

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**FAO-M No. 173 of 2015
Date of Decision: 04.4.2019**

Shakuntla

.....Appellant

Vs.

Gaja Nand

.....Respondent

**CORAM: HON'BLE MR. JUSTICE RAKESH KUMAR JAIN
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: - Mr. J.P.Sharma, Advocate
for the appellant.

Mr. Aditya Sanghi, Advocate
for the respondent.

HARNARESH SINGH GILL, J.

Respondent-Gaja Nand had filed a petition under Section 13 of the Hindu Marriage Act, 1955 ('Act' for short) for dissolution of his marriage on the ground that the appellant-wife had left the matrimonial home immediately after marriage and did not return thereafter and in this manner, the marriage of the parties has not been consummated.

The brief facts of the present case are that the marriage between parties was solemnized on 26.5.1983. No child was born out of the said wedlock. The appellant-wife had visited the matrimonial home on the day of the marriage and thereafter, she had left for her parental home and never visited the matrimonial home again. The appellant-wife had filed a petition under Section 125 Cr.P.C. for maintenance and the respondent-husband has

been paying the maintenance since 1992.

As per the appellant-wife, the respondent-husband tried to contract the second marriage qua which she had filed a suit for permanent injunction which was decreed on 20.3.1992. The appeal preferred by the respondent-husband was also dismissed. It was further the stand of the appellant-wife that in August 1986, father of the respondent and brother Rajender Kumar, Balbir Singh Saini, Advocate and Subh Ram Saini, Advocate visited the house of the respondent-husband, but he refused to maintain her and had misbehaved with her brother-Rajender Kumar.

After hearing the counsel for the parties and taking into consideration the evidence on file, the petition filed by the respondent-husband was allowed vide judgment dated 25.3.2015 and a decree of divorce was granted, accordingly.

Being aggrieved of the said judgment and decree, the present appeal has been filed by the appellant-wife.

We have heard the learned counsel for the parties and also gone through the record of the trial Court with their able assistance .

It has been argued by Mr. J.P. Sharma, learned counsel for the appellant that although the civil suit for permanent injunction filed by the appellant-wife was decreed and the respondent-husband was restrained from contracting second marriage, yet he is maintaining a lady in his house on the pretext of being a permanent maid. The respondent-husband has two children, whom he has shown to have adopted from his brother. It has been further argued that it was the respondent-husband, who had refused to maintain the appellant-wife and, therefore, she had preferred a petition under Section 125 Cr.P.C. and the respondent-husband has been paying the

maintenance. Learned counsel has further argued that the witnesses produced by the husband have categorically denied the factum of marriage. Thus, it is prayed that the judgment passed by the trial Court be set aside as it is based on wrong facts.

Per contra, Mr. Aditya Sanghi, learned counsel for the respondent has argued that the respondent-husband is seeking divorce under Section 13 (1) (ib) of the Act as the appellant-wife had deserted him. Moreover, she has not filed petition under Section 9 of the Act for Restitution of Conjugal Rights to show her intention that she was ever ready and willing to reside in her matrimonial home. It is further argued by the learned counsel for the respondent that the witnesses produced by the appellant-wife especially her brother Rajender Singh (RW-2) could not point out as to how long the appellant-wife had stayed in her matrimonial home.

Before the rival contentions of the parties are considered and issue at hand is adjudicated upon, it would be relevant to extract Section 13(1) (i-b) of the Act. The said Section reads as under:-

(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□

x x x x x

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

After taking into consideration the facts of the present case, we find that the appellant-wife has failed to rebut the assertions raised by the respondent-husband. Admittedly, marriage between the parties was

solemnized on 26.5.1983 and no child was born out of the said wedlock. Desertion is a matter of inference to be drawn from the facts and circumstances of each case.

The case of the respondent-husband is based on the fact that the appellant-wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition of divorce.

