Madras High Court
Chandrika vs M. Vijayakumar on 9 April, 1996
Equivalent citations: 1996 (1) CTC 496, (1996) IIMLJ 439
Author: P Sathasivam
Bench: A A Hadi, P Sathasivam
ORDER P. Sathasivam, J.

1. The respondent in Family Court O.P. No. 199 of 1992 on the file of Principal Family Court, Madras, is the appellant in the above appeal. The husband/respondent herein filed F.C.O. No. 199 of 1992 before the said court Under Section 13(1)(b) of the Hindu Marriage Act, 1955 as amended against the appellant/wife for the grant of divorce on the ground that the wife deserted him without any just cause or reason. The Family Court, by order dated 6.3.1995, allowed the original petition and dissolved the marriage between the appellant and the respondent solemnized on 3.3.1983 by a decree of divorce. Aggrieved by the decree of the Family Court dated 6.3.95, the wife has now come forward with the present appeal before this Court under Section 19 of the Family Court Act.

2. The brief facts leading to the filing of the petition for divorce are as follows:- According to the respondent/petitioner, the marriage between the petitioner and the respondent herein was solemnized on 3.3.1983 at Madras according to Hindu rites and customs. They lived happily for a short period. It is contended that the wife often used to leave for her parents house on some pretext or the other. When objections were raised by the husband, the wife started behaving rudely, but still she was permitted to go to her mothers place. After the marriage the respondent became pregnant and during the month of April, 1983, she sought the permission of her husband to stay in her parents house for some time to which the respondent conceded. According to the husband, even after delivery, the wife failed to return back to the matrimonial home and several attempts in this regard proved useless. It is the definite case of the husband that inspite of his repeated requests to the respondent to return the matrimonial home between 1983 and 1985 December proved futile. It is the further case of the husband that he made several visits to the respondent's house both before delivery of the child and after. When the wife made a brief appearance at the husband's uncle's daughter's marriage in Hotel Ashoka in the month of October, 1984, the husband requested her to return. But inspite of his request, she omitted to do so. It is the further case of the husband that when he went to the place of the wife, the petitioner/husband and his people were insulted and turned away on the ground that they had not come at the appointed time. Therefore, the husband realised that the respondent/wife has no intention to return to the matrimonial home and as a result, he sent a legal notice calling upon the wife to come to the matrimonial home along with the child. Even though she had received the legal notice, only her father sent a reply. It is further contended by the husband that his wife made again a short visit to his place on 27.12.85 to celebrate the child's birthday and thereafter, according to him, the wife's father along with some 20 or 30 people forcibly entered the house and took his wife and child away. Inspite of all these, it is contended by the husband that he made a visit to the wife's house in the year 1986. It is also specifically averred by the husband that his wife has wilfully deserted the petitioner with no intention to return back to the matrimonial home and, therefore, he has filed the present petition to dissolve the marriage on the ground of desertion.

3. The appellant/wife filed a detailed counter wherein the marriage as well as birth of her child have been admitted. According to her, the marital life was not happy on account of the constant intervention by the mother-in-law, namely, Mrs. Geetha. She was always keeping a watch on the appellant and the respondent and never allowed them to enjoy family life especially, as expected by newly wedded couple. It is also the case of the wife that she hails from a respectable family and her parents spent Rs. 1,26,000 towards her wedding. In 1983 when she became pregnant, she would claim that she was very week and required intensive medical treatment for which she went to her parents house. It is also specifically pleaded in the counter that she constantly pleaded her husband to set up a separate family to which, he was not agreeable. The averment that he made many offers to take her back was merely apretention. She also denied the averment that her husband visited her house and stayed for a long duration. After denying all the averments made by the husband, she contended that there is no cause of action in the present petition and she had not deserted the petitioner and prayed for dismissal of the petition. It is also contended that the petition which was filed by the husband after inordinate delay and laches, is not maintainable and liable to be dismissed.

4. In order to prove his case, the petitioner/husband was examined as P.W.I and he has marked Ex. P.l dated 20.2.85, copy of the legal notice and Ex. P-2 dated 28.2.85, reply by the father of the wife. On the other hand, the wife was examined as R.W.1 and she has not exhibited any document in support of her defence.

5. In the light of the oral evidence of both the parties as well as the averments in the legal notice and reply by the father of the wife, the Family Court came to the conclusion that the petitioner/husband has established his case Under Section 13(1)(ib) of the Hindu Marriage Act, 1955 as amended and passed a decree for divorce. In the very same order, the Family Court in the absence of any claim for maintenance or for the custody of the child no order has been passed.

6. Aggrieved by the decree of divorce of the Family Court, the wife filed the present appeal before this Court under section 19 of the Family Court Act.

