

Maharaja Nadar Vs. Muthukani Ammal

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SooperKanoon Citation : sooperkanoon.com/790373

Court : Chennai

Decided On : Dec-05-1985

Reported in : AIR1986Mad346

Judge : Swamikkannu, J.

Acts : [Hindu Adoptions and Maintenance Act, 1956](#) - Sections 18(2)

Appeal No. : Second Appeal No. 1826 of 1979

Appellant : Maharaja Nadar

Respondent : Muthukani Ammal

Advocate for Def. : R. Balasubramaniam, Adv.

Advocate for Pet/Ap. : Ashraff Ali, Adv. of ;Raj and Raj

Judgement :

1. This is a second appeal preferred against the judgment and decree dated 30-1-1979 of the learned II Additional Subordinate Judge, Tirunelveli, in A. S. No. 147 of 1978.
2. The defendant, Maharaja Nadar in the suit is the appellant herein. -
3. The plaintiff, Muthukani Animal filed the suit for maintenance. Her case is as follows : - The marriage of the plaintiff with the defendant was celebrated about 11

years prior to the institution of the suit, in the father's house of the plaintiff at Sivahthipuram, as per the caste custom and usage of the community to which they belong. Since the date of marriage, they lived happily as husband and wife. The defendant was often beating the plaintiff and was cruelly treating her and was driving her out of his house. In spite of it, the plaintiff was bearing all the cruel treatment of her husband and was living as dutiful wife. At one time, the plaintiff was charged with the commission of offence of, theft. The defendant demanded the plaintiffs consent for the second marriage since they have no child. On her refusal, she was beaten and treated with cruelty. At last, the end of 1151 Andu, Adi month, the defendant beat the plaintiff and drove her from his house. He also threatened that in case she returned to his house, she would have to face dire consequences. The plaintiff apprehends that if she joins her husband, her life would be in danger. While so, in the month of Avani, the defendant married one Bommiammal, daughter of Manganatha Nadar as his second wife and they are living as husband and wife. The said marriage is invalid under law. While the marriage of the plaintiff and the defendant is subsisting, the defendant has no right to marry a second wife. Therefore, the defendant is bound to pay maintenance to the plaintiff. So notice was issued to the defendant. At the time of notice, the plaintiff was not aware of the income of the defendant. Therefore, she had, claimed only a sum of Rs. 100/- per mensem towards maintenance. Now the plaintiff learnt that the defendant is having three mike sets and is earning. He is also doing agricultural work and earning Rs. 1,000/- per month. The defendant is also doing money lending business. Considering the status of the parties and also the present cost of living, the plaintiff is entitled to a sum of Rs. 150/- per month towards her maintenance. The plaintiff is also entitled to past maintenance of Rs. 400/- with a charge upon the schedule mentioned property from the defendant.

4. The defendant raised the following contentions : -

The marriage of the defendant and the plaintiff took place about 11 years ago, as per the Hindu rites, custom and usage. Since marriage they were living as husband and wife. It is false to allege that the defendant illtreated the plaintiff and drove her away to her father's house. It is also false to allege that the plaintiffs father often used to bring back the plaintiff and leave 'her in the defendant's house.

The defendant never ill-treated the plaintiff and there is no necessity for the same. The Plaintiff was very affectionate with the defendant and she was living with him happily. It is false to state that the plaintiff was charged with a commission of offence of theft. It is also false to allege that since the plaintiff and the defendant have no issues, the defendant asked for the plaintiff/respondent's consent for the second marriage. Since the plaintiff and the defendant loved each other, they got married. Without any other go, the plaintiff's father had to celebrate the marriage. Taking advantage of the love and affection of the defendant with his wife, the plaintiff's father started to blackmail the defendant and he often came and took the plaintiff to his house without the consent and permission of the defendant. On certain occasions, the defendant used to go to the house of the plaintiff's father to take her back. At last, at the beginning of Sept. 1976 the plaintiff's father came and took away the plaintiff with the jewels worth about Rs. 7,000/- which were presented by the defendant out of love and affection. When the defendant asked the plaintiff to return to his house, the plaintiff's father refused to send her along with him. The defendant never ill-treated the plaintiff with cruelty and he never demanded the plaintiff to give her consent for the second marriage. The allegation that the defendant married one Bommi Ammal is false. The defendant did not marry Bommi Ammal. Even now the defendant is ready and willing to live with the plaintiff. The defendant is not entitled to the schedule mentioned properties absolutely. Excepting his agricultural income, he had no other business as mentioned in the plaint. The allegation that the defendant has got three mike sets for his business is denied. The defendant is getting only a sum of Rs. 75/- per month towards his share of the income from the agricultural lands. He is not getting a huge income of Rs. 1,000/- per month, as alleged. Since the defendant is not getting any income more than Rs. 150/-, he is not in a position to pay Rs. 150/- to the plaintiff towards her maintenance. If at all she is entitled to any maintenance, she would be entitled to Rs. 25/- per mensem considering the status and income of the defendant. The suit has been filed at the instigation of the plaintiff's father. The defendant asked the plaintiff's father to return the plaintiff to him on several times and issued notice and also through several persons. The plaintiff has not chosen to come and live with her husband. Therefore, the plaintiff is not entitled to any maintenance.

5. On the above pleadings, the learned District Munsif framed necessary issues and decreed the suit awarding maintenance at the rate of Rs.50/- per month from the date of plaint till her life-time and also awarding Rs. 200/- towards her past maintenance, creating a charge over the 1/4th share of the defendant on items 1 to 12 alone. Aggrieved: by the decision of the trial Court, the defendant preferred A. S. No. 147 of 1978 before the lower appellate Court. The following points were framed for consideration in the appeal before the lower appellate Court:

'(1) Whether the cruelty and desertion alleged by the respondent herein i.e., the plaintiff in the suit are true?

