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

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Date of Decision: 09th April, 2018

+ **FAO 351/2013 & C.M. Appl. Nos.25186/2016**

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..... Appellant

Through: Mr. Prashanto Chandra Sen, Sr. Adv.
with Mr. Shivanshu Singh and Mr.
Sanjay Kothiyal, Advs.

versus

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..... Respondent

Through: Mr. Sudhir Nandrajog, Sr. Adv. with
Mr. Muhammad Ali Khan, Mr.
Gaurav Gupta, Mr. Jaspal Singh, Mr.
Omar Hoda, Ms. Namrah Nasir and
Ms. Karishma Thakur, Advs.

CORAM:

HON'BLE MR. JUSTICE J.R. MIDHA

J U D G M E N T

1. The appellant has challenged the judgment dated 30th July, 2013 whereby the learned Trial Court dissolved the marriage between the parties by a decree of divorce on the ground of desertion under Section 13(1)(ib) of the Hindu Marriage Act, 1955.
2. The respondent instituted a petition for dissolution of marriage on the ground of desertion on various averments *inter alia* that the parties were married according to Hindu rites and ceremonies on 10th June, 1987, they were blessed with a daughter, named Vardha on 24th July, 1989; the appellant left the matrimonial home and deserted the respondent on 11th November, 1994 without any just and reasonable cause and without the respondent's consent; the appellant took all her clothes and jewellery at the

time of leaving the matrimonial home; the appellant did not return to live with the respondent; the respondent tried to persuade the appellant to return back and even telephoned her daily for several months but all the efforts of the respondent went in vain; the family of respondent also made attempts to persuade the appellant to come back which were also unsuccessful; the appellant did not provide any reasonable explanation for her desertion; the parents of the respondent repeatedly talked to the appellant to persuade her to return; the respondent's father also visited the appellant's parental house several times almost once a month during 1995-96 but the appellant did not respond positively; the appellant has been living in her parental home continuously without a break from 11th November, 1994 till the filing of the petition; the minor daughter, Vardha spent major festivals like Holi, Diwali, winter and summer holidays with the respondent and his parents; the respondent has been deprived of legitimate company of his wife since 11th November, 1994; the appellant's conduct has caused total loss of happiness to the respondent; the appellant is living separately without any reasonable excuse or just cause and she has never disclosed any reason for leaving or withdrawing from the society of the respondent.

3. The appellant filed the written statement to the petition in which she denied all the averments made by the respondent. The appellant denied having deserted the respondent on 11th November, 1994. The appellant claimed to have over heard a sexually intimate telephonic conversation between the respondent and Bharti on a parallel telephonic line whereupon she inquired from the respondent who then made excuses and apologised and told the appellant that he was going on an official trip for a week, the appellant should stay with her parents till he comes back and he would take the appellant for a world tour when he returns. The respondent himself

dropped the appellant and the daughter with one hand bag having 3-4 pair of clothes and nightwear at the appellant's parental house; the respondent did not bother to call for the whole week; the appellant called the respondent after a week when the respondent started talking in a taunting tone and started fighting on phone without any provocation and said that he was busy for some days and would pick the appellant after 2-3 days but that day never came; the respondent forced the appellant to continue staying with her parents; whenever the appellant wanted to come back and live with the respondent, the respondent used to make excuses; in December, 1994, the appellant returned back to the matrimonial house but was told by the respondent's parents to leave the house whereupon the appellant left the house after about 4 hours; on 01st February, 1995, the appellant found the respondent standing intimately close to Bharti with her hand touching waist of the respondent whereupon she asked Bharti whether she was having an affair with the respondent who replied by saying "*if so than what*"; the appellant further asked Bharti whether she was having physical relations with her husband to which she replied "*may be or may not be*"; the appellant contented that the respondent was having extramarital affair with Bharti who was a married lady staying separately from her husband; the appellant informed Ajay Bisaria, husband of Bharti about the involvement of his wife and the respondent; the respondent used to go out with Bharti and number of relations/friends saw them sitting together in an intimate position; one of the relations saw the respondent kissing Bharti in a moving car and the respondent was caught red-handed number of times; the news of love affair of respondent with Bharti even spread to the school of the minor daughter of the parties; the teacher of the daughter of the parties asked the appellant as to whether her husband was having an affair with the wife of a IFS Officer;

