

Devi Singh Vs. Smt. Sushila Devi

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Court : Rajasthan

Decided On : Mar-28-1979

Reported in : AIR1980Raj48; 1979()WLN331

Judge : S.K. Mal Lodha, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 13, 13(1) and 13-A; [Evidence Act, 1872](#) - Sections 101 to 104; Marriage Laws (Amendment) Act, 1976; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 11

Appeal No. : Civil Misc. Appeal No. 113 of 1978

Appellant : Devi Singh

Respondent : Smt. Sushila Devi

Advocate for Def. : G.M. Mehta, Adv.

Advocate for Pet/Ap. : M.L. Kala, Adv.

Disposition : Appeal dismissed

Judgement :

S.K. Mal Lodha, J.

1. This appeal, under Section 28 of the Hindu Marriage Act (No. XXV of 1955) (which will hereinafter for the sake of brevity be referred to as 'the Act') by the

husband, who was petitioner before the District Judge, Jodhpur, is directed against the judgment dated August 16, 1978 by which his petition, filed under Section 13 of the Act was dismissed. In this judgment, the husband-appellant and the wife-respondent will be referred to as the petitioner and the respondent respectively.

2, Petitioner Devisingh and respondent Sushila Devi were married according to Hindu rites in April, 1961. After marriage, both lived together as husband and wife. Out of this wedlock a son was born to them, who attained the age of 14-15 years on Oct. 5, 1977, the date on which the petition was filed. According to the petitioner, the respondent left his house En the year 1964 and started living separately. A long period of 14 years had passed since then. The case of the petitioner Is that the respondent has been living separately with an intention to put an end to the marital relation and she has no intention to come and live with thepetitioner whereby to resume the conjugal relation. It appears from the averments made in the petition, that there was lot of litigation between the parties after 1964. The case of the petitioner is that the respondent is guilty of cruelty and has deserted him without just and reasonable excuse. He, therefore, submitted the petition under Section 13 of the Act for dissolution of the marriage by a decree of divorce.

3. The respondent contested the petition. She has averred that the petitioner had been cruel to her from the very first night of the marriage, that she was not treated properly by the petitioner, that on being assured by the petitioner of a good behaviour, she purchased a house in Bagar Chowk and the petitioner started living with her. According to the respondent, both (husband and wife) lived in that house for some time but on April 12, 1964, the petitioner left the respondent along with an ailing son and, thereafter, he never returned despite her repeated efforts and requests to resume married life. She has stated that a letter was written to the petitioner on November 19, 1965. In brief, her case was that it was on account of improper and cruel behaviour of the husband that she was compelled to live separately. Thus, she imputed desertion on the part of the petitioner. She also raised an objection that there has been unnecessary and improper delay in filing the petition under Section 13 of the Act and as such it is not maintainable. It was pleaded by her that the petitioner had previously filed separate petitions for

restitution of conjugal rights and judicial separation. The petitions for restitution of conjugal rights and judicial separation were dismissed. The dismissal of the petition for judicial separation was maintained by the High Court and, therefore, the present petition under Section 13 of the Act is barred by the principles of res judicata. An objection was also taken that the petition under Section 13 of the Act is not maintainable.

4. The learned District Judge framed four issues. Issue No. 4 relates to relief. Issues Nos. 1, 2 and 3, when translated into English, read as under 3

(1) Whether the non-petitioner (wife) has deserted the petitioner since 1964 without reasonable excuse ?

(2) Whether on the basis of the facts mentioned in para (kh) of the additionalpleas, the petition is barred by the principles of res judicata and. therefore, it is not maintainable ?

(3) Whether the parties have been living separately for 14 years and as such, the petition having been presented after long delay, is not maintainable

5. On behalf of the petitioner, statements of P. W. 1 Devi Singh, P. W. 2 Abdul Razak, P. W. 3 Madanlal, P. W. 4 Arjunsingh and P. W. 5 Prithvisingh were recorded. Respondent examined herself as NAW 1 and NAW 2 Banshi-lal (father of the respondent). The following documents have been exhibited during the trial:

(1) Copy of the plaint filed by the respondent against the petitioner in the Court of the Civil Judge, Jodhpur (Ex. I),

(2) Copy of letter dated Nov. 19, 1965 (Ex. A-I);

