

Madras High Court

S.Thavamani vs The Factum Of Separation; on 19 July, 2011

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated: 19.07.2011

Coram

THE HONOURABLE Mr.JUSTICE ELIPE DHARMA RAO

AND

THE HONOURABLE Mr. JUSTICE M.VENUGOPAL

C.M.A.No.3265 of 2009

and

M.P.No.1 of 2009

S.Thavamani

.. Appellant

V.

G.Sathyamoorthy

.. Respondent

PRAYER: Civil Miscellaneous Appeal filed under Section 19 of the Family Courts Act, 1984

For Appellant : Mr.V.Raghavachari

for Mr.MA.P.Thangavel

For Respondent : Miss.P.T.Asha

for M/s.Sarvabhuman Associates

JUDGMENT

M.VENUGOPAL,J.

The Appellant/Wife has preferred the present Civil Miscellaneous Appeal as against the order dated 28.10.2009 in H.M.O.P.No.91 of 2007 passed by the Family Court, Coimbatore.

2.The Respondent/Petitioner (Husband) has filed H.M.O.P.No.91 of 2007 on the file of Family Court, Coimbatore, under Section 13(1)(ib) of the Hindu Marriage Act, 1955, praying for dissolving the marriage that took place on 31.03.2004 between him and the Appellant/Wife.

3.The marriage between the Respondent/Husband and the Appellant/Wife took place on

31.03.2004 at Kurumandur as per the Hindu Rites and Customs. As a result of the wedlock, the Appellant/Wife delivered a male child on 08.01.2005. According to the Respondent/Husband, after the child birth, the attitude of the Appellant/Wife had changed and she started openly showing her hatred towards him. The Appellant/Wife was travelling everyday from Gobichettipalayam to attend her Lectures job. The Respondent/ Husband issued a lawyer's notice, dated 24.08.2005, expressing his love for the Appellant/Wife and his desire to set the family life again. However, the Appellant/Wife caused a frivolous reply dated 26.06.2005, levelling allegations against the Respondent/Husband. The Respondent/Husband also issued a notice, dated 03.09.2005, to the Appellant/Wife, wherein he explained that he was treated badly at her place and she should now go over to Coimbatore on an auspicious day and that an independent house will be set up, though he had faith in the joint family. The Appellant/Wife's Lawyer reply contained frivolous allegations. The intention of the Appellant/Wife to break was evident.

4.The Respondent/Husband addressed letters dated 24.09.2005 and 26.11.2005 to the Appellant/Wife, but they were ignored. The Respondent/Husband sent a Lawyer's notice dated 19.12.2005 in and by which the Appellant/Wife was called upon to join with him and set up matrimonial home. The Appellant/Wife sent a letter dated 04.01.2006, accusing the Respondent/husband with numerous false allegations. Again, the Respondent/Husband wrote a letter dated 12.01.2005 to the Appellant/Wife expressing his love for her and his anxiety to set up the family. The Appellant/Wife's Lawyer reply dated 11.01.2006 was received by the Respondent/Husband with the usual allegations and a demand for the jewels etc. Subsequently, the Appellant/Wife wrote a letter dated 21.01.2006, reiterating the demands and imposing conditions which were impossible of performance.

5.The plea of the Respondent/Husband is that the Appellant/Wife had voluntarily abstained from his company and refused to set up the matrimonial home though he had given assurances of co-operation. The Appellant/Wife left on 01.12.2004. In the counter filed before the trial Court, she had stated that for the Respondent/Husband's Lawyer notice dated 24.08.2005, she had sent a reply dated 26.08.2005 through her counsel. Moreover, she had sent a rejoinder on 08.09.2005 for the Respondent/Husband's Lawyer Reply notice dated 03.09.2005.

6.Added further, she stated that either herself or her son had not committed any wrong acts for seeking the relief of divorce by the Respondent/Husband.

7.Before the trial Court, on the side of the Respondent/ Petitioner/Husband, witness PW1 was examined and Ex.P1 to Ex.P.15 were marked. On the side of the Appellant/Respondent/Wife, witness RW1 was examined and no document was marked.

