

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

Date of decision : 24th August, 2016

+ MAT.APP.(F.C.)No.52/2014

SMT. JOGINDER KAUR (GOGI) Appellant
Through: Ms. Vikas Jain, Adv.

versus

SHRI PRIT PAL SINGHRespondent
Through: Mr. O.N. Rattanpal, Mr.
Manmohan Singh, Advs.

+ MAT.APP.(F.C.)No.72/2014

SMT. JOGINDER KAUR (GOGI) & ANR. Appellants
Through: Ms. Vikas Jain, Adv.

versus

SHRI PRIT PAL SINGH (PRINCE)Respondent
Through: Mr. O.N. Rattanpal, Mr.
Manmohan Singh, Advs.

CORAM:
HON'BLE MS. JUSTICE GITA MITTAL
HON'BLE MR. JUSTICE I.S. MEHTA

JUDGMENT

I. S. MEHTA, J.

1. The appellant-wife, i.e., Smt. Joginder Kaur (Gogi), under Section 19 of the Family Courts Act, 1984 has preferred MAT.APP.(F.C.)No.52/2014 aggrieved from the judgment and

divorce decree dated 26th February, 2014 in HMA No. 516/2011. She has also preferred MAT.APP.(FC)No.72/2014 partially challenging the order dated 26th February, 2014 in maintenance petition M No. 132/12 passed by the Family Court, Dwarka, New Delhi. Inasmuch as the two appeals rest on identical facts, the appeals have been taken together for consideration.

2. The facts giving rise to the two appeals are briefly noted. The parties before us were married in accordance with Sikh rites and customs on 22nd February, 2008. From their wedlock and cohabitation on 14th November, 2008, they were blessed with a son, i.e., Master Dilpreet Singh.

3. The respondent-husband, i.e., Shri Prit Pal Singh, filed a divorce petition under Section 13(1)(ia)&(ib) of the Hindu Marriage Act, 1955 on 9th June, 2011 for granting divorce in his favour on the ground of cruelty and desertion. The respondent-husband pleaded in his divorce petition that the respondent-husband and appellant-wife both belong to lower middle class; that they got married on 22nd February, 2008 according to Sikh rites and customs. It is further alleged in his divorce petition that the appellant-wife was very proud of her beauty, her qualification and her family and always cursed the day when she got married to the respondent-husband and that he ruined her life and made her pregnant to curtail her freedom to visit her mother at Punjab and other relatives at Delhi. It was further averred that appellant-wife frequently visited her parents at Sangrur, Punjab and other relatives without informing the respondent-husband. She also quarreled

frequently with the respondent-husband on flimsy grounds despite the fact that the respondent-husband took her to the doctor for regular check up and provided her food and medication as per the recommendation of the doctor.

4. It is further alleged by the respondent-husband that the appellant-wife had no respect for the respondent-husband or for any of his family members and her conduct throughout has been cruel, contemptuous, dominating and arrogant. The appellant-wife is alleged to have started humiliating the respondent-husband and also insisted that she would not cook for the family and a maid servant be hired. She is also alleged to have pressurized the respondent-husband to clear the dues of the caterer, who had provided tent, food, etc. in their marriage; that appellant-wife also insisted that they would live separately from the respondent-husband's parents, despite the fact, the father of the respondent-husband was an old man who was a heart patient and confined to bed most of the time. The mother of the respondent-husband too was also stated to be weak and old and that both parents of the respondent-husband required day to day care. As per the respondent-husband, the appellant-wife refused to accede to the demands of the respondent-husband on which she kept on adopting quarrelsome methods to compel the respondent-husband to leave his parents. The respondent-husband's parents even engaged a full time maid servant and paid the full caterer bill to pacify the appellant-wife but the appellant-wife still refused to discharge her duty towards the respondent-husband and his family members.

5. The respondent-husband complained that he had no respect in the eyes of the appellant-wife.

6. It is further alleged in the divorce petition filed under Section 13(1)(ia)&(ib) of the Hindu Marriage Act, 1955 by the respondent-husband that the appellant-wife went to her parental home at Sangrur (Punjab) in the month of March, 2008 just after 15 days of the marriage and remained there for one month. After much persuasions, she was brought back to the matrimonial home but again after 10 days she left the matrimonial home and went to live at her aunt's, i.e., Smt Bayant Kaur, home at Palam Colony, Delhi, where she again stayed for 15 days.

7. It is further alleged by the respondent-husband in Para 10 that the appellant-wife kept on behaving in such manner till 22nd December, 2009 and ultimately she left the matrimonial home on the pretext of *barsi* ceremony of her father at Sangrur (Punjab).

It is alleged that the appellant-wife came back to Delhi after attending the *barsi* ceremony of her father along with her aunt on 29th December, 2009 and went straight-away to her aunt's home without informing the respondent-husband.

