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Sukhama Devi Vs. Niranjan Singh and anr.

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Court : Delhi

Decided On : Apr-29-1983

Reported in : AIR1983Delhi469; 1983(5)DRJ178

Judge : T.P.S. Chawla and; J.D. Jain, JJ.

Acts : Hindu Marriage Act, 1955 - Sections 13

Appeal No. : Letter Patent No. 113 of 1981

Appellant : Sukhama Devi

Respondent : Niranjan Singh and anr.

Advocate for Pet/Ap. : Vijay Kishan and; T.R. Sharma, Advs

Judgement :

J.D. Jain, J.

(1) The facts giving rise to this Letters Patent Appeal against the judgment and decree dated 25th May 1981 of a Single Judge of this Court (passed in F.A.O. No. 43/80) may be briefly stated as under.

(2) The Marriage of the appellant Smt. Sukhma Devi with respondent No. 1 Shri Niranjan Singh was solemnised on 26th June 1972 in accordance with Hindu rites and ceremonies, both the parties being Jat by caste and she was taken to her

Matrimonial home on the next following morning. In December 1978 the husband moved an application for dissolution of the marriage by a decree of divorce on the grounds of (a) desertion, (b) cruelty, and (c) adultery. It was averred by him that the appellant left the matrimonial home on the very evening of 27th June 1972 without any just cause or reasonable excuse and as such there could be no consummation of marriage. She did not return to her matrimonial home uptil the filing of the petition for divorce although he waited for her return all these years and even the negotiations made by him through relatives and friends in this behalf did not fructify. He contended that after his marriage he came to know that the appellant had been living in adultery with respondent No. 2 who is none other than the husband of her real sister Smt. Jai Kaur. On suspecting the conjugal fidelity of the appellant he visited the house of respondent No. 2 and came to know that she was living there with respondent No. 2 and likewise she had been living there even before her marriage with him. He alluded to the following facts in order to substantiate his allegations.

1. Respondent No. 2 was employed as Bus Conductor in Delhi Transport Corporation and by exercising his influence he was instrumental in getting employment to the appellant too as a Lady Bus Conductor. 2. The appellant did not disclose in her employment record that she was a married woman. She did not mention the name of her husband and instead mentioned the name of her father with a view to give an impression that she was an unmarried woman. 3. She intentionally and knowingly described herself as belonging to a Backward Class (Banjara) at the time of joining Laxmi Bai College where she had been studying during 1972-74 and thus she had been getting scholarship from the concerned authority as being a member of a Backward Class. 4. At the time of leaving his house she took away all the ornaments and costly clothes costing about Rs. 10,000.00 which had been given by him (respondent No. 1) to her as presents at the time of their marriage and she did not return the same. 5. She did not care to join the society of respondent No. I and lead marital life all these years because of her being under the influence of respondent No. 2 with whom she was having illicit relations.

(3) The defense taken by the appellant succinctly is that she stayed in her matrimonial home for three days and enjoyed the society of respondent No. 1. Thus, the marriage was duly consummated. Thereafter she went to her parental home on a customary visit called 'Phera' with the consent of respondent No. 1 and as per custom obtaining amongst them the latter was required to bring her back to the matrimonial home within a year. However, he failed to do so. All the same, he had been meeting her off and on at Laxmi Bai College and they had been moving about at various places including restaurants and enjoying the society of each other. Since he did not turn up to take her back to the matrimonial home, her father, her uncle Ram Kumar, her brother Vijender Singh and her cousin brother etc. called a Panchayat at village Sultanpur (to which respondent No. 1 belongs) two or three days prior to 26th June 1973. However, respondent No. 1 did not attend the Panchayat and refused to take her back unless a sum of Rs. 10,000.00 as demanded by him was given by her father. She vehemently denied having any promiscuous relations with her brother-in-law, viz., respondent No. 2, and asserted that she was selected as a Bus Conductor on merits. She pointed out that other members of her family, namely, her sister and her sister-in law (brother's wife) were too employed as Lady Bus Conductor in the Delhi Transport Corporation and respondent No. 2 had nothing to do with their appointment as such as he was just a Bus Conductor himself. As for her admission to Laxmi Bai College, she admitted that she had declared her caste as Banjara but explained that it was with a view to get admission to the College and this had happened a year before her marriage with respondent No. 1. She then studied in the said College for three years. As regards her description in the service record in the Delhi Transport Corporation, she explained that she did not give herself out as 'Miss' but simply mentioned her name 'Sukhma Devi' without indicating whether she was a married woman or not.

