

**Jeevanbala Vs. Rajkumar**

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**Court :** Madhya Pradesh

**Decided On :** Dec-05-2002

**Reported in :** I(2003)DMC694

**Judge :** A.K. Gohil, J.

**Acts :** [Hindu Marriage Act, 1955](#) - Sections 13 and 28

**Appeal No. :** First Appeal No. 144 of 1992

**Appellant :** Jeevanbala

**Respondent :** Rajkumar

**Advocate for Def. :** Party-in-Person

**Advocate for Pet/Ap. :** P.K. Saxena, Sr. Adv., i/b., Raonka, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**A.K. Gohil, J.**

1. This appeal is directed, Under Section 28 of the [Hindu Marriage Act, 1955](#) (for short 'the Act'), against the judgment and decree dated 25.6.1992 delivered by Second Additional Judge to the Court of District Judge, Mandsaur in Hindu Marriage Case No. 6/1984, whereby granted a decree of divorce in favour of the

respondent/husband.

2. The brief facts of the case are that admittedly the marriage between the parties took place as per Hindu rites and customs on 14.5.1981 at Thandla, District Jhabua. The appellant/wife was resident of Jhabua and the respondent/husband was resident of Mandsaur. After the marriage in the year 1981, on 16.1.1984 the respondent/husband filed a petition Under Section 13 of the Act alleging therein that after the marriage they both lived together; marriage was consummated by the respondent/husband and the appellant/wife was residing with the respondent/husband at Mandsaur. It was further alleged that on 15.8.1981 on the Rakhi festival the appellant/wife went to her father's house and while going, she took all ornaments with her. The description of the ornaments has been mentioned in para No. 4 of the petition. It was stated that when she went on Rakhi festival her intention was not to come back. It was further stated that thereafter she came back to her husband's house at Mandsaur but she did not bring her ornaments and valuable clothes. Those valuable ornaments and clothes were kept at Jhabua. When the reason was asked, she gave some lame excuses and she wrote a letter to her mother for sending back her ornaments. Thereafter on 21.11.1981 she again went to her father's house with the intention that she will live for few days and come back with ornaments and clothes but thereafter she did not come back. Sujanmal, father of the respondent/husband along with his friend Premchand went to take her back but she refused to come back to husband's house and the mother of the appellant/wife also refused and from 21.11.1981 till the filing of the petition on 16.1.1984, she was residing at Jhabua and thus it was stated that she has deserted the husband. On 30.3.1982 the husband served a legal notice but even after service of notice she did not come back and sent a wrong reply of the said notice and, therefore, on the ground of desertion respondent/husband sought a decree for divorce. During the pendency of the petition, on 20.9.1989 the respondent/husband added one more ground in the divorce petition that on 15.8.1981 when appellant had gone to her father's house, she was not pregnant and when she came back before 15 days of 22.11.1981 there was no cohabitation between them. In the meantime the respondent/husband had also not gone to Jhabua nor met the appellant and nor cohabited and thus for 280 days there was no cohabitation between them and thus the child delivered by wife is not out of the

wedlock of the husband. It was further stated that she had deserted the respondent because she was living in adultery and she was having some extra marital relation with some other person and the child born was not from him, therefore, also sought a decree for divorce on this ground.

3. In the written statement all these allegations were denied by the appellant/ wife. It was stated that after the marriage, the husband and his family members were demanding dowry and were pressurising for giving more money and at the time of Rakhi festival they demanded one scooter or Rs. 15,000.00 cash. It was further stated that due to the poor condition of the parents of the appellant/wife they could not arrange either a scooter or Rs. 15,000.00. After Rakhi festival when she came back, she became pregnant and this fact was known to the respondent and thereafter they started beating the appellant/wife and on 21.11.1981 the husband himself came to Jhabua and left her with her parents where she delivered a child on 6.6.1982. It was denied that there was no cohabitation between them from Rakhi festival to 21.11.1981 or 15 days earlier of 21.11.1981. On 21.11.1981 she was pregnant and she was carrying three months pregnancy but the husband and his parents were always demanding money and they themselves left her at her parents house. It was stated in the written/statement that she had brought only part of the ornaments and the remaining ornaments were with the father of the husband. It was also denied that she had kept all the valuable ornaments and clothes at Jhabua. It was further stated that when she came back after Rakhi festival, she brought back all the ornaments and they were checked by them. In the written statement she has also denied additional allegation made by amendment dated 20.9.1989 that there was no cohabitation between them after Rakhi festival or she was having illicit relation with some other person. On Rakhi festival when appellant /wife came to Jhabua, the respondent/husband had also came with her. Thereafter they went to Thandala and again came to Jhabua. They both cohabited at Jhabua and thereafter at Mandsaur. The appellant/wife had started vomiting and other problems of post-pregnancy from third month. Therefore, it was the respondent/husband who himself brought her to Jhabua and left her at mother's house. The son born out of the wedlock and the cohabitation with the respondent/ husband. The allegations that she is living in adultery or was having illicit relation with some other person were vehemently denied. She wrote

several letters to the respondent but thereafter he did not turn up either to meet the son or to take her back. It was further stated in the written statement that she was always prepared to live with the respondent/husband and still she is willing to live with the respondent/husband.

