

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 6TH DAY OF AUGUST 2021 / 15TH SRAVANA, 1943

MAT.APPEAL NO. 370 OF 2015

AGAINST THE JUDGMENT IN OP 389/2013 OF FAMILY COURT,

MUVATTUPUZHA,

APPELLANT/PETITIONER:

XXX
AGED 40 YEARS
XXXX

BY ADVS.
SRI.T.M.RAMAN KARTHA
SMT.SYAMA MOHAN

RESPONDENTS/RESPONDENTS:

1 XXXX
AGED 33 YEARS
XXXX

2 XXX
XXX
BY ADVS.
SMT.R.ANJANA
SMT.R.PRIYA
SRI.M.B.SANDEEP
SRI.B.SURJITH

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 15.07.2021, ALONG WITH Mat.Appeal.540/2015 & CONNECTED CASES, THE COURT ON 6.08.2021 DELIVERED THE FOLLOWING:

Mat.Appeal No.370/2015 & conn.cases

-:2:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 6TH DAY OF AUGUST 2021 / 15TH SRAVANA, 1943

MAT.APPEAL NO. 540 OF 2015

AGAINST THE ORDER IN OPG&W 17/2014 OF FAMILY COURT,

THODUPUZHA,

APPELLANT/PETITIONER:

XXXX

AGED 39 YEARS,

XXXX

BY ADVS.

SRI.V.BHASKARA MENON

SRI.T.M.RAMAN KARTHA

SMT.G.SUMA

SMT.SYAMA MOHAN

RESPONDENT/RESPONDENT:

XXXX

AGED 32 YEARS,

XXXX

BY ADVS.

SMT.R.ANJANA

SMT.R.PRIYA

SRI.M.B.SANDEEP

SRI.B.SURJITH

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 15.07.2021, ALONG WITH Mat.Appeal.370/2015 AND CONNECTED CASES, THE COURT ON 06.08.2021 DELIVERED THE FOLLOWING:

Mat.Appeal No.370/2015 & conn.cases

-:3:-

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 6TH DAY OF AUGUST 2021 / 15TH SRAVANA, 1943

MAT.APPEAL NO. 585 OF 2015

AGAINST THE ORDER IN OP 29/2013 OF FAMILY COURT,

THODUPUZHA

APPELLANT/RESPONDENT:

XXXX

AGED 39 YEARS

XXXXX

BY ADVS.

SRI.V.BHASKARA MENON

SRI.T.M.RAMAN KARTHA

SMT.G.SUMA

SMT.SYAMA MOHAN

RESPONDENT/PETITIONER:

XXXX

AGED 32 YEARS

XXXX

BY ADVS.

R.ANJANA

B.SURJITH

R.PRIYA

M.B.SANDEEP

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON 15.07.2021, ALONG WITH Mat.Appeal.370/2015 AND CONNECTED CASES, THE COURT ON 06.08.2021 DELIVERED THE FOLLOWING:

J U D G M E N T

Mat.Appeal Nos.370/2015, 540/2015, & 585/2015

Dated this the 6th day of August, 2021

Kauser Edappagath, J.

The husband who is the appellant in all the above appeals challenges three verdicts passed against him by two different Family Courts in three separate proceedings.

2. For the sake of brevity, we refer the parties to as "husband" and "wife". OP No.389/2013, on the file of the Family Court, Muvattupuzha, was instituted by the husband for dissolution of marriage on the ground of adultery and cruelty. It was dismissed as per the judgment dated 7/2/2015. Mat.Appeal No.370/2015 has been filed challenging the said judgment. OP No.29/2013, on the file of the Family Court, Thodupuzha, was instituted by the wife for return of gold ornaments and money. It was allowed in part as per the order dated 30/4/2015. Mat.Appeal No.585/2015 has been filed challenging the said order. OP (G&W) No.17/2014, on the file of the Family Court, Thodupuzha, was instituted by the husband for appointing him as the guardian of

the minor child. It was dismissed as per the order dated 30/4/2015. Mat.Appeal No.540/2015 has been filed challenging the said order. Since all the appeals are interconnected, we dispose of them together by this common judgment.