8.The trial Court, on an appreciation of oral and documentary evidence available on record and after analysing the same, had resultantly allowed the H.M.O.P.No.91 of 2007 filed by the Respondent/Wife and granted the relief of dissolution of the marriage dated 31.03.2004 that took place between the parties.

9. Being dissatisfied with the order dated 28.10.2009 in H.M.O.P.No.91 of 2007 passed by the Family Court, Coimbatore, the Appellant/Wife has filed the present Civil Miscellaneous Appeal before this Court.

10. The point that arises for consideration in this Civil Miscellaneous Appeal is:-

Whether the Respondent/Husband is entitled to claim the relief of dissolution of the marriage dated 31.03.2004 that took place between him and the Appellant/Wife in H.M.O.P.No.91 of 2007?.

11. The Contentions, Discussions and Findings on point:

According to the Learned Counsel for the Appellant/Respondent (Wife), the trial Court had failed to appreciate the materials placed before it and had come to a wrong inference that it is a fit case for the grant of divorce, when in reality the allegations made by the Respondent/Husband were not proved.

12. It is the further contention of the Learned Counsel for the Appellant/Wife that the trial Court failed to note that in the instant case, the plea of desertion was not proved.

13. Advancing his arguments, it is the submission of the Learned Counsel for the Appellant/Wife that the trial Court had failed to take into account Ex.P.4 Reply Notice, dated 26.08.2005, Ex.P.6 Reply Notice, dated 08.09.2005 and Ex.P.10 Letter, dated 04.01.2006 written by the Appellant/Wife addressed to the Respondent/Husband which would point out that the Appellant/Wife was ready and willing to live with the Respondent/Husband along with the male child.

14. The Learned Counsel for the Appellant/Wife takes a plea that the presumption in the present case was in favour of the Appellant/Wife and the same is not rebutted by the Respondent/Husband and hence, the trial Court ought not to have allowed the petition for divorce.

15. In response, it is the submission of the Learned Counsel for the Respondent/Husband that the trial Court took into consideration the overall evidence of PW1 and RW1 and the documents filed by the Respondent/Husband and had come to a resultant conclusion that the Appellant/Wife without any reasonable cause, had deserted the Respondent/Husband and not living with him, but, living separately and accordingly, granted the relief of divorce in favour of the Respondent/Husband, which need not be interfered with by this Court at this distance of time.

16. PW1 (the Respondent/Petitioner/Husband) in his proof affidavit had stated that he and his wife are College Lecturers and they lived in Coimbatore as husband and wife and further that, they were blessed with the male child on 08.01.2005 and thereafter, his Wife behaviour had changed and she used to exhibit her hatred towards him openly.

17. It is the further evidence of PW1 that on 24.08.2005, through his letter Ex.P.3 dated 24.08.2005, he had expressed his desire to live with the Respondent/Wife in Coimbatore as Husband and wife and his wife sent a wrong reply dated Ex.P.4 dated 26.08.2005. In Ex.P.4 Reply, the Appellant/Wife

had stated that if she was welcomed in a proper manner she would come and also that, he had grabbed and kept her property. Further, he wrote a letter Ex.P.5 dated 03.09.2005 addressed to the Appellant/Wife to change her wrongful opinion about him. Continuing further, he had also stated that he and his wife could see a separate house on an auspicious day and live happily for which the Appellant/Wife sent a wrongful reply Ex.P.4 dated 08.09.2005.

18.PW1 (in his proof affidavit) had also stated that he has written Ex.P.7 and Ex.P.8 Letters, dated 24.09.2005 and 26.11.2005 to the Appellant/Wife, but she has not given replies. Even for the Ex.P.9 his Lawyer notice, dated 19.12.2005, wherein the Appellant/Wife has been asked to join and co-operate with him for leading the matrimonial life, she sent a reply Ex.P.10, dated 04.01.2006, making false allegations against him. In Ex.P.11, dated 12.01.2006, for the reply sent by the Appellant/Wife, he expressed his love and affection towards her and his desire to join and live with her family. But, in the reply among other things she asked the Respondent/Husband to return the jewellery items.

19.PW1 goes on to add in his evidence that the Appellant/Wife had left the matrimonial home in December, 2004 and she refused to lead the matrimonial life with him. Furthermore, she took back her Jewellery, Academic Certificate and Bank Passbook through Court.

