
(1991) 01 BOM CK 0049
In the Bombay High Court
Case No : S.A. No. 74 of 1984

Prabhakar

APPELLANT

Vs

Sou. Mangala

RESPONDENT

Date of Decision : 10-01-1991

Acts Referred:

Hindu Marriage Act, 1955 — Section 13(1)

Citation : (1991) 1 DMC 620

Hon'ble Judges : H.W. Dhabe, J

Bench : Single Bench

Advocate : S.K. Sanyal and A. Shinde, for the Appellant; A.B. Choudhari, for the Respondent

Final Decision : Dismissed

Judgement

H.W. Dhabe, J.—This is an appeal in which the question of the right of a wife in matrimonial matter is involved. It is not in dispute that the appellant-husband is in service in the Municipal Council, Hinganghat, where he also resides. It is also not in dispute that his wife is also in service working as a primary school teacher under the Zilla Parishad Wardha. It is the case of he wife that she has been in service since 1962 and her service is transferable within the jurisdiction of the Zilla Parishad, Wardha. On 8-5-1975 the marriage between the parties was: solemnized. At that time the wife admittedly was not living in Hinganghat but was serving in village Hingani. It is also ah undisputed fact that after her marriage she continued to serve at a place different from Hinganghat and during vacations or holidays she used to go to her husband"s place in Hinganghat and so also vice versa her husband used to visit her at her place of service. During this period the wife conceived from the husband and delivered a female child who is living with her.

2. It is the case of the husband that at the time of the marriage there was an oral agreement between him and his wife that she should leave her service and should come and live with him. According to him he suffered separation for about

2 years but thereafter he insisted that she must leave the job and come and reside with him and that he has not need of her income and can maintain her with his own income. It may be stated at this stage that the wife is doing a teacher's job and is holding a slightly higher position than that of her husband. She is also getting slightly higher salary than him. It appears that after the husband insisted upon his wife to leave the job and to start living with him he has not allowed the wife to come to his house and stay with him nor has he visited her residence and stayed with her. According to the husband after all the attempts to bring the wife to his house failed he filed the instant petition u/s 13(1)(ib) of the Hindu Marriage Act, 1955 on the ground that his wife has deserted him for a continuous period of more than two years prior to the date of the petition.

3. In answer to the case set out by the petitioner/husband the case of the wife is that there was no oral agreement at the time of the marriage that she should leave her service and should stay with her husband in his house. According to her she was even helping her husband by sending Rs. 150/- per month as her husband was living with his parents at Hinganghat. It is further her case that she was ready and willing to continue the same arrangement of going to the husband's place during vacations or holidays and that the husband also could come to her place whenever he desired. She has also alleged that she had tried for her transfer nearer to the place of her husband and during the pendency of the instant appeal in this Court I am informed by both the parties that she is nearer to Hinganghat as she is transferred and posted at Hamdapur which is 20 to 25 Kilometres away from-Hinganghat. It is, therefore, the case of the respondent wife that she has not permanently forsaken or withdrawn from the matrimonial obligations and, therefore, there is no desertion on her part within the meaning of Section 13(1)(ib) of the Act. There is also no animus desired to permanently withdraw from cohabitation.

4. The learned trial Court framed necessary issues on the basis of the pleadings of the parties. The evidence led in the case consists only of the husband and wife themselves. The learned trial Court on the basis of the evidence on record has held that under the Hindu Law, there is an obligation upon the wife to live with her husband in his house and by refusing to do so by not resigning the job as commanded by her husband the respondent-wife had deserted him within the meaning of Section 13(1)(ib) of the Act. He has further found that there was desertion by her from 12-2-1977 since when there was no cohabitation between the parties. He, therefore, concluded that the respondent-wife had deserted her husband continuously for a period of more than two years within the meaning of Section 13(1)(ib) of the Act. He has further concluded that the relations between the parties were irretrievably strained and it was of no use passing merely a decree for judicial separation. He, therefore, granted a decree of divorce to the appellant-husband.

5. The respondent-wife challenged the judgment of the learned trial Court by

filing an appeal in the District Court, Wardha. The learned District Judge, Wardha by his judgment dated 8-4-1983 held that there was no animus desired on the part of the wife to desert her husband because it was proved in the instant case that she was willing to stay with her husband during vacation and holidays and that he was also free to go to her at any time when he wanted to do so. The view, therefore, taken by the learned lower appellate Court was that the wife had not permanently forsaken or had not permanently withdrawn from cohabitation with her husband and, therefore, there was no desertion by her within the meaning of Section 13(1)(ib) of the Act. He, therefore, allowed the appeal preferred by the respondent-wife and set aside the judgment and decree of the learned trial court. He thus dismissed the petition for divorce filed by the appellant husband. Being aggrieved, (he appellant-husband has filed the instant appeal in this Court.