3. The marriage between the husband and wife was solemnized on 23/5/2006 at Sreekrishnaswami Temple, Thodupuzha as per the Hindu religious rites. After the marriage, they resided at the house of the husband at Ernakulam. A child was born in the wedlock on 8/11/2007. The pleadings and evidence on record disclose that the marital relationship between them was not cordial and happy right from the inception. Marital discord developed between them soon after the marriage which was intensified by passage of time. Both accuse each other for the same. The husband filed petitions for divorce on two occasions (OP Nos.270/2008 and 349/2010) and the wife filed a petition for return of gold ornaments and money (OP No.31/2011). Those petitions were withdrawn by them as settled at the intervention of the family members and well wishers. They started to live together again from the month of March, 2012. Still, dispute arose between them. There was even allegation of

assault by the husband against the wife demanding dowry resulting in the registration of crime against the husband and his family members u/s 498A and 34 of I.P.C. Thereafter in 2013, the husband instituted OP No.389/2013 for dissolution of marriage on the ground of cruelty and adultery and the wife instituted OP No.29/2013 for return of gold ornaments and money. In 2014, the husband preferred OP (G&W) No. 17/2014 for appointing him as the guardian of the minor daughter. As stated already, OP No.389/2013 as well as OP(G&W) No.17/2014 filed by the husband were dismissed and OP No.29/2013 filed by the wife was allowed in part vide the impugned orders and judgment.

4. We have heard Sri.T.M.Raman Kartha, the learned counsel appearing for the husband and Sri.M.B.Sandeep, the learned counsel appearing for the wife.

5. We will deal with each original petitions separately one by one.

OP No.389/2013

6. This Original Petition has been filed by the husband for dissolution of marriage on the ground of adultery and cruelty. The first respondent is the wife. The second respondent, who

remained *ex parte*, is the alleged adulterer. The definite case of the husband is that right from the inception of marriage, the wife has perpetrated various iniquitous acts, ranging from several mental agony by constantly using filthy language, abdicating all shared household duties, threatening to commit suicide, refusing to have sex, picking up quarrels constantly demanding to take her back to her parental home, ridiculing him in front of others, abusing his mother etc. making his life a living hell. According to the husband, in spite of various acts of cruelty committed by the wife, he opted to withdraw two petitions for divorce filed by him on earlier occasions with the bonafide belief that they could lead a happy and peaceful life. But, still the wife repeated the matrimonial cruelty and even dragged his mother and sister to matrimonial controversy launching a false and frivolous criminal prosecution against them. Almost all the allegations of cruelty allegedly meted out by him at the hands of the wife were raised by the husband in the earlier two original petitions. His case is that since the wife repeated matrimonial cruelty even after settlement of those cases, the cruelty alleged in the two earlier petitions stood revived. Apart from the ground of cruelty, this

time, the husband has raised the ground of adultery as well. It is alleged that the wife has been maintaining illicit relationship with the second respondent prior to her marriage and even thereafter.

7. The court below after evaluation of evidence found that the husband failed to prove that the wife was maintaining illicit relationship with the second respondent. In so far as the ground of cruelty was concerned, the court below found that earlier two original petitions for dissolution of marriage were settled and the parties reunited and started to reside together again. It was found that after settling OP No.349/2010, they resumed cohabitation and, hence, the cruelty, if any, meted out by the husband at the hands of the wife stood condoned. It was held that inasmuch as the husband did not have a case in the present petition that the wife had caused physical or mental torture after the resumption of cohabitation, the divorce on the ground of cruelty cannot be granted. Accordingly, the original petition was dismissed.

8. Assailing the findings of the Family Court on adultery, the learned counsel for the husband vehemently argued that the Court below was unreasonable and unrealistic in the appreciation

of evidence. The learned counsel submitted that the evidence on record, both oral and documentary, were sufficient to prove adultery alleged so as to grant a decree for dissolution of marriage u/s 13(1)(i) of the Hindu Marriage Act. In order to prove adultery, the husband relied on his own oral evidence, the evidence of his friend who was examined as PW2 as well as Ext. X1. Ext. X1 CD which contains the details of the calls made between the wife and the second respondent were pressed into service to contend that there is an unholy illicit relationship between the wife and the adulterer.