in May 1995, the appellant saw the respondent sitting in a Chinese Restaurant in Khan Market with Bharti; the appellant visited the matrimonial house in 1996 and found Bharti lying in bed; the respondent rented a flat at Jungpura Extension to continue his illicit affair; in 1996-97, the respondent's affair with Bharti became more vigorous; the respondent was a very lustful person and could go to any extent to satisfy his lust; the respondent continued having sexual relations, in a secret way, with the appellant even after deserting the respondent in the year 1994; the respondent used to call the appellant after midnight to his house so that his parents did not come to know about it and thereafter used to have sex with the appellant and used to ask the appellant to leave the house early in the morning before everybody at home would wake up; the appellant used to go and meet the respondent and his parents in the day hours at the matrimonial home since 1994 and the appellant regularly attended all functions like *Karwa Chauth*, *Diwali*, *Holi* and other functions, thrice in 1995, five times in 1996 and four times in 1997; the appellant went to the matrimonial home with the minor daughter with the intention to stay there but the respondent's parents requested her to go back otherwise he would come and suicide and, therefore, the appellant returned back.

4. The following issues were framed by the Trial Court:

“1. Whether the respondent has deserted the petitioner for no rhyme or reason for the last two years prior to filing of this petition? OPP.

2. Relief.”

5. The respondent examined three witnesses to prove his case. The respondent appeared in the witness box as PW-1 and reiterated the averments made in the petition. PW-1 was cross-examined at length by

counsel for the appellant. The respondent examined his neighbour, Radhika Khanna as PW-2 and his friend, Chetan Sharma as PW-3. PW-2 Radhika Khanna is a resident of 108, Golf Links, New Delhi which is in the vicinity of 111, Golf Links, New Delhi i.e. parental house of the respondent. PW-2 deposed that in November 1994, the appellant came out shouting from the house with her two suitcases, each in one hand and put them in her car and again went inside shouting and came out holding the wrist of her daughter and shouted “*chal bete nani ke ghar*” and her gesture at the time was very violent. PW-2 deposed that she saw appellant kicking the flower pot. She further deposed that there was no male member in the house at that time except one servant. She further deposed that she did not see the appellant after leaving the house in 1994. PW-3, Chetan Sharma is a family friend of the respondent and he deposed with respect to the conduct of the appellant. He deposed that the appellant did not turn up to his dinner invitation despite confirming it. With respect to the respondent’s case on desertion, PW-3 deposed that the appellant left the respondent’s house and started living with her parents in Safdarjung Development Area. He further deposed he tried to persuade the appellant who was adamant and told him that the respondent and his family were backward and uncultured people. PW-3 was not cross-examined despite opportunities given.

6. The respondent closed his evidence on 22nd November, 2005 and the case was listed for the appellant’s evidence on 29th December, 2005. Numbers of opportunities were granted to the appellant but no evidence was led by her. The learned Family Court closed the appellant’s evidence on 23rd March, 2007 and the defence of the appellant was struck off. The appellant challenged the order of closure of evidence before this Court in CM(M) 1146/2007 which was dismissed with cost of Rs.50,000/- on 16th October,

2008. The appellant's challenge to this order before the Supreme Court in SLP (C) 20026/2010 was also dismissed on 25th August, 2010.

7. The learned Trial Court allowed the petition for divorce. The conclusion of the findings of the Ld. Trial Court are as under:-

“ISSUE NO.1

The present petition has been filed on 03.11.1998 whereas as per the petitioner, respondent has left his company on 11.11.1994. So the petitioner has been residing separately for more than two years prior to filing of the present divorce petition.

Petitioner during his examination has fully supported his case and the respondent has failed to rebut the contents of the petition as respondent has failed to lead any evidence in the present case. Respondent has failed to prove her additional pleas taken in the written statement. Petitioner in his evidence has specifically stated that on 11.11.1994 he returned from his work around 05.00 PM and he found that respondent had packed her bag and baggage. She had packed 6-8 bags/boxes. She took her bags and belongings in her car and his father's car and said that she would return only when she feel like. The respondent had taken away all her belongings and all her jewellery. This suggests that the respondent has left her matrimonial home of her own. Petitioner has further deposed that they made lot of attempts and he called on the respondent regularly but she did not come back. My cousins and my father made efforts for a period of four years but to no avail and when she did not join her matrimonial home petitioner decided to file the petition.

