

Devi Singh Vs. Smt. Sushila Devi

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Court : Rajasthan

Decided On : May-09-1972

Reported in : AIR1972Raj303; 1972()WLN296

Judge : Kan Singh, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 10

Appeal No. : Civil Misc. Appeal No. 7 of 1970

Appellant : Devi Singh

Respondent : Smt. Sushila Devi

Advocate for Def. : Govindmal Mehta, Adv.

Advocate for Pet/Ap. : B.L. Purohit, Adv.

Disposition : Appeal dismissed

Judgement :

Kan Singh, J.

1. This is a husband's appeal directed against the judgment and decree of the learned District Judge, Jodhpur, dated 25-8-69 dismissing the husband's petition under Section 10 of the [Hindu Marriage Act, 1955](#), hereinafter to be referred as the 'Act', against his wife, the respondent here.

2. Devi Singh was married to Smt. Sushila Devi on 17-4-61 at Jodhpur in accordance with the Hindu rites. After their marriage the couple lived together upto 18-4-63. Thereafter, according to the husband, Smt. Sushila Devi withdrew herself from the society of the husband petitioner without any reasonable excuse and since then she has been living apart from him. According to the husband, although he had made repeated requests to his wife to return to his house, she had evinced no interest in coming back to the husband's house to live with him. On the contrary, he proceeded to say, that the wife disliked the company of her husband and would never live with him. Prior to the petition under Section 10(1)(a) of the Act filed on 12-3-68, the husband had filed an application under Section 9 of the Act for restitution of conjugal rights, but that application came to be dismissed by the learned District Judge, Jodhpur on 11-11-65 on the ground that there was positive evidence for showing that the husband had been cruel towards the wife and she and her child were neglected by the husband who did not even provide food for them. The husband came up in appeal to this Court against the judgment of the learned District Judge in the case for restitution of conjugal rights, but his appeal was dismissed in default on 6-3-68. It is thereafter that the present petition under Section 10(1)(a) of the Act was made by the husband.

3. The present petition was based on the ground of desertion; the husband's case in a nut-shell being that the wife was living apart from him and had no intention to return to him and for it there was no reasonable excuse for her.

4. The wife contested the petition. She gave the history of their relationship since the night of marriage. She averred that the husband had been violent to her. Even on the first night of their meeting at the husband's house the petitioner-husband had levelled charges of theft and unchastity against the wife. She further averred that her life had become miserable and she fell sick. The husband did not provide her any treatment and sent her to her parents* home saying to her falsely that she was a patient of tuberculosis. In December, 1961 the parties again started living together in a rented house, but according to the wife, the husband did not meet the household expenses, consequently it became difficult for the wife to pull on with the husband and accordingly she went to her parental home along with the husband. There she gave birth to a male child. In February, 1963, the wife

purchased a house in Sagar Mohalla of Jodhpur and shifted there along with the husband. The couple lived there for sometime, but on 12-4-63 the husband is alleged to have left the wife alone with her ailing child, thereafter he never returned despite her repeated efforts and requests to resume conjugal life. The wife's father, according to her, approached the relatives of the petitioner on whose advice the wife was sent to her father-in-law's house. There she lived for about two or three days, but the husband did not even care to speak to her. The wife's father then requested the petitioner's uncle one Dr. Ranbir Singh to persuade the petitioner-husband to keep the wife in his house. Even Dr. Ranbir Singh kept the wife and the husband for one night at his own house, but this did not bring the couple together. In the circumstances Dr. Ranbir Singh brought the wife back to her father and thereafter the husband is alleged to have removed all the household goods from the house rented by the wife and even gave her a beating. Thus, according to the wife, the shoe was on the other leg namely, it was the husband who was in desertion and not the wife. She further pleaded that the husband's petition for restitution of conjugal rights having been dismissed on the ground of cruelty it was evident that it was the husband who was preventing the wife from resumption of marital relationship and accordingly the husband should not be allowed to take advantage of his own wrong. The learned District Judge framed the following issues:--

- '(1) 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?
- (2) Whether the petitioner treated the non-petitioner with cruelty and wilfully deserted her since 12th April, 1963?
- (3) Whether the present petition is barred by the principle of res judicata?
- (4) Whether the petition is not entertainable because of inordinate delay in filing it?
- (5) What shall be the relief?'

