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IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment delivered on: 05.03.2018

MAT APP. (F.C) 123/2015

A

..... Appellant

versus

B S

..... Respondent

Advocates who appeared in this case:

For the Appellant : Ms. Swati Rathi, Advocate for appellant along with appellant.

For the Respondent : Mr. Rajat Aneja, Ms. Chandrika Gupta and Ms. Vandna Aneja,
Advocates.

CORAM:

HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

HON'BLE MS. JUSTICE DEEPA SHARMA

J U D G M E N T

SIDDHARTH MRIDUL, J (ORAL)

1. The present matrimonial appeal assails an order dated 27.08.2012 in HMA No. 56/2010 titled as “*Sh. B S vs. Smt. A*”, whereby, the respondent husband’s petition seeking divorce *inter alia* on the ground of desertion was decreed in favour of the said respondent husband (hereinafter referred to as ‘husband’) by the learned Family Court, Rohini, New Delhi.

2. The solitary ground on which the appeal is predicated is that the husband, in order to take advantage of his own wrong, deserted the appellant

(hereinafter referred to as 'wife') and their minor child, namely, P and that the learned Family Court has erroneously come to a conclusion that the wife had deserted her husband.

3. The learned Family Court on the pleadings of the parties, struck the following issues.

- “1. Whether the respondent has deserted the petitioner for a continuous period of not less than two years immediately before presentation of this petition? OPP
2. Whether the petitioner is entitled for a decree of divorce on the ground as prayed for?
3. Relief.”

4. Before we proceed to determine the solitary contention made on behalf of the wife, it would be profitable to adumbrate a few relevant facts. The same are reproduced as under:-

a) It was averred by the husband that the parties were married according to the Hindu Rites and Ceremonies on 23.01.2000 at Village Turkpur, District Sonipat, Haryana and thereafter resided at the matrimonial residence at House No. 347, Village and P.O. Rani Khera, Delhi-110081.

- b) It was further averred on behalf of the husband that the wife would harass the former, essentially, with a view to compel him to reside separately from the family.
- c) The husband also averred that the parties were blessed with a female child on 27.10.2000 and soon thereafter, the wife left the matrimonial house along with the female child to reside with her parents at Village Turkpur, District Sonipat, Haryana.
- d) In this behalf, it was averred that the wife had told the husband at that time that he was not the father of the female child.
- e) It was asserted on behalf of the husband that even during the period that the wife resided with her parents at Village Turkpur, District Sonipat, Haryana, although she came to Delhi frequently to meet some persons, she refused to reside with him.
- f) The husband with the intervention of respectable persons of the society was eventually able to persuade the wife to return to Delhi, albeit on the condition imposed by the latter to arrange a separate accommodation.

g) The parties thereafter resided at a rented house at Village Nangloi from 30.04.2003 till 06.09.2004 when the wife left the society of the husband.

h) It is an admitted position that a petition seeking divorce by mutual consent was instituted by the parties under Section 13-B of the Hindu Marriage Act, 1955 on 25.09.2004, which was subsequently withdrawn on the insistence of the wife.

i) Although, the husband has alleged that the wife maintained illicit relations with some other persons and that a compact disk containing photographs of the latter in support of the said allegation are part of the collateral proceedings under Section 125 Cr.PC, we need not consider them in view of the circumstance that they may not be germane to the adjudication of the present appeal.

j) It is observed that in paragraph 8 of the petition for divorce instituted by the husband on the grounds of desertion, he has averred as follows:-

