

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

TUESDAY, THE 16TH DAY OF AUGUST 2022 / 25TH SRAVANA, 1944

OP (CRL.) NO. 390 OF 2020

AGAINST THE ORDER IN MC 38/2018 OF JMFC, KALAMASSERY

PETITIONER:

MATHEW DANIEL
AGED 69 YEARS
S/O. DANIEL, RESIDING AT CHAKKATTIL HOUSE, GCRA
CROSS ROAD 18, CHANGAMPUZHA NAGAR, KOCHI-682 033

BY ADVS.
SREELAL N.WARRIER
SRI.BIJU MATHEW

RESPONDENT:

LEENA MATHEW, AGED 65 YEARS,
W/O. MATHEW DANIEL, RESIDING AT KOCHOKKAN HOUSE,
KESHAVANPADY, THIRUVANKULAM P.O.-682 305

BY ADV SIKHA G.NAIR

THIS OP (CRIMINAL) HAVING COME UP FOR ADMISSION ON
8.06.2022, THE COURT ON 16.08.2022 DELIVERED THE FOLLOWING:

“C.R.”

J U D G M E N T

Dated this the 16th day of August, 2022

This original petition has been filed to quash Ext.P3 order passed by the Judicial First-Class Magistrate Court, Kalamassery (for short, ‘the court below) in MC No.38/2018 pursuant to the settlement arrived at in mediation.

2. The petitioner is the husband of the respondent. The respondent filed an application under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (for short, the DV Act) against the petitioner claiming various reliefs under Sections 18, 19, 20 and 22. The court below referred the case to mediation. The entire dispute between the parties was settled at the mediation. Ext.P1 mediation agreement dated 6/2/2019 was executed between the petitioner and the respondent. As per the terms of Ext.P1, the petitioner and the respondent mutually and amicably consented to a divorce. It was further agreed that the shared household which stood in the name of the petitioner would be sold within six months for mobilizing money to pay

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maintenance and other monetary benefits to the respondent and the sale proceeds would be shared equally between the petitioner and the respondent. Initially, the court below passed an interim order restraining the petitioner from alienating the property. It was in force till 12/11/2018. Since the matter was settled at the mediation, and it was agreed to sell the shared household to the third party and to share the sale proceedings, the injunction order was not extended. But the property could not be sold as agreed. Therefore, both parties requested the court below to refer the matter again for mediation. Accordingly, the court below again referred the case for mediation. At the second mediation, another mediation agreement (Ext.P2) was entered into between the parties on 22/1/2020. As per the said mediation agreement, the parties mutually and amicably consented to divorce and further the petitioner agreed to pay a sum of ₹25,00,000/- within six months to the respondent to settle the entire dispute. Thereafter, the petitioner filed an affidavit at the court below on 9/7/2020 stating that he was compelled to sign the mediation settlement agreement without understanding the consequences of its terms. He sought permission to withdraw from the said

- :4: -

settlement. The court below after hearing both sides passed Ext.P3 order whereby the petitioner herein was directed to pay a sum of ₹25,00,000/- in terms of the final settlement of all the disputes between the parties as agreed in Ext.P2. The mediation agreement dated 22/1/2020 was made part of the Ext.P3 order. Later, the court below made a correction regarding the date of Ext.P2 agreement in Ext.P3 order as per Ext.R1 (a) order. Ext.R1(b) is the corrected order of Ext.P3. The court below in Ext.P3/Ext.R1(b) found that the contention of the petitioner that he had signed the mediation agreement without understanding the consequences of its terms is devoid of merits and that the parties are bound by Ext.P2 mediation agreement. The petitioner seeks to set aside Ext.P3/Ext.R1(b) order in this original petition.

3. I have heard Sri. Sreelal Warriar, the learned counsel for the petitioner and Smt. Sikha G.Nair, the learned counsel for the respondent.