However on 2nd January, 2010, the respondent-husband received a telephonic call from the aunt of the appellant-wife informing him about the return of the appellant-wife. When the respondent-husband requested the appellant-wife to return back to the matrimonial home along with their minor son immediately, the appellant-wife refused. On the same day, i.e., 2nd January, 2010, in

the evening the respondent-husband made a telephonic call to the appellant-wife's mother, i.e., Smt. Kulwant Kaur, at Sangrur, Punjab and informed her about the situation and stated that the appellant-wife is refusing to join the matrimonial home.

8. In the divorce petition, it was claimed that on 3rd January, 2010, on the advice of the appellant-wife's mother the respondent-husband along with his mother went to the home of the appellant-wife's aunt at Palam Colony, Delhi and requested the appellant-wife to return to the matrimonial home but the appellant-wife refused. There the respondent-husband found that the minor son was suffering from high fever and therefore he brought the minor son with him for treatment.

In the morning of 4th January, 2010, the appellant-wife with her aunt came to the respondent-husband's home and started shouting from the lane itself in abusive language and called the respondent-husband and his parents outside the home. The respondent-husband came out and asked the appellant-wife and her aunt to come inside the home but they refused and the appellant-wife asked the respondent-husband to return her son. The respondent-husband conveyed to the appellant-wife that their minor son is still suffering from fever and he will return the minor son in few days but the appellant-wife slapped him in presence of the people who were present in the lane and also called the Police. The Police asked both the parties to come to the Police Station, Bindapur, along with the minor child, on the next day.

9. The respondent-husband along with his mother and the ailing minor son claims to have gone to the Police Station, Bindapur, on 5th January, 2010 where the appellant-wife, her mother, her aunt and other relatives were present. The minor son was handed over to the appellant-wife on her insistence that she would otherwise commit suicide. The appellant-wife stated in writing to the Police that the respondent-husband had never demanded anything from her parents and all her *stridhan* was with her.

10. It is further alleged by the respondent-husband in his divorce petition under section 13(1)(ia)&(ib) of the Hindu Marriage Act, 1955 that the appellant-wife had not allowed the respondent-husband or his parents to see the face of his son. Moreover, during the entire period of stay in the matrimonial home the appellant-wife was reluctant to have sexual relations with the respondent-husband. The husband goes to the extent of alleging that since the day of the birth of son, i.e., Master Dilpreet Singh, on 14th November, 2008, the appellant-wife has not allowed the respondent-husband to touch her and even threatened that if the respondent-husband tried to touch her, she would commit suicide as a consequence of which the marriage between the parties has broken down resulting in filing of the divorce petition under Section 13(1)(ia)&(ib) of the Hindu Marriage Act, 1955 on the ground of cruelty and desertion.

11. Per contra the appellant-wife contested these assertions of the respondent-husband and had filed written statement on her

behalf stating that she has been harassed on account of dowry and a demand of Rs.2 lakh for purchasing a car was made repeatedly by the respondent-husband and his family members. The appellant-wife asserted that she was thrown out of the matrimonial home on non fulfillment of the said dowry demand.

12. The appellant-wife in her written statement has specifically stated that she has been brought up by her aunt, i.e., Smt. Bayant Kaur, and uncle, i.e., Shri Amarjeet Singh Brik – who were poor people and not able to fulfill the demands of the respondent-husband and his family members as they had already spent a huge amount on her wedding. The appellant-wife has further specifically stated that on the birth of her son, an amount of ₹60,000/- was spent by her uncle and aunt on “*Choochak*” ceremony, and that despite spending of such huge amount the respondent-husband and his family members continued to make the demand of Rs.2 lakh for purchasing a car.

13. The appellant-wife specifically stated in her written statement that she has performed all her matrimonial obligations as a devoted wife and daughter-in-law but the behavior of the respondent-husband and the family members always remained rude.

14. It is pointed out in the written statement that appellant-wife’s father died on 8th September, 2009. She requested the respondent-husband and his family members to join her in the cremation ceremony of her father but they did not join and the appellant-wife had to go with her brother. According to the appellant-wife, she

came back to Delhi on 28th December, 2009 and informed the respondent-husband about her return at her uncle and aunt's home. However, the respondent-husband and his family members misbehaved with the appellant-wife and demanded Rs.2 lakh and a car. When the appellant-wife herself went to the matrimonial home, she was thrown out by the respondent-husband and his family members. Their minor son was snatched by the respondent-husband and the appellant-wife was not allowed to meet him for 4-5 days. The appellant-wife was left with no option but to approach the Police, which got the custody of the child restored to her. It is stated that after throwing the appellant-wife out from the matrimonial home no efforts were made by the respondent-husband to take her back despite her repeated requests. The appellant-wife submitted that all the allegations made by the respondent-husband in the divorce petition under Section 13(1)(ia)&(ib) of the Hindu Marriage Act, 1955 were false and the petition was without merit which was liable to be dismissed.

