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Jayakrishnan G. Nair Vs Salini Prasanna Balachandran Nair

Matrimonial Appeal No. 801 of 2009

Court: High Court Of Kerala

Date of Decision: March 8, 2013

Acts Referred:
Evidence Act, 1872 â€" Section 3#Hindu Marriage Act, 1955 â€" Section 13, 13(1), 13(1)(ia)

Citation: AIR 2013 Ker 143 : (2013) 2 ILR (Ker) 185 : (2013) 2 KHC 268 : (2013) 2 KLJ 588

Hon'ble Judges: Pius C. Kuriakose, J; P.D. Rajan, J

Bench: Division Bench

Advocate: T. Krishnan Unni and Sri K.B. Pradeep, for the Appellant; M. Hemalatha and Sri S. Williams, for the Respondent

Final Decision: Dismissed

Judgement

P.D. Rajan, J.
This appeal is preferred against the judgment in O.P. No. 1346/2004 of the Family Court, Thiruvananthapuram. Appellant

is the husband and respondent is his wife. The appellant filed the Original Petition u/s 13(1)(ia) and (ib) of the Hindu Marriage Act seeking

dissolution of marriage. The marriage between the appellant and the respondent was solemnized on 5-9-1995 at Thiruvananthapuram as per Hindu

Customary Rites. At the time of marriage, the appellant was a post graduate student in Germany doing final year course in Architecture. After the

marriage, the respondent went to Germany in a tourist visa, resided there with the appellant for three months and on expiry of the visa period she

returned to India. After his studies, he joined for a job in Singapore, but respondent stayed at Thiruvananthapuram for the reason that she wanted

to complete her B.Ed. course at Thiruvananthapuram, later, she went to Singapore and resided with him and in the wedlock a female daughter was

born to them. Since the baby was born with bow legs, the respondent insisted the child to be taken back to Thiruvananthapuram for Ayurveda

treatment. Though the appellant was against that decision, ultimately, he agreed to go to Thiruvananthapuram. The respondent always showed

aversion towards the appellant"s parents. While the doctors in Singapore found that the appellant has a damaged kidney, the respondent and her

parents showed more hatred towards the appellant. They alleged that they were cheated by hiding a pre-existing illness and ultimately that kidney

was removed at Amrutha Hospital, Kochi. Three weeks after the removal of kidney, the appellant was forced to return back to Singapore due to

contingencies developed regarding employment. Though the appellant wanted the company of his wife and child, the respondent refused to join

with him back to Singapore and always abused him over telephone. Later in one occasion she joined with the petitioner in Singapore for renewing

her permanent residency status and re-entry permit, stayed there for 10 days, while so she behaved as a total stranger. By the acts done and

words spoken, the respondent had been dealing with the appellant with absolute cruelty. The respondent had deliberately avoided the appellant"s

child from seeing her father and even talking to him over phone. The respondent has deserted the appellant and treated him with mental cruelty and

harassment. Hence, the appellant filed the above O.P. for getting decree of divorce. The respondent denied the allegation by filing written objection

and contended that even on the date of marriage, the appellant and his parents abused her by stating that she is not beautiful and that the gold

brought by her was not sufficient. She contended that the appellant returned to Germany where he was pursuing his studies after marriage without

taking her as agreed before the marriage. According to her, she had gone to Germany about 3 months after obtaining a visiting visa with the efforts

of her father. The appellant did not do anything to extend the period of visa and so she had to return back. Thereafter, the appellant got

employment in Singapore and as directed by him, the respondent joined with him and while staying there she became pregnant, the appellant sent

back the respondent to Thiruvananathapuram saying that the delivery expenses will be very high in Singapore. The main allegation against the

appellant is that he has illicit relationship with one lady in Singapore. She is ready and willing to reside with the appellant along with her child.