(3) Certified copy of the order of the City Magistrate, First Class, Jodhpur dated Mar. 13, 1963, passed in Criminal Original Case No. 44 of 1964 (Ex. A-2)

(4) the certified copy of the judgment of the High Court dated July 8, 1970 passed in S. B. Criminal Revision Petition No. 408 of 1969 (Ex. A-3);

- (5) the certified copy of the order of the District Judge, Jodhpur dated Nov. 11, 1965, passed in Civil Miscellaneous Case No. 103A of 1964 (Ex. A-4);
- (6) the certified copy of the order of the Dist. Judge, Jodhpur dated Aug. 25, 1969 passed in Civil Misc. Case No. 18A of 1968 (Ex. A-5);
- (7) the certified copy of the judgment of the High Court dated May 9, 1972, passed in Section B. Civil Misc. Appeal No. 7 of 1970 (Ex. A-6) reported in AIR 1972 Raj 303;
- (8) the certified copy of the order of the Additional Sessions Judge No. 1, Jodhpur dated Sept. 13, 1977, passed in Criminal Appeal No. S of 1977 (Ex. A-7),
- (9) the certified copy of the order of the District Judge, Jodhpur dated May 25, 1977 passed in Civil Misc. Case No. 78-A of 1974 (Ex. A-8),
- (10) the certified copy of the order of the Additional Sessions Judge, Jodhpur dated March 30, 1971 passed in Criminal Revision No. 35 of 1970 (Ex. A-9) and
- (11) the copy of the reply dated March 1, 1978, filed in Criminal Misc. Case No. 152 of 1977 (Ex. A-10).

6. The learned District Judge decided issues Nos. 1 and 2 in favour of the respondent. Issue No. 3 was decided against the respondent. As a result of the findings on issues Nos. 1 and 2, the learned District Judge dismissed the petition under Section 13 of the Act with costs vide her judgment dated August 16, 1978. Hence, this appeal by the petitioner under Section 28 of the Act.

7. Before framing issues, an endeavour was made by the learned District Judge to bring about a reconciliation between the parties. The reconciliation could not be brought about. Before commencing hearing of the appeal, on February 27, 1979, efforts for reconciliation between the parties were made and they wanted time. On March 5, 1979, parties stated that despite efforts for reconciliation, it could not materialise and, therefore, it was submitted that the appeal may be heard on merits. On that day, the petitioner submitted an affidavit narrating therein the events which took place on February 27, 1979 after the parties had taken time.

The respondent also submitted an application in writing mentioning as to what happened on February 27, 1979. The petitioner and the respondent have given different versions.

8. Mr. M. L. Kala, learned counsel for the petitioner, submitted that the petitioner has clearly established from the evidence that the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of petition. Learned counsel emphasised that under Section 13(1)(ib) of the Act, the petitioner is only required to establish desertion for a continuous period of not less than two years immediately preceding the presentation of the petition. He urged that the conduct of the respondent preceding two years from the date of the presentation of the petition is only relevant for deciding the question whether the respondent has deserted the petitioner. Learned counsel further submitted that desertion has been made ground for dissolution of marriage by a decree of divorce by the Marriage Laws Amendment (No. LXVIII 1976), which came into force on May 27, 1976, and insertion of Section 13 of the Act shows that alternate relief in divorce proceedings can be granted and as such having regard to the circumstances of the case, the Court may pass a decree for judicial separation.

9. Explanation to Section 13(1) of the Act lays down that 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 wilful neglect of the petitioner by the other party to the marriage. It is, therefore, clear from the Explanation to Section 13(1) of the Act that burden was on the petitioner to show that the respondent has deserted him without reasonable cause and without his consent or against his wish. The essentials of desertion are (1) factum of separation (2) intention to bring cohabitation to an end, (3) absence of consent and (4) absence of conduct giving reasonable cause to quit the matrimonial home. In *Bipinchandra Shah v. Prabhavati* AIR 1957 SC 176 it was observed:

'Desertion is matter of inference to be drawn from the fact and circumstances of each case.....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 animus deserendi co-exist. But it is not necessary that they should commence at the same time..... Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume marriage life on such conditions as may be reasonable.'