4. The learned counsel for the petitioner Sri.Sreelal Warriar submitted that the DV Act does not contain any provision to refer the matter to mediation. Drawing my attention to Section 28(1) of the DV Act, the learned counsel submitted that the

proceedings under Sections 12 and 23 of the DV Act are governed by the Code of Criminal Procedure (for short 'Cr.P.C') and, thus, Section 89 and Order XXIII Rule 3 of the Code of Civil Procedure (for short 'CPC') which provides for settlement of the dispute through alternative dispute resolution mechanism and compromise of the suit is inapplicable to the proceedings under the DV Act. The counsel further submitted that the terms of the settlement in Ext.P2 are unconscionable and incapable of performance. The counsel also submitted that the court below went wrong in directing the petitioner to pay a sum of ₹25,00,000/- to the respondent without satisfying the condition in Ext.P2 that a joint petition for divorce by mutual consent must be filed by the parties. Ext.P3 order does not satisfy the characteristics of an order required to be passed by a reference court pursuant to a mediation settlement, added the counsel. On the other hand, the learned counsel for the respondent Smt.Sikha G.Nair submitted that the contention of the petitioner that he had signed the mediation agreements without understanding the consequences is baseless and devoid of merits. The learned counsel further submitted that after entering into a settlement,

one of the parties cannot withdraw from it unilaterally. The counsel also submitted that the petitioner voluntarily executed Exts.P1 and P2 agreements fully understanding its contents and, as such, he is bound by its terms.

5. The first and foremost argument canvassed by the learned counsel for the petitioner is regarding the jurisdiction of the Magistrate Court dealing with the application filed under the provisions of the DV Act to refer the matter to mediation. The learned counsel submitted that the proceedings under Sections 12 and 23 of the DV Act are governed by Cr.P.C and as such, the provisions of Section 89 and Order XXIII Rule 3 of CPC are not applicable to a proceeding under the DV Act. The learned counsel relied on two decisions of the Single Benches of this Court in **Shiyas K.B. v. Manoj Paul and Another** [ILR 2018 (2) Kerala 847] and **Sivarajan v. Subash and Another** (2020 (1) KHC 659) in support of his submission.

6. The very objective of the DV Act is to protect the women against the violence that occurs within the family and for matters connected therewith. The DV Act, therefore, conceives a scheme of protective measure with the object to protect women.

The statement of objects and reasons of the Act record that the civil law does not address the phenomenon of domestic violence and therefore, a law be enacted to provide a remedy in civil law for the protection of women from being victims of domestic violence. Thus, the purpose of enacting the law was to provide civil remedies to a woman who is subjected to domestic violence. Apart from the statement of objects and reasons, various provisions contained in the DV Act make it clear that predominantly the rights and remedies created under the Act are of civil nature. Various kinds of reliefs which can be obtained by the aggrieved person under Sections 18 to 22 of the Act are of civil nature. At the same time, when there is a breach of such orders passed by the Magistrate, Section 31 terms such a breach to be a punishable offence. The reliefs under Sections 18 to 22 can be sought in any legal proceedings pending before a civil court, a family court or a criminal court as well (Section 26). All these reliefs that can be granted by the Magistrate/Court are meant for the welfare and well-being of the women. When the welfare statute is made with the single focus of the protection of women, such an Act must be treated as remedial to protect the

women.

7. The Apex Court in **Indra Sarma v. V.K.V.Sarma** (2013 (14) SCALE 448) examined the scope of the DV Act and held that it was enacted to provide a remedy in civil law for the protection of women from being victims of domestic violence. The Division Bench of the Delhi High Court in **Nidhi Kaushik v. Union of India** [(2013) 203 DLT 722] has held that the proceedings under Sections 12 and 18 to 23 of the DV Act are purely civil in nature. In **Vijaya Baskar v. Suganya Devi** [2010 (4) KLT OnLine 1022 (Mad.)], the Madras High Court examined the scope of the DV Act and held that the term 'civil law' used in the statement of objects and reasons of the Act is not an empty formality and would exemplify and demonstrate that the proceedings at the first instance should be civil in nature. This Court in **Samma Shyju v. Shyju Varghees and Others** (2011 (3) KHC 235) took the view that since the proceedings under the DV Act are civil in nature, an application for amendment of the petition is maintainable. The Apex Court in **Kunapareddy @Nookala Shanka Balaji v. Kunapareddy Swarna Kumari and Another** (2016 KHC 6400) considered the

nature of the proceedings under the DV Act and observed that the purpose of enacting the DV Act was to provide a remedy in the civil law for the protection of women from being victims of domestic violence and to prevent the occurrence of domestic violence in the society. It was further observed that it is for this reason, that the scheme of the Act provides that in the first instance, the order that would be passed by the Magistrate, on a complaint by the aggrieved person, would be of a civil nature and if the said order is violated, it assumes the character of criminality. This Court recently in **Neethu v. Trijo Joseph** (2022 (4) KHC 384) considered the nature of proceedings under the DV Act. Examining the various decisions of the Apex Court and the High Courts, it was held that the kinds of reliefs which can be obtained by the aggrieved person under the DV Act are of civil nature and hence, the rights and remedies created under the Act are of civil nature. After holding so, it was held that in a proceeding under the DV Act, the defence can be struck off for non-compliance with an order of payment of *pendente lite* maintenance. The two decisions relied on by the learned counsel for the petitioner [**Shiyas K.B.** (supra) and **Sivarajan** (supra)]

