IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN
&
THE HONOURABLE MR. JUSTICE P.D.RAJAN

THURSDAY, THE 8TH DAY OF JANUARY 2015/18TH POUSHA, 1936

Mat.Appeal.No. 265 of 2005

O.P.NO. 421/1995 OF FAMILY COURT, THIRUVANANTHAPURAM

APPELLANT(S)/PETITIONER :

T.JOHNSON,
S/O.THOMSON, MOOLAVILAVEEDU, NELLIKKAKUZHI,
KANJIRAMKULAM VILLAGE, NEYYATTINKARA TALUK.

BY ADVS.SRI.C.A.CHACKO
SMT.C.M.CHARISMA
SMT.SONIYA.M
SRI.N.A.SHAFEEK

RESPONDENT(S)/RESPONDENTS :
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1. **RAJESWARY ALIAS AMBIKA,**
   D/O. KUNJULEKSHMY, EDAVAR VEEDU, KUNNAPPUZHA,
   ARAMADA.P.O., ARMADA VILLAGE, NEYYATTINKARA TALUK.

2. **MANIYAN,**
   S/O.THANKAPPAN, KAMALAM BHAVAN, EAST OF C.S.I.CHURCH,
   KUNNAPUZHA, ARMADA.P.O.

R2 BY ADVS. SRI.R.T.PRADEEP
SRI.A.A.RASHEED

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 08-01-2015, ALONG WITH MA.NO. 266 OF 2005, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Msd.

V.K. MOHANAN & P.D. RAJAN, JJ.

Mat.Appeal Nos. 265/2005 & 266 of 2005

Dated this the 8th day of January, 2015

JUDGMENT

P.D.Rajan,J.

These appeals are preferred against the judgment in O.P.Nos.421/1995 and 468/1997 of Family Court, Thiruvananthapuram. O.P.No.421/1995 was filed by the husband against his wife for divorce on the ground of adultery. Subsequently, it was amended by inserting the prayer for divorce on the ground of desertion. Appellant is the husband and respondent is the wife in these appeals. The petitioner's case in the trial court was that he married the 1st respondent as per Christian rites at CSI Church, Aramada, on 17.8.1983. In the wedlock, a male child was born to them on 11.7.1984. Subsequently, the relationship between the

petitioner and the 1st respondent became strained and on 25.7.1986, the 1st respondent left the company of the petitioner and is living separately. After separation, the 1st respondent preferred O.S.No.126/1987 for maintenance before Munsiff Court, Thiruvananthapuram and the suit was decreed directing the petitioner to pay maintenance of ₹200/- per month to the 1st respondent. Before filing the above O.S., she filed M.C. No.54/1986 before the Judicial First Class Magistrate Court, Neyyattinkara under Section 125 Cr.P.C., wherein an order was passed for payment of maintenance to the child. The petitioner contended that he got information that the 1st respondent is living in adultery with the 2nd respondent. In the circumstances, he approached the Family Court for a decree of divorce or in the alternative to pass a decree of judicial separation on

the ground of adultery and desertion.

2. The 1st respondent resisted the above contention in the trial Court and contended that when they were residing together, the petitioner demanded huge amount from her and pledged all the gold ornaments of the 1st respondent. Thereafter, he ill-treated her both mentally and physically. Subsequently, on 25.7.1986, she was hospitalized due to ruthless assault of the petitioner and residing separately. She has no illicit relationship with the 2nd respondent. According to the 1st respondent, the petitioner is leading an immoral life and therefore, it is difficult to reside with him. The 2nd respondent also denied the illegal relationship with the 1st respondent and contended that the 1st respondent is his close relative and therefore, he is an unnecessary party in this case.

3. O.P.No.468/1997 was filed by the petitioner for cancellation of judgment and decree in O.S.No.126/1987 of Munisff's Court, Thiruvananthapuram and other reliefs. The petitioner contended that after the birth of a male child on 11.7.1984, the 1st respondent deserted him and started living separately. Thereafter, she filed M.C.No.54/1986 before the Judicial First Class Magistrate Court, Neyyattinkara and an order was passed in that M.C.to pay maintenance allowance at the rate of ₹100/- per month to the child. In addition to the above M.C., she filed O.S.No.126/1987 before the Additional Munsiff's Court, Thiruvananthapuram in which the petitioner was directed to pay an amount of ₹200/- per month to the 1st respondent. It is the petitioner, who deserted her and she has no other source of income to meet her

requirements. The maintenance amount awarded is insufficient for her day-to-day livelihood. Therefore, there is no ground to set aside the decree in O.S.126/1987, she filed a counter claim for enhancing the maintenance amount. The petitioner also filed a replication with regard to the counter claim.

4. After framing issues, the trial Court recorded the evidence in both cases in O.P.No.421/1995, which consists of oral testimony of PW1, PW2 and CPW1 and documentary evidence of Ext.A1 to A8 and B1 to B7. The Family Court, after analysing the oral and documentary evidence adduced by both parties, granted a decree of divorce on the ground of desertion and O.P.No.468/1997 was dismissed and the counter claim was allowed increasing the maintenance amount as ₹400/- per month to the 1st

respondent. Aggrieved by the above judgment and decree, the husband preferred these appeals.

