

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

FAO-M-32-2008 (O&M)

Date of decision: 07.12.2023

Rekha Rani

....Appellant

V/s

Satish Kumar

....Respondent

CORAM: HON'BLE MR. JUSTICE SUDHIR SINGH

HON'BLE MR. JUSTICE SUMEET GOEL

Present: Mr. Pritam Singh Saini, Advocate with
Ms. Vibha Nagar, Advocate for the appellant-wife.
Mr. Mahavir Singh, Advocate with
Mr. Nitin Kaushal, Advocate for the respondent-husband.

SUMEET GOEL, J.

1. The appellant-wife has preferred the present appeal against the judgment and decree dated 22.01.2008 passed by learned Additional District Judge, Kurukshetra whereby petition filed by respondent-husband under Section 13 of the Hindu Marriage Act, 1955 (hereinafter to be referred as 'the Act') seeking dissolution of marriage was allowed and marriage between the parties was dissolved.

2. Succinctly facts first, as stated in the pleadings and evidence by rival parties.

2.1 The husband filed the divorce petition stating that marriage between the parties was solemnized on 26.06.2003, as per Hindu rites and ceremonies, at Naraingarh in District Ambala, Haryana. The parties lived together as husband and wife and cohabited with each other at village Sainsa, Tehsil Pehowa, District Kurukshetra. It was further stated by the husband that no child was born out of the wedlock and the wife left the

matrimonial home on 31.05.2004. Later on, the husband came to know that wife had performed the second marriage with one Sameer resident of Jaipur on 10.07.2004. The husband also relied upon an affidavit dated 22.06.2005 sworn by the wife acknowledging the factum of her marriage with Sameer; her not willing to live with respondent (herein)-husband, having received her articles as also not wanting any legal action against respondent (herein) - husband as also his family members. The husband also relied upon DDR lodged in this regard vide rapat No.11 dated 23.06.2005 at Police Station Pehowa, District Kurukshetra, Haryana. The husband accordingly sought for a decree of divorce on account of desertion and acts of cruelty committed by wife.

2.2 Upon notice by the learned trial Court, the wife appeared and filed a written statement denying the allegations made in the petition seeking decree of divorce. She denied having performed second marriage with one Sameer resident of Jaipur as alleged in the petition filed by the husband. She further stated that it was the family members of the husband, who had turned her out from the matrimonial home on 25.05.2006 and the affidavit dated 22.06.2005 was got prepared under threat. Dismissal of divorce petition was accordingly prayed for.

2.3 From the pleadings of the parties, following issues were framed by the learned trial Court:-

1. Whether the petitioner is entitled to seek a decree of divorce on the ground of cruelty? OPP
2. Whether the petitioner is entitled to seek a decree of divorce on the ground of desertion? OPP
3. Whether the respondent performed second marriage, as alleged, if so, its effect? OPP

4. Whether the petition is not maintainable in the present form?

OPR

5. Relief

2.4. To prove their respective stand, both the parties led their evidence.

PW-1-Abhey Ram, EHC No.313 Police Station Pehowa, appeared and produced police record pertaining to DDR No. 11 dated 23.06.2005 lodged at Police Station Pehowa, District Kurukshetra. PW-2-Tara Chand, Advocate/Notary Public, who attested the affidavit dated 22.06.2005 (Exhibit P-2), appeared in order to prove the execution of the said affidavit. PW-3-Puran Chand, who was the attesting witness of the said affidavit (Exhibit P-2), appeared in support of his having identified the parties at the time of execution of said affidavit. The husband himself appeared as PW-4 in support of his petition for grant of decree of divorce.

RW-1-appellant (herein) - wife appeared as a witness in support of her own defence against grant of divorce. No other witness was produced by the wife in support of her stand.

2.5. In this backdrop and on the basis of oral as well as documentary evidence available on record; issues Nos.1, 2 and 3 were answered in favour of the husband whereas issue No.4 was decided against the wife & a decree of divorce was granted in favour of the husband and against the wife and marriage between them was dissolved.