pertain to the reference made by a Magistrate Court in a case involving the offence under Section 138 of the Negotiable Instruments Act. The prosecution under Section 138 of the Negotiable Instruments Act is a prosecution for criminal offences. As already stated, the proceedings under the DV Act are of civil nature and the remedies provided therein are civil remedies. Therefore, the dictum laid down in the above decisions is not applicable to the facts of this case.

8. Thus, it can safely be concluded that the DV Act, in general, is of civil kind and the reliefs thereunder are of civil nature and the forum prescribed to secure the reliefs is the criminal court. Merely because the jurisdiction is exercised by the criminal court/Magistrate court and the provisions of Cr.P.C. are followed, it does not change the character of the proceedings as criminal proceedings. The character of the proceedings depends not upon the nature of the forum, which is invested with the authority to grant relief, but upon the nature of the relief sought to be enforced. A proceeding that deals with the right of civil nature do not cease to be so just because the forum for its enforcement prescribed by the statute is the criminal court [See

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Neethu (supra)]. That apart, Section 28(2) of the DV Act provides that the court can formulate its own procedure for disposal of an application under Section 12 or 23 (2) of the DV Act. The flexibility has been given to the court as the proceedings under Sections 12 and 18 to 23 provide civil remedies whereas Section 31 provides a criminal offence. The Apex Court in **Kunapareddy** (supra) held that Section 28(2) empowers the court to lay down its own procedure and the Magistrate dealing with the DV Act is empowered to allow the amendment of the application. Thus, it is clear that even though Section 28(1) of the DV Act provides that all proceedings under Sections 12 and 18 to 23 and for the offence under Section 31 shall be governed by the provisions of Cr.P.C, the court can still lay down its own procedure while dealing with the applications under sub-section (1) of Section 12 or while considering the grant of interim relief or *ex parte* ad interim relief orders under sub-section (2) of 23. In view of the nature of the proceedings under the DV Act and the procedural flexibility provided under sub-section (2) of Section 28 in deciding the applications under Section 12 or 23(2), it cannot be said that the court is bound to strictly abide by the provisions of Cr.P.C in all

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cases. In appropriate cases, it would be open to the court to formulate its own procedure as may be found necessary in the interest of justice, in which event, the court may not have to rely upon Cr. P.C [vide **Neethu** (supra)].

9. The Apex Court in **Afcons Infrastructure Ltd. and Another v. Cherian Varkey Construction Company (P) Ltd. and Others** (2010 KHC 4498) considered the categories of cases normally suitable for the ADR process including mediation. In paragraph 19, it was held thus:

"19. All other suits and cases of civil nature in particular the following categories of cases (whether pending in civil courts or other special Tribunals/Forums) are normally suitable for ADR processes :

(i) All cases relating to trade, commerce and contracts, including

- disputes arising out of contracts (including all money claims);

- disputes relating to specific performance;

- disputes between suppliers and customers;

- disputes between bankers and customers;

- disputes between developers/builders and customers;

- disputes between landlords and tenants/licensor and licensees;

- disputes between insurer and insured;

(ii) All cases arising from strained or soured relationships, including

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- *disputes relating to matrimonial causes, maintenance, custody of children;*
- *disputes relating to partition/division among family members/ co-parceners/co-owners; and*
- *disputes relating to partnership among partners.*

(iii) All cases where there is a need for continuation of the pre-existing relationship in spite of the disputes, including

- *disputes between neighbours (relating to easementary rights, encroachments, nuisance etc.);*
- *disputes between employers and employees;*
- *disputes among members of societies/ associations/ Apartment owners Associations;*

(iv) All cases relating to tortious liability including

- *claims for compensation in motor accidents/other accidents; and*

(v) All consumer disputes including

- *disputes where a trader/supplier/manufacturer/service provider is keen to maintain his business/professional reputation and credibility or `product popularity.*

The above enumeration of `suitable' and `unsuitable' categorization of cases is not intended to be exhaustive or rigid. They are illustrative, which can be subjected to just exceptions or additions by the court/Tribunal exercising its jurisdiction/discretion in referring a dispute/case to an ADR process."

