

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM
&
THE HONOURABLE MRS. JUSTICE MARY JOSEPH**

TUESDAY, THE 8TH DAY OF SEPTEMBER 2015/17TH BHADRA, 1937

MAT.APPEAL No. 187 of 2014 (A)

O.P. NO. 548/2010 OF FAMILY COURT, NEDUMANGAD

APPELLANT/PETITIONER:

**SAJI @ BAIJU,
S/O. G.SIVANANDAN, VELLARADA DESOM, ARATTUKUZH, Y,
S.V.BHAVAN, VELLARADA VILLAGE, NEYYATTINKARA TALUK,
THIRUVANANTHAPURAM - 695 121.**

**BY ADVS. SRI. G.P.SHINOD
SRI. RAM MOHAN.G.
SRI. GOVIND PADMANAABHAN**

RESPONDENT(S)/RESPONDENT:

**SHEEJA @ MANJU,
D/O. G.THANKAPPAN, B.T.M LAY OUT 1ST STAGE, 19-9-B,
MAIN STREET, BANGALORE CITY, KARNATAKA - 560 001.**

**THIS MATRIMONIAL APPEAL HAVING BEEN FINALLY HEARD ON 08-09-2015,
THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:**

**C.K. ABDUL REHIM, J.
&
MARY JOSEPH, J.**

MAT. APPEAL No. 187 of 2014

Dated this the 8th day of September, 2015

JUDGMENT

C.K. ABDUL REHIM, J.

This Mat. Appeal is instituted against the judgment in O.P. No. 548/2010 of the Family Court, Nedumangad. Appellant herein is the petitioner and the respondent herein is the respondent before the court below.

2. The original petition was filed under section 13 of the Hindu Marriage Act seeking dissolution of the marriage established between the parties on 08.12.2008. The appellant contended before that court that the respondent had earlier married one Satheesh of Nagercoil in 2005, and that the marriage with the appellant was solemnized on concealment of the said fact, and also that the marital relationship with the said person was not dissolved legally. Further allegation was that the respondent went away from

cohabitation with the appellant on 19.12.2008 and deserted the appellant despite several requests made to resume cohabitation. It is also contended that gold ornaments and a vehicle entrusted at the time of the marriage was already returned by the appellant on 18.07.2009 at the Vanitha Police Station, Marthandam, on getting receipt of acknowledgment. It is also mentioned that, an earlier application filed seeking divorce on the ground of desertion was withdrawn since it was noticed that the statutory period of one year after the marriage was not expired. Further contention is to the effect that a lawyer notice caused by the appellant was not responded by the respondent.

3. The respondent entered appearance before the Family Court and objected the petition. It is contended that the marriage was solemnized after dissolving the earlier marriage and that the appellant herein was having knowledge about such things, he being the son of the maternal uncle of the respondent. According to the

respondent, it was only due to the interference of the appellant and his family members that the first marriage got dissolved. The respondent also alleged that there was mental harassment from the side of the appellant based on the allegation that she was married earlier and that dowry given was insufficient. It is contended that the respondent went to Bangalore to rejoin her employment and thereafter when she returned the petitioner and his parents have not allowed her to enter the house. It is specifically denied that the respondent had deserted the appellant. She had expressed her willingness to come and reside along with the appellant, even now.

4. Based on the rival contentions, the Family Court raised issues and proceeded with the trial. The appellant gave evidence as PW1. PW2 was examined on behalf of him. Exts.A1 to A4 were marked. The respondent was examined as CPW1. On appreciation of the evidence on record, the court below found that the appellant could not

prove the allegation of desertion, because there is no evidence to the effect that the respondent had withdrawn from the company of the appellant with an intention to have a ceasure of cohabilitation on a permanent basis. It is found that, even if a spouse had abandoned the other for a short period under certain circumstances, it cannot be considered as an intention to put an end to the cohabitation and such an abandonment could not amount to a desertion.

5. Accepting the contention of the respondent that she was compelled to leave away from the husband only because the appellant and his family members were not allowing her to enter the matrimonial home, it is held that there is no desertion proved by the appellant. On that basis the original petition was dismissed. It is challenging the said judgment, this appeal is filed.

6. Despite service of notice from this court the respondent has not chosen to enter appearance or to contest the appeal. On a scanning of the impugned

judgment and on a quick reappraisal of the evidence on record, we are not convinced that the appellant had established his case through any proper evidence before the court below, in order to obtain a decree of dissolution of the marriage on the ground of desertion. However it remains a fact that the respondent is living separated from the husband since 19.12.2008 onwards and despite causing a lawyer notice she had not resumed cohabitation, even though she contended that she is ready and willing to resume cohabitation with the appellant at any time.

7. Apart from the factual aspects, we take note of the fact that the allegation in the original petition is that the respondent had left company of the appellant on 19.12.2008 and deserted him from that date onwards. From the decree of the Family Court, which is produced along with this appeal, it is evident that the original petition before the Family Court was filed on 29.04.2010. Under Section 13(1) (ib) of the Hindu Marriage Act, 1955 a marriage can be

dissolved by a decree of divorce on the ground of desertion, only if the other party to the marriage had deserted the petitioner for a continuous period of not less than two years, immediately preceding the institution of the petition. From the facts mentioned as above it is evident that, on the date of filing of the petition before the Family Court the statutory period of continuous desertion for two years was not over. Hence the original petition before the Family Court was not maintainable. Even though such an issue was not raised by the respondent, we are of the considered opinion that the impugned judgment and decree will become legally unsustainable because of the above said reason. Further, we find that the parties before the Family Court need to be permitted to adduce further evidence in the matter based on the factual circumstances prevailing, with respect to the separate life of both the spouses.

8. Therefore this court is inclined to allow this appeal and to set aside the impugned judgment and decree, on the

basis that the same is legally unsustainable. Since it is found that the original peitititon before the Family Court was not maintainable, the O.P will stand dismissed, subject to liberty of either parties to approach the Family Court afresh seeking dissolution of the marriage on all available grounds, including the ground of desertion. All the contentions raised in the original petition before the Family Court are left open for agitation.

Sd/-
C.K. ABDUL REHIM
JUDGE

Sd/-
MARY JOSEPH
JUDGE

WW