

A vs.m

A vs.m

SooperKanoon Citation : sooperkanoon.com/1223767

Court : Delhi

Decided On : Jul-03-2019

Appellant : A

Respondent : M

Advocate for Pet/Ap. : Mr. Sunil Mittal, Ms. Ekta Sikri, Ms. K. Gayatri, Ms. Aishwarya Anand, Mr. Arun Sanwal, Mr. Rohit Kumar

Judgement :

* % + IN THE HIGH COURT OF DELHI AT NEW DELHI Date of decision:

3. d July, 2019 FAO5062002 & CM No.18768/2009 (u/O VII R-7 CPC) A Appellant Through: Mr. Sunil Mittal, Sr. Adv. with Ms. Ekta Sikri, Ms. K. Gayatri, Ms. Aishwarya Anand & Mr. Arun Sanwal, Adv. versus M Through: Mr. Rohit Kumar, Adv. Respondent + MAT.APP. 87/2008 & CMs No.12602/2008 (u/O XLI R-27 AND CPC) & 18763/2009 (u/O VII R-7 CPC) M Through: Mr. Rohit Kumar, Adv. Appellant A versus Respondent Through: Mr. Sunil Mittal, Sr. Adv. with Ms. Ekta Sikri, Ms. K. Gayatri, Ms. Aishwarya Anand & Mr. Arun Sanwal, Adv. CORAM: HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW1 FAO No.506/2002 has been preferred by the appellant husband against the judgment (dated 2nd August, 2002 in HMA No.1103/ of the Court of the Additional District Judge, Delhi) of dismissal of his petition for dissolution of marriage by a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act, 1955. The appellant husband had also filed an application before the

learned Additional District Judge pointing out that certain judgments cited at the bar at the time of addressing arguments did not find mention in the judgment. The FAO5062002 & MAT.APP. 87/2008 Page 1 of 33 application was disposed of vide order dated 23rd August, 2002 of the Additional District Judge. The order dated 23rd August, 2002 is also impugned in the appeal.

2. The said appeal came up before this Court first on 24th September, 2002 when notice thereof was ordered to be issued. Vide order dated 14th January, 2004 the appeal was admitted for hearing. The appeal was listed for hearing from time to time but for some reason or the other remained to be heard.

3. MAT Appeal No.87/2008 has been preferred by the appellant wife against the judgment and decree (dated 30th May, 2008 in HMA No.233/2008 of the Court of Additional District Judge, Delhi) allowing the petition of the husband for dissolution of marriage by a decree of divorce under Section 13(1)(ib) of the Hindu Marriage Act and resultantly dissolving the marriage of the parties. The said appeal came up first before this Court on 3rd September, 2008. Vide order dated 8th September, 2008, notice of the appeal was ordered to be issued and it was ordered that the husband shall not remarry till the next date of hearing. Vide order dated 30th January, 2009, the appeal was admitted for hearing and the interim order confirmed till the disposal of the appeal.

4. Trial Court records of both the appeals were requisitioned and have been received. Efforts made from time to time for amicable settlement did not succeed. Since 8th December, 2011, the appeals are being taken up together for hearing.

5. The appeals came up before me on 12th September, 2018 when hearing of the appeal of the wife against the judgment and decree granting FAO5062002 & MAT.APP. 87/2008 Page 2 of 33 divorce on the ground of desertion was commenced and the counsel for the wife argued (i) that the husband alleges desertion w.e.f. 14th January, 1995; (ii) that the husband, on 12th October, 1996 instituted the petition for dissolution of marriage by a decree of divorce on the ground of cruelty; (iii) that it is only thereafter on 8th September, 2000 that the petition for dissolution of marriage by a decree of divorce on the ground of desertion was filed; (iv) that to be able to sue for dissolution of marriage on the

ground of desertion, desertion for a period of two years is necessary; and, (v) that the husband, prior to the expiry of the said period of two years, applied for divorce on the ground of cruelty and whereafter it was not possible for the wife to join cohabitation with the husband; the filing of the divorce petition on the ground of cruelty was a message to the wife that the husband does not want to live with the wife.

6. On enquiry it was informed that before 14th January, 1995, the wife was employed with the Central Government Health Scheme (CGHS) at Jaipur, was at Jaipur and the husband who was employed with the Revenue Services, was posted at Agra, but the parties together availed of Leave Travel Concession (LTC) in December, 1994/January, 1995.

7. Though the counsel for the wife, on 12th September, 2018 relied on Shakuntala Kumari Vs. Om Parkash Ghai AIR1981 Del 53 on the proposition that on filing a petition for dissolution of marriage on some other ground during the statutory period of two years of desertion, no case for desertion can be made out but the judgment was not found to be laying down any such absolute proposition of law and was found to be on its own facts. The counsel for the wife on that date also cited Madan Mohan FAO5062002 & MAT.APP. 87/2008 Page 3 of 33 Manna Vs. Chitra Manna AIR1993 Calcutta 33 (DB) in this regard, but it was found that in that case the petition for divorce on the ground of desertion was filed before completion of two years and in the said context it was held that time spent after filing of petition could not be counted for computing period of desertion.

8. On further enquiry on 12th September, 2018, it was informed that the husband was present in Court and was then posted at Mumbai and the wife continued to be posted at Jaipur but was not present in the Court. It was the contention of the senior counsel for the husband that the parties lasted together for only eight years and there were no issues of the marriage.

9. In the aforesaid circumstances, on 12th September, 2018, it was yet further enquired from the counsel for the wife, whether the wife was willing to make any efforts for joining cohabitation with the husband at Mumbai.