(2) Whether the respondent herein is entitled to maintenance? If so, what is the quantum of maintenance?'

6. The lower appellate Court held that it is clear from the evidence of P. Ws. 1 to 3 that the second marriage alleged by the plaintiff/respondent herein is not proved, and there is no positive proof. to show that the defendant/appellant herein has married the said Bommi Ammal as his second wife. The lower appellate Court has also held that the evidence of P.Ws. 1 to 3 shows that the defendant/ appellant herein is living with Bommi Ammal, and as such, the plaintiff/respondent herein has justifiable cause to live separately from her husband and demand separate maintenance from him. The lower appellate Court also held that the desertion alleged by the plaintiff/respondent herein is true. The lower appellate Court also held that the defendant/ appellant herein had deserted the plaintiff/respondent herein and also treated her with cruelty. According to the defendant/ appellant herein, items 13 and 14 are the exclusive properties of his mother. The respondent herein has not preferred any cross-objection against the finding of the trial Court awarding maintenance with charge over the 1/4th share of the defendant/appellant on items 1to 12. Therefore, she cannot ask for any charge over items 13 and 14. There is no satisfactory evidence as to the actual income of the defendant/appellant from his family properties. The plaintiff/respondent admits that the defendant/appellant is entitled to only 1/4th share in the properties. Having regard to the facts and circumstances of the case and the status of the parties, the quantum of maintenance fixed by the trial Court at Rs. 50/- per mensem and a

sum of Rs. 200/- towards the past maintenance cannot be said to be excessive, Therefore, the lower appellate Court held that the respondent is entitled to maintenance, and the quantum of maintenance fixed by the trial Court is fair and reasonable. In the result, the appeal was dismissed with costs, and the judgment and decree of the trial Court were confirmed by the appellate Court. Aggrieved by the above decision of the lower appellate Court, the defendant has come forward with this second appeal.

7. Mr.Ashraf Ali, learned counsel for the defendant/ appellant herein, inter alia, contends that the concept of desertion and cruelty under Hindu Law was not properly appreciated by both by the Courts below, and the lower appellate Court went wrong in confirming the finding of the trial Court that the defendant/ appellant . herein had committed the Acts of desertion and cruelty against his wife the plaintiff/respondent herein.

8. The point for consideration in this Second Appeal is whether the concept of the act of desertion and the act of cruelty under Hindu law, as codified, have been properly understood and applied to the facts of the present case before us.

9. It is not in dispute that the defendant-appellant is the husband of the respondent-plaintiff and their marriage took place 11 years prior to the date of the suit, as per the Hindu custom and usage. It is also not in dispute that they were living happily for some time after marriage and they have no issues. According to the respondent, the appellant often beat her and drove her away to her parent's house and the appellant was treating her with cruelty. Her further case is that her husband asked for her consent to marry a second wife which she refused and in fact the appellant has married one Bommi Ammal, daughter of Manjanatha Nadar of Ariyapuram as his second wife and is, living with her. On the other hand the contention of the defendant is that he never beat his wife and ill-treated her and the cruelty alleged by her is not true. His further defence is that the respondent used to visit her parent's house often without his knowledge and consent and her father used to come and take his daughter often to his house. He would also contend that at last in the-beginning of Sept. 1976; the respondent's father came and took, away the respondent with jewels worth about Rs. 7,000/- presented by

the appellant, and when the appellant approached the respondent and asked her to return to his house, her father refused to send her along with the appellant. The appellant denies having married Bommi Ammal as his second wife. According to him, he continues to have love and affection towards the respondent and he is ready and willing to take back his. wife and live with her.

10. The definite case of the respondent is that the appellant has married the said Bommiammal as his second wife without her knowledge and consent and is living with her, and in the circumstances, it would be harmful for her life to go and live with her husband, and she has been treated with cruelty so as to cause a reasonable apprehension in her mind, that it would be harmful to live with the appellant and that the appellant has abandoned and deserted her.

11. Section 18 of the Hindu Adoptions and Maintenance Act (LXXVII of 1956), reads as follows : -

'18. Maintenance of wife, (1) Subject to the provisions of this Section a Hindu wife, whether married before or after the commencement of this Act, shall be entitled to be maintained by her husband during her lifetime.

(2) A Hindu wife shall be entitled to live separately from her husband without forfeiting her claim to maintenance-

(a) if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish, or of wilfully neglecting her;

(b) if he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with her husband;

(c) If he is suffering from a virulent form of leprosy;

(d) if he has any other wife living;

(e) if he keeps a concubine in the same house in which his wife is living or habitually resides with a concubine elsewhere;

(f) if he has ceased to be a Hindu by conversion to another religion;

(g) if there is any other cause justifying her living separately;

(3) A Hindu wife shall not be entitled to separate residence and maintenance from her husband if she is unchaste or ceases to be a Hindu by conversion to another religion.'

12. The law of maintenance applicable to the Hindu now is statutory. Chapter III of the Act has codified the law. In respect of all matters dealt with in the Act, it supersedes the earlier law. It is only in so far as there is some express enactments in the Act that it can be said to be exhaustive in regard to such express provision. There is no inconsistency between the Act and S. 125 of the Criminal P. C. 1973 (formerly S. 488 of the 1898 Code) and S. 18 does not stand in the way of Magistrate granting relief under S. 125 of the Code. The Section does not entitle a woman to claim maintenance from a person with whom she entered into a void marriage. The wife's right to maintenance flows from this section and it is not a right under the Civil P. C. The section does not amend or abrogate the provisions of S. 10, Hindu Marriage Act, XXV of 1955. It is held in *Natesan Chettiar v. Achiyayee Ammal*, : AIR1975 Mad202 , that in law a woman can be given recognition either as the wife of a man or as his concubine and there cannot be an intermediary class picturesquely described as an 'illegitimate wife'. The only forum available to the wife to enforce her right to maintenance under S. 18 is to have recourse to the Civil Court. It is a well-established principle of law that the wife's right to maintenance is an incident of the status of matrimony, and once the relationship of husband and wife is established the wife gets maintenance as a matter of course.

