

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

WEDNESDAY, THE 1ST DAY OF DECEMBER 2021/10TH AGRAHAYANA, 1943

MAT.APPEAL NO.64 OF 2011

AGAINST THE ORDER/JUDGMENT IN OP 168/2010 OF FAMILY COURT,
KOTTAYAM

APPELLANTS/RESPONDENTS 2 & 3:

- 1 P.T.PHILIPOSE, AGED 72 YEARS,
DOOR NO.15, LAKE VIEW DEFENCE COLONY, SHETTYHALLI
JALAHALLI WEST, BANGALORE,, KARNATAKA.
- 2 ANNAMMA PHILIPOSE, AGED 60 YEARS,
W/O.P.T.PHILIPOSE, DOOR NO.15,, LAKE VIEW DEFENCE
COLONY, SHETTYHALLI, JALAHALLI WEST, BANGALORE,,
KARNATAKA.

BY ADVS.
SMT.A.K.PREETHA
SMT.HEMA R.

RESPONDENTS/PETITIONER/RESPONDENTS 1 & 4:

- 1 SUNIL JACOB, AGED 41 YEARS,
S/O.JACOB KURIAN, ELAVUMKAL HOUSE,, VADAVATHOOR
P.O., KOTTAYAM, KERALA, PIN - 686 008.
- 2 BINDHU PHILIPS AGED 39 YEARS
NO.11, BRIARDALE COURT, PLAINSBORO,, N J 08536,
USA.
- 3 SANTHOSH PHILIPS, AGED 35 YEARS
S/O.PHILIPOSE, 835A LOCKEFIELD STREET,,
INDIANAPOLIS, IN 46202, USA. (DELETED)
(THE NAME OF THE 3RD RESPONDENT IS DELETED FROM THE
PARTY ARRAY AT THE RISK OF THE APPELLANT AS PER
ORDER DATED 12.12.2011 IN IA NO.3122/2011).

BY ADVS.
SRI.ARUN THOMAS
SRI.R.PARTHASARATHY
SMT.SEEMA
SRI.T.B.SIVAPRASAD
SRI.JENNIS STEPHEN
SRI.SANTHOSH MATHEW

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
22.11.2021 ALONG WITH Mat.Appeal.601/2013, THE COURT ON
01.12.2021 DELIVERED THE FOLLOWING:

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE &

THE HONOURABLE MRS. JUSTICE SOPHY THOMAS

WEDNESDAY, THE 1ST DAY OF DECEMBER 2021/10TH AGRAHAYANA, 1943

MAT.APPEAL NO. 601 OF 2013

AGAINST THE ORDER/JUDGMENT IN OP 168/2010 OF FAMILY COURT,

KOTTAYAM

APPELLANT :

BINDU PHILIPS, D/O.PHILIPOSE, AGED 42 YEARS,
299 GREEN, ST, OLD BRIDGE, NJ 08857, USA.

BY ADV SMT.K.V.BHADRA KUMARI

RESPONDENTS :

- 1 SUNIL JACOB, S/O.JACOB KURIAN
ELAVUMKAL HOUSE, VADAVATHOOR P.O., KOTTAYAM,
KERALA - 686 010.
- 2 P.T.PHILIPOSE, DOOR NO.15
LAKE VIEW, DEFENSE COLONY, SHETTYHALLI, JALAHALLI
WEST, BANGALORE, KARNATAKA, 560 013.
- 3 ANNAMMA PHILIPOSE
W/O.P.T.PHILIPOSE, DOOR NO.15, LAKE VIEW, DEFENSE
COLONY, SHETTYHALLI, JALAHALLI WEST, BANGALORE,
KARNATAKA - 560 013.
- 4 SANTHOSH PHILIPS
S/O.P.T.PHILIPOSE, 835A LOCKEFIELD STREET,
INDIANAPOLIS, IN 46202, USA.