15. It is noteworthy that the respondent-husband did not file any replication.

16. From the pleadings of the parties, the learned Family Court framed the following issues :

- 1) *Whether the respondent after the solemnization of marriage has treated the petitioner with cruelty? OPP*
- 2) *Whether the respondent has deserted the petitioner for a continuous period of not less than two years immediately*

*proceeding the presentation of this
petition?OPP*

3) *Relief.*

17. The respondent-husband, i.e., Shri Prit Pal Singh, examined himself as PW1 as the sole witness in support of his case. Smt. Joginder Kaur - the appellant-wife examined herself as RW1; her mother - Smt. Kalwant Kaur as RW2 and her aunt - Smt. Bayant Kaur as RW3. On a consideration of the material on record and after hearing both the parties, the learned Family Judge passed the impugned judgment and decree dated 26th February, 2014 in favour of the respondent-husband on the two counts of cruelty and desertion.

Mat.Appeal (FC) No.52/2014

18. The appellant-wife has filed Mat.Appeal (FC) No.52/2014, inter alia, on the following grounds :

- The statutory period of 2 years of desertion has not been fulfilled in the present case.
- The learned Family Court misread the material evidence placed on record.
- The learned Family Court failed to appreciate that the respondent-husband failed to discharge the onus of proof that the appellant-wife intentionally deserted the respondent-husband permanently.
- The learned Family Court further failed to appreciate that the filing of the divorce petition by the respondent-husband under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955 is a cooked up story to camouflage the illegal demands of dowry made by the respondent-husband and his family members.

19. We firstly consider the challenge divorce decree. It is contended by Ms. Vikas Jain, learned counsel for the appellant-wife that the divorce petition moved on behalf of the respondent-husband is premature as the required period of 2 years after the marriage and desertion as contemplated under Section 13(1)(ia)&(ib) of the Hindu Marriage Act, 1955 has not expired in presence of the admission made by the respondent-husband himself. The learned counsel on behalf of the appellant-wife has submitted that in any case, the respondent-husband has failed to prove on record that the appellant-wife has deserted him.

Ms. Vikas Jain, learned counsel on behalf of the appellant-wife has further submitted that the respondent-husband further failed to prove cruelty and prays that the impugned judgment and decree dated 26th February, 2014 be set aside.

20. On the other hand, the learned counsel for the respondent-husband has submitted that the appellant-wife after 22nd December, 2009 did not cohabit with the respondent-husband at the matrimonial home or any other place of residence; that the same is admitted by the appellant-wife and the appellant-wife has broken the marriage entitling the respondent-husband to divorce on the ground of cruelty and desertion.

The learned counsel on behalf of the respondent-husband has further submitted that the learned Family Court has rightly passed the divorce decree in his favour after appreciating the material evidence on record and submits that the present appeals are devoid of merit and are liable to be dismissed.

has deserted the petitioner for a continuous period of **not less than two years immediately preceding the presentation of the petition;**”
(Emphasis by us)

After the amendment, the ground for desertion for consideration under Section 13(1)(ib) of the Hindu Marriage Act is that one of the spouse who has been deserted by the other for a continuous period of two years immediately preceding the presentation of the divorce petition is entitled to a decree of divorce.

In general parlance, as per ***Oxford English Dictionary***, the word “desertion” means “*The action of deserting, forsaking*”.

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other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of live involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases."

23. The prescription of the continuous period of desertion for not less than two years signifies the intention of desertion and conduct of the party, burdening the onus of strict proof on the petitioner who claims that the other party has deserted him/her.

24. In the instant case, in para 3 of the divorce petition, the respondent-husband has stated that the marriage between the parties was solemnized on 22nd February, 2008 at the Gurudwara Shri Guru Singh Sabha, E-74, Chanakya Place, C-1, Delhi-110064, according to Sikh Rites and Customs. The respondent-husband filed the divorce petition on 9th June, 2011 on the ground of desertion and cruelty against the appellant-wife.

25. The respondent-husband has stated in his affidavit of evidence, i.e., Ex PW1/A, that from the wedlock one son namely, Dilpreet Singh was born on 14th November, 2008.

26. In his cross-examination, the respondent-husband unequivocally admitted that during one and a half year, the marriage was going on smoothly and there was no dispute between him and the appellant-wife and the same is reproduced as under:-

"It is correct that during the course of one and a half year, the marriage was going smoothly and no any dispute was there between me and the respondent."

(Underlining Supplied)

The period of one and half year from 22nd February, 2008, when the parties got married, comes to an end on 22nd August, 2009. Therefore, admittedly all was well till this date.

27. The respondent-husband further tendered his examination in chief of an affidavit wherein he stated that his parents participated in the *barsi* ceremony of his father-in-law at Punjab and he further volunteered that the appellant-wife came back from Punjab to Delhi.