2. The learned Trial Judge framed three vital issues for determination. The first issue was whether the appellant was treated with cruelty by the

respondent, if so, whether he is entitled for any relief. Secondly, whether the appellant was deserted by the respondent. The third issue was that if it

is proved, whether the appellant is entitled for dissolution of marriage as claimed. During the trial, the appellant was examined as P.W. 1 and his

documentary evidence were marked as Exts. A-1 to A-15. The respondent was examined as C.P.W. 1 and no documentary evidence has been

marked on her side. The learned Trial Judge recorded the finding that none of the grounds mentioned in the issues are proved and he is not in a

position to pass a decree for dissolution of the marriage and dismissed the petition. Aggrieved by that, the petitioner in the lower court (the

appellant) preferred this appeal.

3. It is the argument of the learned counsel appearing for the appellant that the alleged cruelty is proved by P.W. 1 by adducing oral and

documentary evidence. Apart from the cruelty, the appellant proved desertion from the part of the respondent. The marriage between the appellant

and the respondent has broken down and there is no possibility to reunion. The appellant and the respondent are living separately for the last

several years without any sufficient reason. When there is no possibility of reunion, the available evidence highlighted by P.W. 1 is sufficient to grant

a decree of divorce. The court below reached in an erroneous conclusion and the pleadings and evidence were not properly considered at the time

of disposing of the petition. Even in the initial days of marriage the behaviour of the respondent was very rough, which finally resulted in the

breaking of the marriage. When cruelty and desertion are established by cogent and convincing evidence, the appellant is entitled for decree of

divorce.

4. Strong resistance was made by the learned counsel appearing for the respondent. She submitted that no specific incident of cruelty was proved

in this case. The oral testimony of P.W. 1 was analyzed with the documentary evidence and the pleadings which according to her shows that there

is nothing on record to prove any act of cruelty from the side of the respondent. The learned counsel for the respondent also categorically

contended that the appellant has illicit relationship with another lady and it was detected while she was residing with the appellant at Singapore. She

submitted that no foundation is made out for granting divorce on the ground of cruelty and desertion. She also submitted that some of the

documents produced in the court below were not marked, considering that submission, those documents were marked as Exts. B-1 series (13 in

numbers), B-2, B-3, B-4, B-5, B-6, B-7, B-8, B-9, B-10 to B-15 for convenience.

5. It is crystal clear that after the marriage, the appellant and the respondent resided together as wife and husband. At that time, they were not think

about a raptured marital life. Both of them resided on various places inside and outside India, gradually their relationship strained, finally the

husband approached the court below for getting a decree for divorce u/s 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955. In this context, we

have examined the first ground for granting a decree for divorce on the ground of ""cruelty"" by the respondent. P.W. 1 was a student in Germany at

the time of marriage and after the marriage, the respondent resided with him for three months in Germany on a tourist visa. After his studies, he

obtained a job in Singapore and thereafter, he stayed there from 1997 onwards. Exts. A-1 & A-7 are the copies of passport and Exts. A-2, A-8

and A-10 are the receipts. Before going to Singapore and Germany, he had undergone medical check up and those documents were marked as

Exts. A-3 and A-4. Exts. A-5, A-6 and A-14 are also letters. Ext. A-9 is the Air Ticket. Ext. A-11 is the appointment card. Ext. A-12 is the

Book. Ext. A-13 is the Photo. Ext. A-15 is the attested copy of FIR in C.C. No. 222/2005. The respondent joined with appellant at Singapore

after completing her classes. In the year 1998, a baby was born to them. He also attended the "Noolukettu ceremony" at Thiruvananthapuram and

thereafter, P.W. 1 returned to Singapore. While residing in Singapore in the year 2000, one of the kidneys damaged due to T.B. and he underwent

curative treatment for one year. Ultimately, the right kidney was removed at AIMS at Kochi on 20-9-2001. Analysing the above facts it is difficult

to find out any attempt of cruelty with intent to cause suffering to the appellant.

6. During his stay at Germany and Singapore, the appellant was a good badminton player and was a regular member of a badminton club and won

several trophies. After removal of one Kidney, the respondent refused to join with P.W. 1 on lame excuses, subsequently, she avoided the

company of P.W. 1 on several occasion. When he requested to renew the permanent residency at Singapore and for getting re-entry permit she

again visited Singapore for ten days. At that time, there was no matrimonial company and she kept away from him. Both of them lived there as

strangers all these ten days. From that point, the relationship became strained and broken. She started accusation and mental torturing against

P.W. 1. Since 2000 August, the respondent and the appellant were sleeping in separate rooms. Even in minor issues, she lost her control and

attempted to cause bodily injuries to P.W. 1. She always alleged that the appellant"s disease is infectious, therefore, she kept aloof from him. P.W.

