

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A.MUHAMED MUSTAQUE

&

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

THURSDAY, THE 29<sup>TH</sup> DAY OF JULY 2021 / 7TH SRAVANA, 1943

MAT.APPEAL NO. 246 OF 2015

AGAINST THE JUDGMENT IN OP 88/2014 OF FAMILY COURT,  
KASARAGOD,

**APPELLANT/PETITIONER:**

P.C.KUNHINARAYANAN  
AGED 50 YEARS  
S/O.CHANDU NAIR, RESIDING AT VARAKKAD, WEST ELERI  
VILLAGE, HOSDURG TALUK, KASARAGOD DISTRICT  
BY ADV SRI.V.N.RAMESAN NAMBISAN

**RESPONDENT/RESPONDENT:**

VIJAYAKUMARI  
AGED 42 YEARS  
D/O.KUNHI KANNAN NAIR, RESIDING AT BALAL VILLAGE,  
HOSDURG TLAUK, KASARAGOD DISTRICT PIN - 671 533.  
BY ADV SRI.A.ARUNKUMAR

THIS MATRIMONIAL APPEAL HAVING COME UP FOR ADMISSION ON  
26.07.2021, THE COURT ON 29.07.2021 DELIVERED THE FOLLOWING:

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**J U D G M E N T**

Dated this the 29<sup>th</sup> day of July, 2021

**Dr.Kauser Edappagath, J.**

This appeal has been preferred by the husband against the dismissal of his original petition for dissolution of marriage on the ground of desertion.

2. The marriage between the appellant and the respondent was solemnized on 31/8/1991 (According to the respondent, the date of marriage is 29/8/1991) at Balal Sri Bhagavathi Kshethram, Hosdurg. Two children were born in the wedlock. Admittedly, they lived together as husband and wife only till 10/7/1996 and since then, they are living separately. After the marriage, the appellant and the respondent were residing at the house of the appellant. The respondent went to her house on 10/7/1996 for the delivery of the second child. Thereafter, she did not return to the house of the appellant. The appellant alleges that the respondent without any reasonable cause did not return to matrimonial home intentionally and thus, deserted him. On the

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other hand, the respondent alleges that she was treated with cruelty by the appellant while they were living together and further the appellant has contracted another marriage and living with the said lady. Thus, the respondent projects reasonable cause for her separate living. In the year 2002, the appellant preferred Original Petition for dissolution of marriage as OP No.88/2002 on the ground of desertion. The said original petition was dismissed holding that the respondent did not desert him. Thereafter, in the year 2008, the appellant preferred OP No.130/2008 for restitution of conjugal rights. The said petition was resisted by the respondent and, after trial, it was dismissed. It was thereafter that the present original petition has been filed for dissolution of marriage on the ground of desertion in the year 2014.

3. It is alleged in the original petition that the respondent left the company of the appellant without any reasonable cause since 10/7/1996. It is further alleged that, on so many occasions, the appellant approached the respondent and tried to bring her back to his house and he attempted to contact her over telephone but the respondent did not turn up. It is specifically

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alleged that, on 10/12/2013, the relatives of the appellant and mediators again approached the respondent and requested her to join him, but she expressed her unwillingness to come and reside with him and continue the marital relationship.

4. In the counter statement filed by the respondent, she specifically denied the ground of desertion canvassed by the appellant. It is contended that during the period when they resided together at the house of the appellant, she was treated with cruelty, both physically and mentally, by the appellant. It is further contended that the appellant took her to her house for delivery of the second child when she was seven months pregnant and thereafter the appellant never visited her to take her back. It is also contended that the appellant married another lady namely Sreeja and he is living with the said lady. According to the respondent, it was the appellant who deserted her and deliberately deprived her the company and cohabitation without any reasonable cause. She was constrained to live separately due to the ill-treatment and neglect by the appellant, added the respondent. The respondent sought for the dismissal of the petition.

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5. The appellant gave evidence as PW1 and the respondent gave evidence as RW1. Ext.A1 was marked on the side of the appellant and Ext.B1 was marked on the side of the respondent. After trial, the court below found that the evidence on record shows that the respondent did not desert the appellant and accordingly the original petition was dismissed as per the impugned decree and judgment. Challenging the said decree and judgment, the appellant preferred this appeal.

6. Heard both sides and perused the records.

7. The appellant is now aged 57 years and the respondent is now aged 49 years. Admittedly, the parties are living separately for the last 25 years i.e., w.e.f. 10/7/1996. Both have categorically stated at the court below that they have absolutely no intention to resume the cohabitation. They have their own reasons to tell.

8. This is the second time the appellant approaches the court to dissolve the marriage on the ground of desertion. Admittedly, till 10/7/1996, both were residing at the house of the appellant. On that day, the respondent was taken to her own house for the delivery of the second child. The court found that

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since the respondent went to her own house for the purpose of her second delivery, it cannot be said that she has deserted him. Accordingly, the original petition was dismissed. However, the contention of the appellant in the earlier original petition (OP No.88/2002) was that, after the delivery of the second child, she did not return to his house without any reasonable cause.