4. On all the allegations, issues were framed. Evidence of both the parties was recorded. Respondent/husband Rajkumar examined himself as P.W. 1; Sajanlal P.W. 2, who is the father of respondent; Premchand Maroo P.W. 3. The appellant/wife Jeevanbala also examined herself as D. W. 1. Copy of the notice dated 30.3.1982 is Ex. P/1 and its reply is Ex. D/1. The Birth Certificate of the son Gaurav is Ex. D/2.

5. Earlier by judgment and decree dated 25.4.1987 petition for divorce was dismissed, against which the husband preferred First Appeal No. 52 of 1987 before the High Court which was decided by judgment dated 16.12.1988. The High Court remanded the case to the Trial Court for fresh trial. Thereafter the husband filed an amendment application in the petition, which was allowed by order dated 20.9.1989.

6. After appreciating the evidence of the parties on record, the Trial Court recorded findings on Issue Nos. 1(a), (b), (c); 2(a), (b), (c) in favour of the respondent /husband that the wife has refused to cohabit with the husband, she has deserted the husband and left the house. The Trial Court also recorded a finding on Issue No. 3(a) against the wife about demand, of dowry and beating the wife and also on Issue No. 4, which was about return of ornaments to wife, against the wife and also recorded finding on Issue No. 5 against husband, about his entitlement for ornaments. The Trial Court also recorded a finding on additional Issue No. 1 in favour of the wife that after deserting the respondent/husband she was not having any extra-marital relation with some other person and gave birth to a legitimate child, which belongs to respondent/husband and granted a decree of divorce in favour of the respondent/husband on the ground of desertion and as well as on the ground of refusal by wife to cohabit with the husband. Being aggrieved by the said judgment, the appellant/wife has filed this appeal.

7. I have heard Mr. P.K. Saxena, learned Senior Advocate instructed by Mr. Raonka, for appellant/wife; as also the respondent, who appeared in person. I have also perused the record.

8. The sole submission of Mr. Saxena, learned Senior Advocate for appellant is that the Trial Court has already recorded this finding that the appellant was not living in adultery and was also not having any extra-marital relation with any other person and Gaurav born out of the wedlock of the appellant and respondent and is not an illegitimate child and the Court has not recorded proper finding on the question of desertion. The appellant has not deserted the respondent/husband; she was always willing to live and still willing to live with the husband but since the husband has performed second marriage, he does not want to keep the appellant with him.

9. Respondent present in person denied the allegation of second marriage but his submission is that because the son does not belong to him, therefore, he does not want to live with the appellant/wife and supported the decree for divorce granted by the Court below on the ground of desertion. His repeated submission was that the appellant herself left the house of the respondent and prayed for dismissal of the appeal.

10. After hearing learned Counsel for appellant and respondent in person, it is true that the respondent has not filed any cross-objection on the finding recorded against him on the additional issue that she was not having any extra-marital relation or illegal relation with some other person and gave birth to legitimate child. Therefore, now only question remains before this Court to consider is whether the respondent/husband could prove that the appellant has deserted the petitioner for a continuous period not less than two years immediately preceding the presentation of the petition. In the case of *Lachman Utamchand Kirpalani v. Meena @ Mota*, reported in AIR 1964 SC 40, it has been held by the Supreme Court that 'For proving the case of desertion, two essential conditions must exist : (1) factum of separation, and (2) intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as deserted spouse is concerned : (1) absence of consent, and (2) absence of conduct giving

reasonable cause to spouse leaving matrimonial home to form necessary intention of leaving the house permanently'. Therefore, the gist of the aforesaid matrimonial offence of desertion consists in intention of deserting spouse. 'Animus deserendi' means never to return to marital home and there must be absence of consent on part of the person deserted. 'Desertion' means abandonment and implies as voluntary withdrawal from a cohabitation that exists. If the case in hand is examined in the light of the aforesaid principle, it would be clear that the Trial Court has not properly recorded finding on the question of desertion and has not properly marshalled the evidence on record. The respondent/husband P. W. 1 Rajkumar has admitted in his cross-examination that he is not doing any business since last 4-5 years; he is having 20-22 Bighas of land and only earning Rs. 5 to 6 thousand per year and residing separately from his father in a rented house. He has further admitted that his father-in-law did not give him anything in the marriage while his father is a moneyed man and enjoying good reputation in the society. He further admits that he is not aware that the financial condition of his in-laws are not good. He further admits in para No. 7 of his cross-examination that the cause of the dispute between them is the gold ornaments which were gifted in the marriage to her, she had kept them with her mother and this was the cause of dispute between them. One gold chain and Payzeb (an anklet) is with her. He further admits that even if the wife is willing to live with him, he is not prepared to keep her. He repeatedly stated that because the wife did not bring back the ornaments and costly clothes, therefore, he does not want to keep her. In para No. 7 he further admits that if the wife is willing to bring back all the ornaments and clothes, he is prepared to keep her. In para No. 9 he admits that if the wife wants to come without the ornaments, even then he is prepared to keep her. He again stated in the cross-examination that his father had gone to take her but neither she came nor returned the ornaments.