5. Devi Singh was the only witness on his side and he did not produce any other evidence. The wife Smt. Sushila Devi examined herself and produced three other witnesses namely, D.W. 1 Kishanlal, D.W. 2 Vijay Singh and D.W. 4 Bansilal. She also placed reliance on the judgment of the previous case which is Ex. A/1 on record.

6. The learned District Judge devoted consideration to the definition of the term 'desertion' and in particular he referred to Section 10 of the Act according to which this expression meant with its grammatical expression and cognate expression the desertion of the petitioner by the other party to the marriage without reasonable cause and without consent or against the wish of other party and included the wilful neglect of the petitioner by the other party to the marriage. The learned Judge also referred to the principles laid down by their Lordships of the Supreme Court in *Bipinchandra Jaisingbhai Shah v. Prabhavati*, AIR 1957 SC 176, wherein their Lordships observed:

'For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English Law and the law as enacted by the.... Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference, that is to say, the facts have to be viewed as to the purpose which is revealed by these acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act would 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.'

In the light of these principles the learned Judge then proceeded to consider the statement of the husband Devi Singh. Devi Singh stated that his wife Smt. Sushila Devi did not want to live with him, because he was not highly educated and she wanted to have a modern husband having huge wealth. He stated that it was on 18-4-1968 that Smt. Sushila had abandoned her matrimonial home without any reasonable excuse and did not return to live with him despite repeated requests and a notice in writing calling upon her to come back to his house. He further stated that on 20-10-68 he went to Sushila Devi's house and stayed there upto 11-00 p.m. and on second occasion he again visited the house of Sushila Devi and stayed there for almost three hours, but he did not receive any response from Sushila Devi. He further stated that he had tried his best to bring his wife back, but she disliked his company. Devi Singh, however, admitted that he had filed an application for restoration of conjugal rights against his wife and that application was dismissed by the Court. He further admitted that Sushila Devi had also filed an application for maintenance before the City Magistrate, Jodhpur who had allowed maintenance to the tune of Rs. 50 per month. He further added that an appeal was pending against the order of the learned City Magistrate. Devi Singh, further had to admit that he did not write any letter to his wife during the period 1963 to 1968. Regarding the allegation of his wife that he had forsaken her on 12-4-63, he stated that he had gone on duty on that day and when he returned he did not find Sushila Devi at his house. Having considered the evidence of Devi Singh the learned District Judge came to the conclusion that the evidence of Devi Singh did not inspire any confidence and there was no other witness on his side to Corroborate his version.

7. On the other hand, the learned Judge found the evidence led by the wife trustworthy. He referred to the previous judgment Ex. A/1 and on the basis thereof held that the wife had a reasonable excuse for staying away from the husband. He observed that Smt. Sushila Devi was forced to live separately from her husband on account of the illtreatment and cruelty meted out to her by the husband during her stay with him. The learned Judge also observed that the petitioner, in the

circumstances, cannot be permitted to take advantage of his own wrong and get the relief of judicial separation. The learned District Judge referred to a passage from *Mst. Gurdev Kaur v. Sarwan Singly* AIR 1959 Puni 152 in this connection. On the basis of this judgment the learned Judge concluded that the burden was on the husband to prove by reliable evidence that the wife had abandoned him without reasonable excuse and this he could not prove for the statutory period. The learned District Judge further observed that there was no bona fide attempt on the part of the husband to bring the wife to the matrimonial home. He added that the mere fact that the wife did not of her own accord come to his house during the period of five years was not sufficient for holding that she has intentionally forsaken or abandoned her husband. In the result, the learned District Judge dismissed the petition for judicial separation.

