

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO 437/2012**

LILY SAINI

..... Appellant

Through: Mr. Diwakar Singh, Advocate

versus

NAND KISHORE SAINI

..... Respondent

Through: None.

CORAM:

HON'BLE MS. JUSTICE REVA KHETRAPAL

HON'BLE MR. JUSTICE V. KAMESWAR RAO

ORDER

04.07.2014

: REVA KHETRAPAL, J. (Oral)

1. The Appellant seeks to challenge the judgment dated 14.08.2012 passed by the Family Court, Saket, New Delhi in HMA No.451/2011 whereunder her petition seeking divorce from the Respondent on the ground of cruelty and desertion under Section 13(1)(ia) and 13(1)(ib) of the Hindu Marriage Act, 1955 was dismissed.

2. The facts relevant for deciding the present appeal are that the Appellant was married to the Respondent as far back as on 25th January, 1987 according to Hindu rites and ceremonies. The marriage was duly consummated and a son was born to the parties in the same year on 03.11.1987. The Appellant alleges that the

Respondent was of a cruel, adamant and stubborn nature and throughout their matrimonial life he treated her with cruelty. He was also abusive and many a times would force her to sell her ornaments to pay his debts. Emboldened by her silence and her submissive nature, he subsequently started demanding money from her, obtaining loans in her name, misusing her credit card and even got a vehicle purchased and financed in the name of the Appellant. His ill treatment caused her untold misery and humiliation. In the year 2006, he left the matrimonial home but nevertheless continuously extended threats to her through his friends and other anti-social elements right upto the month of August, 2010. The marriage thus became a fiction supported only by the legal tie. The sustained force of abusive and humiliated treatment calculated to torture her rendered the life of the Appellant unbearable. The Appellant, therefore, petitioned for divorce on 22nd January, 2011 on grounds of cruelty and desertion.

3. Though the Respondent was served with notice of the petition seeking dissolution of marriage by publication by the learned Family Court, he failed to enter appearance and was accordingly proceeded *ex parte* on 15.11.2011.

4. *Ex parte* evidence was adduced by the Appellant before the Family Court by tendering in evidence her affidavit Ex.PW-1/A1 and documents Ex.PW-1/A to Ex.PW-1/C.

5. The Family Court on the aspect of cruelty held that the Appellant had failed to prove specific dates and instances which had created apprehension in her mind making it impossible for her to live with the Respondent. It further held:

“All instances, as mentioned in the petition, appear to be normal wear and tear of a married life which require mutual understanding and adjustments between a married couple and had not reached the height of cruelty to grant divorce (sic).”

6. With regard to the allegation of desertion made by the Appellant against the Respondent, the Family Court held:

“12. Secondly, the version of the petitioner cannot be accepted on the ground of desertion also. According to her, she was deserted in November, 2006 but no efforts were made by her to patch up the matter with the respondent. The present petition has been filed on 22.01.2011.

13. As per Section 23 of the Hindu Marriage Act, 1955, in any proceedings whether defended or not, if the court is satisfied that there has not been any unnecessary or improper delay in instituting the proceeding, the court shall decree such relief accordingly.

14. In the present case, though desertion has continued since November, 2006 but present petition was filed only on 22.01.2011. Thus, there is unnecessary and improper delay by the petitioner in filing the present petition. The petitioner has not been able to establish the grounds of cruelty and also the ground of desertion in her favour.”

7. Aggrieved by the aforesaid findings, the present appeal has been preferred by the Appellant praying for the setting aside of the impugned judgment and for dissolution of the marriage between the parties by a decree of divorce on the grounds of desertion and cruelty.

8. Notice of the admission of the appeal was issued to the Respondent who evaded service and was ultimately served by publication in the newspapers notwithstanding he chose not to contest the matter.

9. Accordingly, we have heard learned counsel for the Appellant who conceded before a Coordinate Bench that on considering the *ex parte* evidence led in the petition seeking divorce on the ground of cruelty no case would be made out to interfere with the impugned decision. Learned counsel however pressed for the dissolution of the marriage on the ground of desertion. He submitted that in the present case the Respondent is continuously living separately from November, 2006 onwards, i.e., for a period of more than 5 years at the time of the filing of the petition. He further submitted that there has been no unnecessary and improper delay by the Appellant in filing the present petition and the findings of the learned Family Court that the Appellant has caused unnecessary and improper delay in filing the petition is erroneous. In any event, he contended, delay in any other case such as adultery, cruelty, etc. may amount to acquiescence or condonation, but it cannot be so in the case of desertion.

