

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE V.K.MOHANAN

&

THE HONOURABLE MR. JUSTICE P.D.RAJAN

WEDNESDAY, THE 11TH DAY OF FEBRUARY 2015/22ND MAGHA, 1936

Mat.Appeal.No. 244 of 2007 ( )  
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AGAINST THE ORDER/JUDGMENT IN OP 32/2006 of FAMILY COURT, KASARAGOD  
DATED 20-02-2007

APPELLANT/RESPONDENT:  
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C.V.USHA KUMARI, AGED 34 YEARS,  
D/O NARAYANAN, SCHOOL TEACHER, RESIDING AT  
CHERALAM VEEDU, PO.KODAKKAD, KODAKKAD VILLAGE  
HOSDURG TALUK, KASARAGOD DISTRICT.

BY ADV. SRI.V.N.RAMESAN NAMBIAN

RESPONDENT/PETITIONER:  
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P.SUKUMARAN,  
S/O.KELU, PRESENTLY CI OF POLICE, RESIDING AT BENGALOM  
P.O.BENGALOM, MADIKAI VILLAGE, HOSDURG TALUK  
KASARAGOD DISTRICT

R,R1 BY ADV. SRI.KODOTH SREEDHARAN

THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 11-  
02-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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

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Mat Appeal No.244 of 2007

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Dated 11<sup>th</sup> February, 2015

## JUDGMENT

**P.D.RAJAN,J**

This appeal is directed against the judgment in O.P.No.32 of 2006 of the Family Court, Kasargode which was filed under Section 13(1)(ia)(ib) of Hindu Marriage Act for divorce by the husband against his wife. Appellant is the wife and respondent is the husband in this appeal.

2. The case of respondent in the family court was that he married the appellant on 12.5.1994 as per hindu customary rites. After the marriage, both of them resided together in the parental house for fifteen days and thereafter both of them went to their work place. At the time of marriage, he was a Police Constable at Vellarikundu police station and his wife was a teacher in a government school. In the year 1995 he got selection as S.I of Police, there arose the difference between them. After training he joined at Calicut for practical training, at that time the wife refused to join with him. Subsequently,

he was transferred to Pandalam in the year 1995 where he worked for one year and one month, there also his wife did not join with him. In the year 1998, he was transferred to Manjeshwaram. Thereafter to Ferook in the year 2000 and there was no progress in her conduct. According to the petitioner, the wife resided with him till 27.12.1998. During the subsistence of the marriage, wife aborted the pregnancy without his consent thereby, petitioner's ambition for having a child was spoiled by his wife. She usually ill treated him mentally by abusing him over phone. She also complained to his superior officers through telephone making baseless allegations against him. The settlement talks were failed, in the circumstance, the husband approached the Family Court with the above petition.

3. The appellant filed a written objection in the family court and contended that after the marriage she obtained transfer and resided along with the petitioner at his work place in Malappuram and Kozhikode Districts. While they were residing together she became pregnant but the

pregnancy was tubal pregnancy and she underwent a surgery with the consent of her husband. She also resided with him from 27.5.1997 to 13.5.1998 on medical grounds. He had developed an illicit relationship with one Shylaja Kurup, who is a lawyer at Pandalam, while he was working at Ferook. The lady contacted him on the impression that petitioner was a bachelor. When appellant became pregnant, the respondent took her to a Gynaecologist at Edappal on 31.3.1999 and was satisfied with himself about her health condition. While he was working at Malappuram and Kozhikode, she stayed with him at the official residence of the S.I at Nallalam till May 2000 and at Kelakam in Kannur District. The husband also threatened her several times and forced her to obtain divorce by mutual consent. There was no cruelty from her side and she is ready and willing to reside with him.

4. Both parties adduced oral and documentary evidence in the Family Court. The evidence consists of oral testimony of PW1, PW2 and RW1 and documentary evidence of Ext.A1 to A5, Ext.B1 to B4 and Ext.X1.