What is material is the date of return of the appellant-wife from Punjab to Delhi which was 29th December, 2009. This is because the respondent-husband further admitted in his cross-examination that only since then they are residing separately which is reproduced as under :

“It is correct that since then we are residing separately.”

(Underlining Supplied)

28. What is emerging from the aforesaid facts and evidence on the record is that the marriage between the appellant-wife and the respondent-husband continued to be normal till 29th December, 2009 without any problems. There is no evidence at all to suggest that the appellant wife nursed any intention to bring their marriage to an end. The respondent-husband has clearly failed to prove that the appellant-wife deserted him till 29th December, 2009.

29. Even the respondent-husband puts the allegation of desertion *qua* against the appellant-wife only after 29th December, 2009 as

per the para 11 of the petition itself and the aforesaid admission made by the respondent-husband, i.e., PW1 in his cross-examination.

30. The determination of two years period for desertion is therefore to be counted from 29th December, 2009 as it is the case of the respondent-husband that the appellant-wife deserted him on 29th December, 2009. What is required to be shown under Section 13(1)(ib) of the Hindu Marriage Act, 1955 is that either the husband or the wife has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the divorce petition.

31. The divorce petition was filed on 9th June, 2011, that is about 17 months thereafter. The statutory period of separation was not over when the petition was filed.

32. The intention and the conduct of the deserting spouse against each other for the relevant period of two years has to be seen through a test laid down by the Constitution Bench of the Supreme Court in the decision reported at **AIR 1964 SC 40, Lachman Utamchand Kripalani vs. Meena alias Mota** wherein the following parameters were laid down namely, (1) the factum of separation; (2) *animus deserendi*; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home for the purpose of proving desertion under the Hindu Marriage Act, 1955.

33. Let us also examine the aspect of *animus deserendi* to desert on the part of the wife. In para 10 of the divorce petition, the respondent-husband stated as follows :

“10. That the respondent firstly left for her parental home at Distt. Sangrur in the month of March, 2008 just after 15 days of the marriage and she almost remained there for 30 days. After great persuasions, the respondent was brought back to her matrimonial home but she again left the matrimonial house after 10 days and lived at her Bari Massi Home at Palam Colony, Delhi for 15 days and this process of her leaving the house without intimation or intimating on reaching the place of destination continued till 22.12.2009 when she permanently left her matrimonial house on the pretext she is going to her mother’s house at Distt. Sangrur (Punjab) in connection with the Barsi of her father and had not returned to her matrimonial house till today and as such she has rejected the petitioner without any reason.”

34. Thus it is the respondent-husband’s case that the appellant-wife firstly left for her parental home at Distt. Sangrur in the month of March, 2008 just after 15 days of the marriage and she remained there for 30 days. The appellant-wife again left the matrimonial home within 10 days and lived at her aunt’s home at Palam Colony, Delhi for a period of 15 days and this process kept on till 22nd December, 2009 when she left the matrimonial home for her father’s *barsi*.

35. In her written statement, the appellant-wife has denied the aforesaid allegations to be false and stated that her father died on 8th September, 2009 and that she asked the respondent-husband and

his family members to attend the cremation but the respondent-husband and his family members never went there and the appellant-wife had to go with her brother.

36. The appellant-wife came back to Delhi on 28th December, 2009 and called the respondent-husband to take her to the matrimonial home. The appellant-wife alleged in her written statement that the respondent-husband misbehaved with her and said that if she is not bringing Rs.2 lakhs for purchasing a car, he will not allow her to enter the matrimonial home. However, she herself reached the matrimonial home where her minor son was forcefully snatched from her and she was thrown out of the matrimonial home and no cause of action arisen in favour of the respondent-husband.

37. Contrary to his pleadings, during cross-examination, the respondent-husband has admitted that the marriage of the parties was organized by the parents of the appellant-wife and all the expenses were borne by the appellant-wife's parents which is reproduced as under:-

“It is correct that the marriage ceremony was organized by the parents of the respondent and all the expenses was borne out by the parents of the respondent.”

38. We also find that contrary to the allegation that the respondent-husband had brought away the child on account of his sickness, the appellant-wife's contention that the custody of minor child was forcefully taken away from her by the respondent-

husband is supported by the respondent-husband's evidence. The factum of taking away of the minor son forcefully was again admitted by him in the suggestion put by the respondent-husband to the appellant-wife to which she replied as follows :

“It is correct that petitioner and his mother
forcefully taken away my infant son with them.”
(Underlining Supplied)

It was thus the case of the respondent-husband that he had taken away the son of parties forcibly from the appellant-wife!

39. The appellant-wife's aunt RW-3 Smt. Bayant Kaur has also stated that the respondent-husband had visited her house in the evening of 30th December, 2009 and had taken away the minor son of the parties.

