

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

% Date of decision: 17.01.2020

+ **MAT.APP.(F.C.) 318/2019 & CM APPLs. 52860-52862/2019**

HARPEET KAUR

..... Appellant

Through: Mr. Amanpreet Singh, Mr. Pariksha,
Mr. Arun Parashar, Advocates

versus

AMARJEET SINGH

..... Respondent

Through: Nemo.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE ASHA MENON

ASHA MENON, J.

1. This appeal has been filed by the appellant/wife against the judgment dated 28.05.2019, passed by the learned Family Court, (South), Saket, Delhi, allowing the divorce petition filed by the respondent/husband and dissolving the marriage between the parties.

2. The brief facts as may be relevant for the disposal of the present appeal are that the marriage between the parties was solemnised on 17.04.2011, as per Hindu rites and ceremonies. According to the respondent/husband, immediately thereafter, differences arose between them on account of the conduct and behaviour of the appellant/wife. The parties were blessed with a son on 05.12.2012. However, it is apparent that the parties have been living separately since 24.06.2012.

3. In November 2012, the respondent/husband filed a petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') seeking restitution of conjugal rights. Subsequently, on 18.11.2014, he withdrew the said petition. Thereafter, on 15.07.2014, he filed a petition seeking divorce from the appellant/wife on grounds of cruelty and desertion under Section 13(1)(i-a) and 13(1)(i-b) of the HMA.

4. The following issues were framed on 11.05.2018:

- (i) Whether the respondent after the solemnization of the marriage has treated the petitioner with cruelty within the meaning of Sec.-13(1)(i-a) of the Hindu Marriage Act? OPP.
- (ii) Whether the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition within the meaning of Sec.13(1)(i-b) of the Hindu Marriage Act? OPP
- (iii) Whether the petitioner is entitled to decree of divorce, as prayed for? OPP
- (iv) Relief.

5. The respondent/husband examined himself as PW-1, whereas the appellant/wife examined herself as RW-1. On an assessment of the evidence on record and after considering the submissions made

before it, the learned Family Court concluded that the respondent/husband had failed to establish cruelty on the part of the appellant/wife but found that she had deserted him and was thus not interested in the matrimonial relationship. Accordingly, the learned Family Court dissolved the marriage between the parties on the ground of desertion under Section 13(1)(i-b) of the HMA.

6. This appeal has been filed by the appellant/wife being aggrieved by the dissolution of the marriage.

7. Mr. Amanpreet Singh, learned counsel for the appellant/wife has submitted that the learned Family Court had wrongly concluded that the appellant/wife was not interested or willing to live with the respondent/husband and argued that the recording of evidence by the Local Commissioner was in furtherance of a conspiracy to tamper with the evidence and get the desired result, by wrongly recording as the statement made by the appellant/wife to the effect that she was not willing to live with the respondent/husband, as it was false. Thus, when she had no intention to desert the husband and her physical absence from the matrimonial home could be directly attributed to the harassment meted out to her by the husband and his family members, the learned Family Court erroneously concluded that the factors to establish desertion were duly proved. Hence it was prayed that the decree of dissolution of marriage be set aside and the present appeal be allowed.

8. We find no merit in the submission of learned counsel for the

appellant/wife that the Local Commissioner had wrongly recorded her testimony inasmuch as the appellant/wife was cross-examined on 19.03.2019 and the impugned judgment was pronounced on 28.05.2019 and yet, in all this time, no such contention was raised before the learned Family Court.

9. Ordinary human behaviour is such that a prudent person would immediately react and respond when his interest is at stake. If the learned Local Commissioner, being a retired District & Session Judge, had wrongly recorded the deposition of the appellant/wife during her cross-examination, reason predicates that she would have immediately filed an application before the learned Family Court to bring to its notice that a mistake, intentionally or otherwise had occurred in the recording of her evidence. However, no such steps were taken by the appellant/wife. Clearly, this plea has been taken at this belated stage only to overcome the observations made by the learned Family Court that the appellant/wife herself was not interested in the matrimonial relationship to allow the petition of the respondent/husband and dissolve the marriage between the parties.

10. We however note that the learned Family Court has not dissolved the marriage only on the basis of the statement made by the appellant/wife during her cross examination. It has exhaustively discussed the evidence brought on record that reflected the conduct of the parties to conclude that the conditions to establish desertion, namely, the factum of separation and the intention i.e. *animus deserendi* of the appellant/wife alongwith absence of consent and

wrongful conduct on the part of the respondent/husband, have been duly proved. There is no dispute to the fact that the appellant/wife had left the company of the respondent/husband on 24.06.2012. Before that, the evidence reveals that on several occasions, the appellant/wife had left the matrimonial home but she used to return thereafter. The record discloses that subsequent to 24.06.2012, there was no effort made by the appellant/wife to return to the matrimonial home.

