

\$~9

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

% *Date of Judgment: 24th January, 2019*

+ MAT.APP.(F.C.) 64/2017 & CM APPL. 13882/2017

R Appellant

Through: Mr.Tripurari Jha and Mr.Brajesh
Kumar, Advocates with appellant in
person.

versus

M V Respondent

Through: Mr.Nitish Sharma, Advocate along
with respondent in person.

CORAM:

HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH

G.S. SISTANI, J. (ORAL)

1. This is an appeal under Section 19 of the Family Court Act read with Section 28 of the Hindu Marriage Act for setting aside the judgment and decree dated 23.12.2016 (*hereinafter referred to as 'the impugned order'*) by which a petition filed by the respondent/husband under Section 13 (1) (ia) and (ib) of the Hindu Marriage Act, 1955 for dissolution of the marriage on the ground of cruelty and desertion has been allowed on the ground of desertion alone.

2. The marriage between the parties was solemnized as far back as on 28.01.1999 at Delhi as per Hindu Rites and Ceremonies. No child was born out of the wedlock. It is an admitted position between the parties that they separated on 19.09.2003. A decree of divorce was sought on two grounds being 'cruelty' and 'desertion'. While the Family Court has rejected the ground of cruelty, divorce was granted on the ground of desertion.
3. Mr.Jha, learned counsel appearing on behalf of the appellant has submitted that the appellant did not voluntarily leave the house of the respondent. He contends that soon after marriage the appellant was treated with cruelty, she was harassed both physically and mentally, demands of dowry were made from parents of the appellant. It is submitted that the atmosphere in the marital home was such that she apprehended danger to her life and liberty, and thus left the matrimonial home in September, 2003. It is contended that the respondent had no intention of bringing the appellant back to the matrimonial home. Learned counsel has highlighted the fact that on account of the hardships suffered by the appellant and the torture inflicted upon her by the respondent and his family members, she was forced to approach CAW Cell Kirti Nagar in the year 2005. Consequent to a complaint, an FIR was registered bearing FIR No.359/2005 at Police Station-Uttam Nagar under Sections 406/498A/34 of Indian Penal Code, 1860 (IPC) on 29.04.2005. It is fairly admitted that the respondent and his family members were acquitted by the Trial Court on 31.03.2015 as prosecution had failed to prove its case beyond reasonable doubt. Learned counsel also

contends that the appellant had filed a complaint under Section 12 of the Protection of Women from Domestic Violence Act on 03.03.2011, which was listed before Metropolitan Magistrate, Dwarka Courts, Delhi. The complaint was dismissed. Learned counsel further contends that harsh attitude of the respondent is also evident from the fact that he did not make any payment towards the maintenance forcing the appellant to file a complaint under Section 125 of Code of Criminal Procedure, 1973 (Cr.P.C) on 25.07.2011 and a sum of Rs.2,000/- per month was granted towards the maintenance. Mr.Jha, learned counsel submits that the object of highlighting the filing of the FIR, making of a complaint under Section 12 of Domestic Violence Act (D.V.Act) and initiating proceedings under Section 125 Cr.P.C is to highlight the plight of the appellant and to show that the respondent and his family members were torturing and harassing her and, thus, she was forced to stay away from the matrimonial home and not that she voluntarily deserted the respondent/husband. Learned counsel also contends that the Family Court has exceeded his jurisdiction by passing the impugned order and granting divorce on the ground of desertion. Learned counsel further submits that the Family Court has lost track of the fact that a lady who was being tortured at her matrimonial home would not be able to stay and not that she left the home voluntarily. Mr.Jha, learned counsel has also highlighted the fact that the appellant is an illiterate woman and only studied up-to class-X and she has no support except her old parents and thus, to say that she deserted the respondent/husband is incorrect as her family circumstances would not permit her to leave the matrimonial home.

Learned counsel also contends that the appellant has all along been ready and willing to reside in the matrimonial home and perform the duties of a wife.