(4) The trial Court dismissed the petition for divorce holding that none of the grounds for dissolution of marriage was established. The learned single Judge on a re-appraisal of the entire evidence concurred with the findings of the trial Court as regards the grounds of cruelty and adultery. However, she held that the appellant had deserted respondent No. 1 without reasonable cause and without his consent. Hence, the learned single Judge allowed the appeal and dissolved the marriage under Section 13(1)(ib) of the Act by granting a decree of divorce.

(5) 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. It is a total repudiation of the obligation of marriage. (See Halsbury's Laws of England, 4th Edition, Volume 13,Para 576 which summarises the legal position on the subject admirably). Explanationn to Section 13(1) reads as under :

'IN this Sub-section, the expression '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 willful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.'

(6) thereforee a Court must look for the existence of two elements to find desertion ; first the factum of physical separation and second the animus 181 deserendi, i.c the intention to bring cohabitation permanently to an end. The very first question which, thereforee, arises for consideration is whether the appellant departed from her matrimonial house without reasonable cause and with the intention of bringing cohabitation permanently to an end. As stated above, the stand of the appellant is that she stayed with respondent No. 1 for three days after her marriage during which period they performed marital obligations towards each other. Thereafter she left for her paternal home to pay a customary visit called 'Phera' Along with her brother Vijender Singh. Under the custom the husband was required to bring back the bride within one year thereof but respondent No. 1 never came to her parents' house to take her back to matrimonial fold. Respondent No. I did not allude to any such custom in his petition for divorce and asserted that the parties never cohabited after their marriage and the appellant left the matrimonial home on the very first day of her arrival at Ins house. However, in the replication filed by him he admitted that she had gone to her parents' house for 'Pliera'. He, however, went on to say that it was customary for the bride to go back to her parents' house for 'Pheru with all the ornaments presented to her by both the sides. This he asserted in the context of his averment that the appellant had taken all the ornaments and costly clothes which had been presented to her at the time of her marriage while going to her parents' house for 'Phera'. In his deposition as P-W1

he reiterated that on the evening of 27th June, 1972 the appellant left for her parents' house Along with a small child and he was scrupulously reticent about the purpose of her visit to parents' house. However, Mohinder Singh, Public Witness 2, who is elder brother of the father of respondent No 1, stated in the examination in chief itself that on the very date of the arrival of the Doli at the house of respondent No. 1, the brother of the appellant came to their house and she went away with him He explained that according to custom in their family the newly wedded couple is not allowed to meet unless the 'Phera' ceremony is performed. He spelt out the custom in the following words :

'AFTER the Doli the wife once goes back to her parents' house from the house of her husband and subsequently she is brought back after a few days. It is only after the second visit of the wife that she can meet her husband.'

(7) Obviously he gave this Explanationn in order to highlight the point that there could not be any consummation of marriage before the wife had performed 'Phera' ceremony. In the process, however, he admitted in unequivocal terms that a custom like 'Phera' did exist in their community. Indeed, during his crossexamination he was candid enough to admit that as per custom in their family at least for one year after the marriage, it is the husband who goes to the house of his in-laws for bringing his wife from there Similarly, Amar Singh, who is Phoofa of respondent No. 1, stated that : 'In our families a newly wedded husband is not allowed to meet his wife unless he brings her back second time from her parents' house.'