13. Clause 2 of S. 18 of the Hindu Adoptions and Maintenance Act (LXXVIII of 1956r) (corresponding to the former S. 2 of the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, which was substantially the same as S. 18(2) of this Act) provides for cases where the wife is entitled to live separately from her husband without forfeiting her claim to maintenance. There are seven grounds mentioned which justify the wife in her claim for separate maintenance and these are:

a) husband's desertion;

- b) his cruelty;
- c) his suffering from a virulent form of leprosy;
- d) existence of another wife;
- e) his keeping a concubine;
- f) his conversion to another religion;
- g) any other cause which justifies her separate living.

Ordinarily when a wife lives away from her husband for no justifiable reason and without his consent and against his wish, the wife will not be entitled to claim maintenance. This clause lays down that the wife does not forfeit her claim to be separately maintained if she has any of the grounds for separate living mentioned in this clause. This clause does not say that if the wife lives separately from her husband and cannot urge any of the grounds mentioned in this clause she does or does not forfeit her claim to separate maintenance. Cl. 3 of S. 18 of the Hindu Adoptions and Maintenance Act (LXXVIII of 1956) which provides for her not being entitled to separate maintenance mentions two grounds, namely, her unchastity and her conversion to another religion.

14. The clause(2)(a) of S. 18 of the Hindu Adoptions and Maintenance Act (LXXVIII of 1956) provides for separate maintenance being awarded to the wife who has been deserted by her husband, that is to say, abandoned by him without reasonable cause and without her consent or against her wish or wilfully neglecting her. What amounts to desertion has been considered by the Courts and under the provisions of Ss. 9, 10, 13 of the Hindu Marriage Act, XXV of 1955. Cases have held that there can be desertion by the husband even though the wife and the husband are living in the same house. There can be no desertion if the husband has reasonable cause for leaving the wife.

15. Prof. Dr. S.Venkataraman, while editing the seventh edition of N. R. Raghavachariar's Hindu Law, in Vol. II at page 1199 observes as follows-

'There can be no desertion if the husband has reasonable cause for leaving the wife. If he has justification to leave her company, the fact that he has left her without her consent or against her wish would not affect the question so as to convert what is a justifiable leaving into blameworthy forsaking. So also wilful neglect of the wife by the husband will also be desertion though all along the husband and wife are living in the same premises. This wilful neglect embraces not only neglect to maintain her in the matter of providing her with food, raiment and shelter, but also the marital cohabitation and consortium to which the wife is entitled in law from her husband.'

16. The above view of the learned well known jurist Prof. Dr. S. Venkataraman is acceptable.

17. Marriage according to the Hindu Law, is a holy union for the performance of religious duties. The maintenance of a wife by her husband is one arising out of the status of marriage under Hindu Law. It is a liability created by the Hindu Law in respect of the jural relation of husband and wife and is not an obligation arising out of a contract. Marriage according to Hindu Shastras is a sacrament. The gift of a girl to a suitable person is a sacred duty enjoined upon the father, which if duly performed is held to confer upon him great spiritual benefit.

18. According to the Sastras, a Hindu marriage is a samskara or sacrament giving rise to certain religious duties and obligation like making of offerings to the Devas, obligations to the Pitrus, etc. For the due performance of these religious duties, the participation of a wife is essential who is for that reason called Patni. The perpetuation of the lineage (santati) through the son is also enjoined as a religious duty, for the son (putra) saves his ancestors from Hell (Puth) and brings salvation to them. Marriage is, therefore, undertaken by a Hindu not wholly for worldly purposes but mainly for the fulfilment of these religious duties (Dharma Praja Santatyartharn) with the association of a wife who is therefore called a Dharma Patni.

19. Refusal to maintain was considered to be an offence under Hindu Law. Manu declares (***) neither mother, nor father, nor wife, nor son, deserves abandonment; ore abandoning these when not degraded (or casted for

commission of any heinous sin) shall be punished by the king six hundred (Panas). Abandonment is explained to mean refusal to maintain.

20. The right of a Hindu wife for maintenance is an incident of the status or estate of matrimony and a Hindu is under a legal obligation to maintain his wife. The obligation to maintain the wife is personal in ' character and arises from the very existence of the relation between the parties.

21. Manu, cited in Srikrishna's, commentary on the Dayabhaga declares (***)

'The father, the mother, the Guru elderly relation worthy of respect), a wife offspring, poor dependants, a guest, and a religious mendicant are declared to be the group of persons who are to be maintained'. Manu.

22. Manu cited in the Mitakshara while dealing with gifts further declares : (***)

'The aged mother and father, the chaste of wife and an infant child must be maintained even by doing a hundred misdeeds'. Manu.

23. Refusal to maintain a wife was considered to be an offence even during the time of Manu and Yajnavalkya. (***)

Father and son; sister and brother; wife and husband; and preceptor and pupil; of these one forsaking the other if not outcasted, deserves the punishment of (the fine of one hundred) (Panas) Yajnavalkya.

