

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 14.03.2011

MAT APP No. 123/2009

Smt. Vandana Saini Appellant

Through: Ms. Amrit Kaur Oberoi with
Ms. Kanika Sabharwal, Advs.

Vs.

Shri Rahul Saini Respondent

Through: Nemo.

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.

1. By this appeal filed under section 28 of the Hindu Marriage Act, 1955, the appellant seeks to set aside the judgment and decree dated 14.10.09 passed the learned trial

court whereby the petition for divorce filed by the appellant was dismissed.

2. Brief facts of the case relevant for deciding the present appeal are that the marriage between the parties was solemnized on 9.2.2000 at Delhi according to Hindu rites and ceremonies and out of the said wedlock a female child named Priyasha was born on 22.11.2000. It is the case of the appellant that on 15.3.2005 the respondent left her alone at Roorkee with their child and went with his bag and baggage and never returned. Consequently the appellant filed the petition for divorce on the ground of desertion which was proceeded ex parte against the respondent and vide judgment and decree dated 14.1.09 was dismissed. Feeling aggrieved with the same, the appellant has preferred the present appeal.

3. Assailing the impugned judgment and decree, Ms. Amrit Kaur Oberoi, learned counsel for the appellant submits that the respondent has deserted the appellant w.e.f. 15th March, 2005 and thereafter he never returned so as to

discharge his matrimonial obligations. The contention of counsel for the appellant is that the respondent was under heavy debts as he had taken various loans from certain persons, which he failed to repay. Counsel also submits that even the appellant had to sell all her jewellery which was given to her in dowry so as to settle the loan amount taken by her husband. Counsel also submits that on 15th March, 2005 the respondent left Roorkee with bag and baggage leaving behind the appellant at Roorkee to take care of the small child, who was appearing in her final exams. Counsel further submits that despite best efforts made by the appellant the respondent did not return back so as to take care of his wife and small child and had the respondent returned back the situation would have improved. Counsel also submits that the respondent also did not pursue his petition filed by him under Section 9 of the Hindu Marriage Act, which fact again would show that the respondent was never interested to seek restitution of the conjugal rights. Counsel further submits that even the respondent was not appearing in the proceedings separately initiated by the appellant under

Section 26 of the Hindu Marriage Act. Counsel also submits that the respondent did not contest the divorce petition and chose to get himself proceeded ex.-parte. Counsel also submits that even before this Court, the respondent has not appeared. The contention of counsel for the appellant is that this conduct of the respondent in not causing appearance before the learned trial court and before this Court is ample evidence that the respondent has no intention to bring the appellant back to join the matrimonial home so as to discharge his matrimonial obligations. Counsel thus states that this conduct of the respondent is good enough to show that there is a permanent end to cohabitation between the parties. Counsel thus submits that the appellant is entitled to grant of decree on the ground of desertion, if she is not found entitled to the decree on the ground of cruelty. In support of her arguments counsel for the appellant has placed reliance on the judgment of this Court in Smt. Vimal Kanta vs Shri J.M. Kohli passed in FAO No. 46/1995 dated 13.1.2011.

4. I have heard learned counsel for the appellant at considerable length.

5. The appellant filed a petition for divorce on the ground of cruelty and desertion as envisaged under section 13(1)(ia) and (ib) of the Hindu Marriage Act. The case of the appellant is that the respondent husband had played fraud upon the appellant regarding his age and educational qualifications. The appellant also alleged that in May, 2000 the respondent disappeared for almost a week as he had taken loans and was not in a position to pay the creditors. In February 2001 three musclemen invaded the house of the appellant and assaulted her to recover the amount and which the appellant had to pay by selling off her jewellery which she had received at the time of marriage. The appellant further alleged that the respondent did not let her meet her parents and relatives and in October, 2001 had left her at the house of her parents and did not bother to bring her back. That on 15.3.2005, the respondent left the house at Roorkee leaving behind the appellant and their child alone at the

mercy of the strangers and never returned back to fulfil his marital obligations.

6. The learned trial court dismissed the petition of the appellant on the ground that the petition was devoid of any particulars and that the appellant was not able to prove her case to establish any cruelty on the part of the respondent. As far as the observations of the trial court without regard to cruelty are concerned, this court does not find any illegality or perversity in it and the same is upheld to that extent.

7. So far the observations with regard to the ground of desertion are concerned, the learned trial court has held that the appellant was not able to prove the necessary ingredients for proving desertion as envisaged under section 13(1)(ia) of the Hindu Marriage Act, 1955 and hence was not entitled for the decree of divorce on the said ground. 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 desertion of the petitioner has to be without reasonable cause and without the consent of the petitioner and it also includes the willful neglect of the petitioning spouse by the respondent. 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 appellant alleged that the respondent had deserted her without reasonable cause with effect from 15.3.2005 and since then he has never returned back. The statutory requirement that the parties should be living separately for a period of two years before filing the petition for divorce is fulfilled in the present case. But coming 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 15.3.2005. 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 15.3.2005 and never returned back. He filed a petition under section 9 of the Hindu Marriage Act for restitution of conjugal rights which he got dismissed for non prosecution. The appellant filed a petition for divorce and even after notice of the same, he 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 chose 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 15.3.05, the respondent did not return back to fulfil any of his matrimonial obligations and left behind his wife and daughter to fend for themselves. Had there been any intention of the respondent to resume cohabitation with the appellant, then at least he 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 his 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 14.10.09 on the ground of desertion is accordingly set aside.

10. In the light of the above, this court is of the considered view that the desideratum of the delicate structure of proof should not be an impediment in the dispensation of justice. The respondent has acted most unreasonably in just disappearing, turning his back on the conjugal responsibilities leaving the wife and child and further added insult to injury by not appearing before the court to explain his stand where the wife is carrying the load of an ominous marriage.

11. In the light of the foregoing, the court sets aside the judgment and decree passed by the learned trial court dated 14.10.09 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 14, 2011

KAILASH GAMBHIR, J