(8) Daryao Singh, maternal uncle of respondent No. 1 stated during cross-examination that on that day the appellant went with her brother quite happily and without grudge or bickering.

(9) Thus, the existence of custom of 'Phera' has been admittedly unequivocally by the close relatives of respondent No. 1. They have been frank and fair even to admit that it is for the husband to bring the bride back from her paternal home and it was only then that consummation of marriage can take place. As a necessary corollary it would follow that the appellant did not leave her matrimonial home without the consent or against the wish of the other spouse or without any lawful

excuse. There can be no desertion if the separation is with the consent of the other spouse (so-called deserted spouse). The consent may be express or tacit but it must be real. The appellant seems to have left for her parent's house with the express rather than tacit consent of respondent No. 1 because it was in confirmity with a custom admittedly prevalent amongst them and her brother Vijender had specifically came to take her. In other words, animus deserendi- cannot be attributed to the appellant when she left the matrimonial home. It is rather unfortunate that it eventually turned into separation for good'.'

(10) As stated above, for desertion to exist, there must be both factum of physical separation and animus deserendi. Mere physical act of departure of one spouse in the absence of any intention to forsake the matrimonial home does not make that spouse the deserting party. Desertion is not withdrawal from a place but from a state of things, which may be termed, for short 'the home' and it commences from the time when the factum of separation and the animus deserendi coincide in point of time. This may take place simultaneously or may be at different points of time.) The crucial question which, thereforee, arises for consideration is whether or not it is possible in law for a separation which began by being consensual, as in the instant case, to acquire the character of desertion without a previous resumption of cohabitation. Wilfrid Greene M.R. was called upon to consider this question in Pardy v. Pardy 1939 288 and his answer was in the affirmative. He stated the legal position as under:

'FOR the act of desertion both the factum of separation and the animus deserendi are required. A de facto separation may take place without there being an animus deserendi, but, if that animus supervenes, desertion will begin from the moment, unless, of course, there is consent by the other spouse. Thus a husband who leaves his wife for a business voyage may, nevertheless, become guilty of desertion without the necessity of a previous return. All that is required to establish desertion in such a case is the presence of a supervening animus deserendi (a matter to be inferred from the words and conduct of the deserting spouse), a continuance of the de facto separation, and the absence of consent by the other spouse,' .

(11) Similarly, in Bipinchandra Jaisinghbai Shah v. Prabhavati, : [1956]1SCR838 , the Supreme Court enunciated the legal position as follows :-

'IF in fact, there has been a separation the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation . may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time : for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a dose.'

(12) It is, thereforee, to be seen whether such an irrevocable intention on the part of the appellant can be gathered from the facts and circumstances of the instant case. As observed earlier, the custom of 'Phera' stands well established. Under that custom an obligation is cast on. the husband to bring his bride back to the matrimonial home within a year of her departure. It is true that the respondent has vehemently refuted the requirement of his bringing back the appellant to the matrimonial home within a year but his denial is of no consequence in view of the clear evidence to the contrary of both, Mahinder Singh Public Witness 2 and Amar Singh Public Witness 4. This obligation the respondent never cared to discharge. It is not even remotely suggested that he ever made any attempt to bring her back to his house.) His Explanationn for not bringing back the appellant or sending for her apparently is that after about a month of their marriage, he learnt that the appellant was leading a life of unchastity and was residing with respondent No. 2. According to him, he visited Laxmi Bai College sometime towards the end of July or August, 1972 to see the appellant but he could not contact her in the College. He then verified from the Admission Register of the College and he discovered that she had given her caste as Banjara. At that time, he heard the clerks whispering that Sushma about whom he was making verification was the same girl for whom one bus conductor was coming to the college. He then suspected illicit connection between the appellant and respondent No. 2. Consequently, he went to the house of respondent No. 2 at village Sarai and came to know that the appellant had been residing there even prior to her marriage. It was pursuant to the said information

that he kept a track of the activities of the appellant and respondent No. 2 and eventually he took photographs on 16-5-1979 when both the appellant and respondent No. 2 were found sitting together in a park. Both of them had placed their hands on the body of the other.