9. In a case where divorce is sought on the ground of adultery, the proof required to establish adultery need not necessarily be proof beyond a shadow of doubt. Proof by preponderance of probabilities would be sufficient. Direct proof of adultery can rarely be given. The circumstantial evidence is all that can normally be expected in proof of the charge of adultery. However, the circumstances must be such as lead to it by fair inference, as a necessary conclusion. The allegation must be reasonably proved, there must be a high degree of probability.

10. The wife was working as a temporary employee at the

Pollution Control Board, Thodupuzha. The second respondent was an officer at the Pollution Control Board, Thodupuzha. According to the husband, the wife has been maintaining illicit relationship with the second respondent prior to her marriage and even thereafter. But it is pertinent to note that, in both the earlier petitions filed by the husband for dissolution of marriage, there was no such allegation of adultery. The explanation offered by the husband was that it was only after the dismissal of OP No.349/2010, he came to know about the illicit relationship between his wife and the second respondent. But, in cross-examination, he admitted that he had a suspicion about their illicit relationship just prior to her resignation of job from the Pollution Control Board. In cross-examination, he further admitted that he came to know about such a relationship in the year 2008 itself. If that be so, he could have canvassed adultery as a ground in the earlier round of litigations. The husband has no case that he did witness any such illicit relationship between his wife and the second respondent. He did not see them together at any place other than at their working place. He projected a case that his wife and the second respondent went for pleasure trips to

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Munnar and other tourism destinations. But, no evidence was adduced to substantiate the same. PW2 was examined to prove the allegations of cruelty as well as adultery. He deposed that he along with the husband and their friends made enquiry about the relationship between the wife and the second respondent and the enquiry revealed that they were in love prior to the marriage and the relationship continued even thereafter. But it was only hearsay evidence. He could not even say with whom he made enquiry. The evidence of PW2 is no way helpful to prove adultery.

11. The learned counsel for the husband further submitted that a perusal of the print out of Ext.X1 CD produced from the BSNL would show that there were frequent calls between the phone numbers of the wife and the second respondent which suggests unholy relationship between them. It is true that there were calls on many occasions from their telephones for the period from 3/10/2012 to 24/7/2013. It is against the evidence given by the wife that she used to call the second respondent only occasionally that too for official purpose. But merely for the reason that the wife used to make calls regularly to the second respondent, we cannot jump into a conclusion that their

relationship was an illicit one and that there was adulterous act between them. As stated already, there must be a high degree of probability to substantiate the allegation of adultery. The evidence adduced by the husband and discussed above are insufficient to prove adultery even by preponderance of probabilities. Hence, we find no reason to interfere with the finding of the court below on adultery.

12. Before examining the correctness of the finding of the court below regarding condonation of cruelty, we will examine whether the husband has established the cruelty pleaded. Normally matrimonial cruelty takes place within the four walls of the matrimonial home and, therefore, independent witness may not be available. Thus, the court can even act upon the sole testimony of the spouse if it is found convincing and reliable. The Apex Court in **Dr.N.G.Dastane v. Mrs.S.Dastane** (AIR 1975 SC 1534) has held that the standard of proof in matrimonial cases would be the same as in civil cases, i.e., the court has to decide the cases based on preponderance of probabilities. The evidence on record would show that the various acts of cruelty, both physical and mental, as well as harassment meted out by the

husband at the hands of the wife, have been spoken to in detail by the husband. Even though he has been cross examined in length, nothing tangible has been brought out in cross-examination to discredit his testimony. It has come out in the evidence of the husband that the wife has caused innumerable mental stress and pain by constantly sharing abusive words and filthy language towards him and also by threatening to commit suicide on many occasions. It has also come out in evidence that on two occasions, the wife left the matrimonial home openly declaring that she will not return. He has even deposed that on many occasions, the wife refused to have sex with him. Several mediation at the instance of the relatives had also taken place. He further deposed that after the birth of the child, the wife did not permit his mother even to see the child. Regular instances of outrage and resentment on the part of the wife have been spoken to by the husband. Constant picking up quarrels with his mother had also been spoken by him. He asserted that apathy and indifferent conduct of the wife made him completely distressed. It has also come out in evidence that the wife had neglected his parents and used to pick up quarrel with them unnecessarily. Ext.