In *Lachman v. Meena* AIR 1964 SC 40 their Lordships of the Supreme Court have observed:

'It is settled law that the burden of proving desertion--the 'factum' as well as the 'animus deserendi' -- is on the petitioner, and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as that such desertion was without just cause. In other words, even if the wife where she is the deserting spouse does not prove just cause for her living apart, the petitioner-husband has still to satisfy the Court that the desertion was without just cause.' Keeping the principles, laid down by their Lordships of the Supreme Court in view, I, now, proceed to examine the evidence, led by the parties to find out whether the petitioner has been able to establish that the respondent has deserted him without just and reasonable cause. It is not in dispute that the petitioner and the respondent have been living separately since 1964. The relevant averments in this regard are found in paras 4 and 7 of the petition. P. W. 1 Devisingh has stated that the respondent had abandoned the matrimonial home in 1964 and since then, she has been living separately and that she has left the matrimonial home with an intention not to live with him. A perusal of his statement shows that on account of various litigation, the relations between the parties have become estranged and that the respondent had no intention for coming back to the petitioner's house. It will be useful here to extract some portions of his statement.*

P. W. 2 Abdul Razak has been working with the petitioner since 1955, He has stated that while on his duty, the petitioner remains vexed and his cause is litigation. He has admitted that the petitioner did not tell him anything about his wife. P. W. 3 Madanlal was produced to show that he asked the respondent to

settle the dispute but she told that it is difficult, for, she is in service. He has also deposed that from the talks which he had with the father of respondent, it appeared that he did not want to send the respondent. In the cross-examination, this witness has stated that when he enquired from the petitioner about the cause of dispute in 1965-66, the petitioner told him that the respondent is of bad character. P. W. 4 Arjunsingh has deposed that the petitioner and the respondent have been living separately for the last 12-13 years and that when he approached the respondent, she declined to live with the petitioner. The witness has admitted that the petitioner's younger brother Narpatsingh is his friend. It appears from the statement of this witness that he inquired from the respondent about the reason as to why she does not want to go to the petitioner's house but she did not tell any reason. P. W. 5 Prithvisingh

*(This matter being in Hindi we regret that we have to omit it here as we have no facilities for printing Hindi --Ed.).

has stated that he is friend of the respondent's brother as well as of the petitioner's brother and that the respondent's brother told him that the respondent does not go to her matrimonial home and also does not want to go in future. He has further stated that he attempted to have talks with the respondent once or twice but she refused to talk with him and declined to live with the petitioner. He has admitted that*.

The respondent Sushila Devi as NAW 1 has deposed that on April 12, 1963, her son was ill and that she told her husband to arrange for medicines and milk, whereupon the petitioner told her.*

'It is clear from her statement that, thereafter, the petitioner neither cared for her nor for child. She has deposed that neither the husband came to take her nor sent anybody for taking her nor wrote any letter. She has further stated that she made endeavours for going to her husband's house and had also sent a letter to the petitioner with her tenant Banshilal. The learned District Judge has mentioned in detail that statement of NAW 1 Sushila Devi. NAW 2 Banshilal is the father of the respondent. It was stated by him that the petitioner beat the respondent three times, and that she does not want to go to her matrimonial home because she

apprehends danger to her life from her husband. He has narrated the incident of February 5, 1978 when, while the respondent was going on her duty, the petitioner blocked her way. He corroborated NAW 1 Sushila Devi on the point that neither the petitioner nor any of his relations nor his friend came to take back the respondent nor sent any letter to her. The learned District Judge did not place reliance on the statements of P. W. 3 Madanlal, P. W. 4 Arjun Singh and P. W. 5 Prithvisingh for various reasons. One of the reasons given by her was that P. W. 3 Madanlal and the petitioner are co-employees in the Railway and that P. W. 4 Arjunsingh and P. W. 5 Prithvisingh are friends of the petitioner's younger brother Narpal-singh. P, W. 1 Devisingh has stated that he sent some persons for bringing the respondent during five years but he did not remember the names of the person to whom he sent for bringing, the respondent and for making her agreeable. Another important fact in this connection which deserves notice is that in the petition, it has not been alleged by the petitioner that he has suspicion about the character of his wife. During his statement in the court, he has stated that since the respondent has been living separately from him for the last 14 years, he has suspicion about her character. This, he has reiterated in the cross-examination that the only ground for suspicion about her character is that she has been living separately from him for the last 14 years. P. W. 3 Madanlal has stated that when he inquired about the cause of dispute in 1965-66 from the petitioner, the latter told him that the character of the respondent is bad. The witnesses produced by the petitioner do not inspire any confidence. In these circumstances, in my opinion, the petitioner has not been able to discharge the burden which lay on him that the respondent has deserted him without reasonable cause.

