

**IN THE HIGH COURT OF HIMACHAL PRADES, SHIMLA.****FAO No.127/2015****Reserved on: 2.8.2016****Decided on: 3.8.2016**

Anju @ Hemlata

....Appellant

Versus

Mukesh Kumar

....Respondent

**Coram:****The Hon'ble Mr. Justice Rajiv Sharma, Judge.***Whether approved for reporting?*<sup>1</sup>

For the appellant: M/s Avinash Sharma & Vijay Sharma,  
Advocates.

For the respondent: Mr. Pawan K. Sharma, Advocate.

**Per Rajiv Sharma, Judge:**

This appeal is instituted against the judgment dated 15.1.2015 rendered by learned Additional District Judge-II, Solan, in petition No.12-AK/3 of 2013/2010.

2 The key facts necessary for the adjudication of the appeal are that the respondent-husband, Mukesh Kumar, filed a petition under Section 13 (ia) and (ib) of the Hindu Marriage Act, 1955 (in short, the Act) against the appellant-wife, Anju, on the grounds of cruelty and desertion. According to the averments made by the respondent in the

<sup>1</sup> *Whether the reporters of the local papers may be allowed to see the judgment?*



petition, the marriage between the parties was solemnized on 25/26 April, 2007. After the marriage, the appellant used to sit with her sister inside the room by bolting it from inside for 2 to 4 hours at a stretch. She refused to wash utensils. Her behaviour was not proper. The guests were not attended by her. He was serving in Army. On 19.5.2008, she accompanied with her sister left the matrimonial house without informing any member of his family. He could not visit his home due to exigencies of service. He telephonically requested his father and younger brother to contact the appellant and her family members. His brother, father and father's sister (Bua) visited the parental house of the appellant and the mother of the appellant assured them that after consulting her husband, she would send back the appellant. He also sought urgent leave in the first week of September, 2009 and visited the house of the appellant to persuade her to come back to matrimonial home.

3. The petition was contested by the appellant. She denied that on 19.5.2008 she and her sister left the matrimonial house without any reasonable cause. She also denied that the respondent and his family members accompanied by other persons had visited her parental house to resolve the matrimonial discord. According to her, she was not properly treated by the respondent and she was even given beatings. The respondent did not maintain her. She denied that she and her sister used to talk in the room for 3 to 4 hours.



4. No rejoinder was filed.
5. The learned trial court framed the issues on 29.6.2012 and allowed the petition in favour of the respondent and against the appellant. Hence, this appeal.
6. M/s Avinash Sharma and Vijay Sharma, Advocates, have vehemently argued that their client has never treated the respondent with cruelty. She has never deserted the respondent rather, their client was forced to leave the matrimonial house due to cruelty meted out to her.
7. Mr. Pawan K. Sharma, Advocate, has supported the impugned judgment dated 15.1.2015 passed by the learned trial court.
8. I have heard learned counsel for the parties and have also gone through the impugned judgment carefully.
9. PW1, Mukesh Kumar and PW4 Kamla Devi have led their evidence by filing affidavits, Ext. PW1/A and Ext. PW4/A respectively. According to PW2 Pankaj, PW3 Shankar Lal and PW5 Ashok Kumar, they had visited the house of the appellant to resolve the matrimonial discord. One of the grounds taken to prove the cruelty that the appellant and her sister used to gossip for 2 to 4 hours by bolting the room from inside, by any stretch of imagination, cannot be termed as cruelty. It is normally expected from the sisters to sit and talk together. The appellant was not supposed to wash utensils, though she is supposed to do daily chores in the house. Even if it is assumed



hypothetically that she had refused to wash utensils, it cannot be termed as cruelty to the respondent. There is no specific instance that the appellant has shown disrespect to the her mother-in-law, rather it has come in the statements of RW1, Manju and RW2 Ishwar Dass that she was maltreated. No maintenance was paid to her. She was constrained to file a petition under Section 125 Cr.P.C. Learned trial court has granted Rs.3000/- as maintenance to her. It has come on record that the respondent, his brother and mother used to insult both the sisters. According to the averments made in the affidavit, Ext. RW1/A having been tendered by the appellant in support of her examination-in-chief, her mother-in-law used to taunt her for bringing insufficient dowry. Learned trial court has disbelieved her statement only on the ground that this ground was not taken in the reply to the petition. The explanation, given by the appellant that since her real sister is also married to younger brother of the respondent and living in the same family, she avoided stating so in her reply, is plausible. Learned trial court has given perverse finding that the appellant could have filed a complaint with the police, when her brother was serving in the Police Department. The Court can take judicial notice of the fact that filing of report/complaint before the police is a last resort. Learned trial court instead of confining itself to the pleadings of the parties, unnecessarily embarked upon the social behaviour expected from the daughter-in-law towards her mother-in-law. There is no specific



instance, as quoted above, whereby the appellant has insulted or misbehaved with her mother-in-law. The respondent cannot be permitted to take benefit of his own wrongs. The appellant was forced to leave the matrimonial house on account of maltreatment meted out to her. The respondent has not filed any petition for restitution of conjugal rights under Section 9 of the Act. There is no contemporaneous record to prove that the appellant has ever received copy of complaint, Ext. PW6/A. According to the respondent, he along with his brother, father's sister, PW3 Shankar Lal and PW5 Ashok Kumar had visited the house of the parents of the appellant. Statements made by these witnesses have rightly been discarded by the learned trial court due to contradictions in their statements. Rather, as per statement of RW2, Ishwar Dass, brother of the appellant, he and his family members have tried to persuade the respondent to take back the appellant to matrimonial house, but all in vain.

10. In order to prove the desertion, the *animus deserendi* is required to be proved. The burden was on the respondent to prove cruelty as well as desertion. The instances of cruelty like sitting of sisters in one room and gossiping with each other, not washing utensils etc. cannot be termed as "cruelty" within the meaning of Section 13(1) (ia) of the Act. The respondent has created such an atmosphere which forced the appellant to leave the matrimonial home. He has not made any efforts to bring back the appellant to matrimonial home.



11 Their Lordships of the Hon'ble Supreme Court in ***Manisha Tyagi vs. Deepak Kumar reported in 2010(1) Divorce & Matrimonial Cases 451***, have explained the term 'cruelty' as under:

“24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce.”

12 Their Lordships of the Hon'ble Supreme Court in ***Ravi Kumar vs. Julumidevi reported in (2010) 4 SCC 476***, have explained the term 'cruelty' as under:

“19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word.



That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

“.. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people.”

22. “ About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

“5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties.”

13. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah versus Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their



Lordships have held that desertion is a matter of inference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

"What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized 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 summarized 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 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 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 institution 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 deserendi* co-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 *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 also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. 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(A), 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....."

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

14. Consequently, in view of the discussion and analysis made herein above, the appeal is allowed and the impugned dated 15.1.2015 rendered by learned Additional District Judge-II, Solan, in petition No.12-AK/3 of 2013/2010 is set aside. HMA Petition No. No.12-AK/3 of 2013/2010 is dismissed. Pending application(s), if any, also stands disposed of. No order as to costs.

**(Rajiv Sharma)**  
**Judge**

**August 3, 2016**  
(pankaj)