

that point of time, the penalty imposable under Section 76 was rightly deleted by the Commissioner (Appeals). Another factor which has to be taken into consideration is that the penalty under Section 78 also pertains to the penalty for suppressing of value of taxable services. The intention, thus, of the person, has to be for evading the service tax which would impose the liability of the penalty and the section further provides that there has to be fraud, collusion or wilful mis-statement or suppression of facts and contravention of the provisions of the Chapter or of the Rules with intent to evade payment of service tax. Section 78 reads as under:

“[78. Penalty for suppressing, etc. of value of taxable services

- (1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of-
- a) fraud; or
  - b) collusion; or
  - c) wilful mis-statement; or
  - d) suppression of facts; or
  - e) contravention of any of the provisions of this Chapter or of the rules made thereunder with the intent to evade payment of service tax,

the person, liable to pay such service tax or erroneous refund, as determined under sub-section (2) of section 73, shall also be liable to pay a penalty, in addition to such service tax and interest thereon, if any, payable by him, which shall be equal to the amount of service tax so not levied or paid or short-levied or short-paid or erroneously refunded:

Provided that where true and complete details of the transactions are available in the specified records, penalty shall be reduced to fifty per cent of the service tax so not levied or paid or short-levied or short paid or erroneously refunded:

Provided further that where such service tax and the interest payable thereon is paid within thirty days from the date of communication of order of the Central Excise Officer determining such service tax, the amount of penalty liable to be paid by such person under the first proviso shall be twenty-five per cent of such service tax:

Provided also that the benefit of reduced penalty under the second proviso shall be available only if the amount of penalty so

determined has also been paid within the period of thirty days referred to in that proviso:

Provided also that in case of a service provider whose value of taxable services does not exceed sixty lakh rupees during any of the years covered by the notice or during the last preceding financial year, the period of thirty days shall be extended to ninety days.

(2) Where the service tax determined to be payable is reduced or increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, for the purposes of this section, the service tax as reduced or increased, as the case may be, shall be taken into account:

Provided that in case where the service tax to be payable is increased by the Commissioner (Appeals), the Appellate Tribunal or, as the case may be, the court, then, the benefit of reduced penalty under the second proviso to sub-section (1), shall be available, if the amount of service tax so increased, the interest payable thereon and twenty-five per cent of the consequential increase of penalty have also been paid within thirty days or ninety days, as the case may be, of communication of the order by which such increase in service tax takes effect:

Provided further that if the penalty is payable under this section, the provisions of section 76 shall not apply.”

(11) Once the service tax was not leviable under Section 68 at that point of time and the liability was only to deposit the tax under Section 73A(2), which has been done on 15.11.2008, after delay, but due to the service being not taxable at the relevant time when the invoices were raised, we are of the opinion that the case would not fall under the provisions of Section 78 for invoking of the penalty, as has been held by the Tribunal. It was the categorical stand of the appellant before the First Appellate Authority that the service tax had been collected by mistake, on account of the new provision and the office of the appellant was not fully acquainted with the interpretation of the statute due to which the default had occurred and therefore, in view of the defence taken, the Tribunal was not justified, in the present facts and circumstances, to hold that there was a wilful suppression of facts, to bring it within the ambit of Section 78.

(12) Accordingly, the substantial question of law is answered in favour of the appellant and it is held that the penalty was not liable to

be imposed on him on account of the fact that the service which he was rendering at the time of providing of the service was not taxable.

(13) Accordingly, the present appeal is allowed and the order of the Tribunal dated 12.09.2014 (Annexure A-6) is set aside and that of the Commissioner (Appeals) dated 21.06.2013 (Annexure A-3) is restored.

(14) With the above observations, the present appeal stands allowed.

