

* **HIGH COURT OF DELHI : NEW DELHI**

MAT APPEAL No.43 of 2005

% Judgment reserved on: 13th May, 2008

Judgment delivered on: 19th May, 2008

Rakesh Vats
S/o Rajinder Narayan Vats
R/o 10/17-A, Sidh Kunj Apartment,
Near Yog Maya Mandir,
Mehrauli, New Delhi. Appellant
Through: Mr.Prasoon Kumar, Adv.

Versus

Ms. Sharda Vats
W/o Sh.Rakesh Vats
D/o Sh.H.L.Dhiman
R/o 3077 Kingston Ct.
Stream Wood, IL 60107
U.S.A. Respondent
Through: Nemo.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |
| 3. Whether the judgment should be reported in the Digest? | Yes |

V.B.Gupta, J.

The present appeal under section 28 of the Hindu Marriage Act, 1955 (for short as the "Act") read with Order

XLI Rule 1 of Code of Civil Procedure, 1908 has been filed by appellant against the ex parte judgment dated 23.05.05 passed by Sh. K.S.Pal, Additional District Judge, Delhi.

2. Brief facts which are necessary to dispose of this appeal are recapitulated. The marriage between the appellant and the respondent was solemnized on 26.04.86 at New Delhi as per Hindu rites and ceremonies. After the marriage, the appellant went to U.S.A. in the year 1987 as per settlement between the parties but he could not settle there because of harassment and torture by the respondent and her family members and as such he came back to India in the year 1990 and thereafter the appellant in order to maintain his matrimonial obligations kept on going to U.S.A. in the year 1990, 1994 and 1999 but could not settle there because he was treated so badly by the respondent and his family members that the appellant was compelled to return to India every time, without respondent accompanying him. It is further stated that out of this wedlock, a male child named Sohit was born on 17.11.99 and after the birth of this child, the respondent became more violent towards him and finally he came back to India

in 2000 and since then he has been living in India and the respondent has refused to join his company by coming to India despite his sincere efforts and requests made by him.

3. In view of all the circumstances, the appellant filed a divorce petition under section 13 of the Act. Summons was issued to Respondent for appearance but respondent never appeared and accordingly, she was proceeded ex parte.

4. Vide impugned judgment, the learned Trial Court dismissed the divorce petition holding that the appellant was not entitled to seek divorce against the Respondent on the ground of 'Desertion' as contemplated under section 13 (1)(ib) of the Act.

5. It has been contended by the Ld. Counsel for the Appellant that the Appellant had suffered a severe torture and harassment from the Respondent side and hence was unable to restore his family obligations or matrimonial life; the Appellant in the compelling circumstances was left with no option but to live separately from his family. The case of the Appellant is squarely covered under the mental cruelty defined and provided under section 13 (i)(a) of the Act but the Trial Court failed to appreciate this fact. The Trial

Court ought to have seen the fallacy of the fact that despite being served and knowing about the seriousness of the matter, the respondent avoided to appear in the Court or to give any satisfactory reply to the same which is a clear indication of willful neglect of the Respondent. Further the “animus desirendi” has very well been established on the Respondent as she had made the life of the appellant hell, and compelled him to abstain from establishing the conjugal rights, as the respondent never opted to return to her matrimonial home and nor she let the appellant resume the marital life at her place. At one time she left the matrimonial home and on the other hand she did not allow the Appellant to live with her thereby making such a situation in which the Appellant is compelled to live alone or to remain in desertion.

6. Ld. Counsel in support of his contention has cited ***Lachman v. Meena, 1964 AIR (SC) 40, Bharat Lal v. Ram Kali Devi, AIR 1984 Allahabad 274 and Vinay Kumar v. Nirmala Chauhan, AIR 1987 Delhi 79.***

7. The Appellant adduced his evidence on the record by way of his affidavit Ex.PW1/A, wherein he has corroborated

the averments as made in the petition regarding the behavior and conduct of the Respondent as well as of desertion by the Respondent.

8. The proceedings before this Court too, are ex parte. Notice was issued to the Respondent through approved courier but in spite of service Respondent did not appear in these proceedings.

9. Section 13 of the Act reads as under:

"13(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

(i) x x x

(ia) x x x

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

(ii) to (vii) xxx xxx xxx

Explanation.--In this sub-section, the expression "desertion" means 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 to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly."

10. The essential ingredients of desertion are:

- (i) Factum of separation;
- (ii) Animus deserendi;
- (iii) Separation must be without the consent of the husband;
- (iv) Separation must be without there being any reasonable cause or excuse on the part of spouse deserting. Thus, the spouse deserting, if has any reasonable cause or excuse for separating from the other spouse, it will not constitute desertion;
- (v) Desertion must be for a continuous period of 2 years from the date when, for the first time, the spouse deserting has made up mind to desert the other spouse permanently and with no intention to join back till the completion of 2 years preceding the presentation of the divorce petition.
- (vi) There must be permanent intention to forsake the other spouse. The intention must be to repudiate the relationship of husband and wife and to repudiate the matrimonial obligations permanently for a continuous period of 2 years immediately preceding the presentation of the divorce petition. Thus, there must be a permanent intention to live separate.

