IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 30TH DAY OF JULY 2021 / 8TH SRAVANA, 1943

MAT.APPEAL NO. 151 OF 2015

AGAINST THE JUDGMENT IN OP 1955/2009 OF FAMILY COURT,ERNAKULAM, ERNAKULAM

APPELLANT/S:

XXX

BY (Party-In-Person)

RESPONDENT/S:

XXX

BY ADV SRI.MILLU DANDAPANI

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 15.07.2021, ALONG WITH Mat.Appeal.179/2015, THE COURT ON 30.07.2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 30TH DAY OF JULY 2021 / 8TH SRAVANA, 1943

MAT.APPEAL NO. 179 OF 2015

AGAINST THE JUDGMENT IN OP 65/2009 OF FAMILY COURT,ERNAKULAM, ERNAKULAM

APPELLANT/S:

XXX

BY (Party-In-Person)

RESPONDENT/S:

XXX

BY ADV SRI.MILLU DANDAPANI

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 15.07.2021, ALONG WITH Mat.Appeal.151/2015, THE COURT ON 30.07.2021 DELIVERED THE FOLLOWING:

"C.R."

A.MUHAMED MUSTAQUE & DR.KAUSER EDAPPAGATH, JJ.

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Mat. Appeal Nos. 151/2015 and 179/2015

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Dated this the 30th day of July, 2021

J U D G M E N T

A.Muhamed Mustaque, J.

Prologue: In the tradition-bound society of ours, the marital union is not a mere union of individuals but would extend to the union of two families. There is an expectation that spouses in such marital union would follow the traditions, aspirations and values cherished by the families. Marriage and family are two interlinked structures within the society. Each society in different parts of the world has its own ethos about marriage and family. However, all such societies share a common notion that the individuals' union are for companionship, mutual respect and happiness. In an arranged marriage that we follow traditionally in our country, the choice for a woman is limited. They simply
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follow the guidance of parents or elders. In a rich family, they look upon professional status, wealth, etc., as a hallmark for such union. While digressing on this prologue, a thought comes to our mind is, are we really missing what is required for such marital union? Pompous and hedonist lifestyle culture brought marked changes to our outlook. The same is also reflected in the concept of marriage. If marriage is seen as a symbol to project status, without reflecting the values the individuals or society would cherish to profess, we may miss the basic concept required for marriage. The concept of family as a social unit is also slowly withering away to recognize the concept of bond created by the individuals. The individuals who were reluctant to separate, fearing social fear, and on the ideal of the sacrament of marriage, have no fear now to approach the court for divorce to establish the free act of "will". But the system of justice that is followed in the court cannot recognize such free will of the individual. The case in hand, in fact, depicts a story of the struggle of a woman within the clutches of law to give primacy of choice "not to suffer" in the bondage of legal tie. An insatiable urge for wealth and

sex of a husband had driven a woman to distress. In desperation for obtaining a divorce, she has forsaken and abandoned all her monetary claims. Her cry for divorce has been prolonged in the temple of justice for more than a decade (12 years). She still awaits a final bell to answer her prayers and cry. She is unable to digest the delay involved in responding to a request for the separation. Perhaps we are accountable for her tears. We see this is not a solitary instance. On a day-to-day basis, we see many many like her. Her whimper touches our conscience. We shall advert to this enigma while concluding this judgment.

2. **Facts of the case:** These appeals arise from a common judgment allowing a petition for divorce on the ground of cruelty and dismissal of a petition for restitution of conjugal rights. The appellant is the husband. The appellant married the respondent in accordance with the custom prevalent in the Hindu-Ezhava community on 11/2/1995. In the wedlock, two children were born. The appellant is a qualified medical doctor at the time of marriage. The respondent-wife's father is a realtor. The appellant's father was a well-known doctor in Calicut. The marriage was an arranged marriage. The

respondent is said to have been given 501 gold sovereigns at the time of marriage besides car and flat. The appellant never practised as a medical doctor. He engaged in the real estate business and construction. The real estate business was not a smooth run for the appellant. He never succeeded in the business. A case of cruelty was put forward by the respondent on constant harassment and demand for money. It is the case of the respondent that the respondent's father gave Rs.77 lakhs to the appellant on different occasions. The respondent also stated that the entire gold ornaments were also misappropriated by the appellant. The respondent attributed the cause of failure in the real estate business was due to the profligate lifestyle of the appellant. The respondent also stated that sexual perversion and physical harassment as a part of the cruelty. It appears that the appellant also doubted the chastity of the respondent. In the petition, the appellant stated that the respondent levelled an extramarital relationship with the caretaker of the flat and the driver. The appellant in the written statement denied all allegations except attribution of extramarital