10. It is settled law that the Appellant who is the deserted spouse, in order to succeed on the ground of desertion must prove two essential conditions so far as the deserting spouse is concerned *viz.*, (i) the factum of separation and (ii) the intention to bring co-habitation permanently to an end (*animus deserendi*). Similarly, two elements are essential so far as the deserted spouse is concerned, *viz.*, (i) the

absence of consent and (ii) the absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention as aforesaid. (See ***Bipinchandra Jaisinghbai Shah vs. Prabhavati*, AIR 1957 SC 176**). Thus, 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 tantamounts to a total repudiation of the matrimonial ties.

11. It is equally well settled 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 the fact that such desertion was without just cause. In other words, even if the deserting spouse does not prove just cause for living apart, the deserted spouse had still to satisfy the Court that the desertion was without cause. (See ***Lachman Utamchand Kirpalani v. Meena alias Mota*, AIR 1964 SC 40** and ***Dr. N.G. Dastane v. S. Dastane*, AIR 1975 SC 1534**). In the case of ***Dr. N.G. Dastane (supra)***, it was further laid down that the word “satisfied” in Section 23 of the Act must mean “satisfied on a preponderance of probabilities”. Hence, the inference of desertion has to be made on a balance of probabilities. In the present case, on a preponderance of probabilities, the un rebutted evidence of the Appellant clearly leads to the inference of desertion.

12. A look now at the Sub-Section (1) of Section 23 of the Hindu Marriage Act, 1955 which has been adverted to by the learned Family

Court for arriving at the conclusion that the Appellant who is the deserted spouse is not entitled to the relief of dissolution of her marriage with the Respondent on account of the unnecessary and improper delay caused by her in instituting the petition for divorce. The relevant portion of the said Section reads as under:

“23. Decree in proceedings.— (1) In any proceeding under this Act, whether defended or not, if the court is satisfied that—

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|-----|--|----------|----------|-----------|
| (a) | <i>x</i> | <i>x</i> | <i>x</i> | <i>x</i> |
| (b) | <i>x</i> | <i>x</i> | <i>x</i> | <i>x</i> |
| (c) | <i>x</i> | <i>x</i> | <i>x</i> | <i>x</i> |
| (d) | <i>there has not been any unnecessary or improper delay in instituting the proceeding, and</i> | | | |
| (e) | <i>x</i> | <i>x</i> | <i>x</i> | <i>x”</i> |

13. The only aspect which arises for consideration in the present appeal, therefore, is whether there has been any unnecessary or improper delay caused by the Appellant in instituting the proceedings for divorce. For adjudicating the aforesaid issue, recourse must of necessity be to the provisions of Section 13(1)(ib) of the Hindu Marriage Act, which for the sake of facility, are reproduced hereunder:-

“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 –

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|------|---|----------|----------|----------|
| (i) | <i>x</i> | <i>x</i> | <i>x</i> | <i>x</i> |
| (ia) | <i>x</i> | <i>x</i> | <i>x</i> | <i>x</i> |
| (ib) | <i>has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition”</i> | | | |

14. As set out in the impugned judgment, the act of desertion took place in November, 2006 and the present petition was filed on 22.01.2011. Section 13(1)(ib), reproduced hereinabove, clearly spells out a continuous period of *not less than two years immediately preceding the presentation of the petition* as the period of desertion required as a *sine qua non* for presentation of the petition. Thus, by no stretch of imagination, the Appellant could have presented the petition before November, 2008. Had she done so, the petition would have been liable to be dismissed on the ground of non-fulfilment of the conditions laid down in Section 13(1)(ib). **The use of the words not less than two years** even otherwise suggest that this is the minimum requirement for presentation of a petition on the ground of desertion but **no maximum period has been laid down within which the petition must be presented.** This, in our considered opinion, is indicative of the fact that the legislature has vested the deserted spouse with the option of presenting the petition after a lapse of two years from the date of the petition but has not made it incumbent upon the deserted spouse to necessarily present a petition on completion of the aforesaid period of two years of desertion. The reason for this is clear enough. The legislature has kept in mind a contingency where the deserted spouse may still entertain a hope and expectation that the deserting spouse would ultimately return to the matrimonial home. In a given case this may be after three years or four years or even more. It is for the deserted spouse to determine the period after which she should seek a decree of divorce and the only

