 2019.

They were living separately atleast for a period of five years prior to filing this petition. In such circumstances, we are of the view that the appellant made out a ground for divorce under Section 2(iv) of the Act. We also note that the Family Court had not entered into any finding on this point while discussing the point Nos.2 and 3. The Family Court carried on an assumption that providing maintenance would be sufficient to prove that the husband performed marital obligations. This finding, according to us, is erroneous and cannot stand the scrutiny of the law.

6. The next ground is under Section 2(viii) (a) of the Act. This ground refers to the physical and mental cruelty of the wife. We noted that the parties are living separately for more than five years before the institution of the petition. That would show that there was no cohabitation. In such circumstances, we will not be able to justify the case put forward by the appellant-wife in regard to the physical or mental cruelty in the context of Section 2(viii)(a)

of the Act.

7. The next ground is under Section 2(viii) (f) of the Act. Though in the petition, this provision has not been specifically mentioned, we are of the view that mere omission to quote a statutory provision will not disentitle the claim for divorce on that ground if there are sufficient averments in the petition. There are averments in the petition regarding contracting second marriage by husband with Hajira. That fact has not been denied. If there exists a marriage with another lady during the subsistence of the previous marriage, the burden is on the husband to prove that he had treated both wives equitably in accordance with the injunctions of Quran. Staying away from the first wife for five years itself would show that he had not treated them equally. The respondent has no case that he lived with the appellant after 2014. The refusal to cohabit and perform the marital obligations with the previous wife is tantamount to the violation of the Quranic

injunctions which commands equal treatment of the wives if the husband contracts more than one marriage. In such circumstances, we have no hesitation to hold that the appellant-wife is entitled to get a decree of divorce on that ground also. We, therefore, allow this appeal and set aside the impugned judgment. We grant divorce under Sections 2(iv) and 2(viii) (f) of the Act. We, accordingly, dissolve the marriage between the appellant and the respondent solemnised on 04.08.1991. No order as to costs.

Sd/-

A.MUHAMED MUSTAQUE

JUDGE

Sd/-

SOPHY THOMAS

JUDGE

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