IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE PIUS C.KURIAKOSE
&
THE HON'BLE MR. JUSTICE BABU MATHEW P.JOSEPH

TUESDAY, THE 5TH DAY OF MARCH 2013/14TH PHALGUNA 1934

OP (FC).No. 3174 of 2012 (R)

I.A. NO.477/2012 IN M.C. NO.123/12 OF THE FAMILY COURT, THIRUVANANTHAPURAM.

PETITIONER/PETITIONER:

RAJESH R.NAIR, AGED 37 YEARS
S/O.LATE RAGHAVAN NAIR, R/A.CHITHANYA, THULAYIL LANE
PETTAH, THIRUVANANTHAPURAM, NOW R/A.OFFICIAL QUARTERS
INDIAN INSTITUTE OF TECHNOLOGY
(I.I.T FOR SHORT)CHENNAI.

BY ADVS.SMT.K.KUSUMAM
SMT.N.SHAMNA

RESPONDENT/RESPONDENT:

MEERA BABU, AGED 32 YEARS
D/O.G BABU, R/A.'NAVAMI', KRA NO A/58
VIDHYADIRAJA ROAD, KANNANMOOLA, THIRUVANANTHAPURAM

R1 BY ADV. SMT.J.SHEEBA
R1 BY ADV. SRI.T.K.ANANDA KRISHNAN

THIS OP (FAMILY COURT) HAVING BEEN FINALLY HEARD ON 07.12.2012, THE COURT ON 05-03-2013, DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: TRUE COPY OF M.C. NO.123/2012 IN THE FAMILY COURT, THIRUVANANTHAPURAM.

EXT.P2: TRUE COPY OF IA.271/12 IN M.C.123/2012 ON THE FILE OF FAMILY COURT, THIRUVANANTHAPURAM.

EXT.P3: TRUE COPY OF OBJECTION FILED BY THE PETITIONER HEREIN TO EXT.P21A.

EXT.P4: TRUE COPY OF WRITTEN AGAREEMENT EXECUTED BEFORE THE ADLATH BETWEEN THE PETITIONER, THE RESPODENT AND THEIR COUNSEL WHICH IS ALSO SIGNED BY THE MEMBERS OF THE ADALATH, AND SUBMITTED TO THE FAMILY COURT.

EXT.P5: TRUE COPY OF DECREE IN O.P.813/2010 ALONG WITH COMPROMISE PETITION.

EXT.P5(A):TRUE COPY OF O.P.813/2010 OF THE FAMILY COURT, THIRUVANANTHAPURAM.

EXT.P6: TRUE COPY OF JUDGMENT IN OP.238/10 OF FAMILY COURT, THIRUVANANTHAPURAM.

EXT.P7: TRUE COPY OF JUDGMENT IN O.P.217/2012 OF FAMILY COURT, THIRUVANANTHAPURAM.

EXT.P8: TRUE COPY OF JOINT PETITION FILED AS O.P.652/20122 OF FAMILY COURT, THIRUVANANTHAPURAM.

EXT.P9. TRUE COPY OF **B** BIARY IN EXHIBIT P8 CASE.

SEXT.P10. TRUE COPY OF I.A.477/2012, SFILED BY PETITIONER IN EXHIBIT P1 CASE.

EXT.P11: CARBON COPY OF THE IMPUGNED ORDER IN I.A.271/2012 AND IA NO. 477/2012, DATED 7.9.2012 ON ON THE FILE OF THE FAMILY COURT, THIRUVANANTHAPURAM.

RESPONDENT'S EXHIBITS:

EXT.R1(A): LITERATURE ON MULTIPLE SCLEROSIS.

EXT.R1(B): SERIES OF PROJECTS ENTRUSTED TO THE PETITIONER/HUSBAND BY VARIOUS COMPANIES.

EXT.R1(C): TRUE COPY OF SCHOOL AND COLLEGE CERTIFICATES OF THE RESPONDENT/WIFE.

EXT.R1(D): TRUE COPY OF THE EXPERIENCE CERTIFICATE OF THE RESPONDENT ISSUED BY CDAC.

EXT.R1(E): SERIES OF MEDICAL BILLS FROM 30.7.2009 TO 20.4.2012.