embargo laid down by the legislature is that the said period should not be less than two years. Section 23(1)(d), in our opinion, must be read down in the context of Section 13(1)(ib). To do otherwise would lead to absurdity and would impliedly lead to the deserted spouse scuttling to file a petition seeking dissolution of marriage after a period of two years even while entertaining the hope that the other spouse would see the light of the day and rejuvenate the matrimonial ties by returning to the shared home and hearth.

15. The question whether the delay in the institution of a petition praying for a decree of divorce is unnecessary or improper is a question of fact. To determine this question, each case has to be examined on its facts and circumstances. Lapse of time in presentment of cases falling under Section 13(i)(b) cannot necessarily be taken as unnecessary or improper delay. We are fortified in coming to this conclusion from the decision of a learned Single Judge of this Court (Hon'ble Mr. Justice D.K. Jain, as His Lordship then was) decided on November 04, 1993 in the case of ***Kusum Lata vs. Satish Kumar Khanna***:-

“.....Whether delay is unnecessary or improper is a question of fact. For it each case has to be examined on its facts and circumstances. While delay of a given period may be unnecessary, unreasonable or improper in some cases, the delay of that or a larger period may not be unreasonable in another case. Broadly speaking, if a ground in cases of restitution of conjugal rights or annulment of marriage or of other cases of avoidance of marriage is one which is or could be discovered or noticeable soon after the marriage and there is no

uncertainty about it, such as impotency, hazardous disease, like schizophrenia or leucoderma etc; offensive or loose character, and the petition is not filed expeditiously without much delay, giving an impression of connivance, or the cause for the delay is not explained, the delay would be unnecessary or improper. If however, the cause of complaint is not discovered or discoverable early or the cause of delay is explained, the delay would not be improper or unnecessary. Besides, in cases where a divorce is sought on the ground of desertion, the considerations are different. A deserted spouse may not act with the speed he is supposed to act in the case falling in the earlier category, referred to hereinabove, in order to afford sufficient opportunity to the erring spouse to relent, mend his or her ways and resume forsaken marital obligation. Lapse of time in such cases cannot necessarily be taken as unnecessary or improper delay. Thus, each case would depend on its own facts. Support is lent to this view by three decisions of this Court, relied upon by Mr. O.N.Vohra, learned counsel for the respondent. These are AIR 1967 Punjab 152, Smt. Nirmoo vs. Nikka Ram, AIR 1968 Delhi 260 and Mrs. Rita Nijhawan vs. Mr. Bal Kishan Nijhawan, 1973 (9) DLT 222.”

16. In the instant case, we find that even otherwise there has been no unnecessary or improper delay by the Appellant in filing the petition for dissolution of the marriage. The cause of action accrued to the Appellant at the earliest in November, 2008 and the petition was presented in January, 2011 after a little more than two years of the accrual of the cause of action. The finding of the learned Family Court that by virtue of the provisions of Section 23 of the Hindu Marriage Act, 1955 there has been unnecessary and improper delay

by the Petitioner in filing the present petition for divorce is therefore clearly unsustainable. The Appellant has, in our opinion, conclusively established the ground of desertion through her evidence, which is unrebutted on record. As such, the marriage between the Appellant and the Respondent is liable to be dissolved on the ground of desertion as enunciated in Section 13(1)(ib) of the Hindu Marriage Act.

17. Resultantly, we set aside the judgment of the learned Family Court dated 14th August, 2012 dismissing the petition. The necessary corollary is that the marriage of the Appellant and the Respondent stands dissolved by a decree of divorce under Section 13(1)(ib) of the Hindu Marriage Act.

18. The appeal is allowed and stands disposed of in the above terms.

**REVA KHETRAPAL
JUDGE**

**V. KAMESWAR RAO
JUDGE**

July 04, 2014
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