
(2023) 08 KL CK 0044

In the High Court Of Kerala

Case No : Original Petition (Family Court) No. 202 Of 2022

Treasa Bency @ Bency N L

APPELLANT

Vs

Dr. Preceline George @ Antony Preceline George

RESPONDENT

Date of Decision : 04-08-2023

Acts Referred:

Constitution of India, 1950 — Article 227

Citation : (2023) 08 KL CK 0044

Hon'ble Judges : A.Muhammed Mustaque, J;Sophy Thomas, J

Bench : Division Bench

Advocate : K.V.Bhadra Kumari, Santhan V.Nair, Christeena P George

Final Decision : Dismissed

Judgement

Sophy Thomas, J.

1. The judgment debtor in EP No.7 of 2016 in OP No.1698 of 2009 on the file of Family Court, Ernakulam, filed this original petition challenging Ext.P13 order dated 01.12.2021.
2. The petitioner herein filed OP No.1698 of 2009 for recovery of money and gold. The respondent/husband preferred a counterclaim for recovery of 11 sovereigns of gold ornaments entrusted by him with the petitioner/wife. That OP was tried along with two other OPs, and a common judgment was delivered by the Family Court on 31.07.2012, granting a decree in favour of the wife, and she was directed to return the gold ornaments of the husband, as and when she gets back the money and gold from the husband, as per the decree.
3. Admittedly, the respondent/husband paid Rs.15 lakh and returned the wedding ring to the petitioner as per the decree, and thereafter he filed EP No.7 of 2016 to get back the gold ornaments as claimed in his counterclaim. The wife opposed that EP, but, as per Ext.P4 order, the Family Court directed the wife to return 11 sovereigns of gold to the husband, or its value as prayed in the EP with interest @ 9% per annum, within one month. The wife preferred OP(FC) No.154

of 2019 before this Court to set aside Ext.P4 order. As per Ext.P5 judgment, this Court set aside Ext.P4 order and remanded the matter to Family Court, Ernakulam, for further consideration. Accordingly, the Family Court passed Ext.P13 order directing the wife to return 86 gms of gold ornaments scheduled in the counterclaim, or its present market value with interest @ 9% per annum. Against that order, now the judgment debtor has preferred this original petition.

4. Heard learned counsel for the petitioner as well as the respondent.

5. Let us see whether this is a fit case to invoke the supervisory powers of the High Court, under Article 227 of the Constitution of India.

6. An irresponsible decree passed by a Family Court made the parties to shuttle between courts, challenging the executability of the decree. In the decretal portion of the judgment in OP No.1698 of 2009, though the Family Court directed the petitioner to return the gold ornaments given to her by the husband, the quantity of gold to be returned was not specifically stated. So, when the husband filed the E.P for recovery of the gold ornaments directed to be returned to him, the wife opposed the same, and she approached this Court, challenging the orders passed by the execution court.

7. Let us see, even if the weight of the gold ornaments to be returned to the husband was not specifically stated in the decree, whether it was discernible from the judgment itself. As we have seen, OP No.1698 of 2009 was filed by the wife for getting back Rs.15 lakh and a gold ring weighing one sovereign. In that OP, the husband preferred a counterclaim for 11 sovereigns of gold scheduled therein. To the counterclaim filed by the husband, no replication was seen filed by the wife. In the proof affidavit filed by the husband as PW1, he had specifically stated the counterclaim made by him, and he had a prayer to treat his counterclaim as part of the proof affidavit. During cross examination of PW1/ husband, he was not confronted by the wife with the counterclaim made by him. When the wife was examined as RW1, she categorically stated that she was demanding back the gold ornaments purchased by her father for an amount of Rs.3,50,000/-, and those ornaments are in her locker. Moreover she admitted that she got back C and D schedule properties also from the husband. Admittedly now no gold is due to her from the husband.