20.PW1 (in his cross examination) had deposed that till the Appellant/Wife conceived, there was no difference of opinion with him and after conception, the differences arose and after 4, 5 months of conception, he asked the Appellant/Wife not to go for employment and from that point of time, the problem arose and that the Appellant/Wife had not accepted whatever told by him and she used to argue and there was a difference of opinion.

21.RW1 (Appellant/Wife) in her proof affidavit, had stated that there was no enmity with her husband and the family members and had great respect towards them and especially towards her husband, she has behaved as a responsible wife. She has also stated that after the delivery, the Respondent/Husband (PW1) phoned on 23 occasions and threatened that only if 10 more sovereigns of gold are brought by her, he would take her with him and also, he had contacted the Appellant/Wife's colleague lecturers and the relatives and threatened that he is going to divorce the appellant.

22.RW1 (in her cross examination) had deposed that she did not remember that in the letter written to the Respondent/Husband on 22.01.2006, she has mentioned that she is going to lodge a complaint against him and his parents for dowry harassment and she has no intention to lodge such a complaint and only by demanding 10 sovereigns of gold, the respondent/husband was doing wrong after wrong.

23.Also, she had stated that she sold Thali Kodi of 5 sovereigns towards her son's medical expenses and that Ex.P.11 dated 12.01.2006 has come to her for which he sent a reply.

24.The Learned Counsel for the Appellant cites the decision of Honourable Supreme Court Lachman Utamchand Kirpalani v. Meena Alias Mota, (1964) 4 SCR 331 : AIR 1964 SC 40, wherein in

Paragraphs 70 and 71, it is among other things held as follows:

o....The husband, for one reason or other, either because of his respect for his parents or because of his weakness or because of both, though at the beginning he was affectionate to his wife, was not able to stand up for her and later on he fell in line with his parents and sisters and began to ill-treat her. Though in the earlier years she was allowed to go to her parents' house now and then, later on the appellant and his parents refused her permission to go to her parents' house or allowed her to do so once in a while with great reluctance, when her father, on one of his infrequent visits, was in India. She was not even permitted to go when her uncle died. The appellant also contemplated a second marriage, but, for one reason or other, it did not come off. By the year 1954 she was in a nervous strain and necessarily that must have affected her health. Her father, who came to India at the end of 1953, heard her complaints and saw her physical and mental condition. He did what a loving father should do in the circumstances. Giving up the ideas of false prestige, he approached the parents of the appellant directly and through a friend and persuaded them to permit the respondent to go to his house and thereafter to the Far East with him for a short stay to recoup her health. The respondent also took the permission of her husband. After some time, the husband - I am assuming that his version of the visit along with Dr. Lulla, to Poona was true-changed his mind and asked her to come back, but she refused to come back. From her standpoint she obviously did not like her husband going back on his word and disturbing her planned holiday, to which she was looking forward. From the standpoint of the husband, he was angry because as, a Hindu husband he expected his wife to obey him whether his demand was reasonable or not. The wife, perhaps' did not tell him the day when she would be leaving with her father to the Far East. She must have been afraid that he would prevent her somehow from going abroad. That explains her conduct in not seeing him or his parents at Bombay before she boarded the ship. The subsequent correspondence shows that the appellant was telling her from his commanding position that she should give up her holiday and come back to him immediately and she, on her part, was persuading him in a subdued tone to permit her to stay for a few months and promising to come back thereafter. The letter dated April 2, 1955, was an unexpected and unmerited blow to her. Therein she was charged with unchastity and leading a fast and reckless life. Even a Hindu wife would be enraged and insulted by such dastardly conduct on the part of her husband. Even so she sent a reply couched in a dignified and controlled language denying his allegations and stating that she would return in a few months. She was not even invited by the appellant when his sister was married in November 1955. She therefore, came back to India only in April 1956. In view of the serious allegations made by the appellant in his letter dated April 2, 1954, and in view of his determined attitude disclosed therein, she naturally and properly expected that the husband would invite her or send somebody to take her back to his home. Instead of doing so, though he knew that the respondent had come to India, he did not make any attempt to invite her or send a relation to bring her to his home as he used to do on previous occasions when she went to her father's house. By that time as the Act came into force, he found his opportunity for which he was waiting and took advantage of the situation. As the statutory period of two years had expired from the date she left India, he rushed to the Court. On these facts, I have no doubt that the appellant failed to establish that the respondent deserted him without any reasonable cause.

