

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.96 of 2020

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Akhilesh Kumar S/o Ramji Saw R/o Mohalla Bich Bazar, Sohsarai, P.S.-
Sohsarai, District- Nalanda.

... .. Appellant/s

Versus

Poonam Kumari D/o Rajendra Sah R/o Village- Sahari, P.S.- Barh, District-
Patna.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr.Rajnish Kumar, Adv.
For the Respondent/s : None

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 31-07-2024

The present appeal has been directed against the
impugned judgment dated 13.11.2019 passed in Matrimonial
(Divorce) Case No. 133 of 2015 under Section 13 of Hindu
Marriage Act, 1955, whereby and whereunder the matrimonial
case filed by the appellant for dissolution of marriage with
respondent has been dismissed.

2. Before going to the factual aspect of the case,
it is necessary to mention that appellant had earlier filed M.A.
No. 346 of 2011 which was disposed of with liberty to file fresh
divorce petition in the competent court. It is worth to mention
that Matrimonial (Divorce) Case No. 31 of 2005 was earlier
dismissed by the court of Principal Judge, Family Court,



Nalanda on 10.02.2010 and again application for divorce under Section 13 of Hindu Marriage Act was filed in the year 2015 which was dismissed by the concerned court on 13.11.2019 and against the order dated 13.11.2019, the present M.A. No. 96 of 2020 has been filed.

3. Briefly stated facts of the case is that marriage of appellant and respondent was solemnized on 16.12.1999 as per Hindu Customs and Rites. After marriage respondent was being brought at her matrimonial home at Bich Bazar, Sohsarai, District-Nalanda and after one week she returned to her parents house. After marriage appellant went to Delhi and during course of residing together one female child/Jyoti Kumari was born on 15.10.2000. It is alleged that respondent/wife used to assault and tried to provoke the appellant/husband. The appellant tried his best to pacify her behaviour and took her to Delhi but her behaviour did not change. Respondent used to abuse and assault in presence of friends and family. It is asserted by the appellant that on 16.12.2000 respondent's father came to the residence of appellant at Delhi and took the respondent back on the pretext of Pooja (worship). When the appellant went to take back the respondent, behaviour of respondent was changed and respondent replied that she would not live with him and she



demanded the salary of appellant for meeting her expenses. Appellant started paying three thousand per month but the said amount was not sufficient for her and respondent demanded and insisted for half of the salary. It is further asserted that respondent filed false case just to recover the amount. The appellant filed application for restitution of conjugal right under Section 9 of Hindu Marriage Act before the competent court vide Matrimonial Case No. 32 of 2003 and in the said case, decree has been passed by the concerned court for restitution of conjugal right and ordered respondent to go and join with her husband. It is further alleged that Matrimonial Case No. 31 of 2005 has been dismissed by the Principal Judge, Family Court, Nalanda on 10.02.2010 only on the ground that respondent lived with appellant for a period of one month and has not deserted for one year and on the said ground, desertion was not made when judgment was delivered on 10.02.2010. It has been asserted that respondent has been continuously avoiding association of her husband. In the light of said circumstance, appellant had no option but to file fresh divorce case on the ground of desertion since 2005. The appellant approached this court vide Miscellaneous Appeal No. 346 of 2011 and while disposing of the said appeal on 21.04.2015 the co-ordinate



Bench observed that the ground of desertion was not made out when judgment dated 10.02.2010 was passed but the wife has been continuously avoiding association with her husband all along, he has no option but to file a fresh divorce case on the ground of desertion from 2005 till date. At para-7 of said judgment dated 21.04.2015 it is observed that said appeal is permitted to be withdrawn while granting leave to the appellant to file a fresh divorce case in the competent court as also to take steps for stoppage of the maintenance allowance. It has been submitted that appellant suffered unnecessary harassment from the respondent since 2004 as she left the house of the appellant and appellant has already lost valuable time of life since both parties are living separately and there is no option to restore conjugal right of the parties.

4. Pursuant to the notice, respondent appeared in the court of Principal Judge, Family Court, Nalanda.

5. Respondent had filed written statement. She admitted the factum of marriage as well as birth of a female child/Jyoti Kumari and a male child/Aman Kumar. In para-3 of the plaint purposely she has not mentioned that one son/Aman Kumar was born. She denied the allegation that she has demanded any amount or half of the salary from the appellant.