4. Per contra, learned counsel for respondent submits that there is no illegality or infirmity in the order passed by the Family Court. Learned counsel further submits that the respondent has been taking every step and every measure possible to resume his matrimonial life, which is evident from the fact that he also instituted proceedings against his wife under Section 9 of the Hindu Marriage Act (HMA) seeking restitution of conjugal rights. He submits that in case there was any truth or merit in the submission which has been made by learned counsel for appellant, the appellant would have returned back between the period 2003 and 2012, when the respondent was forced to file a petition seeking divorce under Section 13(1) (ia) and (ib) of the Hindu Marriage Act. He submits that the respondent and his family members made every effort to bring back the appellant who had left the matrimonial home on her own. Learned counsel submits that the appellant was adamant and hell-bent in not resuming her marital life. He submits that the Family Court has correctly analyzed the facts, examined the evidence and applied the law to the facts of the present case and thus, the same does not require any interference. Both the learned counsels have relied upon the evidence placed on record in support of their submissions and contentions.
5. We may note that the following issues were framed in this case:
“1. Whether the respondent after solemnization of the 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 preceding the presentation of this petition? OPP

3. Relief.”

6. While issue no.1 stands decided against the respondent, issue no.2 has been decided in favour of the respondent/husband. The Family Court has while relying on a judgment of *Savitri Pandey vs. Prem Chandra Pandey*, reported in (2002) 2 SCC 73, held that the appellant had intentionally abandoned her husband. It is useful to produce paras 24 and 25 of the impugned judgment:

“24. According to the petitioner, Sh. Manoj Vasishth, PW-1 the respondent, Smt. Rekha has deserted the matrimonial home since 19.09.2003. The respondent, Smt. Rekha, PW-1 has also admitted the separation although it is being claimed by the respondent that she was thrown out of the matrimonial home on 15.09.2003. PW-1 has deposed that since 19.09.2003, the respondent is residing with her parents and she has refused to join his company. He, other family members, relatives and common friends also tried their level best to take her back to the matrimonial home on several occasion but she and her parents openly declared that the respondent would not join his company and that she and her parents also threatened to involve the petitioner and his family members and relatives in false dowry cases. PW-1 has further deposed that the respondent not only used filthy abusive language with him and his family members but the respondent and her parents started passing derogatory remarks for him and his parents. PW-1 has deposed that on 29.09.2003, his mother and bua visited the house of the respondent's parents but the respondent refused to join his company and again in February, 2004, Shri Jagdish and Shri Suresh, uncles of the petitioner again visited the house of the respondent's parents and tried their level best to come back to join the matrimonial home but the respondent and her parents flatly refused to cooperate the petitioner and

openly threatened that respondent shall not join the petitioner's company and would file complaint before CAW Cell to involve him and his entire family in dowry case and also openly declared that the respondent will not live with the petitioner and would take divorce. The petitioner had also reported the said incident to Chowki In-charge, East Uttam Nagar on 05.02.2004. PW-1 has deposed that since the respondent and her parents refused to cooperate him, he having no option filed a petition U/s 9 of HMA in the month of February, 2004 vide HMA No. 197/2004. PW-1 has further deposed that the respondent deserted him since 19.09.2003. RW-1, Smt. Rekha has stated during her cross-examination on 13.08.2014 "I have left the company of my husband on 15.09.2003, on that occasion also my husband had accompanied me". She also admits that her husband and his family members namely Chacha, Fufa, Bhuaji etc. had visited her on two occasions just to meet her. She also admitted that her husband i.e. the petitioner herein had filed a petition Section 9 in the court to bring her back. The respondent, Smt. Rekha Vs. RW-1 has categorically admitted during her cross-examination that "it is correct that I did not make any effort for going back to my matrimonial home." She also admits that after 2003 she never joined the company of her husband. She also stated during her cross-examination that she did not enjoy a single day at her matrimonial home. The respondent admitted in her case that on 31st July, 2002 she started blaming the petitioner and hit herself with kitchen belon. The respondent also admits that her mother-in-law and Bua had visited her to bring her back on 29.09.2003 and the petitioner's uncle Sh. Jagdish and Sh. Suresh had visited her house on 01.02.2004 for compromise. It is thus evident from deposition of RW-1 that the respondent was not happy in the matrimonial home and she left the matrimonial home on 15.09.2003 and the parties have not resumed cohabitation thereafter. It is also evident from the deposition of RW-1, Smt. Rekha that respondent as well as his family members comprising of his mother, Bua and uncles visited the respondent on 29.09.2003 and 01.02.2004 for bringing her