10. The counsel for the wife stated that he will have to take instructions but also contended that the appeals have to be decided on the material on record.
11. Being of the opinion that the intention of a spouse can be known from the conduct of the spouse and if the wife is not anxious to save her marriage by appearing in the Court and/or joining cohabitation, that will be a factor to be considered, the hearing was adjourned to 13th September, 2018 for the wife of appear in the Court.
12. The wife appeared on 13th September, 2018 and stated that she will join the husband at Mumbai on 15th September, 2018. FAO5062002 & MAT.APP. 87/2008 Page 4 of 33
13. The husband was made to furnish his residential address at Mumbai to the wife and the hearing adjourned to 5th October, 2018 recording that in the event of the parties not continuing to live together, what had transpired will not affect the rights of the parties in the appeal.
14. On 5th October, 2018 the counsel for the wife on enquiry informed that the wife did not go to Bombay as she panicked on the apprehension that the husband is staying with his second wife.
15. In the circumstances, the counsels were heard further on 5th October, 2018 and 10th October, 2018 and orders reserved. The senior counsel for the husband handed over a note of submission and the counsel for the wife was also given similar liberty.
16. I have perused the records and considered the submissions.
17. The judgment of dismissal of the petition for divorce on the ground of the wife having treated the husband with cruelty records:-
- "(i) that the parties were married according to Hindu rites and ceremonies on 20th October, 1988 at Delhi; (ii) though the marriage was consummated but no child was born of the wedlock; (iii) that it was the case of the husband that:-
- "(a) at the time of finalization of marriage it was represented to him that the wife was born on 3rd September, 1962 and was not working anywhere and had taken

admission in Master of Science (M.S.) in S.M.S. Medical College, Jaipur; FAO5062002 & MAT.APP. 87/2008 Page 5 of 33 (b) the wife from the beginning used to keep herself elusive and aloof from the husband and used to quarrel over trivial matters; (c) the wife did not pay any respect to the elders of the house and never wished or touched their feet; (d) the wife was aloof and quarrelsome during the honeymoon period in Kathmandu also and was in the habit of concealing things from the husband; (e) the husband, after marriage had to leave for Madras for his training and though wanted the wife to accompany him but she initially refused and agreed after much persuasion; (f) on reaching Madras, the wife complained about the accommodation and threatened to leave for her parents house in Jaipur; (g) on 27th November, 1988, a letter was received from the father of the wife asking the wife, to reach Jaipur or she would lose her job; (h) the husband on that day came to know that the wife was working on ad hoc basis as a doctor in CGHS and which fact was never disclosed; (i) on receiving the letter, the wife insisted on leaving for Jaipur; FAO5062002 & MAT.APP. 87/2008 Page 6 of 33 (j) though the parents of the husband received the wife at the Delhi Airport and offered to drop her to Jaipur in their car but the wife said that she did not want to live at their mercy and said that they should leave for their graves in that car; (k) though the husband tried to contact the wife but the wife did not respond to any of his letters; (l) in November, 1988 when the wife went to her parental home at Jaipur, she was pregnant and when the husband reached Jaipur in February, 1989, he was told that the wife had got the pregnancy terminated; (m) the husband was posted to Allahabad in April, 1989 but the wife refused to join him and asked the husband to get himself posted at Jaipur; (n) the husband applied for transfer and got himself transferred to Jaipur but the wife did not sleep with the husband saying that the husband was not worthy of that and was a nincompoop; (o) the wife refused to stay in the official accommodation allotted to the husband at Jaipur and did not even visit the husband in June, 1989 when the husband was ill; (p) the husband met with an accident on 29th April, 1990 while coming from Delhi to Jaipur and suffered multiple fractures and injuries; FAO5062002 & MAT.APP. 87/2008 Page 7 of 33 (q) though the wife was informed of the same but still did not visit the husband; (r) the husband returned to Jaipur in June, 1990 and again asked the wife to join him in the official accommodation and after much

persuasion, the wife agreed in July, 1990; (s) the husband and wife visited Delhi on 10th August, 1990 to celebrate the birthday of the husband with the parents of the husband; (t) the behavior of the wife towards the parents of the husband was abusive and she used to vanish from the house of the parents of the husband for hours at time without disclosing her whereabouts; (u) when the husband enquired about her whereabouts from the wife, she in a fit of rage sat on the fractured arm of the husband, causing another fracture; (v) the wife also threatened to lodge a false criminal case against the husband and his family members and called the Police; however, no case was registered against him and the wife left for her parental home. (w) in August, 1990, the husband was at Kanpur; in September, 1991 the wife reached Kanpur with her parents; on the asking of the parents of the wife, the wife agreed to live at Kanpur with the husband; FAO5062002 & MAT.APP. 87/2008 Page 8 of 33 (x) however there was no change in the behavior of the wife; on 25th October, 1991 when the husband was at his office, the wife called him and threatened to commit suicide and accused the husband of having a loose character and picked up her baggage and left for Jaipur; (y) the husband, in October, 1992 was posted at Agra and again went to Jaipur in December, 1992 and asked to wife to get herself transferred to Agra; after much persuasion the wife joined the husband at Agra but refused to join the husband for official dinners and used to create a scene by insulting the husband in the presence of his friends and once in a fit of rage also tore up the marriage album; (z) however, the wife refused to get herself transferred to Agra though visited the husband twice thereafter at Agra in March 1993 but did not allow the husband to have any physical relations with her; (aa) the wife, even during her visits to Agra quarreled with the visitors as well as the mother of the husband and used to leave for Jaipur whenever she wanted; (ab) though the wife visited the husband at Agra on Diwali in the year 1994 but refused to meet any guests and again suddenly left for Jaipur; FAO5062002 & MAT.APP. 87/2008 Page 9 of 33 (ac) the husband, in an effort for reconciliation asked the wife to avail of LTC to Madras, Bangalore and Trivandrum; though the wife agreed but throughout quarreled and did not allow any physical relations and immediately on return to Agra left for Jaipur from the Railway Station itself; (ad) the husband, between January and May, 1995 made several telephone calls to the wife at Jaipur but the wife refused to talk; (ae) on

10th May, 1995, the wife visited the husband at Agra and said that she wanted a settlement and again left for Jaipur in the middle of the night; and, (af) all the said acts of the wife have caused mental cruelty to the husband and his family members.

