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HIGH COURT OF CHHATTISGARH, BILASPUR**First Appeal (M) No. 116 of 2014**

Jasveer Kaur D/o J.S.Saluja, aged about 44 years, R/o Tarbahar Chowk, Police Station Tarbahar, Police Station Civil Lines, Bilaspur, Civil and Revenue District Bilaspur, Chhattisgarh.

---- Appellant**Versus**

Vikram Singh S/o Sardar Mahendra Singh Khanuja, aged about 43 years, R/o Khamhardih, Shankar Nagar, Police Station and Post Telibandha, Civil and Revenue District Raipur, Chhattisgarh.

---- Respondent**First Appeal (M) No. 130 of 2014**

Jasveer Kaur D/o J.S.Saluja, aged about 41 years, R/o Tarbahar Chowk, Police Station Tarbahar, Police Station Civil Lines, Bilaspur, Civil and Revenue District Bilaspur, Chhattisgarh.

---- Appellant**Versus**

Vikram Singh S/o Sardar Mahendra Singh Khanuja, aged about 43 years, R/o Khamhardih, Shankar Nagar, Police Station and Post Telibandh Civil and Revenue District Raipur, Chhattisgarh.

---- Respondent**First Appeal (M) No. 134 of 2014**

Bikram Singh S/o Sardar Mahendra Singh Khanuja, aged about 43 years, R/o Khamhardih, Shankar Nagar, Police Station Telibandha, Raipur and Tahsil and District Raipur, Chhattisgarh.

---- Appellant**Versus**

Smt. Jasveer Kaur, D/o Sardar Jagat Singh Saluja, aged about 41 years, R/o Time Zone, Opp. PGBT College, Tarbahar Chowk, Police Station Tarbahar, Bilaspur Tahsil and District Bilaspur, Chhattisgarh.

---- Respondent

For Appellant/Husband	:	Smt. Fouzia Mirza, Advocate.
For Respondent/Wife	:	Shri M.V.Paranjpe, Advocate.

Hon'ble Shri Navin Sinha, Chief Justice
Hon'ble Shri P. Sam Koshy, J.

Judgment on Board**Per Navin Sinha, Chief Justice****16/02/2016**

1. These three appeals between the same parties are based on a soured matrimonial relationship, preferred by either of the parties and have therefore been heard together and are being disposed by a common order.

2. The parties were married on 14.12.1999 at the approximate age of 27 and 25 years respectively. They separated as early as 22.3.2000. The Appellant-husband filed an application for divorce under Section 13 of the Hindu Marriage Act (hereinafter called 'the Act') on 16.6.2011 before the Family Judge, Raipur on grounds of cruelty and desertion. On 1.10.2011, the Respondent-wife filed an application before the Family Judge, Bilaspur under Section 9 of the Act for restitution of conjugal rights. The suit for divorce filed by the Appellant at Raipur was disposed on jurisdictional grounds leading to institution of a fresh suit for divorce on the same grounds before the Family Judge, Bilaspur on 4.2.2012 registered as Civil Suit No. 62-A/2012. By a common judgment dated 14.11.2014, the Family Judge granted divorce to the Appellant on grounds of desertion but rejected the plea of cruelty. The application for restitution of conjugal rights by the Respondent was rejected. Permanent alimony of Rs. 30,00,000/- under Section 25 of the Act was granted to the Respondent. FA (M) No. 116 of 2014 has been filed by the Respondent challenging grant of divorce. FA (M) No. 130 of 2014 has also been filed by the Respondent assailing rejection of her application for restitution of conjugal rights and FA (M) No. 134 of 2014 has been filed by the Appellant questioning the grant of permanent alimony. During pendency of the proceedings before the Family Court the dispute regarding maintenance *pendente lite* travelled upto the Supreme Court when it was enhanced from Rs. 4000/- to Rs. 25,000/- by order dated 29.10.2013 observing that at the final stage the determination of alimony/maintenance shall "obviously" be considered by the appropriate Court.

3. Learned Counsel for the Appellant submitted that the Family Judge after consideration of evidence has arrived at a finding that the Respondent had deserted the matrimonial home on 22.3.2000 without just and unreasonable cause and granted divorce under Section 13(1)(ib) of the Act. Even if the charge of cruelty has not been proved, grant of permanent alimony of such a large amount essentially amounts to giving an advantage or benefit to the Respondent

for her own wrongful conduct in having been the home breaker. The primary principle of law is that no person can be permitted to take advantage of his or her own wrong. The second limb of the submission was that Section 24 of the Act provides for grant of maintenance *pendente lite* on an application made for the purpose by the aggrieved. Section 25 of the Act likewise provides for grant of permanent alimony and maintenance at the time of final decree on an application made for the purpose.

