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

% *Date of Judgment: 24.01.2019*

+ **MAT.APP.(F.C.) 198/2017 & CM APPL. 41215/2017**

K K K Appellant

Through: Mr.Satish Kumar, Advocate.

versus

B Respondent

Through:

CORAM:

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

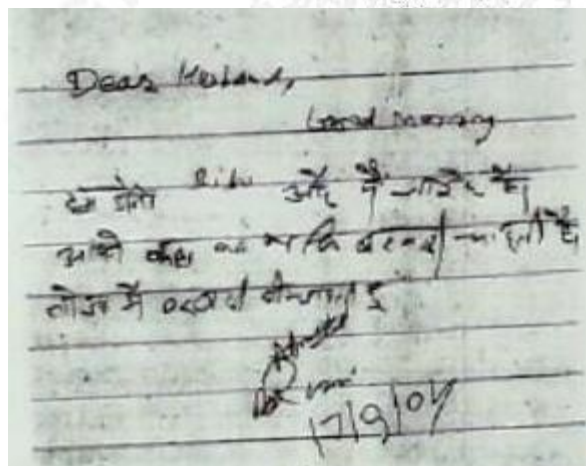
JYOTI SINGH, J. (ORAL)

1. The present appeal has been filed challenging the judgment dated 05.04.2017 passed by the learned Trial Court in HMA No.61546/2016 whereby the petition under Section 13 (1) (ia) and (ib) of Hindu Marriage Act, 1955 filed by the appellant for dissolution of marriage has been dismissed.
2. The brief and relevant facts are that the parties got married on 13.04.1996 at Delhi as per Hindu Rites and Ceremonies. A girl child was born on 27.11.1997 out of the said wedlock. The parties

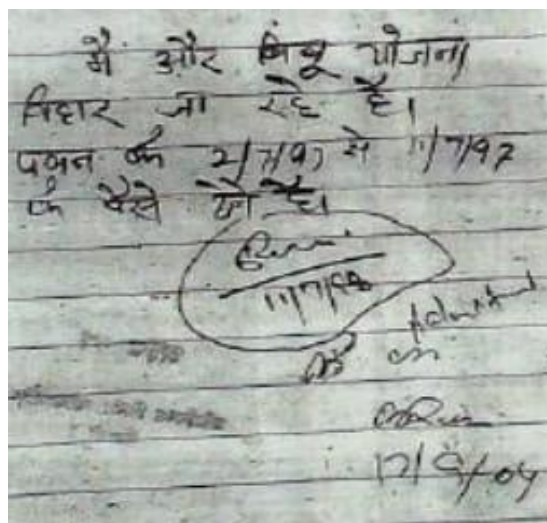
cohabited as husband and wife at the matrimonial home at Raj Nagar-II, Palam Colony, New Delhi.

3. The disputes and differences having arisen between the parties, the appellant/husband filed a petition on 04.03.2003 seeking dissolution of marriage on ground of 'cruelty' and 'desertion' against the respondent/wife. The grounds on which divorce petition was filed are that it was a simple marriage and without any dowry and from the beginning the appellant had showered love and affection on the respondent and tried to provide all the comforts to her, but she was always indifferent and non-cooperative. The respondent never wanted to stay in the matrimonial home would always force the appellant to arrange for an alternative residence in some posh colony at Yojna Vihar on the ground that the matrimonial home was not upto her status and unhygienic and she felt suffocated in her matrimonial home. The appellant naturally expressed his inability to move out of the house as he could not afford a house in a posh colony nor could he afford leaving his old and aged parents alone and, thus, this became a main cause for repeated fights between the parties. It was pleaded that many times the respondent would abuse and insult and threaten his parents and him and on 15.08.1996 the matter became very serious, when the respondent went to the extent of threatening the appellant that if he did not fulfill her demands, she would implicate him and his family members in a dowry case. Grievance also was that the respondent always neglected her matrimonial duty and never cooked food or washed utensils and did not even care for his old and ailing mother and on being asked to do any household chores, she would

respond by saying that she was not a maid servant. Another ground in the divorce petition was that after birth of the child on 27.11.1997 though the appellant and his family members provided good care and diet to the respondent, she started leaving the matrimonial home frequently and started going to her parental house and on 11.07.1998 while the appellant was away, she picked up a quarrel with his mother and abused and insulted her and left the matrimonial home along with her clothes, jewellery and other valuables. While leaving the house, she left behind two written notes addressed to the appellant. The scanned copy of the said notes are re-produced below:



Dear Mohan,
Good morning
I am going to my parents' house.
I will be back in 10 days.
I will call you when I am back.
Love,
Rani
17/9/04



Me and Bhabhi are going to the market.
We will be back in 2/3/4 days.
We will call you when we are back.
Love,
Rani
11/7/98
17/9/04

4. The appellant also pleaded that all efforts of the appellant to bring the respondent back to the matrimonial home went in vain and to further harass him, the respondent lodged a false complaint with the CAW Cell on 20.05.1999. The appellant, therefore, sought dissolution of the marriage on grounds of 'cruelty' as well as 'desertion' as according to him, the respondent had intentionally and without any cause left the matrimonial home on 11.07.1998 and did not return thereafter.
5. The respondent contested the matter and filed a written statement taking preliminary objection that in fact she had been thrown out of the matrimonial home on 11.07.1998 by the appellant and he inflicted mental and physical cruelty on her. In the written statement, the respondent had denied the averments made in the divorce petition and in fact, blamed the appellant and his family members for having demanded dowry. It was pleaded that it was only because she could not fulfill the dowry demands of the appellant that she was inflicted with mental and physical cruelty. She denied that she had ever requested the appellant to shift out to a posh colony or that she had ever refused to cook food or do other household chores. The respondent denied the alleged incident of 15.08.1996 and in fact, pleaded that during her pregnancy the entire expenses were incurred by her parents and the appellant had left her in the hospital and did not even take care thereafter. She claimed that it was the appellant who was instrumental in throwing her out from the matrimonial home on 11.07.1998 and she stayed outside the house the whole night but he made no efforts to bring her back, hence, she was not guilty of cruelty or desertion as alleged.

6. The appellant filed replication to the written statement and reiterated the averments in the main petition and denied the averments in the written statement.
7. On 17.09.2004, the learned Trial Court framed the following issues:
 - “(i) *Whether after solemnization of marriage, the respondent has treated the petitioner with cruelty? OPP*
 - (ii) *Whether the respondent has deserted the petitioner for a continuous period of not less than two years immediately before the presentation of the petition? OPP*
 - (iii) *Relief.”*
8. During the trial vide order dated 16.03.2004, the respondent and her child were granted monthly maintenance of Rs.1000/- as interim maintenance, besides Rs.1100/- towards litigation charges. In the proceedings between the parties under Section 125 of Code of Criminal Procedure, 1973 the respondent and the girl child were granted maintenance of Rs.2500/- and Rs.1500/- per month respectively.
9. The appellant examined himself as witness and filed a detailed affidavit Ex.PW1/A and also examined his brother Shri Prem Prakash who filed his affidavit in evidence, Ex.PW2/A. Both the witnesses were cross-examined by the respondent. The appellant also examined Mr.Atul Kumar Mittal as a witness to an alleged incident on 15.08.1996 who was also cross-examined by the respondent. The respondent on the other hand examined herself as RW-1 and also her

father Mr.Brij Mohan as RW-2. Both the witnesses were cross-examined by the learned counsel for the appellant.