She denied all the allegations made against her. She has submitted that after dismissal of Divorce Case No. 31 of 2005, appellant solemnized second marriage with Puja Kumari and one son Ansh was born out of the wedlock of Puja Kumari and appellant/Akhilesh Kumar and existence of second marriage performed by appellant during the lifetime of first wife is also amounting to cruelty against the respondent/legally wedded wife. She has further submitted that she made attempts to lead a happy conjugal life rather desertion was made by her husband/appellant.

6. Learned counsel for the appellant submitted that judgment dated 13.11.2019 passed in Matrimonial (Divorce) Case No. 133 of 2015 is bad in law as well as on the facts as the Family court has not appreciated the facts of the case and dismissed the aforesaid petition under Section 13 of Hindu Marriage Act merely believing the version of respondent that appellant entered into the second marriage in the year 2005 but the same is without any material basis to form such opinion. Appellant denied the second marriage as alleged. It has been submitted that appellant entered into second marriage during pendency of Matrimonial (Divorce) Case No. 31 of 2005 but there is no whispering in the order dated 10.02.2010 passed by



learned Principal Judge, Family Court while deciding the Matrimonial (Divorce) Case No. 31 of 2005 that appellant had already performed second marriage in the year 2005. It has been submitted that admittedly, it is undisputed that appellant and respondent left the company of each other in the year 2005 and since the year 2005, 14-15 years have already elapsed when Matrimonial (Divorce) Case No. 133 of 2015 has been dismissed on 13.11.2019 and appellant has been continuously paying maintenance amount to the respondent and desertion committed by respondent for such a long period is sufficient ground for grant of divorce. Since the year 2005 near about 19 years have already elapsed, pragmatically for which conjugal right of the appellant has not been restored and appellant himself found in several round of litigation just to overcome acrimony and agony of life as respondent herself had deserted appellant without any reason and rhyme. Initially appellant has taken effort by filing petition under Section 9 of Hindu Marriage Act for restitution of conjugal rights of both parties and just to overcome Section 9 Hindu Marriage Act respondent has joined the appellant for one month, though, it is technically served the purpose of respondent but in reality she has not joined the company of the appellant and since then appellant has suffered a



lot on the ground of desertion.

7. Respondent did not turn up before this court despite being sufficient service of notice.

8. From the side of the appellant, 3 witnesses were examined. PW-1 is Ramji Saw, PW-2 is Umesh Kumar and PW-3 is appellant himself. The appellant has not produced any documentary evidence. Respondent has adduced two witnesses, OPW-1 is respondent herself and OPW-2 is Jyoti Kumari. Respondent has adduced documentary evidence as Exhibit-A (report received under RTI), Exhibits-B, C and D (3 copy of photograph). Thereafter family court dismissed the matrimonial case filed by the appellant. Being aggrieved the appellant has preferred the present miscellaneous appeal.

9. In the light of given facts and circumstances of the case, the question arise:-

Whether the appellant has proved the case on the ground of desertion in the light of given evidence and the materials available on record or not ?

10. It is necessary to analyze the evidence of PW-3/appellant. PW-3 has reiterated the factum of marriage. He has reiterated the fact asserted in the divorce petition. He has asserted that in the year 2003 he filed the petition under Section



9 of Hindu Marriage Act for restitution of conjugal right whereby the petition was allowed by the A.D.J. in his favour and he has stated that after obtaining the decree, respondent was brought at her matrimonial house with full dignity in the year 2005 and she lived there for 2 to 4 days and she did not behave well with the family members and went to her paternal house. He has stated that Divorce Case No. 31 of 2005 was dismissed only on the ground that respondent was brought to matrimonial home after passing decree of restitution of conjugal rights and appellant has stated that the present divorce case has been brought in the light of direction of this Court and respondent has been residing separately since the year 2005. He has also stated that after obtaining the decree, the respondent was not residing with appellant and in this court all the processes have been exhausted to secure the attendance of respondent but she did not turn up before this Court and thereafter direction was given by this court to file a fresh divorce case and to take steps for stoppage of maintenance.