11. Of course, it is important to assess as to whether the respondent/husband was in any way responsible for the appellant/wife being disinclined to return to the matrimonial home. We find no such blameworthy conduct of the respondent/husband on the record. One reason offered by the appellant/wife, which she had to prove, was that she had been ill treated due to non-fulfilment of demand of dowry and she was expelled from the house. However, neither in the cross-examination of the respondent/husband, conducted on her behalf, nor in her affidavit by way of evidence, Ex. RW-1/A, did she succeed in establishing that she had been harassed for dowry. A mere suggestion in this regard was given to the respondent/husband when he was examined as PW-1 and he promptly rejected the suggestion that he or his family members had ill treated the appellant/wife for dowry. On the other hand the respondent/husband disclosed *“the cause of dispute between us was the insistence of the respondent not to sleep on beds of our house, not to live with my family members. The cause of dispute was she wanted a separate floor to be constructed for her in the same house.”* In her affidavit, Ex. RW-1/A, the appellant/wife claimed that

she had never quarrelled with the respondent/husband or his family members and it was he who used to beat and insult her and send her to her parents' house. However, no such case was put up to the respondent/husband during his cross-examination.

12. The appellant/wife has claimed that she was not allowed to visit her parents' house even on important ceremonies or rites. During her cross-examination, however, she admitted that on the death of her uncle (*Tau*) in May 2012, she was not allowed to attend the cremation as she was pregnant. She further admitted as correct that she had gone to the *Bhog* ceremony. She volunteered the information that at that time, a lot of quarrel had taken place at her matrimonial home and she was allowed to go only after she had appended her signatures on a blank stamp paper. But this was a new fact that she had introduced during her cross-examination and need not detain us.

13. What is significant is that though in her affidavit, the appellant/wife claimed that she was not allowed to go for important functions and rites, the objections raised by her in-laws at the time of cremation of her uncle (*Tau*) may have been founded on the fact that she was pregnant and possibly customarily, women in that condition do not attend cremations. In any case, it was not as if she had abided by that objection for, after she raised a quarrel, she had, in fact, gone for the death ceremonies. This reflects her adamant temperament which is also important to be noticed in the context of the fact that after 24.06.2012, she did not return to the matrimonial home which clearly reflects her intention to stay away. She further claimed that in

June 2012, when she left the matrimonial home, there was a lot of “*mar pitai*”.

14. The respondent/husband had stated that the appellant/wife had left on account of matrimonial discord and that an oral complaint to the police had been lodged by him by dialling No.100. This oral complaint was reduced into writing by the police as DD No.31A. The appellant/wife in her cross-examination also admitted that the mother of the respondent/husband had called the police. There is no reason why on the arrival of the police, she did not put forth her version as being the correct version. Rather, her case is that she never complained to the police about any harassment or ill treatment. Thus, her claim that she had a just and valid cause to live away from the matrimonial home on account of the harassment meted out to her by the respondent/husband and his family members, is clearly not borne out from the record.

15. During her cross-examination, the appellant/wife admitted that after their marriage, she and the respondent/husband had been given a separate room on the ground floor, to live peacefully. She also admitted that after the upper floor was constructed, only she and the respondent/husband had been living there peacefully. While claiming that the upper floor including the Kitchen, was not constructed at her request, she also admitted that after the kitchen was constructed, only she and the respondent/husband were using the said kitchen, for cooking independently, while living there peacefully. This fact would show that mere denial by the appellant/wife that she had not insisted

on a separate accommodation for herself and the respondent/husband, is not enough to disbelieve the respondent/husband who asserted that she had done so. Once the respondent/husband and his family accommodated her desire and provided an independent living space for her and the respondent/husband, there was no apparent reason for the appellant/wife to have left the matrimonial home and start living with her parents.

16. During his cross-examination, the respondent/husband, had set forth the sequence of events that had occurred just before the appellant/wife left the matrimonial home in the following manner:

“From 01.06.2012 to 05.06.2012, the respondent was living with me on separate floor of my parents’ house. Then she had gone to her parental house where she stayed for three days. On 8.06.2012, I brought the respondent back to my house on my floor of the house as on the next day me and the respondent were to leave for Punjab by train. Thus by train we went to Punjab on 09.06.2012. We both stayed in Punjab for four days. Thereafter we came back to Delhi and stayed on my floor of the house till 24.06.2012. Thereafter, on account of matrimonial discord between me and the respondent she went to her parents’ house with her parents.”