10. From a reading of the judgment of the Family Court, we find that at the stage of the arguments, none had appeared on behalf of the respondent to address arguments and since the matter was very old and pending for long time, the Family Court decided the petition on the basis of the oral and documentary evidence as well as pleadings on record.
11. The Family Court after perusing the evidence and pleadings came to a conclusion that the respondent was not guilty of any act or omission which caused any mental pain or agony or suffering to the appellant and the appellant had failed to prove that he had been treated with cruelty. Issue no.1 was, therefore, decided against the appellant/husband and in favour of the respondent/wife.
12. As regards issue no.2, the Family Court observed that two letters on which great emphasis was laid by the appellant, to show desertion on behalf of the respondent, did not lead to an inference that there was any intent to desert and rather the contents of the complaint Ex.PW1/3 filed by the respondent with the police, corroborated that she was being ill-treated for bringing insufficient dowry and for the birth of the girl child. The Family Court also relied on the evidence of the respondent that she had been forced out of the matrimonial home on 10.07.1998 and kept sitting outside the house throughout the night and went to parent's home on 11.07.1998 at 02:00 PM, having no option.
13. Family Court came to a conclusion that the appellant had failed to prove that the respondent had deserted the appellant and issue no.2

was also decided against the appellant/husband. The petition for divorce was dismissed. Costs of Rs.50,000/- were also imposed on the appellant on account of the fact that he had not returned dowry articles, admittedly given during the marriage and directions were issued to the appellant to pay maintenance granted to the respondent and the child under Section 24 of the HMA, till the date of the judgment.

14. Before us today, learned counsel for the appellant has raised two fold arguments assailing the judgment of the Family Court. Main plank of his arguments are that the respondent did not want to live in the matrimonial home as according to her, it was unhygienic and not upto her status and repeatedly insisted that they should shift to a posh colony somewhere in Yojna Vihar. He also argued that she was always abusing and insulting his old parents and him and would insist that he should separate from his parents and this amounted to 'cruelty' but the Family Court had erred in not treating this as 'cruelty', despite the appellant having deposed to that effect and his deposition was corroborated by PW2 and PW3. The Family Court has, thus, erred according to him in holding that the appellant could not prove cruelty against the respondent. Second argument raised by the learned counsel for the appellant was that since the respondent did not want to live in the matrimonial home, it was she who left the matrimonial home on 11.07.1998 on trivial issues and did not return thereafter. The intent was clearly to desert the appellant and in support of this contention, learned counsel has drawn the attention of this court to two notes Ex.PW1/1 and Ex.PW1/2 written by the respondent, which we

have reproduced above. The argument advanced is that plain reading of the contents of the two notes indicates that the respondent wanted to leave the matrimonial home and was not thrown out by the appellant and, therefore, a clear case of desertion is made out. He contends that in view of this clear evidence, the Family Court had erred in deciding the issue no.2 against the appellant.

15. On 15.11.2017, notice was issued by this court to the non-applicant/respondent. As per the service report, the respondent was served on 18.12.2017. Despite service of notice, none appeared on behalf of the respondent on 20.07.2018. The appellant was directed to take steps to serve the respondent again by all modes, returnable on 25.09.2018. On 25.09.2018, again none appeared on behalf of the respondent despite service of notice and the appeal was listed for hearing on 03.12.2018. On the said date, learned counsel for the appellant requested time to prepare a short note along with judgment of the matter was adjourned for today i.e. 24.01.2019. Today also, none has appeared on behalf of the respondent.
16. We have heard learned counsel for the appellant and perused the record as well as the judgment of the Family Court impugned before us.
17. Perusal of the pleadings show that no specific allegations were made by the appellant to show how the appellant or his parents were abused, insulted or humiliated by the respondent. In his cross-examination, the appellant stated that he was employed as a postman at a distance of 30 kilometre from the matrimonial home and used to leave the house at 08:00 AM and return back at around 07:00PM-08:00PM and, thus,

allegations that the respondent did not do any household work or ill-treated his mother could only be informed to the appellant by his mother, but the mother was not examined as a witness. The Appellant could not substantiate by any incident or evidence that the respondent abused or insulted him. There were contradictions in the testimony of appellant inasmuch as in his cross-examination he stated that the respondent visited her parental home 5 to 6 times between 27.11.1997 to 11.07.1998 but in the latter part, he testified that she would visit her parents once in a week either for a day or 3 to 4 days. Not much credence can be given to the testimony of PW2 who is the elder brother of the appellant and stated that the respondent always neglected household work and ill-treated the appellant and their mother, since in his cross-examination, he admitted that he had never stayed with the appellant and his wife. Moreover, he did not bring out any specific incident to prove the allegations. The Family Court has rightly disbelieved the testimony of PW3 as the appellant was friend of his brother. Moreover, the evidence of PW3 is only to the effect that whenever he visited the house of the appellant, his mother was doing household work but in latter part of his testimony, he corrected it to say that it was not every time that mother was working.