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*S. Gupta*

***Before M.Jeyapaul & Raj Rahul Garg, JJ***

**SURINDER KAUR —Petitioner**

*versus*

**RAVINDER SINGH — Respondent**

**FAO-M-360-2009**

**April 1, 2015**

***Hindu Marriage Act, 1955—S. 13—Code of Criminal Procedure, 1973— Ss. 107 & 151—Divorce on ground of cruelty—Husband alleged that wife misbehaved, insulted him and his family members—He further alleged that wife left matrimonial home without asking husband and got aborted child without telling him or taking his permission—Decree of divorce was passed in favour of husband—Held, that even if act of cruelty was there on part of wife on child abortion, but same stood condoned by husband and on same point husband could not allege that he was treated with mental cruelty—Wife moved an application before Deputy Commissioner for her rehabilitation in her matrimonial home—This showed that she intended to live with her husband at her matrimonial home—Thus, intention of wife to bring to an end matrimonial relations permanently, is missing—Further, such proceedings under section 107/151 Cr.P.C were preventive action on part of police so as to prevent breach of peace—Cruelty against husband and family relatives and desertion could not be proved—Findings by trial Court were to be set aside.***

*Held*, that even if the act of cruelty was there on the part of the wife on that account but the same stood condoned and now on this

point the husband cannot allege that he was treated with mental cruelty and was thus entitled to a decree of divorce.

(Para 11)

*Further held*, that in fact the wife moved an application before Deputy Commissioner for her rehabilitation in her matrimonial home. This fact is admitted by the husband and even the witnesses examined by him. During his cross-examination as PW-1 husband stated that they had been attending the hearing before the Deputy Commissioner. He further admitted as correct that Deputy Commissioner had instructed them to rehabilitate the appellant-wife. He had instructed them to go to Panchayat for the aforesaid purpose. Under those circumstances, if proceedings under Sections 107/151 Cr.P.C. had taken place that would not mean that wife got registered a false case against her husband. In fact these proceedings are preventive action on the part of the police so as to prevent breach of peace. These proceedings terminate after 6 months. Except these proceedings, no other case was got registered by the wife against her husband.

(Para 12)

*Further held*, that even during the pendency of the petition, the wife had gone to the house of her husband on 27-4-2009 and stayed there uptill 13-5-2009. There is no dispute about this fact. This further goes to show that wife has never intended to desert her husband.

(Para 14)

*Further held*, that her statement that 'I undertake to give respect and love to my husband and to live peacefully with him at my matrimonial house' goes to show that she intends to live with her husband at her matrimonial home, she is respectful wife and it is the compelling circumstances at the house of her husband, due to which she was unable to live there or was not allowed to live there in that house. These very lines further go to show that she has not deserted her husband at all.

(Para 15)

*Further held*, that desertion means intention to bring matrimonial ties to an end permanently. Even if husband and wife have been living separately for long, that would not constitute desertion. In the case in hand the intention of the wife to bring to an end matrimonial relations permanently, is missing. The learned trial court without discussing the ground of desertion simply concluded in one line that the wife had deserted the husband continuously for 2 years immediately

preceding the presentation of the petitioner. Thus finding of the learned trial Court is unfounded on record and is not sustainable.

(Para 16)

*Further held*, that likewise without framing any issue regarding permanent alimony to wife and without taking any evidence on that point, the learned trial Court directed the husband to pay a sum of ₹2,15,000/- (gross amount) as permanent alimony to the wife. As such, for want of evidence, this finding of the learned trial Court is also not sustainable.

(Para 17)

*Further held*, that husband has failed to prove that Surinder Kaur-wife has treated him with cruelty and further deserted him. Therefore, the findings recorded by the learned trial Court on issues No. 1 and 2 are set aside and even the order of permanent alimony is also set aside as indicated above.

(Para 18)

Samya Singh, Advocate *for the appellant*.

None for the respondent.

**RAJ RAHUL GARG, J.**

(1) This appeal is instituted by Surinder Kaur (wife) against the impugned judgment and decree dated 31.10.2009 rendered by Sh. Nirbhaw Singh Gill, the then Additional District Judge, Nawanshahr whereby the decree of divorce was granted in favour of husband-Ravinder Singh dissolving his marriage with Surinder Kaur on the ground of cruelty and desertion leaving the parties to bear their own costs. The husband was also directed to pay a sum of ₹2,15,000/- gross amount as permanent alimony to the wife within 3 months from the date of judgment and decree.