18. The judgment records that the wife contested the petition for divorce on the ground of cruelty inter alia pleading that:-

"(i) as per the averments in the petition for divorce itself, the husband from time to time had condoned the alleged acts of cruelty; (ii) was improper delay of over eight years in instituting the petition; (iii) in November, 1988 when the husband went to Bombay for training, as per joint understanding the wife joined CGHS at Jaipur; FAO5062002 & MAT.APP. 87/2008 Page 10 of 33 (iv) the husbands parents did not want the marriage to continue and when the wife came to Delhi on learning of the accident of the husband and the husbands parents did not allow her to stay there; (v) when the husband was transferred to Kanpur, the wife pleaded with him not to leave her alone at Jaipur but the husband said that he will first have to seek permission of his parents; (vi) the wife was always humiliated by the parents of the husband; (vii) the husband did not want the wife to give up her profession and wanted the wife to continue to work so as to supplement their income; (viii) when the husband was posted at Delhi, the wife also applied for transfer to Delhi but the husband did not help her in the same by sponsoring her; (ix) though the wife got herself medically examined because no child of the marriage was being born and was found to be normal and healthy and fit for child bearing but the husband refused to have himself medically examined; (x) the wifes parents had informed the husbands family at the time of finalization of marriage that the wife had joined CGHS on ad hoc basis and had left her postgraduation; (xi) though no dowry demand was made but the expectations of the husbands family were very high; FAO5062002 & MAT.APP. 87/2008 Page 11 of 33 (xii) the husband himself is inhuman, short tempered, ill natured and untruthful in his behavior and used to humiliate and insult the wife; (xiii) the wife never conceived and thus the occasion for termination of pregnancy did not arise; (ix) the husband, even at the time of marriage was suffering from tuberculosis but the said fact was hidden from the wife and her family; (x) the LTC tour was also as per the convenience of the

husband who did not care for the convenience of the wife; (xi) it was the husband who wanted the wife to agree to mutual divorce and even offered expenses of marriage borne by the family of the wife; and, (xii) the petition for dissolution of marriage had been filed only after failing to persuade the wife to agree for divorce by mutual consent; 19. The learned Additional District Judge, on the basis of pleadings and the evidence led before him, dismissed the petition for dissolution of marriage by a decree of divorce on the ground of cruelty reasoning that (i) the husband failed to prove that he was not aware of the employment of the wife at CGHS, Jaipur; (ii) on the contrary the husband, in his cross- examination had admitted that from 10th October, 1988 to 1st November, 1988 the wife was on earned leave for marriage and honeymoon purpose and from 19th December, 1988 to 23rd December, 1988 the wife had taken FAO5062002 & MAT.APP. 87/2008 Page 12 of 33 casual leave and this admission showed that the husband was aware of the employment of the wife at Jaipur at the time of his marriage inasmuch as without employment there would have been no question of earned leave or casual leave; (iii) the wife would not have benefited from concealing her employment and rather it was a matter to be proud of; (iv) the husband had not pleaded or deposed of having asked the wife to quit her job at any time or that he had any objection to the employment of the wife; (v) rather the husband at one time, on the ground of his wife working at Jaipur, had sought a transfer to Jaipur; (vi) in one of the letters of the husband to his employer, he also mentioned that his wife had been recommended to UPSC for permanent selection in CGHS; (vii) the husband had also failed to prove that the wife was pregnant at any time during the marriage or had got her pregnancy terminated; (viii) it was unbelievable that a newlywed, who according to the husband was eager to know about her pregnancy soon after the marriage, would, without any rhyme or reason undergo abortion; (ix) no dates had been given when the wife allowed the husband to have sexual intercourse and when she refused; (x) had the wife undergone an abortion, the husband would have led evidence of clinic where the abortion was got done; (xi) the husband had also failed to give any reason as to why the wife did not conceive thereafter; (xii) no particulars had been given by the husband of the hospital in which he was admitted after his accident, for how much duration he remained there and when was the wife informed of the same; (xiii) the wife was not going to