11. Sajanalal (P.W. 2), father of the respondent, also stated in his examination-in-chief that after the Rakhi festival she herself came back to Sasural (Husband's house) along with her brother Subhash but at that time she came only with the wearing clothes and she did not bring the ornaments and other clothes and on asking she said that she will bring the same later on. Thereafter his son and daughter-in-law both went to Jhabua. After three days son came back alone and

stated that wife is not willing to come back and the mother of the appellant also refused to send her back and since then she is residing with her mother and has not come back. He further stated that after 2-3 months, he along with his friend Premchand Maroo and son Rajkumar went to Jhabua but she did not come back and her mother and brother also refused to send her and they also did not return the ornaments. He further stated that if the appellant is willing to live, he is prepared to keep her. In the cross-examination he denied that the son born to the appellant does belong to his son.

12. In the notice Ex. P/1 issued on behalf of the respondent/husband to the wife, it has been stated that on 22.11.1981 you went to your mother's house that you will stay there for some days and come back along with the ornaments and clothes but thereafter you did not turn up. Ex. D/1. which is the reply of the notice, the wife replied that on 22.11.1981 the husband himself came to Jhabua with the wife and left her at her mother's house as she was pregnant and thereafter he did not come back to take her back. From the evidence of P.W. 1 Rajkumar it is clear that the dispute between the parties is about ornaments. In petition it was pleaded that she had gone for some days with promise that she would come with ornaments and clothes. He has already admitted in para No. 7 that he is prepared to keep his wife if she wants to come with the ornaments and in para No. 9 he stated that even without the ornaments. Appellant Jeevanbala (D.W. 1) has also stated in her statement that she is prepared to live with her husband. In reply of the notice, Ex. D/I, she had stated that she is prepared to live with the husband, she has stated the same in the written reply and also stated in the cross-examination that she is still prepared to live. In fact it was the burden on the respondent/ husband to prove that she left the house without any reasonable cause forever with the intention to bring cohabitation permanently to an end. When it has come in the evidence that the husband is prepared to keep her and it has also come in the evidence of the appellant that she is also prepared to live together, I do not think that any case for desertion is made out. It was the burden on the respondent to prove that she has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. It was also the burden on the respondent/husband to prove abandonment by the wife. Though they are living separately for so many years and their son Gaurav is now aged about 20 years,

therefore, without the proper and sufficient evidence on record that she has deserted the husband forever; and without the evidence of 'animus deserendi', the marriage cannot be dissolved. The Trial Court has already recorded the finding in favour of the appellant/wife that the son born out of the wedlock of the appellant and Gaurav is not an illegitimate child and there is no evidence on record that the appellant was having any extra-marital relation with any other person. In view of the aforesaid clear-cut finding in favour of the appellant which according to me was not the real cause between the parties. It was simply a misapprehension in the mind of husband without any proof. In fact the real cause for dispute was ornaments and clothes.

13. After appreciating the evidence of the parties on record, I think that the Trial Court has not properly marshalled the evidence and has ignored the admissions of both the parties and has committed an illegality in recording finding on the question of desertion and has wrongly granted decree of divorce on the ground of desertion. In fact for obtaining a decree on the ground of desertion, it is the burden on the respondent, who is seeking a decree to prove that the other party has deserted forever without the consent and not prepared to live together, but in this case no such clear-cut or sufficient evidence is available on record about voluntary desertion by wife or refusal for cohabitation with husband. It appears that mainly there was dispute about the ornaments which were given by the parents of the husband to the wife in the marriage and respondent and his father was only interested in getting those ornaments. It also appears that the ground of illegitimate relation with some other person was fictitiously made out subsequently with a view to get decree for divorce and rightly so it was pleaded in the petition after five years of the birth of child on 6.6.1982. The original petition for divorce was filed on 16.1.1984 and the amendment was filed on 28.9.1989.

14. Therefore, considering the evidence on record, this appeal is allowed and the decree of divorce granted on the ground of desertion is set aside. The finding recorded by the Court below, regarding desertion, is also set aside and the petition filed by the respondent/husband for divorce is dismissed with no order as to costs. A decree be drawn up accordingly. Record be returned.