40. The respondent-husband also does not suggest that he made any effort to take the appellant-wife to the matrimonial home. There is no evidence of attempts of the respondent-husband to resume cohabitation with his wife. On the contrary, he used force to remove his son from her.

41. The evidence on record further establishes that on the contrary, the respondent-husband resisted the efforts of the appellant-wife to resume cohabitation. The appellant-wife has established that in the morning of 28th December, 2009, she telephoned the respondent-husband and told him that she was coming back to her matrimonial home but the respondent- husband and her mother-in-law told her that if she was not carrying Rs.2

lakhs, she will not be allowed. Her aunt as well as her mother deposed as RWs and supported this statement.

42. It is the case of the respondent-husband himself that he did not go for the *barsi* of his father in law and that the appellant-wife had to go to Punjab for it with her aunt and relatives. Clearly, the appellant-wife has established the reason for going and also the fact that she had not gone with any intention of permanently leaving or deserting the matrimonial home. More importantly, the temporary departure of the appellant-wife to attend her father's *barsi* was with the consent of her husband and in-laws. On the contrary, the respondent-husband compelled her to stay away. The appellant-wife was not permitted to return to the matrimonial home by the respondent-husband. Even the custody of her son was restored back to appellant-wife with the intervention of the Police Station, Bindapur on 05.01.2010.

43. The appellant-wife went to participate in her father's *barsi* ceremony with the consent of the respondent-husband and thereafter it is an admitted fact that the appellant-wife came back to Delhi on 29th December, 2009 and she was not permitted to join the matrimonial home and thereafter her aunt, i.e., Smt. Bayant Kaur, took the reconciliation step to send the appellant-wife to join the matrimonial home. The admission and suggestion put to the RW1, i.e., appellant-wife, does not show the animus deserendi on her part, rather the step taken for reconciliation by making telephonic call *ipso facto* dispels the false allegation leveled against the appellant-wife by the respondent-husband.

44. The respondent-husband was under the legal obligation to prove that the appellant-wife deserted him intentionally permanently for a continuous period of two years. Instant is a case where the divorce petition has been filed before completion of required relevant two years period of desertion on the false ground. The respondent-husband's own admission and suggestion during the cross-examination of the RW1, i.e., appellant-wife, as discussed above demolishes the whole stratagem of the respondent-husband to get rid from performing legal obligation of maintenance and other social formalities.

45. Clearly the respondent-husband has failed to establish any intention or *animus deserendi* on the part of the appellant-wife to abandon permanently her matrimonial home.

46. The desertion as alleged by the respondent-husband therefore, not only does not fulfill the required period of two years but also fails to prove four essential conditions, i.e., (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct for the purpose of proving desertion under the Hindu Marriage Act, resulting in non entitlement of the divorce decree in favour of the respondent-husband on the ground of desertion.

47. It is now necessary to examine the second ground on which divorce is sought. The respondent-husband had urged that after solemnization of the marriage, the appellant-wife has treated him with cruelty within the meaning of the expression entitling him to a decree of divorce. Cruelty on the part of a spouse, has been

provided as a ground for divorce in sub-section (ia) of sub-section (1) of Section 13 of the Hindu Marriage Act, 1955 which reads as follows :

“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—

xxx

xxx

xxx

[(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty;

xxx

xxx

xxx”

48. The expression “*cruelty*” however, has not been defined by the Hindu Marriage Act, 1955. The concept of cruelty differs from person to person depending upon his/her upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

49. The onus to prove the aforesaid allegation of the desertion and cruelty lay strictly on the respondent-husband.

50. It is the plea of the appellant-wife that she was not permitted by the respondent-husband to enter into the matrimonial home as she could not fulfill the dowry demand of Rs.2 lakhs and one car.

The allegation of the appellant-wife is strengthened by the suggestion put to RW1, i.e., appellant-wife, during her cross-examination by the respondent-husband which reads thus:

“It is correct that my mother in law demanded Rs. 02 lakh and one car.”

(Underlining by us)

51. The plea of appellant-wife that she was thrown out from the matrimonial home is further strengthened by the following suggestion put to the appellant-wife, during her cross-examination by the respondent-husband that she was man-handled by her mother-in-law :

“It is correct that I was manhandled by my mother in law but I cannot reported the matter to the police.”

(Underlining Supplied)

52. The plea of the appellant-wife that her parents spent ₹60,000/- on *Choochak* ceremony is supported by the following suggestion put to the appellant-wife, during cross-examination by the respondent-husband :

“It is correct that my mother spent about Rs. 60000/- on the birth of my child on Chhochak Ceremony.”

53. The appellant-wife has referred to several efforts on her part and through her aunt at Delhi to join her husband and in-laws which were thwarted and rejected by them. The respondent-husband has admitted this position by way of the following suggestion to the appellant-wife during her cross-examination by the respondent-husband.

“It is correct that on my massi’s request family members of the petitioner and also the petitioner visited my Massi’s house in the evening at 7.00 PM.”

