

exceeding one year may have to be passed or it was necessary to switch over to the warrant procedure for any other reason; and (b) in not giving an opportunity of being heard to the accused before adopting the procedure of a warrant case.

(13) In the peculiar circumstances of this case, when the trial has lingered on for such a long time not on the basis of the fault of the accused, but due to the wrong procedure adopted by the Magistrate and looking into the percentage of adulteration in milk, i.e. there was a deficiency of 0.6 per cent milk fat and 0.5 per cent milk solids not fat, I think no useful purpose would be served to add to the agony of the accused-petitioner more for a longer time.

(14) Consequently, I allow this petition, set aside the order of the Chief Judicial Magistrate, dated August 6, 1993, quash the complaint and consequent proceedings thereto.

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J.S.T.

Before Hon'ble Dr. Sarojnei Saksena, J.

SADA NANDA,—Appellant.

versus

INDRA DEVI,—Respondent.

F.A.O. No. 8-M of 1987

16th February, 1995

*Hindu Marriage Act, 1955—S. 13—First Appeal—Desertion—Forced by conduct of husband, wife sought refuge in paternal home—Whether leaving of matrimonial home by wife constitutes desertion—Held desertion does not mean walking out of house but withdrawal from matrimonial home.*

*Held*, that the appellant has not come forward with a plea that he is willing to take his wife back in the matrimonial home, while the respondent wife has categorically stated so. From her statement, it is evident that after marriage within 2/3 days she was turned out of the house by the appellant as he wanted her to bring valuable articles from her parental home. Thereafter, he started filing petitions for divorce for restitution of conjugal rights and for execution of the decree passed in his favour in the first case filed under Section 9 of the Act but he was all through unsuccessful. It is obvious that she has not deserted him, rather she was forced by his conduct to leave the matrimonial home and have refuge in her

parental home. Desertion does not mean walking out of the house, but means withdrawal from the house. In *Amarjit Singh v. Darshan Kaur* (1994 MLJ 375) a Division Bench of this Court has held that "A house is built by hands and a home is built by hearts. Mere withdrawal from sex may not constitute withdrawal from home.

(Para 13)

*Further held*, that if the wife is forced to leave matrimonial home for failure of the appellant to provide her home of congenial atmosphere, than such an act cannot be given insignia of desertion. Husband and wife are required to live in harmony with real concern for each other. There has to be tolerance with sense of reciprocity. Indian Constitution has now provided Fundamental Duties in Article 51-A. One of the duties is to "renounce practice derogatory to the dignity of women."

(Para 14)

*Hindu Marriage Act, 1955—S. 13—Dissolution of marriage on grounds of dead lock—Whether husband should be allowed to take advantage of his own wrong.*

*Held*, that in *Chander Kala Trivedi v. Dr. S. P. Trivedi* (1993) 4 S.C.C. 232, it is held that if a marriage was dead and there was no chance of its being retrieved, it was better to bring to an end. But it cannot be disputed that the husband-appellant has not been dutiful and conscious of his responsibilities either towards his wife or his son. He never contributed any thing towards upbringing of his son, but even then it cannot be said that this wedlock has become a dead lock because the wife is still willing to join the matrimonial home. The appellant cannot be allowed to take advantage of his own wrongs by pleading that the wife has deserted him.

(Para 16)

S. S. Mahajan, Advocate with Miss Aparna Mahajan, Advocate,  
for the Appellant.

H. S. Sangha, Sr. Advocate, Rajesh Khurana, Advocate with him,  
for the Respondent.

## JUDGMENT

*Dr. Sarojnei Saksena, J.*

(1) This appeal presented under Section 28 of the Hindu Marriage Act, 1955 (for short 'the Act') is directed against the judgment and decree dated 3rd October, 1986 rendered by the Additional District Judge, Jalandhar in HM case No. 116 of 1985 thereby dismissing the application seeking dissolution of marriage by a decree of divorce on the grounds of cruelty and desertion.

(2) In a nut shell the facts of the case are that the appellant was married to the respondent on 25th May, 1964. In this wedlock the respondent gave birth to a son, who is now aged about 21 years. Son is living with the respondent. There is a chequered history of litigation between the parties. On 6th February, 1973 the respondent withdrew from the matrimonial home without any reasonable excuse. The appellant filed a petition under section 9 of the Act on the ground of desertion which was decreed on 26th March, 1974. On 19th April, 1976 he filed a petition for divorce which was withdrawn on 9th June, 1976 as the respondent gave him an assurance to rejoin. On the basis of the decree passed under Section 9 of the Act, he filed another petition for divorce which was dismissed on 2nd May, 1978. He preferred an appeal against that judgment and decree, but the High Court dismissed the appeal on 20th November, 1978. He filed another petition under Section 9 of the Act which was also withdrawn on the respondent's assurance to perform the matrimonial obligations. He filed execution petition also to implement the said decree. That too was dismissed.