10. It may be stated that the petitioner filed a petition for restitution of conjugal rights under Section 9 of the Act and this was registered as S. B. Civil Misc. Case No. 103A of 1964. Issues Nos. 1 and 2 framed in that case were as follows:

(1) Did the respondent withdraw from the society of the petitioner without any reasonable excuse on 18-4-1963, and took away gold ornaments weighing seven tolas?

(2) Did the applicant make efforts to call her to reside and perform matrimonial relations, but she did not turn up?

The learned District Judge, in his judgment (Ex. A-4) dated November 11, 1965, after considering the evidence, which was led before him, recorded the following findings: 'In the instant case, there is the positive evidence to show that legal cruelty was exercised on the wife and she and her child were neglected to provide them with food. No blame was attached by the husband to her character. In that circumstance the attitude of the husband certainly amounts to legal cruelty, and constitutes a ground for refusing a decree for restitution of conjugal rights. The relations between the parties have come to such a stage that it cannot be expected of them normally to live together and it is in the interest of happiness, health and safety of the wife that she should not be forced to be in the company or society of the husband by a decree of restitution of conjugal rights.'

He, therefore, dismissed the petition for restitution of conjugal rights. It was admitted before me that an appeal was preferred against the judgment of the learned District Judge dated November 11, 1965, by which he dismissed the application for restitution of conjugal rights and that the appeal was dismissed for default. Thereafter, the petitioner submitted a petition for obtaining a decree for judicial separation under Section 10(1)(a) of the Act. In that case, five issues were framed inclusive of relief. As all the issues were connected with each other, they were disposed of together. Issue No, 1 was as under:

'Whether the non-petitioner has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition?'

The learned District Judge dismissed the petition for grant of a decree for judicial separation by his judgment (Ex. A-5) dated August 25, 1969 and held as under:

'The burden was upon the petitioner to prove by reliable evidence that the non-petitioner abandoned him without reasonable excuse. He could not prove desertion throughout the statutory period. There was no bona fide attempt on his part to bring his wife to the matrimonial home. The mere fact that the wife did not of her own accord come to his house during the period of five years is not

sufficient to hold that she had intentionally forsaken or abandoned her husband. The husband treated her cruelly as is evident from the judgment of this Court dated 11th November, 1965. She was forced to live separate from her husband throughout this period. This does not amount to desertion on her part.' The petitioner went in appeal and this Court, vide its judgment (Ex. 6) dated May 9, 1972, dismissed the appeal. This Court in its judgment (Ex. 6) while agreeing with the learned District Judge held that the petitioner has failed to prove desertion on the part of the respondent. From the perusal of this judgment it is clear that the averments which the petitioner had made in his petition under Section 13(1)(b) of the Act were also made in the petition for restitution of conjugal rights and judicial separation. The petitioner was not successful in establishing the averment that the respondent has deserted him without reasonable excuse. The respondent has averred that the petitioner beat her and in that connection he was convicted. P. W. 1 Devisingh has admitted that he was convicted for having beaten the respondent and that conviction was maintained by the appellate court. He has also admitted that the respondent had initiated criminal proceedings under Section 107, Criminal P. C. A perusal of the certified copy of the order (Ex. A-9) of the Additional Sessions Judge No. 2 dated March 30, 1971, shows that revision against the order passed by the learned Magistrate asking the petitioner and two others to furnish personal bond and surety for an amount of Rs. 5000/- on July 4, 1970 i.e. next date of hearing, was dismissed. In para 4 of the reply, reference of the letter (copy of which has been marked as Ex. A-I) dated November 19, 1965 was made. The petitioner in his statement in court has stated that he does not know whether the original letter was received by him or not. He has further stated.*

