IN THE HIGH COURT OF KARNATAKA

KALABURAGI BENCH

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DATED THIS THE 17TH DAY OF AUGUST, 2020

PRESENT

THE HON'BLE MR.JUSTICE KRISHNA S.DIXIT

AND

THE HON'BLE MR.JUSTICE P.KRISHNA BHAT

MFA No.201154/2018 (FC)

Between:

Sri Yusufpatel
S/o Shamshurpatel Patil
Age: 37 years, Occ: Business
R/o Sangolli Rayanna Colony
Vijayapura

... Appellant

(By Sri G.G. Chagashetti, Advocate)

And:

Smt. Ramjanbi
W/o Yusufpatel Patil
Age: 36 years, Occ: Household work
R/o Near Iqra School Bagayat Galli
Vijayapura-586101

... Respondent

(By Sri R.J.Bhusare, Advocate)

This Miscellaneous First Appeal is filed under Section 19(1) of the Family Court Act, praying to set aside the judgment and decree dated 02.04.2018 passed by the Family Court, Vijayapur in OS No.47/2016 by dismissing the suit.

This appeal coming on for admission this day, ***Krishna S. Dixit J.***, delivered the following:-

JUDGMENT

This appeal by the husband calls in question the Judgment & Decree dated 02.04.2018 whereby the learned Principal Judge, Family Court, Vijayapura having decreed the respondent-wife's suit in O.S.No.47/2016 has dissolved the marriage between them. After service of notice, the respondent-wife having entered appearance through her counsel opposes the appeal making submission in justification of the impugned Judgment & Decree.

2. Brief facts

(a) Both the appellant and respondent happen to be Sunni Muslims; their marriage was performed on 17.07.2014 in the presence of Jamat people of Masjid-e-Mehraj at Bada Makan, Siddakha Road, Bengaluru as

per Shariyat Law; after the marriage, for a short period the parties led a happy life in a separate house, independent of parents of the husband.

(b) The respondent had filed a suit in O.S.No.47/2016 seeking a decree for dissolution of marriage on the grounds of cruelty and desertion alleging that she and her parents were manhandled by the appellant and his parents without any justification whatsoever; the appellant has contracted a second marriage with another lady, when the respondent was carrying and that he has begotten a child from the said lady.

(c) The appellant herein being the defendant had resisted the suit claim in addition to seeking a decree for the restitution of conjugal rights *inter alia* contending that he had always loved the respondent; he contracted the second marriage only because of the irresistible pressure mounted by his parents who are quite powerful & politically influential; Sheriat permits a

Mohammaden to contract plural wives and such a conduct per se does not amount to cruelty, nor constitute a ground for opposing restitution of conjugal rights.

(d) The court below had framed as many as 8 issues as specified in para-26 of the impugned judgment; to prove her case the respondent plaintiff got herself examined as PW-1; similarly, to prove his version, the appellant husband got himself examined as DW-1 and got marked two documents namely, a copy of complaint in Ex.D-1 dated 23.12.2015 given by wife to the State Women's Commission, Bengaluru & a copy of letter with the complaint in Ex.D-2; the learned trial Judge having considered all aspects of the matter has entered the subject judgment & decree that are now put in challenge in this appeal.

3. Having heard the learned counsel for the parties and having perused the papers, this court

declines to interfere in the matter for the following discussion:

(a) The finding recorded by the learned trial Judge that during the initial period of marriage although parties lived happily in a separate matrimonial home, after some period the parents of the appellant-husband had manhandled the respondent-wife & her parents, is supported by the evidentiary material and the very admission of the appellant himself; it is a bounden duty of every husband to protect his wife in any circumstances; what acts the appellant did, to protect his wife from the onslaught of his parents are neither pleaded nor proved; the contention that his parents are very influential & powerful is too feeble a justification for allowing the poor wife to be tortured. The very institution of marriage is founded *inter alia* on the mutual support and security of spouses; if the husband fails to protect his wife from his own violent parents, the

very trust of the wife is shaken and therefore she is entitled to oppose restitution of conjugal rights, lest she should undergo the same ill treatment.

(b) It is not in dispute that the appellant husband has contracted a second marriage and that the second wife has given birth to a child; however, he seeks to justify his act of contracting second marriage pleading that he did it on the pressure of his parents who are too powerful to be defied; this stand again is too poor a justification to say the least; if this, in the given circumstances is recognised as a justification, a husband may contract two more marriages as well seeking shelter under Sheriat; this apart, the appellant has failed to establish his contention that the entry of the second lady to the existing matrimony is with the prior consent of the respondent-wife; it is a matter of common knowledge that, women regardless of their religion and socio-economic conditions, detest their

husbands contracting a second marriage; therefore, the proof of consent requires cogent evidence which is militantly lacking in this case.

(c) The plea of the appellant-husband that the Sheriat permits a Muslim to contract in marriage plural wives, may be legally true; In fact, ***Mulla's Principles of Mohammaden Law***, 22nd Edn., LexisNexis at paras-255 & 264 states the position of law:

> *"255. Number of wives.- A Mohamedan may have as many as four wives at the same time but not more. If he marries a fifth wife when he has already four, the marriage is not void but merely irregular."*
>
> *"264. An irregular marriage is one which is not unlawful in itself, but unlawful for something else..."*

The Hon'ble Kerala High Court speaking through Justice V.R. Krishna Iyer (as he then was) in ***Shahulameedu vs. Subaida Beevi 1970 K.L.T. 4*** has observed about the right of a Muslim to practise polygamy under the Sheriat as under:

> *"It follows from these passages that the Koranic injunction has to be understood in the perspective of prevalent unrestricted polygamy and in the context of the battle in which most males perished, leaving many females or orphans and that the holy prophet himself recognised the difficulty of treating two or more wives with equal justice and, in such a situation, directed that an individual should have only one wife. In short, the Koran enjoined monogamy upon Muslims and departure therefrom as an exception. That is why, in the true spirit of the Koran, a number of Muslim countries have codified the personal law wherein the practice of polygamy has been either totally prohibited or severely restricted. (Syria, Tunisia, Morocco, Pakistan, Iran, the Islamic Republics of the Soviet Union are some of the Muslim countries to be remembered in this context)..."*

(d) It is also pertinent to refer to another Division Bench decision of Hon'ble Kerala High Court in ***Saidali K.H. vs. V. Saleena***, Mat. Appeal No.94/2007 disposed off vide judgment dated 22.10.2008; Hon'ble Justice **Harun-Ul-Rashid** heading the Bench appreciably and tellingly observed as under:

"11. *The practice of having more than one wife, though not totally prohibited, is discouraged by imposing stringent conditions making it almost impossible to keep more than one wife at a time. These stringent conditions were imposed on the man even during the life time of Prophet Mohammed. The concept of polygamy, limited to four, with restrictions was permissible during that time due to unavoidable facts and circumstances prevalent during the said period. Going by Quranic versions, permission to marry more than one woman, but not more than four was given at a time when there were lots of orphans, widows and captives of war who were unable to live a dignified life and their strength was far more than the men, which gave rise to social problems in the society. Appeal to the people to marry orphans, widows and captives of war was necessitated on account of social inequality, economic distress and like conditions to which women were put to suffer... The mandate issued by Prophet Mohammed was intended to save the destitute and to protect their belongings. Even after fifteen centuries, some people of our country seem to be very particular in following the aforesaid tenets of Islam unmindful as to whether such circumstances exist or not... We have seen women and children standing in the verandah of courts who are either divorced women or second, or third or fourth wife of such persons seeking maintenance from their husbands. Unrestricted freedom to marry women of their choice was enjoyed by men and subsequently to casually pronounce talaq according to their whims and fancies. The indiscreet conduct of such persons in marrying and keeping more than one wife is continuing without any restriction. Most of such marriages are illegal since they are against Quranic injunctions...*"

(e) There is no dispute that Section 2 of the Dissolution of Muslim Marriages Act, 1939 recognizes 'cruelty of conduct' of the husband as a ground for the dissolution of marriage at the instance of aggrieved 'woman married under muslim law'. It needs to be stated that 'marital cruelty' as a concept, by its very nature defies definition; courts have emphasised that in the backdrop of spousal relationship, words, acts or conduct constituting cruelty are infinitely variable with the increasing complexities of modern life; no attempt at defining cruelty is likely to succeed, fully; merely because an act is lawful, it does not *per se* become justifiable in married life; for example, of course subject to all just exceptions, smoking and drinking are not unlawful; snoring too, is not, but still in certain circumstances they may amount to cruelty to a sensitive spouse; on the same analogy though contracting a second marriage by a Muslim may be lawful, but it more often than not, causes enormous cruelty to the first wife justifying her claim for divorce.

What the Hon'ble Allahabad High Court observed in ***Itwari vs. Smt. Asghari, AIR 1960 Allahabad 684*** needs to be appreciably reproduced:

> *"Muslim Law as an enforced in India has considered polygamy as an institution to be tolerated but not encouraged, and has not conferred upon the husband any fundamental right to compel the first wife to share his consortium with another woman in all circumstances. A Muslim husband has the legal right to take a second wife even while the first marriage subsists, but if he does so, and then seeks the assistance of the Civil Court to compel the first wife to live with him against her wishes, …….. she is entitled to raise the question whether the court, as a court of equity, ought to compel her to submit to cohabitation with such a husband. In that case the circumstances in which his second, marriage took place are relevant and material in deciding whether his conduct in taking a second wife was in itself an act of cruelty to the first. …….. Mr. Kazmi contended that the first wife is in no case entitled to consider the second marriage as an act of cruelty to her. I cannot agree. ……."*

(f) The learned trial Judge having considered the pleadings of the parties and the evidentiary material placed on record has found that the appellant's second marriage was brought about by the pressure of his

parents; this apart, the appellant has admitted that the respondent-wife was put to torture by his parents; the explanation offered by him for espousing the second lady hardly constitutes any justification for opposing the claim of first wife for divorce on the ground of cruelty;

(g) In matters of marital cruelty, what the Privy Council in ***Moonshee Bazloor Ruheem vs. Shamsunnissa Begum (11 MIA 551)*** observed more than a century & a half ago, is worth adverting to:

> *"Indian law does not recognize various types of cruelty such as 'Muslim' cruelty, 'Christian' cruelty, 'Jewish' cruelty, and so on, and the test of cruelty is based on the universal and humanitarian standards, that is to say, conduct of the husband which would cause such bodily or mental pain as to endanger the wife's safety or health. The onus today would be on the husband who takes a second wife to explain his action and prove that his taking a second wife involved no insult or cruelty to the first, and in the absence of cogent explanation the Court will presume under modern conditions that the action of the husband in taking a second wife involved cruelty to the first, and it would be inequitable for the Court to compel her against her wishes to live with such a husband."*

Mr.Fyzee an acclaimed Islamic jurist in his *magnum opus* "**Outlines of Muhammadan Law**" Fifth Edition, Oxford at page 91 lauds the above judgment stating "*This strong judgment shows clearly that since the passing of the Dissolution of Muslim Marriages Act 1939 the courts have leaned heavily in favour of the wife in all such cases and restitution cannot be had by the husband unless the wife is clearly in the wrong."*

In the above circumstances, this appeal lacking in merits is liable to be rejected and accordingly it is, costs in the circumstances, having been made easy.

Sd/-
JUDGE

Sd/-
JUDGE

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