A7 would show that a crime was registered against the husband and his parents on the allegation that they physically assaulted the wife which ultimately ended in acquittal. The husband specifically deposed that right from the inception of marriage, there has been unusual conduct and abusive humiliating treatment on the part of the wife. It is settled that physical violence is not absolutely essential to constitute cruelty. To constitute cruelty, the conduct and behaviour of one spouse towards the other need only be of such a nature that it causes reasonable apprehension in the mind of the latter that it is not safe for him/her to continue the marital tie. From the kind of attitude, conduct and treatment discussed above, it can readily be inferred that the husband has every reason to apprehend that it is not safe for him to continue the marital relationship with the wife.

13. Now, we will come to the finding of the court below regarding condonation of cruelty. The court below found that even assuming that the allegations of cruelty stood proved, in the facts of the present case, there was clear condonation on the part of the husband. The court below found that after the parties

settled OP No.349/2010, they resumed cohabitation and lived together from March, 2012 to 13/11/2012 and there was no case for the husband that during the said period, he was subjected to any sort of cruelty by the wife.

14. Under S.23(1)(b) of the Hindu Marriage Act, in any proceeding under the Act, whether defended or not, the relief prayed for can be decreed, only if 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 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. 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.

15. The Apex Court has very succinctly and elaborately summarised the law regarding condonation in **Dr. N.G. Dastane** (supra) and has held that the 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 and the condoned cruelty can be revived if fresh matrimonial offence is 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 to indulge in matrimonial offence. Again, 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. Recently, the Division Bench of this Court in **Prabin Gopal v. Meghna** (2021(3) KLT 812) held that past acts of cruelty even after condonation are grounds to seek divorce if revived by later

acts of cruelty.

16. Admittedly, the compromise entered into between the parties which led to the withdrawal of OP Nos.349/2010 and 31/2011 did not materialise. Both the husband and the wife accuse each other for committing breach of the compromise. At any rate, it is not in dispute that there was breach of the compromise. The question is not who has committed the breach. The question is whether the compromise has been adhered to by both parties and whether there was normal resumption of conjugal relationship. Mere compromise would not amount to condonation of cruelty unless and until the matrimonial life was restored. There is absolutely no material on record to indicate resumption of conjugal life in its true spirit between the husband and the wife after the compromise. Even the wife has admitted that the conjugal relationship was not smooth and cordial after the compromise. Her case is that the husband and his family members assaulted her on 13/11/2012 and, thus, she was constrained to leave the matrimonial home. It was found to be incorrect by the Magistrate Court.

17. Making continuous telephonic interactions by the wife

with the second respondent ignoring the warning given by the husband and false initiation of criminal prosecution by the wife against the husband and his parents after the reunion have been projected by the husband as the instances of fresh matrimonial offence committed by the wife. It has come out in evidence that the wife used to make frequent telephone calls with the second respondent during the period from 3/10/2012 to 27/4/2013. Ext. X1 CD produced from BSNL would substantiate the same. There were instances where the wife made calls during odd hours as well. For instance, on 28/2/2013, she had made 10 calls out of which 5 were missed calls, that too between 10.40 p.m to 10.55 p.m. It is true that we have found that the said evidence is not sufficient to infer adultery on the part of the wife. The question is, whether making such calls would constitute mental cruelty as argued by the learned counsel for the husband. As stated already, right from the inception of marriage, the marital relationship was not cordial. They separated three times and reunited. There were mediation and conciliation several times. The parties have decided to resume cohabitation consequent to the withdrawal of OP Nos.349/2010 and 31/2011. In that

circumstances, the wife would have been more vigilant in her behaviour. The husband deposed that on one occasion, he overheard the intimate conversation between the wife and the second respondent and on questioning, she told him that the second respondent was having more right over her body and mind than him. According to the husband, she continued making calls with the second respondent in spite of his warning. It shows that even after the husband questioned the wife about her telephone conversation with the second respondent, and even after she realised that the husband did not like her making such telephone calls, she continued to make telephone conversation with the second respondent on almost all days, and several times on a single day. It is also pertinent to note that during evidence, the wife deposed that she used to call the second respondent only on certain days. However, documentary evidence proved otherwise. Making discreet phone calls frequently by the wife with another man disregarding the warning of the husband, that too at odd hours, amounts to matrimonial cruelty.