EXT.R1(F): TRUE COPY OF THE GOLD TICKET PLEDGED BEFORE THE CANARA BANK.

EXT.R1(G) :COPY OF THE COUNTER AFFIDAVIT FILED BY PETITIONER HUSBAND BEFORE THE LOWER COURT.

EXT.PR1(H): SERIES OF GOVERNMENT ORDERS AND PAY STSRUCTURE SHOWING HIKE IN ALLOWANCE OF THE PETITIONER/HUSBAND.

EXT R1(I): THE COPY OF THE OBJECTION FILED AGAINST EXT.P10 BEFORE THE LOWER COURT BY THE RESPONDENT/WIFE.

// TRUE COPY //

P.S.TO JUDGE.

C.R.

PIUS C. KURIAKOSE
&
BABU MATHEW P. JOSEPH, JJ.

O.P.(FC) No. 3174 of 2012

Dated this the 5th day of March, 2013

JUDGMENT

Babu Mathew P. Joseph, J.

This original petition is filed with the prayers for quashing Ext.P11 order passed by the Family Court, Thiruvananthapuram, on I.A. Nos. 271 of 2012 and 477 of 2012 in Ext.P1 M.C. No.123 of 2012 on the files of that Court and for quashing Ext.P1.

2. Heard the learned counsel appearing for the petitioner and the learned counsel appearing for the respondent.

3. The brief facts necessary for disposal of this original petition are as follows: The petitioner is the husband of the respondent. Their marriage was on 24.11.2005. A son was born to them. Differences and disputes have been developed between them after their marriage. They have been living separately since 24.7.2009. The respondent filed O.P.No.813 of 2010

against the petitioner claiming maintenance for her and for their son, return of money etc. before the Family Court, Thiruvananthapuram. The respondent also filed O.P.(G&W) No.238 of 2010 before that court for appointing her as the guardian of the minor son. The petitioner filed O.P.No.217 of 2011 against the respondent for restitution of conjugal rights. While so, all the pending disputes between them have been settled by Ext.P4 agreement executed by them on mediation. Accordingly, joint compromise petitions have been filed before the Family Court in O.P.No.813 of 2010 and in O.P.No.238 of 2010. Both the cases have been disposed of by the Family Court in terms of the compromise. O.P.No.217 of 2011 has also been dismissed as not pressed. In Ext.P4 agreement between the parties, the respondent has agreed to forgo her right to claim maintenance against the petitioner on condition that the petitioner shall pay an amount of Rs.1,50,000/- to her in full and final settlement of all her claims. The petitioner has agreed to pay Rs.12,000/- as monthly maintenance to the child. Terms regarding custody of child have been incorporated in the

agreement. Terms have also been incorporated in respect of a car, ornaments and other belongings. It was further decided by the parties to mutually divorce their marriage through appropriate petition. On the basis of the settlement so arrived at between the parties, they have filed joint petition for divorce by mutual consent under Section 13B of the Hindu Marriage Act. That petition for divorce came to be dismissed on 19.3.2012 for default. It appears from Ext.P9 B Diary that the respondent consecutively remained absent when the petition for divorce was taken up by the Family Court. Both the parties were absent on 19.3.2012.

4. The respondent, thereafter, has filed M.C.No.123 of 2012 under Section 125 of Cr.P.C. before the Family Court claiming a monthly maintenance of Rs.75000/- from the petitioner. Ext.P1 is a copy of the same. Along with Ext.P1, the respondent has also filed I.A.No.271 of 2012 claiming Rs.75,000/- as monthly interim maintenance from the petitioner. Ext.P2 is a copy of that application. The petitioner has filed his objections in I.A.No.271 of 2012 raising his contention that the claim is not maintainable in

the light of Ext.P4 agreement entered into between the parties as the parties have already settled all monetary and other disputes between them and the respondent has waived her right to claim maintenance and also raising other contentions. The petitioner has also filed I.A.No.477 of 2012 for considering the maintainability of M.C.No. 123 of 2012 as a preliminary issue. Ext.P10 is a copy of that application. The Family Court heard both the I.As. 271 of 2012 and 477 of 2012 together and disposed of them by passing a common order. Ext.P11 is a copy of that order. Learned Judge of the Family Court dismissed I.A.No.477 of 2012 holding that M.C.No.123 of 2012 is maintainable. Also passed an order on I.A.No.271 of 2012 directing the petitioner to pay an interim maintenance of Rs.15,000/- per month to the respondent. Aggrieved by the order so passed by the Family Court, the petitioner has preferred this original petition.