11. Desertion is the break up in the matrimonial home, which is by one spouse from the company of the other. When one spouse has to leave the matrimonial home under compulsion, the same would not amount to desertion. Physical leaving of home by itself would not amount to desertion unless animus deserendi is established.

12. The law on the issue of desertion is fairly well settled. The ingredients that have to be established have been explained by the Apex Court in ***Lachman (supra)***, as under;

"The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act. 1947, whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhawati, 1956 SCR 838: ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.), Vol. 12 was cited with approval:

"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. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases."

The position was thus further explained by this Court:

"If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. 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 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 Desertion is a matter of inference to be drawn from the facts and circumstances of 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."

Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. It is settled law that the burden of proving desertion - the "factum" as well as the "animus deserendi" - is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife, where she is the deserting spouse, does not prove just cause for her living apart, the

petitioner-husband has still to satisfy the Court that the desertion was without just cause.”

13. In view of the aforesaid, this Court has to find the answer to two questions :

(i) The factum of separation and

(ii) Whether the appellant has proved the respondent's intention of bring cohabitation permanently to an end (animus deserendi).

14. If the answers to both the questions is affirmative then the impugned decree deserves to be set aside and if otherwise, then this Court has to uphold the impugned judgment.

15. The difficulty in this case is that though the factum of separation is there but the marriage cannot be dissolved, as the appellant had failed to establish animus deserendi on the part of the respondent. As regard the first question, undisputedly parties are residing separately since 2000, therefore, this question does not require any more consideration hence, the same is answered affirmative and it is held that they are residing separately.

16. So far other question is concerned, this court has to consider the evidence to find out the respondents

intentions for residing separately; whether she has animus deserendi against the appellant or residing separately with sufficient cause because of the act of the appellant.

17. No evidence apart from his own testimony by way of affidavit was led by the Appellant. Appellant himself stated in his appeal that after the marriage, they have decided to settle in USA as per settlement. Thus, there was justifiable excuse on the part of the respondent to forsake her husband. Relevant finding of the Tribunal with regard to the desertion are as under:-

“Now coming to the second condition i.e., animus deserendi, I am of the view that there is no material on the record to conclude that the respondent has deserted the petitioner with the intention to put her marital relations with the petitioner to an end because in para 4 of his petition, the petitioner has admitted that after the marriage, they have decided to settle in USA as per settlement. This averment on the part of the petitioner goes to show that the refusal of the respondent to come back to India to join the company of the petitioner is not without any reasonable cause or justification and rather it was with the consent of the petitioner himself. In view of these facts and circumstances of the case, no inference can be drawn that the respondent has been living separately in USA with the intention to bring her marital relations with the petitioner to an end.”

18. In this case, it cannot be held that wife will be considered to have deserted the husband without sufficient reasons. The material on record does not show that the wife lived away from the husband without sufficient cause.

19. Mere separation is insufficient to constitute desertion. Thus, the Court cannot go on sole deposition of the litigant. The allegation of cruelty/desertion leveled against the respondent wife hinge mainly on the narration of facts in the affidavit.

20. In ***Chetan Dass v. Kamla Devi, AIR 2001 SC 1709***, the Apex Court has observed that:-

“Matrimonial matters are matters of delicate human and emotional relationship. It demands mutual trust, regard, respect, love and affection with sufficient play for reasonable adjustments with the spouse. The relationship has to conform to the social norms as well. The matrimonial conduct has now come to be governed by statute framed, keeping in view such norms and changed social order. It is sought to be controlled in the interest of the individuals as well as in broader perspective, for regulating matrimonial norms for making of a well-knit, healthy and not a disturbed and porous society. The institution of marriage occupies an important place and role to play in the society, in general. Therefore, it would not be appropriate to apply any submission as a straitjacket formula for grant of relief of

divorce. This aspect has to be considered in the background of the other facts and circumstances of the case.”

21. Merely because the Respondent is ex parte, no adverse inference would be drawn. The Appellant has to stand on his own legs to prove the ground of divorce, even if the Respondent is ex parte.

22. Thus, the submissions made by learned counsel for Appellant cannot be accepted in the facts and circumstances of the case as it appears that the appellant is the one who has left matrimonial home. The Appellant cannot be permitted to take advantage of a situation brought about by the appellant himself and seek divorce on the ground of desertion.

23. For the above reasons, I find no infirmity with the impugned judgment of the Additional District Judge.

24. The appeal therefore fails, and is accordingly dismissed.

V. B. GUPTA, J.

May 19, 2008
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