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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Judgment: 14th February, 2019*

+ **MAT.APP.(F.C.) 232/2018, CM APPL 38167-68/2018 (Stay)**

S Appellant

Through: Mr. Mahesh Verma, Advocate.

versus

R K Respondent

Through: Mr. K.S. Kashyap, Advocate.

CORAM:

**HON'BLE MR. JUSTICE G.S. SISTANI
HON'BLE MS. JUSTICE JYOTI SINGH**

G.S. SISTANI, J. (ORAL)

1. Challenge in this appeal is to the judgment dated 13.08.2018 by which a petition filed by the respondent/husband under Section 13(1)(ia) and (ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'HMA') seeking dissolution of marriage by a decree of divorce on the grounds of cruelty and desertion has been allowed.
2. The necessary facts required to be noticed for the disposal of this appeal are that the marriage between the parties was solemnised on 21.04.2007 at Delhi as per Hindu rites and ceremonies. Out of this wedlock, one son was born on 29.05.2008, who is under the care and custody of the appellant/mother. The parties are living separately since 17.03.2011. The petition seeking divorce on the grounds of Section 13

- (1)(ia) & (ib) has been filed by the respondent/husband on 30.05.2012.
3. Mr. Mahesh Verma, learned counsel appearing on behalf of the appellant/wife contends that the impugned judgment dated 13.08.2018 is based upon conjectures and surmises and is not sustainable in the eyes of the law because no evidence was placed on record by the respondent/husband to prove cruelty or desertion by the appellant/wife.
 4. The counsel for the appellant/wife has also submitted that the Family Court has failed to consider the fact that the parties were blessed with a single child and the appellant/wife did not want to give her son in adoption to her brother rather it was the respondent/husband who wanted to give her son in adoption to his sister.
 5. The counsel for the appellant/wife contended that she has never inflicted cruelty upon the respondent/husband or his family members but on the contrary it was the respondent/husband who has caused cruelty upon her as a result of which one complaint dated 17.03.2011 has been filed by the father of the appellant/wife to the Police Station Rajouri Garden.
 6. As far as the ground of desertion is concerned, the counsel for the appellant/wife submits that she has never deserted her husband and she is willing to join the company of her husband even as on date. It was also submitted by the counsel for the appellant/wife that she has never refused physical relations with the respondent/husband and the Family Court has erred in granting a decree of divorce. Lastly, it was submitted that all the judgments relied upon by the Family Court are not applicable to the facts and circumstances of the present case.

7. The appeal is opposed by Mr. K.S. Kashyap, learned counsel appearing on behalf of the respondent/husband and submits that there is no infirmity in the view taken by the learned Family Court and it is thus prayed that the present appeal is devoid of any merit and thus liable to be dismissed.
8. We have heard learned counsel for the parties and considered their rival submissions. We have also given our thoughtful consideration to the impugned judgment passed by the Family Court alongwith the evidence available on record.
9. We may note that on 06.01.2016, the following issues were framed by the learned Family Court:

“1. Whether the petitioner is entitled to a decree of divorce u/s 13 (1)(ia) & (ib) of HMA, 1955? OPP

2. Relief.”

10. The Family Court while relying upon the various judgments including ***Vijaykumar Ramchandra Bhate v. Neela Vijaykumar Bhate*** reported at ***(2003) 6 SCC 334*** which was subsequently upheld in the case of ***Narendra v. K. Meena***, reported at ***AIR 2016 SC 4599*** alongwith ***Raj Talreja v. Kavita Talreja*** reported at ***AIR 2017 SC 2138*** observed that the conduct of the appellant/wife was sufficient to cause such mental pain and suffering to the respondent/husband making impossible to live with the respondent herein. It will be useful to reproduce relevant para of the impugned judgment which reads as under:

“The respondent has made unfounded and unproved allegations against the petitioner regarding accumulation of wealth through corruption by the brother in law of the petitioner and giving of Rs. 50,000/- by the father of the respondent to the petitioner and these allegations are sufficient

to cause mental cruelty to the petitioner. This conduct of the respondent is sufficient to cause such mental pain and suffering to the petitioner making impossible to live with the respondent.”

