

In the High Court of Punjab and Haryana at Chandigarh

FAO No. M-197 of 2008
Date of Decision: 24.2.2016

Sanjay Jain

---Appellant

versus

Rajni

---Respondent

Coram: Hon'ble Mr. Justice Rajive Bhalla
Hon'ble Mrs. Justice Rekha Mittal

Present: Mr. Amit Jhanji, Advocate
for the appellant

Mr. Subhash Goel, Advocate
for the respondent

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

Rekha Mittal, J.

The present appeal has emerged out of a matrimonial relationship wherein the parties stayed together only for a short span of 21 days after their marriage on 19.8.1994. Both the parties were earlier married, had one child each from their earlier wedlock and got decree of divorce before contracting second marriage.

The appellant blamed the respondent-wife for deserting him without any reasonable cause or excuse since 10.9.1994. It is averred that

the appellant convened panchayats twice in the house of Sh. Amrit Bansal, his maternal uncle. A sitting was also held at the house of in laws of elder sister of the respondent and then at the house of Sh. Shiv Mittal of M/s Aarti Steels for cohabitation between the parties but the respondent did not agree to come back to the matrimonial home. His efforts for reconciliation through office of the Red Cross Society did not yield any result, the respondent demanded a sum of Rs. 6,00,000/- as a compromise formula which the appellant was unable to pay in view of his financial status.

The respondent filed the written statement and, in turn, denied all the allegations accusing her being guilty of desertion. It is averred that the appellant earlier filed a false and frivolous petition under Section 7 of the Hindu Marriage Act, 1955 (for short "the Act") on the allegations that the respondent is not his legally wedded wife. The petition was withdrawn on 24.10.1998 from the Court at Ludhiana. The appellant has deserted the respondent without any reasonable and probable cause.

The marriage of the parties was solemnized on 19.8.1994. Master Garry, son of the respondent from her previous marriage was taken in adoption by the appellant on 6.8.1994 and a Deed of Adoption was executed in this regard. After few days of marriage, behaviour of the appellant changed and he told the respondent that he will not keep Master Garry as his son and she should leave him at her parents house. He further asked her to transfer her entire money to him if Master Garry was to be kept in his house. Though the appellant had agreed that he would not ask for money in lieu of taking care of Master Garry but still the respondent advanced a loan of Rs. 2,25,000/- to M/s Santu Mal Shambhu Nath, a

proprietorship concern of his father by way of cheques drawn at Union Bank of India, Kesar Ganj, Ludhiana. The appellant and his family members were pressurizing her to leave Master Garry at her parents house failing which she would also be turned out of the matrimonial home. She told the appellant that Master Garry is his adopted son on which he became furious, gave her beatings and turned her out of the matrimonial home alongwith master Garry on 10.9.1994. The entire jewellery and other valuable articles of dowry were retained by the appellant. The parents of the respondent alongwith Harish Khanna, Ram Chand and Pardip Kumar approached the appellant and his parents and requested to keep the respondent and master Garry but the appellant and his parents refused to accede to their request. The appellant himself is guilty of deserting the respondent without any reasonable cause and he cannot be allowed to take advantage of his own wrong.

The appellant filed replication, reiterated his stand taken in the petition and denied the allegations raised in the written statement.

The learned trial court framed the following issues:-

- “1. Whether the respondent has deserted the petitioner since September, 1994? OPP
2. Relief.”

The learned trial court permitted the parties to lead evidence in support of their respective pleadings.

The appellant examined Rajiv Sharma PW1, Gurdip Singh Buttar PW2, S.P.Malik PW3, Smt. Puppun Avinash Singh, Member of Indian Red Cross Society, Ludhiana PW4, Dharampal Jain, paternal uncle of the appellant PW5, Bal Mukand, a relative of the appellant PW6, Amrit Bansal,

maternal uncle of the appellant PW7, Smt. Kanta Jain, mother of the appellant PW8 and Arun Jain, a cousin of the appellant PW9, Sanjay Jain appeared as PW10.

To rebut evidence of the appellant, the respondent appeared as her own witness and examined Rajinder Kumar Singhanian PW1, Pardeep Kumar, her brother RW2, Ram Dhan, paternal uncle of the respondent RW4, Harish Khanna RW5, Piara Lal, her father RW6 and Sh. B.K. Goyal, Advocate RW7.

On due consideration of pleadings of the parties, evidence adduced and rival submissions made by their respective counsel, the learned trial court has held that the appellant has failed to substantiate his allegations that the respondent-wife is guilty of a matrimonial offence and as a consequence, the petition was dismissed with costs.

Feeling aggrieved against the verdict of the learned trial court, the instant appeal has been preferred by the appellant husband.

Counsel for the appellant contends that the learned trial court has not appreciated the evidence on record in right perspective and thus committed a gross error in non-suited claim of the appellant that the respondent is guilty of desertion and thus deprived the appellant of conjugal bliss by staying away from the matrimonial home. It is further argued that the respondent left the matrimonial home just 21 days after the marriage and refused to resume matrimony despite best efforts of the appellant through mediation of relatives, respectables and Indian Red Cross Society. The respondent left the matrimonial home with an intent to finish the matrimonial ties, therefore, she is guilty of desertion without any

reasonable cause or excuse. The respondent refused to produce a child out of their wedlock which was seriously objected to by the appellant.