The statement of the respondent as NAW 1 shows that when her husband abandoned her, she at the first time sent a letter with Banshilal Shad, who was tenant of her father's house to her husband, and Banshilal, after return told her that the petitioner has torn the letter and told him not to bring letter again nor to give any information in this regard. Thereafter, along with Bhanwari Bai, the respondent is said to have gone to the petitioner's house and the petitioner told her that why had she come and further told her to return with honour.* He told her that he did not want to live with her or her children. It appears from her cross-examination that there is danger to her from her husband and whenever she goes

out, she takes with her some persons. Learned counsel for the petitioner has submitted that the finding of the learned District Judge that there was just cause for the wife to live separately from the petitioner is established, is wrong, for, the reasons constituting just cause found by the learned District Judge are not sufficient for coming to the conclusion that there was reasonable excuse for the respondent to live separate from the petitioner. According to the learned counsel, just cause should be grave and weighty. In this connection be referred to Shamlal v. Saraswati Bai AIR 1967 Madh Pra 204, Dastane v. Dastane AIR 1970 Bom 312, Satya Devi v. Ajaib Singh AIR 1973 Raj 20 and Lalita Devi v. Radha Mohan AIR 1976 Raj 1.

11. In a suit by husband for restitution of conjugal rights, it was held in Shamlal's case that failure of wife to prove 'just cause' for staying away from husband and further when the 'cruelty' against her is also not proved, the husband is entitled to a decree for restitution of conjugal rights. It was further held that 'just cause' must be grave and weighty, or 'grave' and convincing. It may be mentioned that under Section 9 of the Act, in a petition for restitution of conjugal rights the petitioner has to establish that husband or wife has, without reasonable excuse, withdrawn from the society of the other. In Satyadevi's case, it was held that the reasons for a wife to stay away from the husband have nonetheless to be grave and weighty even though they may not amount to legal cruelty. Dastane's case and Lalitadevi's case are not applicable to this case. In Lachman's case it was observed:--

'The expression 'reasonable cause' must be so construed as to bring about a union rather than separation. The said expression is more comprehensive than cruelty and such other causes, It takes in every cause which in a given situation appears to be reasonable to a court justifying a spouse to desert the other spouse,' (underlining is mine) Between the parties, it was observed in Devisingh v. Sushila Devi AIR 1972 Raj 303 as under:-- 'Here, in the present case, it was the wife who was held to be the wronged party and the husband was held to be in the wrong. Thereafter, once the husband's petition for restitution[^] of conjugal rights was dismissed it was for him to make bona fide and reasonable efforts to appeal to the sense of the wife and to satisfy her that should she return to him, she would be treated with all conjugal kindness due to her as his wife. Where the husband

has not been able to show this in his subsequent petition, the previous state of things resulting in a reasonable apprehension in the mind of wronged spouse about the future behaviour of the other spouse would be there and as long as a reasonable apprehension in the mind of the wronged spouse continues it cannot be said that the spouse so wronged is in desertion.'

12. Learned counsel appearing for the petitioner also contended that there was an intentional abandonment of the petitioner by the respondent. On the basis of the decisions reported in *Smt. Kako v. Ajit Singh* AIR 1960 Punj 328, *Kirpal Singh v. Harbans Kaur* AIR 1967 Delhi 19 and *Rohini Kumari v. Narendra Singh* AIR 1970 All 102 learned counsel argued that only conduct preceding two years from the date of presentation of the petition is to be seen for inferring whether desertion has been proved or not. He also argued that the respondent took an unreasonable attitude when she insisted for the return of the articles given at the time of the marriage, that the petitioner should come and live with her and that she does not want to live with her in his house. According to the learned counsel this unreasonable attitude constitutes desertion. He placed reliance on *Roshanlal v. Basant Kumari* (1967) 69 Pun LR 566 and *Krishna bai v. Punamchand* AIR 1967 Madh Pra 200. He further submitted that it was the duty of the wife-respondent to resume cohabitation which she failed to do. Reliance was placed on *Smt. Tirath Kaur v. Kripal Singh*, AIR 1964 Punj 28, *Madhukar v. Saral* AIR 1973 Bom 55 and *Anil v. Sudhaben* AIR 1978 Guj. 74. None of these contentions are of any help to the petitioner for the purpose of holding that the respondent has deserted him without reasonable excuse. On the basis of *Devi-singh's* case, learned counsel for the respondent contended that it was the duty of the petitioner to call the wife-respondent to her matrimonial home. He further contended that the desertion, which has started once will continue unless fresh efforts are made by the petitioner for resuming cohabitation, as he cannot be allowed to take advantage of his own wrong. According to Mr. Mehta, there was reasonable excuse for the respondent to live separate from the petitioner.