5. The learned counsel appearing for the appellant contended that the decree of divorce granted by the Family Court on the ground of desertion is not disputed. But, the learned counsel contended that the maintenance granted in O.P.No.468/1997 is excessive. According to her, the 1st respondent already relinquished her claim for maintenance in M.C.No.54/1986 before the Judicial First Class Magistrate Court, Neyyattinkara, as per the compromise entered into between the appellant and the 1st respondent. Subsequently, she did not make any such claim before the institution of O.P.No.468/1997. The 1st respondent claimed enhancement only in her counter claim. Hence, the learned counsel prays to set aside the judgment

and decree passed in O.P.No.468/1997.

6. The learned counsel appearing for the 1st respondent strongly resisted the above contention and submitted that the compromise entered into between the appellant and the 1st respondent in M.C.No.54/1986 is not a ground for rejecting her claim for maintenance in a subsequent O.P. in another situation, after divorce. The learned counsel contended that the 1st respondent is entitled to get the enhanced rate of maintenance, but no application was filed from her side.

7. According to Section 10 (ix) of the Divorce Act, 1989, after solemnization of the marriage, on a petition presented to the District Court either by the husband or the wife, be dissolved on the ground that since the solemnization of marriage, the other party has deserted

the petitioner for at least two years immediately preceding presentation of the petition. The evidence of PW1 shows that after the marriage, both parties resided together only for a short period. Thereafter, the 1st respondent renounced the matrimonial home and residing separately. The petitioner alleges adultery against his wife. Even though such a contention was raised, no other believable evidence has been adduced in the trial Court to prove the adultery. The trial Court came to the conclusion that the 1st respondent withdrew from the society of the petitioner on deserting him. The 1st respondent has also contended that the husband deserted her and she is residing separately from 1986 onwards. PW1 produced a marriage certificate obtained from the Chairman of Diocese, which was marked as Ext.A1 by the trial court.

Ext.A2 is the copy of the maintenance petition filed before J.F.C.M.-I, Neyyattinkara. Ext.A3 is the counter in M.C.54/86. Ext.A4 is the compromise petition in the above M.C. Ext.A5 is the F.I.R in Crime No.179/1990 of Poojappura Police Station. Ext.A7 is the judgment in C.C.No.137/1993. Ext.A8(a) is the wound certificate. Even though those documents were produced in the trial Court, those are not sufficient to prove the alleged adultery. The 1st respondent was also examined in the trial Court as CPW1 and Exts.B1 to B7 were marked on her side. Ext.B4 is the counter in M.C.No.54/1986. Ext.B7 is the written statement in O.S.No.126/1987. These evidence show that there was a civil dispute and a maintenance case is pending, in which the maintenance case was settled as per Ext.A4. Considering the submission made by the learned counsel

for the appellant, there is evidence with regard to desertion.

8. Apex Court in **Bipinchandra Jaisinghbai Shah** v. **Prabhavati** [AIR 1957 SC 176] held that 'For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid."

In paragraph 10 of Bipinchandra Jaisinghbai Shah's case (supra), held as follows:

> 10. WHAT is desertion? "Rayden on Divorce" which is a standard work on the subject has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-

"In its essence desertion means the intentional permanent forsaking and abondonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the

presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similiarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not

call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period

> that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-
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> "These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution... .. "
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> With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back."

9. In the trial Court, CPW1, the 1st respondent admitted that the 2nd respondent is close relative of the 1st respondent, which was admitted by the 2nd respondent in his counter statement. Considering the evidence of PW1

and CPW1 it is found that from the date of desertion i.e, on 25.7.1986, both of them were residing separately. The facts revealed by their evidence show that their conduct and expression revealed their intention for a permanent separation. They have no intention to reunite. Therefore, this is a fit case to grant divorce on the ground of desertion. The finding of the Family Court on the ground of desertion and adultery is correct and no interference is necessary.

10. The specific case of the 1st respondent was that her husband deserted her in the year 1986. She is residing with her child, after desertion. She also adduced evidence to show that while they were residing together, there was physical and mental torture from the side of her husband and she was admitted in hospital. Earlier, she

filed a maintenance petition before the Judicial First Class Magistrate Court, Neyyattinkara and an order was passed in that case to pay maintenance of ₹100/- per month to the child. She also filed O.S.No.126/1987 before the Additional Munsiff Court, Thiruvananthapuram, in which there was a direction to pay ₹200/- per month to her. CPW1 in her evidence admitted that she has no other job or income for her livelihood. PW1 contended that CPW1 deserted him and living in adultery and therefore, she is not entitled to get any amount as maintenance, which was denied by the lower Court in O.P.No.468/1997 and a sum of ₹400/- was awarded to her as monthly maintenance. According to the 1st respondent, since the standard of living is increasing recently, it is a meagre amount to meet her day-to-day requirements. No contra claim was put

forward by the 1st respondent. Since as a deserted wife, she has sufficient reasons to refuse to live with the husband. Cruelty made by the husband instigating her to desert him. The 1st respondent has rightly pointed out that the husband has a duty to give maintenance to his wife. Accordingly,the Family Court granted maintenance of ₹400/- to the wife. We do not find any illegality in the above judgment. In such circumstances, there is no merit in these appeals and accordingly, the appeals are dismissed. There is no order as to costs.

V.K. MOHANAN, JUDGE.

P.D. RAJAN, JUDGE.

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