(Emphasis supplied)

The above-quoted paragraph starts with the sentence "all other suits and cases of civil nature". Thus, all cases of civil nature irrespective of the forum before which it is pending can be

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referred to any of the ADR processes. Sub-clause (ii) of paragraph 19 mentioned above says that all cases arising from strained or soured relationships, including disputes relating to matrimonial causes, maintenance etc. are suitable for ADR processes.

10. For all these reasons, I hold that the Magistrate exercising jurisdiction under the DV Act has the power to refer the matter before it to mediation applying the principles of Section 89 of CPC, record the compromise and pass an order in terms of the settlement applying the principles of Order XXIII Rule 3 of CPC.

11. When the parties settle the dispute at mediation by signing an agreement detailing the procedure to be followed to work out the settlement, certainly that agreement is having all the characteristics of Order XXIII Rule 3 of CPC. The scheme of Order XXIII Rule 3 is to avoid multiplicity of litigation to enable the parties to settle their dispute once and for all. When the parties agreed to settle the dispute in terms of compromise under Order XXIII Rule 3 of CPC, one of the parties cannot unilaterally withdraw from the compromise. The Explanation to Order XXIII Rule 3 makes it clear that only an agreement or compromise

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which is void or voidable under the Indian Contract Act could be considered as not lawful agreement for the purpose of the Rule. Chapter II of the Indian Contract Act contains provisions relating to voidable contracts and void agreements. The petitioner has absolutely no case that the compromise is vitiated by any one of the grounds enumerated in Chapter II of the Indian Contract Act. The only contention taken by the petitioner is that he was compelled to sign the mediation settlement agreement without understanding the consequences of its terms. So long as there is no contention that the compromise is vitiated by one of the grounds enumerated in Chapter II of the Indian Contract Act, the parties of the compromise are bound to honour the compromise and the court has the duty to enforce it. The Apex Court in ***Salkia Businessmens' Association and Others v. Howrah Municipal Corporation and Others*** [(2001) 6 SCC 688] has held that the terms of the compromise which become part of the order of the court should be strictly enforced. It was observed that if the courts are not to honour and implement their own orders, and encourage party litigants - be they public authorities, to invent methods of their own to short circuit and give a go-by to

the obligations and liabilities incurred by them under orders of the court - the rule of law will certainly become a casualty in the process - a costly consequence to be zealously averted by all and at any rate by the highest Courts in the States in the country. A Single Bench of this Court in **Mohanan P.K. And Others v. Sudhakshina Ramakrishnan and Others** (2017 (3) KHC 155) considered the effect of an agreement entered between the parties in a mediation. It was held in paragraph 8 of the judgment thus:

“The parties when put their signature by accepting the terms and conditions in writing, the agreement is having all the characteristics of the compromise as referred to under Order XXIII Rule 3 of CPC and no party can withdraw from it unilaterally. The moment it reaches the court, the court will have to act upon the compromise and to pass a decree in terms of the compromise. No doubt, the court concerned will have to be satisfied with the legality of the compromise as well as jurisdiction to pass a decree based on such compromise. Once a settlement has been arrived at between the parties in relation to the matters in the suit, that concludes as far as the court concerned in relation to the dispute resolved in the settlement. It is to be noted that court recording the compromise is entering into a satisfaction in terms of Order XXIII Rule 3 of CPC and the court is not merely acting upon agreement. If one party wants to withdraw from the agreement, the court has every

-:17:-

power to decide whether the agreement was effected lawfully or not. If it is proved to the satisfaction of the court that the dispute has been settled wholly or in part by a compromise, the court shall pass a decree in accordance with the agreement. The proviso to Order XXIII Rule 3 has a significant guidance in this regard. Therefore, if in the case of denial of an agreement or in the case of unilateral withdrawal, the court will have to enter a satisfaction whether there was a compromise of the subject matter of the suit or not".