Family Court, after sifting and weighing the evidence on record, allowed the application under Section 13(1)(ia) and (ib) of the Hindu Marriage Act and the marriage was dissolved with effect from the date of decree with cost of the proceedings from the respondent. Aggrieved by that, the wife approached this court with this appeal.

5. Learned counsel appearing for the appellant contended that the alleged desertion under Section 13(1)(ib) was not proved in this case. Appellant resided with the respondent till May 2000 at Nallalam. Therefore, the period of desertion for a continuous period not less than two years immediately preceding the presentation of the petition was not proved in this case and there was no pleadings about the date of desertion and mental cruelty in the petition. When there was no pleadings and evidence in a case, the respondent is not entitled for a decree as claimed in the petition. Learned counsel relied on the decision of the Apex Court in **Adhyatma Bhattar Alwar V. Adhyatma Bhattar Sri Devi** (2002(1) SCC 308), **Savitri Pandey V. Prem Chandra Pandey** (2002

(2) SCC 73) and **Pradeep Kumar V. Rekha** (2013(2) KLT Short Note 121, case No.153).

6. Learned counsel appearing for the respondent contended that there is specific pleading with regard to desertion and cruelty. While they were residing together, she made false complaint to the superior officers against her husband through phone and that false allegation amounts to cruelty. After filing the above petition, she convened a press conference at Press Club, Kannur raising false allegation which amounts to cruelty. Even though the pleadings about press conference is not found, in the petition which happened during the pendency of this petition, he could not amend such pleadings at that time, but she admitted that fact in her examination and therefore making false allegation through Press Conference amounts to cruelty. Besides that she aborted the pregnancy without the consent of her husband and put forged signature in the consent letter which also amounts to cruelty.

7. Desertion is recognized as a good ground for

divorce under Section 13(1)(ib) of Hindu Marriage Act 1955. Any party after solemnization of marriage, has a right to get the marriage dissolved by a decree of divorce on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. The desertion for the purpose of seeking divorce under the Act means an intentional permanent abandonment of one spouse by the other without the other's consent and without reasonable cause. In other words, one party repudiated the other totally in their life without fulfilling any obligations of the marriage. Desertion is not a withdrawal from one place to another for a particular period. According to Hindu Marriage Act, it involves both mental element and physical element. The factum of separation and intention to bring the cohabitation permanently to an end or animus desirendi are the two main ingredients necessary to constitute desertion.

8. The matter may be further examined on the basis of the decision of the apex Court in Savithri Panday V. Prem Chandra Pandey (2002(2) SCC 73) in which it was held in paragraph 8 as follows.

8. "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be

determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shal V. Prabhavati held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion”.

9. Desertion as a ground must be for a continuous period of two years immediately prior to the filing the petition. In this case PW1 deposed that both parties resided together till 8.4.2000 but the wife RW1 contended that she resided with him during onam holidays of the year 2000. Even after filing this petition in the year 2000, both of them resided together for 26 days. If that be the position, the animus deserendi as stated under Section 13(1)(ib) was not established in this case. If the above evidence of RW1 is admitted, the factum of separation with intention to desert the wife is not proved for actual desertion. While considering desertion as a ground for divorce, the court has to

scrutinize the pleading and proof in support of such desertion. When there is no pleading and proof, no decree of divorce could be granted on the ground of desertion. Therefore the permanent abandonment of one spouse by the other without other's consent and without reasonable cause for the statutory period must be pleaded and proved. Desertion is a continuing matrimonial offence, once desertion begins, it continues day by day till it come to an end by the conduct of the deserting spouse. This also clarifies that desertion is not complete even if the statutory period expires, it may bring to an end by the act or conduct of the deserting spouse. Therefore we conclude that desertion is not a single act but it is a continuous act of conduct which is to be determined under the facts and circumstances of each case. Therefore, the contention of the husband that the wife resided with him till 8.4.2000 and thereafter deserted is unbelievable.