(2) Brief facts of the case are like this; that husband-Ravinder Singh sought decree of divorce on the ground of cruelty and desertion alleging that he was married to Surinder Kaur on 18.02.1993 at village Barnala, District Nawanshahr. The marriage was solemnized as per Sikh rites and rituals. No child was born out of this wedlock. Regarding cruelty, it is the case of husband that right from the very beginning of the marriage, wife started misbehaving, insulting him without any reason. Her behaviour towards him and his family members was rude, insulting, contemptuous and aggressive. She refused to give love and affection due towards husband from his wife. She is short tempered

lady. She used to get angry at trivial matters. On the second day of her marriage she started abusing and saying that she had been married against her wishes with him. She was not happy staying with him and further that she wanted to get married in a big city to a rich man. She also said that she hates him and his suffocating small village. She also misbehaved and fought with his parents without any reason or cause. She used to insult, abuse and humiliate him and his family members in the presence of relatives and friends. After few days of marriage she refused to prepare tea for his relatives and friends stating that she was not their servant. Even at home she refused to cook meal for him and his family members and even did not care to bring a glass of water on his asking. She had been comparing her family with his family and used to consider her family as superior to them.

(3) It was further alleged that appellant-wife left her matrimonial home after about 3 months of the marriage of her own and without asking him or his parents. After lot of persuasion by the respondent-husband, respectables and members of Panchayat, she came back about 2 months. Thereafter, after 3 months, she again left the matrimonial home without informing and asking the husband. As per husband at that time, wife was pregnant but without disclosing the same she got aborted the child at her parents' house. He tried to bring her back many times but she refused. However, in the month of October 1996, due to intervention of Panchayat and others, wife came back to her matrimonial home. She stayed at her matrimonial home only till April 1998 and then left again for her parental house without asking or informing him and his family members. Since then she has been residing at her parents' house and has refused to join the company of husband. Many attempts were made to bring her back even through Panchayat but she clearly refused to live with him. Under these circumstances, it was pleaded that husband has suffered great mental agony and was thus treated with cruelty by the wife and deserted him for a period of more than 2 years immediately preceding the presentation of the petition without any just and reasonable cause.

(4) On the other hand, the appellant-wife contested the petition besides several legal objections. Each and every allegation regarding cruelty and desertion was specifically denied. It is the case of the wife that she belongs to a poor family. Her husband started saying that she is not beautiful and not of his status. He also started saying that he would get divorce from her and marry to a beautiful and rich girl. On this, the dispute has arisen between the parties and the same was compromised,

but inspite of that the husband did not mend his ways and his behavior. He had been telling her that he would get divorce from her and marry a rich girl. She gave full respect to her husband and his family members during her stay at her matrimonial home. The allegations mentioned by the husband in his petition have been levelled only in order to get rid of her. In fact, she had always remained obedient to her husband and his family members. Her father is not alive. Being a daughter of poor parents, she tried her level best to cooperate with the husband and his family members but he was not happy with this marriage. Many times he told her that he would not keep her in his house and would get divorce from her. Many times he gave beatings to her but she tolerated all that with the hope that her house may not be ruined. It was further denied that she ever left her matrimonial home of her own or without asking him and his family members. Wife also denied that she was pregnant as such it was pleaded that question of abortion does not arise. She never refused to join the company of her husband. It is further the case of the wife that she was turned out of her matrimonial home by her husband, after giving severe beatings. She had to reside with her parents. On 07.07.1996, a compromise was effected between the parties, thereafter, she stayed in her matrimonial house till June 1999. In June 1999, she was again turned out of her matrimonial home by her husband in three clothes after giving her severe beatings. Thereafter, she and her family members many times asked the husband to keep his wife in his house but he frankly refused and said that he would get divorce from her and marry again with a beautiful and rich lady. It was further alleged that the husband cannot be allowed to take benefits of his own wrongs. Even today, she is ready and willing to join the company of her husband. She has not deserted her husband. With these pleas, dismissal of petition with costs was prayed.

(5) Husband filed replication in which he reiterated his case and denied the averments of the wife taken in the written statement.

(6) From pleadings of the parties following issues were framed:-

- (i) Whether the respdt. has treated the petitioner with cruelty? OPP
- (ii) Whether the respdt. has deserted the petitioner without any reasonable cause for two years immediately proceedings the present petition i.e. April 1998? OPP
- (iii) Relief.