54. The forcible removal of the minor child from his mother – the appellant-wife by the respondent-husband is also established by the evidence of the respondent’s witnesses as well as the following suggestion put to the appellant-wife during her cross-examination by the respondent-husband.

“It is correct that petitioner and his mother forcefully taken away my infant son with them.”

This had necessitated the intervention of the police.

55. Further, apart from the own admission of the respondent-husband, the appellant-wife in her cross-examination had also clearly stated that since the date of their marriage on 21st February, 2008 till 24th December, 2009, relations between the parties remained cordial. The same is reproduced hereunder :

“Since my marriage on 21.02.2008 to my leaving my matrimonial home on 24.12.2009, relationships with my husband were cordial and there was no major dispute between us.”

(Underlining Supplied)

56. The unchallenged testimony of the appellant-wife stands corroborated by the evidence of her mother RW-2 Smt. Kalwant Kaur and her aunt RW-3 Smt. Bayant Kaur.

57. We have noted above the respondent-husband’s admission during his cross-examination that during the course of one and a half year after their marriage, prior to the appellant-wife leaving for her father’s *barsi* on 22nd December, 2009, their marriage was going smoothly and there was no dispute between the respondent-

husband and the appellant-wife. It is therefore, an established fact on the record that the appellant-wife after leaving for Punjab on 22nd December, 2009 the appellant-wife was not permitted by the respondent-husband to live jointly with him at any point of time to attract cruelty by her against the respondent-husband. This shows that till 29th December, 2009, i.e. when the appellant-wife returned from Punjab, the respondent-husband has no grievance with the conduct of the wife. The allegation that the appellant-wife spurned sexual relations after the birth of their son on 14th November, 2008 is clearly unsubstantiated and false.

58. There is thus no material evidence on record to support the allegations of cruelty. Further more vague, general and unsubstantiated allegations are of no consequence and effect. In any case, there is no room to appreciate the evidence in a different way by us other than respondent-husband's own admissions.

59. It is crystal clear from the above that the appellant-wife has neither committed cruelty nor deserted the respondent-husband. Rather it is the respondent-husband who has taken false pleas which he has not been able to establish.

60. On the contrary, as our discussion in Mat.App.(FC) No. 72/2014 would show the respondent-husband has cruelly and unfairly deprived his wife and son from bare sustenance in an effort to financially strangle them.

61. Consequently, for the reasons aforesaid, we find merit in the present appeal and set aside the divorce decree dated 26th

February, 2014 in HMA No.516/2011 passed by the Family Court, Dwarka, New Delhi.

62. Mat.App.(F.C.) 52/2014 is allowed in the above terms.

Mat.App. (F.C.) 72/2014

63. The appellant-wife had filed a petition under Section 125 CrPC seeking maintenance for her son and herself on the ground that she was unemployed and completely without resources.

64. The appellant-wife had deposed that she had the qualification of M.A., B.Ed., but she was completely unemployed and had no source of income. The appellant had prayed for maintenance in the sum of ₹15,000/- for herself and for ₹10,000/- for the son of the parties.

65. We find that so far as the income of the respondent-husband was concerned, the appellant-wife had set up a plea that the respondent-husband was running a gym in the half portion of the ground floor of his house wherefrom he was earning about ₹50,000/- per month. The respondent-husband disputed this and claimed he was earning salary of ₹5,000/- per month as an employee in his chacha's gym.

66. By the impugned order dated 16th February, 2014, the family court judge has returned a finding that the appellant-wife had never worked and was not employed. It is noted in para 21 of the impugned order that the appellant-wife had no independent source of income. The family court also rejected the defence of the

respondent-husband that the appellant-wife was teaching and taking tuitions or having any earning at all.

67. The family court has in the impugned order rejected the respondent-husband's pleas and assessed the salary of the respondent-husband at ₹10,000/- based on his claim that he was earning ₹5,000/- in the year 2012. Based there on, a direction was made to the respondent-husband to pay a sum of ₹2000/- per month to the child of the parties from the date of institution of the petition till the date of the order and ₹3,500/- per month from the date of the order till he attains majority.

68. Maintenance was denied to the appellant-wife for the reason that she had withdrawn from the company of the respondent-husband without any reasonable cause.

69. This judgment and findings have not been assailed by the respondent-husband and so far as he is concerned, has attained finality.

70. We have above disagreed with the finding of desertion by the appellant-wife and concluded to the contrary. It is therefore necessary to examine the judgment dated 26th February, 2014 passed by the family court on the appellant-wife's application for maintenance.

71. We may note that in the affidavit dated 14th January, 2016, apart from tuitions, the respondent-husband has urged a bald, unsubstantiated plea that the appellant-wife is working in a private firm without any particulars. The appellant-wife has staunchly denied such assertions. We find that so far as the income and

resources of the appellant-wife are concerned, they remain the same. But it needs no elaboration that the respondent-husband would have grown with passage of time and steep inflation in terms of daily necessity as bare food even.