10. A perusal of the pleading shows that the next ground put forward by the the respondent was that the

appellant treated him with cruelty while they were residing together. Under Section 13(1)(ia) of the Act, a marriage can be dissolved by a decree of divorce on a petition presented by the husband or wife on the ground that the other party, after solemnization of the marriage, treated the petitioner with cruelty. PW1, the husband in his evidence deposed that there was cruelty from the part of the wife throughout his life. In the oral evidence he deposed that she made false allegations about him and was not co-operating with him as a wife in his family life. When he visited her at her residence, she was not found in the house as she had gone to her family house and was staying there. While he was residing at Pandalam in his official quarters, she was reluctant to stay there. On several occasions, he adjusted with the appellant by taking leave and resided there and at that time also, she was not co-operative. In Ext.A5 she alleged that he eloped with a lady having two children and moreover while they were residing together, she complained to the superior officers raising false allegation

which amounts to cruelty. After filing the above petition, she convened a press conference at Press Club, Kannur raising false allegation which amounts to cruelty. She admitted this fact in her cross examination. During the pendency of divorce petition, he could not amend and insert such pleadings in the OP, therefore he contended that false allegation through Press Conference also amounts to cruelty. Moreover, the respondent's ambition to become a father was spoiled by the appellant for the reason that she aborted her pregnancy without the consent of the husband. Besides this, she forged the signature of the husband in the consent letter. This conduct of the appellant amounts to grave mental cruelty.

11. We have considered the effect of the above allegations. Conducting a press conference against husband raising unfounded defamatory allegation amounts to mental cruelty. The defamatory statements in the pleading that petitioner was having illicit connection with a lady lawyer, gave promise to marry her and stayed

with her in hotel amounts to another cruelty. In the press report dated 10.8.2003 she alleged that the petitioner eloped with a lady having two children before his marriage. Moreover filing false complaint against husband and his family members in the Judicial First Class Magistrate Court, Mattannur amounts to humiliation. She stated that she tried her level best to reside with the husband but we are of the opinion that this is not the way for her to go back and reside with the husband. It is well settled that the above conduct of the wife amounts to mental cruelty.

12. Apex Court in **K.Srinivas Rao V D.A.Deepa** (2013(5)SCC 226) held in paragraphs 16, 27 and 28 as follows.

“ 16. Thus, to the instances illustrative of mental cruelty noted in Samar Ghosh, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have averse impact on the business prospect or the job of the spouse and filing

repeated false complaints and cases in the court against the spouse would, in the facts of case, amount to causing mental cruelty to the other spouse.

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27. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent wife in her complaint dated 4.10.1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatised by the false and indecent statement made in the complaint. His grievance appears to us to be justified. The complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent wife was anxious to go back to the appellant

husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent wife has caused mental cruelty to the appellant husband.

28. xxxx The conduct of the respondent wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant husband, in filing appeal questioning the acquittal of the appellant husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant husband”.

13. Apex Court in 2002(2) SCC 73 **Savitri**

**Pandey's** case (supra) held in paragraph 6 as follows.

“6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters, it is contemplated as a conduct of such type which endangers the living of the petitioner with the

respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.

14. Considering the case in hand and on appreciation of the evidence, it is seen that the actual desertion as stated by the husband is not pleaded with the statutory

period mentioned under Section 13(1)(ib) of the Act. The animus deserendi or intention to desert and the factum of separation which are the two essential elements to constitute desertion are not properly found in the alleged desertion. Even though there was factum of separation, their rejoining after filing the petition shows that they have no intention to bring the cohabitation permanently to an end. This shows that the petitioner husband failed to prove the ground of desertion and the judgment of the lower court on the ground of desertion is to be set aside. No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof with regard to mental element and physical element.

15. From the totality of the evidence, we are of the opinion that the divorce granted under Section 13(1)(ib) of the Hindu Marriage Act is only to be set aside and the divorce granted under Section 13(1)(ia) is to be confirmed.

16. In the result, we set aside the divorce granted under section 13(1)(ib) of the Hindu Marriage Act 1955.

In all other aspect, we confirm the finding of the Family Court. The appeal is allowed in part. No order as to costs.

V.K.MOHANAN, JUDGE

P.D.RAJAN, JUDGE

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