71. Even if she deserted him within the meaning of Section 10 of the Act, I would hold that by writing the letter dated April 2, 1955, she ceased to be in desertion from that date. A fair reading of that letter, read in the context of her offer to return within a few months, shows beyond any doubt that he closed the door for her return long before the statutory period had expired. When the respondent wrote to the appellant telling him that she would come in a few months, he wrote to her saying that she was leading an immoral life and that he would no longer be "drawn into her game." Even after that letter, she wrote back denying his charges and promising to come as soon as her health improved. I have no doubt that, at any rate from April 2, 1955, the desertion, if any, on the part of the respondent, came to an end and from that date the appellant was guilty of desertion.

25. He also relies on the decision of Honourable Supreme Court Dharmendra Kumar vs Usha Kumar, AIR 1977 SUPREME COURT 2218, wherein it is held hereunder:

In order to be a "wrong" within the meaning of s. 23(1)(a) the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled. ILR (1971) Delhi 6 (FB) and AIR 1977 Delhi 178, Approved.

Where after a little over two years of passing of decree of restitution of conjugal rights in her favour, the wife applied for dissolution of marriage under S.13(1A)(ii) and the husband in his written statement alleged that the wife refused to receive or reply to the letters written by the husband and did not respond to his other attempts to make her agree to live with him, this allegation, even if true, did not amount to misconduct grave enough to disentitle the wife to the relief she asked for.

26. He seeks in aid of the decision of the Honourable Supreme Court Smt. Saroj Rani v. Sudarshan Kumar Chadha, (1984) 4 Supreme Court Cases 90, at Page 91 wherein it is held that 'The 'wrong' under Section 23(1)(a) has to be something more than mere disinclination to agree to an offer of reunion; it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.'

27. Apart from the aforesaid decisions, the Learned Counsel for the Appellant/Wife places reliance on the following decisions:

(a) In M. Lakshmi v. K. Seethapathy, Technician, Baggage & Shipping Plant Madras Fertilizers Limited, Madras-68, 1997 (III) CTC 718, this Court has held that 'the burden is on husband to prove desertion on part of wife without reasonable cause for statutory period and the evidence on record shows that husband did not try to take wife back and wife had intention to join her husband and that the divorce cannot be granted on the ground of desertion.

(b) Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi, (2002) 1 Supreme Court Cases 308, at Page Nos. 309 and 310, the Honourable Supreme Court in Paragraph 7 has laid down as follows:

Desertion in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may

furnish a ground for relief are :

1. The factum of separation;
2. The intention to bring cohabitation permanently to an end *animus deserendi*;
3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;

From the Explanation to Section 13(1)(i-b) of the Hindu Marriage Act, 1955, it is clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage. Therefore, for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.

(c) In *Savitri Pandey v. Prem Chandra Pandey*, (2002) 2 Supreme Court Cases 73, at Page 75, the Honourable Supreme Court has observed as follows:

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that 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.

Bipinchandra Jaisinghbhai Shah v. Prabhavati, AIR 1957 SC 176; *Lachman Utamchand Kirpalani v. Meena* AIR 1964 SC 40 relied on To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case. As desertion in matrimonial cases means the

withdrawal of one party from a state of things, i.e., a marital status of the party, no party to the marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognised and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of consummating the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further the perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, there can be no desertion without previous cohabitation by the parties. The basis for this theory is built upon the recognised position of law in matrimonial matters that no-one can desert who does not actively or wilfully bring to an end the existing state of cohabitation. However, such a rule is subject to just exceptions which may be found in a case on the ground of mental or physical incapacity or other peculiar circumstances of the case. However, the party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong.