relationship with the caretaker. The evidence, in this case, consists of oral evidence of respondent herein as PW1 and Exts.A1 to A7. On the side of the appellant, the appellant and his brother were examined as RW1 and RW2. Exts.B1 to B3 and B7 to B16 were marked on the side of the appellant. Pending a petition for divorce filed by the respondent, the appellant filed a petition for restitution of conjugal rights. Both the cases were tried together. By a common judgment dated 24/10/2014, the petition filed for divorce by the respondent was allowed, and the petition filed for restitution of conjugal rights by the appellant was dismissed.

3. We have to refer to the conduct of the appellant in this proceeding. The appeal was originally filed by the appellant through a lawyer. He relinquished vakalath. Thereafter, a notice was issued to the appellant by this Court, and when the matter was taken up on 14/6/2021, we passed the following order:

> It appears that the appellant (party in person) made a request to the court officer to adjourn the matter as he is unable to attend the case online. Taking note of his request, we adjourn this matter to 28.06.2021. Let him appear in person and argue or make some other alternate arrangements. The matter will be taken

up on 28/6/2021 and disposed of on that date.

Thereafter, when it was taken up on 28/6/2021, Adv.P.B.Sajith represented on behalf of the appellant and sought an adjournment. Accordingly, the case was again listed on 15.7.2021. On that day, none represented on behalf of the appellant. We had the advantage of hearing only the learned Senior Counsel, Smt.Sumathi Dandapani appearing for the respondent. We have perused the entire records before rendering this judgment.

4. **Finding of the family court:** The family court found that the appellant was treating the respondent as a money-minting machine. The family court found that the respondent tolerated harassment for the sake of marriage, and the respondent had chosen to file a petition for divorce when harassment and cruelty reached a level beyond toleration. The family court particularly noted the complaints made by the father of the appellant before the police narrating harassment meted out to him as well as to the respondent. The family court did not disbelieve the oral testimony of the respondent in regard to sexual perversity. The

family court found the oral testimony of the respondent trustworthy and unshaken during the cross-examination. The family court also found that unsubstantiated imputation of the illicit relationship of the respondent with the caretaker and driver would also amount to cruelty.

5. A**nalyses of evidence and our finding on facts:** The respondent's father admittedly is an affluent businessman. Admittedly, the business ran by the appellant went into trouble. The respondent abandoned her monetary claim for the obvious reason that the appellant is not in a position to meet any of such claims. The respondent has a case that on several occasions, more than Rs.77 lakhs were given to the appellant by the respondent's father. It appears that the failure in the business was not merely a business failure in a normal course of business but attributable to the wayward life led by the appellant. The appellant's own father approached the police with complaints against the appellant and his brother. These complaints were filed for police protection. It is appropriate to reproduce some of the relevant portions of the complaints. In Ext.A2 complaint dated 9/2/2009,

it is stated thus:

... Son XXXXX(*) has married from Ernakulam and his family life is in complete disarray now. He has been ill-treating his wife and members of her family and as a result of police complaint preferred by them before the police, he has been severly warned by the police. Till then son XXXXX(*) was residing in his wife's house. Thereafter he is residing along with a friend of his, the permanent address is not known to me.

It is submitted that my son XXXXX(*) comes to my residence very often and he is compelling me to give him more monetary assistance which I am not able to do now because I have drained all my bank savings to repay the debt incurred by my sons. Because of my inability to provide him with any monetary assistance, he is threatening me with danger to my life if I were not oblige him by disposing of the house and the land surrounding the house and pay substantial portion of the balance after repaying the balance bank debt. He is also threatening me for extracting my signature in documents for sale of the house...
[(*)name of the appellant is deliberately masked by us]

6. In Ext.A3 complaint dated 30/4/2009, it is stated thus:

My only daughter who is residing with her husband in Trichur, together with her married son & married daughter are helping me by arranging money to pay the loan availed by my sons

from the Federal Bank. Since they are helping me financially to pay off the loan, my son XXXXX (*) is threatening my daughter and her two children over the phone daily with danger to their lives. My sons have come to know that I may get back the title deeds from the Bank very soon, and continue to live in the house, which they demand to be sold for they know which I will never agree...

