

**HIGH COURT OF KERALA****Bench: Honorable Mrs. Justice Anu Sivaraman & Mr. Justice C. Pratheep Kumar****Date of Decision: 15th March 2024**

Matrimonial Appeal No. 894 of 2023 against Judgment Dated 13.11.2023 in OP No.906 of 2022 of Family Court, Ernakulam

**Appellant: Dr. Jinu Joy****Versus****Respondent: Dr. Bony Baiju****Legislation:**

Divorce Act, Section 10A

**Subject:**

Matrimonial appeal against the dissolution of marriage granted by the Family Court, Ernakulam. The primary issues concern the withdrawal of consent for mutual divorce and the enforceability of the terms agreed upon in mediation.

**Headnotes:**

**Matrimonial Law – Divorce by Mutual Consent – Withdrawal of Consent –** case concerning the withdrawal of consent for divorce by mutual consent under the Divorce Act was examined. The primary focus was on the validity and effects of withdrawing consent after partial compliance with the terms of a mediation agreement. [Para 2, 3, 13, 20]

**Interpretation of Mutual Consent in Divorce – Analysis –** The court analyzed the legal principles governing divorce by mutual consent, especially focusing on whether a party can unilaterally withdraw consent after partially complying with the terms of a mediation settlement. The court considered precedents from the Bombay High Court and its implications on the present case. [Para 17-19]

Precedential Influence – Relevance – The court discussed the relevance and applicability of previous decisions from various High Courts, including the Bombay High Court and previous Kerala High Court judgments, in determining the legal position of withdrawing consent in mutual consent divorces. [Para 17, 19]

Decision – Upholding Family Court’s Decision – The High Court upheld the Family Court’s decision, which had decreed the divorce despite the appellant’s withdrawal of consent, basing its judgement on established legal principles and precedents. The court found no illegality or irregularity in the Family Court’s approach and dismissed the appeal. [Para 21]

**Referred Cases:**

- Benny v. Mini [2021 (2) KLJ 190]
- Prakash Alumal Kalandari v. Jahnavi Prakash Kalandari [AIR 2011 Bom. 119]
- Jayaraj R. v. Kaya G. Nair [2023 KHC 361]
- Sureshta Devi [(1991) 2 SCC 25]

**Representing Advocates:**

**For Appellant: Bobby Rapheal.C, E.C.Poulose**

**For Respondent: Sheeba Mariam. J., Arundhathy K. Alias(K/1393/2022)**

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

**C. Pratheep Kumar , J.**

This is an appeal filed by the 2<sup>nd</sup> petitioner in OP. No.906/2020 on the file of the Family Court, Ernakulam, against the judgment dated 13.11.2023, dissolving the marriage with the respondent herein under Section 10 A of Divorce Act.

2. The appellant is the wife of the respondent. Their marriage was on 26.10.2014. Since May 2018, they were residing separately as marital relationship got strained. There were several litigations between the parties before various courts. All these disputes were settled in Mediation and an agreement incorporating the terms of settlement was arrived at between the parties on 18.3.2022. As per the terms of settlement, the respondent agreed to pay a sum of Rs.16 Lakhs to the appellant herein. The Guardianship and permanent custody of their child was handed over to the appellant as per the

mediation agreement. The respondent agreed to pay a sum of Rs.50,000/- towards full and final settlement of maintenance due to the child. They have also agreed to dissolve their marriage on mutual consent.

3. As per the terms of mediation agreement, a joint petition for divorce was filed as O.P. No. 906 of 2022 on 1.4.2022. When the OP was taken up after the waiting period of six months, the appellant filed a memo on 28.11.2022 withdrawing her consent for divorce. The respondent filed I.A. No.8086/2022 praying for allowing the original petition on accepting the Demand Draft in the name of appellant's father. He also filed I.A. No.3/2023 for a direction to the appellant to accept the demand draft for Rs.10 Lakhs drawn in favour of her father. Out of the total sum of Rs.16.50 Lakhs, agreed to be paid to the appellant, Rs.6,50,000/- was already paid and for the balance amount of Rs.1,00,000/, a Demand Draft was taken in favour of the father of the appellant as per the terms of settlement and produced the Demand Draft along with I.A. No.3/2023.

4. When the above I.As along with the O.P. came up for consideration of the Family Court, the appellant strongly opposed the applications and the original petition on the ground that the mediation agreement was executed without her free consent and will and that she is not willing to terminate the marriage with the respondent. She also sought for permission to deposit Rs.6.5 Lakhs already received from the respondent.