24. Manu has also declared that a wife cannot be detached from her husband either by sale or by abandonment, implying that the marital tie cannot be severed in any way being inalienable by its very nature. (***)

It is laid down that the abandonment of a guiltless wife is punishable by the king. She is entitled to be properly 'maintained by the husband so long as she remains faithful to him and even in a case of faithlessness, the law declares that she should be provided with a bare pittance for her subsistence. In a case where the husband abandons his wife without any fault on her part he should be directed to take her back, and on non-compliance should be made liable to yield a third of his fortune to her; when however the husband is so poor that deprivation of a third

part of his fortune would be extremely hard, he should be made to provide her with proper maintenance. On her part, it is the duty of the wife to remain faithful and obedient to her husband. According to Hindu Law, the condition of women is one of dependance. (***)

Manu declares that 'while young she remains under the control of her father, after marriage under the control of her husband and, on his death under the control of her sons, she does not deserve complete independence at any time'. Even when the husband dies, the duty to remain faithful to her husband is not at an end Manu declares. (***)

'Let her rather emaciate her body by living upon pure flowers, roots, and fruits but let her not, when the husband is dead, even pronounce the name of another man, and longing for the unparalleled virtue of those who remain steadfast to one husband, let her lead a life of austerity observing strictly the rules of continence and foregoing all sensual pleasures until she dies'. It would seem to follow from the above as well as from the distinct text? 'a second husband of a good woman is nowhere prescribed' Manu did not approve of a widow remarriage. So commenting upon the above text Kulluka says 'that being so, the second, marriage of a woman is also prohibited'.

25. The wife is bound to live with her husband and to submit herself to his authority. An agreement enabling the wife to avoid a marriage, or to live separate from her husband if he leaves the village in which his wife, and her parents reside, or if he marries another, wife, is void. Such an agreement is against public policy and contrary to the spirit of Hindu Law. An agreement of this kind is no answer to a suit for restitution of conjugal rights by a husband against his wife. *Sitaram v Aheeree* (1873) 2 Beng LR 129, and *Tekait v. Basanta* (1901) ILR 28 Cal 751. The husband is bound to live with his wife and to maintain her.

26. The husband is the lawful guardian of his minor wife and is entitled to require her to live with him, however young she may be, unless there is a custom enabling the wife to live with her parents until she has arrived at puberty *Arumuga v. Viraraghava* ILR(1961) Mad 255. As soon as the wife is mature, her home is necessarily in her husband's house *Kondal Roy v. Rangayanaki* ILR(1923) Mad

791 : AIR 1924 Mad 49, Dadaji v. Rukma Bai ILR(1886)Bom301, and Tekait v. Basanta ILR(1901) Ca175l. He is bound to maintain her in his house while she is willing to reside with him and discharge her duties. If she quits him of her own accord, either without cause or on account of such ordinary quarrels as are incidental to married life in general, she can set up no claim to separate maintenance vide Bommadevaraya Naganna v. Bommadevara Rajya Lakshmi Devi (1928) 55 Mad U 242 : AIR 1928 PC 187; Kullya Nessuree v. Dwarkanath 6 Suth WR 115 (2), Sidlingappa v. Sidava ILR(1878) Bom 634, and Surampalli Bangaramma v. Surampalli Branbaze ILR(1908) Mad338.

27. Where the husband keeps a concubine in the house or treats her with cruelty so as to endanger her personal safety, she is entitled to live apart and claim separate maintenance, vide Lalla Govind v. Dawlat 14 Suth WR 451 : 6 Beng LR App 85; Dular Koveri v. Dwaraka Nath ILR(1905) Cal 234; Matangini v. Jogendra ILR(1892) Cal 84; and Babu Ram v. Kokla, ILR(1924) All 210: AIR 1924 All 39 . In a case under Sec. 488 of the Criminal P.C. it was held that the wife could not refuse to live with her husband and claim separate maintenance if he kept a concubine as it was not adultery, vide Dular Kuari v. Dwarka Nath ILR(1905) Cal 234 and Queen Empress v. Mannath Achari ILR(1894) Mad 260.

28. Mere diminution of physical comfort in her husband's house is not a cause justifying her to live away from her husband and claim separate maintenance. Vasuntharadevi v. Ramakrishna (1947) 2 Mad U 544: AIR 1949 Mad 100. Cruelty and abandonment are not the only grounds on which separate maintenance could be allowed to a wife. Separate maintenance can also be awarded when the husband for reasons of his own chooses to put the wife away from him or the wife lives away from her husband for justifiable reasons. A wife is entitled to be maintained from her husband irrespective of his possession of any property and her right to maintenance is not lost, though curtailed to the barest necessities, by her unchastity if she continues to live with the husband. If the wife has to live away from her husband for a just cause, as for instance, husband's virulent leprosy, his habitual cruelty or neglect endangering her health or personal safety, or his keeping a concubine in the house, or his desertion or refusal to maintain her, then she will be entitled to separate maintenance. It may be said that the grounds which

would be available to a wife to defeat a suit for restitution of conjugal rights would also entitle her to live apart from her husband and claim separate maintenance vide *Matan Gini v. Jogendra* ILR(1892) Cal 84, *Surampalli Bengaramma v. Brambaze* ILR(1908) Mad 338, and *Sitabai v. Ramachandra*, (1910) 12 Born LR 373: 6 Ind Cas 525.

29. A wife who has sued for maintenance on the ground that she was a chaste woman and that she has left her husband owing to his misconduct, is not entitled, when the husband proves her vicious 'course of life' to claim maintenance on the ground that the husband should also prove that she was living an immoral life when she filed the suit vide *Kuppammal v. Thangamuthu Pandaram* : AIR1944 Mad426 . But it was held in *Ananthanarayana v. Sharadamma* (1944) 49 Mys HCR 235, that if the facts found are that she was guilty of a single act of infidelity but that subsequently she has maintained a pure and unsullied life for twenty years before suit, she is entitled to starving maintenance from her husband.

