

**IN THE HIGH COURT AT CALCUTTA  
CIVIL APPELLATE JURISDICTION  
APPELLATE SIDE**

**Present:  
THE HON'BLE JUSTICE HARISH TANDON  
&  
THE HON'BLE JUSTICE PRASENJIT BISWAS**

**FAT 107 of 2020**

**Smt. Nilima Ghosh  
Vs.  
Sri Bipad Taran Ghosh**

**Appearance:**

For the Appellant : **Mrs. Sulekha Mitra , Adv.  
Mr. Manas Kumar Das, Adv.**

For the ECL : **Mr. Manik Das, Adv.**

For the Coal Mines  
Provident Fund Organization : **Mr. Kallol Guha Thakurta, Adv.**

Judgment On : **12.9.2023**

**Prasenjit Biswas, J.:**

The instant appeal has been preferred against the judgement and decree dated 10.12.2019 passed by the learned Additional District Judge 4<sup>th</sup> Court, Asansol, Paschim Bardhaman in Matrimonial Suit No. 33 of 2016 whereby the application filed by the respondent husband for grant of

decree of divorce u/s 13 of the Hindu Marriage Act, 1955 was allowed. The wife is in appeal before this court.

The parties got married on 23.11.2012 according to Hindu rites and customs at the house of the appellant. Soon after the marriage difference and disputes have been cropped up in between them. It was pleaded that the appellant/wife told the respondent that she had no intention to marry him and is not willing to live with him. It is stated by the husband that the appellant/wife used to say that her marriage had been given by her parents with him by way of exercising force. Despite hearing this respondent kept himself mum with hope that his wife would change her habit and normal conjugal life would restore between them.

The husband further pleaded that this appellant used to pickup quarrel with him and his mother and abused them with filthy languages and also used to say that she would not live with him in anyway and ultimately this appellant/ wife left for her father's house on 28.12.2012. Thereafter the respondent on many questions requested this appellant to come back but his request was ended in vain. Therefore, when all the efforts made by him went on vain he instituted a case for restitution of conjugal rights which was subsequently withdrawn by the respondent as this appellant/wife filed a complaint case against him under section 498A of I.P.C. Since 28.12.2012 the parties had not lived together as husband and wife and the appellate/wife wilfully deserted the respondent for a continuous period of more than two years the application was filed seeking divorce.

Reply has been filed by the wife wherein she denied all the averments and instead it is stated that she had married the respondent to lead a happy conjugal life but the respondent and his mother started making demands and sarcastic comments on the wife or demand of dowry. The wife further states that having not fulfilled the demand of dowry, the dispute further aggravated and she was put to torture. However, since she wanted to save her marriage, she continued but eventually on 20.03.2013 she was abused, assaulted and was ousted from the house and forced to stay at her matrimonial house. On 22.03.2013 this appellant and her parents went to her matrimonial home but the petitioner did not allow her to enter in the house. The wife further stated that she had love and affection towards the respondent and is ready and willing to lead their conjugal life.

The learned trial court on the basis of pleadings framed the issues as to whether the wife has treated the husband with cruelty and deserted him and in order to prove the facts, the husband examined himself as PW1 whereas the wife has examined herself. The learned trial court after evaluating entire facts and evidence passed a decree in favour of the husband under section 13 of the Hindu Marriage Act, therefore, the instant appeal by the wife.

The Learned Counsel for the appellant would submit that the learned trial court failed to appreciate the evidence adduced by the husband who in his cross-examination admitted that in the application for restitution of conjugal rights he stated that their marriage was

consummated. Our attention was drawn about the evidence adduced by PW1 wherein he stated that his father-in-law had brought the wife to his house on 24.11.2013 and pressurised her to live there but this appellant denied to stay with her husband, such story of pressurising and denial to stay is not credible because this appellant went there to stay with her husband to lead a happy conjugal life but unfortunately she was not allowed to enter into the house. It is stated by the wife that the dispute started for demand of dowry for which the complaint was made and it is an admitted fact that till date the case is pending against this respondent. Therefore, the contention of the wife that she was subjected to cruelty is well established as no acquittal has been effected till date. Therefore, the judgement and decree of the trial court is required to be interfered.

We have heard learned counsel for the appellant and have also perused the materials on records.

We shall deal and discuss with the evidence about cruelty and desertion in seriatim.