be benefitted by not taking care of the husband at the time of his accident; (xiv) the wife is not expected to travel a long distance just to spend 10-11 minutes with the husband; (xv) the fact that the wife left the matrimonial home so soon after her arrival showed that she was not accorded proper treatment at the matrimonial home; (xvi) the husband had not proved that the wife made any false allegations or accusations against him; (xvii) the husband had failed to prove the other acts of cruelty; (xviii) the wife, being an educated lady cannot be expected to have behaved in the manner alleged by the husband; (xix) the wife cannot be expected to have sat on the arm of the husband or to have misbehaved with her mother-in-law or sister-in-law; (xx) the mother and sister of the husband had not been examined; (xxi) though the husband had examined his colleague but his testimony has to be perused with caution, being an interested witness; (xxii) the wife, being a working lady was having her own compulsions and could not be expected to reside with the husband, especially when it was not the case of the husband that he had asked the wife to quit her job; (xxiii) the job of the husband was also a transferable job and it was humanly impossible for the wife to get herself transferred to each of the places where the husband was posted; (xxiv) thus non-residence of the wife with the husband was for the reason of her employment ; (xxv) the wife could not be expected to not have a natural instinct to become a mother; (xxvi) rather it had emerged that the wife had joined the company of the husband from time to time after availing leave from her department; (xxvii) had the wife not wanted to reside with the husband, she would not have taken leave from time to time to reside with the husband; (xxviii) the husband had failed to prove that wrong date of birth of the wife was represented at the time of marriage; (xxix) no specific instance of cruelty after the LTC tour had been proved and the alleged instances of cruelty of prior thereto stood condoned by the parties undertaking a joint LTC tour and visiting various places; (xxx) irretrievable break down of marriage is not a ground for divorce under the Hindu Marriage Act; and, (xxxi) even though the marriage between the parties seemed to have irretrievably broken down, no relief could be granted to the husband.

20. The judgment allowing the petition for divorce on the ground of desertion records:-

"(i) the case of the husband, in addition to what was pleaded in the petition for divorce on the ground of cruelty, to be: (a) that the wife on returning from the LTC tour on 14th January, 1995, left for Jaipur from Agra Railway Station itself; (b) the husband made several telephone calls to Jaipur between January and May, 1995 and spoke to the parents of the wife; (c) the wife refused to talk to the husband; (d) the husband even rang up at the office of the wife and tried to reason with the wife but she was abusive and hung up the phone; (e) the wife visited the husband on 10th May, 1995 and said that she wanted a settlement; (f) the husband tried to reason with the wife but the wife flew into rage and returned to Jaipur stating that she was not interested in the husband and the husband should not even try to talk to her; FAO5062002 & MAT.APP. 87/2008 Page 15 of 33 (g) the wife had thus deserted the husband on 14th January, 1995 and had brought the marital relationship to an end; and, (h) the attempts of the husband to make the marriage survive had proved futile; (ii) that the wife had contested the petition for dissolution of marriage by a decree of divorce on the ground of desertion, besides on what was pleaded in the written statement in the petition for divorce on the ground of cruelty, pleading:-

"(a) that after 14th January, 1995, the wife had visited and cohabited with the husband at Agra in March, 1995 to celebrate Holi and thereafter both had visited Mathura and Vrindavan; (b) the wife had again visited the husband in May, 1995 at Agra when the husband informed the wife that he was likely to get transferred from Agra and both of them had planned to get posted to a place where could both live together; (c) the husband got transferred to Delhi and the wife visited Delhi and lived in the parental house of the husband; (d) the husband had visited the wife in October, 1995 at Jaipur where it was decided that the wife would get transferred to Delhi; FAO5062002 & MAT.APP. 87/2008 Page 16 of 33 (e) though the parties had also decided that the wife would visit the husband for Diwali but the husband did not confirm; (f) in December, 1995 the wife sent her transfer application to the husband at Delhi but he did not co-operate and sponsor her for the same; (g) in January/February, 1996 the wife repeatedly tried to contact the husband on telephone but the husband avoided; (h) in May, 1996 the husband informed the wife over telephone that he was going abroad and wanted to settle and asked for divorce; (i) in July, August and September, 1996 the wife, her parents and other

relatives visited Delhi for settlement but no settlement agreed by the husband; and, (j) the husband cannot be permitted to take advantage of his own wrong.

21. The learned Additional District Judge has dissolved the marriage of the parties on the ground of desertion by the wife, reasoning that (i) there was no cross-examination of the husband on his deposition that he was not aware before marriage that the wife was working; (ii) there was no cross-examination of the husband qua his deposition that he learnt of the same only on the receipt of letter at Madras from the father of the wife; (iii) though the wife in her cross-examination has denied receipt of any FAO5062002 & MAT.APP. 87/2008 Page 17 of 33 such letter but in her cross-examination in the proceeding for divorce on the ground of cruelty had admitted to the same; (iv) the wife was thus indulging in falsehood with respect to receipt of the letter; (v) in the absence of any cross-examination of the husband, his claim that he was not aware prior to marriage of the employment of the wife with CGHS at Jaipur has to be believed; (vi) the husband had also proved that in the matrimonial advertisement got issued by the family of the wife it was represented that the wife was doing her postgraduation and was not employed; (vii) the husband had also proved that though he got himself posted to Jaipur but the wife did not join him in the official accommodation allotted to him at Jaipur; (viii) the wife in her cross-examination admitted that the husband lived at Jaipur from 12th April, 1989 till September, 1990; (ix) the statements of the wife about residing with the husband in the house allotted to him at Jaipur were contradictory; she could not even give the address of the house allotted to the husband and admitted that she was throughout that period drawing House Rent Allowance (HRA) from her department and in her official records her residence during the period was the residence of her parents and that she had not informed her office of the change of her address to that of the address of her husband; (x) the wife could not even remember the names of the neighbours also of the official accommodation of the husband at Jaipur; (xi) it thus stood proved that the wife had refused to join the husband even when the husband was living in Jaipur; (xii) though the wife claimed to have visited the husband and lived with the husband at Agra but again could not prove the same and made contradictory statements; she could not tell anything about the official accommodation allotted to FAO5062002 & MAT.APP. 87/2008 Page 18 of 33 the husband at Agra as she would have known