7. Mr. A. Venkatesan, learned counsel appearing for the appellant, contended that in the light of the evidence on record, the decree of divorce granted by the Family Court is unsustainable. He also contended that in view of inordinate delay; namely, 7 years the petition for divorce at the instance of the husband ought to have been dismissed by the Family Court. Finally, he contended that the Family Court committed an error in not awarding maintenance for the appellant and her minor child. On the other hand, Mr. Sampathkumar, learned counsel for the respondent contended that inasmuch as the husband had established the factum of physical desertion and animus deserandi, the decree of divorce granted by the Family Court cannot be assailed. In respect of claim for maintenance, the learned counsel fairly conceded that both the wife and child are entitled, and any reasonable amount may be fixed in the light of the income of the husband.

8. In the light of the above factual position, we have carefully considered the submissions of both the counsel. The marriage between the appellant and the respondent and a child born out of the wed-lock are not disputed by both the parties. The ground sought for divorce Under Section 13(1)(b)

of Hindu Marriage Act, 1955 as amended is that the wife deserted the petitioner without any just cause or reason. Section 13(1)(b) reads as follows:-

"Section 13. Divorce- (1) Any marriage solemnized whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

We have to find out whether the condition prescribed under the above section has been complied with or proved by the husband in order to grant a decree for divorce, Ex.P-1 dated 20.2.85 is the Registered legal notice sent by the Advocate of the petitioner to the wife and her father. In Ex. P-1 it is specifically mentioned that even from the beginning of the marriage, the wife was very eager to visit her parents, house now and then and in order to fulfill her requests, the husband was ready and willing to send her to her parents house and further stated that on many occasions he also accompanied her and stayed with her and took part in many functions in his father-in-law's house. In one such visit, namely, on 30.4.83, the wife expressed her wish to stay for some time in her father's house and promissed to return to her husband's house at T. Nagar at a later date. Since she was pregnant, in order to give her best comfort and peace of mind, according to the husband, he allowed her to stay with her father for some time. However, it is the case of the husband that inspite of several requests made on several occasions, she was postponing her return to her matrimonial home by giving some excuse or other. At this juncture, the wife delivered a male child, on 27.12.1983. After the delivery of the child according to the husband, he was in the impression mat his father-in-law and other relatives would fix an auspecious day and he would bring his wife and child to T. Nagar and live them there. However, inspite of his request, the wife did not turn up. It is also seen from Ex. P-1 mat as suggested by the grand- father of the wife, the husband went to her parents house along with his mother. It is also mentioned in Ex. P-1 that inspite of fixing an auspecious day, on some lame excuse, the wife did not evince any interest to come back. In Ex.P-1, a formal request was made in the end of the notice which is relevant for the purpose of this case:-

"Having failed in the several attempts made by my client to persuade his wife to come and live with him, my client has taken this step to write this letter in the fond hope that he will be successful in making all of you realise that urgent steps must be taken to make husband and wife live together happily."

9. It is admitted that Ex. P-1 notice has been received by the wife as well as her father. The appellant herein did not send any reply for Ex. P-1. However, her father sent a reply under Ex. P-2 dated 28.2.85. It is true that in Ex. P-2, the father of the wife had denied many averments made in Ex. P-1. No doubt, the father of the appellant herein has also concluded by requesting the son-in-law to stay with his daughter for a weak in order to allay her fears in the following manner:-

"Eversince the receipt of your notice, my daughter has become very much perplexed and confused. My daughter is afraied of very much of the outcome of this notice. She .fears to go to her husband's

house, as she apprehends danger. It is therefore naturally advisable to first allay her fears and then to take her to her matrimonial home.

I, therefore, request you to kindly advise your client to go over to my house and stay with my daughter atleast for a week, so that my daughter will realise her fears unwarranted and would happily go with her husband."

10. Apart from Ex.P-1, the respondent herein deposed as P.W.1 and re-inforced the averments made in the petition about the marriage between himself and the appellant herein, the birth of the child, the desertion of the wife and also his efforts to get the wife back to the matrimonial home and also the conduct of the appellant herein in refusing to return to matrimonial home. On the other hand, the appellant herein as R.W.1 deposed that she has not committed any act of desertion and her present stay at the place of her parents is on account of the fact that the respondent herein (husband) refused to concede to the demand of her in setting up a separate family. In her evidence she also stated that, her husband's mother was not properly behaving towards her.

