

(2017) 08 RAJ CK 0037
In the Rajasthan High Court
Case No : 379 of 2012

Vimal Kumar Mishra S/o Shri Narsingh Prasad Mishra	APPELLANT
Vs	
Smt Savita W/o Sh. Vimal Kumar Mishra	RESPONDENT

Date of Decision : 23-08-2017

Acts Referred:

[Hindu Marriage Act, 1955](#), [Section 13](#) -
Divorce

Citation : (2017) 08 RAJ CK 0037

Hon'ble Judges : Ajay Rastogi, Ashok Kumar Gaur

Bench : DIVISION BENCH

Advocate : Neeraj Tiwari, Sunil Kumar Singh

Judgement

1. The present misc. appeal is filed by appellant-husband assailing the judgment & decree dated 22.11.2011 passed by Id. Family Court No.1, Jaipur, wherein the application filed by the husband under Section 13 of the Hindu Marriage Act seeking decree of divorce on the ground of cruelty and desertion has been dismissed.
2. The facts in nutshell are that the marriage of the appellant and respondent was solemnized on 17.07.1994 as per the customs and traditions prevailing in Hindu community and out of the said wedlock, a girl child was born on 27.08.1996.
3. The appellant filed an application under Section 13 of the Hindu Marriage Act, 1955 on 19.03.2004 before the Family Court, Jaipur. The appellant pleaded in his application that respondent-

wife immediately after marriage, on first night disclosed that her marriage was solemnized without seeking her consent and she was forced to give the consent due to her father not being alive and as such, the marriage was under compulsion. It was alleged that the respondent-wife refused to stay at her matrimonial house and she went very often to her parents' house and used to reside there for considerable time. She tried to avoid company of the appellant and her visit to her parents' house was a daily routine, and in spite of several requests, the respondent-wife did not stay at matrimonial home.

4. It was alleged that the behaviour of the respondent-wife was quite rude and non-cooperative towards family members of the appellant. She did not participate in normal household work at her matrimonial home. It was alleged that the respondent-wife had gone to Assam after seeking permission of the appellant and she insisted that appellant should shift there and stay with her. When the appellant came to know about respondent being pregnant, he requested her to stay at matrimonial home to deliver the child but she went to her parents' house. The appellant pleaded that the respondent had gone to Assam on death of her brother, namely, Chandra Prakash and after the death of her brother, the appellant's father had gone to Assam to bring her back but she refused to come back. The appellant pleaded that the respondent was determined to stay at her own parents' house and as such, she deprived him from matrimonial company. The appellant pleaded that on all social occasions in the family like engagement of his brother, religious function, death of uncle of appellant, the respondent-wife did not come at all and all these acts caused mental cruelty to the appellant.

5. The appellant pleaded that the respondent-wife had left

matrimonial home permanently by deserting him on 25.09.1996 and he was also deprived of love and affection of his daughter. The appellant sought a decree of divorce on these averments.

6. The respondent-wife filed reply and denied the allegations of cruelty as well as of desertion. In brief, the respondent pleaded that the mother of the appellant was cruel to her and she used to misbehave. It was pleaded that the respondent and appellant had gone to Vaishno Devi immediately after marriage and their relations were normal but after some time, she was scolded and was beaten. It was pleaded that when the respondent's close relatives died, no body came from the appellant's side to attend social functions. It was pleaded by her that she had gone to her in-laws house in December, 1996 with her daughter and there, her daughter was seriously ill and the appellant did not take her daughter to the doctor and on 19.01.1997, she was sent back to her parents' house and since then, she was staying there and no efforts were made by the appellant to bring her back and she pleaded that she did not want a decree of divorce. She wanted to live with the appellant-husband.

7. On the basis of the pleadings of the parties, the following issues were framed-"VERNACULAR MATTER OMITTED"

8. The appellant in support of his case got himself examined as PW-1 and Kamal Mishra as PW-2. In defence, the respondent produced herself as DW-1, her elder sister Sangeeta Sharma as DW-2 and her elder sister Sarita Sharma as DW-3.

9. The Family Court on the basis of evidence on record has come to the conclusion that neither the ground of cruelty nor of desertion is proved and as such, has rejected the application filed by the appellant-husband.

10. The learned counsel for the appellant submitted that the trial

court has erred in giving finding on both the issues and the evidence has not been considered in right perspective while rejecting the application filed by the appellant.

11. The learned counsel for the appellant has made submission that there was ample evidence to prove that appellant had suffered mental cruelty by the various acts pleaded and proved in the case. It has been submitted that the Family Court has failed to consider that the appellant and his family members tried their level best to reconcile the differences of husband and wife and on several occasions, they wanted to resolve the controversy between the parties. It is argued that the respondent-wife was adamant to reside separately from the appellant without any just and reasonable cause, which definitely amounted to an act of cruelty as the appellant was deprived from matrimonial company of his wife.