(3) The appellant's contention is that the respondent does not want to reside in the matrimonial home. She is always giving false assurances to frustrate his legal actions. She has deserted him for a period of more than two years. He is always prepared to take her in his fold, but she is declining to rejoin without any reasonable cause. She filed a petition under Section 125 Cr.P.C. against him. She also prosecuted him under the Dowry Prohibition Act. She is not permitting him to see his son, thereby she has treated him with cruelty. Hence he filed this divorce petition on 4th December, 1985.

(4) The respondent admitted the legal actions taken by her husband against her, but she has emphatically denied that she deserted him or treated him with cruelty. According to her, she is willing to go to her matrimonial home. After the compromise when she went to reside with him, after few days he turned her out. The appellant is dragging her in this chain of long drawn litigation. She also denied that she did not allow the appellant to see his son.

(5) Parties examined themselves only. The trial Court, on appraisal of evidence on record, came to the conclusion that the appellant has failed to prove the ground of desertion. All through, she has expressed her willingness to rejoin him. Once after compromise, she went to reside with the appellant, but he turned her out of the house. He is not ready and willing to keep her in the matrimonial home. It is also held that the ground of cruelty is also not proved. Hence the dismissal of the petition.

(6) The appellant's learned Counsel admitted that the appellant filed two petitions under Section 9 of the Act and 3 petitions under Section 13 of the Act. His one petition filed under Section 9 of the Act was decreed, but all other petitions were dismissed. Even Execution Petition is dismissed. Since 6th of February, 1973 they are living separate.

(7) It is admitted fact that after 6th February, 1973 the respondent has not joined the appellant in the matrimonial home. After the compromise in the divorce petition, she lived with him for one or two days only to frustrate the attempt to get a divorce on that count. Thus, it is obvious that she has no *animus* to resume cohabitation and she has permanently broken the shackles of marital life. The trial Court has not scanned the evidence minutely ; otherwise the conclusion is irresistible that the appellant has proved the ground of desertion.

(8) He further contended that even the ground of cruelty is proved by the appellant. She filed a petition under Section 125 Cr. P.C. and another complaint under Dowry Prohibition Act against him, thereby she has caused mental agony to him. She has also not allowed him to see his son. She has treated him with cruelty. It is also contended that from the conduct of the parties, it is evident that it is not a wedlock, but a deadlock. The marriage is irretrievably broken. On this count also he prayed that a decree of divorce should have been passed.

(9) The respondent's learned Counsel vehemently stressed that from the chequered history of litigation, it is evident that the appellant had no intention to rehabilitate the respondent. Even in the High Court when conciliation proceedings were drawn, he declined to take her back in the conjugal home. Thus it is obvious that he only wants to get rid of her. The reason is that after marriage he wanted certain valuable items to be brought from her parental home. She declined and therefore she was turned out from the house. After the compromise in the divorce petition she went to live with him. She lived him for about two months, but again he turned her out on the same ground. This is the third divorce petition on the same ground of desertion. She was/is always willing to join him, but he does not want to take her back in the matrimonial home.

(10) Thus it is evident from the record that from 25th March, 1974 to 14th December, 1985 the appellant husband is dragging her in litigation. Uptil now he has filed 3 divorce petitions and two petitions under Section 9 of the Act. He has failed in his all these attempts.

(11) Cruelty is not defined in the Act. Mental cruelty means that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other, must be of such a nature that the parties could not reasonably be expected to live together. Regard must be had to the social status, educational level of the parties and the society they move. (V. Bhagat v. Mrs. D. Bhagat, 1994 (1) P.L.R. 603).

(12) In this case the appellant has alleged that the respondent filed a petition under Section 125 Cr. P.C. and a complaint under Dowry Prohibition Act against him, thereby she has caused mental pain and agony to him. The respondent has not admitted these facts in her reply. He has not filed any document to prove that such a petition or a complaint was filed by her against him. The third ground of cruelty is that she does not permit him to see his son. He has utterly failed to prove this ground also. He has not examined any witness to corroborate him. She has denied this allegation on oath. Even otherwise, it does not stand to reason that he was not permitted by her to meet his son, who was all through going to educational institutions and now he is in service. Thus the trial Court has rightly held that the appellant has utterly failed to prove the ground of cruelty.