BY ADVS.
SRI.ARUN THOMAS
SMT.ANILA GEORGE
SRI.JENNIS STEPHEN
SRI.SANTHOSH MATHEW

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
22.11.2021 ALONG WITH MAT. APPEAL No.64/2011, THE COURT ON
01.12.2021 DELIVERED THE FOLLOWING:

**A.MUHAMED MUSTAQUE &
SOPHY THOMAS, JJ.**

C.R

Mat. Appeal Nos. 64 of 2011 & 601 of 2013

Dated this the 1st day of December, 2021

J U D G M E N T

Sophy Thomas, J.

These appeals arise out of the judgment in O.P. No.168 of 2010 of the Family Court, Kottayam. The petitioner Sri.Sunil Jacob filed that O.P against respondents 1 to 4 i.e his wife, parents in law and brother-in-law respectively, for recovery of amounts borrowed from him by the 2nd respondent-father-in-law.

2. The facts could be summarised as follows:

The petitioner married the 1st respondent on 15.04.1996 as per Christian religious rites and ceremonies. The 2nd respondent father-in-law was running a business by name M/s.Sinai Pharmaceuticals Pvt.Ltd at Bangalore. As he was suffering from financial crisis, he borrowed amounts from the petitioner on various occasions totaling 81,300 U.S dollars assuring that it could be returned with 18% interest as and when

demanded. Rs.1 lakh was repaid towards interest and in June 2008, Rs.19,11,080/- was returned to the petitioner. The balance outstanding is Rs.75,90,522/-. Even after sending lawyer notice, the amount was not repaid.

3. According to the petitioner, he advanced the amounts to the 2nd respondent on the insistence of his wife. Their marriage was solemnized at Kottayam and they last resided together within the jurisdiction of Family Court, Kottayam. So he filed that O.P before Family Court, Kottayam arraying his wife, parents in law and brother-in-law as respondents 1 to 4 respectively to realise the amount, as the transaction, according to him, occurred on account of his marital relationship with the 1st respondent.

4. Respondents 1 and 4 were set ex parte. Respondents 2 and 3 filed written statement challenging the transaction as well as maintainability of the O.P before Family Court, Kottayam. The parties went on trial. PWs 1 to 3 were examined and Exts.A1 to A23 were marked from the side of the petitioner. RWs 1 and 2 were examined and Exts.B1 to B18 were marked from the side of the contesting respondents 2 and 3. On an appraisal of the available facts and evidence, the Family Court, Kottayam was

found to have jurisdictional competence, and the O.P was allowed in part with cost of Rs.5,000/- permitting the petitioner to realise Rs.15,78,716/- from respondents 1 and 2 with 12% interest from the date of demand till realisation.

5. Aggrieved by the judgment and decree, the contesting respondents 2 and 3 filed Mat.Appeal No.64 of 2011 and the 1st respondent/wife filed Mat.Appeal No.601 of 2013 alleging that no notice was served on her, and the petitioner/husband deliberately did not take steps in her correct address though he was well aware of her residential address in USA. She is assailing the impugned judgment and decree on the ground that she was denied an opportunity to defend the case for want of proper notice, leading to an ex parte decree against her.

6. The main grounds of attack against the impugned judgment and decree are on four grounds;

- (i) The dispute involved in the above mentioned O.P is not a dispute coming under the jurisdictional competence of a Family Court under Section 7 of the Family Courts Act, 1984.
- (ii) The courts at Kottayam had no territorial jurisdiction to entertain that O.P as no cause of

action or any part of the cause of action
arose within the limits of courts at Kottayam.

- (iii) The money claim put forward by the
petitioner was barred by limitation.
- (iv) The 1st respondent was denied an opportunity to
defend the case and she suffered an
ex parte decree as no steps were taken in
her correct address and no notice was served
on her.

7. For the sake of convenience, the appellants in
Mat.Appeal No.64 of 2011, Sri.P.T. Philipose and Smt.Annamma
Philipose, and the appellant in Mat.Appeal No.601 of 2013
Smt.Bindu Philips shall be referred as appellants 1, 2 and 3
respectively, and the 1st respondent in both the appeals Sri.Sunil
Jacob shall be referred as the respondent hereinafter.