11. PW-1 and PW-2 have reiterated and supported the version of PW-3.

12. OPW-1 is respondent herself. She has reiterated the version of her written statement regarding the



factum of marriage and birth of Jyoti Kumari and Aman Kumar. She has stated that after dismissal of Divorce Case No. 31 of 2005, appellant/husband performed second marriage with Pooja Kumari and one son Ansh took birth on 12.08.2014. She stated that she has sought the aforesaid information under RTI and same stands marked as Exhibit-A. She further stated that appellant is enjoying his life with second wife and she as well as her children lived deserted life.

13. OPW-2 (daughter of appellant) has also supported and reiterated the statement made by OPW-1.

14. From perusal of material available on record, it is undisputed fact that appellant has filed a case for restitution of his conjugal right and same is allowed and decreed in favour of the appellant. In the year 2005 appellant has filed Matrimonial (Divorce) Case No. 31 of 2005 which was dismissed only on the ground that respondent-wife joined the company of appellant-husband within a period of one year from the date of passing the order of restitution of conjugal right. Again appellant approached this court vide M.A. No. 346 of 2011 and same has been disposed of with direction to appellant to file a fresh divorce case in the competent court and also to take steps for stoppage of maintenance. Again appellant filed



Divorce Case No. 133 of 2015 and same has been dismissed on the ground that appellant himself married with second lady and one son took birth from second marriage. Appellant himself has stated that during the course of several round of litigation it is crystal clear that respondent herself has left the matrimonial house in the year 2005 for which appellant has filed Matrimonial Divorce Case No. 31 of 2005. Though respondent has stated that appellant married with second lady in the year 2005 but in Divorce Case No. 31 of 2005 there is no whispering about second marriage of appellant and the aforesaid divorce case has been dismissed on 10.02.2010 only on the ground that one year has not elapsed when the respondent left the matrimonial home. Appellant himself has proved that he has taken shelter of Section 9 of Hindu Marriage Act for restitution of conjugal right. Respondent has not taken any effort for restitution of conjugal life as she has left the matrimonial home and the appellant-husband has proved the fact that he has tried his best to reconcile the matter by filing petition under Section 9 of the Hindu Marriage Act for restitution of conjugal right and every effort taken by the appellant has become futile as since 2005 respondent has not joined the company of the appellant and just to overcome the decree of Section 9, she joined for 3 to



4 days and she never claimed that appellant-husband has performed second marriage prior to year 2015, though allegation relates back to year 2005 and abruptly in the year 2015 when Matrimonial Case No. 133 of 2015 was filed, the respondent has taken a new defence just to overcome the Divorce Case No. 133 of 2015. Earlier she has not taken any defence of similar ground, though, she has claimed that appellant has already married in the year 2005. She has taken different stand at different point of time just to overcome the claim of the appellant. She has produced Exhibit-A, B, C and D. She has not proved how the marriage of appellant with another lady has taken place. There is no cogent material to prove that appellant has married with another lady, except bald statement given in form of defence just to overcome the claim of the appellant. Even the author of document of Exhibit-A has not been examined. The respondent has not produced any material to prove her claim that appellant has married with Puja kumari and the story of second marriage has been falsely prepared without producing any cogent material to prove the same.

15. In order to prove desertion, relevant Section is 13(1)(1-b) of the Hindu Marriage Act, 1955 which 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-

(i-b) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition;

Explanation- In this subsection, 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.

16. When we are referring the ground of desertion, we find that there are two kinds of desertion:-

(i) actual desertion and (ii) constructive desertion.

In the case of desertion, it is settled by the Hon'ble Supreme Court through judicial pronouncement and it has been interpreted that (what could be said to be "Desertion" in the divorce proceedings filed under Section 13 of the Hindu Marriage Act, 1955). The expression "Desertion" has come up under the judicial scrutiny of Hon'ble Supreme Court in ***BipinChandra JaiSinghBai Shah vs. Prabhavati (AIR 1957***



SC 176) which was considered in the case of ***Lachman UtamChand Kirpalani vs. Meena alias Mota (AIR 1964 SC 40)***. In ***BipinChandra JaiSinghBai Shah (supra)*** it has been held that if a spouse abandons the other in a state of temporary passion, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. The Hon'ble Supreme Court collating the observations made in the earlier decisions, stated its view as under:-

“Collating the aforesaid observations, the view of this Court may be stated thus: Heavy burden lies upon a petitioner who seeks divorce on the ground of desertion to prove four essential conditions, namely, (1) the factum of separation; (2) animus deserendi; (3) absence of his or her consent; and (4) absence of his or her conduct giving reasonable cause to the deserting spouse to leave the matrimonial home.”

