

P. Indira Devi Vs. Kumaran

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Court : Kerala

Decided On : Aug-06-1981

Reported in : AIR1982Ker78

Judge : P. Subramonian Poti, Actg. C.J. and; George Vadakkal, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13

Appeal No. : M.F.A. No. 216 of 1980

Appellant : P. Indira Devi

Respondent : Kumaran

Advocate for Def. : M. Ratna Singh, Adv.

Advocate for Pet/Ap. : T.L. Viswanatha Iyer and; N. Subramoniam, Adv.

Disposition : Appeal allowed

Judgement :

Subramonian Poti, Ag. C.J.

1. A petition for dissolution of marriage under S. 13 of the Hindu Marriage Act stands allowed by the order of the learned District Judge of Kozhikode by the judgment which is under appeal here. The appeal is at the instance of the wife who objected to the petition for divorce. We shall refer to the parties as they are

arrayed in the petition for divorce. The petitioner, K. Kumaran, married the respondent P. Indira Devi on 6-4-1975 and in that marriage they have a child. On 1-9-1975, when the wife was pregnant, she is said to have left for her father's home along with the father but without getting the consent of the petitioner. She delivered a child there and thereafter the petitioner tried to take her back to his house but she refused. She instituted proceeding for maintenance before the Chief Judicial Magistrate as M. C. No. 108 of 1977 complaining that the husband was neglecting to maintain her and the child. When those proceedings came up, the petitioner offered to take his wife and the child with him and maintain them which offer was accepted by the respondent. In furtherance of such offer the respondent accompanied the petitioner to the Calicut Railway Station in order to proceed from there by train to Parappanangadi, where the house of the husband was situate. The petitioner was accompanied by two other persons. At the Railway Station four tickets were purchased and one ticket was given to the respondent and she was asked to wait in the Ladies Waiting room. The other three were on the platform, chatting. According to the petitioner, after sometime when he looked for his wife she was not seen in the waiting room and it was understood that she had been taken by her uncle in a taxi from the Waiting Room. Her evidence shows that she went to Parappanangadi. According to her, before the train came she tried to find her husband but not finding him she went along with her uncle . to Parappanangadi. From there she did not go to her husband's house as she was told that the reception in the husband's house would not be welcome. She is said to have gone to the police and made a complaint. Thereafter the husband filed the petition for divorce alleging that his wife had deserted him from 1-9-1975 and since there is desertion for more than two years the petition for divorce had to be allowed. The petition was filed on 22-3-1978. The learned District Judge found that he was inclined to believe the petitioner and concluded that the respondent had gone home without the permission of the petitioner. He further found, 'that there was no absolute duty on the part of the petitioner to go and fetch her. She could have gone to her marital home which she did not do'. It is further found that it is the admitted case of both parties that before the Magistrate when the case M. C. 108 of 1977 came up, the petitioner, expressed his preparedness to take the respondent and child to his house and maintain them that this was accepted by

the respondent and the petition was dismissed. After referring to the incident at the Calicut Railway Station he seems to find that the version of the petitioner as to what happened was acceptable. Then without any further discussion the learned Judge simply finds that the case of the petitioner is true and not that of the respondent. On that basis he holds that the respondent had deserted the petitioner for the requisite period. We must observe that the judgment is thoroughly unsatisfactory. The learned Judge has treated the matter very lightly and casually. He has not formulated the matters which had to be considered in a dispute of this nature nor has he entered findings thereon. In fact his mind has not been applied to the real controversy which he was called upon to decide. In matrimonial cases, the Court is expected to evince considerable anxiety and it is only after due deliberation that a Court should grant a divorce. We regret to see that there is absence of such due deliberation in this case.

2. Merely finding that the petitioner's case is true and therefore desertion for the requisite period is proved, would not meet the requirements of a proper order. Under what circumstances separation may amount to desertion has not engaged the attention of the learned Judge. Again at what time and how the desertion commenced and whether desertion continued during the whole of the period are matters on which one would expect a Court to exercise itself in a case of this nature.

3. On the facts what is proved is that on 1-9-1975 when the wife was pregnant she was taken to her home by her father. Even assuming that before going to her father's house she did not take the consent of her husband, that does not mean that she was deserting the husband. She lived in her father's house. She never indicated her unwillingness to go back to her husband's house. There are instances where minor irritants may keep spouses apart and some amount of give and take on the part of one of the spouses may make marital life possible and smooth in such cases. In this case when the husband did not maintain the wife for sometime, the wife issued a notice for maintenance to which the husband sent the usual reply that he was willing to take and maintain her. Thereafter a case for maintenance was instituted. The fact remains that in that case the wife agreed that she will not prosecute it. The petition was allowed to be dismissed when the offer

was made by the husband that he will take the wife and child to his house. This is a point, the significance of which is lost sight of by the learned District Judge. The wife would not have allowed her petition to be dismissed if she had no intention to go with her husband. She would have rather proceeded with her petition. She allowed her petition to be dismissed. The learned Judge missed to note in his judgment that the wife accepted the offer. If she had accepted the offer but changed her mind later desertion would commence only when her change* of mind took place. On the facts one would find it almost impossible to find a case of desertion. It has been so found in this case only because the Court had no occasion to consider what are the elements or requirements constituting desertion. Since this question is of common occurrence, we wish to state what 'desertion' means and what a Court must look for in a case of desertion. Desertion, in its essence, is the separation of one spouse from the other with intention on the part of the deserting spouse of bringing cohabitation permanently to an end - vide *Herod v. Herod* ((1938) 3 All ER 722 at p. 731); *Hopes v. Hopes* ((1948) 2 All ER 920 at p. 925). Further such separation must be without the consent of the other spouse. The mere physical act of departure of one spouse does not necessarily make that spouse the deserting party-Desertion is not withdrawal from a place but from a state of things, -- *Pardy v. Pardy* ((1939) 3 All ER 779 at p. 782). What law seeks to enforce is the recognition and discharge of the common obligations of the married life and it is therefore said that mere withdrawal from the place should not be taken as desertion. It must be the withdrawal from a state of things. The state of things may be termed for short the home -- *Lane v Lane* ((1952) 1 All ER 223). Therefore, a Court must look for the existence of two elements to find desertion: first, the factum of physical separation and second, the animus deserendi, that is the intention to bring cohabitation permanently to an end. These two elements must be present on the part of the deserting spouse and there must be absence of consent as well as absence of conduct reasonably causing the deserting spouse to form his intention to bring cohabitation to an end. Desertion commences from the time the factum of separation and the animus deserendi coincide in point of time. This may be simultaneous or may be at different points of time.

4. There is no scope in this case for finding any animus to bring cohabitation and marital life permanently to an end when the wife was pregnant and left for her

father's home on 1-9-1975. Whether she left with the consent of the husband or not is immaterial for that purpose. It was merely a case of one of the spouses leaving for the parents' home. There is no indication that she formed the necessary animus later. In fact, her acceptance of the offer made by her husband to take her home when the maintenance case came up is itself proof that she had no animus to separate. There is no evidence to show that such animus was formed later, much less two years prior to the date of the petition. In these circumstances, there was no scope for allowing the petition for divorce. The order of the learned District Judge is set aside and the petition for divorce dismissed. The appeal is allowed with costs.

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