**The jurisdictional competence of Family Court to
entertain the O.P.**

8. The case of the respondent is that the 1st appellant-
father-in-law borrowed 81,300 U.S dollars from him for his
business purposes, agreeing to repay the amount with 18%
interest per annum, as and when demanded. The 1st appellant
denied the case put forward by the respondent and according to

him, no money was borrowed on the assurance of returning it with interest. According to him, he was running a business by name 'Sinai Pharmaceuticals Pvt.Ltd' at Bangalore and the respondent had invested some money in that business, to purchase its shares in his name, as well as in the name of his wife, the 3rd appellant. Exts.A2 and A3 letters sent by the 1st appellant to the respondent will clearly show that, he was in financial crisis and he requested the respondent to send money to his Bank Account in IOB at Bangalore, offering 18% interest. Ext.A16 email sent by him also will speak about the financial transaction between them, and the undertaking by the 1st appellant to repay the balance amount. According to the respondent, he never directed the 1st appellant to purchase shares of M/s.Sinai Pharmaceuticals either in his name, or in the name of his wife, and the understanding was to repay the amount advanced with 18% interest as and when demanded.

9. Learned counsel for the appellants would contend that, if at all there was any monetary transaction between the son-in-law and father-in-law, the Family Court will not get jurisdiction to entertain the dispute, as it is not a suit or proceeding coming

under explanation (a) to (g) or under Section 7(2) of the Family Courts Act. The Family Court reached the conclusion that if there was no such marital relationship, the respondent would not have advanced money to his father-in-law, and so, it was a transaction arising out of a marital relationship, which will squarely come under Section 7(1)(d) of the Family Courts Act.

10. At his juncture, it will be beneficial to go through Section 7 of the Family Courts Act, 1984, which deals with the jurisdiction of the Family Court.

7. Jurisdiction.- (1) Subject to the other provisions of this Act, a Family Court shall-

- (a) have and exercise all the jurisdiction exercisable by any District Court or any subordinate Civil Court under any law for the time being in force in respect of suits and proceedings of the nature referred to in the explanation; and
- (b) be deemed, for the purposes of exercising such jurisdiction under such law, to be a District Court or, as the case may be, such subordinate Civil Court for the area to which the jurisdiction of the Family Court extends.

Explanation.-The suits and proceedings referred to in this sub-section are suits and proceedings of the following nature, namely:-

- (a) a suit or proceeding between the parties to a marriage for a decree of nullity of marriage (declaring the marriage to be null and void or, as the case may be, annulling the marriage) or restitution of conjugal rights or judicial separation or dissolution of marriage;
- (b) a suit or proceeding for a declaration as to the validity of a marriage or as to the matrimonial status of any person;
- (c) a suit or proceeding between the parties to a marriage with respect to the property of the parties or of either of them;
- (d) a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship;
- (e) a suit or proceeding for a declaration as to the legitimacy of any person;
- (f) a suit or proceeding for maintenance;
- (g) suit or proceeding in relation to the guardianship of the person or the custody of, or access to, any minor.

(2) Subject to the other provisions of this Act, a Family Court shall also have and exercise-

- (a) the jurisdiction exercisable by a Magistrate of the First Class under Chapter IX (relating to order for maintenance of wife, children and parents) of the Code of Criminal Procedure, 1973 (2 of 1974); and
- (b) such other jurisdiction as may be conferred on it by any other enactment".

11. Section 8 of the Act deals with the ouster of jurisdiction of the Civil Court to entertain and try the suits and proceedings mentioned in Section 7 of the Act.

12. Learned counsel for the respondent contended that the dispute involved in this case, is coming under explanation(d) to Section 7(1) of the Family Courts Act as it is a suit for an order or injunction in **circumstances arising out of a marital relationship**.

