

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

TUESDAY, THE 6TH DAY OF JANUARY 2015/16TH POUSHA, 19361

Mat.Appeal.No. 378 of 2005 ()

AGAINST THE ORDER/JUDGMENT IN OP 481/2003 of FAMILY COURT, KANNUR
DATED 07.06.2005

APELLANT/PETITIONER:

KIZHAKKE PURAYIL KUNHIRAMAN,
AGED 32 YEARS, TEACHER, RESIDING AT PODIKKALAM
IN SREEKANDAPURAM AMSOM, KOTTUMUGHAM POST
SREEKANDAPURAM (VIA) .

BY ADVS.SRI.M.SASINDRAN
SRI.SREEJITH S.NAIR

RESPONDENT(S)/RESPONDENT:

O.S.DEEPA, AGED 23 YEARS,
D/O.SREEDHARAN, OTTAPPANAL HOUSE, SREEKANDAPURAM AMSOM
ELLERINHI DESOM, KOTTUMUGHAM POST.

R,R1 BY ADV. SRI.V.A.SATHEESH
R,R1 BY ADV. SRI.V.T.MADHAVANUNNI

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON
06-01-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

acd

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

Mat.Appeal No. 378 of 2005

Dated this the 6th day of January, 2015

JUDGMENT

V.K.Mohanana,J.

The above appeal is directed against the judgment dated 7.6.2005 in O.P.No.481/2003 of the Family Court, Kannur, by which the learned Judge dismissed the above O.P. filed by the appellant/petitioner for divorce under Section 13(1) (ib) of the Hindu Marriage Act.

2. The case of the appellant/petitioner is that the marriage between the respondent and himself was solemnized on 19-10-1997 as per the customs prevailing in their community and the respondent/wife, without any valid reason, deserted him since 28.12.1998. It is the further case of the appellant/petitioner that though a decree was passed against

the respondent/wife and in favour of the petitioner, restituting conjugal rights, the wife failed to come and reside along with him and under the above circumstances, he approached the court below with the prayer for a decree dissolving his marital relationship with the respondent. By filing a counter statement, the respondent/wife, while admitting the fact that she is legally wedded wife of the appellant/petitioner, denied all other contentions. According to her, due to the cruelty towards her from her husband, she was forced to shift her residence to her parental home. She contended that she has filed a compliant before the Judicial First Class Magistrate Court, Thaliparamba against the cruelty maintained by the appellant/petitioner towards her. It is also her case that O.P.No.21/2000 was filed by the appellant/petitioner for restitution of conjugal rights.

But, she did not contest that O.P. under the impression that the the petitioner-husband will change his conduct and approach towards her. It is the further contention of the respondent-wife that after the decree in O.P.No.21/2000, the appellant-husband has not taken any steps to take her back. According to her, though on 26.5.2002, she along with her parents had gone to the residence of the petitioner, the petitioner-husband refused to accept her. According to the respondent-wife, she is always ready and willing to go and join with the petitioner-husband and to reside along with him. So, according to the respondent-wife, there is no merit in the Original Petition filed by the petitioner-husband.

3. On the appearance of the parties, an attempt was made for a settlement, but the same failed and the Principal Consellor reported that though the respondent-

wife was ready to go and reside along with the petitioner-husband, the petitioner-husband was not willing for a reunion.

4. Thereafter, the trial was proceeded during which the petitioner was examined as AW1 and Exts.A1 to A4 were marked. From the side of the respondent, RW1 and RW2 were examined.

5. On the basis of the rival contentions and the evidence on record, the trial court formulated two issues, among which the first issue is that whether the petitioner is entitled to get a decree for divorce on the ground of desertion and the second issue is to the proper order as to costs. The learned Judge of the Family Court, after considering the entire evidence on materials on record, guided by the decision of this Court in K. Narayanan v. K. Sreedevi [AIR 1990 Kerala 151], held that the petitioner

has miserably failed to establish the essential ingredients of desertion in support of the prayer sought for by him and consequently, dismissed the petition. It is against the above judgment, the petitioner therein preferred this appeal.

6. We have heard Sri. M. Sasindran, the learned counsel for the appellant and Sri. V.T. Madhavanunni, the learned counsel for the respondent.