13. It is well settled that if one spouse by his words and conduct compels the other spouse to leave the matrimonial home, the former would be guilty of desertion though it is the latter who has physically separated from the other and has left the

marital home. This Court vide its judgment (Ex. A-6) dated May 9, 1972 held that the petitioner has failed to prove desertion on the part of the respondent. No new facts or circumstances have been brought on record from which it can be inferred that the petitioner intended to treat the respondent with conjugal kindness.

14. Learned counsel for the appellant submitted that divorce has been made more liberal. He invited my attention to Section 13A of the Act, which was inserted by the Marriage Laws (Amendment) Act, 1976 and urged that on a petition for dissolution of marriage by a decree of divorce, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation. In this case, as is clear from the judgment (Ex. A-6) that the dismissal of the petition under Section 10 of the Act for judicial separation was maintained by the High Court on the ground that the petitioner has failed to prove desertion on the part of the respondent. In these circumstances, Section 13A is not at all attracted.

15. It was also submitted by the learned counsel for the petitioner that admittedly both husband and wife have been living separate for the last 14 years and so there is a long desertion which tantamounts to mental and moral cruelty to the petitioner. In this connection, learned counsel referred to *Avinash Prasad v. Chandra Mohini* AIR 1964 All 486 and *Anna Saheb v. Tara-bai* AIR 1970 Madh Pra 36. In *Avinash Prasad's* case, the petition under Sections 10 and 13 of the Act was dismissed. The appellant, in that case, sought dissolution of the marriage, and in the alternative, judicial separation on three grounds, namely, adultery, cruelty and desertion by his wife. While dealing with the question of cruelty in that case, the learned Judge observed as under:

'So far as the question of cruelty is concerned there is no satisfactory evidence of physical cruelty committed by the respondent upon the appellant. There is, of course, sufficient evidence of the respondent voluntarily depriving the appellant of her society and cohabitation for a long period. This, however, amounts to mental and moral cruelty to the appellant.'

Parihar v. Parihar AIR 1978 Raj 140 is not applicable to the facts of this case. In the peculiar circumstances of that case, the learned Judge observed that the

marriage between the parties was only an empty shell which should be destroyed with maximum fairness and minimum bitterness. In this case, as held by me above, it has not been established that the respondent has been living separate from the petitioner without reasonable excuse. The finding of the learned District Judge in regard to issue No. 1, is, therefore, affirmed,

16. The learned District Judge, while deciding issue No. 2, held that the petition of the petitioner under Section 13 of the Act is barred by the principles of res judicata.

17. Mr. M. L. Kala, learned counsel for the appellant urged that the doctrine of res judicata cannot be invoked in this case. He supported his contention on two grounds: (1) No divorce proceedings were held previously between the parties and (2) that so far as cause of action relating to dissolution of marriage by a decree of divorce is concerned, it is a recurring one, for, after every two years a fresh cause of action arose to the petitioner to get the marriage dissolved by a decree of divorce under Section 13(1)(ib) of the Act. According to the learned counsel, when there is a recurring cause of action, the principles of res judicata cannot be invoked. He supported his contention by a decision reported in *Ram Harakh v. Jagar Nath* AIR 1932 All 5. This decision is wholly distinguishable. In that case, plaintiff's suit for restitution of conjugal rights was dismissed by the trial court. The plaintiff did not prefer any appeal to the lower appellate court against that part of the decree. The plaintiff in his appeal to the Allahabad High Court prayed that a decree for restitution of conjugal rights be passed. In those facts and circumstances the learned Judge observed:

'We are of opinion that we ought not to entertain this plea. The dismissal of the plaintiff's suit for restitution of conjugal rights will not prevent him from bringing a fresh suit claiming for the same relief at the proper time when the girl has attained her puberty and is in a position to be sensible of her marital responsibilities.'