(13) It is thus abundantly clear that having become suspicious about the conjugal fidelity of the appellant respondent No. 1 virtually lost all interest in her and he made no effort worth the name to rehabilitate her. The learned single Judge has, however, observed that :

'AS such it is clear that the evidence on behalf of the petitioner indicates that he wanted a reconciliation with respondent No. 1 if she was willing to sever her relationship with respondent No. 2 and he approached his relatives to make efforts in this regard. His uncle Daryao Singh has corroborated his version and stated that efforts were made in this regard.'

(14) We have meticulously gone through the entire evidence on record but we have not been able to lay our hands on an iota of evidence which can even remotely warrant the inference drawn by the learned single Judge Significantly, there is not even a whisper in his examination-in-chief about any attempt on his part to bring about reconciliation. All that he has stated 184 is that neither the appellant nor her brother ever approached him for reconciliation or for clarification of her relationship with respondent No. 2. However, during his cross-examination he did assert that two or four days after his overhearing the whisper between the clerks of the college, he talked to his Phuphar, (maternal uncle and other relations about it and those relatives of his talked to the relatives of the appellant in that connection. However, he did not know the dates or the month when they talked to them. He did not accompany his relatives on any such occasion to the house of the appellant's parents or her relatives. He further admitted that he did not try to contact the appellant personally or her relatives in connection with the information derived by him from the whisper. It is thus obvious that apart from talking to his own relatives he took no steps whatsoever to verify the truth of the information which was based purely on whisper. Further, he made no effort whatsoever towards reconciliation with the appellant and his statement that his relatives talked

to the parents/relatives of the appellant is just hearsay and as such it is not admissible in evidence. Pertinently on further cross-examination, he stated that he had told his relatives that he was prepared to keep the appellant with him provided she agreed to sever her relation with respondent No. 2. The first effort in that direction was made by him in September 1972 but he did not recollect the exact date when it was made. He asserted that his uncle Inder Singh, Phuppar Amar Singh and his maternal uncle Daryao Singh made successive efforts toward reconciliation and their conciliatory efforts continued for about 2 years and even later up to the date of institution of the petition for divorce. However, he did not write any letter to his wife requiring her to come and live with him. He did not recollect the dates of any such effort or months or the year thereof.

(15) Mahinder Singh, Daryao Singh and Amar Singh are the only witnesses examined by respondent No. I in support of his case. We have, looked in vain in the dispositions of all of them for any attempt on their part to bring about reconciliation between the couple. There is not even a whisper about any such attempt in the testimony of any one of them. While Mahinder Singh and Amar Singh have not uttered a word about it, all that Daryao Singh has stated is that three or four months after the marriage of the parties, respondent No. 1 told him that she was having illicit relationship with one Ranbir Singh and he once met father of the appellant in that connection Thereafter he also talked to one Sukhdev Singh a relation of the appellant who was married in their village. Those relatives of the appellant told him that they would look into the matter and would inform him latter on. However, they never reported back to him. On a bare reading of his testimony, it is crystal clear that he talked to the father and another relative of the appellant, if at all, to complain about the alleged promiscuous relation between the appellant and respondent No. 2. He nowhere states that he talked to them to bring about reconciliation between the parties and pave the way for reunion of the appellant with respondent No. 1. He does not even say that respondent No. I was willing to take the appellant back in the matrimonial house provided she served her connection with respondent No 2.