8. In assailing the judgment and decree of the learned District Judge, learned counsel for the appellant has tried to put emphasis on the following circumstances:

(1) the wife had contested the application for restitution of conjugal rights and this went to show that really she did not want to return to the husband;

(2) the wife is a telephone operator getting about Rs. 250 or Rs. 300 per month and thus was having an independent career and was consequently in no mood to return to the husband who had no education in comparison to her and was not placed in the position like the wife;

(3) the wife had lodged a criminal case against the husband of beating which was dismissed;

(4) the husband had made several attempts to induce his wife to come back by approaching her but in spite of that the wife was adamant and was not returning.

9. Learned counsel, therefore, maintained that from these circumstances it should be inferred that the appellant husband had been successful in proving desertion on the part of his wife. Learned counsel also put weight on the circumstance that the wife has landed herself in a contradictory position. On the one hand, she was asserting that she was ever prepared to go to her husband and had made efforts

for inducing the husband to resume marital life, but she was nonetheless resisting the application of the husband for restitution of conjugal rights and, therefore, it comes from her with ill-grace to advance the plea of legal cruelty when the wife was at the same time showing her willingness to return to the husband. Learned counsel even took the position that from the stand that she has taken it should be presumed that she had condoned the so-called cruelty on the part of the husband. As regards the effect of the judgment Ex. A/1, learned counsel for the appellant argued that that judgment if at all would be res judicata regarding the events that had happened prior to the making of the petition under Sec. 9 of the Act, but could be of no assistance in judging the conduct of the parties for the subsequent period.

10. Learned counsel for the respondent has supported the judgment of the learned District Judge. Besides referring to the cases cited by the learned District Judge in his judgment, the learned counsel invited attention to some more cases like *Meena v. Lachman*, AIR 1960 Bom 418; *Dr. Dastane v. Mrs Das-tane*, AIR 1970 Bom 312; *Trilok Singh v. Savitri Devi*, AIR 1972 All 52; *Jyotish Chandra v. Meera Guha*, AIR 1970 Cal 266 and *Narayan Prasad v. Prabha Devi*, AIR 1964 Madh Pra 28.

11. There is no manner of doubt that for getting a decree of judicial separation it is the petitioning spouse who is to prove (1) that the answering spouse has deserted him or her for a continuous period of not less than two years immediately preceding the presentation of the petition; or (2) has treated the petitioning spouse with such cruelty as to cause a reasonable apprehension in the mind of the petitioner that it would be harmful or injurious for the petitioner to live with the other spouse; and so on. I need not refer to the other grounds for judicial separation, as the petition is based on the sole ground of desertion for a continuous period of not less than two years. The term 'desertion', according to the explanation in Section 10, as I have already observed above, with its grammatical variation and cognate expression means the desertion of 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. Further, according to what was observed by their Lordships in *Bipinchandra's* case, AIR 1957 SC 176 already referred, so far as the deserting spouse is

concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly, two elements are essential so far as the deserted spouse is concerned; (1) the absence of consent, and (2) the absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner seeking relief under the Act has to carry the burden of proving these elements in the two spouses respectively and in this regard there was a material departure in the Indian Law from what has been the position under the English Law. The inference regarding animus deserendi may be drawn from certain facts which may not in another case be capable of leading to the same inference, that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. 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.

12. Now the first question in this case is as to when the alleged desertion commenced in the present case. According to the petitioning husband, the wife had left on 18-4-1968 i, e. when she left the husband's home without any lawful excuse and had since then not given conjugal society to the husband despite repeated efforts and persuasions. It was further pleaded that the respondent had no intention of coming back to the petitioner's home to rehabilitate his home and hearth to give him her conjugal society. Then it was averred that the respondent had on many occasions before many persons disclosed that she disliked the petitioner and she has accordingly great distaste for his company. As regards the previous litigation, he stated that the respondent vehemently opposed the application for restitution of conjugal rights and had thrown unwarranted accusations at him and the result was that the petitioner could not succeed in those proceedings. As regards the accrual of cause of action he averred in para 6 of the petition that it arose on 6-3-1968 when the appeal in the previous case was dismissed in default by this Court.

