

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ **MAT.APP. NO. 50/2009**

% Judgment delivered on: 16.03.2011

BAL KISHAN MEHTA Appellant
Through: Mr.Prabhjit Jauhar with
Ms.Anupama, Advocates

versus

SMT.RAVINDER KAUR MEHTA Respondent
Through: None.

CORAM:
HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? No
2. To be referred to Reporter or not? No
3. Whether the judgment should be reported in the Digest? No

KAILASH GAMBHIR, J. Oral

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1. By this appeal filed under Section 28 of the Hindu Marriage Act, 1955 the appellant seeks to set aside the impugned judgment and decree dated 28.03.2009 passed by

the learned trial court whereby the petition filed by the appellant under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act for divorce was dismissed.

2. Brief facts of the case relevant for deciding the present appeal are that the marriage between the parties was solemnized on 23.1.1990 at Delhi according to Hindu rites and ceremonies and no child was born out the said wedlock. The appellant has alleged that the respondent was cruel to him from the very beginning and did not fulfil her matrimonial obligations by refusing to have sexual intercourse with him. It is also alleged that the respondent has deserted him w.e.f 2.10.2005 and never returned back. Consequently the appellant filed a petition for divorce on the ground of cruelty and desertion which vide judgment and decree dated 28.3.2009 was dismissed. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Assailing the judgment and decree, Mr.Prabhjit Jauhar, learned counsel appearing for the appellant submitted that the learned trial court failed to appreciate the settled

legal position that denial of sex by the respondent after 2.10.2005 caused great mental cruelty to the appellant and this circumstance by itself was sufficient to grant decree of divorce in favour of the appellant. The contention of counsel for the appellant is that neither did the respondent choose to contest the divorce petition nor she has chosen to contest the present appeal and, therefore, the learned trial court ought to have given due weightage to the unrebutted evidence of the appellant proving unjust withdrawal of the respondent from the company of the appellant w.e.f. 02.10.2005 and from the same date depriving the appellant-husband to have any kind of physical relationship with her.

4. Counsel for the appellant further submits that the appellant is also entitled to the decree of divorce on the ground of desertion as well as despite sufficient efforts made by the appellant, the respondent refused to join back the company of the appellant thereby permanently bringing cohabitation to an end. The contention of counsel for the appellant is that had the respondent been serious enough to

return back to join back the matrimonial home, at least she could have appeared in the said divorce proceedings to make such an offer, but her non-appearance before the learned trial court and before this Court as well clearly shows the clear intention on the part of the respondent not to resume the cohabitation. Counsel for the appellant also submits that the respondent did not turn up before the Court in the joint divorce petition although the same was duly signed by her and such derelict conduct on the part of the respondent clearly demonstrates that she was neither willing to give divorce to the appellant nor she was prepared to restore back the matrimonial ties. In support of his arguments, counsel for the appellant has placed reliance on the following judgments:-

(i) Suraj Prakash Sehgal Vs. Lt. Col. Smt.Amrita Sehgal 1999 VI AD (DELHI) 291

(ii) Iswar Bhai C.Patel Vs. Harihar Behera & Anr. (1999) 3 SCC 457

(iii) Prag Mittal Vs. Smt. Vikita Mittal 84 (2000) DLT 470

5. I have learned counsel for the appellant at considerable length and gone through the records.

6. The appellant filed the petition for divorce on the ground of cruelty and desertion as per the law envisaged under 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955. It is the case of the appellant that the respondent wife was uncooperative right from the inception of marriage and caused a lot of mental pain and agony to the appellant by her behaviour. It is also the case of the appellant that the respondent refused to have sexual intercourse with him which is certainly an act of cruelty committed by the respondent wife. The learned trial court has given the finding that the appellant was not able to prove the ground of cruelty as per the settled legal position. The learned trial court observed that the conduct complained of by the appellant is the normal wear and tear of married life and not so grave and severe as envisaged under section 13(1)(ia) to warrant the decree of divorce. Cruelty has not been defined in the Act and rightly so as what may be cruelty in one case may not be cruelty in the other case. The incidents and acts complained should be so grave and weighty so as to satisfy the conscience of the court

that it is not possible for the parties to live together without mental pain and agony. It has to be something more than the ordinary wear and tear of married life and has to touch a certain pitch of severity. The present case is where the appellant has not lead any evidence to prove that the respondent was cruel to him and hence so far this ground is considered, I do not find any illegality and perversity in the findings arrived at by the learned trial court.

7. The other ground on the basis of which the appellant has claimed the decree of divorce is that the respondent deserted him without reasonable cause since 2.10.2005 and never returned back. The ground of desertion is envisaged under section 13(1)(ib) of the Act which states that :

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;

[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.]

Hence, it would be evident from the above that for claiming the decree of divorce on the ground of desertion the petitioner has to prove that he was deserted without reasonable cause and without his consent by the deserting spouse. It is a settled legal position that for proving desertion, the petitioner has to prove the two necessary ingredients of (1) factum of separation and (2) animus deserendi; which means the intention to bring cohabitation permanently to an end. The two essential ingredients with regard to the deserted spouse is; (1) absence of consent and (2) the absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid.

8. In the facts of the present case, the respondent wife left the matrimonial home on 2.10.2005 and never returned back. With regard to the ingredients to prove the ground of desertion, the burden was on the appellant to prove the same.

The appellant has established the first essential of factum of separation with regard to desertion which is from 2.10.2005. So far the second ingredient with regard to animus deserendi is concerned, this court is of the considered view that it can be gathered from the conduct of the respondent. Here it would be useful to refer to the observations of the Apex Court in the case of ***Bipin Chander Jaisinghbhai Shah vs. Prabhawati AIR 1957 SC 176*** where it was held that:

"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; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close."

9. In the present case, the respondent deserted the spouse on 2.10.2005 and never returned back. The parties even filed a petition under section 13 B of the Hindu Marriage

Act for divorce by mutual consent which was duly signed by the respondent but she later did not appear before the court in the proceedings. The appellant consequently when filed a petition for divorce on the ground of cruelty and desertion and even after notice of the same, the respondent chose not to appear and was proceeded ex-parte before the learned trial court. In the appeal filed before this court as well, the respondent has chosen not to appear and contest the said divorce petition. This conduct of the respondent goes on to ascertain the necessary animus required for proving the ground of desertion. It is a settled legal position that the factum of separation and animus need not co exist. In the present case also when there was a de facto separation on 2.10.05, the respondent did not return back to fulfil any of her matrimonial obligations. Had there been any intention of the respondent to resume cohabitation with the appellant, then at least she would have come forward to contest the divorce petition filed by the appellant or even the appeal filed before this court. The conduct of the respondent gives sufficient

ground to construe the necessary intention on her part to bring cohabitation permanently to an end. Thus in the facts and circumstances of the case the necessary ingredients to prove desertion exist and therefore the judgment and decree dated 28.3.09 on the ground of desertion is accordingly set aside.

10. In the light of the foregoing, the court sets aside the judgment and decree passed by the learned trial court dated 28.3.09 so far as the ground of desertion is concerned. The present appeal is accordingly allowed and the decree of divorce granted to the appellant.

March 16, 2011
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KAILASH GAMBHIR, J