(d) In *Rajendran v. R.Dhanalaxmi*, 2009-2-L.W.571, at Page 572, this Court has held that 'the onus of proof was on the husband to prove that there was animus deserendi on the part of the wife in shunning the company of the husband and in this Case, the wife despite having undergone torture at the hands of the husband, has chosen to file the application for restitution of conjugal rights and that shows her intention to resume cohabitation with the husband and it was because of the husband's attitude, the separation resulted in their matrimonial relationship and in such a case it is crystal clear that absolutely there is no ground for granting divorce.

(e) In *Ravikumar v. Julmidevi*, (2010) 4 Supreme Court Cases 476, at Page 477, the Honourable Supreme Court has held that 'in exercise of its powers first appellate court can come to a finding different from that arrived at by trial court, especially where appreciation of evidence by the trial Court is not proper etc.'

(f) In the decision *Thatchinamoorthy v. Sivagamy*, 2010-2-L.W.903 (Division Bench), at Page 913 this Court in Paragraphs 33 to 35 has observed and held thus:

3. In AIR 1964 SC 40 (*Lachhman Uttam Chand Kirpalani Vs. Meena*), the Supreme Court observed that 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.' The essence of desertion has (sic) judicially understood his (sic) total repudiation of obligation of marriage or abandonment of the deserted house with an intention to bring the cohabitation permanently to an end. Mere physical separation between the spouses or very intention of one to separate from the other without any overtact would not by itself amount to desertion.

34. According to the Explanation to Section 13(1)(ib) 'desertion' should be without reasonable cause and without the consent or against the wish of such party. It follows that if a spouse for any reasonable cause or justifiable reason leaves the company of the other, such spouse cannot be said, to have deserted the other spouse, where the wife is forced to live away from the husband. In her evidence, the Respondent has stated that when she questioned about the illicit intimacy of the Appellant with Mahalakshmi, she was driven out of the matrimonial house in April, 1998. In the

counter filed by the Respondent and also in her evidence, the Respondent asserted her willingness to live with the Appellant. When the Appellant/husband has developed illicit intimacy with another woman and the said Muthulakshmi has also given birth to a female child, the Appellant/husband has created a compelling situation for the wife to live separate. Having driven the Respondent out of the matrimonial house, the husband cannot blame her for desertion.

35.Desertion within the meaning of Section 10(1)(a) of the Act read with explanation does not imply only separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation. Where the Appellant/husband persistently accuses wife of unchastity it would be a reasonable cause for the wife to live separate. In the instant case, the Respondent has expressed her willingness to live with the Appellant. Absolutely no grounds are made out to prove the Respondent has deserted the Appellant.

28.The Learned Counsel appearing for the Appellant/Wife refers to Ex.P.11 Rejoinder Letter, dated 12.01.2006 written by the Respondent/Husband to the Appellant/Wife, wherein he had stated that he was waiting to get instructions from her regarding the facilities required and further stated that even after the false allegations made by the Appellant/Wife, he still loved her and points out that the intention of the Respondent/Husband was to live with the Appellant/Wife.

29.In Ex.P.12, the Appellant/Wife's Lawyer Notice dated 11.01.2006 addressed to the Respondent/Husband's Lawyer, it was among other things mentioned that the Respondent/Husband ill-treated the Appellant/Wife even though she is a Lecturer and that he must return back the 27 Sovereigns of gold jewels, all her Educational Qualifications Certificates and Bank Passbooks kept by him. Further, it was also stated that in order to get money, jewels and the salary from the Appellant/Wife, the Respondent/Husband had married her and he had no love and affection on the Appellant/Wife, which was a conclusive proof.

30.In the Letter Ex.P.13, dated 21.01.2006, addressed to the Respondent/Husband, the Appellant/Wife had stated that he may please come along with his parents and relatives and take her child as per the Hindu Customs, which was her desire.

31.At this stage, the Learned Counsel appearing for the Appellant/Wife submits that neither the Appellant/Wife nor the Respondent/Husband abandoned each other and also that as between the parties, there was no intention to abandon. In Ex.P.9, the Respondent/Husband's Lawyer notice, dated 19.12.2005, addressed to the Appellant/Wife had stated that he was submitting to whatever conditions she had imposed on him in the fond hope that the marriage continue and join with the child. Further, he was prepared to submit himself to all her reasonable demands and conditions. In short, Ex.P.9, the Respondent/Husband's lawyer notice addressed to the Appellant/Wife calls upon the Appellant/Wife to make up her mind and to join with the Respondent/Husband as early as possible by sorting out the minor problems if any between the parties.