4. Even if maintenance *pendente lite* had been granted during pendency of the proceedings, it was mandatory for the aggrieved to prefer an application separately for grant of permanent alimony if so desirous. Once such application is filed and the other side answers it, the provision perceives a mini enquiry of respective capacities to arrive at an adjudged determination of quantum after considering various aspects as mentioned in Section 25(1) of the Act including the conduct of the parties and other circumstances of the case. If judicial discretion is wide, the Court is also required to keep in mind various factors such as a drop in income, other familial responsibility and other intervening factors etc to balance equities. In the present case, no such application was filed by the Respondent. The Family Judge on his own merely on basis of one paragraph from the evidence of the Respondent in cross-examination arrived at a determination for awarding permanent alimony at a grossly exorbitant amount. The Appellant, in absence of any such enquiry and hearing was deprived of the opportunity to convince the Family Judge that even if he was of the opinion that permanent alimony ought to be granted notwithstanding the fact that the fault lay with the Respondent for divorce, an opportunity was denied to the Appellant to persuade the Family Judge with regard to what may have been the appropriate amount of permanent alimony. The last submission was that while awarding permanent alimony the Court did not consider adjustment or set off of Rs. 3,85,500/- paid as maintenance *pendent elite* (under Section 24 of the Act Rs. 3,48,000 from October, 2012 till October, 2013, and Rs. 37,500/- from

November, 2015 to January, 2016 under Section 125 CrPC.) Also placing reliance on AIR 2012 SC 2586 (Vishwanath Sitaram Agrawal v. Sau Sarla Vishwanath Agrawal) on which the Respondent relies, it was submitted that the facts of the case were entirely different and no general proposition has been laid down that maintenance *pendente lite* paid could not be set off while awarding permanent alimony.

5. Learned Counsel for the Respondent submitted that the institution of a divorce case before the Court having no jurisdiction on territorial grounds amounted to institution of no Suit at all. The application for restitution of conjugal rights by the Respondent therefore preceded the application for divorce by the Appellant. It was next submitted that the allegations of cruelty have been found to be false. The making of false allegations against the Respondent was itself sufficient explanation why she was compelled to leave the matrimonial home. Desertion without reasonable cause therefore could not be said to have been established. This aspect has not been considered by the Family Judge. The institution of a Suit for restitution of conjugal rights by her is but evidence that she was always ready and is willing to restore matrimonial relationship and never had the intention to leave the matrimonial house permanently. Her leaving the matrimonial home was therefore a temporary act with no permanent *animus deserendi* to end the matrimonial relationship by not returning. No sooner did she think that the Appellant could be persuaded to restore the matrimonial relationship, she made every conceivable effort to go back to the matrimonial home which was consistently resisted by the Appellant. The Respondent and her father, DW-2, Sardar Jagat Singh in their testimony detailed the number of efforts made to restore and revive the matrimonial relationship unsuccessfully due to non cooperation by the Appellant. These factors have not been properly appreciated by the Family Judge before holding that the Respondent had deserted the matrimonial home without valid justification or without reasonable cause.

6. The Respondent was desirous for restoration of matrimonial relationship only. Alternately it was submitted that it was not mandatory for her in the facts of the present case to file an application for grant of permanent alimony under Section 25 of the Act at the time of passing of the decree. The parties were under no misconception that permanent alimony was a matter to be specifically decided because of the observations and directions of the Supreme Court while ordering maintenance *pendente lite*. Therefore, the parties were not taken by surprise. The Appellant led no evidence with regard to his income and responsibilities. It was left for the Respondent to lead evidence with regard to his income and which remained unrebutted. No prejudice has been caused to the Appellant in any manner. In any event, the procedure provided under Section 25 of the Act sought to be relied upon was only a handmaid of justice and did not create any substantive obligation in absence of which the matter could not be considered. No such objection was raised by the Appellant at the time of hearing and evidence. The permanent alimony awarded call for no interference. The Appellant himself in the attempted effort at settlement before the Gurudwara Committee, Gondapara Bilaspur, in July 2012 had offered to pay a sum of Rs. 12 Lacs towards permanent alimony. Relying on Vishwanath Sitaram Agarwal (*supra*) it was submitted that any maintenance paid during the pendency of the divorce case may not be directed to be set off as the Respondent has already spent the same on her maintenance.

7. It was lastly submitted that the rejection of the prayer for restitution of conjugal rights was primarily based on the application for divorce of the Appellant having been allowed. If the decree for divorce is set aside, the application for restitution of conjugal rights, but has to be allowed.

8. We have considered the submissions on behalf of the parties and perused the judgments under appeals as also the evidence available on record.