13. Now let us examine what are the circumstances arising out of a marital relationship. The 'circumstances' in relation to a marital relationship will be those particulars which closely precedes, surrounds, accompanies and follows a marital relationship. The main requirement is that such 'circumstances' must have a direct bearing on marriage, since the marriage precedes, the existence or origin of a 'marital relationship'. 'Circumstances' arising out of a marital relationship are therefore, 'occurrences or things which stand around or about, which attend upon, which closely precede or follow, which surround and accompany, which depend upon or which support or qualify the principal event' of a marriage or marital relationship. So, the

prime question to be asked on institution of a proceeding before Family Court under Section 7(1) read with explanation (d) of the Act is therefore, whether the foundation of the claim was a marital relationship and whether the petition and the relief emerged in the circumstances closely preceding, surrounding and following a marital relationship. If the answer is in the affirmative, the court can entertain the petition (***Leby Issac vs. Leena M. Ninan and others*** reported in 2005 KHC 960).

14. In the case in hand, the transaction between the son-in-law and the father-in-law was purely a business transaction of advancing amounts either to invest in business or to repay with interest as and when demanded. Ext.B17 lawyer notice demanding the amount was sent by the son-in-law to the father-in-law. He was claiming the amount back from his father-in-law, as the amounts were received by him only. When examined before court as PW1, he categorically deposed that his wife never demanded money from him and it was the father-in-law who demanded the money, and received the same. Though, in the pleadings, he has got a case that he advanced money to his father-in-law as insisted by his wife, no evidence is forthcoming

to prove that contention. So, evidently, it was purely a business/commercial transaction between the son-in-law and father-in-law, and it cannot be termed as a suit or proceedings for an order or injunction in circumstances arising out of a marital relationship.

15. In **Janaki Amma and others** vs. **Renuka Sadanandan and others** reported in 2016 (1) KHC 266, a Division Bench of this Court held that "the crucial aspect to be considered while deciding the question as to whether it is a suit or a proceedings instituted seeking an order or injunction in the circumstances arising out of a marital relationship, is the cause of the lis itself, and not the parties to the lis. Prime consideration should be as to whether the cause of the lis has got any bearing with the marital relationship. An objective assessment should be made as to whether the cause has got any stem from the circumstances arising out of the marital relationship. In other words, whether the cause should have been existed but for the marital relationship, shall be the basis of the assessment. If the answer is on the positive, definitely the lis can be categorized as one, not coming within the scope of Explanation (d). But, if the

cause of action is emerging out of any circumstances related to the matrimonial relationship and the same could not have existed independently, then the suit can be maintained before the Family Court, and it will fall under Explanation (d) to Section 7(1) of the Act”.

16. In the present case, the son-in-law advanced amounts to the father-in-law on interest basis, and he could have very well filed a suit before the ordinary civil court to realise that amount. So, it cannot be said that the cause of action could not have existed independently.

17. In **Vijayalakshmi vs. P.K Jayashree and Ors.** reported in 2018 (4) KLT 903, a Division Bench of this Court held as follows:

“Adjudication of matrimonial disputes in a congenial atmosphere is the function of the Family Court. No doubt, a broad and liberal approach is required in determining the jurisdiction of the Family Court. But, it does not mean that, the Family Court has the jurisdiction to adjudicate matters not even remotely connected with marriage and marital relationship. Exclusion of jurisdiction of civil courts cannot be readily inferred. The expression “in circumstances arising out of a marital relationship” in Clause (d) of the Explanation to S.7(1) of the Act, denotes such

circumstances surrounding, preceding and closely following a marital relationship, that is, the principal event of marriage and the eventualities surrounding the same. The "circumstances" must have a direct bearing on marriage. Prime consideration should be as to whether the cause of the lis has got any bearing with marital relationship. If the cause of action is emerging out of any circumstances related to matrimonial relationship and the same could not have existed independently, then the suit can be maintained before the Family Court, and it will fall under Clause (d) of the explanation to S.7(1) of the Act. It is not necessary that, parties to a suit or proceeding under that clause, shall be parties to a marriage...".