In this case, as stated above, the petition for judicial separation was submitted by the petitioner under Section 10 of the Act. This Court in its judgment (Ex. A-6) held that the petitioner has not been able to prove desertion on the part of the respondent. Desertion, which commenced on April 12, 1963, continued up to the date of the presentation of the petition for dissolution of marriage by a decree of

divorce. There was no resumption of conjugal relationship during the period.

18. A perusal of para 4 of the petition shows that both petitioner and respondent have been living separate since 1964. In para 5, it was stated that various litigations, inclusive of criminal cases, between the parties have been going on since 1964. Para 6 of the petition deserves mention, where it is written.*

The petitioner in his deposition as P. W. 1 has supported these averments made in the petition. The relevant portion of his statement has already been excerpted above while dealing with issue No. 1. The petitioner has, of course, stated that after the decision by the High Court in appeal arising out of a petition under Section 10 for judicial separation, he had attempted for re-conciliation. He has stated*

The statement of the petitioner was recorded on January 23, 1978. He has stated that prior to 1 1/2-2 years, from the date of his deposition, he has talked with the respondent. There is no cogent and convincing evidence on record to hold that the petitioner had made bona fide and reasonable efforts by removing all her apprehension and created such an atmosphere so as to facilitate her return to the matrimonial home. The matter in issue in the petitions for judicial separation and for dissolution of marriage by decree of divorce is same. In *Triloksingh v. Savitridevi* AIR 1972 All 52 it was observed :

'I do not think merely because the reliefs in two suits between same parties filed one after the other are different in nature, a finding on an issue in the earlier filed suit on a matter in controversy between the parties and necessary for its decision should not operate as *res judicata* in the latter suit if the same matter is in issue between the parties and necessary for the decision of the latter suit also. It would always be so no matter the relief claimed in the latter suit also is different in form and nature.'

The matter relating to desertion was directly and substantially in issue in the petition under Section 10 of the Act for judicial separation. This issue was decided by the learned District Judge in favour of the respondent and against the petitioner. The decision was maintained by this Court. In these circumstances, on

the same facts in my opinion, the learned District Judge was right in holding that the present petition for dissolution of the marriage by a decree of divorce under Section 13(1)(b) was barred by the principles of res judicata,

19. The only point that now survives for consideration is whether the finding of the learned District Judge that the petition is not unnecessarily and improperly delayed is correct or not.

20. The learned District Judge has held that the petition is not unnecessarily and improperly delayed and, therefore, it is maintainable. Mr. G. M. Mehta, learned counsel for the respondent questioned this finding. I agree with the learned District Judge that the petition as filed on October 1, 1977 cannot be thrown out on the ground of delay, for, divorce has been made a ground for dissolution of the marriage on the basis of desertion by the Marriage Laws (Amendment) Act, 1976, which came into force from May, 27, 1976. It is true that petition for restitution of conjugal rights, filed by the petitioner was dismissed and an appeal against that was also dismissed for default. It is also true that the petition for judicial separation was dismissed by the learned District Judge on August 25, 1969 and the appeal against that judgment was dismissed by this Court on May 9, 1972. Judicial separation was claimed on the ground that the respondent had deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition under Section 10 of the Act. Therefore, the fact remains that desertion has been made a ground for dissolution of the marriage by a decree of divorce only when the Act was amended in 1976. In these circumstances, it cannot be said that the petition for dissolution of marriage by a decree of divorce was unnecessarily and improperly delayed. It needs to be emphasised here that the desertion was made a ground of judicial separation in the previous litigation between the parties and the finding in this regard was recorded against the petitioner by this Court in appeal.

21. In these circumstances, no valid exception can be taken to the finding arrived at by the learned District Judge to the effect that the petition was not unnecessarily or improperly delayed.

22. I do not consider it worthwhile to encumber this judgment by referring to all the authorities cited at the bar, for, I have already noticed authorities hereinabove, which are relevant to the questions, which were canvassed before me.

23. The net result of the exercise done hereinabove is (1) that the petitioner has not been able to establish that the respondent has deserted him without reasonable cause and (2) that the decision of the issue relating to desertion given in the petition for judicial separation operates as a bar on the principles of res judicata.

24. For the reason mentioned above this appeal has no force and it is, accordingly, dismissed. In the circumstances of the case, I leave the parties to bear their own costs of this appeal.

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