17. The above extract of the testimony of the respondent/husband during his cross-examination, would also reflect the fact that despite everything, he was willing to bring her back and continue with the matrimonial relationship, but did not really succeed. It is surprising that on behalf of the appellant/wife, the question put was as to how many times the respondent ‘visited’ the house of the respondent/husband prior to 01.06.2012, as after the marriage, a wife

does not “visit” the matrimonial home, but “resides” there. Of course, the respondent/husband responded that the appellant/wife had “visited” his house on a number of occasions but the crux of the matter is that the appellant/wife used to “reside” at her parents’ house and go to stay with her husband off and on, for short periods of time and he used to discharge his obligation of bringing her back to the matrimonial home.

18. Notably, the respondent/husband is the one who had filed the petition for restitution of conjugal rights. The appellant/wife chose not to attend that matter. The learned Family Court has observed that from the order sheets placed and proved on record as Ex.PW-1/5, the case was first taken up on 05.11.2012 and the first appearance on behalf of the appellant/wife was recorded on 05.03.2013. She also filed an application under Section 24 of the Hindu Marriage Act, 1955 seeking maintenance. Almost a year later, on 26.02.2014, when the parties submitted that there was a chance of amicable settlement, they were directed to the Mediation Centre. However, on 18.11.2014, the respondent/husband withdrew that petition under Section 9 of HMA. The participation of the appellant/wife in those proceedings was limited to three dates. Her explanation given for non-appearance in the court to attend the hearings in the petition for restitution of conjugal rights was that she was suffering from TB and was under treatment for the same. No medical evidence has been produced in respect of the treatment for TB and that it had prevented her from moving around and attending the court proceedings. The explanation

offered is therefore not acceptable. In fact, the true reason was also given by the appellant/wife that she did not join the proceedings as she did not wish to live with the respondent/husband, who was petitioner in that case.

19. The record discloses that the appellant/wife had also not disclosed to the respondent/husband that they have been blessed with a son and the specious explanation offered was that since the summons of the petition under Section 9 of the HMA was received on the same day that their son was born, she and her family did not have any time to inform the respondent/husband about the birth. She also admitted as correct, that it was only pursuant to the orders of the court that the respondent/husband was allowed to meet their son. She also admitted that she had been in consecutive default of orders granting visitation rights to the respondent/husband. Thus, her conduct clearly reveals that the appellant/wife had no interest in a family life with the respondent/husband. Despite sincere efforts made by the respondent/husband to bring the appellant/wife back to the matrimonial home, she never agreed to it.

20. In Lachman Utamchand Kirpalani vs. Meena alias Mota, AIR 1964 SC 40, the Supreme Court observed as under:-

“18. 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 materia with that of Section 10(1) of the Act. In the judgment of this Court in Bipin Chander v. Prabhawati [(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 abandons 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 desorendi). 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 coexist. 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.”

(Emphasis added)

21. Intention, as revealed by the acts of the appellant/wife both anterior as well as subsequent to the separation on 24.06.2012, establishes beyond any doubt that she had no interest in returning to the matrimonial home or resuming cohabitation with the respondent/husband. She had no reason not to return as it has been noticed hereinabove that she was allowed separate accommodation with her husband and there is no evidence that she was being subjected to any kind of ill treatment or harassment at the hands of the respondent/husband or his family members.

22. In this context, the two statements made by the appellant/wife during her cross-examination, as recorded on 19.03.2019, to the effect “*I did not want to live with the petitioner*” (with reference to her absence from the proceedings under Section 9 of HMA, initiated by the respondent/husband) and “*Even now I do not want to live with the petitioner*”, reveal the *animus deserendi* and have been rightly relied

upon by the learned Family Court to conclude that she had deserted the respondent/husband.

23. Each time, the respondent/husband had made efforts to bring the appellant/wife back home and even when she had left the matrimonial home on 24.06.2012, he had filed a petition for restitution of conjugal rights in November 2012. Therefore, it is apparent that the appellant/wife had left the matrimonial home without the consent of the deserted spouse namely, the respondent/husband and without his giving her any cause to leave the matrimonial home.

24. In the light of the foregoing discussion, there is no merit in the present appeal and we do not find any reason to interfere in the impugned judgment dated 28.05.2019, passed by the learned Family Court, which is upheld. The appeal filed by the appellant/wife is dismissed alongwith the pending applications.

(ASHA MENON)
JUDGE

(HIMA KOHLI)
JUDGE

JANUARY 17, 2020
pkb/MK