This version clearly suggests that the respondent left the company of the petitioner of her own and several attempts were made by the petitioner and his father and cousins for a period of four years to bring her back but to no effect. He has further deposed that he feels that the he has been deserted without any just cause and without his consent. Petitioner was cross examined at length but nothing incriminating came on record against the petitioner. Though the respondent has alleged to have cohabitation with the petitioner when Ms. Bharti Chaturvedi ditched the petitioner but she has failed to prove the same as she failed to lead any evidence.

The expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wishes of such

party and includes the wilful neglect of the petitioner by the other party to the marriage.

Petitioner has succeeded in establishing all the ingredients of desertion. Respondent had left the matrimonial house with a clear intention to abandon it. Accordingly, it can be safely concluded that respondent has left the company of the petitioner with permanent intention not to return to her matrimonial home. There is nothing on record to suggest that petitioner has compelled or gave consent to the respondent to leave the matrimonial home with permanent intention not to return back, as such, the respondent has deserted the petitioner without any reasonable cause or without consent of the petitioner. Issue no.1 is accordingly decided in favour of the petitioner and against the respondent.

RELIEF.

Petitioner has succeeded in establishing that the respondent has left his company with the intention not to return back. Respondent has withdrawn from the company of the petitioner without any cause or without consent or without any sufficient reason. In view of the discussion on issue no.1 I am of the considered opinion that the petitioner is entitled to decree for divorce u/s 13-1(ib) of Hindu Marriage Act, 1955 on the ground of desertion.

Accordingly, the marriage between the petitioner and the respondent is dissolved by way of decree of divorce u/s 13-1(ib) of Hindu Marriage Act, 1955 on the ground of desertion.”

(Emphasis supplied)

8. Mr. Prashanto Chandra Sen, learned senior counsel for the appellant urged the following submissions at the time of hearing-

- (i) The appellant never deserted the respondent; the respondent dropped the appellant at her parental house on 11th November, 1994 and told her that he will take her after coming back from one week tour but did not do so; the appellant went back to the matrimonial home along with her daughter in December, 1994 but the respondent's parents told her to go back otherwise respondent would commit suicide; the appellant used to go to the matrimonial home during the day hours and she spent all major festivals including *Diwali* and *Holi* at the

matrimonial home; the respondent was having regular sex with the appellant; the desertion has not been proved by the respondent inasmuch as the respondent has not been able to prove his absence of consent to the separation.

- (ii) The respondent is guilty of deserting the appellant and his minor daughter.
- (iii) The respondent had refused to maintain the appellant and his minor daughter as a result of which the appellant and her minor daughter had to file petition under Section 125 Cr.P.C.
- (iv) The respondent was in arrears of maintenance at the time of passing the impugned judgment and, therefore, the learned Trial Court erred in passing the impugned judgment without clearance of the arrears of maintenance.
- (v) The Trial Court erred in not following the directions dated 25th August, 2010 of the Supreme Court in Special Leave Petition No.20026/2010 whereby all the objections raised by the appellant herein were required to be considered by Trial Court.
- (vi) The Trial Court failed to appreciate that the respondent had not complied with the order dated 11th August, 2000 either by informing the companies about the address of the appellant or by re-directing the dividends to the appellant nor have disclosed the particulars of the sources/details of the shares and debentures or deposits from where Rs.13,000/- per month was being accrued since 11th August, 2000 upto April, 2010 and Rs.15,08,000/- (Fifteen Lacs Eight Thousand Only) had become due upto April, 2010 which respondent has not paid to the appellant. The appellant was entitled to receive the actual dividends received along with the original certificates which are part

of maintenance of the appellant.

- (vii) The Trial Court erred in not considering the findings given by the Court of Metropolitan Magistrate in the order dated 07th June, 2010 in proceedings under Section 125 Cr.P.C.