72. The respondent-husband has filed an affidavit of assets, income and expenditure dated 14th January, 2016 filed before us. In this affidavit, the respondent-husband has claimed to be a trainer at a gym at a monthly salary of ₹8,000/-. This gym is being run in the same premises as before. No details or particulars of the business are mentioned. No documents are enclosed.

73. In the affidavit dated 14th January, 2016, the respondent-husband has shown his address as E-7A, Gali No. 20 & 22, Chanakya Place, New Delhi-110059 wherefrom he is running the gym itself.

74. The respondent-husband has submitted that he does not have any liability and has claimed the sole expenditure as pocket money of Rs.600/- per month.

75. In his cross examination, the respondent-husband had admitted that a gym was being run from a portion of his house. He however claimed that the house was owned by his father who has sold his share in the house to his younger brother (chacha) in the year 1990. The respondent-husband had claimed that it was this uncle who was owning a gym in which he was working as a coach at a monthly salary of ₹8,000/- per month.

76. It is trite that irrespective of the onus or the burden of proof, a person in possession of the best evidence has to place it on record.

77. In this regard, we may advert to the pronouncement of the Privy Council reported at *AIR 1917 PC 6 T.S. Murugesam Pillai v. Manickavasaka Pandara* which reads as follows:

“A practice has grown up in Indian procedure of those in possession of important documents or information lying by, trusting to the abstract doctrine of the onus of proof and failing accordingly to furnish to the Courts the best material for its decision. With regard to third parties, this may be right enough: they have no responsibility for the conduct of suit; but with regard to the parties to the suit it is, in their Lordships' opinion, an inversion of sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the written evidence in their possession which would throw light upon the proposition.”

78. This principle was reiterated by the Supreme Court in a pronouncement reported at *AIR 1968 SC 1413 Gopal Krishna Ketkar v. Mohamed Haji Latif*, wherein it was held thus:

“Even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. It is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof.”

79. In a pronouncement reported at *(1988) 1 SCC 626 National Insurance Co. Ltd., New Delhi v. Jugal Kishore & Ors* it was observed by the Supreme Court that it had consistently emphasised

that it was the duty of the party which was in possession of a document which would be helpful in doing justice, to produce that document and that such party should not be permitted to take shelter behind the doctrine of burden of proof.

80. All documents relating to the ownership of the property as well as running of the gym (statutory permissions; registrations, bank accounts) would be available to the respondent-husband either from his father or from his uncle, if they were owning the property or running the gym. He has chosen not to place any such record in support of his plea on record either before the family court or on the record of this case.

81. However, not a single document (other than a self-serving and procured salary certificate from his uncle) has been filed, either before the family court or before us to support his pleas.

82. There is no document to support the pleas set up. We are, therefore, unable to accept the contention of the respondent-husband that his father has sold the property and that he has no right, title or interest in the property where he is residing and also running the gym.

83. It is not possible to accept the respondent-husband's plea that he was earning ₹5,000/- earlier (as claimed before the family court) or ₹8,000/- as claimed here for another reason. The respondent-husband has placed before us an interim order dated 31st October, 2012 passed in CC No. 129/12, being a complaint under Section 12 of the Protection of Women from Domestic Violence Act, 2005 by the appellant. In this complaint, an order

dated 31st October, 2012 was passed whereby the MM-I, Mahila Court, Dwarka District Courts had assessed respondent's income at Rs.8,500/- per month and he was directed to pay monthly maintenance in the sum of ₹2,000/- per month towards the maintenance of the appellant and ₹1500/- per month towards the maintenance of the child of the parties.

84. By the impugned order dated 26th February, 2014, the respondent-husband's income has been assessed at ₹10,000/- which finding he has accepted.

85. After the filing of this present appeal on 16th December, 2015, this court had recorded the following submission on behalf of the respondent-husband:-

“Respondent, who is present in Court, volunteers that he would pay maintenance of ₹5,000/- from December, 2015, onwards to the respondent and also clear the arrears of maintenance at the rate of ₹1500/- per month, i.e. total ₹6500/-. The statement is accepted without prejudice to the rights and contentions of both parties.

List on 18.2.2016.

Interim orders to continue till further orders.”

(Emphasis by us)

86. On 18th February, 2016, we had directed as follows :-

“The maintenance in terms of the order dated 16th December, 2015 shall be paid to the appellant by RTGS transfer into Saving Bank Account No. 4172000100270660 maintained in Punjab National Bank, Vikas Puri Branch, New Delhi on or before the 7th day of each English calendar month.”

We have been informed that the respondent-husband has been paying this amount to the appellant-wife per month. No difficulty has been expressed at any time during the pendency of the appeal with regard to making payment of this amount. Despite these facts, he has claimed that he is earning only ₹8,000/- as on date.