3. Learned counsel for the appellant-wife has argued that the learned trial Court has erred in granting the decree of divorce on the ground of desertion as there was neither any intention on part of the wife to desert nor the requirement of statutory period of two years' desertion, as stipulated

in Section 13 of the Act, had been met with in the instant case. Learned counsel has submitted that the affidavit dated 23.06.2005 (Exhibit P-2) was taken under coercion by the husband and his family members & hence, execution thereof does not prove animus on part of the wife for deserting the husband. It was also argued that the wife was turned out of the matrimonial home on 25.05.2006 by the husband and hence he cannot be permitted to take benefit of his own wrong while pleading the ground of desertion. He further argued that the impugned judgment is not based on cogent evidence and has been passed in derogation of the settled principles of law and, therefore, the same is not sustainable and deserves to be set-aside.

4. Per contra, learned counsel appearing for the respondent submits that impugned order has been passed after appreciating oral as well as documentary evidence on record. He submits that it is fully established on record that the appellant had deserted the respondent on her own free will and performed second marriage, the factum whereof, is clearly proved by affidavit dated 22.06.2005 (Exhibit P-2) and the DDR No.11 dated 23.06.2005 registered at Police Station Pehowa, District Kurukshetra, Haryana.

5. We have heard learned counsel for the parties and perused the record with their assistance.

6. The prime point for determination in the present matter is as to whether the husband ought to have been granted the decree of divorce, on the ground of desertion by the wife, by the learned trial Court.

Relevant Statute

7. Section 13 of the Hindu Marriage Act, 1955 reads as under:-

“13. Divorce:- (1) Any marriage solemnized, 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-

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[(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

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[Explanation:- In this sub-section, the expression “desertion” means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.] ”

Relevant Case Law

8. The precedents, relevant to the matter on issue, are as follows:

(i) A Full Bench of the Hon'ble Supreme Court in judgment titled as ***Bipinchandra Jaisinghbai Shah vs. Prabhavati, 1957 AIR (Supreme Court) 176***, while extensively dealing with the law on desertion has held as under:-

“40. 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".

Thus the quality of permanence is one of the essential elements which differentiates 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 ease 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 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. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the situation of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to 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 deserendico-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; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing Cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, 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 bonafide 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 also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubts. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of **Lawson v. Lawson, 1955-1 All E R 341 at p. 342**, may be referred to :-*

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution....."

(ii) In a judgment titled as **Debananda Tamuli vs. Smt. Kakumoni Katakya, 2022 (5) SCC 459**, it was held by the Hon'ble Supreme Court as under:-

"7. The law consistently laid down by this Court is that desertion means the intentional abandonment of one

spouse by the other without the consent of the other and without a reasonable cause. The deserted spouse must prove that there is factum of separation and there is an intention on the part of deserting spouse to bring the cohabitation to a permanent end. In other words, there should be animus deserendi on the part of the deserting spouse. There must be an absence of consent on the part of the deserted spouse and the conduct of the deserted spouse should not give a reasonable cause to the deserting spouse to leave the matrimonial home. The view taken by this Court has been incorporated in the Explanation added to sub-section (1) of Section 13 by Act No.68 of 1976.

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8. *The reasons for a dispute between husband and wife are always very complex. Every matrimonial dispute is different from another. Whether a case of desertion is established or not will depend on the peculiar facts of each case. It is a matter of drawing an inference based on the facts brought on record by way of evidence.”*

(iii) The Hon’ble Supreme Court in judgment titled as ***Smt. Roopa Soni vs. Kamalnarayan Soni, in Civil Appeal No.5700 of 2023 (Arising out of SLP (C) No.15793 of 2014) = 2023INSC814***, decided on 06.09.2023 held as under:-

10. *On the question of burden on a petition for divorce, burden of proof lies on the petitioner. However, the degree of probability is not one beyond reasonable doubt, but of preponderance.”*

Analysis (re legal principles)

10. The principles of law, as can be culled out from the abovesaid case-law, are as follows:

I For a Court to accept the plea of desertion two sets of pre-requisite conditions are necessary.