It is profitable to quote the observation of the Hon'ble Apex Court rendered in case of **V. Bhagat vs. D. Bhagat (Mrs.)** reported in **(1994) 1 SCC 337** wherein it is held that mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live

together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

The Supreme Court in case of **Parveen Mehta v. Inderjit Mehta** reported in **(2002) 5 SCC 706**, has held thus:

*"21. Cruelty for the purpose of Section 13(1) (i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other.*

*Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling*

*of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other."*

It is thus settled that whether in the facts and circumstances of a given case, the plaintiff has been able to make out a case of grant of divorce on the ground of cruelty would depend upon the nature of the pleadings and evidence in that case. There can be no straight jacket formula where cruelty is said to have been committed by one or other property to the marriage.

Let us see how the husband was able to bring home his case of cruelty both mental and physical in getting a decree of divorce. If we examine the evidence apropos the ground of cruelty, it is to be seen that the husband has alleged ordinary wear and tear of marital chord in day-to-day happening as cruelty committed by the wife. It is stated by the husband that since the day of marriage this appellant used to say that she had no intention to marry him and she is not willing to live with him also. Husband deposed that appellant started to misbehave with him and his

family members and did not allow the respondent to live with him. In cross examination Pw1 husband stated that in application praying for restitution of conjugal rights he mentioned therein that their marriage has been consummated. Mere words spoken by the wife that she had no intention to marry with the respondent and the marriage was fixed contrary to her wishes would not amount to cruelty as it is understood and taken as matrimonial offence under section 13(1)(b) of the Act, 1955.

The main allegation of husband is that marriage is not consummated due to refusal by the wife and she had caused physical and mental cruelty upon him and his mother since the date of marriage. No relations of the husband were examined before the trial court. No plausible explanation exists for the same. If the wife after marriage started to live in her matrimonial house under one roof with her in-laws and if she committed misbehaviour with the in-laws and husband as alleged by the husband which triggered the cruelty, then the husband could have produced evidence as it cannot be presumed by mere bald statement of the husband that he and his mother were subjected to torture by the wife. The allegation also exists that the wife was subjected to torture on demand of dowry immediately after the marriage. The said allegation eventually converted into a case filed under section 498A of IPC and the cases still pending. There is no plausible explanation by the husband respondent as to what is the outcome of such proceeding pursuant to the complaint made by the wife. Under the circumstances, when the wife refused to join the husband, reasonable reasons exist.

The statement of the husband would show that pursuant to the complaint made by the wife a criminal case is pending and nothing has been brought before us to show that what has happened in that criminal case and whether any acquittal has been recorded or charges have been framed. At this juncture submission made by the wife would be accepted that for the reasons stated in her complaint, she was forced to stay away which cannot be amounted to cruelty.

In the instant case, the burden of proving cruelty since has not been discharged properly by the husband who sought divorce on the ground of cruelty. Therefore, grant of decree of divorce on the ground of cruelty appears to be unsustainable. We are not in agreement with the findings recorded by the trial court on this count that the husband is able to prove the ground of cruelty.

We shall now advert to the legal principle as to when the ground of desertion can be said to be proved for grant of decree of divorce.

In ***Bipinchandra Jaisinghbai Shah Vs. Prabhavati*** reported in ***AIR 1957 SC 176***, history and development of a concept of "desertion" as a cause of action for grant of decree of divorce has been spelt out. Quoting English authors and Halsbury's Laws of England, the Supreme Court observed thus in paragraph 10 *inter alia* that-

*"10. What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarised the case-law on the subject in these terms:-*

*"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".*

The legal position has been admirably summarised in paras 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.), Vol 12, in the following words:-

*"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.*

*Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.*

*The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.*

*The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must*

*exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".*

The Supreme Court thereafter in the above referred case held that the quality of permanence is one of the essential elements which differentiate desertion from wilful separation. 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, 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 petition for divorce bears the burden of proving those elements in the two spouses respectively.

In ***Smt. Rohini Kumari Vs. Narendra Singh*** reported in ***AIR 1972 SC 459***, the Supreme Court again held that desertion does not imply only a separate residence and separate living. It is also necessary

that there must be a determination to put an end to marital relation and cohabitation.

In order to seek decree of divorce on the ground of 'desertion', plaintiff must prove that he/she has been deserted for a continuous period of not less than two years immediately, preceding the presentation of the petition. Therefore, in order to attract the said ground there should be desertion for continuous period of two years prior to the date of institution of suit. The aforesaid requirement can be termed as a necessary pre-condition for seeking a decree of divorce on ground of desertion. Therefore, it is imperative on the part of plaintiff to plead and prove that defendant has deserted plaintiff and has continued doing so uninterruptedly for a period of two years, prior to the institution of suit.