18. Next facet of matrimonial cruelty canvassed by the husband is the initiation of false complaint by the wife against

him, his mother and sister. It has come out in evidence that on 27/11/2012, the wife filed a complaint before the Kuruppampady Police Station alleging that she was assaulted by the husband, his mother and sister on 13/11/2012. On the basis of the said complaint, a crime was registered as FIR No.1387/2012. Ext. A7 is the copy of the FIR. The husband, his mother and sister faced the prosecution as CC No.131/2014 u/s 498A r/w 34 of I.P.C. before the Judicial First Class Magistrate Court, Perumbavoor. According to the husband, the said prosecution was initiated by the wife falsely and with intent to harass him and his family members.

19. No doubt, making false complaints and initiating false criminal prosecution by one spouse against other constitutes mental cruelty. In ***K.Srinivas v. K. Sunitha*** {(2014) 16 SCC 34}, Apex Court held that filing false complaint against husband and his family members under S.498A and S.307 of Indian Penal Code will amount to matrimonial cruelty defined under S.13(1)(ia) of Hindu Marriage Act. In ***Naveen Kohli v. Neelu Kohli*** {(2006) 4 SCC 558}, it was held that making false complaints before the police and authorities causing innumerable mental stress and making false and defamatory allegations will amount to mental

cruelty. In **David M. D. v. K. G.Mercy**(2013 (3) KHC 739), the Division Bench of this Court has held that making false allegations against the husband and child and making false complaints to the authority by the wife will amount to cruelty.

20. The learned counsel for the wife submitted that initiation of criminal prosecution u/s 498A of IPC was not pleaded in the original petition nor was it highlighted as a mental cruelty and, therefore, the said ground could neither be raised nor be addressed to. The learned counsel relied on a latest decision of the Apex Court in **Mangayakarasi v. M.Yuvaraj** (AIR 2020 SC 1198) in support of his submission.

21. The Apex Court in **Malathi Ravi (Dr.), M.D. v. Dr. B. V. Ravi, M.D** (AIR 2014 SC 2881) has held that subsequent events, established from the uncontroverted materials on record, can be taken into consideration in a case seeking dissolution of marriage. In **A. Jayachandra v. Aneel Kaur** (AIR 2005 SC 534), the Apex Court held that if acts subsequent to the filing of the divorce petition can be looked into to infer condonation of the aberrations, acts subsequent to the filing of the petition can be taken note of to show a pattern in the behaviour and conduct. In

Srinivas (supra), the criminal complaint was filed by the wife after filing of the husband's divorce petition. Still it was taken into consideration being a subsequent event to grant divorce. In **Malathi Ravi** (supra), the husband instituted the petition for divorce on the ground of desertion and the wife instituted the petition for restitution of conjugal rights. The Family Court dismissed the petition for divorce and allowed the petition of the wife for restitution of conjugal rights. After the said judgment, the husband did not prefer an appeal immediately. He waited for the wife to join and for the said purpose, he wrote letters to her and as there was no response, he sent a notice through his counsel. The wife, eventually, joined at the matrimonial house being accompanied by her relative who was working in the police department. After she stayed for a brief period at the matrimonial home, she left her husband and thereafter lodged an FIR alleging demand of dowry against the husband, his mother and sister as a consequence of which, the husband was arrested being an accused for the offences under S.498A and S.506 read with S.34 of the Indian Penal Code and also under the provisions of Dowry Prohibition Act. He remained in custody for a day until he was

enlarged on bail. The learned trial Magistrate recorded a judgment of acquittal. After all these events took place, the husband preferred an appeal along with an application for condonation of delay before the High Court. The High Court took note of subsequent events into consideration and granted divorce on the ground of cruelty though the relief of dissolution of marriage was sought on the ground of desertion alone. It was confirmed by the Apex Court. In ***Mangayakarasi*** (supra) relied on by the wife, the subsequent event of filing false complaint was taken as a ground for divorce for the first time before the High Court in the second appeal. It was held that the High Court in the limited scope available to it in a second appeal under S.100 of the Civil Procedure Code was not entitled to re appreciate the evidence and, hence, has no power to rely on the said subsequent event to grant divorce in second appeal. The said dictum is not all applicable to the facts of our case.