11. The perusal of the oral evidence of P.W.1 disclosed that during last week of April, 1983 she visited her parent's house and requested P.W.1 to allow her to be in her parents place for some time. This request was conceded as she was a pregnant lady and according to P.W.1, thereafter she failed and omitted to return to matrimonial home. It is useful to mention that even in the counter statement the appellant has not disputed her act of staying away from her husband though she would not admit that staying with her father would not amount to desertion. The reason offered by the wife for living separately from her husband is that her mother-in-law was not properly behaving with her and she could not tolerate the harassment, The perusal of the pleadings as well as the evidence of both the parties did not show any single instance or what was the kind of treatment she suffered in the hands of her mother-in-law. As pointed out by us, except the mere statement, there is no specific instance of harassment or any other instance done by the mother-in-law. Except the ipsi dixit of the oral evidence, the wife had not examined any other independent witness in order to prove her claim. We are not impressed in convinced after reading the evidence of R.W.1 in this respect. As stated earlier, the fact, that the appellant and the respondent were living away from each other has not been disputed and, in fact, the wife had admitted this fact of separate living and this proves that the wife has specifically stayed away from the company of the husband. The above factual position proves the factum of physical desertion by the wife. Apart from this, the evidence of P.W.1 discloses that after the desertion by the wife, he caused a legal notice to the appellant and her parents which has been marked as Ex. P-1 Ex. P-2 is the reply notice given by the father of the wife. Both Exs. P-1 and P-2 were admitted by the wife during her examination. Inspite of the request made by the husband through his counsel, the wife did not concede to his request. But, on the contrary, her father had sent a reply, We have already extracted the relevant portion from Ex. P-1 as well as Ex. P-2. The notice and reply, namely, Exs. P- 1 and P-2 indicate that while there was an offer by the husband to take the respondent back, the same has been rejected without any proper cause or acceptable reason. It is needless to mention that the wife is bound to live with her husband. From the materials found in this case, it is evident and clear that the husband had taken all necessary steps to solve the problem, on the other hand, the wife failed on account of her part to rejoin in her husband without any acceptable cause. Hence, we are in entire agreement with the findings of the

court below that the husband had proved not only the factum of physical desertion but also the factual animus deserandi.

12. The next contention of the learned counsel for the appellant is that there is enormous delay and laches on the part of the husband in filing the present petition for divorce and that the Family Court ought to have dismissed the petition for divorce. It is true that under Ex. P-1 dated 20.2.85, the respondent herein through his counsel requested his wife to come and join with him in the matrimonial home and filed the present petition for divorce only in the year 1992 that is, after expiry of seven years. In this respect, the learned counsel for the respondent contended that delay of 7 years is not fatal to his claim for divorce based on the ground of desertion. He also cited a decision reported in Gurmel Singh v. Bharpur Kaur, in support of his contention. In the said case, the petition filed for divorce on the twin grounds of cruelty and desertion was dismissed only on the ground of delay and laches by Additional District Count, Sangrur. In the appeal after referring the factual aspects, the Punjab and Haryana High Court in the said decision held that in cases relating to desertion, the consideration about delay in filing divorce petition on the grounds of cruelty and adultery is not applicable. After relying upon the observation of Lord Denning MR. in Becker v. Becker (1966) 1 All England Reporter 894. The Punjab and Haryana High Court in the said Judgment has held in the following manner:-

"The learned Judge has non-suited the petitioner on the ground of delay in filing the petition. The conclusion cannot be sustained. In cases relating to desertion the consideration about delay in filing divorce petition on the grounds of cruelty and adultery is not applicable. In cases of divorce on the grounds of adultery and cruelty, delay in filing a divorce petition leads to irresistible inference that the same have been condoned, but inaction in presenting divorce petition promptly is not fatal when the ground of divorce is desertion. In such cases, the husband may be slow to take advantage of a right which accrued to him after lapse of two years of his desertion by the other spouce. In such cases, the petitioner should be asked to explain asto why he had delayed the filing of the petition. He should be given an opportunity to explain this fact. If this is not done, then his petition cannot be thrown out on this score. Lord Denning M.R., with his usual felicity, observed in Becker v. Becker (1966) 1 All ER 984, as under: -

"The husband was not asked why he had delayed for so long. He was not asked why at this stage he wished for a divorce. He was not given an opportunity of explaining. We are told now that the reason is because he wishes to marry his cousin who is in Germany.

The Commissioner was much influenced by the passage in Raydon on Divorce (9th Edn.) P.269 dealing with unreasonable delay. That, however, is dealing with cases of adultery or cruelty. Desertion is different. Our attention has been drawn to what Hodson, L.J., said in Crump v. Crump :-

"In dealing with the question of desertion it seems to me entirely different considerations apply and the fact that a person does not, immediately the three years lapse, take proceedings for divorce is not of itself a matter calling for adverse criticism at all. In fact one would regard it rather from the opposite point of view. It would in many cases and perhaps in most cases, be praiseworthy if a

person who had been deserted by his spouse did not at the first possible moment when the law allowed it petition for divorce. One knows in a great many cases such spouses endure with patience hope for many years before taking advantage of the right which is now available to them." So delay in desertion cases is not on the face of it to be regarded as a reason for refusing a decree. If it went on for a great number of years and was completely unexplained. It might be a ground for refusing divorce, but this is not such a case.."

