

K. Narayanan Vs. K. Sreedevi

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Court : Kerala

Decided On : Jan-18-1989

Reported in : AIR1990Ker151

Judge : Varghese Kalliath and; M.M. Pareed Pillay, JJ.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13(1); Marriage Laws (Amendment) Act, 1976 - Sections 13

Appeal No. : M.F.A. No. 126 of 1984

Appellant : K. Narayanan

Respondent : K. Sreedevi

Advocate for Def. : U.P. Kunnikulaya, Adv.

Advocate for Pet/Ap. : K.P.V.B. Ejman, Adv.

Disposition : Appeal dismissed

Judgement :

Varghese Kalliath, J.

1. This appeal arises from an Original Petition. The husband is the appellant. He wanted divorce under Sections 13 and 13A of the Hindu Marriage Act. The grounds alleged are desertion and cruelty. The courts below considered the

evidence adduced in the case by the husband and wife and came to a conclusion that the husband failed to establish both grounds. The petition was dismissed. The husband appeals.

2. The facts necessary for the decision of this appeal are these : The marriage between the appellant and the respondent was on 6-11-1978. The appellant-husband is in the military service. After the marriage since his leave expired, he left his native village on 15-11-1978. From 6-11-1978 to 15-11-1978 the husband and wife were living together. When the husband left his house he instructed his wife to be in his house and that she should take care of his ailing mother. According to the husband even though strict instructions were given by the husband the wife did not obey those instructions and without the consent and permission of his mother she left the house. This important circumstance has been very strongly denied by the wife. According to the wife she was living in the house of the husband looking after her husband's mother. But she went to her house when she got information that her father was sick and admitted in a hospital.

3. It is in evidence that the husband returned to his native village on 19-3-1979. At the time when he returned to his house the wife was in his house. According to the husband the wife returned to the house of the husband only on 15-3-1979 knowing that the husband is returning to his native village on 19-3-1979. But it is admitted by both parties that from 19-3-1979 to 23-3-1979 the husband and wife lived together in the wife's house. On 23-3-1979 according to the husband, he wanted the wife to accompany him to his house. The case of the husband is that the request was refused by the wife. In this context a fact has to be stated. On the day of marriage of the appellant and respondent there was another marriage between the husband's sister and wife's brother. It is said that some rift and ill feeling between this couple remained unsettled. According to the husband the wife refused to accompany him on the ground that the rift between and his wife (the sister of the husband) has not been settled. These allegations have been denied by the wife. According to the wife, she remained in her house since the husband promised that he will take her back to his house. Any how, after 23-3-1979 the husband and wife never lived together.

4. The question is whether there was willing desertion by the wife which constituted a ground for divorce on the facts proved in the case. There is no clear evidence in this case to show that the husband has made any attempt to take back the wife after 23-3-1979. Of course, it is contended that since on 23-3-1979 the wife has refused to accompany the husband, there was no useful purpose in repeating the demand to the wife to live with the husband.

5. The court below, after referring the evidence adduced in the case and appreciating the evidence of PW 1 the husband, and PW 2 appellant's brother, found that the case pleaded by the wife is believable. According to the court below there was no intention for desertion on the part of the wife. It is true that the wife was not living with the husband in his house from 23-3-1979.

6. The true content and import of desertion Clause (1)(b) of Section 13 of the Hindu Marriage Act imparts a definite idea of complete and endless abandonment of one spouse by the other. This must be without the other's consent and without justifiable cause. 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. Desertion is always a matter of inference to be drawn from the facts and circumstances of each case. There may be often cases where a spouse is forced under certain peculiar circumstances by the conduct of the other spouse, to live separately or to stay away. In such a case there is no legal desertion to constitute a ground for divorce. The simple reason is that the said situation has been brought about by the act of the spouse who had misconducted himself or herself.

7. Desertion as a ground for divorce was added to Section 13 by the Marriage Laws (Amendment) Act, 1976. Before the amendment, it was only a ground for judicial separation. Now the ground of desertion for claiming divorce is qualified as desertion for a continuous period of two years immediately preceding the presentation of the petition. The Explanation makes it clear that the expression 'desertion' means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent and against the wish of such party and it includes the willful neglect of the petitioner by the other party to the

marriage. The section read along with the explanation makes it abundantly clear, that in its essence it signifies the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage viz (Lachman v. Meena, AIR 1964 SC 40). The explanation gives emphasis to the quality of permanence as one of the essential elements differentiating desertion from voluntary separation for good reasons. It is very important to note that in deciding what constitutes desertion, one of the first matters for consideration is the intent of the offending party in addition to separation or withdrawal from cohabitation.

8. The question which constitutes desertion for the purpose of constituting a ground for divorce has been considered by a Division Bench of this court in Indira Devi v. Kumaran 1981 Ker LT 739 : (AIR 1982 Kerala 78 at p. 80) where it was held thus :--

'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. Further such separation must be without the consent of the other spouse does not necessarily make that spouse the deserting party. Desertion is not withdrawal from a place but from a state of things.'