I hope you will remember, and similar complaint submitted by me to you in person two months back. Now there is a marriage function in my family at Tagore Centenary Hall, Calicut on 20th May 2009. All my family members are expected to attend the marriage. My daughter and her childrens are very much desirous of attending the marriage. They are expected to come and stay with me. Coming to know about their programme, my son XXXXX(*) is threatening her everyday over phone filling here that if she were to go over to Calicut and stay with me for the marriage, she will do so with risk to her life. I must say is making our life miserable.(sic)" [(*)name of the appellant is deliberately masked by us]

7. In the above complaint, the appellant's father narrates shouldering the loan liability created by the appellant and the brother on him.

8. In Ext.A4 dated 12/3/2009, the relevant paragraph reads as follows:

My sons have come to know that I may get back the title deeds from the Bank and continue to live in my house, which they demand to sell, which I refuse to do. In a recent family get-together, my sons told them that they will get the documents from me forcefully, even by violent methods.

9. In the backdrop of the demand for money made by the appellant from his own father, we need not disbelieve the case of the respondent that Rs.77 lakhs were paid on different occasions heeding to the demand made by the appellant to the respondent's father. The respondent's case is that the entire gold ornaments were taken away by the appellant and sold to discharge his liability. The financial status of the respondent would clearly show that substantial gold ornaments were given at the time of marriage. The Court, while evaluating the conduct of a spouse in matrimonial proceedings assumes its role as that of prudent man's analysing of the human behaviour. The 'cruelty' reflects the character of a person. The Court, therefore, is required to adopt social semiotic approach to analyse the conduct in given situation. Having analysed the conduct of the appellant, it is quite probable that the appellant had utilized gold

ornaments for his own needs. The physical cruelty and mental cruelty meted out to the respondent have been narrated succinctly in the oral testimony given by the respondent. The respondent has deposed that even during her pregnancy, the appellant abused her. She also deposed that the appellant committed forceful sex when she was sick and bedridden. She also deposed that she was subjected to the worst form of sexual perversion and unnatural sex against her will. The respondent deposed that the appellant even did not spare her for sex even on the day the appellant's mother expired. She also stated that the appellant forced her to have sex in front of their daughter. The unshaken cross-examination about the sexual conduct of the appellant need not be disbelieved by this Court. There was no serious challenge against the narration of sexual conduct of the appellant referred to in the chief examination. The further allegation regarding cruelty that the respondent was forced to go along with the appellant to the Bar against her will need not be disbelieved. The respondent also stated that she was forced to give a cheque to the creditors of the appellant. It seems that the respondent was convicted

for the offences under Section 138 of NIA. We may not be justified in adverting those aspects in this case as it may adversely affect the prosecution of the above case. There is no dispute to the fact of raising imputation of adultery made by the appellant. In the written statement itself, the appellant has stated that the respondent is having an illicit relationship with the caretaker of the apartment where she was residing. The appellant raised a complaint before the Cyber Cell, Calicut. It is stated in the proof affidavit that the investigation revealed that the telephonic conversation with the caretaker. However, it is to be noted that no evidence was adduced by the appellant to place the investigation report before the family court. The allegations of adultery remained unsubstantiated.

10. Whether finding on facts would constitute a ground for cruelty or not: Matrimonial relationship is all about contentment. When there is harmony at home, that leads to contentment in marriage. The harmony is evolved through mutual respect and trust. Debt of the appellant sparked the dispute between the appellant and the respondent. It is not a case where the respondent or her father do not want the appellant to get out of

the trouble. The respondent and father appear to have helped the appellant in the best possible manner. However, it turns to be a strategy for the appellant to get more money from the respondent and her father in the pretext of his debt. The appellant wants to make use of fiduciary relationship to its hilt for financial gain and bargain. The acts on the side of the appellant instilled a fear in the respondent that the continuation of the marital life is only for the purpose of meeting the financial obligations created by the husband elsewhere. What constituted mental cruelty is succinctly explained in the judgment of the Apex Court in **Samar Ghosh V. Jaya Ghosh [(2007) 4 SCC 511]**. After placing reliance on Halsbury's Laws of England and American jurisprudence, the Apex Court laid down parameters to evaluate constituent elements for mental cruelty on the facts and circumstances of each case. It is appropriate to refer to certain paragraphs of the said judgment, which reads thus:

“No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The

instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental

health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

11. It is to be noted that the demand for money has to be taken into account in the background of the fact that the appellant never cared to provide love and care to the respondent or his children. In the matrimonial life of the appellant and the respondent, the respondent never felt any security or affection or care from the side of the appellant. This, coupled with the fact of constant harassment demanding money, has caused mental pain, agony and sufferings to her. We have no hesitation in holding that the act and conduct on the side of the appellant constituted mental cruelty.

12. Sex in married life is the reflection of the intimacy of the spouse. The evidence of PW1 clearly establishes that she was subjected to all sorts of sexual perversions against her will. It is obvious that the appellant disregarded the wishes and feelings

of the respondent. We also need not disbelieve the respondent's version that the appellant often forced her to have unnatural sex. The oral evidence of the respondent is natural. We find no reason to discredit her testimony.

13. A husband's licentious disposition disregarding the autonomy of the wife is a marital rape, albeit such conduct cannot be penalised, it falls in the frame of physical and mental cruelty. Marital rape is alien to our penal jurisprudence. 'Marital rape' is defined in Black's Law Dictionary 8th Edition as "a husband's sexual intercourse with his wife by force or without her consent". Marital rape occurs when husband is under notion that body of his wife owe to him. In Anglo-American tradition, derived from feudal Norman custom allows a woman subordinate to the male through the legal status of marriage and, the individual existence is suspended under marital unity. This is known as coverture which was disassembled in the United States through legislations.(1) In patriarchal system, husband also has similar approach to woman. In modern social jurisprudence, spouses in marriage are treated

1 [https://www.britannica.com/topic/coverture viewed on 29 July 2021.]

as equal partners and husband cannot claim any superior right over wife either with respect to her body or with reference to individual status. Treating wife's body as something owing to husband and committing sexual act against her will is nothing but marital rape. Right to respect for his or her physical and mental integrity encompass bodily integrity, any disrespect or violation of bodily integrity is a violation of individual autonomy. Autonomy essentially refers to a state of feeling or condition one believes to possess having control over it. In matrimony, spouse possesses such privacy as invaluable right inherent in him or her as individual. Therefore, marital privacy is intimately and intrinsically connected to individual autonomy and any intrusion, physically or otherwise into such space would diminish privacy. This essentially would constitute cruelty. Merely for the reason that the law does not recognise marital rape under penal law, it does not inhibit the court from recognizing the same as a form of cruelty to grant divorce. We, therefore, are of the view that marital rape is a good ground to claim divorce

14. In this case, the insatiable urge for wealth and sex of the husband had forced the respondent to take a decision for divorce. The appellant's licentious and profligate conduct cannot be considered as part of normal conjugal life. Therefore, we have no difficulty in holding that insatiable urge for wealth and sex of a spouse would also amount to cruelty.

15. The appellant also failed to substantiate imputation of adultery to the respondent. Unsubstantiated allegations of adultery would also constitute mental cruelty. Therefore, we are of the view that the findings of facts as above clearly establish a ground for cruelty warranting divorce.

16. **Epilogue**: Men choose, and men fail. Choosing a partner is autonomy; the choice to separate is not autonomy. Where do we balance the individuals best interest and the larger interest of the society? Divorce law prevalent today alludes to a discussion and deliberation of delicate balancing exercise as above. Autonomy is now considered as a part of privacy and ennobled as a fundamental right. Individuals have the freedom to share their relationships through the