had she been visiting every month as claimed by her; the husband has succeeded in proving that from the very beginning of the marriage he was not informed that the wife was employed at Jaipur;(xiii) that the wife had not made any genuine efforts to make herself transferred on the place of posting of the husband which was either at Kanpur or Agra; (xiv) that the version of the wife that she had given a transfer application to the husband could not be believed as the application has to be made to her own department and not to the department of the spouse; the husband could not have moved the application in his department; (xv) it thus could not be said that the husband did not take interest in getting the wife transferred to the place of his posting; (xvi) it was not disputed by the wife that she, from the beginning knew that the husband is from Indian Revenue Service which was an all India transferable job; (xvii) it was not the case of the wife that there was any understanding at the time of marriage that she will continue to work at the same place and not at the place of posting of the husband; (xviii) the husband had also successfully proved that despite him getting himself transferred to Jaipur, the wife did not live with him in Jaipur; (xix) thereafter also the wife had visited the husband for short periods only; (xx) the wife had not stayed for a single day with the husband after returning from the LTC tour; (xxi) therefore it stood proved that the wife was interested in continuing with her job and living with her parents except for brief periods when she lived with the husband; (xxii) keeping in view the nature of the job of the husband, the husband could not be expected to permanently live with the wife at Jaipur; (xxiii) in the circumstances it was for the wife to make all efforts to join conjugal FAO5062002 & MAT.APP. 87/2008 Page 19 of 33 society of the husband; the husband had shown his intention by getting himself transferred to Jaipur; (xxiv) on the contrary, the wife had failed to show any animus to live with the husband; the burden to prove that the wife had reasonable cause to stay away from the husband was on the wife and the wife had failed to discharge the same; (xxv) though the wife had alleged that she and her parents were harassed but no evidence in this regard was led and no cross-examination of the husband also on the said aspect was done; (xxvi) the claim of the wife of having visited the husband in June, 1996 was contradictory to her statements in the earlier proceedings; and, (xxvii) the husband had thus established that the wife had deserted him for two years immediately prior to the filing of the petition.

22. With respect to MAT Appeal No.87/2008, the counsel for the wife argued that (i) the husband has nowhere said that he provided house with material comforts and made requisite efforts for the wife to reside with him; (ii) desertion is claimed by the husband on 14th January, 1995; (iii) however the petition on the ground of desertion was filed only on 8th September, 2000; (iv) prior thereto on 12th October, 1996 the husband filed the petition for divorce on the ground of cruelty; (v) that it is the case of the wife that the parties have cohabited after 14th January, 1995 also; (vi) the husband admits the wife to have visited and resided with the husband on 10th May, 1995; (vii) that the wife had joined CGHS on ad hoc basis in April, 1988 i.e. shortly prior to her marriage on 20th October, 1998; (viii) that the wife gained permanent employment with CGHS in the year 1992, w.e.f. September, 1991; (ix) that the husband was not interested in the wife residing with him; (x) the wife not staying at FAO5062002 & MAT.APP. 87/2008 Page 20 of 33 husbands place may not be cruelty but is desertion; (xi) however once the husband files a petition for divorce on the ground of cruelty, the wife could not be expected to join the husband; (xii) the husband, by filing the petition for divorce, made it known to the wife that he was not interested in living with the wife and the wife in such circumstance cannot be said to have deserted the husband; reliance is placed on Pal Rampal Vs. Santosh Rampal 28 (1985) DLT102 where also the husband filed petition for divorce first on the ground of cruelty and thereafter on the ground of desertion ;it was observed that on the husbands allegation that it was dangerous to live with his wife because of her acts of cruelty, it can be definitely said that he was not willing to keep the wife in the matrimonial home; for proving the ground of desertion it must be established by the husband that he was willing to live with the wife but the wife was avoiding cohabitation by deserting the husband; when the husband filed for divorce on the ground of desertion he was availing the same period during which he alleged that the wife was practicing cruelty - it would thus result into two inconsistent positions in law; the husband is not willing to keep the wife but at the same time, for the purposes of desertion, he is ready to keep her but she is avoiding his company; (xiii) that the husband, in the petition first filed on the ground of cruelty did not say that he wanted to live with the wife; (xiv) reliance is placed on Bipinchandra Jaishinghbai Shah Vs. Prabhavati AIR 1957 SC176 stated to be the first judgment on dissolution of marriage on the

ground of desertion and it was argued that the same has been followed ever since; (xv) on the filing of the petition on the ground of cruelty, desertion came to an end and owing thereto burden never shifted on the wife to prove FAO5062002 & MAT.APP. 87/2008 Page 21 of 33 reason for her not cohabiting with the husband; (xvi) that the husband since the year 1996 is having a relationship with another lady; that the wife filed CM No.18763/2009 in this regard in MAT Appeal No.87/2008, in reply where to the husband admitted to the presence of the said woman in his house though gave an explanation therefor.

23. Per contra, the senior counsel for the husband, qua MAT Appeal No.87/2008 contended (i) that the impugned judgment rightly records that the counsel for the wife had not cross-examined the husband on material aspects; attention in this regard was drawn to the evidence led; (ii) that the wife nowhere in the written statement pleaded that she was unable to join cohabitation of the husband because of the husband having filed the petition for divorce on the ground of cruelty; (iii) that the wife nowhere during the pendency of the petition for divorce alleged that the husband was residing with another woman or the wife was unable to join him for the said reason; (iv) merely a visit pleaded of 10th May, 1995 does not amount to cohabitation; and, (v) it is not even the evidence of the wife that she cohabited with the husband on 10th May, 1995.