12. The learned counsel for the appellant has argued that there was enough evidence on record to prove that right from the first day of marriage, the wife due to her stubborn attitude and having no interest to share anything with her husband had indulged in act of cruelty.

13. The learned counsel for the appellant has further argued that the issue of desertion has wrongly been decided against the appellant. The Family Court failed to see that appellant and his family members requested several times the respondent to discharge her marital obligations and to stay with the appellant. The learned counsel has argued that finding of the court below that since no application under Section 9 of the Restitution of Conjugal Rights was filed, an adverse inference should be drawn against the appellant, is misconceived.

14. The learned counsel for the appellant has argued that the

respondent herself had admitted in her statement that she was living separately since 1996 and yet decree of divorce has been declined.

15. Per contra, the learned counsel for the respondent has argued that there is no illegality in the judgment & decree passed by the Family Court. The grounds raised by the appellant for claiming decree of divorce were not proved and urged that impugned judgment & decree requires no interference by this Court.

16. We have heard the learned counsel for the parties and considered the material on record.

17. A perusal of the impugned judgment shows that the Family Court though had framed separate issues of cruelty and desertion, however, the separate findings have not been recorded on each of the issues.

18. Cruelty, which is a ground for dissolution of marriage, is willful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental or as to give rise a reasonable apprehension of such a danger. The mental cruelty falls within purview of a matrimonial wrong. The cruelty has been used in relation to human conduct and human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. Cruelty is a course or conduct of one, which is adversely affecting the other. Cruelty can be intentional or unintentional. Cruelty in matrimonial life may be of unfounded variety, which can be subtle or brutal. It may be by conduct, words, gestures, by a mere silence, violent or non-violent.

19. The various decisions of the Apex Court lay down the principle of adjudging the cruelty. The Apex Court in the case of Narendra Vs. K.Meena [(2016) 9 Supreme Court Cases

455], while dealing with the issue of mental cruelty by leveling baseless allegation without foundation has found it to be a very serious nature and it has been held that such kind of baseless and false allegation surely can be a cause for mental cruelty. The Apex Court has held in the said judgment as under:-

"15. With regard to the allegations about an extra- marital affair with maid named Kamla, the re- appreciation of the evidence by the High Court does not appear to be correct. There is sufficient evidence to the effect that there was no maid named Kamla working at the residence of the appellant. Some averment with regard to some relative has been relied upon by the High Court to come to a conclusion that there was a lady named Kamla but the High Court has ignored the fact that the Respondent wife had levelled allegations with regard to an extra-marital affair of the appellant with the maid and not with someone else. Even if there was some relative named Kamla, who might have visited the appellant, there is nothing to substantiate the allegations levelled by the Respondent with regard to an extra-marital affair. True, it is very difficult to establish such allegations but at the same time, it is equally true that to suffer an allegation pertaining to one's character of having an extra-marital affair is quite torturous for any person - be it a husband or a wife.

16. We have carefully gone through the evidence but we could not find any reliable evidence to show that the appellant had an extra-marital affair with someone. Except for the baseless and reckless allegations, there is not even the slightest evidence that would suggest that there was something like an affair of the appellant with the maid named by the Respondent. We consider levelling of absolutely false allegations and that too, with regard to an extra- marital life to be quite serious and that can surely be a cause for metal cruelty.

17. This Court, in the case of Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate, has held as under:-

"7. The question that requires to be answered first is as to whether the averments, accusations and character assassination of the wife by the appellant husband in the written statement constitutes mental cruelty for sustaining the claim for divorce under Section 13(1) (i-a) of the Act. The position of law in this regard has come to be well settled and declared that levelling disgusting accusations of unchastity and indecent familiarity with a person outside wedlock and allegations of extramarital relationship is a grave assault on the character, honour, reputation, status as well as the health of the wife. Such aspersions of perfidiousness attributed to the wife, viewed in the context of an educated Indian wife and judged by Indian conditions and standards would amount to worst form of insult

and cruelty, sufficient by itself to substantiate cruelty in law, warranting the

claim of the wife being allowed. That such allegations made in the written statement or suggested in the course of examination and by way of cross-examination satisfy the requirement of law has also come to be firmly laid down by this Court. On going through the relevant portions of such allegations, we find that no exception could be taken to the findings recorded by the Family Court as well as the High Court. We find that they are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous for her to live with a husband who was taunting her like that and rendered the maintenance of matrimonial home impossible."