12. Law presumes, *prima facie*, in favour of agreement/deed duly executed. Normally, when execution of a document is either admitted or proved and no disabling factor or vitiating circumstances is alleged or proved, admission or proof of signature with necessary formalities, if any, will be proof of execution with the knowledge of the contents at least *prima facie* for the purpose of shifting the burden. The burden of proving the vitiating factors is on the person who alleges them. The only case set up by the petitioner is that he was compelled to sign the compromise agreements, Exts.P1 and P2, without understanding the consequences of its terms. The said allegation is vague in nature. There is nothing to substantiate the same. The petitioner is a literate person. The mediation agreements were signed

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before the mediator. The counsel for the petitioner has also signed in it. The terms of the compromise are lawful. The petitioner has miserably failed to *prima facie* satisfy that he executed the agreements without knowing their consequences. As stated already, initially an interim injunction was granted by the court below against alienation of the property in question. Since the matter was settled at the mediation, the interim order was not extended and accordingly, the petitioner sold the property. It was thereafter the petitioner withdrew from the settlement. It appears that the petitioner has now raised a contention that he was forced to sign the mediation agreements without understanding its consequences only to wriggle out of the compromise. The Division Bench of this Court in **Teena M.Ansari v. Rinoj Eappen** (2019 (4) KHC 593) has held that after entering into a settlement through the process of mediation and after the court as well as the parties have acted upon the settlement, one of the parties cannot be permitted to unilaterally withdraw from the same. It was further held that a settlement agreement entered between the parties through mediation has got a certain solemnity attached to it and granting permission for

withdrawing from such an agreement would destroy the sanctity of the whole process of mediation.

13. The learned counsel for the petitioner next contended that the default clause in Ext.P2 does not contemplate the recovery of ₹25,00,000/- promised to be paid, but instead contemplates the continuance of the proceedings. The counsel further submitted that since the petitioner herein has expressed his inability to comply with the settlement, the default clause would come into operation and in such a case, the court cannot make an order based on the settlement and can make an order only after sufficient enquiry is carried out. Without conducting any enquiry, the court below went wrong in ordering the petitioner to pay a sum of ₹25,00,000/-, argued the counsel. I cannot subscribe to the said argument. Once a settlement has been arrived at between the parties in a *lis*, that concludes the dispute resolved in the settlement and the parties are bound by it. Based on the settlement arrived at the mediation, the parties cannot be directed to invoke the original jurisdiction of the court to ensure that the compromise is worked out. Such a procedure

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would be against the spirit of the mediation process itself. In ***Salkia Businessmens' Association*** (supra), the Apex Court has held that viewing breach of the terms of the compromise as a matter of mere contract between the parties and disregarding it has a disastrous effect on rule of law. As stated already, the Magistrate exercising jurisdiction under the DV Act has the power to refer the matter before it to mediation, record the compromise and pass an order in terms of the settlement. The order so passed in respect of the matters that fall within Sections 18 to 22 of the DV Act can be enforced in accordance with the law. As far as the settlement that falls outside the ambit of Sections 18 to 22 is concerned, the parties are bound to follow the terms of the settlement. The direction in Ext.P3 order to pay ₹25,00,000/- to the respondent falls within Sections 21 and 22. The settlement arrived at in Ext.P2 that both parties shall file a joint petition for divorce and get the marriage dissolved does not fall within Sections 18 to 22. Thus, the court below has rightly held in Ext.P3 that with respect to the said term, the Ext.P2 mediation agreement will prevail.

In the light of the above findings, I find no reason to

OP(Cr1) No.390/2020

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interfere with Ext.P3/Ext.R1(b) order. The original petition fails,
and it is accordingly, dismissed.

sd/-

DR. KAUSER EDAPPAGATH

JUDGE

Rp

APPENDIX OF OP (CRL.) 390/2020

PETITIONER EXHIBITS

EXHIBIT P1 TRUE PHOTOCOPY OF THE FIRST MEDIATION SETTLEMENT BETWEEN THE PARTIES ON RECORD IN MC 38/2018 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KALAMASSERY

EXHIBIT P2 TRUE PHOTOCOPY OF THE SECOND MEDIATION SETTLEMENT BETWEEN THE PARTIES ON RECORD IN MC 38/2018 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KALAMASSERY

EXHIBIT P3 TRUE PHOTOCOPY OF THE ORDER OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, KALAMASSERY IN MC 38/2018

RESPONDENT'S EXHIBITS

EXHIBIT R1 (a) TRUE COPY OF ORDER IN CMP NO.1332/2021 JUDICIAL FIRST CLASS MAGISTRATE COURT, ERNAKULAM

EXHIBIT R1 (b) TRUE COPY OF ORDER IN MC 38/2018 OF THE JUDICIAL FIRST CLASS MAGISTRATE COURT, ERNAKULAM.