(16) There is thus no shred of evidence on record to warrant the inference that respondent No, 1 was ever desirous of bringing her back to the matrimonial home

much less that he made any effort at reconciliation. 185

(17) It is in this state of evidence that the momentous question vihether the appellant ever decided or made up her mind to permanently abandon her matrimonial home is to be answered. In our view the answer must be in the negative. It is for the simple reason that as per custom obtaining in their community, the appellant was legitimately looking forward to her husband visiting her parent's home in order to take her back to his own house. However, he failed her completely and her expectation was totally belied. Certainly, there was no bar to respondent No. 1 taking her back to the matrimonial home at any time even after expiry of one year of her coming to her parent's house but as seen above he took no such step because he ostensibly entertained grave suspicion about the chastity of his wife.

(18) In same circumstances the honest and reasonable belief, though mistaken, of one spouse that he or she has been wronged by the other, say by committing adultery, may be a just cause to forsake her/him but the belief must be induced by actual conduct of the other spouse of a suspicious or incriminating nature and it must not be induced by gossip or hearsay.

(19) Unfortunately, in the instant case the mind of the appellant was poisoned by a mere whisper. He did not make any effort to verify the facts and took the troth of the whisper for granted. He did not talk to the clerks of the college about the source of their information. They had simply whispered about a conductor visiting the College to see the appellant but he at once jumped to the conclusion that she must be having adulterous relationship with him. He took no steps even to contact the appellant and afford her an opportunity to explain it. So his belief cannot be said to be honest and sensible It was the result of caprice and distorted judgment. Even otherwise he did not make any honest and sincere effort to ascertain true facts. Indeed, having regard to the overall conduct of respondent No. 1 we entertain serious doubts about the veracity and authenticity of his whole story about his having visited the College of the appellant and overhearing the clerks whisper. There are concurrent findings of both the Courts that respondent No. 1 his miserably failed to bring home the charges of adultery and cruelty to the

appellant. Having regard to the conspectus of the evidence on the record to which we have already adverted, we find no cogent ground to take a different view of the matter. We would however, wish to add that having regard to the close relationship between the appellant and respondent No. 2 and the fact that both of them were employed in the same concern namely Delhi Transport Corporation there would have been many occasions for them to meet. There was nothing abnormal if they were seen together. Moreover the concept of social behavior and etiquette is fast changing with the spread of education and the impact of western civilisation on the minds of the educated people. It is no longer a sin for a woman to talk or walk with a male colleague or co-worker. Respondent No. 1 would have been thereforee well advised to verify the facts for himself rather than believing the whisper blindfold. His story of his having taken the photographs of the appellant and .respondent No. 2 fails to carry conviction and has been rightly disbelieved by both the courts. It was much after the filing of the petition for divorce. We have looked at these photographs but we find it impossible to decipher the identity of the persons seen in the photographs because the impressions are very vague. The photographs were perhaps taken from a pretty long distance. Even otherwise the two persons who are seen in these photographs are not sitting in a posture which can be said to be indecent or vulgar so as to warrant an inference of their intimacy. Hence there was not even. a semblance of justification for failure on his part to bring her back.

(20) It would appear that even the appellant and her parents did precious little to approach respondent No. 1 to seek resumption of marital life between the two. No doubt, appellant deposed that after about a year of their marriage her father and brother made an effort towards reconciliation but respondent No. 1 demanded Rs. 10,000.00 in cash from them as a condition precedent for keeping her in his house but this bald statement of hers too is hearsay because she did not examine either her father or her brother to testify to what actually transpired at the Panchayat, which was allegedly convened on or about 24-6-1977. They would have been the best persons to depose to their dialogue, if any, with respondent No. 1 or his relatives. Thus, there is total want of legal evidence in this respect.

(21) A vital question which is a necessary concomitant of the above still remains to be answered. It is whether it was incumbent upon the appellant or her parents etc. to persuade respondent No. 1 to take the appellant back to his fold. Raw social realities loom large on the legal horizon in this context. Indisputably, parties belong to an orthodox and conservative community which still adheres to old traditions and customs like Phera ceremony and the duty of the husband to bring her back from his paternal home within a year or so is sanctified by custom. The appellant and her people thereforee, would have justifiably waited for respondent No. 1 to come and take her back. No Explanationn is forthcoming as to why respondent No. 1 made no effort to bring the appellant back to the matrimonial home when she had gone to her parent's house with his explicit consent on a customary visit. It would thus appear that respondent No. 1 deliberately doffed and flouted the customary edict.