20. The close scrutiny of the statement of appellant reveals that the respondent right from the initial days of her marriage was not interested in staying with the appellant. The respondent was in frequent habit of leaving the matrimonial home without any cogent reason and she has deprived the appellant from the matrimonial company. There is further ample evidence to prove the fact that on several efforts being made to persuade the respondent to come back by the relatives of the appellant, failed and she had never shown her inclination to stay with the appellant. The Court also finds that on several social occasions, the company of wife-respondent was required and as such, the respondent always failed to participate and did not show her involvement in appellant's social life. We also find that merely by birth of a child within two years of marriage, does not lead to situation where it can be presumed that appellant was having a normal matrimonial life. The long period of separation, lead to mental cruelty for a husband.

21. The extract of cross-examination of the appellant for the present purpose is reproduced as under:-

"VERNACULAR MATTER OMITTED"

22. We have further closely examined the testimony of

respondent-wife and we find that she had taken shelter of not going to matrimonial home by saying that she was ill-treated by her-in-laws. She has further taken a plea that on account of death of her brother in family, the appellant did not come. The said plea taken by the respondent does not justify her action of not staying with her husband-appellant and to maintain a normal matrimonial life.

23. The extract of cross-examination of the respondent, being relevant for the present purpose is reproduced as under:-

"VERNACULAR MATTER OMITTED"

24. The Court finds that the finding of the Id. Family Court is not based on correct appreciation of facts which have come on record. The Family Court has misdirected itself in reaching to the conclusion that non-staying of respondent with the appellant was of not a great significance. On the contrary, this Court finds that the appellant was deprived of company of his wife for no justifiable reason and as such, it amounted to mental cruelty.

25. For establishing the ground of desertion as far as deserting spouse is concerned, two conditions are necessary: (i) the factum of separation and (ii) the intention to bring cohabitation permanently to an end (*animus descendi*). Similarly, two elements are essential so far as the deserted spouse is concerned: (i) the absence of consent and (ii) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention.

26. The Apex Court in the case of *Malathi Ravi, M.D. Vs. B.V.Ravi, M.D.*, (2014) 7 Supreme Court Cases 640 has laid down the law for proving the desertion. Inferences may be drawn from certain facts of those acts or by conduct, expression of intention, both anterior and subsequent to the actual acts of

separation. The relevant para is quoted here under:-

"18. To appreciate the rivalised submissions raised at the Bar, we have carefully perused the petition and the evidence adduced by the parties and the

judgment of the Family Court and that of the High Court. The plea that was raised for grant of divorce was under Section 13(1)(i-b) of the Act. It provides for grant of divorce on the ground of desertion for a continuous period of not less than two year immediately preceding the presentation of the petition. The aforesaid provision stipulates that a husband or wife would be entitled to a dissolution of marriage by decree of divorce if the other party has deserted the party seeking the divorce for a continuous period of not less than two years immediately preceding the presentation of the petition. Desertion, as a ground for divorce, was inserted to Section 13 by Act 68 of 1976. Prior to the amendment it was only a ground for judicial separation.

19. Dealing with the concept of desertion, this Court in Savitri Pandey v. Prem Chandra Pandey has ruled thus:-

"Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations i.e. not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case. After referring to a host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbai Shah v. Prabhavati¹ held that if a spouse abandons the other in a state of temporary passion, for example, anger [pic]or disgust without intending permanently to cease cohabitation, it will not amount to desertion."

20. In the said Savitri Pandey case, reference was also made to Lachman Utamchand Kirpalani's case wherein it has been held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (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. For holding desertion as proved 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."

27. The ground of desertion which has not been found proved by the Id. Family Court, needs a closer scrutiny to find out whether the wife had voluntarily deserted her husband or she was forced to leave company of her husband by creating such an atmosphere by appellant.

28. The closer scrutiny of the evidence, clearly reveals that the respondent-wife after delivery of her child in her own parental house, did not stay with the appellant. There is further evidence to show that the efforts which were made to bring her back also failed. The Court further finds that respondent herself has admitted in her cross-examination that she was staying separately since 1996.

29. This Court is of the opinion that the Id. Family Court has not considered the evidence in right perspective with respect to ground of desertion. The appellant had proved that it was the wish of the respondent that she should not stay in her matrimonial home and she avoided the same by one pretext or the other. The long separation results in break in matrimonial bond and it becomes irreparable by passage of time.

30. The Court finds that the issue of desertion was proved by the husband and as such, he was entitled for decree of divorce. Accordingly, the findings on both the issues of cruelty and desertion being perverse and contrary to material on record, are set aside. .

31. Consequently, the appeal filed by the appellant is allowed and the judgment & decree dated 22.11.2011 passed by the

Family Court No.1, Jaipur is set aside. Their marriage solemnized on 17.07.1994 stands dissolved and the appellant-husband is held entitled for the decree of divorce. Registry to do the needful. No costs.