18. When we analyse the facts of the case in hand, it could be seen that, the claim for money made by the respondent against the 1st appellant-father-in-law is not a circumstance arising out of marital relationship. The amount was advanced to be repaid with interest, even according to the respondent. It was rather business/commercial transaction, and it has no connection or foundation that can be attributed to the marital relationship. The cause of action for realising the money advanced, would exist independently before an ordinary civil court as the transaction is purely a civil dispute.

19. Every transaction by either of the spouse or by both of them with the in-laws or relatives cannot be termed as 'in circumstances arising out of a marital relationship'. There may be many personal or commercial transactions for either of the spouse or by both, with the in-laws or their relatives or even remotely between the family members or relatives of either spouse. Such transactions cannot have any nexus with the marriage or marital relationship between them. At the most, we can say that the parties to that transaction got related or got acquainted with each other, because of the marriage between the spouses. But, the transaction cannot be termed as a 'circumstance arising out of the marital relationship' in order to bring it under the jurisdictional competence of a Family Court. Moreover, the cause of action arising out of such transactions, will exist independently irrespective of the marital relationship.

20. In the case in hand, the father-in-law received amounts from his son-in-law for his business purposes agreeing to repay the amount with interest. Payment of interest also is rather admitted by way of making payment of Rs.1 lakh. The son-in-law could have maintained a suit for recovery of money before the

competent civil court, irrespective of the marital relationship between himself and his wife.

21. On an anxious consideration of the rival contentions put forward from either side, we have no hesitation to hold that the transaction between the respondent and the 1st appellant was not a dispute coming under explanation (d) to Section 7(1) of the Family Courts Act, and so, the O.P was not coming with the jurisdictional competence of a Family Court.

Territorial jurisdiction of Courts at Kottayam

22. The appellants are challenging the territorial jurisdiction of the Family Court, Kottayam to entertain the O.P. They are admitting the fact that the marriage between the respondent and the 3rd appellant was solemnised at Kottayam on 15.04.1996. It is also rather admitted that, the couple lastly resided together at Kottayam.

23. The parties are Christians and they are governed by the Divorce Act, 1869. As per Section 3(3) of the Divorce Act, 'District Court' means, in the case of any petition under this Act, the Court of the District Judge within the local limits of whose ordinary jurisdiction or of whose jurisdiction under this Act the

marriage was solemnised or the husband and wife reside or last resided together. The jurisdiction of the District Court mentioned in Section 7(1) of the Family Courts Act is to deal with suits and proceedings of the nature enlisted under explanation (a) to (g) of Section 7(1) and also Section 7(2) of the Family Courts Act. The petitioner filed the O.P before Family Court, Kottayam as if it was a suit or proceeding for an order or injunction in circumstances arising out of a marital relationship. We have already found that the transaction between the respondent and his father-in-law, the 1st appellant was not a circumstance arising out of a marital relationship, and he ought to have filed that suit for recovery of money in the ordinary civil court having competent jurisdiction. So, we have to fall back to Sections 15 to 20 of the Code of Civil Procedure to find out where suits are to be instituted depending upon the nature of the claim. As far as money claim is concerned, Section 20 CPC is applicable, and it reads as follows:

“20. Other suits to be instituted where defendants reside or cause of action arises

Subject to the limitations aforesaid, every suit shall be instituted in Court within the local limits of whose jurisdiction-

- (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
- (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
- (c) the cause of action, wholly or in part, arises”.

24. The respondent has stated in the O.P that “the cause of action for this petition arose at Kottayam when the marriage between the petitioner and the first respondent was solemnized on 15.04.1996, and further on 30.01.2009 when both have last resided together at Vadavathoor, Kottayam and on December 1997 when the first payment was made and thereafter continuously and on June 2008 when the respondents made the part payment of Rs.19,11,080/- back to the petitioner, and on various dates when the respondents failed to return the money lent by the petitioner. Since the marriage was solemnized at Holy

Trinity CSI Cathedral Church, Kottayam and the petitioner and the first respondent last resided together at Vadavathoor, Kottayam, within the jurisdiction of this Honourable court, this Honourable court is having the jurisdiction to entertain this original petition”.