24. The counsel for the wife, in rejoinder argued (i) that the wife learnt of the husband residing with another woman only in the year 2009 and thus had no occasion to bring it up during the pendency of the petition for divorce; and (ii) referred to Shakuntala Kumari supra holding that by filing a petition for annulment of marriage on the ground of impotency of the deserting spouse, the husband made it clear that he was neither ready nor willing nor anxious to take the deserting spouse back and he wanted the marriage to be treated as if non-existent and the deserting spouse even FAO5062002 & MAT.APP. 87/2008 Page 22 of 33 if had a unilateral change of heart thereafter and wanted to return to the matrimonial home, she could no longer do so; (iii) referred to Darshan Gupta Vs. Radhika Gupta (2013) 9 SCC1 holding that the grounds of divorce provided under Section 13(1) of the Hindu Marriage Act are based on the fault of the party against whom dissolution of marriage is sought; in matrimonial jurisprudence, such

provisions are founded on the matrimonial offence theory or the fault theory; under this jurisprudential principle, it is only on the ground of an opponents fault, that a party may approach a Court for seeking annulment of his/her matrimonial alliance; in other words, if either party is guilty of committing a matrimonial offence, the aggrieved party alone is entitled to divorce; the party seeking divorce under the matrimonial offence theory must be innocent; if a husbands act of cruelty compels a wife to leave her matrimonial home, whereupon she remains away from the husband for the stipulated duration, it would not be open to a husband to seek dissolution of marriage, on the ground of desertion; (iv) referred to Madan Mohan Manna Vs. Chitra Manna AIR1993 Calcutta 33 holding that a petition for desertion before completion of two years of marriage is premature and time spent after filing of petition could not be considered for computing the period of desertion; (v) referred to Lachman Utamchand Kirpalani Vs. Meena AIR 1964 SC40 laying down the ingredients of the ground of desertion; and, (v) referred to Bipinchandra Jaishinghbai Shah supra also explaining what constitutes desertion.

25. The senior counsel for the husband has in the context of long distance marriages referred to Geeta Jagdish Mangtani Vs. Jagdish Mangtani (2005) 8 SCC177 where, finding that (i) the marriage survived FAO5062002 & MAT.APP. 87/2008 Page 23 of 33 only for a brief period of about seven months; (ii) there had been no attempt on the part of the wife to stay with the husband; and, (iii) the wife was a school teacher enjoying long summer vacations but even during the summer vacations had not stayed with the husband, desertion on the part of the wife was concluded observing that a course of conduct over a long period indicates total abandonment of marriage and cannot be justified on ground of monetary consideration alone as a reasonable cause to desert.

26. The senior counsel for the husband, challenging the judgment impugned in FAO No.506/2002 argued (i) that during the subsistence of the marriage from 20th October, 1988 to 14th January, 1995 i.e. for six years three months, the wife lived with the husband for 111 days i.e. less than four months only; (ii) that the parties have been litigating for the last 22 years; (iii) the learned Additional District Judge, though held the marriage to have irretrievably broken down, dismissed the petition holding cruelty to have not been proved; (iv) that the husband was not looking for

a long distance or week end marriage; (v) misrepresentation by the wife and her family at the time of finalization of marriage and the insistence of the wife to continue to work at CGHS has resulted in a long distance marriage of the parties; (vi) the learned Additional District Judge has erred in not believing misrepresentation on the part of the wife; (vii) had the factum of employment been disclosed to the husband, the wife would have known the date till when the wife had leave and there would have been no occasion for the father of the wife to have sent an SOS letter to Madras, receipt whereof has been admitted by the wife; (viii) though the wife took a stand that she lived with the husband from time to time and which was denied by the husband but did FAO5062002 & MAT.APP. 87/2008 Page 24 of 33 not prove the same by producing her leave record which was the best evidence; (ix) the learned Additional District Judge has believed the unproven version of the wife instead of drawing adverse inference; (x) the learned Additional District Judge, from the factum of the wife continuing to draw HRA, should have believed the version of the husband that inspite of the husband taking a posting at Jaipur, the wife refused to reside with the husband in the house at Jaipur; had the wife so lived in the official accommodation of the husband at Jaipur, she could not have drawn HRA from CGHS; (xi) the reasoning of the learned Additional District Judge is based on surmises and conjectures; (xii) the learned Additional District Judge has refused to believe proven version of the husband, reasoning that the wife had nothing to benefit from her unreasonable conduct proved by the husband; (xiii) the husband has also proved the act of the wife spitting on his face and the learned Additional District Judge has again disbelieved the same on the conjecture that the wife being an educated lady could not be imagined to indulge in such conduct; (xiv) the learned Additional District Judge has wrongly held that the husband had condoned the acts of cruelty; merely because the husband has made repeated attempts to save his marriage does not amount to condonation; (xv) though the wife claimed to have visited the house of the husband at Agra but could not answer any questions with respect thereto; (xvi) though the wife in her written statement pleaded that she was victimized for dowry but did not even bother to lead any evidence to prove the same and such conduct of the wife of a false allegation of dowry demand also amounts to cruelty; (xvii) the learned Additional District judge has applied wrong principles of law of evidence to reject

the proven case of the husband of cruelty; FAO5062002 & MAT.APP. 87/2008 Page 25 of 33 (xxiii) the learned Additional District Judge has refused to believe what even the wife had admitted; and, (xxiv) the judgment of the learned Additional District Judge is perverse, contrary to evidence and based on surmises and conjectures; reliance is placed on Samar Ghosh Vs. Jaya Ghosh (2007) 4 SCC511 and A. Jayachandra Vs. Aneel Kaur MANU/SC/1023/2004.