Having summarised the settled legal position as to the nature of marital offence of desertion and when the said ground can be said to have been established by the deserted spouse, we shall now consider the evidence on this aspect.

If, in fact, there has been a separation, the essential question always is whether the act could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* co-exist. If a deserting spouse takes advantage of the *locus poenitentiae* thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home

with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable.

It is stated by the wife that she had intention to resume marital chord with the husband. Husband stated that this appellant left her matrimonial house on 28.12.2013 and since then he has/had no relation with his wife. It is stated by the wife that on 20.03.2013 she was driven out from her matrimonial house by the husband after inflicting physical torture upon her and thereafter on 22.03.2013 she went to her matrimonial home for leading conjugal life with her husband but she was not allowed to enter into the house. On the other hand husband stated that his father-in-law brought the appellant to his house and pressurised her to stay therein but wife openly denied to it. We find such story of pressurization and denial by wife to stay in matrimonial home is not credible because she went there to live with the husband.

What has been considered by the Court below is that the wife left her matrimonial house on 28.12.2012 and thereafter she had not gone back there. View taken by court below cannot be sustained as according

to scheme of Act, it is the period of two years of continuous desertion prior to institution of suit, which has to be pleaded and proved by plaintiff in order to succeed in a suit for divorce on ground of desertion. Since respondent failed to plead and prove that appellant had deserted him continuously for a period of two years, prior to date of presentation of plaint, suit for divorce on the ground of 'desertion' could not have been decreed. Apart from above, we also find that in order to justify 'desertion' on part of defendant-appellant, court below has not taken into consideration the subsequent events which took place after 28.12.2012. In order to seek decree of divorce on the ground of 'desertion', plaintiff must prove that he/she has been deserted for a continuous period of not less than two years immediately, preceding the presentation of the petition. Therefore, what implies from plain reading of aforesaid section is that defendant must have deserted petitioner for a continuous period of two years prior to the date of institution of suit. This requirement can be termed as a necessary pre-condition for seeking a decree of divorce on ground of desertion. It is imperative on the part of plaintiff to plead and prove that defendant has deserted plaintiff and has continued doing so uninterruptedly for a period of two years, prior to the institution of suit.

Going by the credible testimony of Nilima (DW1) that none of the occasions she expressed any disinclination to return to her matrimonial home. There is nothing on record to show that Nilima disliked the company of her husband. On the contrary, the credible testimony of Nilima examined as DW.1 will go to show that it was her husband and

mother-in-law who disliked the smooth sail of the matrimony between Nilima and Bipad Taran. Far from Nilima deserting her husband and her matrimonial home, it was Bipad Taran who was trying to avoid her company. The subsequent event of withdrawal of suit for restitution of conjugal rights and not allowing Nilima to enter in his house after 28.12.2013 will fortify our conclusion that Nilima had never deserted her husband so as to entitle Bipad Taran to a decree of divorce on the ground of desertion. View taken by Court below is manifestly illegal as per scheme of Act itself. We also find that there is no pleading and proof of *animus deserendi* and in absence of such pleading we cannot say that the factum of desertion has been proved.

In view of discussions made hereinabove, present appeal succeeds and is liable to be allowed. It is accordingly allowed. Accordingly, the judgement and decree passed by the learned trial court is liable to be and is hereby set aside.

With respect to permanent alimony, it appears from the document submitted on behalf of the Eastern Coal Fields Limited having its office at Devchandnagar, Paschim Bardhaman that husband is working as Stowing Mazdoor of Satgram Incline Colliery. It appears that the wife was granted monthly maintenance at the rate of rupees 8,000/-per month. Presently the wife has no source of income. Considering the present market rates and inflation and to further averred multiplicity of proceedings, we deem it

appropriate that Rs.10,000/-be granted as monthly maintenance to the wife henceforth.

Accordingly, the husband shall pay an amount of Rs.10,000/- (Rupees ten thousand only) as monthly maintenance of the appellant wife. The deduction shall be made from source and would be paid to the account of wife.

It is made clear that as and when salary is reciprocally increased, the amount of maintenance shall also be increased proportionally to the extent of increase of percentage in future salary, which the wife would be entitled to receive.

In the result, we allow the appeal and set aside the judgement and decree passed by the trial court.

No order as to costs.

Urgent photostat certified copies of this judgement, if applied for, be made available to the parties subject to compliance with requisite formalities.

I agree.

**(Harish Tandon, J.)**

**(Prasenjit Biswas, J.)**