22. Coming to the evidence on record, FIR relating to the crime was produced before the Family Court and marked as Ext. A7. It was dated 27/11/2012, prior to the filing of OP No. 389/2013. The judgment of acquittal was passed after the

disposal of OP No.389/2013 by the Family Court. The judgment of acquittal dated 31/01/2019 has been produced before us as per IA No.02/2021. A perusal of the judgment would show that there is clear observation doubting the veracity and genuineness of the prosecution case. It shows that said initiation of criminal prosecution was false.

23. For the reason stated above, we hold that making continuous telephonic interactions by the wife with the second respondent ignoring the warning given by the husband and false initiation of criminal prosecution by the wife against the husband and his parents after the reunion constitute mental cruelty and they are sufficient to revive the past acts of proved cruelty. Therefore, the conclusion of the court below on this ground is not legally sustainable. The evidence on record shows that the husband and the wife were at loggerheads right from the inception of their marriage. Regardless of the subsistence of the marriage for the last twelve years, the couple was unable to patch up their differences. The allegations and counter allegations levelled against each other establish that there is no further chance of a rapprochement. The husband has pleaded

and proved specific instances of cruelty meted out on him by the wife which have been discussed in the preceding paragraphs. Admittedly, they are residing separately since November, 2012. Thus, we hold that the husband has made out a case for granting a decree for dissolution of marriage on the ground of cruelty u/s 13(1)(ia) of the Hindu Marriage Act. The court below went wrong in dismissing his original petition for dissolution of marriage. The impugned judgment in Mat. Appeal No.370/2015, thus, is not sustainable and is liable to be set aside. We do so.

OP No.29/2013

24. This Original Petition has been filed by the wife against the husband for recovery of gold ornaments weighing $46\frac{3}{4}$ sovereigns and an amount of ₹1,00,000/-. The Family Court found that the wife has succeeded in proving the entrustment of 20 sovereigns of gold and its misappropriation by the husband. The Family Court also found that an amount of ₹1,00,000/- has been given by the wife to the husband in trust. Accordingly, a decree for realisation of 20 sovereigns of gold ornaments or its market value and also ₹1,00,000/- with interest @6% was granted.

25. The wife alleged that at the time of marriage, she was

having 51 sovereigns of gold ornaments which were entrusted with the husband as her trustee and after three months of marriage, he sold away 20 sovereigns of gold ornaments to purchase a property measuring an extent of 14 cents in his name. It was also alleged that to purchase the said property, he availed ₹55,000/- from her father and later in the month of January, 2007 and in September, 2009, he availed ₹20,000/- and ₹25,000/- respectively from her father. According to her, the entire money of ₹1,00,000/- was received by the husband towards her family share as a trustee. It was further alleged that the entire gold ornaments of 51 sovereigns except those required for her daily wear having total sovereigns of $4\frac{1}{4}$ were in the possession of the husband. The husband totally denied the above allegations. According to him, no gold ornaments were entrusted to him, nor did he receive any money from the wife or her father. He has also taken a contention that the original petition is barred under the provisions of Order XXIII Rule 1 of C.P.C.

26. The learned counsel for the husband relying on Sub-Rule (4) of Rule 1 of Order XXIII of C.P.C vehemently argued that the wife having withdrawn from OP No.31/2011 without seeking

permission of the court to file a fresh petition on the same subject matter, was precluded from instituting any fresh petition in respect of the same subject matter or part thereof. Order XXIII Rule 1 of CPC deals with withdrawal of suit or abandonment of claim. The principle underlying Rule 1 of Order XXIII is that when a plaintiff once institutes a suit in a court and thereby avails of the remedy given to him under law, he cannot be permitted to institute a fresh suit in respect of the same subject matter again after abandoning the earlier suit or withdrawing it without permission of the court to file a fresh suit. The principle is founded on public policy to prevent the abuse of process of court. Sub-Rule (3) of Rule 1 contemplates qualified or conditional withdrawal of suit. It permits the plaintiff to withdraw the suit or part thereof with leave of the court to institute a fresh suit on the same subject matter if it is satisfied that (a) the suit must fail by reason of formal defect; or (b) there are sufficient grounds for granting the prayer of the plaintiff. Sub-Rule (4) of Rule 1 expressly states that where the plaintiff abandons any suit or part of claim or withdraws from a suit or part of claim without the leave of the court to file fresh suit, he cannot institute fresh suit

in respect of the same subject matter. Section 21 of the Hindu Marriage Act, 1955 make the provisions of Code of Civil Procedure applicable to proceedings under the Act.