back. The petitioner had also filed the petition for restitution of conjugal rights. Thus it is evident from record that there was no intention of the petitioner to bring the matrimonial ties to an end of rather it was the respondent who refused to resume the marital ties with the petitioner despite efforts made by petitioner and his family members the desertion on part of the respondent from September, 2003 is established on record. The present petition was filed on 13.09.2012. Thus the petitioner has established on record that the respondent has not cared for and has deserted him for a continuous period of not less than two years immediately preceding the presentation of the present petition. It has thus emerged from the evidence that despite best efforts of the petitioner, it is the respondent, who has chosen to stay away from the matrimonial home and has continuously deprived the petitioner from her company till date. When the respondent refuses to join the company of the petitioner over a period of many years despite his repeated efforts, she deprives him from conjugal bliss. The co-existence of factum of separation and intention to live separately on the part of respondent is proved on record. The petitioner has, thus, been able to establish that he has been deserted by the respondent and is hereby, entitled to grant of decree of divorce on the ground desertion. Accordingly, issue No. 2 is decided in favour of petitioner.

25. The petitioner is therefore, entitled to divorce on the ground of desertion.

Issue No.2 is decided in favour of petitioner.”

7. The Family Court has reached a conclusion of ‘desertion’ by the appellant based on the evidence on record. During cross-examination, the appellant herein RW-1 had admitted that she had left company of her husband on 15.09.2003, when her husband had accompanied her. She admits that the family members of the respondent being Chacha, Fufa, Buaji etc. had visited her on two occasions just to meet her. She also admitted that her husband had filed a petition under Section 9 of

Hindu Marriage Act to bring her back. It has also been admitted in the evidence that after 2003, she never joined the company of her husband nor did she enjoy a single day at the matrimonial home. Surprisingly, she has even admitted that on 31.07.2002 she started blaming her husband and she hit herself with a kitchen *belan*. The appellant also admits in her evidence that her mother-in-law and *bua* visited her to bring her back on 29.09.2003 and also the husband's uncle Shri Jagdish and Shri Suresh had visited her house on 01.02.2004 for compromise. The evidence would show that after separation on 15.09.2003 the parties had not resumed cohabitation thereafter. At least on two occasions, the family members of the respondent had visited the house of the appellant including close family member being mother-in-law and *bua*, who insisted on bringing her back. It is also admitted that family members of her husband being Chacha, Fufa and Buaji had visited her house which would also show that efforts were being made for a resolution of the matter between the parties. The respondent had also filed a petition for restitution of conjugal rights, even then the appellant did not return to the matrimonial home.

8. Although we may note that petition under Section 9 of Hindu Marriage Act was dismissed for non-prosecution, but if the respondent had made the effort of filing such a petition, it was an opportunity for the Appellant, if she desired, to have returned to her matrimonial home, but she did not do so. We also find force in submissions made by learned counsel for the Respondent that he waited from 2003 to 2012 and only thereafter filed petition for divorce. Throughout this period, the appellant did not make any effort to return back, which

shows that the absence was voluntary and the intention clearly was to bring an end to matrimonial relationship permanently. We find no force in the submissions made by learned counsel for the appellant that the appellant could not reside in her matrimonial home as she was being tortured on account of demands of dowry, for the reason that admittedly, the proceeding arising out of the FIR filed under Section 498A/406 IPC as also those under Section 12 of the D.V. Act have been decided against her. In addition, her own evidence shows that she had hit herself with a *belan*.

9. Taking into account the evidence, we find that there is no infirmity in the judgment passed by the Family Court. Resultantly, the appeal is dismissed.
10. Application, being CM No.13882/2017, for stay also stands dismissed, accordingly.

G.S.SISTANI, J.

JYOTI SINGH, J.

JANUARY 24, 2019

SSC