9. Mr. Sudhir Nandrajog, learned senior counsel for the respondent urged the following submissions at the time of hearing -

- (i) The appellant deserted the respondent without his consent and without any reasonable or just cause. The respondent has duly proved the desertion and the testimony of none of the witnesses was shaken in the cross-examination. Reference is made to the testimony of the statements of PW-1, PW-2 and PW-3.
- (ii) The appellant has not led any evidence to rebut the evidence led by the respondent.
- (iii) The appellant has failed to raise any justifiable ground for setting aside the impugned judgment and has time and again attempted to raise the question of maintenance.
- (iv) The appellant dragged the divorce proceeding on the sole ground that adequate maintenance has not been granted to the appellant whereas the appellant filed a number of maintenance petitions under different statutes. These maintenance petitions have witnessed several rounds of litigation up to the Apex Court. However, the respondent duly complied with all the orders of the Courts and has been duly paying the maintenance to the appellant as per the directions of the Courts.
- (v) The respondent duly filed his Income affidavit before this Court on 30th January, 2016 upon the directions of this Court. The respondent has been paying the maintenance amount, as directed in the maintenance proceedings, to the appellant as well as his daughter. The

respondent duly fulfilled his duties towards his daughter and singlehandedly took care of all her expenses, including expenses of her medical education.

- (vi) The appellant has been pursuing a number of proceedings against the respondent for the past 19 years and has gone up to the Supreme Court to enhance her maintenance. The respondent has been paying the maintenance amount as directed by the Courts. Vide order dated 16th December, 2014, this Court directed the payment of maintenance of Rs.30,000/- per month which has been paid upto date by the respondent.
- (vii) The respondent had attempted to reach out to the appellant for an amicable settlement. However, despite more than generous offer given by the respondent, the appellant declined to settle with the aim to extort more money from the respondent.

Findings

10. On careful consideration of the rival contentions of the parties, this Court agrees with the learned Trial Court that the appellant deserted the respondent on 11th November, 1994 without any reasonable cause and without the consent of the respondent. The appellant cross-examined the respondent at length but nothing incriminating came on record against the respondent. The appellant has not led any evidence to rebut the evidence led by the respondent.

11. With respect to the appellant's contention that she had regular sex with the respondent after November, 1994, no evidence whatsoever has been led by the appellant and, therefore, the Ld. Trial Court rightly rejected the same.

12. With respect to the appellant's contention that the respondent did not

clear the arrears of maintenance at the time of passing of the impugned judgment, this Court vide order dated 16th February, 2018 directed both the parties to file the statement of maintenance on affidavit in pursuance to which the respondent filed the statement of the maintenance account on affidavit on 21st February, 2018 whereas no statement of the maintenance account on affidavit has been filed by the appellant. The appellant has also not filed any response to the statement of maintenance account of the respondent. In that view of the matter, it is held that the respondent has paid upto date maintenance to the appellant.

13. With respect to the appellant's contention that the Ld. Trial Court has not considered the findings of the Metropolitan Magistrate in the orders under Section 125 Cr.P.C. dated 07th June, 2010 and 23rd March, 2007, this Court is of the view that the desertion was not an issue in those proceedings and, therefore, any observation in those cases cannot be said to be *res judicata*. In that view of the matter, there is no infirmity in the approach of the Trial Court in basing the findings on the evidence recorded before it.

14. With respect to the appellant's objection that all the objections were not considered by the Trial Court, this Court is of the view that all the objections have been considered by the Trial Court in accordance with law.

15. There is no infirmity in the well-reasoned findings of the Ld. Trial Court and the decree of divorce on the ground of desertion is upheld.

16. There is no merit in this appeal, which is hereby dismissed. The appellant is at liberty to file an appropriate application before the Ld. Trial Court for permanent alimony under Section 25 of the Hindu Marriage Act, 1955. Upon such application being filed, the Trial Court shall expedite the hearing and endeavour to decide the same within one year. In order to ensure the sustenance of the appellant till then, the respondent is directed to

pay interim maintenance of Rs.1,00,000/- per month to the appellant for a period of 18 months from today subject to the final outcome of the proceedings under Section 25 of the Hindu Marriage Act. 1955.

17. Pending application is disposed of.

APRIL 09, 2018
rsk/dk/ak

J.R. MIDHA
(JUDGE)