32.In Ex.P.10, the Appellant/Wife's Reply, dated 04.01.2006, addressed to the Respondent/Husband, she had stated that she was treating the Respondent/Husband as her 'two eyes'.

33.In Ex.P.8 Letter, dated 26.11.2005, addressed to the Appellant/Wife, the Respondent/Husband had stated that 'it has become necessary for both of them to live together and bring up their child and to see a house at Coimbatore and live separately and he did not understand as to why she is not agreeing for the same, etc.

34.As a matter of fact, in Ex.P.8 Letter dated 26.11.2005, the Respondent/Husband had stated that 'Let us not dig the thing which had passed' and that they would think of the future.

35.In Ex.P.7 Letter dated 24.09.2005, sent by the Respondent/Husband to the Appellant/Wife, the husband had stated that only when they live happily the sweet child would be brought up with happiness and proper culture and further, the Respondent/Husband had asked the Appellant/Wife to write what she meant 'on an auspicious day' 'as per procedure'. Further, in the said letter, the Respondent/Husband had stated that he was ready to welcome the Appellant/Wife with a smiling face.

36.The Learned Counsel for the Appellant/Wife submits that the Appellant/Wife's Lawyer reply notice Ex.P.12, dated 11.01.2006, addressed to the Respondent/Husband's Advocate, was taken advantage of by the Respondent/Husband for the plea of divorce and for desertion there must be a separation of mind between the parties and in the present case, the same was lacking.

37.Obviously, Ex.P.12 Reply lawyer's notice, dated 11.01.2006 of the Appellant/Wife addressed to the Respondent/Husband's Lawyer, had triggered rift between the parties for the simple reason that the said Lawyer's reply notice refers to the fact that the Respondent/Husband in order to get money, jewels and salary of the Appellant/Wife had married her and that he had no love and affection on the Appellant/Wife.

38.The Respondent/Husband filed H.M.O.P.No.91 of 2007 on the file of Family Court, Coimbatore, on the ground that the Appellant/Respondent/Wife had deserted him for a continuous period of not less than two years immediately presiding the presentation of the petition as per Section 13(1)(ib) of the Hindu Marriage Act, 1955. It is to be borne in mind that divorce could not be granted simply on the ground of disparity in the status of the spouses or their respective families as per the decision Anita @ Sona Goswami v. Sourendra Kanta Goswami, (2000) II DMC 126(Cal-DB).

39.A stable marriage is a valuable institution for the social organisation. However, divorce is permitted only when a serious ground exists. In a case of desertion, the intention to bring the cohabitation permanently to an end and element of separation must exist. Both the two ingredients mentioned ought to continue during the statutory period. Indeed, the term 'Desertion' means the desertion of spouse by other spouse to the marriage without a reasonable cause and without consent or against the desire of such party which includes a case of wilful neglect.

40.In regard to the deserted spouse is concerned (a)the absence of consent and (b)the absence of conduct giving reasonable cause to the spouse leaving the matrimonial house to form the necessary intention are to be essentially present in a given case. Desertion cannot mean withdrawal from the place, but it is from a state of things. Hence, the term 'desertion' means withdrawing from the

matrimonial obligations namely not allowing and facilitating cohabitation between the parties.

41. In a case of desertion, the petitioner should prove that there has been desertion throughout the statutory period and there has been no bona fide endeavour on the part of the other parties to return to the matrimonial house and that the petitioner has not prevented the other spouse either by words or by conduct from cohabitation as per decision *Chintala Venkata Sathyanarayana Rao v. Chintala Shyamala*, AIR 2003 A.P. 322.

42. Desertion can be inferred from the facts and circumstances drawn from each case. In a case of separation, the *Animus Deserendi* plays a vital role. *Animus Deserendi* must co-exist throughout the statutory period. If the parties are living separately and wife has no intention to resume matrimonial relationship. The *Animus Deserendi* on the part of wife is proved as per decision *Shrawan Kumar Giri v. Rita Devi*, 2002 (3) Jhr. L.J.R. 88 at p.90 (Jhr).