(22) It was urged by counsel for respondent No. 1 with some fervour that failure on the part of respondent No. 1 to bring back the appellant within a reasonable time should have put her and her parents on guard and awakened them to the realities of the situation. Thus, they should have taken some positive steps to restore the appellant to her matrimonial home. However, we do not find any merit in this contention because it was the duty of respondent No. 1 under the custom governing the parties to go to her parents' house and bring her back. The bride was not expected to go to her matrimonial home of her own. Understandably, they would have considered it inauspicious and a social taboo for a newly married wife to go back to her in-laws house without her husband taking her back.

(23) Although the contention of respondent is that the allegation about her leading an unchaste life was conveyed to the father and other relatives of the appellant through Amar Singh, she has categorically denied having been ever aware of such imputation till after filing of the petition for divorce. The learned single Judge seems to be in two minds on this matter. In para 28 of the judgment (as reported in (1981) 2 Divorce and Matrimonial Cases page 29) she observed : -

'THE assertion of the respondents that they were not aware that the appellant-petitioner was aggrieved about their relationship till December, 1978 when the

petitioner went to Court seems hard to believe.'

(24) But in the very next paragraph while considering the question if she had just cause to stay away from the matrimonial house the learned Judge reversed the finding of the trial court with the remark :

'THE finding of the trial court, that respondent No. 1 was justified in staying away from the petitioner-appellant because he had leveled allegations of adultery against her, does not appear to be correct in the facts and circumstances, as it is clearly the case of both the respondents that they were not aware of these allegations before the filing of the petition. As such there could hardly be any justification for respondent No. 1 to stay away from the petitioner-appellant when she did not even know that such a charge had been leveled.'

(25) We are inclined to endorse the latter view because the former view is based on mere surmise and conjecture. There was hardly any scope for vacillation, on the part of the learned single Judge. Under the circumstances, all that can be said is that the appellant or for that matter her parents took no steps to facilitate her return to the matrimonial home but as observed above no such obligation rested on her/them. Hence, mere inaction on her part will not justify an inference that she had made up her mind to bring consortium to an end and desert respondent No. 1 for ever. She may be feeling really helpless in the matter.

(26) Yet another important question for consideration in such cases is whether the conduct of the deserted spouse has been such as to excuse the deserting spouse from making any attempt to put an end to desertion or from attempting any reconciliation. The following well known observations of Lord Macmillan in his speech in the House of Lords in Pratt v. Pratt 1939 A.C. 417 are very apposite in this connection :

'IN my opinion what is required of a petitioner for divorce on the ground of desertion is proof that throughout the whole course of three years the respondent has without cause been in desertion. The deserting spouse must be shown to have persisted in the intention to desert throughout the whole period. In fulfillling its duty of determining whether on the evidence a case of desertion without cause

has been proved the court ought not in my opinion to leave out of account the attitude of mind of the petitioner. If on the facts it appears that a petitioning husband has made it plain to his deserting wife that he will not receive her back or if he has repelled all the advances which she may have made towards a resumption of married life, he cannot complain that she has persisted without cause in her desertion.'

(27) On the question of just cause Lord Romer made some pertinent remarks at page 428. This is what he said :

'IT would, in my opinion, be quite unreasonable to hold that the respordent, guilty though she was of the serious matrimonial offence of desertion, should be expected to present herself at her husband's door without any knowledge of how she would be received, and thereforee at the risk of being subjected to the indignity of having admission refused her by her husband or by one of his servants.'

(28) In Cohen v. Cohen 1940 A.C. 631 all the law Lords expressly approved the words of Lord Macmillan.