18. On the other hand, the learned Family Court after examining evidence of RW-1 found that RW-1 stood her ground that the respondent never asked the appellant to shift to any posh area. The evidence of RW-1 shows that she was made to work as a maid servant and was ill-treated during her pregnancy, which was not controverted by any evidence by the appellant.

19. As regards two notes written by the respondent Ex.PW1/1 and PW1/2 on which much emphasis was laid by the appellant, the Family Court has rightly held that context in which the same were written has not been brought forth by the appellant. In fact, a perusal of the notes, in our view and as held by the Family Court shows that in fact, the respondent was in a disturbed state of mind and was only wishing the appellant “Dear husband” and “Good morning” and it certainly cannot be deciphered from them that the respondent had any intent to desert the appellant, as alleged.
20. The Family Court, in our view, has rightly observed that the contents of the complaint Ex.PW1/3 written by the respondent to the police rather corroborates that the respondent was being ill-treated and the birth of the girl child brought further misery in her life. The complaint also reveals that the respondent was being threatened that the appellant would marry some other girl and when the respondent went to meet the appellant at his office on 04.12.1998, he did not listen to her and in fact, physically assaulted her in front of his colleagues. The evidence of the respondent proves that in fact, the appellant had turned her out of the matrimonial home on 10.07.1998 and she kept sitting outside the house throughout night and having no option went to her parental home on 11.07.1998 at 02:00PM.
21. It is also proved from the evidence of the respondent and corroborated by her father RW-2 that the respondent and her father had gone to the house of the appellant for amicable statement thrice i.e. on 03.01.1999, then in December, 1999 and again in January or March, 2000 but the appellant misbehaved with them.

22. Reading of the impugned judgment also indicates that even during trial, the respondent was willing to come back and reside with the appellant but the appellant was adamant and not willing to take her back. The Family Court has observed that the conduct of the appellant during trial has been very vindictive and without any empathy to the plight of the respondent.
23. The Family Court, in our view having perused the evidence has rightly come to the conclusion that the appellant failed prove both ‘the cruelty’ and ‘desertion’ on the part of the respondent and, has, thus rightly dismissed the petition for divorce under Section 13 (1) (ia) and (ib) of Hindu Marriage Act, 1955. We are supported in our view by the judgment of the Apex Court in the case of **Dr. N. G. Dastane Vs. Mrs. S. Dastane reported as AIR 1975 SC 1534; V. Bhagat Vs. D. Bhagat reported as (1994) 1 SCC 337; Savitri Pandey Vs. Prem Chandra Pandey reported as (2002) 2 SCC 73**, wherein it was held that specific instances of cruelty have to be proved. Also in **Bipin Chandra Jaisinghbhai Shah Vs. Prabhavati reported as AIR 1957 SC 176**, wherein the Hon’ble Apex Court has held that for desertion two aspects need to be proved; 1) factum of separation and 2) the intent to bring co-habitation permanently to an end. Similarly, the Hon’ble Apex Court in **Laxman Utamchand Kirpalani Vs. Meena alias Mota reported as AIR 1964 SC 40**, has held that desertion means the intentional permanent abandonment of one spouse by the other without reasonable cause. It was also held that mere separate living by the parties to the marriage may not be enough indication of desertion. The burden has to be discharged by proving such acts or

conduct which is an expression of an intention to desert, both anterior and subsequent to the actual acts of separation.

24. In our view, the appellant has not been able to discharge the burden of proving either the allegations of cruelty or desertion against the respondent.
25. There is, thus, no merit in the appeal and the same is hereby dismissed with no order as to cost. The order dated 05.03.2017 of the Family Court is hereby upheld.

JYOTI SINGH, J.

G. S. SISTANI, J.

JANUARY 24, 2019

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