13. I have carefully scanned the petition. It did not in express terms say in any paragraph as to when the desertion had begun. It is far from saying as to when the physical act of separation and the animus deserendi coincided. If one were to take the initial separation on 12-4-1963 as the commencement of the period of desertion then there is a formidable hurdle in the path of the appellant-husband and it is the judgment in the previous case. The learned District Judge who decided that case, after discussing the evidence of the parties, drew the following conclusion:

'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'.

In the teeth of such a finding which was given in a case between the same parties which raised precisely the same issue about the allegation of cruelty on the part of the husband one cannot legitimately hold that the wife was in desertion when she allegedly left the husband's home on 13-4-1963. One does not know thereafter as to when the so-called desertion really commenced. The matter was sub judice in the previous appeal till it came to be dismissed in default on 6-3-1968.

14. Now I may turn to the statement of the appellant if he has brought any additional facts in the present case. I have already adverted to the averments contained in the petition. It was mentioned therein that the wife had great distaste for the company of her husband and she had given out that she would never live with the petitioner. If this fact were established then perhaps it could be said that there is commencement of the desertion though one cannot be sure as to when and on what date precisely there was desertion on the part of the wife. As P. W. I. Devi Singh had nowhere stated to whom his wife had stated at any time that she

would never return to him. Such other persons before 'whom she had said so. has not been mentioned by Devi Singh, nor has he produced any other witness. Therefore, it cannot be said that the petitioner has brought anything new in the present case.

15. Learned counsel has emphasised, as I have already observed, the present attitude of the wife. Learned counsel had argued that the wife had shown a strong determination to oppose the husband's prayer for restitution of conjugal rights. Apart from, this she was having an independent career and was in no mood to live with the husband. I have considered these circumstances, but to my mind, they do not advance the petitioner's case to any significant extent. One comes across a stalemate when the husband's prayer for restitution of conjugal rights against the wife is dismissed on the ground of cruelty. The question is in that event what is to happen? Are we to proceed always on the state of events that existed prior to the filing of the application for restitution of conjugal rights or new things that happen afterwards, and if so. what should be the nature of the new things that may affect the status quo to the advantage of restoration of marital relations between the two spouses. No direct authority could be brought to my notice. There are, of course some observations in Trilok Singh's case. AIR 1972 All 52. After observing that the finding on the crucial question of fact recorded in the former suit for restitution of conjugal rights would be *res judicata* and it would not be open to the husband as a petitioner to reargue the same question of fact again in the latter suit, the learned Judge went on to say that if the wife condoned the conduct of the husband and went back to live with him and then again came away without any reasonable cause and against the will of the husband then the wife can be said to be in desertion. The learned Judge, however, did not proceed to dilate further on this question as it was not one of the questions raised in the appeal.

16. Learned counsel for the appellant, as observed above, takes the stand that in that the wife had offered to return to the husband, she had condoned the husband's previous cruelty and, therefore, that should not stand in the way of the husband in the Present petition and as the wife was not returning to the husband, she should be taken to be in desertion. The argument is ingenious no doubt, but I am afraid that is hardly sufficient for raising the plea of condonation. In the petition

nowhere has the petitioning husband pleaded condonation, even though he was fully aware of what has been held by the competent court in the previous litigation. Condonation has to be pleaded and it cannot be left to be inferred just on the basis of a bit of a statement here or a bit there. The cross-examination of the husband reveals that though the wife was showing her willingness to return, she was demanding some assurance from the husband. The husband was asked a question in cross-examination, if he was prepared to give in writing to the wife that he would behave properly in future, but he declined to give any written assurance.

17. Having devoted consideration to the matter, while I may not go as far as to hold that once an application for restitution of conjugal rights has been dismissed on the basis of legal cruelty on the part of the petitioning spouse that should result in the closure of freezing of the marital relationship for good, there could be reconciliation and change of hearts even subsequently, but then it would be the duty of the spouse who is in the wrong to take the initiative and make bona fide and reasonable efforts to induce the wronged spouse to resume marital relations. 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. Therefore, 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 good 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 the 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. I am, therefore, in agreement with the learned District Judge that the appellant has failed to prove desertion on the part of his wife, the respondent here.

18. The result is that this appeal fails and is hereby dismissed. The parties are, however, left to bear their own costs.