27. The meaning and interpretation of the term “subject matter” came up for consideration before the Apex Court in **Vallabh Das v. Madan Lal** (AIR 1970 SC 987). It was held thus:

“The expression “subject matter” is not defined in the Code. It does not mean property. It has a reference to a right in the property which the plaintiff seeks to enforce. The expression includes the cause of action and the relief claimed. Unless both of them (cause of action and relief claimed) in the second suit are the same as in the first suit, it cannot be said that the subject matter of the second suit is the same as that in the previous suit.”

Thus, the term “subject matter” includes the plaintiff's cause of action in the suit and as such a suit on a different cause of action is not barred under Sub-Rule (4) of Rule 1 of Order XXIII of C.P.C.

28. The wife's original petition was one for return of gold ornaments and money allegedly entrusted by her to the husband. Going by the pleadings, the husband is in the status of a trustee in so far as the said ornaments and money entrusted to him are concerned and the gold ornaments and money are trust property in the hands of the husband. Thus, the husband is bound to

account to the wife at any time when she demands. A suit by the wife for return of gold ornaments and money entrusted with her husband or in-laws as a trustee is governed by Section 10 of the Limitation Act and there will not be any limitation for such a suit. The cause of action in each successive suit would be different one. The wife is entitled to claim it back at any time as the cause of action is recurring one. Thus, the provisions of Sub-Rule (4) of Rule 1 of Order XXIII of C.P.C would not be bar to institute a second suit for recovery of gold ornaments and money by the wife against the husband inasmuch as the gold ornaments and money should be deemed to be trust property in the hands of the husband and the cause of action is recurring and continuing one. That apart, earlier petition (OP No.31/2011) was withdrawn along with the petition for dissolution of marriage (OP No.349/2010) filed by the husband as the entire dispute was settled and the parties decided to resume cohabitation. It has come out in evidence that the said settlement did not materialise and again they separated. It was thereafter, on fresh cause of action, the present petition for return of gold ornaments and money was filed. The husband also filed a fresh petition for dissolution of

marriage. In these circumstances, we endorse the finding of the Family Court that bar under Sub-Rule (4) of Rule 1 of Order XXIII would not apply.

29. Coming to the merits, the wife relied on her own testimony and the evidence of her father who was examined as PW2 to prove her case. PW1 and PW2 categorically gave evidence that the wife was having 51 sovereigns of gold at the time of marriage. The description of the gold ornaments were also given in the pleadings as well as in the evidence. According to the wife, out of the said 51 sovereigns of gold ornaments, $4\frac{1}{4}$ sovereigns of gold ornaments were retained by her for daily wear and the balance were entrusted to the husband. However, she admitted that after three months of marriage, she gave 20 sovereigns of gold ornaments to the husband to purchase the property. The court below on evaluation of evidence found that the entrustment of the said 20 sovereigns of gold ornaments alone stood proved and there was no satisfactory evidence to prove the entrustment of the remaining $26\frac{3}{4}$ sovereigns of gold ornaments. Exts. B9 and B10 documents relating to the purchase of the property would substantiate the case of the wife that 20

sovereigns of gold ornaments were entrusted to the husband for the purchase of the property. In so far as the claim of ₹1,00,000/- is concerned, the definite case of the wife is that ₹55,000/- was collected by the husband from her father to purchase the property, ₹20,000/- was collected to purchase a bike and another sum of ₹25,000/- was collected at the time of taking the rented house. PW1 and PW2 gave positive evidence that PW2 gave the above said amounts to the husband. Even though PW1 and PW2 were cross-examined in length, nothing tangible were extracted from their cross-examination to discredit their testimony. The court below on evaluation of evidence found that the entrustment of 20 sovereigns of gold ornaments as well as ₹1,00,000/- by the wife to the husband stood clearly proved. On re appreciation of evidence, we are not persuaded to take a different view. Hence, we confirm the order of the court below.