This aspect of the matter has been clearly stated in an English decision Pardy v. Pardy reported in (1939) 3 All ER 779 at p. 782. There it is stated that desertion is not withdrawal from a place but from a state of things. When desertion is made as a ground for seeking divorce, what the court has to look into is as to whether the state of affairs continues, where one of the spouses refuses to discharge the common obligation of the married life and it is because of this it is held that mere withdrawal from the place should not be taken as desertion.

9. In this case there is no evidence to show that the wife wanted to stop cohabitation permanently with the husband. The evidence on the part of the husband is sleek and slender; it is insufficient. The court below has found so. Further, it has to be noted that in the objection filed by the wife she has made it very clear that she is willing to live with her husband. In the deposition before the

court also it is stated by the wife that she is willing to live with her husband-appellant. In fact her case is that the husband is not discharging his obligation towards his wife-respondent. The appreciation of evidence made by the court below in regard to the question of desertion is legally right and we do not see any ground to interfere with the finding of the court below.

10. The second ground alleged in the appeal is cruelty. There is no case of any physical cruelty that has been committed against the wife. The cruelty alleged is the refusal of the wife to look after the mother of the husband. According to the wife she was living in the house of the husband looking after the husband's mother. She only left the house with the permission of the mother-in-law. Of course one circumstance has been brought out in the case that when the mother-in-law died though information was given the wife did not return to the house of the husband. The wife admits that what she has done is improper. This sole circumstance will not be sufficient to constitute a ground for divorce based on cruelty.

11. Prior to the Amendment Act of 1976, cruelty was not an offending act constituting a ground for divorce. But now under Section 13(1)(a) it is added as one of the grounds. The term 'cruelty' is not defined in the Act. The concept of cruelty is not a static one and so a definition applicable and suitable for all time cannot be given. It is a concept which would naturally change depending on social and economic conditions, status of parties and a multitude of other considerations. In *Sheldon v. Sheldon* (1966) 2 All ER 257, Lord Denning M.R. pertinently pointed out that the categories of cruelty are not closed. Naturally, the court has to decide the question whether there was cruelty on the part of the spouse as against the other weighing and understanding the conduct of the erring spouse and the consequence and effect of that conduct on the victim. It is profitable to remember what Lord Reid has observed in *Gollins v. Gollins* (1963) 2 All ER 966 :

'Whether cruelty, as a matrimonial offence, has been established is a question of fact and degree, which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case, rather than by any objective standard; accordingly, in case where the two spouses are of normal

physical and mental health, and the conduct of the respondent spouse, so considered, is so bad that the other should not be called on to endure it, cruelty is established and then it does not matter what was the respondent's state of mind, e.g., it is immaterial whether the respondent's conduct was 'aimed at' the other spouse or due to unwarranted indifference, attributable, perhaps, selfishness or laziness.'

12. We do remember when we quote what Lord Ried has said, the observations of Chandrachud, J., as he then was, in *Dr, N.G. Dastane v. Mrs. S. Dastane*, AIR 1975 SC 1534 'An awareness of foreign decisions would be a useful asset in interpreting our own laws. But it has to be remembered that we have to interpret in this case a specific provision of a specific enactment. What constitutes cruelty must depend on the terms of the statute.'

13. In a Division Bench decision reported in AIR 1988 Kerala 244 (*Gangadharan v. T.K. Thankam*) Shamsuddin, J., speaking for the Division Bench has said (Para 19) :--

'It is difficult to lay down a precise definition or to give an exhaustive description of the circumstances which would constitute cruelty. Cruelty should be of such a nature as to satisfy the conscience of the court that the relationship between the parties had deteriorated to such an extent that it would be impossible for them to live together without mental agony, torture or distress to entitle the party to secure divorce. Physical violence is not absolutely essential to constitute cruelty and a consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of the Act. Mental cruelty may consist of verbal abuses and insults by using filthy and abusive language leading to constant disturbance of mental peace of the other party.'

14. Of course the courts are taking a liberal view in the matter of grounds based on cruelty in the matter of allowing divorce. But whatever liberal approach that is to be adopted the court can find cruelty only on some legal evidence. Here the evidence is insufficient to hold that the petitioner has established the ground of cruelty. Even in the pleading the husband has not stated how the wife has treated the husband in a cruel manner to constitute a ground based on cruelty. We do not

see any error in the finding of the court below that the husband failed to establish the ground of cruelty. So on this ground also we find it difficult to interfere with the finding recorded by the court below.

15. Though we are dismissing this appeal we feel that this is a fit case where the parties should consider whether a joint petition can be filed under the Hindu Marriage Act for divorce, since it is seen that the husband and wife are not living together for a considerable number of years. With the above observations, the appeal is dismissed. No order as to costs.

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