It is a clear case of *animus deserendi* i.e. intention to desert. From the evidence, it is clear that the appellant-wife has brought the cohabitation permanently to an end by deserting her spouse. Rajender Kumar-brother of the appellant had stepped into the witness box as RW-2. He is stated to be a Typist in the Court Complex since 1985 and has worked with many Advocates. He failed to give any date or month on which the appellant-wife had visited her matrimonial home to pay the condolence on the death of the parents of the respondent-husband. The father of the respondent-husband had died two years prior to the filing of the present divorce petition in the year 2013 and his mother had died 20 years ago. Even Balbir Singh, Clerk at Sarasawati Senior Secondary School, who stepped into the witness box as RW-7, had proved on record that Narender Saini and Jeetu Saini are the adopted son and daughter, respectively, of the respondent and are studying in the said School. Thus, both the children were adopted by the respondent-husband from his real brother Ram Gopal. Paying maintenance under Section 125 Cr.P.C. also shows that the appellant-wife is residing away from her husband and is being paid maintenance since 1992. The said fact has not been rebutted by the appellant-wife.

Even otherwise the nature of proof required in the matrimonial

matters is different. The fact alleged by a spouse, about his/her private intimate life are not supposed to be known to any other person and no corroboration can be accepted in such a case. To seek corroboration to a fact alleged by a spouse to a marriage regarding the healthy or unhealthy character of either ultimate relation which belongs to sacred and secret precincts of marital life, and which are known only to the spouses and which are not supposed to be known to any other living soul on the surface of the planet, would amount to shutting one's eye towards the facts of life and reality.

In the present case, it has been proved on record that the appellant-wife had deserted her husband for the continuous period of not less than two years immediately preceding the presentation of the petition of divorce and that is why she had not filed any petition under Section 9 of the Act for Restitution of Conjugal Rights.

The Apex Court in ***Lachman Utamchand Kirpalani versus Meena alias Mota 1964 AIR (SC) 40*** has held as under:-

"The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal from Bombay where the Court had to consider the provisions of Section 3(1) of the Bombay Hindu Divorce Act, 1947, whose language is in pari material with that of Section 10(1) of the Act. In the judgment of this Court in Bipin Chandra v. Prabhavati, 1956 SCR 838 there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in Halsbury's Laws of England (3rd Edn.), Vol. 12, was cited with approval :

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that 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 life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

The position was thus further explained by this Court:

"If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, (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.....Desertion is a matter of inference to be drawn from the facts 'and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference ; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. 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. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time."

Thus, it is a settled law that the burden to prove animus

deserendi is on the spouse alleging it. It has to be established beyond the shadow of reasonable doubt to the satisfaction of the Court, that the desertion throughout the entire period of two years before the petition was without just cause.

Similarly in the case of ***Adhyatma Bhattar Alwar versus Adhyatma Bhattar Sri Devi AIR 2002 Supreme Court 88***, it was held by the Apex Court as under:-

“ 'Desertion' in the context of matrimonial law represents a legal conception. It is difficult to give a comprehensive definition of the term. The essential ingredients of this offence in order that it may furnish a ground for relief are :

- 1. The factum of separation;*
- 2. The intention to bring cohabitation permanently to an end animus deserndi;*
- 3. The element of permanence which is a prime condition requires that both these essential ingredients should continue during the entire statutory period;*

The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include willful neglect of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage. Therefore, 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 petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period.”

Thus, taking into consideration the above facts and circumstances, it is a clear case of *animus deserendi* on the part of the appellant-wife. The appellant-wife cannot be allowed to take benefit of her own wrongs. It is beyond common prudence as to why she wants to keep alive a relationship, which had pragmatically ceased to exist once the marriage was not consummated.

Thus, we do not find any illegality or infirmity in the well reasoned judgment passed by the Family Court, which may warrant any interference by this Court.

The appeal is dismissed.

(RAKESH KUMAR JAIN)
JUDGE

(HARNARESH SINGH GILL)
JUDGE

April 04, 2019
Gurpreet

Whether speaking /reasoned : Yes/No
Whether Reportable : Yes/No