7. The learned counsel for the appellant vehemently submitted that for the last several years, the appellant and the respondent were residing separately, since the respondent deserted the appellant-husband. According to the learned counsel, the learned Judge of the trial court is wrong in dismissing the petition preferred by the appellant-husband. It is also pointed out by the learned counsel for the appellant that the complaint filed

by the wife against the petitioner/appellant found against the respondent-wife and in favour of the appellant-husband and as such, according to the learned counsel, the reasons stated by the respondent-wife for living separately are false and incorrect. It is also the contention of the learned counsel for the appellant that the contentions taken by the respondent-wife resisting the prayer for divorce are not substantiated, since, even though there is a decree in favour of the petitioner/appellant restituting the conjugal right of the petitioner, the respondent-wife refused to join with the appellant-husband. So, according to the learned counsel, the said findings itself is sufficient to show that the wife wilfully deserted the appellant-husband. The learned counsel for the appellant has also submitted that the trial court is wrong in dismissing the petition for divorce on the

ground of desertion.

8. On the other hand, Sri. V.T. Madhavanunni, the learned counsel for the respondent vehemently submitted that the appellant-husband filed O.P.No.21/2000 for restitution of conjugal rights, only after the respondent filed the M.C. for maintenance during the year 2000. Justifying the reasons assigned by the learned Judge of the Family Court dismissing the divorce petition, the learned counsel for the respondent submitted that the decree in O.P.No.21/2000 was an ex parte decree and after obtaining an ex parte decree, the appellant- husband has not taken any steps to execute that order. The said fact is sufficient to show that the filing of O.P.No.21/2000 was, without any bona fide, but only to create ground for divorce.

9. We have carefully considered the rival

contentions and have also perused the evidence on record. In the light of the contentions advanced and in view of the evidence on records, the only question to be considered is whether the trial court is justified in denying a decree for divorce as sought for by the appellant-husband.

10. Admittedly, the marriage between the appellant and the respondent was solemnized on 19.10.1997 as per the customs then prevailing in their community. It is also an admitted fact that on 28.12.1998 onwards the respondent-wife was residing separately. The ground urged for divorce is desertion. The legal position is well settled by the decision of this Court, which is relied on by the learned Judge of the Family Court. In K. Narayanan's case (*supra*), this Court had held that "two essential conditions attached to the notion of desertion are : (1) the factum of separation and (2) the intention to bring marital

life permanently to an end animus deserendi". In the facts and circumstances of the case and in view of the allegations raised against the respondent/wife, further question to be considered is whether the respondent-wife deserted the petitioner/husband with an intention to bring marital life permanently to an end. In order to consider the above question, certain material facts are absolutely necessary, which we will refer now.

11. As we have already indicated, the fact beyond the dispute is that the respondent was residing separately since 28.12.1998. However, the appellant-husband approached the Sub Court, Payannur only during the year 2000 for restitution of conjugal rights. In this juncture, it is relevant to note that the respondent-wife filed M.C.No.19/2000 before the Judicial First Class Magistrate Court, Thaliparamba claiming maintenance under Section

125 Cr.P.C. and the said prayer was allowed by the learned Magistrate as per Ext.-A3 order. It is also relevant to note that the specific contention raised by the appellant-husband is that the wife, leaving him alone, went to her paternal home and resided there, deserting him. However, in the maintenance case, the learned Magistrate allowed the claim for maintenance. If the stay of the respondent-wife in her paternal house is without any justifiable reason, the learned Magistrate could not have granted the maintenance claimed by such a wife. In this juncture, it is relevant to note that when the respondent-wife was examined as RW1, she had specifically deposed before the Court that as she could not tolerate the cruelty maintained against her by the appellant-husband, she was forced to quit the matrimonial home and to reside in her parental house. The above evidence of RW1 remains in tact and

there was no effective challenge against such evidence. If that be so, the explanation offered by RW1 for leaving separately would show that she had no intention to desert the petitioner-husband, but, she was forced to reside separately because of the cruelty and harassment maintained by the husband against her. In addition to the above facts, it is also relevant to note that the decree in O.P.No.21/2000 is an ex parte decree in favour of the appellant/husband, and according to RW1, she did not contest that petition under the impression that her husband/ appellant would change his attitude towards her. The learned Judge of the Family Court has specifically found that after the decree in O.P.No.21/2000, the appellant did not take any steps to execute the said decree for bringing back his wife/respondent to his house and to have a family life with his wife. The above facts and the

evidence available on record are sufficient to hold that the learned Judge of the Family Court is correct in his finding that the appellant-husband failed to establish that the separate living by the wife was with an intention to put an end for marital life permanently.

In the light of the above facts and circumstances and in view of the evidence and materials on record, we do not find any merit in the contentions advanced by the learned counsel for the appellant, so as to interfere with the judgment under challenge. Accordingly, this appeal is dismissed as devoid of any merit.

V.K. MOHANAN, JUDGE.

P.D. RAJAN, JUDGE.

acd