(Emphasis Supplied)

11. The Family Court has also reached to the conclusion that the appellant/wife has deserted the respondent/husband after examining the evidence and in the light of the law laid down by the Hon'ble Supreme Court in the cases of **Savitri Pandey v. Prem Chandra Pandey**, reported at (2002) 2 SCC 73 and **Lachman Utamchand Kirpalani v. Meena**, reported at AIR 1964 SC 40. The reasoning given by the Family Court is reproduced as under:

“The petitioner in affidavit Ex.PW1/A also deposed about his attempts to save matrimonial home. The petitioner proved notice dated 30.04.2012 as Ex. PW1/11 and postal receipt as Ex. PW1/12. The petitioner in notice dated 30.04.2012 Ex. PW1/11 called upon the respondent to join marital company with the respondent. The petitioner is not cross examined on the point that the petitioner did not make any attempt to bring back the respondent at matrimonial home or that notice Ex. PW1/11 is not served upon the respondent. The notice Ex. PW1/11 is correctly addressed as reflected from postal receipt Ex.PW1/12. There is presumption of service of notice as it is correctly addressed. The petitioner proved that notice EX.PW1/11 was served upon the respondent. The counsel for the respondent argued that the petitioner could not prove service of notice Ex. PW1/11 upon the respondent. The said argument is without any legal force. The notice Ex.PW1/11 was served upon the respondent.

25. The petitioner from the quality and quantity of evidence proved that the respondent w.e.f. July, 2008 stopped cohabiting with the respondent and there is no physical relation between the petitioner and respondent since then. The respondent has finally left matrimonial home on 17.03.2011. The respondent

intentionally forsaken and abandoned the petitioner without his consent and reasonable cause. The respondent repudiated obligations of marriage. The respondent did not permit or facilitate the cohabitation between the parties. The petitioner and the respondent are living separately since July, 2008 with an intention on part of the respondent to bring cohabitation permanently to an end. The desertion is not the withdrawal from a place but it is withdrawal from the state of things. This is also reflected from the point that the respondent did not join matrimonial cohabitation despite service of notice Ex. PW/11 and even did not reply the said notice and further as stated by the respondent in Complaint Mark P-2 and FIR Mark P-3 that there is no physical relation between the petitioner and the respondent for more than two years prior to the filing of Complaint Mark P-2 and FIR Mark P-3. The respondent could not prove that due to reasonable cause and justified reasons she stopped matrimonial cohabitation with respondent since July, 2008 and thereafter left the matrimonial home on 17.03.2008. It is proved that the respondent has deserted the petitioner since July, 2008 i.e. for a period not less than immediately preceding institution of present petition.”

(Emphasis Supplied)

12. In the petition seeking divorce, various grounds were pleaded by the husband/respondent herein alleging cruelty by the appellant/wife. The respondent/husband had also sought a decree of divorce on the ground of desertion. At this stage, we deem it necessary to state the grounds on which the divorce was sought and the evidence led in this regard. It would be useful to reproduce paras 5, 6, 7, 17, 20, 22, 24 and 28 of the petition seeking divorce which read as under:

“5. That on 16.3.2011, the Petitioner's son Daksh was ill and the Respondent had taken him to Dr. Devender Clinic for treatment. The doctor gave treatment and told that son/Daksh is suffering from "Chest congestion" and treatment will be continue 5 days.

6. That on 17.3.2011, the Respondent took Petitioner's son and treatment documents and left the house of the Respondent along with, and on the direction of his father at about 4.30 p.m. without informing Petitioner and in the absence of Petitioner. It is further submitted that on this day the Respondent also took her all Jewelry and ornaments bring with herself at the time of marriage as well as given by the Petitioner at the time of marriage and thereafter time to time as well as luggage without any cause/ sufficient reason and without the knowledge of the Petitioner, when he was on his job.

7. That in complaint dt.17.3.2011 made to police station Rajouri Garden, New Delhi by the father of the Respondent, wherein her father has asked permission to SHO that he wants to take back his daughter from matrimonial home to her parental home with him putting false allegations on Respondent and his family. In fact, the reason behind leaving of Petitioner's house was pre-planned.

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17. That the Respondent has deserted the Petitioner and has no physical relationship between them since the year 2008. That in a test on 23.7.2008, the Respondent and Petitioner came to know that the Respondent was suffering from "a mixed echogenic SOL (21x21mm) in the fundus." That thereafter the Respondent herself refused to make physical relation with Respondent.

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20. That the Petitioner at several occasions has tried to save his matrimonial life. However, due the armament (Sic:adamant) attitude of the Respondent, the same could not be done.

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22. That many times the respondent left the house of petitioner without any cause and every time the petitioner made compromise with respondent self or through mediators.

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24. That the respondent deserted the petitioner since 2008 and intentionally leaved the house of the petitioner and did not come back. Apart from it, the respondent had treated the petitioner with utmost cruelty.

xxxx xxxx xxxx

28. That in order to save matrimonial life, the Petitioner on 06.04.2011, 03.05.2011, 10.10.2011 and on 30.04.2012 sent legal notice through Advocate by registered post has approached the respondents to come back home. But, of no consequences.”