9. The Respondent and the Appellant were known to each other since earlier as the sister of the Appellant was a friend of the Respondent. Unfortunately, the marriage ran into rough weather as early as 22.3.2000 even before they had the opportunity to know and understand each other. The Appellant was employed in a private company at the time of marriage and the Respondent held a degree in LLB. The families of both resided at Bilaspur. The Appellant resided at Raipur for his vocation. According to the Appellant, the Respondent did not approve of the former frequently visiting Bilaspur to meet his parents and allegedly would even deprive him of physical relationship so as to persuade him to listen to her bidding. She had even threatened to jump off the train on 5.3.2011 for that reason. The Respondent is said to have left the matrimonial home at Raipur on 22.3.2000 never to return. All efforts at reconciliation by well-wishers failed. The Appellant was posted to Nagpur in August, 2000 and asked her to accompany him which was also declined. The differences between the parties were unsuccessfully sought to be sorted out by counselling at the police lines as deposed by PW-5 Amna Khan. The witness deposed that while the Appellant was willing the Respondent appeared reluctant. An attempt was made at amicable settlement for parting of ways peacefully with the intervention of the Gurudwara Committee as a part of which a sum of Rs. 12 Lacs was offered to be paid by the Appellant.

10. Satisfied of the futility of his efforts, the Appellant then instituted a Suit for divorce on 16.6.2011 before the Family Judge, Raipur on grounds of cruelty and desertion. Since the parties were married at Bilaspur, the Suit was disposed as not maintainable leading to institution of Civil Suit No. 62-A/2012 on the same grounds at Bilaspur on 4.2.2012. The Suit for divorce can therefore safely be said to have been instituted first in time by the Appellant only after which the Suit for restitution of conjugal rights was filed by the Respondent on 1.10.2011, nearly 11½ years after having left the matrimonial home. That the Respondent left the matrimonial home on 22.3.2000 never to return is undisputed. Her justification that she feared sorcery by the Appellant or his mother has not been

substantiated by evidence during the trial. The defence that the Appellant bit her hand has also not been established.

11. The Respondent contends that several efforts were made by her to restore matrimonial relationship by repeatedly going to the house of her in-laws at Bilaspur or that the Appellant promised to come to Bilaspur and take her to the matrimonial home. The distance between the two cities is a little over 100 KMs. No evidence has been led by the Respondent of any effort or attempt by her to proceed to Raipur herself. In the reconciliation meeting on 2.9.2012 at Central Point Hotel, the Respondent did not come. The Respondent gave no explanation that if the Appellant had wrongly deserted her, why she took 11½ years to file the Suit for restitution of conjugal rights on 1.10.2011 and that too only after the Suit for divorce was filed by the Appellant on 16.6.2011. The Family Judge rightly concluded that the Suit for restitution was not filed bonafide with a genuine desire to restore matrimonial relationship but was in reaction to the Suit filed by the Appellant for divorce.

12. The Respondent in her written statement at paragraph 29(a) pleaded that if she had left the matrimonial home without reason, the Appellant also took no steps to bring her back. The onus in the facts was exclusively on the Respondent which she failed to discharge. Section 13(1)(ib) of the Act makes it a valid ground for divorce if one of the spouse has deserted the matrimonial home for a period of not less than two years immediately preceding the presentation. The requirement stands satisfied. Had the Respondent furnished any explanation that she had not left the matrimonial home without reasonable cause the onus would have shifted to the Appellant and desertion would not have been proved. Her conduct in having left the matrimonial home nearly 11½ years ago without taking any steps for revival of the matrimonial relationship establishes that she had the *animus deserendi* not to return to the matrimonial home from the very inception.

13. In 2001 AIR SCW 4641 (Adhyatma Bahattar alwar v. Adhyatma Bahattar Sri Devi) the three essential ingredients to grant divorce on the grounds of desertion were (a) the factum of separation, (b) intention to bring cohabitation to permanent end (*animus deserendi*) and (c) an element of permanence to continue with the state of affairs, a prime condition which must continue throughout the statutory period. We therefore find no reason to interfere with the grant of divorce to the Appellant on the ground of desertion. FA(M) No. 116 of 2014 consequently fails. Logically, FA(M) No. 130 of 2014 against dismissal of the application under Section 9 of the Act also fails. The fact that the ground of cruelty alleged by the Appellant may not have been established cannot vitiate the former finding.

14. That brings to the fore the question of permanent alimony as granted under Section 25 to the Respondent. Learned Counsel for the Respondent submitted that she is not desirous of any alimony but only restoration of matrimonial relationship. The Appellant is not willing to consider the same. The parties have been living away from each other for now nearly sixteen years and stayed together for barely few months after the marriage. No useful purpose is going to be served by any effort in that direction by us. In (2007) 2 SCC 263 (Rishikesh Sharma v. Saroj Sharma) under similar circumstances it was observed as follows :-

“5. In our opinion it will not be possible for the parties to live together and therefore there is no purpose in compelling both the parties to live together. Therefore, the best course in our opinion is to dissolve the marriage by passing a decree of divorce so that the parties who are litigating since 1981 and have lost valuable part of life can live peacefully for remaining part of their life.