30. A wife who is voluntarily living apart from her husband for no improper motive may at any time return to her husband and claim to be maintained by him vide *Surampalli Bangaramma v. Surampalli Brambaze*, ILR(1908)Mad 338, and *Sitharathamma v. Seshamma* : (1939)1MLJ456 . But she cannot be held to be entitled to separate maintenance when the husband is willing to keep her in his house and she refused to accept his offer without sufficient justification. But where the wife offers to live with the husband, but the latter refuses to accept her in view of his having taken another wife, she is entitled to demand separate maintenance from the husband sufficient to enable her to live as far as may be consistently with the position of a wife in something like the same degree of comfort and with the same reasonable luxury of life, as she should have in her husband's household vide *Sobhanadamma v. Nara Simhaswarni* : AIR1934 Mad401 .

31. A wife's right is not forfeited but only suspended during the time she commits a breach of duty by living apart and is revived when at his death such duty ceases to exist. Her right to be maintained out of his estate being thus in existence, in *Periambal Chettiar v. Sundrammal* ILR (1945) Mad 586 : AIR 1945 Mad 193, it was held that her husband cannot execute a will which can defeat such a right.

When a wife leaves her husband's house by his consent, he is, of course, bound to receive her again when she desires to return, and if he refuses to do so, she will be entitled to maintenance just as if he had turned her out vide *Nitya v. Soondaree*, (1868) 9 SWR 475. Where the case is not one of the wife leaving the husband and living away from him for no justifiable reasons, but one where the husband, for reasons of his own, chooses to put her away from him, and in view of the unreasonable attitude of her husband which has nothing to do with her character, she has no choice but to live away from him, the case is to be treated as one of abandonment by the husband and she should be awarded separate maintenance.

32. Under Hindu Law, the claim to maintenance is a legal right and a demand and refusal are not necessary for its creation. The only legal answer to such a claim is either abandonment or waiver. The discretion, of the court is generally exercised in adjusting the rate at which the arrears are to be awarded or by limiting the period by reference to the doctrine of implied abandonment. It was held in *Sobhanadamma v. Narasimhaswami*, ILR 39 Mad 658 (sic) that in the case of a wife living with her father who is in affluent circumstances without making a claim for maintenance for a long time, the court may take the date of demand as the proper date from which arrears are to be awarded. Maintenance of an abandoned wife can be made a charge upon the husband's share and there is no distinction in this respect between the position of a widow and -that of an abandoned wife, vide *Gopala v. Parvathi* AIR 1929 Mad 47. In determining the amount of maintenance, the court usually takes into consideration, the reasonable wants of the woman, her position in life, her husband's means and income, as well as the mode of the former life of herself and her husband, and the fact that she has property of her own, though a relevant consideration in determining the quantum of maintenance, does not preclude her from claiming her right to be maintained vide *Appibai v. Kimji*, : AIR1936 Bom138 . If a wife deserts her husband in order to live in adultery, or on the ground of his remarriage or his trivial quarrels, or his unkindness not amounting to cruelty she will not be entitled to claim separate maintenance.

33. The goal of life is joy, serenity and not pleasure or happiness. Joy is the fulfilment of one's nature as a human being. The aim of life is a happy harmony of

man and woman. The concept of Andhanarisvara brings it out. (Svaha Eva Havirbhujam Premna Sarirdrdhtaram Harasya). The wife does not belong to the husband but makes a whole with him. The wife is the root of all social welfare.

Kryanam Khalu Dharmyanam Satpanyo Mulakaranam

The wife is the Saha Dharma Cariniyam Corvasi Yavad Ayus Tava Saha Dharmacarini Bhavatu.

She is with him in the performance of all his duties.

34. In Halsbury's Laws of England, Vol.12 (Third edition by Lord Simmonds, pages 241 and 242), the legal position regarding desertion had been admirably summarised as follows : -

'In its essence desertion means the intentional, permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

35. Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed for short 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

36. The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or, where the offence appears as a cross charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the

cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion, is a continuing offence'.

37. It was pointed out in *Bipin Chandra v. Prabhawati* : [1956]1SCR838 , that desertion is a matter of inference to be drawn from the facts and circumstances of each case, The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference, that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi, coexist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Hindu Divorce Act, 1957 (Bombay Act XXII of 1947), prescribes a period of four years as a continuous period during which the two elements must subsist.

Sinha, J., observes :

'Hence if a deserting spouse takes advantage of the locus paenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence, it is necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable'.

(vide *Bipin Chandra v. Prabhawati* : [1956]1SCR838 . It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like any

other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. *Lawson v. Lawson* (1955) 1 All ER 341, . Desertion differs from other matrimonial offences such as adultery, in that it does not consist of an act or a number of acts separate and distinct in themselves, but is rather an activity or course of conduct which must persist for the statutory period up to the presentation of the petition. Reference may be made to *Sitabai v. Ramachandran*, : AIR1958 Bom116 (FB).

38. The constructive or indirect desertion has been explained by the Privy Council in *Lang v. Lang* (1954) 2 All ER 571, as follows : -

'It has been recognised that the party truly guilty of disrupting the home is not necessarily or in all cases the party who first leaves it. The party who stays behind may be, by reason of conduct on his part, making it unbearable for a wife with reasonable self-respect or powers of endurance, to stay with him, so that he is the party really responsible for the break down of the marriage. He has deserted her by expelling her, by driving her -out. In such a case the factum is the course of conduct pursued by the husband something which may be far more complicated than the mere act of leaving the matrimonial home. It is not every course of conduct by the husband causing the wife to leave which is a sufficient factum. A husband's irritating habits may so get on the wife's nerves that she leaves as a direct consequence of them, but she would, not be justified in doing so. Such irritating idiosyncrasies are part of the lottery in which every spouse engages on marrying, and taking the partner of the marriage 'for better, for worse'. The course of conduct the 'factum' must be grave and convincing'.