“8. That after passing the sometime respondent again started to create problem and pressurized the petitioner to arrange a separate accommodation. Due to undue pressure of the respondent, on 30.04.2003 the petitioner arranged a rented house at Village at Nangloi

and petitioner started to live with respondent and minor girl. So than after petitioner started a office related to security guard service at Uttam Nagar and remained outside all of day from his new house that is village Nangloi. So, in the absence of the petitioner, respondent developed illicit relation with some other persons and that time respondent was under the flash ponds. That very time in the absence of the petitioner, respondent always used to remain outside of the house and this very fact was disclosed by the nearest and dearest of the petitioner then petitioner tried to understand her not to do so but she straightaway refused and she told the petitioner there is no any truth so petitioner took her home named photographs when she was accompanied with some other persons and CD were also prepared about the adultery of the respondent with other persons. After that the respondent came to know about these facts. She pressurized to the petitioner for mutual divorce passing dire consequences upon the petitioner that if the petitioner will not ready for divorce she will commit suicide. It was the respondent who wanted to get rid of from the petitioner. So mutual divorce petitioner was filed on 25.09.2004 before filing the 13-B H.M.A on 06.09.2004 she left the society of the petitioner and then after she herself withdraw the mutual petition on 29.11.2004 U/s 13-B (1) H.M.A, 1955. Then on 20.12.2004 respondent moved a false application before the Women Cell, Pritam Pura against the petitioner and his family members. Alleging to make demand of dowry misappropriation of istridhan or demanding dowry where a false FIR was registered on 21.06.2005 against the petitioner and his family

members at P.S.-Kanjhawala, Delhi U/s 498/406/34 IPC, vide FIR No. 159/05, where on anticipatory bail was moved and it was admitted on 27.07.2005. The respondent roped the petitioner and his family members in false and fictitious demand case. Actually she had already, taken all her belonging article including istridhan before filing the mutual divorce petition 13-B (i) on 25.09.2004.”

k) In response thereto, the wife did not specifically refute or controvert the averments of fact made by the husband in his petition but limited herself to a general and unspecified denial in the following words:-

“8. That para No. 8 of the petition is wrong and specifically denied. The respondent has never demanded any separate accommodation and it was only because of the own mind set of the petitioner and according to business plannings of the petitioners. The facts of filing of petition for divorce by mutual consent and its withdrawal is a matter of record and regarding the dates of leaving the society of petitioner and lodging of FIR, much more has already been stated by the respondent in foregoing paras under reply.”

l) The husband in his affidavit by way of evidence before the learned Family Court, reiterated his assertion that the wife had deserted him permanently from 06.09.2004, which assertion has gone uncontroverted in his cross-examination. Further a perusal of the cross-examination of the

husband clearly and unequivocally reflects that it was put to him on behalf of the wife that the latter had left him permanently from 06.09.2004 and that for more than two years prior to the institution of the petition for divorce, the wife had not resided with him.

5. A perusal of the affidavit by way of evidence filed on behalf of the wife before the learned Family Court further reveals that the same is bereft of any specifics or details in relation to the date or time during which the parties did not reside together nor does the same mention any reasons as to why the wife started permanently living separately, from the husband.

6. In this view of the matter, the learned Family Court determined Issue No. 1 extracted hereinabove in the following words:-

“ISSUE NO. 1

15. Present petition has been filed by the petitioner only on one ground of desertion for seeking dissolution of marriage. It is the case of petitioner/husband that respondent/wife has deserted him on 06.09.2004 without any rhyme or reason and till the date of filing of petition, she has not rejoined the matrimonial society of the petitioner. Due to inadequate pleadings and evidence led by the parties, main stress of the parties is on the point of cruelty rather than being on the point of proving desertion.

16. In *Alwar vs Sri Devi* 2002 SC-88 AIR the Hon'ble Supreme Court has laid down two essential ingredients constituting desertion which are (1) the factum of separation (ii) the intention to bringing cohabitation permanently to end *animus deserendi*. Desertion is a total repudiation of the marriage between the parties. It is the intentional abandonment of one spouse by the other without reasonable cause. So far the deserting spouse is concerned, two essential conditions must be there namely (i) 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 deserted spouse is concerned (i) 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, no ground of physical or factual separation how long the same may be, would constitute 'desertion' unless a requisite "*animus deserendi*" so as to establish desertion.