5. In spite of the fact that the appellant has impounded her consent for the dissolution of marriage on mutual consent, the Family Court, relying upon the decision of this Court in **Benny v. Mini [2021 (2) KLJ 190]**, allowed the I.As. filed by the respondent as well as the original petition and passed a decree, dissolving the marriage. Aggrieved by the above judgment, the wife preferred this appeal raising various grounds.

6. It was contended on behalf of the appellant that she had signed in the mediation agreement without her free will and also that she is not willing for a divorce by mutual consent. According to her, a sum of Rs. 50,000/- agreed to be paid towards maintenance of the child is inadequate and against the mutual understanding between the parties.

7. In the connected O.P No.2446 of 2020, she had filed an application for permission to return Rs.6.5 Lakhs received from the respondent. The Family Court was not justified in allowing I.A.No.3 of 2023 directing the appellant to receive Rs.10 Lakhs, drawn in favour of her father. It is also contended that the decision of this Court in **Jayaraj R. v. Kaya G. Nair [2023 KHC 361]** permits the parties to withdraw their consent to divorce at any time before passing the decree.

In the light of the above grounds, the appellant prayed for setting aside the impugned judgment passed by the Family Court.

8. On the other hand, the learned counsel for the respondent would argue that after settling all the pending disputes before the Mediation, the parties entered into mediation agreement and the respondent performed part of his obligation and hence the appellant is not justified in withdrawing the consent and therefore, it was argued that this appeal is liable to be dismissed.

9. Now, the point that arise for consideration is the following:

1. *Whether the appellant was justified in withdrawing her consent for divorce by mutual consent after receiving part of the agreed amount?*
2. *Whether the impugned judgment of the Family Court calls for any interference in the light of the grounds raised in the appeal?*

10. Heard both sides.

11. Appellant and the respondent were married on 26.10.2014 at

St. George Basilica, Angamaly and a child was born in the wedlock. However, due to serious difference of opinion between them, they started living separately since 2019. Several cases filed between them were pending before various courts. They involve OP.No.2446/2020 on the file of the Family Court, Ernakulam filed by the appellant for return of money, GOP.No.1015/2020 filed by the respondent for custody of the minor child, O.P.No.1004/2020 and CC.No.217/2021 pending before the Judicial First Class Magistrate Court-I, Ernakulam filed under Section 498 of IPC. All the disputes between the parties were settled in mediation and accordingly a mediation agreement was signed on 18.3.2022. As per the mediation agreement, the respondent agreed to pay a total sum of Rs.16 Lakhs to the appellant towards full and final settlement of all financial claims in O.P.2446/2020. The mode of payment of the above Rs.16 Lakhs is given in detail in the mediation agreement. The respondent further agreed to pay a sum of Rs.50,000/towards maintenance of the minor child. The appellant agreed to relinquish any further claim towards maintenance for herself and the minor child.

12. The respondent agreed to withdraw O.P.1004 of 2020 filed by him seeking divorce and both parties agreed to dissolve their marriage by mutual consent. As per the terms of compromise, the respondent had to pay Rs.2 Lakhs on or before 31.3.2022, another Rs.2 Lakhs on or before 31.5.2022, a further sum of Rs.2 Lakhs on or before 31.7.2022 and balance Rs.10 Lakhs is to be paid

on or before 31.8.2022. Maintenance amount of Rs.50,000/- is to be paid on or before 31.3.2022. Admittedly, the respondent paid a total sum of Rs.6,50,000/- to the appellant, as agreed and the appellant received those payments without raising any objection.

13. Further, as per the terms of compromise, the appellant alongwith the respondent filed a joint petition for divorce under Section 10A of the Divorce Act on 1.4.2022. Thereafter, when the case was taken up after the waiting period of six months, the appellant filed a memo withdrawing her consent.

14. Relying upon the decision of this Court in **Benny v. Mini [2021 (1) KHC 723]**, the Family Court held that unilateral withdrawal by one party after the other party has performed his part of the terms in the memorandum of agreement is a sharp practice which cannot be permitted or tolerated for a moment as it would shatter the faith of the litigants in the justice delivery system and make a mockery of the alternative dispute resolution mechanism. Accordingly, in spite of the withdrawal of consent by the appellant, the Family Court allowed the OP and dissolved the marriage under Section 10A of the Divorce Act.

15. During the course of arguments, we have interacted with the parties and found that there is no chance for a re-union between them.

16. On behalf of the the appellant, relying on the decision of a Division Bench of this Court in **Jayaraj R. v. Kaya** (supra), the learned counsel would argue that for granting a divorce by mutual consent, a consent of both parties is required till a final order is passed. If, in the meantime, any of the parties withdraws consent, the Family Court cannot pass a decree granting divorce by mutual consent.