39. In *Edwards v. Edwards* (1949) 2 All ER 145, it was held that conduct which falls short of legal cruelty may justify one spouse in leaving another, provided it is of a grave and convincing character. In *Marjoram v. Marjoram* (1955) 2 All ER 1, it was held that sluttishness alone is not a sufficient ground. In *Bartholomew v. Bartholomew* (1952) 2 All ER 1035, it was held that wife is dirty in her person and the home is no ground justifying desertion.

40. Under cl. (h) of S. 18 of the Hindu Adoptions and Maintenance Act (LXXVIII of 1956), cruelty as a ground for maintenance is dealt with. A Hindu wife is entitled to live separately from her husband and claim maintenance on the ground that he has treated her with such cruelty as to cause a reasonable apprehension in her mind that it will be harmful or injurious to live with the husband. Though the clause does not in terms so state it is abundantly clear from the language used that the application of rule must depend on the circumstances of each case. The meaning given to 'cruelty' in cl. (b) of Sec. 18 of the Hindu Adoptions and Maintenance Act (LXXVIII of 1956) accord with the meaning given to the expression as used in Sec. 10(I)(b) of the Hindu Marriage Act, 1956.

41. The legal. conception of 'cruelty' comprises two distinct elements firstly, the ill-treatment complained of, and, secondly, the resultant danger or apprehension thereof. In *Jamieson v. Jamieson*, (1952) AC 525 , it was held that it would be inaccurate and liable to lead to confusion if the word cruelty is understood apart from its effect on the victim. The apprehension contemplated by the above legal conception is that further cohabitation will be harmful or injurious and not that the same or similar acts of cruelty will be repeated. Where the acts or conduct can be said to amount to cruelty it is immaterial that there is no danger of its repetition. The inquiry must be whether the cruel treatment established by evidence is of such a nature as to cause in the mind of the victim reasonable apprehension that it will be harmful or injurious to live with the other party.

42. What is cruel treatment must to a large extent be a question of fact or a mixed question of law and fact to be determined within the ambit of the rule and the accepted criterion to which reference has already been made. In Mulla's 'Principles of Hindu Law' fifteenth edition, at page 783, Sunderlal T. Desai while dealing with Sec. 13 of the Hindu Marriage Act XXV of 1955, observes as follows -

'Physique, temperament, standard of living and culture of the spouses and the interaction between them in their daily life and all other relevant circumstances must have bearing on the question whether the acts or conduct complained of amount to the matrimonial offence which entitles a spouse to relief under this clause. The conduct alleged must be judged up to a point by reference to the

victim's capacity or incapacity for endurance in so far as that is or ought to be known to the offending spouse (vide Mackenzie v. Mackenzie, (1895) AC 384,. It is also necessary to weigh all the incidents and quarrels between the parties keeping in view the impact of the personality and conduct of one spouse upon the mind of the other (vide King v. King 1958) AC 124'.

43. The modern view is that mental cruelty can cause even more grievous injury, and create in the mind of the injured spouse reasonable apprehension that it will be 'harmful or unsafe to live with the other party.

The age, environments, standard of culture and status in life of the parties are also matters which may be decisive in determining on which side of the line a particular act or course of conduct lies. The acts and incidents complained of as also the conduct of the parties must be taken together to form a composite picture from which alone it can be ascertained whether the acts of one spouse on another should, judged in relation to all the surrounding circumstances, be found to amount to cruelty. The existence of cruelty depends not on the magnitude, but rather on the consequence of the offence, actual or apprehended (vide Barker v. Barker, (1949) 1 All ER 247. Mental ill-treatment may be coupled with physical ill-treatment in order together to found a charge of cruel treatment.

44. In Lachman Uttamchand Kirpalani v. Meena : [1964]4SCR331 , the Supreme Court has laid down the true meaning and ambit of Sec. 10(l)(a) of the Hindu Marriage Act, XXV of 1955, read with the Explanation. Reference was made in the majority judgment to the earlier decision in Bipin Chandra Jaisinghbai Shah v. Prabhavati : [1956]1SCR838 , in which all the English decisions as also the statement contained in authoritative text books were considered. After referring to the two essential conditions, namely, the factum of physical separation and the animus deserendi which mean the intention to bring the cohabitation permanently to an end as also the two elements so far as the deserted spouse was concerned i.e. (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention, it was observed while examining how desertion might come to an end:

'In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to have regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where, however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse'.

45. While discussing the elements of desertion, Rayden on Divorce (11 th edition, page 223) contemplates that two elements should be present on the side of the deserting spouse, namely, the factum, i.e., physical separation and the animus deserendi, i.e., the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation, to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of 'constructive desertion' is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him.

46. In *Sirigiri Pullaiah v. Sirigiri Rushin Gamma* : AIR 1963 AP323 , it was held that the effect of, the two aforesaid Acts was that a wife was entitled to claim separate

maintenance and residence from her husband if he should marry again. If the wife could claim maintenance, on the ground that the husband had remarried it could not be said that she had deserted her husband without reasonable cause within the meaning of Sec. 10(l)(a) of the Hindu Marriage Act XXV of 1955. In that case a, petition had been filed for judicial separation under Sec. 10(l)(a) of the Hindu Marriage Act, 1955. The husband had taken a second wife and she was entitled to live separately and claim maintenance. 'the husband,' therefore, could not claim judicial separation on the ground of desertion. The husband had taken a second wife several years before starting proceedings under the Hindu Marriage Act, 1955 and sometime after the wife had obtained a decree for maintenance. The High Court was of the view that the second marriage of the husband was a good ground for the first wife to live separately and that was a justifiable reason for doing so.: There would thus be no scope for the argument that desertion was without, reasonable cause within the meaning of Sec. 10(l)(a) of the Hindu Marriage Act, 1955.