1 categorically stated that he is healthy and physically fit for his day to day activities and continuing his periodical check up. The respondent is

torturing him mentally and deserted him, which is a harassment and cruelty. P.W. 1 was cross-examined by the respondent on various aspects of

cruelty but, no specific incidents of cruelty was proved by him.

7. Cruelty is a good ground for divorce under Hindu Marriage Act. Apex Court in Savitri Pandey Vs. Prem Chandra Pandey, held that ""acts of

cruelty have to be to distinguished from ordinary wear and tear of the marriage"". Now we have examined what acts art harmful to the appellant

while residing with the respondent and what acts are committed with intention to cause suffering to him. The oral evidence of C.P.W. 1 shows that

at the time of the marriage 150 sovereigns of gold, besides six sovereign chain and presentation items for Rs. 50,000 were given to P.W. 1. On the

same day of the marriage, the appellant and his family members informed that the gold given is low, she looks bulky and not so beautiful,

moreover, demanded Rs. 5 lakh more from her, which was shocked her. Immediately, she informed this to her father and on 10-9-1995 her father

gave Rs. 4 lakh to the appellant. During the 1st week of October, P.W. 1 went to Germany and this separation shocked her. There was no

attempt made by the appellant for processing and submitting of the visa application.

8. We have also examined the evidence of C.P.W. 1 with more cautions to find out whether any intentional acts of cruelty and desertion in her

evidence. The documents of C.P.W. 1 were marked as Exts. B-1 to B-16. On 15-2-1998, she delivered a female child, at that time, the mother

of the appellant said that ""C.P.W. 1 delivered a male baby"" which was said with intention to insult her. For this there is no evidence. On the day of

''noolukettu'', P.W. 1 demanded 50 sovereigns of gold and her father gave Rs. 4 lakh on 14-4-1998. The baby was born with bow legs, for that

she took treatment from Ayurveda Hospital, Thiruvananthapuram. On 4-3-2000, she went to Singapore with P.W. 1 and stayed there. While so

they purchased a flat from Housing Development Board, Singapore, for that, she collected 20,000 S. Dollars from friends and relatives. C.P.W. 1

categorically stated that the appellant and her parents ill-treated her by not giving proper food. But, the specific place, where she was ill-treated is

not specifically mentioned in her petition. C.P.W. 1 stated that the appellant had undergone treatment for T.B. to the right kidney and the right

kidney removed by an operation at AIMS, Kochi and the entire treatment expenses was borne by her father. In the year 2003, May, she went to

Singapore for renewing permanent residency permit. P.W. 1 was reluctant to collect C.P.W. 1 from the Airport. While they were residing together

for renewing permanent residency permit, the appellant''s illicit relationship with one Calistiens ying was detected. One day, when she returned to

her flat, after Shopping, the door was found closed and when she knocked the door, this Calistiens ying came out of the house and assaulted her.

When neighbours intervened, she left the place. Immediately, the respondent returned to India with her dresses and other articles. It is clear from

the evidence of C.P.W. 1 that she has no previous contact with the above lady and no enmity with her. In such a situation it is difficult to believe

that incident Analysing the evidence of both parties, it is seen that they are blaming each other and no particular incident of cruelty was proved in

this case.