87. The respondent-husband is guilty of concealment of material facts and documents. He has attempted to mislead the court, merely to deprive his wife and child of maintenance. We are at this stage refraining from taking punitive action which this conduct invites only in the expectation that the respondent-husband may mend his ways in this family dispute.

88. There is no document at all on record to show that the gym is being run by his uncle. This is clearly false and incorrect.

89. No gym trainer would be engaged full time at a monthly salary of ₹8,000/- only. That is less than the amount being drawn by domestic workers. It is also less than monthly wage payable to a worker as per the Minimum Wages Act.

90. We, therefore, hold that the respondent-husband has interest and right, if not title, in the immoveable property where he is residing; that he is directly involved in the running of a gym and his income cannot be less than ₹20,000/- per month.

91. It is trite that maintenance is not bare sustenance but has to be sufficient to enable the parties to meet their essential needs. Maintenance of a wife, who has been thrown out of the home,

would include a reasonable amount of rent; expenses on food, medication, social obligations, transportation, toiletries etc.

92. The respondent-husband has admitted that the appellant-wife and his son are residing with “*her massi and mausa in their home*”. We have held that the respondent-husband is responsible for the separation and no fault can be attributed to the appellant-wife for the same. It is his legal, moral and social duty and responsibility to ensure accommodation and residence for his spouse and child in his own house. If he is unwilling to permit them to join, he is bound to ensure adequate maintenance to them so that they can pay rent and live a life of dignity on their own. It is not the responsibility of the appellant-wife’s “masi and mausa” to provide shelter, maintenance and support to the wife and son of the respondent-husband.

93. The respondent-husband has completely ignored and neglected his son who was born on 14th November, 2008. The child would now be aged about eight years and would be school going, probably a student of Class II or III. The maintenance of the child would have to include all expenses for his education which would include his school fees, transportation charges, school uniform, school books, pocket money, expenses of extracurricular activities, school outings.

94. It is also to be kept in mind that these expenses would not be static and would grow as the child reaches higher classes. The factor of inflation has also to be kept in mind. The respondent has

to bear all these expenses and the appellant would be entitled to seek the consequential enhancement of these expenses.

Result

95. It is also necessary for us to make a reasonable order towards the litigation expenses of the appellant-wife. In Column 25 of the affidavit dated 14th January, 2016, the respondent-husband had disclosed that he is incurring expenses of ₹1,000/- per hearing on the costs of the present litigation. The appellant-wife, therefore, would have also spent not less than ₹25,000/- in these two appeals. The appellant is entitled to be similarly treated.

96. In view thereof, we direct as follows :-

(I) The appellant-wife is held entitled to maintenance which is quantified as follows :

- | | | |
|-------|---|---------------------------|
| (i) | <i>With effect from the date of institution of the petition till 26th February, 2014 till the passing of this judgment</i> | <i>₹3,000/- per month</i> |
| (ii) | <i>Maintenance with effect from the date of passing of the present judgment</i> | <i>₹7,500/- per month</i> |
| (iii) | <i>Towards rental</i> | <i>₹2,500/- per month</i> |

(II) In addition, so far as the maintenance for the child is concerned, the appellant-wife shall be additionally entitled to the following :

- (i) *With effect from the date of institution of the petition till 26th February, 2014* ₹2,000/- per month
- (ii) *Maintenance with effect from 26th February, 2014 (date of the family court order) till the passing of the present judgment.* ₹3,500/- per month
- (iii) *Maintenance with effect from the date of passing of the present judgment* ₹5,000/- per month

(III) The appellant-wife is held entitled to litigation expenses which are quantified at a total of ₹25,000/- for both appeals. The amount shall be paid in ten equal installments to her alongwith the monthly maintenance commencing from the next month.

(IV) The respondent-husband shall continue to pay the above amounts to the appellant-wife by RTGS transfer in the Saving Bank Account No. 4172000100270660 maintained by her in the Punjab National Bank, Vikas Puri Branch, New Delhi on or before the 7th day of each English calendar month.

(V) The respondent-husband is entitled to adjust the amounts already paid against the amounts due and payable by virtue of our judgment.

(VI) Arrears of the maintenance shall be paid in twenty five monthly equated instalments commencing from October, 2016 by the same mode as at serial no.IV above.

(VII) As a result of the above, the judgment dated 26th February, 2014 in Maintenance Petition (M) No. 132/2012 is modified in the above terms.

97. Mat.App.(F.C.) 52/2014 & Mat.App. (F.C.) 72/2014 are allowed in the above terms.

98. Copy of this judgment be placed on the file of Mat.App.(F.C.)No.72/2014.

99. Let the LCR be sent back with a copy of this Judgment.

100. In the circumstances of the case, there shall be no order as to costs.

I.S.MEHTA, J

GITA MITTAL, J

AUGUST 24, 2016

'dc'