43. The essence of desertion refers to the intentional permanent abandonment of one spouse by the other that other's consent and without a reasonable cause. To prove the factum of desertion and *animus deserendi*, it is for the petitioner to establish the same to the satisfaction of the Court as per decision *Arundhati Deepak Patil v. Deepak Bhaurao Patil*, 2008 (5) Bom C.R.1 at p.12.

44. Also, the plea of divorce is not to be granted on the ground that both the parties were living separately for about 7/8 years before the filing of the petition. To put it precisely, there must be cogent and coherent evidence on the record to establish that the wife had no intention to join the matrimonial home after she parted company as per decision *Amarjit Kaur v. Babu Singh*, 1990 (1) H.L.R. 58 at p.60 (P. & H.).

45. We worth recall the decision of this Court *P.Kalyanasundaram v. K.Paqualatchamy*, (2003) 1 MLJ 669 (Division Bench), at Page 671, wherein it is laid down as follows.:

Mere statement or expression of intention to return is not sufficient to terminate desertion. *Animus revertendi* is not sufficient. There must be *factum revertendi*. Husband alleging abnormal relationship of wife with her father would not amount to cruelty. Wife writing letters to the Higher Authorities of the husband where he is working amounts to cruelty. Even though the decree for divorce is granted on ground of desertion by the wife that does not preclude the Court from awarding maintenance to the wife.

46. Proceeding further, the term 'desertion' means withdrawal from the matrimonial obligations. The onus of proving the desertion is to be taken into account by appreciating the concept of marriage in a proper perspective. Desertion is not an isolated act complete in itself, but, it is a continuous conduct of a party to be decided based on the entire conspectus of the facts and circumstances of a given case. One cannot ignore an important fact that if a spouse abandons the other in a transitory passion like anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion as per decision *Pothapragada Sri Lakshmi Maruthi Hara Gopal v. P.Seshu Kumari*, 2004 (3) A.L.T. 607 at P.612, 613 (A.P.).

47.As far the present case is concerned, the Respondent/Husband in H.M.O.P.No.91 of 2007 on the file of the trial Court had averred that the Appellant/Respondent (Wife) left on 01.12.2004 and had voluntarily abstained from his company and refused to set up the matrimonial home. According to the Respondent/Husband, the matrimonial tie between him and the Appellant/Wife could not continue. Admittedly, the marriage between the parties took place on 31.03.2004 at Kurumandur. As a result of the wedlock, the Appellant/Wife delivered a male child on 08.01.2005. In the instant case, the Appellant/Wife had not taken positive endeavours after December 2004 to live with the Respondent/Husband. Though many letters were exchanged between the parties, there was no meeting point for them. The Appellant/Wife had received her belongings from the Respondent/Husband. Also, in the counter, she had stated that the Respondent/Husband asked her to live with him. The Respondent/Husband called the Appellant/Wife to live in the status of the separate family. In her evidence as RW1, she had also deposed that the Respondent/Husband asked her to come and live with him. Therefore, it is quite evident that the Appellant/Wife had deserted the Respondent/Husband without any reasonable or justifiable cause and in fact, the evidence of the Respondent/Husband as PW1 and other evidence and circumstances were so clinching that the Respondent/Husband had proved the factum of desertion by the Appellant/Wife and in that view of the matter, we hold that the trial Court came to the right conclusion and granted the relief of dissolution of marriage dated 31.03.2004 that took place between the parties. Viewed in that perspective, the Civil Miscellaneous Appeal fails.

48.In the result, the Civil Miscellaneous Appeal is dismissed leaving the parties to bear their own costs. Consequently, the order dated 28.10.2009 made in H.M.O.P.No.91 of 2007 on the file of Family Court, Coimbatore, is affirmed by this Court for the reasons assigned in this Miscellaneous Appeal. Connected Miscellaneous Petition is also closed.

(E.D.R.J.) (M.V.J.)

Index :Yes
Internet :Yes
mps

To

The Family Court, Coimbatore.

ELIPE DHARMA RAO, J.
AND
M. VENUGOPAL, J.

mps

C.M.A.No.3265 of 2009
and
M.P.No.1 of 2009

19.07.2011