First set of condition(s) is *qua* the conduct/action(s) of the spouse in question. The essential conditions *qua* the deserting spouse are factum of actual separation & animus deserendi i.e. intention to permanently end cohabitation. The essential conditions *qua* the deserted spouse are absence of consent & absence of behaviour which creates reasonable cause for other spouse to stay away.

Second set of condition is that such desertion ought to be for a continuous period of two years preceding the presentation of divorce petition.

When both the abovesaid set of conditions are fulfilled, only then a spouse can be granted a decree of divorce on the ground of desertion.

II When a Court considers the plea of desertion, the same is required to be considered in the realm of factual matrix of each individual case since every case has its own peculiar facts and circumstances. This aspect assumes more significance in matrimonial litigation as the relationship between husband and wife is a complex and an intricate one.

III The burden of proof lies on the spouse seeking divorce but the degree of proof required is of preponderance and not one of being beyond reasonable doubt.

Analysis (re facts of the present case)

11. Now we revert back to the facts of the present case.

11.1 The divorce petition in question appears to have been prepared on 13.11.2006 and the same was filed by the husband on or around 15.11.2006. As per the divorce petition, the wife had left the matrimonial home on 31.05.2004. The affidavit 22.06.2005 (Exhibit P-2), executed by the wife, contains a clear averment that she had remarried on 10.07.2004

with one Sameer resident of Jaipur. She had also received back her articles which stand enumerated in a list appended with this affidavit. The affidavit (Exhibit P-2) as also the above list is clearly recorded in the DDR No.111 dated 23.06.2005 registered at Police Station Pehowa, District Kurukshetra.

11.2 In the divorce petition filed by the husband, notice was issued to the wife on 15.11.2006 for 11.01.2007. The wife had appeared, through counsel, before the learned trial Court on 11.01.2007. In the written statement dated 15.03.2007 filed by the wife, it has been pleaded that affidavit dated 22.06.2005 (Exhibit P-2) was got written by her under threat and that she was turned out from the matrimonial home on 25.05.2006.

11.3 As per material available on record, there is no complaint before any Police/Administrative authority or any petition before a Court of law by the wife before 11.01.2007 i.e. the day when she entered appearance, through Counsel, in Court in the divorce petition. Of course, she had relied upon a petition under Section 12 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as 'DV Act petition') filed by her before the Court at Jaipur on or about 05.02.2007 as also the applications given by her to Jaipur Police on 05.02.2007 and on subsequent dates thereafter. However, the fact remains that no grievance was raised by her before any Court or Police/Administrative Authority before 11.01.2007 (the day when she appeared, through Counsel, in the divorce petition proceedings). It is, thus, clear that wife never ever raised the issue of forcible execution of affidavit (Exhibit P-2) at least till her appearance in the divorce petition.

11.4 PW-2 Tara Chand (who is the Notary Public having attested the affidavit) and PW-3 Puran Chand (who is Lambardar and had identified the

parties) have been examined by the husband in support of the factum of execution of affidavit dated 22.06.2005. These two witnesses have fully supported the case of the husband regarding this aspect. This affidavit was clearly recorded and referred to in the DDR No.111 dated 23.06.2005 registered at Police Station Pehowa District Kurukshetra. As noted hereinabove, the wife did not raise any complaint/grievance regarding the forcible execution of the affidavit dated 22.06.2005 from 25.05.2006 (the date when she was turned out from the matrimonial home in her written statement as per her own stand) till at least 11.01.2007 (the day when she appeared, through Counsel, in the divorce proceedings).

11.5 In our considered opinion, the evidence brought on record regarding execution of affidavit dated 22.06.2005 (Exhibit P-2); recording of the execution of this affidavit in police DDR dated 23.06.2005; the wife not raising any grievance/complaint regarding forcible execution of affidavit till at least 11.01.2007 (the day when the wife appeared, through counsel, in the divorce proceedings); her filing DV Act petition before Jaipur Court on or about 05.02.2007 as also the complaint made to Jaipur Police 05.02.2007, when evaluated in totality, clearly shows and proves that the wife had executed the said affidavit (Exhibit P-2) without any coercion/threat as alleged by her. In her affidavit (Exhibit P-2), she had explicitly acknowledged the factum of her marriage with Sameer and her not willing to live with the respondent-husband, which proves the factum of separation on her part with an intent to permanently sever marital ties.