47. The Madras High Court, however, in *A. Annamalai Mudaliar v. Perumayee* Animal : AIR1965 Mad139 , expressed the opinion that the right to live separately from the' husband given to the wife under Sec. 18(2)(d) of the [Hindu Adoptions and Maintenance Act, 1956](#), could not be the same as a right of judicial separation under Sec. 10(2) of the Hindu Marriage Act, 1955. While dealing' with the above aspect, the Supreme Court in *Smt. Rohini Kumari v. Narendra Singh*, : [1972]2SCR657 , has observed as follows: -

'The true principle behind Sec. 18(2) of the [Hindu Adoptions and Maintenance Act, 1956](#) was that it should be open to the wife to claim to live separately from her husband in case he had got another wife living when the wife did not want to seek divorce or judicial separation. In the judgment under appeal it has been pointed out that desertion within the meaning of Sec. 10(l)(a) of the Hindu Marriage Act, 1955, read with the Explanation does not imply only a separate residence and separate living.

It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Without animus deserendi there can be no desertion

within the meaning of sec. 10(l)(a) of the Hindu Marriage Act, 1955. The consideration that, in case the husband remarries the wife is entitled to separate residence and maintenance under the Hindu Married Women's Right to Separate Residence and Maintenance Act, 1946, or any other enactment could not be utilised as a reason for coming to the conclusion that the fact of the remarriage of the husband must necessarily afford a reasonable cause for desertion'.

48. The Supreme Court has further observed in Smt. Rohini Kumari v. Narendra Singh, : [1972]2SCR657 as follows: -

'In our judgment the view of Allahabad High Court in the present case must be upheld. The preamble of the Act describes it as one to amend and codify the law relating to marriage among Hindus. It is well known that when a particular branch of law is codified it is intended and the object essentially is that on any matter specifically dealt with by that law it should be sought for in the codified enactment alone when any question arises relating to that matter. Ordinarily when it has been expressly stated that an enactment is meant for codifying the law the court is not at liberty to look to any other law. The Act not only amends but also codifies the law of marriage and it has made fundamental and material changes in the prior law. Sec. 4 of the Act gives overriding effect to its provisions. Therefore unless in any other enactment there is a provision which abrogates any provision of the Act or repeals it expressly or by necessary implication the provisions of the Act alone will be applicable to matters dealt with or covered by the same. Ss. 9 and 10 of the Act provide for restitution of conjugal rights and judicial separation. Sec. 10 deals with judicial separation and once a decree for judicial separation has been granted a decree for dissolution of marriage can be passed under S. 13(1-A) provided there has been no resumption of cohabitation between the two parties to the marriage for a period of two years or upwards after the passing of the decree for judicial separation. It may be mentioned that Sec. 13 gives several grounds for dissolution of marriage by a decree of divorce and one of the grounds is the one contained in sub-sec. (1-A) of that section. The [Hindu Adoptions and Maintenance Act, 1956](#), hereinafter called the Maintenance Act also amended and codified the law relating to adoptions and maintenance among Hindus. Sec. 18(2) provides inter alia that the Hindu wife shall be entitled to live separately from her husband

without forfeiting her claim to maintenance if he is guilty of desertion, that is to say, of abandoning her without reasonable cause and without her consent or against her wish or of wilfully neglecting her or if he has any other wife living. Indeed the last clause (g) of Sec. 18(2) is very general i.e., if there is any other cause justifying her living separately. Sec. 10 of the Act and Sec. 18 of the Maintenance Act are quite distinct and one cannot be said to control the other. The former provision deals with the matrimonial offences by either spouse which would justify the grant of a decree for judicial separation. Sec. 18 provides for grant of maintenance to the wife alone. Sub-section (1) says that a Hindu wife shall be entitled to be maintained by her husband during her lifetime, Sub-sec. (2) gives her a right to live separately from her husband without forfeiting her claim to maintenance provided any of the conditions in Cls. (a) to (g) exist or are specified. The essential ingredient of desertion, animus deserendi i.e., intention on the part of the deserting spouse to remain separated permanently or to bring cohabitation to an end for ever need not exist in case of a wife who has been given the right to live separately in certain circumstances without forfeiting her claim to maintenance. The Act and the Maintenance Act provide different remedies to a wife whose husband has been guilty of desertion. Under the Act she can sue for judicial separation if the conditions laid down in sec. 10(1)(a) of the Act read with the Explanation are satisfied. She can without resorting to that remedy choose to live separately from her husband who would be bound to maintain her if it is proved that he has been guilty of desertion and the other conditions laid down in S. 18(2)(a) are satisfied. It is significant that under Sec. 13(2) of the Act a wife may present a petition for dissolution of marriage by a decree of divorce on the ground that the husband had married again before the commencement of the Act or that any other wife of the husband married before such commencement was alive at the time of the solemnization of the marriage of the petitioner. But this can be done only if the marriage with the petitioner was also solemnized before the commencement of the Act. For instance in the present case the wife could have asked for dissolution of her marriage under the aforesaid provisions because the marriage of the husband with countess Rita was performed before the Act came into force. If she, however, did not choose to resort to that remedy she could decide to live separately under Sec. 18(2)(d) of the Maintenance Act. This shows

the sharp contrast in the provisions of the two enactments. When the wife chooses to live separately under Sec. 18(2)(d) in the circumstances mentioned before she would be entitled to maintenance from the husband. He could not compel her to return to him so long as his marriage with the other wife is not dissolved but if the marriage is dissolved the husband can call upon the wife to return to him and if she does not return it is very doubtful if she can still claim maintenance from him under Sec. 18 of the Maintenance Act. However, this is a matter on which we need express no final opinion. All that we are concerned with, in the present case, is whether the provisions of Sec. 18(2) of the Maintenance Act can affect the matters provided for by Sec. 10 of the Act. It is quite obvious that Sec. 18 of the Maintenance Act does not amend or abrogate the provisions of Sec. 10 of the Act which alone must be looked at for the purpose of disposing of the appeal before US.'