Counsel for the respondent, on the other hand, would urge that the appellant himself is a guilty spouse and cannot be allowed to take advantage of his own wrong. The appellant adopted Master Garry, son of the respondent born out of her previous wedlock and even executed an Adoption Deed but later for the reasons best known, he refused to own Master Garry as his adopted son and still further Master Garry became an eyesore for the appellant and his family. It is vehemently argued that as the respondent objected to indifferent attitude of the appellant towards master Garry, the respondent alongwith master Garry was turned out of the matrimonial home. The respondent never refused to resume cohabitation but the appellant himself was not willing for the same and for that reason he initially filed a petition under Section 7 of the Act denying existence of a valid marriage between the parties for want of requisite ceremonies and on his failure to get a decree in those proceedings, filed the instant divorce petition in the year 2001. It has been proved in cross examination of the appellant that the respondent expressed her desire to come back to the matrimonial home but the appellant refused to resume cohabitation as the respondent was unable to bear a child since she had undergone an operation.

We have heard counsel for the parties and perused the records with their able assistance.

Before advertng to the merits of the case, it is appropriate to recapitulate the legal position laid down by Hon'ble the Supreme Court of India in **Bipinchandra Jaisinghbhai Shah v. Prabhavati AIR 1957**

Supreme Court 176 wherein it has been held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It was further held that for the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely (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. The same view was reiterated by the Apex Court in **Lachman Utamchand Kirpalani vs. Meena alias Mota AIR 1964 Supreme Court 40**.

Concededly, the parties stayed together as husband and wife for a period of 21 days and they have been living separately since 10.9.1994. There is no denial that before filing the petition for divorce in the year 2001, after about 07 years of separation of the parties, the appellant husband filed a petition under Section 7 of the Act for declaration that the marriage between the parties is null and void as no proper ceremonies of marriage were performed on 19.8.1994. The petition was instituted on 14.3.1997 and remained pending for about 1½ years and was later withdrawn. In that case, no witness was examined by the appellant. The plea of the appellant that he withdrew the said petition because of some understanding between the parties does not get substantiated from evidence on record. It is universally accepted that the man may tell lie but not the circumstances. The fact that the appellant filed a petition for declaration of

marriage between the parties to be null and void speaks volumes against bona fides of the appellant that he wanted to resume cohabitation or the respondent is guilty of desertion.

The appellant examined a large number of witnesses to establish that the respondent wife refused to resume matrimony despite his efforts. A careful and due consideration of the facts elicited during their cross examination would evident that the respondent never expressed her intention to snap the marital ties. Smt. Pappu Avnash Singh, a member of the Indian Red Cross Society, Ludhiana deposed in the opening lines of her cross examination that with their counselling both the parties agreed to live together. The appellant has examined his close relatives to portray the respondent in poor light and she being a villain and responsible for separate living of the parties. However, the appellant has admitted that during pendency of the petition, in the process of exploring possibility of an amicable settlement, the parties met at Dhodha Sweets. He has further admitted that the respondent expressed her readiness to live with him but she could not bear a child as she had undergone an operation. A relevant extract from his testimony reads as follows:-

“It is correct that even during pendency of this suit efforts for rehabilitation were made. It is wrong to suggest that during court efforts I refused to keep her. It is correct that I and respondent met at Dhodha sweets as a consequence of compromise proceedings started in court and in that meeting respondent told me that she is ready to live with me but she cannot bear a child as she has undergone operation.

Volunteered. She also told that in case she was to bear child why should she had left the house. It is correct that I told respondent that there is no fun of living together as she cannot bear a child. It is wrong to suggest that we turned her out of our house as she refused to bear my child. It is correct that before 10.9.1994 and after marriage the respondent told me that does not want to bear any child.”

A plain reading of the extract makes it apparent that the respondent was ready to live with the husband but he was not agreeable as she was unable to bear a child.

Taking into consideration conduct of the appellant that he earlier filed a petition for declaring his marriage with respondent as null and void for want of requisite ceremonies coupled with revelations made during meeting of parties pendente lite, it is difficult to hold that the respondent is to be blamed for separate living of the parties.

There cannot be any dispute about the settled position in law that it is incumbent for the party seeking divorce on the ground of desertion to prove that he/she is not taking advantage of his/her own wrong. In the light of facts on record, it can be safely inferred that the appellant himself is a guilty spouse who did not intend to resume matrimony, may be, due to dispute regarding adoption of Master Garry. We stand fortified in our observations from the fact that the appellant has tried his best to wriggle out of the Adoption Deed by raising an issue that no ceremonies of adoption i.e. giving or taking of the child had taken place. The witnesses examined by the appellant have admitted the factum of adoption of Master Garry but the

appellant has denied it. It further appears that as there was dispute between the parties in regard to adoption of the child, that created unpleasantness, and the respondent alongwith the child had to leave the matrimonial home. There is no cogent and convincing evidence on record to prove one of the essential ingredients of desertion namely the respondent has stayed away from the matrimonial home with an intent to bring cohabitation permanently to an end (*animus deserendi*). That being so, we do not find any error much less illegality in the findings of the learned trial court, negating claim of the appellant.

Before parting with this order, we have given our anxious consideration to the fact, whether such a marriage should be allowed to remain alive which appears to have become lifeless due to long separation of the parties. The irretrievable break down of marriage is not one of the grounds for divorce. As has been noticed hereinbefore, the appellant himself was not interested in resumption of cohabitation, hence, he cannot be allowed to take advantage of long separation for seeking a decree of divorce.

In view of what has been discussed hereinabove, finding no merit, the appeal is dismissed leaving the parties to bear their own costs.

(Rajive Bhalla)
Judge

(Rekha Mittal)
Judge

24.2.2016

PARAMJIT