voluntary choice of a partner. But the same individuals do not have the freedom to separate or break the relationship of their will. Legislation on divorce curtails their freedom through defined grounds. In such ground canvassed, we often find ingenuity of the lawyers that matters in deciding the fate of a relationship than the real factors. The pleadings canvassed on the grounds for divorce in such proceedings are more destructive of the relationship dismissing any chance of reunion. A spouse in a marriage has a choice, a choice not to suffer, which is fundamental to the autonomy guaranteed under natural law and the Constitution. Law cannot compel a spouse to suffer against his or her wish by denial of divorce by the court. This is what really happens on the dismissal of the divorce petition. This case, like many other cases before us, depicts a sordid tale of a woman losing a precious part of her life in a battle of fate. That fate was not chosen by her; that is imposed on her vis-a-vis legal heteronomy. Legislature's power through legal paternalism for the public good cannot be questioned or doubted. Autonomy and paternalism suggest a fine balance that must be with an objective to

protect the interest of the individual whose choice is restricted. Enumerated grounds of divorce such as cruelty, adultery, desertion etc., to grant divorce are having a trace of heteronomy. Law on divorce was enacted, reflecting deeper values of the culture of the society at that time. In those times, the social philosophy behind marriage does not recognize the dissolubility of the marriage except in extreme circumstances. Legal heteronomy and individual autonomy is a delicate balancing exercise in a legal relationship. In a changed scenario of marriage in the society, shifting from the social philosophy to individual philosophy, we are afraid whether the present divorce law on enumerated grounds would stand to the test of constitutionality. Fine balancing of individual choice and individual's best interest is missing in such law. We desist from making further comments on the same as the issue has to be examined in appropriate cases. However, we have suggestions for change which we put forth here.

17. "Do people have free will" is perhaps the most difficult question to be answered in the context of marriage in society. Human by nature is fallible and

susceptible to weakness of his or her own decisions. These decisions, though they appear to be calculative, are often expressed in emotionally challenging situations. Individuals best interests are interests related to many factors. Though men may feel that they are free to choose what they want, their choice is conditioned by the circumstances surrounding them. The very existence of humans on this earth is conditioned and determined by the behaviour of others. Marriage and family are not free from such patterns of behaviour in society. The history of mainstream sociological behaviour in relation to marriage and family do not absolve and allow the individuals to retreat on their will even though marriage is considered as a legally recognized social contract between two individuals. The individuals have to be safeguarded against misguided factors while taking the decision on his or her own will. The role of legislation thus is only to provide or lay down measures to determine the path for appropriate decisions by the individuals. Paternalistic intervention through legislation must be limited to help and aid parties in taking a decision for their own good. Therefore, the framework of divorce law must be

with an objective to help individuals to take a decision on their own affairs. This framework must promote a platform at different levels to enable individuals to exercise free choice.

18. The State believes a sustained family constitutes happiness in the larger society and the ultimate happiness of the State. Therefore, the paternalistic intervention of the State on public good is justifiable. State necessarily can regulate divorce. The forum provided under law to decide upon the fate of a relationship must be conceded with a power to enable parties to decide on the best possible choice governing their own affairs by themselves and not by wresting the power on a fictional ground to decide on their fate. The court should not wield any power to decide on the choice of the individual. The court should articulate its power in a scientific temper to help individuals to make decisions on their own affairs. Modern-day mediation, medical help like psychological and psychiatric, involvement by families and friends etc., would progressively help the parties to take a decision of their own choice.

19. Dissolubility of marriage may bring myriad losses to a spouse on such separation. While law allowing an individual to act on his or her choice, the law cannot ignore loss of such spouse who suffered in the matrimony or in separation. Husband or wife is likely to be exposed to vulnerability on exercise of such option for separation by one of the spouse. Vulnerability alludes to a situation of a spouse who will be disadvantaged consequent upon such separation and causation demands empowerment of such spouse. Sometimes the spouse who seeks the divorce might be responsible for disruption of the relationship. The law has to safeguard the spouse as against any loss suffered in relationship or on such separation. Therefore, our law also should equip to deal with marital damages and compensation. We need to have a law dealing with human problems with a humane mind to respond.

20. There cannot be any difficulty in having a common code of law to all communities, at least for marriage and divorce on the above line. Individuals are free to perform their marriage in accordance with personal law, but they cannot be absolved from compulsory

solemnization of the marriage under secular law. Marriage and divorce must be under the secular law; that is the need of the hour. Time has come to revamp the marriage law in our country.

In the light of the above, the appeals are dismissed. No order as to costs.

Sd/-

A.MUHAMED MUSTAQUE, JUDGE

Sd/-

DR.KAUSER EDAPPAGATH, JUDGE

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