49. In the instant case before us, on the question of second marriage, the trial court has rejected the case of the plaintiff/respondent herein. The respondent herein had not preferred any cross-objection as against the said observation of the trial court. A careful perusal of the evidence of P.Ws. 1 to 3 shows that the appellant herein is living with Bommiammal. Thus, we find that the respondent herein has justifiable cause to live separately from her husband and demand separate maintenance from him.

50. Bearing in mind the above principles laid down regarding desertion and cruelty by the Supreme Court in the decisions referred to above, we have no hesitation to hold that the plaintiff/respondent herein has proved her case regarding both the grounds alleged by her. It is not in dispute that the appellant and the respondent loved each other before marriage and got married, and they were living happily for some time after marriage. The appellant/ defendant who examined himself as D.W. 1 has deposed that he gave Rs. 2,000/- to the plaintiff's father and he often used to demand money from him, but he refused to give money to his father-in-law. It is contended on behalf of the appellant herein, relying on the said evidence of D.W. 1, that because of the misunderstanding between the appellant and his father-in-law, his father-in-law at last came and took away his daughter to his house. It is further contended on behalf of the appellant herein that in spite of

steps taken by the appellant himself and through some common men to take back his wife, the appellant's father-in-law refused to send the respondent herein along with the appellant.

51. It is relevant to note that as regards the money dealings, except the ipse dixit of D.W. 1, there is no other corroborative evidence to prove the same. Coming to the question of steps taken by the appellant herein to take back his wife/respondent herein from: her parents' house, none of the common men had been examined to show that the appellant went and asked his wife to return to his house. If really the respondent herein had deserted her husband/the appellant herein and went away from him, the appellant would have, issued a notice to her asking her to come and live with him. But he has not taken any such steps. On the other hand, for the suit notice Ex. A-1 issued by the respondent to the appellant, the appellant has sent Ex. A-3 reply to the respondent herein stating that the appellant is ready and willing to take the respondent and live with her.

52. Regarding the jewels which, according to the appellant, had been stealthily taken away by the respondent, the appellant did not take any steps to get back the same. All these aspects of the case would go to show that the desertion alleged by the respondent herein is true. The case of the appellant that it is the respondent who deserted the appellant, under the circumstances, cannot be accepted. The fact that the appellant is living with another woman, Bommi Ammal shows that he has deserted the respondent herein and is not looking after her. P.W. 3, the plaintiff/ respondent herein states in her evidence that she was beaten by her husband six years ago and was driven out of her house. She would also say that she was beaten by her husband on 20 occasions. She would say that her father would come to her husband's house and take her to his house. In a case like this, in order to prove cruelty, there cannot be any better evidence than that of the version of the wife/respondent herein. Therefore, there is no substance in the argument advanced on behalf of the appellant herein that the non-examination of the respondent's father affects the case of the respondent regarding cruelty. It is relevant to note that the appellant and the respondent have no issue for eleven years during the marital life. It is in the evidence of the respondent as P.W. 3 that her husband used to abuse her as a 'barren lady'*. The evidence thus spoken to

by P.W. 3 shows the mental agony she was suffering, in that she was being called as* by none other than her own husband. This kind of accusation made by the appellant herein, without any proof on record showing that he had undergone a medical test to prove his potency, in my view, certainly amounts to legal cruelty meted out to his wife/respondent herein. The accusation of a Hindu wife as a 'barren lady' by any one, much less her own husband, certainly amounts to cruelty under law. Thus, if we assess the evidence adduced in this case, it is clear that cruelty and desertion alleged by the plaintiff/ respondent herein have been proved. The very fact that the defendant/ appellant herein is living with the said Bommi Ammal, though there is no proof of any marriage between the appellant and Bommi Ammal, yet, would go to show that such a life led by the appellant herein with Bommi Ammal excluding the company of the respondent herein for a considerable time certainly amounts to desertion under the provision of Sec. 18 of the [Hindu Adoptions and Maintenance Act, 1956](#). Thus, I find that the cruelty and desertion alleged by the respondent herein are true. Under the circumstances, the respondent herein has justifiable cause to live separately from the appellant herein and demand maintenance.

53. As regards the quantum of maintenance claimed by the respondent herein, the trial court awarded maintenance at the rate of Rs. 50/- per mensem from the date of plaint and also awarded a sum of Rs. 200/- towards past maintenance with a charge over 1/4 share of the appellant herein on plaint items 1 to 12 alone. The quantum of maintenance and the past maintenance fixed by the trial court and in turn confirmed by the lower appellate court cannot be said to be excessive. The respondent herein has not preferred any cross objections as against the said finding of the trial court before the lower appellate court. Hence the said finding of the trial court regarding quantum has become final and conclusive, and is binding on the plaintiff/respondent herein.

54. In the result, the Second Appeal faili) and it is dismissed. Under the circumstances, there is no order as to costs.

55. Appeal dismissed.