5. Learned counsel for the petitioner submitted that Ext.P4 agreement entered into between the petitioner and the respondent on 30.4.2011 is binding on both the parties. Based on that agreement, joint compromise petitions have been filed in

the pending matters before the court by the parties and, accordingly, recording the compromise, O.P.No. 813 of 2010 filed by the respondent claiming maintenance etc. was disposed of in terms of the compromise. Similarly, O.P. (G&W) No.238 of 2010 filed by the respondent for appointing her as the guardian of the minor son was also disposed of in terms of the compromise. Moreover, O.P.No.217 of 2011 filed by the petitioner for restitution of conjugal rights also came to be dismissed as it was not pressed by the petitioner. Therefore, all the claims including the right to claim maintenance of the respondent have been settled between the petitioner and the respondent by executing Ext.P4 agreement. The petitioner has discharged all his liabilities under Ext.P4 agreement and the respondent has received all her claims under that agreement. That agreement has been acted upon by the Court by way of disposing of the cases in terms of the joint compromise petitions filed by the petitioner and the respondent on the basis of Ext.P4 agreement. In Ext.P4, the respondent has specifically waived her right to claim maintenance from the petitioner on condition that the petitioner

should pay Rs.1,50,000/- to her in full and final settlement of all her claims. Accordingly, the petitioner has paid Rs.1,50,000/- to the respondent and the respondent has received the same. Therefore, in the light of Ext. P4 agreement entered into between the parties and the petitioner has discharged all his liabilities under that agreement, no further claim for maintenance by the respondent is maintainable as it was already forfeited, she further submitted.

6. Learned counsel for the respondent, on the contrary, contended that the agreement between the petitioner and the respondent and the receipt of Rs.1,50,000/- by the respondent waiving her right to claim maintenance from the petitioner cannot stand in the way of the respondent claiming maintenance subsequently. The right to claim maintenance under Section 125 of Cr.P.C. is a right provided by the Parliament to the wives based on public policy. Such a right cannot be taken away by way of consent or by a clause incorporated in an agreement like Ext.P4. Therefore, Ext.P1 claim for maintenance is maintainable and Ext.P11 order passed by the court below is legally sustainable and

enforceable.

7. There is no dispute between the parties regarding the fact that Ext.P4 agreement has been executed by them on 30.4.2011. And, as could be seen from Ext.P4, the respondent has waived her right to claim maintenance and all other claims on condition that the petitioner should pay Rs.1,50,000/- to her. There is also no dispute regarding the fact that, as agreed in Ext.P4, the petitioner has paid Rs.1,50,000/- to the respondent. Whether waiving of her right to claim maintenance by the respondent receiving Rs.1,50,000/- from the petitioner will be a bar for her to claim maintenance from the petitioner is the question to be considered first.

8. The respondent has filed Ext.P1 claim for maintenance under Section 125 of Cr.P.C. Section 125 of Cr.P.C. provides that if any person having sufficient means neglects or refuses to maintain his wife, unable to maintain herself, a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife at such monthly rate, as such Magistrate thinks fit, and to

pay the same to such person as the Magistrate may from time to time direct. Section 125 of Cr.P.C. is a provision incorporated in the Cr.P.C. by the Parliament enabling certain categories of persons including a wife to claim maintenance. Under this Section, a wife who is unable to maintain herself can claim a monthly allowance for her maintenance from her husband having sufficient means when he neglects or refuses to maintain her. Thus, the right to claim maintenance provided to the wife is a statutory right created by the Parliament. This is for achieving the goal of protecting a wife who is unable to maintain herself to claim maintenance from her husband having sufficient means when he neglects or refuses to maintain her. The public policy of protecting such women is reflected in Section 125 of Cr.P.C. In other words, it is a benevolent provision enabling a weaker section of the society to earn their livelihood. An agreement by which a wife waives her right guaranteed under Section 125 of Cr.P.C. will only be an agreement against public policy. An agreement against public policy is void. Therefore, a clause of waiver incorporated in Ext.P4 agreement by which the wife has

given up her right to claim maintenance from the husband is void and hence, unenforceable.