5A. The learned counsel for the husband has invoked the principles of orthodox Hindu Law that the wife must be obedient to her husband and must live in his home. Her refusal to do so according to her amounts to desertion within the meaning of Section 13(1)(ib) of the Act. On the contrary the learned counsel for the wife has urged before me that the modern changes in living of the Hindu society and the Constitutional provisions treating the men and women as equal should be taken into consideration in considering the question whether there is desertion within the meaning of Section 13(1)(ib) of the Act. The submission is that the inroads made by the modern thoughts upon the orthodox Hindu Law should be given effect to in considering the question of the alleged desertion by the wife. A similar concept of desertion is applicable in the Matrimonial Causes Act, 1973 in England in which the concept is further made clear by upholding that desertion is not the withdrawal from a place but from a 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". See : Halsbury's Laws of England-Vol. 13-4th Edition-Paras 575 and 576. The Delhi High Court has also taken the above view in the case of Om Prakash Narang Vs. Prabha Narang, .

6. What is desertion and what is meant by animus desired is now well settled particularly in view of the judgment of the Supreme Court in the case of Lachman Utamchand Kirpalani Vs. Meena alias Mota, . In its essence desertion means intentional forsaking and abandonment of one spouse by the other without other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. For the Offence of desertion so far as the deserting spouse is concerned two essential conditions must be fulfilled i.e. (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, namely (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving matrimonial home to form the necessary intention as stated above. I may at this stage make a reference to the explanation given in Section 13(1) introduced by Act No. 68 of 1976 which is

clearly intended to give effect to the interpretation given to the expression "desertion" by the Courts. According to the said explanation "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 by the other party to the marriage."

6A. It is in the context of this law relating to desertion that it is necessary to consider in the instant case whether the wife has deserted her husband. I may also make a reference to the further and--important requirement of Section 13(1)(ib) that such a desertion should be for a continuous period of not less than two years immediately preceding the presentation of the petition. One of the well-settled principles which needs to be borne in mind is that there is no exhaustive definition of the term "desertion" and each case has to be considered in its own facts and circumstances to find out whether there is desertion within the meaning of Section 13(1)(ib) of the Act.

7. Bearing this principle in mind to appreciate the evidence on record in the instant case it may be seen that in the instant case there is no dispute that prior to the marriage on 8-5-1975 the wife had been employed as a teacher in the Zilla Parishad service. According to her she was employed since 1972. Thus, on the date of the marriage she had almost put in about three years" service. The husband had married her fully knowing that she was in service in the Zilla Parishad and that her posting was not in Hinganghat but in some place where the Zilla Parishad School was situated. He was further aware of the fact that her service was transferable and she could be posted in any school of the Zilla Parishad. The husband has, however, set out a case that at the time of marriage there was an oral agreement with his wife that she should leave the job after marriage. The finding of fact in this regard rendered by the learned lower appellate Court, however, is against him. The said finding of fact cannot be said: to be perverse and has therefore to be maintained. It may be seen that it is not in dispute that for two years after the marriage the wife continued in service and that the husband used to go to her place and she also used to go to his place during the said period. If it was desired by the husband that she should resign the job such an arrangement would not have continued for such a long period.

7A. Once the case of the husband that there was an oral agreement with his wife that his wife should resign the job stands rejected the fact on record would show that the parties had not decided upon their matrimonial home and even after marriage the wife continued to live at the place where she was serving and both of them visited each other at their places. It is only after a period of two years that the husband had asked his wife to leave the job and to live with him at his place. It is further clear from the evidence on record that it is the husband who had discontinued the--arrangement of visiting each other and has not allowed his wife to visit him because she was adamant and did not leave the service. It may be stated that it has been proved in this case that the wife had told her husband that the same arrangement should continue and that he should continue to visit

her and that she would continue to visit him at his place during vacations and holidays and further that she would try to get herself transferred to the nearest place from Hinganghat.

8. I may at this stage state that I had called both the parties during the hearing of this appeal personally. The learned counsel for the wife informed me that the wife at present is transferred to village Hamdapur which is only 20 to 25 kilometres from--Hinganghat but since there is no direct bus service it takes about three hours to reach Hinganghat from Hamdapur via Wardha. Since there is no direct bus service it is not possible for the wife to stay with her husband in Hinganghat and go to Hamdapur. It is also made clear that if she is posted at a place from where she can go to discharge the duties in her service she is ready to stay with her husband at Hinganghat. It is clear from the above facts that the place where the wife is serving is not far away and the parties can visit each other very conveniently. It may also be stated that even if she is posted at any place in the district Wardha under the jurisdiction of the Zilla Parishad the said place can not be far away from Hinganghat and the parties can easily visit each other whenever they choose to do so.

9. The question, therefore, to be considered is be whether it can be said in view of the clear evidence of wife and the statement which is also made before me whether the wife has permanently forsaken and abandoned the society of the petitioner or that there is total repudiation of the obligations of marriage by her. In my view, looking to the facts and circumstances in this case and particularly the fact that at the time of marriage itself both parties were living separately and had not settled upon a matrimonial home and that they continued to visit each other it cannot be said that there is total repudiation of the obligations of marriage by the wife when she had clearly stated that she was willing to visit the place of her husband during vacations and holidays and that her husband can visit her at any time.