17. In case of *Bipin Chandra vs Prabhvati* AIR 1957 176 it was held that the offence of desertion commences when the fact of separation and the *animus deserendi* co-exist but it is not necessary that they should commence at the same time."

18. In the present case, it is submitted by the parties that parties were married on 23.01.2000. They lived together in the matrimonial home till 30.04.2003 except one occasion where respondent/wife had gone to her parental home for one year and thereafter she joined the matrimonial society of petitioner on 15.04.2002. It is the case of petitioner that on

30.04.2003 he took rented accommodation at Nangloi due to continuous threat of respondent of living separate from her in laws. It is the case of petitioner that while living at Nangloi she developed illicit relationship with some other persons and she used to remain outside the house till late in the evening. It is further case of petitioner/husband that on 06.09.2004 she left the company of the petitioner without information and his consent and since then she is living separate from petitioner/husband. **This fact of living separate from the petitioner since 06.09.2004 has neither been disputed by the respondent/wife in any manner. In the written statement, respondent is silent as to when and why she has left the rented accommodation at Nangloi. She has only denied the allegations made by the petitioner in the petition. All denials made by the respondent are evasive and vaguely denied. Main stress has been put by the respondent on the fact that petition for mutual divorce was filed by the parties which was later on dismissed as respondent had withdrawn her consent.** It is the case of respondent that her consent was obtained by force by the petitioner whereas it is the case of petitioner that she wanted to get divorce as she wanted remarry with some other person, however, later on she changed her mind.

19. **In the cross examination of petitioner and other petitioner witnesses not even a single question has been put on behalf of the respondent that when the respondent has left the matrimonial home/rented accommodation or that it was because of act of the petitioner that she has left the matrimonial home.** Though it is vaguely mentioned by respondent in her

WS that petitioner & his family were not satisfied with the dowry given in marriage, but no stress has been laid by respondent on this aspect in the cross examination of petitioner & his witnesses. Respondent has admitted that she left the Nangloi home on 06.09.2004 but no explanation for that has been either pleaded or proved by the respondent.

20. Even otherwise respondent has nowhere stated that she did not have the intention to desert or she ever try to reside again with the petitioner. During cross examination of respondent she has placed on record two complaints Ex.RW1/P-X dt. 23.10.2004 and Ex.RW1/PX-1 date 31.12.2004. In the document Ex.RW1/PX which is filed by the respondent in October, 2004, she has not stated anywhere that she is not permitted to live with the husband or that she wants to live with her husband. It is only in Ex.RW1/PX-1, respondent has stated that her husband has taken her to Nangloi where he kept her properly for 2-3 months, thereafter he opened friendship club and he also involved the respondent in the said club. Now since she has got the petition for mutual divorce dismissed, her husband and in laws are not permitting her to remain in the matrimonial home. Respondent has not placed on record any document to show if any action was taken by the police on this complaint Ex.RW1/PX-1 or not. Even in this complaint, she has written her address as address of village Ranikhera which is matrimonial home at respondent and she has not stated why she has left the rented accommodation on 06.09.2004.

21. Entire pleading of respondent is silent as to why she has left the rented accommodation on

06.09.2004 or whether she herself has left the rental accommodation on 06.09.2004 or not. It is specific allegation of petitioner in the petition and in evidence that respondent has left the rented accommodation at Nangloi on 06.09.2004 without any reason but there is no cross examination of petitioner and other petitioner witnesses on this point. Neither respondent has stated that she was compelled to leave the matrimonial home on 06.09.2004 without any reason as her pleadings are silent to this effect nor the respondent has given any reason why she left the matrimonial home or rented accommodation at Nangloi. Respondent is also silent about the fact if she tried to reside with the petitioner after 06.09.2004. It is the case of the petitioner that respondent has left the matrimonial society of petitioner as she was having their relationship with many people. Case of the petitioner is supported by PW-3. No specific cross examination to contradict the testimony of PW-3 has been done by the respondent. It was the duty of the respondent to show in her defence that she never wanted to live separately from petitioner and also respondent should not have the intention to desert i.e. the “animus deserendi”. But, since respondent is silent on the aspect, why and how she started living separately from petitioner and also the fact that she did not take any defence that she took any step to re-unite her family with petitioner. It proves the elements of desertion on the part of respondent. On the other hand, respondent had not shown any conduct of petitioner, the deserted spouse, which could disentitle him from relief claimed.