11.6 The facts and circumstances of the case, when examined in light of the evidence brought on record, clearly prove the factum of actual separation of the parties; animus deserendi on behalf of the wife; absence of

consent by the husband to such separation as also no proof of any behaviour by the husband which would have caused the wife to stay away. On the contrary, it is clear from the factual conspectus of the case, that the appellant-wife had left the husband with the intention to permanently severe relationship for a period of more than 2 years, immediately preceding the presentation of divorce petition.

11.7 Accordingly, we do not find any infirmity in the findings returned by the learned trial Court while granting the decree of divorce in favour of the respondent (herein)-husband and against the appellant (herein)-wife.

12. Before we part with the judgment, another important aspect of the matter is required to be looked into.

12.1 The parties have been living separately for more than 17 years. The child, as stated by the wife to have been born from the wedlock in question, is living with the wife. As per the material brought to our notice, there has been no meaningful interaction/contact between the child and the respondent-husband.

12.2 It is worthwhile to note that, in the present appeal, notice of motion was issued way back on 08.02.2008 and the matter was referred to Daily Lok Adalat of this Court, wherein strenuous efforts were made to strike reconciliation between the parties. However the efforts for reconciliation between the parties failed and the following order was recorded by the Daily Lok Adalat of this Court on 23.01.2012:-

“As per the order passed by this Court on 13.7.2011 the parties appeared in person and efforts for compromise were made by us. The respondent-husband exhibited his intention to take the appellant (wife) back to the matrimonial home and

further stated that he be given a week's time to arrange some independent accommodation for them to live together along with their child, as according to him, the accommodation presently in his occupation was not suitable. On his request, the matter was adjourned to 16.8.2011 with the direction to the parties to appear in person. On 16.8.2011 when the parties appeared in person the appellant-wife stated that as their child was to appear in some school examination commencing from 24.8.2011 and the respondent-husband had stated that he would take the appellant-wife right from the Court to the matrimonial home and would appear in Court on 6.9.2011. Pursuant to the order dated 16.8.2011 the parties informed the Court that they had stayed together and would desire this arrangement of staying together to continue for some more time with further direction that they would take their son aged about 6-7 years along with them. The matter was then adjourned to 29.9.2011 when on that date the parties appeared and expressed their desire to continue the arrangement of their staying together along with their son for some time more with a view to create congenial atmosphere. Accordingly, we adjourned the case to 9.11.2011 and then to 16.12.2011 to give them more time to live together with a view to sort out the difference, if any, between them. On the adjourned date, on the request of the parties the case was taken up on 20.1.2012 when the parties again prayed for adjournment.

Today, the parties have come present. The respondent-husband states that he is not in a position to live with his wife. Our efforts to bring about a compromise between the parties have failed. In these circumstances, the case is sent back to the Hon'ble High Court for adjudication."

12.3 From the above, it is abundantly clear that the arduous reconciliation attempts made by this Court have proved futile. However, when by judicial intervention, the marital status of the parties comes to an

end by way of passing a decree, the Court ought to grant permanent alimony or maintenance. In the instant case, the learned trial Court while granting the decree of divorce in favour of the husband has not granted any permanent alimony. We are also unable to award any permanent alimony to the appellant-wife in view of provisions of Section 25(3) of the Act as it was the appellant-wife who has deserted the husband and has performed the second marriage.

Decision

13. Resultantly the present appeal is dismissed. The decree of divorce granted by the learned trial Court is upheld. No order as to costs.

(SUMEET GOEL)
JUDGE

(SUDHIR SINGH)
JUDGE

December 07, 2023
Ajay

Whether speaking/reasoned:	Yes/No
Whether reportable:	Yes/No