13. The appellant herein was examined as RW-1. During her cross-examination, it was admitted by her that she left the matrimonial home on 17.03.2011 due to the illness of her mother by informing the S.H.O., Rajouri Garden. The appellant/wife also informed her mother-in-law about her leaving matrimonial home because of ill health of her mother. In the later part of her cross-examination, the appellant/wife has taken a different stand and stated that the reason to leave matrimonial home was only cruelty inflicted upon her as well as upon her son. The appellant/wife has denied the suggestion that the respondent/husband had ever asked her to give their son in adoption to the sister of the respondent/husband. She also denied the suggestion that the reasons mentioned in the complaint dated 17.03.2011 is false. It is noteworthy to mention that the appellant/wife had stated in her cross-examination that she has not made any complaint to any authority including the Police officials regarding the acts mentioned by her in the written statement.
14. In response to the suggestion put to the appellant/wife in her cross-examination regarding if the respondent/husband had ever asked her to

join the matrimonial home. She replied that it is wrong to suggest that the respondent/husband never asked before CAW Cell to live with her or to come back to the matrimonial home. However, in the later part of her cross-examination she denied that the respondent/husband asked her to come back to the matrimonial home before the CAW Cell. The appellant/wife further deposed that she did not remember as to whether her ultrasound of lower abdomen was conducted on 23.07.2008 and as to whether she was suffering from "*a mixed echogenic SOL (21x21 mm) in the fundus*". The appellant/wife also denied the suggestion that she refused having physical relations with the respondent/husband w.e.f. 23.07.2008 after she was diagnosed with an ailment.

15. In order to prove the ground of desertion, it was open for the respondent/husband to show that his wife had left the matrimonial home intentionally and for the purpose of staying away permanently with her son or reasonable cause for such an act. It is also the case of the respondent/husband that the wife had withdrawn from her matrimonial obligations and there was no co-habitation between the parties and the same was not for not any justifiable reasons.
16. We may note that the father of the appellant/wife made a complaint on 17.03.2011 at Police Station Rajouri Garden wherein it was stated by him that he is taking his daughter/appellant herein back to the parental home and also leveled allegations of cruelty against the respondent/husband and his family members. On 18.03.2011, a complaint was made by the appellant/wife before CAW Cell, Kirti Nagar wherein it has been stated that she went to her parental home

due to illness of her mother.

17. Reading of the evidence available on record would show that the father of the appellant/wife has sought permission from SHO, P.S. Rajouri Garden to take the appellant/wife back to the parental home besides leveling of other allegations of cruelty. Further, the appellant/wife in complaint dated 18.03.2011 (Mark P-2) mentioned about the illness of her mother as the reason for leaving her matrimonial home. It has also emerged from the evidence that the respondent/husband has approached the appellant/wife on 06.04.2011, 03.05.2011 and 10.10.2011 but the appellant/wife chose to stay away from her matrimonial home. Besides this, the respondent/husband has also served a legal notice dated 30.04.2012 which has been duly served upon her. The reading of the entire evidence cumulatively shows that there was no intention of the appellant/wife to resume co-habitation. Additionally, the appellant/wife in the complaint dated 18.03.2011 and FIR (Mark P-3) has admitted that there was no physical relation between the respondent/husband and the appellant/wife for the last more than two years and they were living separately. The respondent/husband was not cross examined on the point that the appellant/wife has left the matrimonial home on 17.03.2011 due to the constant torture, humiliation, pressure, dowry demands and cruelties committed by the respondent/husband and his family members. The appellant/wife has also chosen not to cross-examine the respondent/husband on the point that due to the respondent/husband there was no physical relation between them or that the appellant/wife never refused for physical relation with the

respondent/husband.

18. The Hon'ble Supreme Court in the case of *Savitri Pandey (supra)* held that 'Desertion' means the intentional permanent forsaking and abandonment of one spouse by the other without the other's consent and without reasonable cause. It was further held that it is a total repudiation of the obligations of marriage and not mere withdrawal from a place but from a state of things and thus, withdrawal from the matrimonial obligations. It was further held as '*The proof of 'Desertion' has to be considered by taking into consideration the concept of marriage which in law legalizes the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and for procreation of children.*'
19. Taking into account the evidence available on record in the light of the law laid down by the Hon'ble Supreme Court in the case of *Savitri Pandey (supra)*, we find that the appellant/wife in her complaint dated 18.03.2011 and also in FIR (Mark P-3) has admitted that there was no physical relation between the parties for the last more than two years and they were living separately. The respondent/husband was not cross-examined on the point that due to the respondent/husband there was no physical relation between the parties or that the appellant/wife never refused for the physical relation with the respondent/husband. In this backdrop, we find that the parties were living in the same house but without marital cohabitation and thus, it has come on record that the appellant/wife was not maintaining marital co-habitation with the respondent/husband since July, 2008.

20. We find that there is no infirmity or illegality in the judgment passed by the Family Court. The present appeal is devoid of any merit. Resultantly, the appeal alongwith the pending applications stand dismissed.

G.S.SISTANI, J.

JYOTI SINGH, J.

FEBRUARY 14, 2019
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