9. S.13(1)(b) of the Hindu Marriage Act states that desertion must be for a continuous period of not less than two years immediately preceding the presentation of the petition. In the Explanation to the said provision, the word 'desertion' is defined as the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party and its grammatical variation and cognate expression have to be construed accordingly. Therefore, in order to constitute a matrimonial offence, desertion must be for a continuous period of not less than two years before the presentation of the petition. After the dismissal of OP No.88/2002, the appellant filed OP No.130/2008 for restitution of conjugal rights, which was also dismissed. The definite case of

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the appellant is that, thereafter on 10/12/2013, his relatives and mediators again approached and requested the respondent to join with the appellant, but, she informed her unwillingness to come and resume cohabitation with him. Thus, the cause of action for the present original petition is a totally different one and therefore, the dismissal of OP No.88/2002 is not a bar to institute the present petition for dissolution of marriage on the ground of desertion.

10. The question as to what precisely constitutes “desertion” came up for consideration before the Supreme Court in ***Bipinchandra Jaisinghbai Shah v. Prabhavathi*** (AIR 1957 SC 176). It was held that “For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of bringing 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”. It was further held that desertion is a matter of inference to be

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drawn from the facts and circumstances of the case. The inference may be drawn from certain facts, which may not in another case be capable of leading to the same inference. If, in fact, there has been separation, the essential question always is, whether that act could be attributable to the *animus deserendi* since both the factum and animus should co-exist for a period of at least two years. In the case of **Lachman Utamchand Kirpalani v. Meena alias Mota** (AIR 1964 SC 40) and **Smt.Rohini Kumari v. Narendra Singh** (AIR 1972 SC 459), the Supreme Court has reaffirmed the principle stated in the earlier case with regard to the concept of desertion under the Hindu Marriage Act. In **Savitri Pandey v. Prem Chandra Pandey** (AIR 2002 SC 591), the Supreme Court following the above decisions held that, in its essence, desertion means the intentional permanent forsaking and abandonment of one spouse by the other without other's consent and without reasonable cause. It was further held that desertion may also be constructive which could be inferred from the attending circumstances. The Division Bench of this Court in **Latha Kunjamma S. v. K.Anil Kumar** (2008 (2) KHC 580) has held that the ground for desertion upon



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which the petition for dissolution of marriage was filed does not require that the petitioner must prove her case beyond all reasonable doubt. Standard of proof required is only sufficient to find out whether the preponderance is in favour of the existence of the fact alleged.

11. Coming to the facts of the case, as already stated, the respondent after leaving the company of the appellant as early as on 10/7/1996 is living away from the appellant at her house with the children. The evidence discloses that thereafter they did not reside together even a day. In the counter statement, the respondent projected two reasons for her separate living. The first reason shown is the ill-treatment and cruelty on the part of the appellant and the second reason is that the appellant has contracted another marriage with one Sreeja and he is residing with her. It must be noted that apart from the mere allegation that the appellant treated the respondent with cruelty, there is absolutely no evidence either in this case or in the earlier litigations that the appellant exercised any cruelty on the respondent. In so far as the allegation regarding the second marriage of the appellant is concerned, the case charged against

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the appellant for bigamy u/s 494 of I.P.C. at the instance of the respondent ended in acquittal. Even the criminal case registered against the appellant at the instance of the respondent on the allegation that the appellant trespassed into the parental house of the respondent and assaulted her ended in acquittal at the appellate stage. Thus, both grounds canvassed by the respondent for her separate living have no basis.

12. It is pertinent to note that after the dismissal of OP No.88/2002, the appellant preferred OP No.88/2014 seeking restitution of conjugal rights. The said original petition was resisted and hotly contested by the respondent and ultimately it was dismissed. When the appellant/husband makes an offer to resume the conjugal relationship and the respondent/wife resists the same without any reasonable cause and fails to resume cohabitation, that itself amounts to constructive desertion. In the said original petition, the respondent has contended that she was not interested to resume the conjugal relationship. When the respondent was examined in this original petition also, she categorically stated that she has no intention to reside with the appellant. We have already found that the respondent failed to

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substantiate the two reasons shown by her for her separate living. Admittedly the parties are living separately for the last more than 25 years. Since the respondent has turned down the offer made by the appellant in the original petition filed by him for restitution of conjugal rights to resume the marital relationship, it has to be held that the respondent has constructively deserted the appellant without any justifiable cause since then.

For the reasons stated above, we hold that the appellant has made out a case for desertion and is entitled to a decree for dissolution of marriage on that ground. Accordingly, we allow the appeal and set aside the impugned decree and judgment. The marriage between the appellant and the respondent solemnized at Balal Sri Bhagavathi Kshethram, Hosdurg hereby stands dissolved. The parties shall bear their respective costs.

Sd/-

**A.MUHAMED MUSTAQUE**

**JUDGE**

Sd/-

**DR. KAUSER EDAPPAGATH**

**JUDGE**

Rp