25. As already found, the place of marriage or the place of last residence of the spouses has no bearing in a claim for money in a civil suit between the son-in-law and the father-in-law, though his wife and in-laws were also made parties to the suit. Admittedly, the 1st appellant was doing business at Bangalore. The amounts were transferred to the Bank Account of the 1st appellant at Bangalore as seen from Exts.A2 and A3 letters. The 1st appellant was permanently residing at Bangalore and in the O.P, the address of appellants 1 and 2 were shown as they are residing at Bangalore. Even the respondent has no case that he paid any amount to the 1st appellant at Kottayam. So, going by Section 20 CPC also, the courts at Kottayam will not get territorial jurisdiction to entertain the money claim made by the respondent as the transaction in its entirety or any part of it never occurred at Kottayam and the appellants were also not residing at Kottayam, even going by the petition averments. So, no cause of

action arose at Kottayam so as to make the O.P maintainable within the territorial jurisdiction of any courts at Kottayam.

Is the money claim barred by law of limitation

26. As the jurisdictional competence of Family Court is found against, we leave the question of limitation of the claim open to be decided by a competent civil court where the petition will be re-presented after return from the Family Court.

Non service of notice on 3rd appellant leading to ex parte decree

27. The 3rd appellant is assailing the decree and judgment on the ground that she was not served with any notice. According to her, she was permanently residing at USA and her address was very much known to the respondent, who was none other than her husband. Without serving notice on her, the respondent managed to obtain a decree against her, behind her back.

28. On going through the proceedings sheet in the O.P, it could be seen that though notice was ordered, it was not served on 3rd appellant and her brother. On 21.07.2010, the Family Court made an endorsement in the proceedings sheet that 'R1

and R4 absent. Their father is present. Hence there is actual notice. R1 and R4 set ex parte'. The proceedings of the Family Court will not show that any earnest efforts were made by the Family Court to serve notice on the 3rd appellant. The service on her father cannot be treated as service on her, especially when she was permanently residing in USA. The 3rd appellant has no case that her father received notice on her behalf as her agent. There is nothing to show that the 3rd appellant authorised her father to receive notice or summons on her behalf.

29. The Family Court is governed by the Code of Civil Procedure as per Section 10 of the Family Courts Act which reads as follows:

“10. Procedure generally.-(1) Subject to the other provisions of this Act and the Rules, the provisions of the Code of Civil Procedure, 1908 (5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings [other than the proceedings under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974)] before a Family Court and for the purposes of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such Court...”.

Order V CPC regarding issue and service of summons governs service of summons in Family Court also. So, without serving notice/summons on the 3rd appellant or her agent, or by effecting substituted service, the Family Court ought not have declared her ex parte. Therefore, the judgment and decree passed without serving notice on her will not be binding on her. So her Mat.Appeal is liable to be allowed on that ground.

Conclusion:-

30. On an overall analysis of the available facts and circumstances, we have to conclude that the Family Court, Kottayam had no jurisdictional competence or territorial jurisdiction to entertain O.P No.168 of 2010 and the 3rd appellant ought not have been set ex parte without proper service of notice/summons on her or on her agent. So, the impugned judgment and decree are liable to be set aside and we do so.

31. Hence the above Mat.Appeals stand allowed setting aside the impugned judgment and decree. The LCR shall be returned to Family Court, Kottayam forthwith, and the Family Court shall return the original petition to the petitioner

(respondent herein), within ten days of receipt of copy of this judgment whereby he can re-present it before competent civil court. The parties shall suffer their respective costs.

After the pronouncement of the judgment, learned counsel for the appellants submitted that certain fixed deposits have been made by them pursuant to an order granting stay, before the Family Court. In the light of the judgment, we allow the appellants to withdraw the same from the Family Court.

Sd/-

**A.MUHAMED MUSTAQUE
JUDGE**

Sd/-

**SOPHY THOMAS
JUDGE**

smp