(29) Having regard to the peculiar circumstances of this case there is no warrant for the conclusion that the appellant was determined to sever the matrimonial bond for ever. Desertion is not to be decided by merely ascertaining which party left the matrimonial home first. Just as it is desertion for one spouse to abandon the other, so it is also desertion for one spouse to cause the other to live separate and apart. The person who intends bringing cohabitation to an end and whose conduct in reality causes its termination commits the act of desertion. In legal parlance such conduct is termed as constructive desertion. On the facts of the present case, we take the view that respondent No. I cannot set up that desertion of the appellant continued over the period during which he had evinced to her a firm and decisive determination that she should not return to him. That he finally rejected his wife is evident from/the stubborn and ostrich like attitude of respondent No. 1 who was primarily responsible for the appellant living apart from him for all these years. Hence, respondent No. 1 is manifestly guilty of constructive desertion and- as such he is disentitled to claim the relief of divorce on the plea of desertion by his

wife.'

(30) Lastly the question of burden of proof assumes considerable importance in a situation like this. It is settled law that burden is on the plaintiff to prove desertion without cause for the statutory period. He must prove the factum as well as the animus deserendi. Of course, the standard of proof beyond reasonable doubt is not required as in English law but the court has to be satisfied on a preponderance of probabilities abut the existence of both these essential ingredients. Denning, L.J. observed in Dunn v. Dunn in (1948) 2 All ER 822 :

'THE legal burden throughout this case is on the husband, as petitioner, to prove that his wife deserted him without cause. To discharge that burden, he relies on the fact that he asked her to join him and she refused. That is a fact from which the Court may infer that she deserted him without cause, but it is not bound to do so. Once he proves the fact of refusal, she may seek to rebut the inference of desertion by proving that she had just cause for her refusal ; and, indeed, it is usually wise for her to do so, but there is no legal burden on her to do so. Even if she does not affirmatively prove just cause, the Court has still at the end of the case to ask itself ; Is the legal burden discharged Has the husband proved that she deserted him without cause ?'

(31) Hence even if the appellant has failed to prove just cause for her living apart (assuming that she ought to have), respondent No. 1 has still to satisfy the Court that desertion was without just cause.

(32) In arriving at the conclusion that the appellant intended to permanently forsake the respondent the learned Judge has been very much swayed by the following two facts, besides of course, failure on her part to return to the matrimonial home.

'(I) Her taking up employment as a bus conductor subsequent to her marriage and not disclosing her matrimonial status. (ii) Her loitering about on occasions with respondent No. 2.'

(33) This according to the learned Judge is not normal conduct for someone who intends to return to the matrimonial home.

(34) However, we do not think that any of these facts betrays an intention on her part to destroy the matrimonial relationship. She had to seek employment as a measure of economic security after her virtual rejection by respondent No. 1, Non-disclosure of her married status may be ascribed to a lurking fear in her mind that it may lead to some complication or enable respondent No. 1 to play some mischief.

(35) As for her loitering about with respondent No. 2, we find that there is virtually no evidence on record to substantiate this allegation except the tendentious statements of respondent No. 1 and Amar Singh both of whom are very much prone to paint her black on the marriage canvass. Even otherwise having regard to close relationship of the appellant and respondent No. 2 and their being colleagues in the same organisation, there is nothing abnormal about it. Indeed, nothing turns upon it in the absence of any positive evidence about their having been seen in compromising position or making indecent advances towards each other.

(36) Thus taking into consideration the totality of circumstances, we are of the view that respondent No. 1 has failed to discharge the legal burden of proof which lay on him. Hence the finding of the learned single Judge that the appellant is guilty of matrimonial offence of desertion cannot be sustained.

(37) To sum up thereforee this appeal succeeds, the judgment as well as the decree passed by the appellate Court is set aside and the petition for divorce is dismissed. Under the circumstances the parties are left to bear their own costs throughout.

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