6.....The wife was not willing to accept the lump sum amount but however expressed her willingness to live with her husband. We are of the opinion that her desire to live with her husband at this stage and at this distance of time is not genuine. Therefore, we are not accepting this suggestion made by the wife and reject the same.”

15. Section 25 provides for filing of an application at the time of passing of the decree or subsequent thereto for payment of permanent alimony which is to be determined on a host of factors like income, property, conduct of the parties and other circumstances of the case, as may appear just to the Court. In (2013) 2 SCC 114 (U. Sree v. U. Srinivas) it was observed that grant of permanent alimony was not a one sided affair but had to be balanced that the living condition of the other party was not affected holding as follows :-

“33.....We have already opined that the husband has made out a case for divorce by proving mental cruelty. As a decree is passed, the wife is entitled to permanent alimony for her sustenance. Be it stated, while granting permanent alimony, no arithmetic formula can be adopted as there cannot be mathematical exactitude. It shall depend upon the status of the parties, their respective social needs, the financial capacity of the husband and other obligations. In *Vinny Parmvir Parmar v. Parmvir Parmar* while dealing with the concept of permanent alimony, this Court has observed that while granting permanent alimony, the court is required to take note of the fact that the amount of maintenance fixed for the wife should be such as she can live in reasonable comfort considering her status and the mode of life she was used to when she lived with her husband. At the same time, the amount so fixed cannot be excessive or affect the living condition of the other party.”

16. If an application is filed under Section 25 at the time of passing of the final decree, an enquiry of sorts is required to be conducted before grant of permanent alimony with an adequate opportunity of hearing to the parties for enabling the Court to decide what would be just and proper quantum of maintenance in the given facts of a case. The requirement under Section 25 of the Act is undoubtedly procedural but has a salutary purpose. It is not in dispute that no such application was filed by the Respondent in the present case. But, in the facts and circumstances of the case, we are satisfied that no prejudice has been caused to the Appellant in absence of any such specific application having been preferred by the Respondents. The parties were at issue with regard to the income of the Appellant before the Family Judge when they led evidence. The Appellant did not lead any evidence in response to the contention of the Respondent that he had an annual income Rs. 16,08,000/- considering which,

permanent alimony of Rs. 30,00,000/- was granted. The parties were well aware of the observations of the Supreme Court dated 29.10.2013 that at the time of conclusion of the proceedings, the final determination of alimony/maintenance was required to be considered by the appropriate Court. The parties were therefore well put on notice that this would be an issue at the time of final disposal of the matter. The Appellant therefore cannot be said to have been taken by surprise.

17. The Appellant alternately questions it as excessive and that the conduct of the Respondent disentitles her to that quantum. The Appellant in FA (M) No. 134 of 2014 along with the memo of appeal has annexed additional documents that he had subsequently lost his earlier job and there has been a decline in his income from Rs. 1,34,000/- per month to a gross income of Rs. 88,722/-. It has also been submitted that his sister is now divorced and is living with her children who are being supported by the Appellant. His aged parents also require medical attention. These are matters which he could not place before the Family Judge in absence of any separate enquiry held under Section 25 of the Act. No evidence has been placed before us whether the sister was herself getting any alimony or not. There is no denial by the Respondent to the fact of reduction in income of the Appellant and that he is also required to look after his aged parents, that the Respondent held a professional qualification which she was pursuing till she got her licence suspended in 2013 and has the capacity to earn by restoration of her licence also, the conduct of the Appellant himself in having offered Rs. 12 Lacs for settlement in 2012, we are satisfied to modify the amount of permanent alimony as granted by quantifying the sum at Rs. 15 Lacs which is considered just and proper keeping in mind the interest of both sides. We are not inclined to accept the submission that because it was the Respondent who deserted the matrimonial home, she is entitled to no maintenance. Under Section 25 of the Act, her conduct can be a relevant criteria for deciding the quantum but it cannot be a ground to deny alimony altogether as the Act contains no such prohibition.

18. In Viswhwanath Sitaram Agrawal (supra) the Appellant was very well off financially and owned an Oil mill, Ginning factory and a petrol pump. The case is distinguishable on its own facts. The Appellant is not similarly situated as discussed. It is therefore directed that while making payment of permanent alimony as directed the Appellant shall deduct that already paid to the Respondent during the pendency of the divorce proceedings.

19. Resultantly FA (M) No. 116 of 2014 and FA (M) 130 of 2014 preferred by the Respondent are dismissed. FA (M) No.134 of 2014 preferred by the Appellant is allowed in part.

Sd/-
(Navin Sinha)
CHIEF JUSTICE

Sd/-
(P. Sam Koshy)
JUDGE