9. Here, the appellant approached this Court u/s 13(1) (ia) and (ib) of the Hindu Marriage Act, 1955 for divorce. The relevant portion of Section

13 reads thus:

13. Divorce.-- (1) Any marriage solemnised, 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--

(i) *** *** ***

(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

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

The word "cruelty" is not defined in the Statute and the circumstances leading to cruelty draw from various incidents deposed by the parties. In a

social life, while both parties are living together as per marital tie, the husband and wife have to take certain precautionary measures for the smooth

flow of the marital life. The behavioural pattern of the couple must be adjusted in each incident during the subsistence of the marital tie. When one

of the parties approached the court alleging cruelty, it is the primary responsibility of the petitioner to plead and establish a particular incident at

particular place happened or such incidents happened at particular places during the subsistence of the marital relationship. Therefore, we are of

the opinion that "cruelty" as a ground for divorce is not found in his evidence. In the normal course of their matrimonial life, some incidents

happened while residing in India and out side. As a part of the marital life, such acts committed cannot be called acts of cruelty within the meaning

of Section 13(1)(ia). The demand of dowry and allegation of illicit relation of the husband in the written statement are not proved and those cannot

amount to cruelty. Apex court in R.V.E. Venkatachala Gounder Vs. Arulmigu Viswesaraswami and V.P. Temple and Another, discussed the

principle of standard of proof required for proving a fact in both civil and criminal cases, the Court held thus: (para 28)

Whether a civil or a criminal case, the anvil for testing of "proved", "disproved" and "not proved", as defined in Section 3 of the Indian Evidence

Act, 1872, is one and the same. A fact is said to have been "proved" when, if considering the matters before it, the Court either believes it to exist,

or considers its existence so probable that a prudent man ought, under the circumstances of a particular case, to act upon the supposition that it

exists. It is the evaluation of the result drawn by applicability of the rule, which makes the difference. "The probative effects of evidence in civil and

criminal cases are not however always the same and it has been laid down that a fact may be regarded as proved for purposes of a civil suit,

though the evidence may not be considered sufficient for a conviction in a criminal case. BEST says: there is a strong and marked difference as to

the effect of evidence in civil and criminal proceedings. In the former a mere preponderance of probability, due regard being head to the burden of

proof, is a sufficient basis of decision: but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of

assurance is required. (BEST, S. 95). While civil cases may be proved by a mere preponderance of evidence, in criminal cases the prosecution

must prove the charge beyond reasonable doubt". (See Sarkar on Evidence, 15th Edition, pp. 58-59). In the words of Denning LJ (Bater v. B.

1950, 2 ALL ER 458, 459) "It is true that by our law there is a higher standard of proof in criminal cases then in civil cases, but this is subject to

the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there

may be degrees of proof within that standard. So also in civil cases there may be degrees of probability". Agreeing with this statement of law,

Hodson, LJ said "Just as in civil cases the balance of probability may be more readily fitted in one case than in another, so in criminal cases proof

beyond reasonable doubt may more readily be attained in some cases than in others1. (Hornal v. Neuberger Products Ltd. [((1956) 3 ALL ER

970 at p. 977 D].

From the above legal principle, it is clear that the principle of preponderance of probability is the main aspect in civil cases and proof beyond

reasonable doubt in criminal cases.

10. In view of the above principle we have discussed the nature and quality of evidence necessary in a case to prove cruelty u/s 13(1) of the Hindu

Marriage Act. In the decision of Naveen Kohli Vs. Neelu Kohli, , the Court held thus (para 65):

65. The expression "cruelty" has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of

matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. The cruelty may be mental or

physical, intentional or unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is

mental, the problem presents difficulties. First, the enquiry must begin as to the nature of cruel treatment, second the impact of such treatment in the

mind of the spouse, whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter

of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases

where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need

not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

In another decision of Shobha Rani Vs. Madhukar Reddi, , the court held thus (para 4):

4. Section 13(1)(ia) uses the words "treated petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been

defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and

obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or

unintentional. If it is physical, the Court will have no problem in determining it. It is a question of fact and degree. If it is mental the problem

presents difficulties. First, the enquiry must begin as to the nature of cruel treatment. Second, the impact of such treatment in the mind of the

spouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference

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conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or injurious effect on the other spouse need not be

enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

In a recent decision rendered by the Apex Court in Vishwanath Agrawal Vs. Sau. Sarla Vishwanath Agrawal, held that;

The expression "cruelty" has an inseparable nexus with human conduct or human behaviour. It is always dependent upon the social strata or the

milieu to which the parties belong, their ways of life, relationship, temperaments and emotions that have been conditioned by their social status. A

set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the

parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach

importance.