17. The Hon'ble Supreme Court in the case of ***Debananda Tamuli vs. Kakumoni Katakya*** reported in (2022) 5 SCC 459 at para 8 held as under:-

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.



18. The Supreme Court in the case of ***Adhyatma Bhattar Alwar v. Adhyatma Bhattar Sri Devi*** reported in AIR 2002 SC 88 has observed as under:-

"The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately preceding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include 'wilful neglect of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes wilful neglect of the petitioner by the other party to the marriage, therefore, 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, no elements are essential so far as the deserted spouse is concerned: (1) 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 petitioner for divorce bears the burden of proving those elements in the two spouses respectively and their continuance throughout the statutory period."

19. The appellant has taken legal remedy just to



restore his matrimonial life in the year 2003 and same has been heard ex parte and allowed in the year 2004. Thereafter, the appellant filed divorce petition bearing Matrimonial (Divorce) Case No. 31 of 2005 and the said divorce petition was dismissed in the year 2010 only on the ground that one year has not been completed since respondent has left matrimonial house. Again appellant approached this court in the year 2011 but he was directed to file fresh divorce case in competent court and to take steps for stoppage of maintenance. In the year 2015 appellant has filed divorce petition and same was dismissed by the Principal Judge, Family Court, on the ground that respondent has claimed that appellant has performed second marriage with another lady. The document produced by the respondent has no substance to prove the allegation that appellant has married with another lady. In this way, her evidence on the said count is merely a bald statement which has no substance to prove the case in her favour. It is clear that respondent is negating the company of appellant at one or another pretext and appellant has approached the court after span of time to get legal remedy but appellant was being deprived of the said legal remedy at one pretext or another but the fact remained same that appellant was not in the company of respondent since 2005. The appellant has



raised his grievance in the divorce petition filed in the year 2005 and again in the year 2015 he has reiterated his grievance against the respondent and appellant has proved the case that respondent has left the matrimonial home without any reason and rhyme and respondent tried her best to overcome the claim of the appellant at one pretext or another and more than 19 years have elapsed since the year 2005.

20. From perusal of material available on record, it is crystal clear that the allegation regarding second marriage against the appellant relates back to the year 2005 but in Matrimonial (Divorce) Case No. 31 of 2005 there was no whispering regarding the said fact though it is a serious allegation made by the respondent against the appellant which can debar the claim of husband on the sole ground but there is no whispering in the order dated 10.02.2010 passed in Matrimonial (Divorce) Case No. 31 of 2005. In Matrimonial (Divorce) Case No. 133 of 2015, respondent levelled allegation relates back to 2005 which is totally absurd and without any basis. It is also crystal clear that appellant has proved that respondent has left matrimonial home without any reason and the appellant himself has filed case for restitution of conjugal rights in the year 2003 and same has been decided ex parte in



the year 2004 and order has been passed that respondent has to reside with appellant to lead the conjugal life. From perusal of the record it is also clear that respondent has not taken any effort for restitution of conjugal rights. The respondent joined the company of appellant at the last stage when statutory period is about to expire and she has never explained as to why she has not joined earlier. In this way, intention of respondent to resume cohabitation is not established and in the light of aforesaid material, factum of separation has been proved and inference can be drawn that there was animus deserendi on the part of respondent and her defence was innovated just to overcome the outcome of legal remedy available to the appellant and she has not taken any reasonable excuse for remaining away from matrimonial home.

21. In view of the discussions made in foregoing paragraphs and the facts and circumstances of the case, the Principal Judge, Family Court has committed error in dismissing the appellant's Matrimonial (Divorce) Case No. 133 of 2015. Thus, appellant has made out a case so as to grant decree of divorce on the ground of desertion. Therefore, judgment dated 13.11.2019 passed by the learned Principal Judge, Family Court, Nalanda, Bihar Sharif is hereby, set aside



and present M.A. No. 96 of 2020 stands allowed while accepting the Matrimonial (Divorce) Case No. 133 of 2015 and ordering dissolution of marriage between the appellant and respondent dated 16.12.1999. No order as to costs.

22. Registry is requested to draw decree in accordance with law.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

shahzad/-

AFR/NAFR	AFR
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