17. In the decision in **Prakash Alumal Kalandari v. Jahnvi Prakash Kalandari [AIR 2011 Bom. 119]**, a Division Bench of Bombay High Court had occasion to consider the withdrawal of consent to a joint petition by one of the parties. In paragraph 16, the court held thus:

“16. As aforesaid, if the Petition is filed "simplicitor under Section 13B of the Act" for divorce by mutual consent, the Court must satisfy itself that the consent given by the parties continues till the date of granting decree of divorce. Even if one party unilaterally withdraws his/her consent, the Court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate of Section 13B of the Act. However, the situation 18 FCA.61.10 would be different if the parties in the first instance resort to Petition for relief under Section 9 or 13 of the Act and during the pendency of such Petition, they decide to invite decree for divorce by mutual consent. On the basis of agreed arrangement, if the parties were to execute Consent

Terms and then file a formal Petition/Application to convert the pending Petition to be treated as having been filed under Section 13B of the Act to grant decree of divorce by mutual consent, then, in the latter proceedings, before the decree is passed, one party cannot be allowed to unilaterally withdraw the consent if the other party has already acted upon the Consent Terms either wholly or in part to his/her detriment. In other words, the Court will have to be satisfied that: (i) there is sufficient, good and just cause for allowing the party to withdraw his consent, lest, it results in permitting the party to approbate and reprobate; (ii) that the other party would not suffer prejudice which is irreversible, due to withdrawal of the consent. If this twin requirement is not satisfied, the Court should be loath to entertain the prayer to allow the party to unilaterally withdraw his/her consent.”

18. Relying upon the decision of Bombay High Court in **Prakash Alupal Kalandari** (supra), a Division Bench of this Court in **Benny v. Mini** (supra), in a similar instance held in paragraph 24 as follows:

“24. Following the judgment in **Prakash Alupal Kalandari**(supra),we hold that once the parties agree to file a joint petition, pursuant to an agreement/compromise in pending proceedings, then the parties are estopped from resiling from the agreement. Therefore, the unilateral withdrawal of consent by the respondent, especially after the appellant has performed his part of the terms in the memorandum of agreement, is only a sharp practice which cannot be permitted or tolerated for a moment as it would shatter the faith of the litigants in the justice delivery system and make a mockery of alternative dispute resolution mechanism.”

19. The decision in **Prakash Alupal Kalandari** (supra), and **Benny** (supra) were distinguished by a Division Bench in **Jayaraj R.**

(supra). In paragraph 44 the Division Bench held that:

“44. The law laid down by the Division Bench of the High Court of Judicature at Bombay in **Prakash Alupal Kalandari** [AIR 2011 Bom. 119] and that laid down by the Division Bench of this Court in **Benny** [2021 (1) KHC 723], have no application to the facts of the case on hand. In the above two cases the courts were dealing with, either an application filed during the pendency of an original petition for decree of divorce under Section 13 of the Hindu Marriage

Act, to convert the pending proceedings to a petition for divorce by mutual consent under Section 13B of the Act, as per the 'consent terms' executed between the parties, which was acted upon in part, or an original petition filed under Section 13B of the Act for a decree of divorce by mutual consent, after the withdrawal of pending litigations for decree of divorce under Section 13B of the Act, for return of money and gold ornaments and also for maintenance, and the wife has taken advantage on the basis of the compromise agreement. After referring to the law laid down by the Apex Court in Sureshta Devi [(1991) 2 SCC 25], the Bombay High Court in Prakash Alumal Kalandari [AIR 2011 Bom. 119] found that, if the petition is filed "simpliciter under Section 13B of the Act" for divorce by mutual consent, the court must satisfy itself that the consent given by the parties continue till the date of granting the decree of divorce. Even if one of the party unilaterally withdraws his/her consent, the court does not get jurisdiction to grant decree of divorce by mutual consent in view of the mandate under Section 13B of the Act."

20. In the instant case also, several litigations are pending between the parties before various courts including petition for divorce, custody of child and patrimony. All those cases were settled in mediation and the parties agreed to dissolve their marriage by mutual consent. Accordingly, the parties filed a joint petition for divorce, received part payment, disposed of the pending cases and thereafter at the final stage when the case was taken up for evidence to record the consent of the parties, the appellant withdrew her consent.

21. In the above circumstances, the present case is one coming within the ambit of the decision in **Prakash Alumal Kalandari** (supra) and **Benny** (supra) and as such in spite of the subsequent withdrawal of consent by the appellant, the Family Court was justified in decreeing the O.P. We do not find any illegality or irregularity in the finding in the impugned judgment of the Family Court and as such this appeal is liable to be dismissed.

In the result, this appeal is dismissed.

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