8. During cross examination of the wife, she categorically admitted that, the thali chain with thali, the wedding ring bearing the name of the husband, one pair of ear studs and six bangles weighing 6 gms each, are in her possession. She never put forward any claim over those ornaments which were admittedly scheduled in the counterclaim. The ornaments admitted to be in possession of the wife were tallying with the gold ornaments scheduled in the counterclaim.

9. It is a matter of common knowledge that the thali chain and thali will be given by the husband. When the husband was possessing the wedding ring bearing the name of the wife, normally the wife will be possessing the wedding ring bearing the name of the husband. Though the wife was admittedly possessing the

wedding ring, in the counterclaim, the husband was not making any claim over that ring. He was claiming only the thali chain and thali weighing 5 sovereigns, six bangles weighing 4½ sovereigns in total, and a pair of ear studs weighing 1½ sovereigns. After giving back the 'thali' weighing 2 gms, the wife was possessing 86 gms of gold. She has no case that those ornaments were part of the gold purchased by her father, expending Rs.3.5 lakh, which is now available in the locker. She never filed a replication against the counterclaim. In paragraph 21 of the common judgment, the learned Family Court has discussed about the counterclaim put forward by the respondent/husband. It reads as follows:

"21. Regarding counter claim, RW1 admits in cross examination that she is in possession of the gold ornaments claimed under counter claim, therefore, I feel that no elaborate discussion is necessary on this issue. Hence it is found that PW1 is entitled to get it back...".

10. May be because, such a finding was there in paragraph 21, in the decretal portion, the weight or details of the ornaments mentioned in the counterclaim was not repeated. In the decretal portion, the Family Court ought to have mentioned, at least the weight of the ornaments that has to be returned by the wife to the husband. Taking advantage of the omission from the part of the Family court, now the wife is making all sorts of objections to the execution petition filed by the husband, that too after getting back the gold and money due from the husband under the very same decree.

11. We have already found that, to the counterclaim filed by the husband, no replication was filed by the wife, and the husband was not confronted with the counterclaim, during his cross examination. The wife had no case that the gold ornaments scheduled in the counterclaim actually belonged to her. Though the husband was given a decree for recovery of gold from the wife as per the counterclaim, no appeal was preferred by the wife against that decree. When the husband filed execution petition as EP No.7 of 2016 and obtained Ext.P4 order, directing the wife to return 11 sovereigns of gold, she filed Mat.Appeal No.378 of 2019 before this Court with a delay of more than six years. Finding no satisfactory explanation for the delay, the delay petition as well as the Mat.Appeal were dismissed. Now she is trying her luck by challenging Ext.P13 order passed against her, by the execution court.

12. The contention taken up by the learned counsel for the petitioner/wife that no executable decree was passed against her, is not tenable, as the decree was for the counterclaim put forward by the husband, which was specifically scheduled in the OP, and admitted by the petitioner. So, even if the weight of the ornaments to be returned, was not specified in the decree, since the decree was for the counterclaim, it was very well discernible from the schedule of the counterclaim, with its weight and description. We are not justifying the Family Court who failed to give the exact weight of the ornaments to be returned, in the decretal portion. But, parties cannot be made to run from pillar to post, for the irresponsible way of doing things by a Family Court.

13. The parties were litigating each other since 2009, and they got a decree in the year 2012. Even in the year 2023, i.e. after a decade of passing the decree, one of the parties is preventing the other from enjoying the fruits of that decree, by taking undue advantage of an omission from the part of the court, and that cannot be permitted.

On going through the facts and circumstances, we are of the view that, after making clear admission before the trial court, that she was possessing the thali chain with thali, ear studs and six bangles scheduled in the counterclaim and without making any protest against that claim, taking undue advantage of an omission from the part of the Family Court, she is opposing the decree even after receipt of the money and gold due from the husband under the very same decree. So, the O.P(FC) filed by the petitioner/wife is liable to be dismissed.

Hence, the OP(FC) stands dismissed.