27. Per contra, the counsel for the wife, supporting the judgment of the Additional District Judge of dismissal of petition for divorce on the ground of cruelty, has argued that (i) the judgment of the learned Additional District Judge is well reasoned and in accordance with the law laid down in para 34 of Dr. N.G. Dastane Vs. S. Dastane AIR 1975 SC1534 paras 12&15 of A. Jayachandra Vs. Aneel Kaur (2005) 2 SCC22 and para 12 of Gurbux Singh Vs. Harminder Kaur AIR 2011 SC114(ii) that the husband has nowhere pleaded or deposed that he ever asked the wife to leave her job and live with him; (iii) had the wife been denying sex to the husband, there would have been no occasion for the wife to become pregnant as also claimed by the husband; (iv) it is apparent from the timing of filing of the petition for divorce on the ground of cruelty and the subsequent petition on the ground of desertion that the husband had sought to break the marriage under all circumstances; (v) the conduct of the husband does not entitle him in terms of Section 23 of the Hindu Marriage Act to have the marriage dissolved; (vi) subsequent events can be taken note of at the appellate stage keeping in view the provisions of Section 23(1)(a) of the Hindu Marriage Act the Court has to be satisfied that the spouse seeking divorce is not in any way taking advantage of own wrong or disability; (vii) in Sunita Devi Vs. Om Prakash 174 (2010) DLT FAO5062002 & MAT.APP. 87/2008 Page 26 of 33 471 it was held that the subsequent development can be taken into consideration as the appeal is a continuation of the original petition; (viii) in Ashok Kumar Jain Vs. Sumati Jain AIR 2013 SC2916 also it has been held that subsequent conduct can be taken note of by the Court; and, (ix) reference is made to para 7 of Umesh Kumar Aggarwal Vs. Shashi Kumari AIR 1987 Delhi 235 and on Laxman Rao Vs. Vidya Chouhan MANU/MP/0328/1996 holding that just because a wife chooses to continue with her job, does not mean that she has any intention of bringing cohabitation permanently to an end.

28. Having gone through the pleadings and the evidence recorded in both petitions, I am unable to agree with the conclusions drawn in the judgment impugned in FAO No.506/2002 and find the judgment impugned in MAT Appeal No.87/2008 to be drawing correct inferences and conclusions from the evidence led. The evidence, in the petition for divorce on the ground of desertion, having been led after the recording of evidence in the petition for divorce on the ground of cruelty, it is quite evident that the stand of the wife is inconsistent. I also tend to agree with the senior counsel for the husband that the judgment impugned in FAO No.506/2002 is indeed based on surmises and conjectures and on what in the opinion of the learned Additional District Judge could be expected of the wife who is a qualified medical practitioner and holding a high post in the CGHS at Jaipur and not on the basis of what had been proved in the evidence recorded. The learned Additional District Judge is indeed found to have got around findings of fact proved in evidence merely by observing that it was not something which could be expected of the wife as senior medical practitioner in CGHS and/or that there was no reason FAO5062002 & MAT.APP. 87/2008 Page 27 of 33 for the wife to behave in such fashion. On the contrary, the learned Additional District Judge pronouncing in the petition for divorce on the ground of desertion is indeed found to have drawn the correct conclusions from the evidence before him including qua inconsistencies in the statements of the wife in the two proceedings.

29. Having concluded so, I have weighed the option of writing a long- drawn judgment as is the norm in such cases but which would be with respect to the same evidence as referred to in the two impugned judgments and only drawing my inferences therefrom.

30. In my view the same is not indeed necessary in the present case and would merely further delay the disposal of the appeals, adding to the agony of the parties. It is unfortunate that the parties married as far back as in the year 1988 i.e. 31 years back and living separately since the year 1995 i.e. for the last 24 years have had to litigate about something as personal as these disputes for the last 24 years, and with uncertainty as to their marital status. One of the root causes for such delays is the nature of detailed pleadings and detailed evidence which have become the norm in such disputes and which in turn result in longer trials and a

long time in writing judgments in such matters. I am of the view that at least as an Appellate Court, once on perusal of the material on record, a conclusion agreeing with the impugned judgment has been reached, expressing so would suffice.

31. I may only add that qua the plea of the husband of misrepresentation practiced by the wife and her family at the time of finalization of marriage, the learned Additional District Judge in the FAO5062002 & MAT.APP. 87/2008 Page 28 of 33 judgment impugned in FAO No.506/2002 has erred in ignoring the clear finding of fact on the basis of evidence led in this respect merely by observing that there was no reason for the wife and her family to hide the said fact. From the matrimonial advertisement it is clear that the wife was represented to be studying and not in employment. On the contrary, it is not in dispute that the husband at the time of finalization of marriage had already been selected to the Indian Revenue Service and which was an all India transferable job. The evidence on the part of the wife also is that though she was earlier pursuing postgraduation but since four months prior to the marriage got an opportunity to join CGHS on ad hoc basis, joined the same. The wife was admittedly employed with CGHS till the time of her marriage on ad hoc basis. In the circumstances, the version of the husband that there was no agreement or understanding of the parties of having a long-distance marriage with the husband residing wherever he is posted and the wife residing wherever she is posted, with the two to meet only on holidays. The wife admittedly was absorbed into CGHS much after nearly four years of the marriage in the year 1992. From the said undisputed facts, the insistence of the wife to continue with CGHS on ad hoc basis and to also seek permanent employment, is consistent with the stand of the husband of the refusal of the wife to cohabit with the husband on day to day basis as most married couples do, amounting to desertion as well as cruelty.