OP (G&W) No.17/2014

30. This Original Petition has been preferred by the husband for appointing him as the guardian of his minor daughter who was then aged 8 years. The Family Court after evaluation of the evidence dismissed the petition allowing visitation right to the

husband on the third Saturday of every month at the premises of the court from 10.00 a.m to 1.00 p.m.

31. Admittedly the child was in the custody and care of the mother since its birth. After the last separation of the husband and wife on 13/11/2012, the child is with the mother. It was alleged in the petition that he being the father is the natural guardian of the child and that mother was not taking proper care of the child and hence he has to be appointed as the guardian. It was also alleged that the wife has no means to maintain the child or to give proper education. It was further alleged that the wife was living in adultery with her superior officer and that would detrimentally affect the welfare and future of the child. In the objection statement, the wife contended that the child was well taken care of by her and the welfare of child was safe in her hands. She further contended that the husband has in fact abandoned and neglected the child. The allegation regarding adulterous act has been denied.

32. It is settled that the welfare of the child is of paramount consideration in matters relating to the guardianship and custody of the child. Admittedly, the child is with the mother

since its birth. There is nothing on record to suggest that the child is in any way neglected or not taken care of by the mother. The evidence on record also would show that child has been given proper care and education by the mother. The husband in evidence has admitted that till filing petition for maintenance of the child by the wife, he did not make any demand to see the child. He also admitted that he did not pay any amount towards the maintenance of the child. He did not enquire about the education of the child also. We have already found that the husband has failed to prove the alleged adulterous act by the wife. The court below found that considering the welfare of the child, the mother has to be appointed as the guardian. We see no reason to interfere with the said finding.

33. The impugned order was passed in April, 2015. At that time, the child was aged 7 years. It was considering the tender age then, that the Family Court granted visitation right to the husband only once in a month during day time at the court premises. Now, the child has attained 13 years. The Apex Court in ***Yashita Sahu v. State of Rajasthan*** {(2020) 3 SCC 67} has held that even if the custody is given to one parent, the other

parent must have sufficient visitation rights to ensure that the child keeps in touch with the other parent and does not lose social, physical and psychological contact with any one of the two parents. It was further held that in addition to the visitation rights, contact rights are also important for the development of the child. Recently, the Apex Court again in ***Amyra Dwivedi (Minor) through LRs v. Abhinav Dwivedi*** {(2021) 4 SCC 698} has held that when the Court grants visitation rights, these rights should be granted in such a way that the parent who is granted the visitation right, can meet the child in an environment conducive to the parent and the child. The husband is free to move the Family Court to modify or vary the visitation right granted including seeking contact rights. If such an application is filed, the Family Court shall consider and dispose of the same on merits in accordance with law.

In the light of the above findings, we dismiss Mat.Appeal No.540/2015 as well as Mat.Appeal No.585/2015 and allow Mat.Appeal No.370/2015. The impugned judgment in Mat.Appeal No.370/2015 to the extent dismissing the claim for dissolution of marriage on the ground of cruelty is set aside. OP No.389/2013

Mat.Appeal No.370/2015 & conn.cases

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on the file of the Family Court, Muvattupuzha is allowed in part u/s 13(1)(ia) of the Hindu Marriage Act. The marriage between the husband and the wife solemnized on 23/5/2006 at Sreekrishnaswami Temple, Thodupuzha is hereby dissolved. The parties are directed to bear their respective costs.

Sd/-

A. MUHAMED MUSTAQUE

JUDGE

Sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

Mat.Appeal No.370/2015 & conn.cases

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APPENDIX OF Mat.Appeal No.370/2015

APPELLANT'S EXHIBITS

ANNEXURE 1 CERTIFIED COPY OF THE JUDGMENT OF THE
JUDICIAL FIRST CLASS MAGISTRATE-III,
PERUMBAVOOR DATED 3.1.2019 IN CC
NO.131/2014

Mat.Appeal No.370/2015 & conn.cases

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APPENDIX OF Mat.Appeal No.540/2015

APPELLANT'S EXHIBITS

ANNEXURE 1 TRUE COPIES OF THE PHOTOGRAPHS OF THE
MINOR IN THE COMPANY OF HER PATERNAL
RELATIONS.

//True Copy//

PS to Judge