22. My view also gets support from the judgment 186 (2012) DELHI LAW TIMES 332-Kamlesh

Kumari vs Mehtab Singh decided by Hon'ble Mr. Justice Kailash Gambhir of Hon'ble Delhi High Court. In the present case his lordship has considered the case of Lachman Utam Chand Kirpalani vs Meenu @ Mota, (1964) 4 SCR 331 where it was held that:-

“Thus, it is clear from above, that the deserting spouse should have deserted the other spouse without his consent and without being there any just and reasonable cause. In a case of desertion by the deserting spouse there should be reason sufficient enough for such spouse not to reconcile with the deserted spouse. But where the deserting spouse withdraws not only physically from the marriage but also from the society of the deserted spouse without any reasonable cause, the ground of desertion shall be available to the deserted spouse.”

23. **In view of my above discussion, I am of the opinion that petitioner has been able to prove successfully that respondent has deserted him on 06.09.2004 and petition has been filed on 08.09.2004 ie. She has deserted the petitioner continuously for two years before filing of present petition. Hence issue no. 1 is decided in favour of the petitioner and against the respondent.**

(emphasis supplied)

7. A plain reading of the above extracted paragraphs clearly reveal that the factum of living separately from the husband since 06.09.2004 has neither been disputed by the wife in any manner nor has she elaborated on the circumstance as to when and why she left the rented accommodation at

Village Nangloi. In view of the foregoing, the learned Family Court opined that the denials made by the wife in response to the pleadings of the husband are evasive and vague.

8. The learned Family Court further came to a conclusion that the wife has not been able to make good her case of “constructive desertion” since not even a single question was put to the husband in this behalf.

9. Finally, the learned Family Court found that the wife admitted that she left the rented accommodation at Village Nangloi home on 06.09.2004 but no explanation whatsoever for that act has either been pleaded or proved by her.

10. The learned Family Court, therefore, decided the said issue in favour of the husband and against the wife and proceeded to grant the petition for divorce on the ground of desertion in favour of the husband. The marriage between the parties was accordingly dissolved.

11. The wife has instituted the present appeal with an application seeking condonation of delay of 37 days, which delay has since been condoned. However, it is relevant to observe that the husband has since re-married on

15.11.2012; beyond the period of limitation of institution of the appeal assailing the impugned order.

12. Mr. Rajat Aneja, learned counsel appearing on behalf of the husband has also invited our attention to the fact that the husband along with his legally wedded wife have since been blessed with a son on 01.07. 2015.

13. It is trite to state that the requirement in law to entitle a spouse to obtain a decree for divorce on the ground of desertion requires that the deserting spouse should have deserted the other spouse without his consent and without there being any just and reasonable cause.

14. In the present case, in view of the foregoing discussion, we are of the considered view that the wife left the company of her husband for a period of two years, prior to the institution of the petition for divorce without his consent and without there being any just and reasonable cause and has not offered any explanation in this behalf either in her pleadings or in her evidence.

15. In our view, therefore, it is evident that the wife deserted the husband within the meaning ascribed by the relevant provision and in terms thereof.

16. Consequently, we see no reason whatsoever to interfere with the findings of fact arrived at by the learned Family Court as elucidated in the impugned order.

17. The appeal is consequently, accordingly devoid of any merit and is hereby dismissed and disposed off.

**SIDDHARTH MRIDUL
(JUDGE)**

**DEEPA SHARMA
(JUDGE)**

MARCH 05, 2018
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