9. A Magistrate of the first class is conferred with jurisdiction to deal with a claim for maintenance under Section 125 of Cr.P.C. Now, a Family Court can also exercise the jurisdiction exercisable by a Magistrate of the first class under Section 125 of Cr.P.C. as provided under clause (a) of sub-section 2 of Section 7 of the Family Courts Act. Thus, a Magistrate or a Family Court has jurisdiction to deal with the claim of a wife for maintenance. This jurisdiction is conferred on such courts by the Parliament. By the act of parties, the courts cannot be deprived of such jurisdiction. In other words, the parties cannot agree to oust the jurisdiction of a Magistrate or a Family Court to entertain a claim for maintenance preferred by a wife against her husband. For this reason as well, the clause of waiver incorporated in Ext.P4 agreement by which the respondent has given up her right to claim maintenance from the petitioner cannot hold good in the eye of law. Therefore, the contention raised by the learned counsel for the petitioner that in view of the waiver of the right to

claim maintenance by the respondent, Ext.P1 claim preferred by her is not maintainable is liable to be rejected and hence, we do so.

10. We shall now consider another important aspect of the matter. There is no dispute regarding the fact that the petitioner and the respondent have been living separately since 24.7.2009. That they are living separately since 24.7.2009 is evident from Ext.P8 joint petition for divorce filed by the petitioner and the respondent before the Family Court. But, there is no evidence to show that they have been so living separately by mutual consent since 24.7.2009. Ext.P4 agreement has been entered into between the petitioner and the respondent on 30.4.2011. One of the clauses incorporated in Ext.P4 agreement is that the petitioner and the respondent have mutually decided to dissolve their marriage through an appropriate petition. Accordingly, they have filed Ext.P8 joint petition on 30.4.2011 itself for divorce by mutual consent. The petitioner has not pressed his O.P.No.217 of 2011 filed for restitution of conjugal rights and, accordingly, that original petition came to be dismissed as not pressed. Ext.P7 is a

copy of that judgment. When the said clause in Ext.P4 agreement, Ext.P7 judgment and Ext.P8 joint petition for divorce by mutual consent filed by the parties are considered, it can safely be found that the petitioner and the respondent have been living separately by mutual consent from 30.4.2011 onwards. The said clause in Ext.P4 agreement itself is sufficient for finding that the petitioner and the respondent have decided to live separately by mutual consent with effect from 30.4.2011. Now, the question arises for consideration is whether the respondent is entitled to receive maintenance or interim maintenance from the petitioner after they have been living separately by mutual consent i.e., from 30.4.2011 onwards.

11. Section 125(4) of Cr.P.C. reads as follows:

> "(4) No wife shall be entitled to receive an allowance for the maintenance or the interim maintenance and expenses of proceeding, as the case may be, from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or <u>if they are living separately by mutual consent.</u>" (Emphasis supplied)

Going by the above sub-section, no wife is entitled to receive

maintenance from her husband if they are living separately by mutual consent. Here, the petitioner and the respondent have been living separately since 30.4.2011. Therefore, Exts.P1 and P2 claims for maintenance and interim maintenance respectively filed by the respondent are hit by sub-section (4) of Section 125 of Cr.P.C. In other words, Exts.P1 and P2 claims are not maintainable. Hence, Ext.P11 common order passed by the Family Court is liable to be set aside. Ext.P1 claim for maintenance is liable to be quashed.

In the result, Ext.P11 common order passed by the Family Court, Thiruvananthapuram, is set aside. Ext.P1 claim for maintenance viz. M.C.No.123 of 2012 on the files of the said Court is quashed.

This original petition is allowed.

Sd/-

PIUS C. KURIAKOSE, JUDGE.

Sd/-

BABU MATHEW P. JOSEPH, JUDGE.

krs.