

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE DEVAN RAMACHANDRAN

&

THE HONOURABLE MRS. JUSTICE M.B. SNEHALATHA

FRIDAY, THE 19<sup>TH</sup> DAY OF JULY 2024 / 28TH ASHADHA, 1946

MAT.APPEAL NO. 113 OF 2023

(AGAINST THE JUDGMENT IN OP NO.410 OF 2019 DATED 31.10.2022 PASSED

BY THE FAMILY COURT, THODUPUZHA)

APPELLANT/PETITIONER:

ANKITHA JOY  
AGED 26 YEARS  
D/O. JOY AUGUSTINE @ AUGUSTHY,  
THUNDATHIL HOUSE, MUTHALAKODAM P.O,  
THODUPUZHA VILLAGE, THODUPUZHA TALUK,  
IDUKKI DISTRICT, PIN - 685605.

BY ADV T.V.GEORGE

RESPONDENT/RESPONDENT:

JOY AUGUSTINE @ AUGUSTHY,  
AGED 55 YEARS,  
S/O AUGUSTHY, THUNDATHIL HOUSE,  
MUTHALAKODAM P.O, THODUPUZHA VILLAGE,  
THODUPUZHA TALUK, IDUKKI DISTRICT,  
PIN - 685605.

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON  
19.07.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

'C.R.'

JUDGMENT

Devan Ramachandran, J.

In adversarial litigative processes, the general rule is that the burden of proof resides on the party who asserts the affirmative of the issue. However, Section 109 of The Bharatiya Sakshya Adhiniyam, 2023 (formerly Section 106 of the Indian Evidence Act, 1872) serves as an exception to this general rule by shifting the burden of proof to the party who has exclusive knowledge of the fact in question.

2. Incontestably, only a person who is in possession of a special fact or knowledge can disseminate it. To ensure fairness and transparency in judicial proceedings, Section 106 of the Indian Evidence Act makes a party in possession of such knowledge accountable. Exclusive knowledge of certain facts casts

responsibility to disclose them; it places the burden on the party who is in a better position to produce the germane evidence. If the party with special knowledge fails to provide sufficient evidence, the court may draw an adverse inference against them.

3. To paraphrase, Section 109 of the Bharatiya Sakshya Adhiniyam, establishes principles concerning the burden of proof in cases where a fact lies within the special knowledge of an individual; it stipulates that when any fact is particularly within the knowledge of one party, the responsibility to prove that fact rests with that party.

4. The afore have specific bearing in this case. The appellant calls into question the correctness of the judgment of the learned Family Court, Thodupuzha, in O.P.No.410/2019.

5. The aforementioned Original Petition was

filed by the appellant seeking a decree of maintenance and for the expenses for her marriage in future from her father - the respondent herein; but which has now been dismissed by the learned Family Court, primarily finding that she has not been able to establish the financial status and fiscal condition of the latter.

6. Smt. Adorn Anna Martin - learned counsel for the appellant, vehemently argued that the learned Family court has erroneously and unjustifiably placed the entire onus of proof on her client to establish the financial status of her father - the respondent herein, when this was virtually an impossibility for her. She argued that, when her client made a specific assertion that the respondent - her father, had neither maintained her, or her siblings; nor has he made any provision for her marriage expenses

in future, particularly when he had the means to do so, being a person engaged in Real Estate Business and Financing - the learned Trial Court could not have dismissed her Original Petition, merely saying that she has been "*unable to establish the financial status of the respondent*" (sic).

7. Smt. Adorn Anna Martin, thereafter, pointed out that the respondent did not lead any evidence, though he was examined as RW1, to establish that he did not have sufficient means; and that this is vitally pertinent because, his specific case, in the objections filed before the Trial Court, was solely that she is working as a Guest Lecturer in a College, thus being capable of maintaining herself; thus he being not liable to maintain her. She predicated that, when her client is not a married person and when, in her examination as PW1, she admitted

that she is working in a College, but receiving a meager remuneration of Rs.5,000/- per month, it was impermissible for the Trial Court to have still found that she did not lead proper evidence against her father to prove his income or means. She thus prayed that this Appeal be allowed and the Original Petition be ordered as prayed for.

8. We notice from the endorsements on the files that the respondent has been validly served summons from this Court. However, he has chosen not to be present in person, or to be represented through counsel; thus constraining us to dispose of this Appeal in his absence.

9. Smt.Adorn Anna Martin has handed over to us all the documents and evidence on record; and we, therefore, deem it appropriate to dispose of this matter based on the same because, the evidence includes only Ext.A1 which is the

School Certificate of the appellant, and the depositions of PW1 and RW1.

10. We find force in the afore submissions of the learned counsel for the appellant because, PW1 - the appellant herein, conceded in her deposition that she is working as a Guest Lecturer in a College, but explained that she was only earning Rs.5,000/- per month.

11. No contra evidence to the afore has been offered, even when the respondent was examined as RW1. His consistent position, as discernible from his deposition as RW1, is that, he had taken care of his family all through and that he had not neglected them; but that it was they who had deserted him for frivolous reasons. As rightly argued by Smt.Adorn Ann Martin, RW1 also has a case that the appellant is not entitled to maintenance, since she is now employed.

12. *Quod Hoc* the financial capacity of the

respondent, his deposition as RW1 contains only a bald assertion that he does not have any income and that he is not engaged in Real Estate Business or Money Lending activities. However, his testimony is conspicuously absent as to his means, or as to his avocation; and we are, therefore, of the firm view that the learned Family Court could not have placed blame on the appellant because, as rightly argued by her learned counsel, it would be rather sysiphean for her to prove the income of the respondent, especially when the means of an individual can be disclosed only through evidence, documents and other materials, which may be in his exclusive possession.

13. This is apodictic because, as discussed afore, in an application for maintenance, it is the respondent who may be normally bound to disprove his alleged income, in view of Section

109 of the Bharatiya Sakshya Adhiniyam, 2023 (verbatim to Section 106 of the Indian Evidence Act), which reads as follows:

*"109. Burden of proving fact especially within knowledge. - When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."*

14. The afore provision ineluctably imposes the burden of proof on the respondent since his income details are something that is "especially within his knowledge"; and obviously hence, if he fails or refuses to furnish germane evidence/details regarding it - which is within his special knowledge - then a valid presumption may lie against him.

15. We are, consequently, of the opinion that the entire matter will require to be reconsidered by the learned Family Court, after affording necessary opportunities of leading

evidence to both sides.

16. We are persuaded to the afore course also taking into account of the singular fact that the appellant is a young lady, who has yet not married; and because she asserts - though as of now, without being fully proved - that she has no means to maintain herself, her income as a Guest Lecturer being exiguous; and that the respondent has refused to do so even in the past.

For the afore, we allow this Appeal and set aside the impugned judgment of the learned Family Court; with a consequential direction to it to reconsider OP No.410/2019, after affording necessary opportunities to both sides of leading fresh evidence and of further hearing; thus culminating in an appropriate fresh judgment, as expeditiously as is possible, but not later than eight months from the date of receipt of a copy

of this judgment.

We clarify that we are fixing the time frame relatively short, solely taking into account the assertion of the appellant that she is awaiting marriage and that she requires financial support for it urgently.

We, however, deem it necessary to clarify that we have not entered into the merits of the rival contentions, except to the extent necessary for the purpose of this judgment; and that the entire matter will be reconsidered by the learned Family Court as per law, following due procedure.

Sd/-

DEVAN RAMACHANDRAN

JUDGE

Sd/-

M.B.SNEHALATHA

JUDGE