Several incidents were described from both sides alleging cruelty which shows that the act or conduct of one party caused to the other party

unhappy, misery, dejection in their life which cannot amount to cruelty. Moreover innocent neglect or want of affection, silly expression of hatred

will not be amount to conduct establishing cruelty. In this context the observation of the apex court in Savitha Pandey"s case (supra) is very

relevant and held that ""acts of cruelty have to be distinguished from ordinary wear and tear of marriage."" So we conclude that appellant failed to

prove both physical or mental cruelty in this context.

11. Keeping in view of the aforesaid discussion we have considered the allegation of alleged ""desertion"" in this case. The principle of desertion is

the abandonment of one spouse by the other with out any consent of the other. In actual desertion renunciation of matrimonial home as a fact is

necessary. Similarly, actual separation with an intention to desert is essential. A person may go out and stay at various places for business, study,

job and other various purposes in his day-today life and may be spent two years or more. It may not amount to desertion since there is an intention

to return. The oral evidence of P.W. 1 and C.P.W. 1 shows that both of them never intended to abandon each other with the factum of ""Animus

deserendi"". It is admitted by P.W. 1 in his evidence that at the time of marriage he was a student in Germany and after the marriage, the respondent

resided with him for three months in Germany on a tourist visa. After higher studies, he obtained a job in Singapore and thereafter, he stayed there

from 1997 onwards. The respondent joined with the appellant at Singapore only after finishing her classes. In the year 1998, a baby was born to

them. He also attended the "Noolukettu ceremony" at Thiruvananthapuram and thereafter, P.W. 1 returned to Singapore. While residing in

Singapore in the year 2000, one of the kidneys damaged due to T.B. and he underwent curative treatment for one year. Ultimately, the right kidney

was removed at AIMS at Kochi on 20-9-2001. R.W. 1 admitted her stay in Germany and Singapore. She admitted the delivery of female child on

15-2-1998. Her evidence shows that when P.W. 1 requested to renew the permanent residency at Singapore and for getting re-entry permit she

again visited Singapore for ten days, P.W. 1 deposed that there was no matrimonial company at that time and she kept away from him. Both of

them lived there as strangers all these ten days, and according to P.W. 1, from that point, the relationship became strained and broken. Most of the

above narrations reflect the marital life of both parties. It is admitted feet that the burden of proving all aspect of desertion is always on the

appellant. Here, the facts highlighted are not sufficient to prove the actual desertion.

12. In this context we may refer to one decision of the apex court discussing the principle of desertion. In Bipin Chander Jaisinghbhai Shah Vs.

Prabhawati, in which the Supreme Court observed as follows:

...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. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas

under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the

suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for

divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case.

Desertion is a matter of inference to be drawn from the facts and circumstances to 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 co-exist. 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 years period and the Bombay Act prescribed a period of four years as a

continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae 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 to 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. It is also well-settled that in proceedings for divorce the plaintiff must prove the

offence of desertion, like and 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.

It is worth to note the following decisions of this Court in Narayanan v. Sreedevi 1989 (1) KLT 509 and Baby v. Gopinath 1989 (1) KLT 650. In

Narayanan''s case (supra) this Court considered the meaning of ''desertion'' and held as follows:

6. The true content and import of desertion in clause 1(b) of S.13 of the Hindu Marriage Act imparts a definite idea of complete and endless

abandonment of one spouse by the other. This must be without the other''s consent and without justifiable cause. Two essential conditions attached

to the notion of desertion are: (1) the factus of separation and (2) the intention to bring marital life permanently to an end animus deserendi.

Desertion is always a matter of inference to be drawn from the facts and circumstances of each case. There may be often cases where a spouse is

forced under certain peculiar circumstances by the conduct of the other spouse, to live separately or to stay away. In such a case there is no legal

desertion to constitute a ground for divorce. The simple reason is that the said situation has been brought about by the act of the spouse who had

misconducted himself or herself.