The very same view has been taken by this Court in a judgment reported in Rajagopalan v. Kamalammal, 1981 (94) L.W. 695. After seeing the above proposition, we are in entire agreement with the view expressed by Punjab and Haryana High Court. We are also of the same view that inaction or delay in presenting divorce petition is not a fatal when the ground of divorce is desertion, In such cases the husband may be slow to take advantage of a right which accrued to him after a lapse of some years of his desertion by the other spouse. Hence the contention of the learned counsel for the appellant that the petition has to be dismissed on the ground of inordinate delay cannot be accepted.

13. The learned counsel for the appellant finally contended that inspite of desertion by the wife, she is entitled maintenance for herself and for her child. The court below rejected the request of the wife regarding maintenance on the simple ground that there has been no claim either for maintenance or for custody of the child. It is true that as per Section 25 of the Hindu Marriage Act, 1955, on application made to the Court either by the wife or by the husband, the Court may pass an order of maintenance at the time of passing decree for divorce. Even though section 25 says that the maintenance amount has to be fixed on the basis of on application, even without an application, on the basis of oral request, it is open to the court below to pass an order for maintenance to either party. In support of the above proposition, the learned counsel for the appellant relied upon Jayakirshna Panigrahi v. Surekha Panigrahi . In the said judgment, the Division Bench of the Andhra Pradesh High Court has held that "Despite the dissolution of marriage at the instance of husband, it would also be a fit case to grant maintenance to the wife, even in absence of formal application before the Court."

In Chandra Rajan v. Radha alias Mahalakshmi Raju J., 1995 (1) M.L.J. 624, while interpreting sections 24 and 25 of the Hindu Marriage Act, has held that.

The provision of Section 25 confers an enabling power upon the court itself while granting divorce or judicial separation to also pass an order for the maintenance of the wife. The contemplated application as noticed supra to be made by such parties has to be limited and confined to the case when the court, while disposing of the main petition has not thought of passing an order for grant of maintenance and was silent on the said issue and not otherwise, becomes essential or necessary to separately make an application even when the court chooses to decide about the same as part of the main petition, particularly as in this case by also disposing of simultaneously an application filed by the wife for maintenance along with main petition for divorce."

In the said case an objection was taken that without an application for permanent alimony and maintenance the court has no power to order payment under section 25. After reading the

provisions contained in section 24 of the Act along side with section 25, Raju, J., has held that, "That plea taken for the petitioner that unless a separate application is. be in during the course or at the time of passing the decree also filed for permanent alimony and maintenance, the court could not have ordered for the payment under section 25 of the Act is incorrect."

We are also in entire agreement with the view expressed by the learned Judge in the said judgment. The conjoined reading of section 24 and 25 of the Act clearly shows that during the disposal of the main petition for divorce, it is open to the court to pass appropriate orders for alimony or maintenance even without any proper application. It is brought to our notice by the learned counsel for the appellant that during the course of arguments, both parties have filed written submissions before the Family Court for the convenience of the court. In the written submissions filed by the wife/respondent before the Family Court, there is a specific plea for maintenance for herself and for her minor son aged about 11 years. We have also perused the same and the necessary contentions are there in para 6 of the written submissions filed by the wife. Hence, in view of the above fact as well as the law enunciated in the above referred decisions, we are of the opinion that the wife and minor child are entitled for maintenance.

14. Regarding the quantum of maintenance, it is seen from the evidence of P.W.I, that is, husband that he was earning Rs. 2,500 per month and he has also admitted that the wife is not employed any where. In view of the fact that the appellant/wife is not employed and is not earning independently and is maintaining herself and her minor son aged 11 years and of the fact that the husband is earning a sizable amount, namely, Rs. 2,500 per month, we fix a sum of Rs. 500 towards maintenance of wife and another sum of Rs. 300 per month towards the maintenance of the minor child payable by the husband. At the end of the hearing, Mr. Sampath kumar, learned counsel for the respondent/husband, fairly requested that if the husband offers any amount towards necessary fees and expenses for the education of the minor child, he should be permitted by the wife. Inasmuch as it is good gesture by the husband, we hope that there may not be any objection by the wife in this regard considering the welfare of the child.

15. For all the above reasons, we confirm the decree of divorce passed by the Family Court dated 6.3.95 and grant a decree for maintenance of Rs. 500/- per month for wife and Rs. 300 per month for minor child payable by the husband, from the date of petition to this extent, the decree of the Family Court is modified and in other respects, the same is confirmed. The C.M.A., is partly allowed as indicated above. No order as to costs.