32. Resultantly FAO No.506/2002 is allowed and the judgment and decree of dismissal of the petition for divorce filed by the husband under Section 13(1)(ia) of the Hindu Marriage Act is set-aside. The petition filed by the husband under Section 13(1)(ia) of the Hindu Marriage Act is FAO5062002 & MAT.APP. 87/2008 Page 29 of 33 allowed and a decree of divorce of dissolution of marriage between the parties is passed under Section 13(1)(ia) of the Hindu Marriage Act.

33. As far as the contention of the counsel for the wife, of the petition for divorce on the ground of desertion being not maintainable owing to the husband, during the statutory period of two years having filed for divorce on the ground of cruelty is concerned, the same, on facts of the present case, is not attracted. It is not the general rule of law that filing of a petition for divorce during the statutory period of desertion is a bar to the subsequent filing of the petition for divorce on the ground of desertion. The different grounds of divorce prescribed constitute separate causes of action and filing of a petition for divorce on one ground is no bar to subsequent filing of petition for divorce on another ground. The question, whether the petition for divorce on the ground of desertion is barred for the reason of previous filing of a petition for divorce on another ground, is a question of fact. If it is pleaded and proved that the spouse accused of desertion was prevented from joining the company of or co- habiting with the accusing spouse on account of earlier filing of a petition for divorce on any other ground, then certainly the subsequent petition for divorce on the ground of desertion would be barred. The desertion averred by the husband in the present case is of 14th January, 1995. The petition on the said ground could not have been filed prior to expiry of two years from 14th January, 1995. The husband on 14th October, 1996 i.e. prior to the expiry of two years, filed the petition for divorce on the ground of cruelty. The wife, in her written statement to the said petition, while denying the acts of cruelty pleaded by the husband, also pleaded this clearly shows the immense cruelty against the respondent inspite of her FAO5062002 & MAT.APP. 87/2008 Page 30 of 33 tremendous sacrifice to make the marriage happy and successful, accusing the husband of cruelty. From the wife so pleading, the only inference is that even if the husband was not willing to live with the wife, the wife was also not so willing. Moreover, the husband in the petition for divorce on the ground of cruelty also pleaded that he, even after 14th January, 1995 made several telephonic calls to Jaipur between January and May, 1995 and spoke to the parents of the respondent. The respondent refused to talk to the petitioner. The petitioner even talked to the respondent at her office on telephone and tried to reason with her to decide the future, once for all, but the respondent was abusive and she banged the phone, saying that she did not want to have anything to do with the petitioner, clearly indicating that he, even after 14th January, 1995 and inspite of cruelty

inflicted on him by the wife, was willing to live with the wife and wanting the wife to live with him. The wife in her written statement thereto denied that the husband made any such attempts and rather pleaded that the petitioner and the respondent had normal relation between January, 95 to May, 95 and after getting his posting at Delhi the petitioner called the respondent to Delhi in July, 95. She went to his parental home in Janakpuri. Both of them tried for suitable accommodation at Delhi. Meanwhile the parents of the petitioner again misguided the petitioner and he stopped contacting the respondent. Then in Oct. 95 petitioner visited Jaipur and suggested for the transfer of the respondent to Delhi.. The wife was however unable to prove any co- habitation after 14th January, 1995. The wife, in her written statement to the petition for divorce on the ground of desertion did not plead that though she was desirous after 14th October, 1996 i.e. when the petition for FAO5062002 & MAT.APP. 87/2008 Page 31 of 33 divorce on the ground of cruelty was filed, but felt that she could not, on account of filing of the said petition. No evidence also has been led on the said ground. It is thus clear that in the present case, filing of the petition for divorce during the statutory period of two years was not an impediment to the wife though desirous of co-habiting with the husband, so co-habiting. It was open to the wife to plead that she was prevented from co-habiting during the statutory period of two years, though desirous, owing to the filing of the petition for divorce on the ground of cruelty. Without the same, there can be no bar to the maintainability of the petition for divorce on the ground of desertion. The judgment impugned in MAT. Appeal No.87/2008 finds the wife guilty of animus desertendi and the wife has neither pleaded nor proved animus revertendi. Rather the wife in her written statement to the petition for divorce on the ground of desertion has pleaded that it is the husband who is guilty of constructive desertion and he is trying to take advantage of his own wrongs and which the wife has failed to prove. The wife, during arguments on the petition for divorce on the ground of desertion also did not urge the said ground and the said ground has been taken for the first time in this appeal. The grounds of divorce are a state of mind and a mind with legal acumen cannot be a substitute for the mind of the concerned spouse.

34. I otherwise agree with the reasons given in the judgment of dissolution of marriage by a decree of divorce impugned in MAT Appeal No.87/2008, which are

found to be apposite on the basis of pleadings and evidence therein. It cannot be lost sight of that though the husband became entitled to file a petition for divorce on the ground of desertion on expiry of two years from 14th January, 1995 i.e. on 14th January, 1997 but FAO5062002 & MAT.APP. 87/2008 Page 32 of 33 waited till 8th September, 2000 to file the said petition. On the basis of evidence led, animus desertendi of the wife is clearly established.

35. Thus MAT Appeal No.87/2008 is dismissed confirming the decree of divorce by dissolution of marriage of the parties on the ground of desertion under Section 13(1)(ib) of the Hindu Marriage Act. However no costs. Decree sheets be drawn up. RAJIV SAHAI ENDLAW, J.

JULY03 2019 pp.. PS - On request, the names of the parties have been concealed and the names are mentioned on a separate header of the judgment, which is ordered to be kept in a sealed cover with the file. FAO5062002 & MAT.APP. 87/2008 Page 33 of 33

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com