7. Desertion as a ground for divorce was added to S.13 by the Marriage Laws (Amendment) Act, 1976. Before the amendment, it was only a

ground for judicial separation. Now the ground of desertion for claiming divorce is qualified as desertion for a continuous period of two years

immediately preceding the presentation of the petition. The Explanation makes it clear that the expression ''desertion'' means the desertion of the

petitioner by the other party to the marriage without reasonable cause, and without the consent and against the wish of such party and it includes

the wilful neglect of the petitioner by the other party to the marriage. The section read along with the explanation makes it abundantly clear, that in

its essence it signifies the intentional permanent forsaking and abandonment of one spouse by the other without the other''s consent and without

reasonable cause. It is a total repudiation of the obligations of marriage vide [Lachman Utamchand Kirpalani Vs. Meena alias Mota,]. The

explanation gives emphasis to the quality of permanence as one of the essential elements differentiating desertion from voluntary separation for

good reasons. It is very important to note that in deciding what constitutes desertion, one of the first matters for consideration is the intent of the

offending party in addition to separation or withdrawal from cohabitation.

In Baby''s case (supra) this Court also held thus:

To constitute an act of desertion two elements must be there on the side of the deserting spouse. Firstly, the factum of physical separation is the

sine qua non of desertion. There must also be the animus deserandi to bring cohabitation or the matrimonial consortium to an end. Likewise, so far

as deserted spouse is concerned, to constitute desertion, it must be affirmatively established that he was not a consenting party to the desertion by

the opposite party. In other words, if it is found that desertion happened on account of the action of the deserted spouse he cannot legitimately

adopt the posture of innocence. On the side of the deserted spouse there should not occur any conduct giving reasonable cause to the spouse

leaving matrimonial house. In a case where desertion is alleged to obtain decree of divorce it must be established that the deserting spouse

purposefully kept away from the other party to the marriage with the avowed intention of not having any matrimonial relationship. In Smt. Rohini

Kumari Vs. Narendra Singh, the Supreme Court held that desertion within the meaning of S.10(1) (e) of the Act read with Explanation does not

imply only a separate residence and separate living but also a determination to put an end to matrimonial relationship and cohabitation. One of the

essential elements which differentiates desertion from wilful separation is the quality of permanence. If in a case a spouse abandons the other

spouse in a state of temporary passion or anger without intending to cease cohabitation permanently, it will not amount to desertion. In a case

where a spouse had left the opposite party''s company never to return and with the intention to bring cohabitation permanently to an end, the

necessary animus deserandi can be inferred. In a case where physical separation with animus deserandi has been established, certainly, the

allegation of desertion stands proved.

Keeping in view of the principles pertaining to desertion, we have scrutinized the oral and documentary evidence of the wife respondent. The

evidence shows that there was no deliberate desertion from her side through out her life. A temporary retreat by wife from the company of the

husband will not amount to permanent desertion. Actual desertion is not a simple or stray retreat by one spouse from a place, but, the permanent

physical separation with an intention to end the cohabitation permanently. Because the appellant is working abroad, he became impelled to live

separately for a pretty long time in another country. But, C.P.W. 1 never intends to withdraw from the life of the appellant and she deposed that

she is more anxious about the marital life and status. In such a situation, we are Of the opinion that the burden is heavy on the appellant to prove

that the temporary withdrawal by his wife was with the intention to separate permanently from his life. Unless and until such evidence is adduced

the appellant cannot aspire for divorce on the ground of desertion. In this case, we are of the opinion that the appellant failed to prove the alleged

desertion also. If the respondent is living with "animus deserendi" and her absence was without sufficient reason to leave the company of the

husband, then only the appellant"s claim has some relevancy. Here, he has not pleaded and established any incident of permanent withdrawal by

his wife. We are of the opinion that the respondent wife had not withdrawn from the company of the husband with animus deserendi. Accepting the

legal principles discussed above, we conclude that the trial court considered all relevant facts and answered properly. There is no illegality or

irregularity in the finding recorded by the court below.

In the result, the judgment and decree passed by the court below are confirmed. There is no merit in this appeal and this appeal is dismissed

accordingly. Parties will suffer their respective costs.