10. The learned counsel for the husband has, however, urged before me that according to the Hindu Law it is the wife's duty to her husband to submit herself obediently to his authority and to remain under his roof and protection and if she does not obey him and is not ready to Jive under his roof and protection it would mean desertion by her within the meaning of Section 13(1)(ib) of the Act. The learned counsel for the wife has, however, urged before me that the above orthodox principle of Hindu Law is not valid and applicable in the present day modern Hindu society under which women have equal rights with men and arc earning their livelihood like men by taking recourse to service, profession or any other occupation like him. It is, therefore his contention that the wife must have an equal voice in settlement of the matrimonial home and if that is not settled at the time of the marriage it cannot be said that she has withdrawn from the matrimonial home. In support of his contention he has relied upon the decision of the Delhi High Court in the case of Swaraj Garg Vs. K.M. Garg, . In support of the orthodox view the learned counsel for the husband has relied upon the

decision of the Punjab High Court in the case of Smt. Tirath Kaur v. Kirpal Singh AIR 1964 Pun 29.

11. In my view the concept of desertion cannot be static and must take notice of the reforms and changes in the society. Such reforms and changes in the society have been taken note of by the State also when such reforms and changes in the Shastric or orthodox Hindu Law were introduced by Legislation by the State. This Act itself has taken notice of such changes. Divorce was, itself not permitted under the orthodox Hindu Law but it was permitted by the statutory provisions of this Act. I may in particular refer to the provisions of permanent alimony and maintenance in Section 25 of the Act. The maintenance there under can be granted even to the husband if he has no means but on the contrary the wife has means to maintain him. The above provisions would show that the original concept that there was an obligation upon the husband to maintain his wife irrespective of the question whether he has means or not is changed and even the husband can claim maintenance from his wife under the aforesaid provisions of the Act if he has no means to maintain him but the wife has.

12. It may be seen that since in the old days the wife was not earning but was staying with her husband under his roof and protection and was thus dependent solely upon him, the duty was cast upon the husband to maintain her. If in these modern times, the wife is herself earning and is thus not solely dependent for her maintenance upon her husband but on the contrary can even support her husband and her family which change has been taken note of in the Act itself when it is provided therein that the husband can also claim maintenance from his wife, if he has no means to support him, it would not be proper to take recourse to the old and orthodox principle of Hindu Law that the wife is obliged to live with her husband under the same roof and his protection to determine whether there is desertion on her part if she failed to discharge the above obligation because she is in service else where. Moreover, from the facts in the instant case, it is clear that the places of service of the parties were nearer in the same district and they were in fact visiting each other at their places since their marriage. I would, therefore, prefer the view taken by the Division Bench of the Delhi High Court in the case cited supra rather than follow the decision of the Punjab High Court cited supra. The view taken by the Delhi High Court is in consonance with the aspirations of women folk and the rights they enjoy under our constitution which has guaranteed to them equal rights with men.

13. As regards the settlement of matrimonial home, I have already held that there was no matrimonial home settled by the parties in the instant case because even after the marriage the wife continued to live at her parents' place where she was serving and the arrangement of visiting each other continued. The Delhi High Court has rightly held that the matrimonial home should be settled by consent of both parties. I may also refer to para 623 of Halsbury's Laws of England Fourth Edition Vol. 13, in this regard. It is stated therein that it is the husband's duty to provide his wife with a home according to his circumstances.

There is no absolute rule whereby either party is entitled to dictate to the other where the matrimonial home shall be; the matter is to be settled by agreement between the parties, by a process of give and take, and by reasonable accommodation.

14. It was therefore, necessary that when knowing fully well that both were already in service at different places, both should have decided by agreement and by adjustment of each other where they should have a matrimonial home. It is in evidence that originally at the time of her marriage the wife was living at Hingani where she was serving. She continued in that place till she was transferred to Zadasi as stated above. The husband was and is living with his parents at Hinganghat. This arrangement shows that there is no permanent matrimonial home agreed to and settled between the parties. There is, therefore, no question of there being any obligation upon the wife to reside in her matrimonial home in the facts and circumstances in the instant case. The insistence" of the husband that the wife should leave the service and reside with him is not, therefore, warranted in the facts and circumstances in the instant case and the attitude of the wife showing that she is ready and willing to continue the arrangement of visiting each other at their places would show that there is no desertion on her part. The facts in this case would show that because they are living separately it is not an impediment in the discharge of their matrimonial obligations.

15. Adamant attitude of the husband that she should resign and then come to live with him would show that the husband is not allowing the wife to come to him. If at all, the animus desired particularly in regard to the constructive desertion can be attributed to him and not to his wife. The view taken by me is not only supported by the Division Bench of the Delhi High Court Swaraj Garg Vs. K.M. Garg, cited supra but is also supported by the judgment of the Madras High Court in the case of N.R. Radhakrishnan v. N. Dhanalaxmi AIR 1975 Mad 33 1. The contention raised on behalf of the husband, therefore, deserves to be rejected.

16. In the result, the instant appeal fails and is dismissed. However, in the circumstances, there would be no order as to costs in this appeal.