



**IN THE HIGH COURT OF HIMACHAL PRADESH,
SHIMLA.**

FAO No. 251/2015
Decided on: 19.8.2015

Yashwant Singh Chauhan.

...Appellant.

Versus

Sneh Lata.

...Respondent.

Coram:

Hon'ble Mr. Justice Rajiv Sharma, Judge.

Whether approved for reporting?¹ Yes

For the Appellant : Mr. Anuj Gupta, Advocate.

For the Respondent : Nemo.

Justice Rajiv Sharma, Judge (oral).

This appeal is directed against the judgment and decree dated 16.5.2015 rendered by the Additional District Judge-Shimla in Case No.12-R/3 of 2010.

2. "Key facts" necessary for the adjudication of this appeal are that the marriage between the parties was solemnized on 5.5.1995 according to Hindu ritual, rites and custom prevalent in the area. Appellant has filed petition under section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage by decree of divorce. According to the

¹ Whether reporters of the local papers may be allowed to see the judgment? Yes

appellant, conduct of the respondent always remained arrogant, cruel and quarrelsome. Respondent without any reasonable cause withdrew from the society of the appellant. She has also filed petition for maintenance. There is no possibility of conciliation between the parties. Respondent has subjected him to cruelty.

3. Petition was contested by the respondent. The averments made in the petition were denied. According to the respondent, a sum of Rs. 25,000/-, which was given to her at the time of marriage was also utilized by the appellant. Appellant has contracted second marriage with another lady, namely, Smt. Yashodha. She has given birth to two children. She has filed a petition under section 125 of the Code of Criminal Procedure against the appellant seeking maintenance. It was allowed by the Court. The appellant was Government servant. He was drawing more than Rs. 30,000/- per month. He was having income of Rs. 5 lakhs from the orchard. Respondent has no alternative except to take shelter in the house of her father. The son was about 12 years old at the time of filing of petition.

4. Issues were framed by the learned Additional District Judge-I, Shimla on 16.3.2012. He dismissed the petition on 16.5.2015. Hence, the present appeal.

5. Mr. Anuj Gupta, learned counsel for the appellant has vehemently argued that his client has been subjected to cruelty by the respondent. Respondent has deserted the appellant without any reasonable cause.

6. I have heard the learned counsel for the appellant and have gone through the judgment carefully.

7. Appellant has appeared as PW-1. According to him, he was treated by the respondent with cruelty. She used to abuse him with intention to humiliate him. She used to leave the house without permission. Respondent has left his company without any reason and cause.

8. PW-2 Roshan Singh has shown ignorance to the specific case of respondent that the appellant has contracted second marriage with Yashoda Devi. PW-4 Gulab Singh has also shown ignorance regarding second wife of the appellant having two children. PW-5 Mehar Sain has also shown ignorance regarding contracting second marriage by the appellant. However, fact of the matter is that these witnesses

have not denied the case of respondent that appellant has contracted second marriage specifically.

9. Respondent Sneh Lata has appeared as RW-1. According to her, she was living separately from her husband since 1996. It is the appellant who has left her company without any reason. The behaviour of appellant towards her was not good. Appellant has contracted second marriage with Yashodha Devi. She was constrained to file a petition under section 125 of the Code of Criminal Procedure for maintenance.

10. RW-2 Duni Chand has proved documents Ex.RW-2/A to Ex.RW-2/D. RW-3 Kusum Clerk from Sarswati Vidya Mandir School, Samala, Rohru has proved school record Ex.RW-2/D. It is evident from the school record that appellant has contracted second marriage with Yashodha Devi. Date of birth of Bharat Bhushan is 5.12.2002 and date of birth of Jaiwanti is 25.12.2003. Name of the mother of Bharat Bhushan and Jaiwanti in the school register is recorded as Yashodha Devi. The averments made by the appellant in the petition against the respondent were vague and sketchy. It was upon the appellant to prove cruelty against the respondent. It is the appellant, who has caused

mental cruelty towards respondent by contracting second marriage with Yashodha though first marriage was subsisting. She was constrained to file petition under section 125 of the Cr.P.C. for maintenance. Appellant cannot be permitted to take advantage of his own wrong. Respondent was forced to live with her parents. She has to maintain a boy, who was 12 years old at the time of filing of petition, i.e. 17.8.2010. Thus, appellant has failed to prove that he has been subjected to cruelty by the respondent or she has deserted him without any sufficient cause.

11. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** versus ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Their Lordships have held that desertion is a matter of inference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

"What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation

permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), Vol 12, in the following words:-

"In its essence desertion 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 obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. 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 Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to 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 those 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 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 close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. 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

married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of *Lawson v. Lawson*, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

12. Their Lordships of the Hon'ble Supreme Court in ***Lachman Utamchand Kirpalani versus Meena alias Mota***, AIR 1964 SC 40 have held that in its essence desertion 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 obligations of marriage. Their Lordships have further held 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. Their Lordships have held as under:

"The question as to what precisely constitutes "desertion" came up for consideration before this Court in an appeal for Bombay where the Court had to consider the provisions of S. 3(1) of the Bombay Hindu Divorce Act, 1947 whose language is in pari materia with that of S. 10(1) of the Act. In the judgment of this Court in *Bipin Chandra v. Prabhavati*, 1956 SCR 838; ((S) AIR 1957 SC 176) there is an elaborate consideration of the several English decisions in which the question of the ingredients of desertion were considered and the following summary of the law in *Halsbury's Laws of England* (3rd Edn.) Vol. 12 was cited with approval : "In its essence desertion 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 obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases." The position was thus further explained by this Court. "If a spouse abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there, (1) the factum of separation, and (2) the intention of 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. 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 those 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 could be attributable to an *animus deserendi*. The offence of desertion commences when the fact of separation and the *animus deserendi* coexist. 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." Two more matters which have a bearing on the points in dispute in this appeal might also be mentioned. The first relates to the burden of proof in these cases, and this is a point to which we have already made a passing reference. 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. As Dunning, L. observed : (Dunn v. Dunn (1948) 2 All ER 822 at p. 823) :

"The burden he (Counsel for the husband) said was on her to prove just cause (for living apart). The argument contains a fallacy which has been put forward from time to time in many branches of the law. The fallacy lies in a failure to distinguish between a legal burden of proof laid down by law and a provisional, burden raised by the state of the evidence The legal burden throughout this case is on the husband, as petitioner, to prove that this 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? Take this case. The wife was very deaf, and for that reason could not explain to the Court her reasons for refusal. The judge thereupon considered reasons for her refusal which appeared from the facts in evidence, though she had not herself stated that they operated on her mind. Counsel for the husband says that the judge ought not to have done that. If there were a legal burden on the wife he would be

right, but there was none. The legal burden was on the husband to prove desertion without cause, and the judge was right to ask himself at the end of the case: Has that burden been discharged?"

13. Their Lordships of the Hon'ble Supreme Court in ***Smt. Rohini Kumari versus Narendra Singh***, AIR 1972 SC 459 have explained the expression 'desertion' to mean 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.

"Under Section 10 (1) (a) a decree for judicial separation can be granted on the ground that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. According to the Explanation the expression "desertion" with its grammatical variation and cognate expression 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. The argument raised on behalf of the wife is that the husband had contracted a second marriage on May 17, 1955. The petition for judicial separation was filed on August 8, 1955 under the Act which came into force on May 18, 1955. The burden under the section was on the husband to establish that the wife had deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. In the presence of the Explanation it could not be said on the date on which the petition was filed that the wife had deserted the husband without reasonable cause because the latter had married Countess Rita and that must be regarded as a reasonable cause for her staying away from him. Our attention has been invited to the statement in Rayden on Divorce, 11th Edn. Page 223 with regard to the elements of desertion According to that statement for the offence of desertion there must be two elements present on the side of the

deserting spouse namely, the factum, i.e. physical separation and the animus deserendi i.e. the intention to bring cohabitation permanently to an end. The two elements present on the side of the deserted spouse should be absence of consent and absence of conduct reasonably causing the deserting spouse to form his or her intention to bring cohabitation to an end. The requirement that the deserting spouse must intend to bring cohabitation to an end must be understood to be subject to the qualification that if without just cause or excuse, a man persists in doing things which he knows his wife probably will not tolerate and which no ordinary woman would tolerate and then she leaves, he has deserted her whatever his desire or intention may have been. The doctrine of "constructive desertion" is discussed at page 229. It is stated that desertion is not to be tested by merely ascertaining which party left the matrimonial home first. If one spouse is forced by the conduct of the other to leave home, it may be that the spouse responsible for the driving out is guilty of desertion. There is no substantial difference between the case of a man who intends to cease cohabitation and leaves the wife and the case of a man who with the same intention compels his wife by his conduct to leave him."

14. Their Lordships of the Hon'ble Supreme Court in the case of **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

"4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in relation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the spouse. Whether it caused reasonable

apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and per se unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. In such cases, the cruelty will be established if the conduct itself is proved or admitted.

5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in *Sheldon v. Sheldon*, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

15. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour,

which may be important in dealing with the cases of mental cruelty, as under:

“98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

- (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommodore or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

16. Their Lordships of the Hon'ble Supreme Court in ***Ashok Kumar Jain vs. Sumati Jain***, AIR 2013 SC 2916 have held that it is always open to the Court to examine whether the person seeking divorce “is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief.” On such examination if it is so found that the person is taking advantage of his or her wrong or disability it is open to the Court to refuse to grant relief.

17. In the instant case also appellant has contracted second marriage though first marriage was subsisting. Thus,

the relief sought for by the appellant cannot be granted to him. The appellant has disobeyed the law by contracting second marriage. It is reiterated that he cannot be permitted to take advantage of his own wrong and the respondent has no option but to leave the matrimonial home.

18. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

**(Justice Rajiv Sharma),
Judge.**

19.8.2015
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High Court