(7) After taking oral as well as documentary evidence of both the parties and hearing both the counsel for the parties, the decree of divorce on the ground of cruelty and desertion was passed in favour of husband. A sum of ₹2,15,000/- (gross amount) was awarded as permanent alimony to the wife payable within 3 months from the date of judgment.

(8) Aggrieved by the impugned judgment and decree, wife Surinder Kaur preferred the present appeal.

(9) We have heard learned Ms. Samya Singh, Advocate for the appellant whereas respondent-husband did not choose to appear nor his counsel appeared before us. We have also appraised the entire material coming on record.

(10) The learned trial Court came to the conclusion that wife treated the husband with mental cruelty as she admitted during the course of her cross-examination that she was pregnant at the time, she left the matrimonial house after 7-8 months of the marriage. It is specific case of the husband that she got aborted the child without telling them or their permission.

(11) Wife firstly took the plea in her written statement that she was not pregnant but during the course of her cross-examination she admitted this fact. However, no explanation is furnished by the wife as to why and under what circumstances she aborted the child. As such in the estimation of learned trial Court she has treated the husband with mental cruelty. So far as the above conclusion of the learned trial Court is concerned, it is reasonable but the counsel for the appellant-wife contended that even if that was so, that act of wife stood condoned. Since, it is the case of husband himself that in the month of October 1996, the wife came back to her matrimonial home and stayed till April 1998. Though, it is the case of the wife that at that time she stayed in her matrimonial home uptill June 1999 yet the fact remains that for about 2 years she stayed in her matrimonial home with respondent-husband, as husband and wife. In the light of this arguments, we consider to hold that even if the act of cruelty was there on the part of the wife on that account but the same stood condoned and now on this point the husband cannot allege that he was treated with mental cruelty and was thus entitled to a decree of divorce.

(12) The next argument which weighted in the mind of the trial Court is this; that the wife herself admitted that the case under Sections 107/151 Cr.P.C. was registered against the husband and his family



members. She has admitted that she got a false case registered against him as such it amounts to cruelty on the part of the wife. Again aforesaid argument is misplaced. In fact the wife moved an application before Deputy Commissioner for her rehabilitation in her matrimonial home. This fact is admitted by the husband and even the witnesses examined by him. During his cross-examination as PW-1 husband stated that they had been attending the hearing before the Deputy Commissioner. He further admitted as correct that Deputy Commissioner had instructed them to rehabilitate the appellant-wife. He had instructed them to go to Panchayat for the aforesaid purpose. Under those circumstances, if proceedings under Sections 107/151 Cr.P.C had taken place that would not mean that wife got registered a false case against her husband. In fact these proceedings are preventive action on the part of the police so as to prevent breach of peace. These proceedings terminate after 6 months. Except these proceedings, no other case was got registered by the wife against her husband. Whenever, she was confronted with the situation that she ever made a complaint against her husband for giving her severe beatings she categorically stated in negative, with the explanation that she did not do that, as she wanted to live with her husband. The conduct of the wife in not lodging a complaint against the husband or not taking any action against the conduct of her husband, not moving any application to the authorities regarding the treatment given by her husband to her; clearly shows that she never intended to break the relationship of husband and wife but wanted to live with him. Her moving application to the Deputy Commissioner for her rehabilitation further shows that she was positive in settling at her matrimonial home. Ex.A-1 writing dated 24.01.2006 made before the Panchayat further shows that the Panchayat was held in pursuance with the application moved by the wife. The matter was brought in the Panchayat by the wife and not by the husband. Ramji, Member Panchayat of village Chankoya appeared in the Court in support of Ravinder Singh-husband as PW-4 which shows that husband had a clout in the village Panchayat. In spite of that the husband has failed to bring on record even a single document showing the proceedings of the Panchayat. This fact negates the case of the husband that he had tried several times through Panchayat to bring back appellant-wife.

(13) Appellant-wife is a fatherless child. She has been residing with her brother and sister. She belongs to a poor family whereas the respondent-husband was owning a truck at the time of his marriage but after sometime he had disposed of the same, obviously for the reason