

REFERENCE UNDER THE DIVORCE ACT.

Before Sir Owen Beasley, Kt., Chief Justice, Mr. Justice Ramesam and Mr. Justice King.

1934,
December 10.

ROI (BARI) STREE (PETITIONER), PETITIONER,

v.

RASSINGA NAIK AND ANOTHER (COUNTER-PETITIONER AND
NIL), COUNTER-PETITIONERS.*

Divorce—Husband—Misconduct of—Cessation of cohabitation between husband and wife as a result of—Desertion in law—If, committed by husband—Indian Divorce Act (IV of 1869), sec. 10.

A wife separated herself from her husband on account of his adultery with a concubine in his house.

Held that, inasmuch as the conduct of the husband brought about a cessation of cohabitation between himself and his wife, in law he had committed an act of desertion.

Dickinson v. Dickinson, (1889) 62 L.T. 330, and *Sickert v. Sickert*, [1899] P. 278, followed.

CASE referred by the Agent to the Governor, Ganjam at Chatrapur in his letter, Ref. Original Petition No. 1 of 1932, dated 17th February 1933, under section 9 of the Indian Divorce Act, for decision of the High Court (Miscellaneous Case No. 1 of 1929 on the file of the Court of the Subdivisional First Class Magistrate and Special Assistant Agent, Balliguda Division).

C. P. Connell appeared as *amicus curiae*.

BEASLEY C.J. THE ORDER of the Court was delivered by BEASLEY C.J.—This case has been referred to us by the Agent to the Governor at Ganjam. It relates to a petition for divorce on the grounds of adultery and desertion under section 10 of the Indian Divorce Act. The facts of the case are

* Referred Case No. 1 of 1933.

that the petitioner separated herself from her husband on account of his adultery with a concubine in his house. On these grounds she was awarded maintenance by a Criminal Court on the 29th July 1929 at the rate of Rs. 2 a month. This order the respondent failed to comply with, only paying Rs. 13-3-0 to the petitioner from that date and no more. The learned Agent to the Governor says that, although for judicial separation adultery or desertion may form a reasonable cause, both these facts have to exist before a dissolution can be ordered, but he is of the opinion that the husband's living in adultery does not imply that he deserted the petitioner, but that the fact that he failed to maintain her even after a decision of a competent Court may imply desertion. In his opinion it does do so. The decision of the High Court is requested upon this latter point. The learned Agent to the Governor has, if I may say so, overlooked the real point or the point of importance, which is, whether the conduct of the husband brought about a cessation of cohabitation between himself and his wife. If it did, then in law that is desertion. In the present case the husband brought a concubine into the house where his wife was living with him and she had accordingly to leave the house. There is clear authority in English decisions that such conduct as that by a husband amounts to desertion. The first of these decisions is *Dickinson v. Dickinson*(1), a case exactly in point. There, a wife petitioned for the dissolution of her marriage on the grounds of adultery and desertion. The parties were married

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in 1866, and in 1872 the husband brought to the house a woman with whom he had immoral relations. The wife refused to admit her, but the husband insisted. The wife remained a short time in the house and then told her husband that either she or the woman must leave the house. The husband told her that she might do as she liked, but that the woman would remain. The wife thereupon left, and never afterwards cohabited with her husband. It was held that the husband was guilty of deserting his wife. Another case is *Sickert v. Sickert*(1). In that case the observations of GORELL BARNES J. on page 282 are very much in point. He there says :

“ In order to constitute desertion there must be a cessation of cohabitation and an intention on the part of the accused party to desert the other. In most cases of desertion the guilty party actually leaves the other, but it is not always or necessarily the guilty party who leaves the matrimonial home. In my opinion, the party who intends bringing the cohabitation to an end, and whose conduct in reality causes its termination, commits the act of desertion. There is no substantial difference between the case of a husband who intends to put an end to a state of cohabitation, and does so by leaving his wife, and that of a husband who with the like intent obliges his wife to separate from him.”

In view of these two decisions the real question here must be answered by saying that the petitioner has proved that the respondent, her husband, deserted her. The case must, therefore, be sent back to the Agent to the Governor at Ganjam to be disposed of in the light of the opinion which we have given. We are very much obliged to Mr. Connell for the valuable assistance he has given us as *amicus curiae*.

G.R.