(13) So far as the ground of desertion is concerned, there is oath against oath. The appellant has not come forward with a plea that he is willing to take his wife back in the matrimonial home, while the respondent wife has categorically stated so. From her statement, it is evident that after marriage within 2/3 days she was turned out of the house by the appellant as he wanted her to bring valuable articles from her parental home. Thereafter he filed a petition under Section 9 of the Act which was decreed. Then in the divorce petition, a compromise was arrived at and she went to live with him. The appellant withdrew his case. Even then there was no change in his behaviour. She lived there for about one and 3/4th months and again she was turned out of the house. Thereafter he started filing petitions for divorce, for restitution of conjugal rights and for execution of the decree passed in his favour in the first case filed under Section 9 of the Act, but he was all through unsuccessful. Even his appeal was dismissed by the High Court and now he has filed this petition. Thus, it is obvious that she has not deserted him, rather she was forced by his conduct to leave the matrimonial home and have refuge in her parental home. Desertion does not mean walking out of the house, but means withdrawal from

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the house. In *Amarjit Singh v. Darshan Kaur* (1), a Division Bench of this Court has held that "A house is built by hands and a home is built by hearts. Mere withdrawal from sex may not constitute withdrawal from home."

(14) From earlier proceedings as well as from her ocular evidence, it is evident that she had demonstrated the surge of an urge to live together and thus *animus deserendi* is lacking. Both the spouses are teachers by profession. They are well educated persons. Their social status is apparent on record. The respondent is entitled to comforts and company of the appellant and has a right to live with dignity. If the wife is forced to leave matrimonial home for failure of the appellant to provide her home of congenial atmosphere, then such an act cannot be given insignia of desertion. Husband and wife are required to live in harmony with real concern for each other. There has to be tolerance with sense of reciprocity. Indian Constitution has now provided Fundamental Duties in Article 51-A. One of the duties is to "renounce practice derogatory to the dignity of women".

(15) In the case in hand the respondent is keen to come back to the matrimonial home as is evident from the chequered history of the litigation. From the record, it is evident that the appellant's attitude was not to rehabilitate her. She has made attempt to refrain him from breaking the bond of marriage. In such proved facts and circumstances, inbredillation is that the wife has not wronged but is wronged ruthlessly on matrimonial front. I find that the trial Court was right in repelling this ground too, unsustainable on facts and untenable in law.

(16) So far as the alternative prayer is concerned, in *Chander Kala Trivedi v. Dr. S. P. Trivedi* (2), it is held that if a marriage was dead and there was no chance of its being retrieved, it was better to bring it to an end. In the instant case it cannot be said that the marriage is dead both emotionally and practically. No doubt the continuance of marital alliance for names sake is a permanent agony and affliction, but it cannot be disputed that the husband-appellant has not been dutiful and conscious of his responsibilities either towards his wife or his son. He never contributed any thing towards upbringing of his son, but even then it cannot be said that

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(1) 1994 M.L.J. 375.

(2) (1993) 4 S.C.C. 232.

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this wedlock has become a dead lock because the wife is still willing to join the matrimonial home. The appellant cannot be allowed to take advantage of his own wrongs by pleading that the wife has deserted him. Conversely it is a prove that he is guilty of constructive desertion.

(17) Marriage is not like a partnership at will or a house of cards. Both the spouses should strive to defend the institution of marriage, rather than dissolve it. In married life normal wear and tear is required to be tolerated by both the partners. While they share the same roof, same bed, they are required to be tolerant to each other. Parties are educated. They should be well aware of the importance of the congenial matrimonial home. Now their son is of marriageable age. They are already too late in coming to terms, but it is expected that they will ensure avoidance of never.

(18) Finding the appeal devoid of merit, it is liable to be dismissed and is hereby dismissed with no order as to costs. In view of this decision C.M. No. 1227-CII of 1987 being infructuous is also hereby dismissed.

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*J.S.T.*

*Before Hon'ble Jawahar Lal Gupta & S. C. Malte, JJ.*

**JAGTAR SINGH,—Petitioner.**

*versus*

**HINDUSTAN PETROLEUM CORPORATION LTD. &  
OTHERS,—Respondents.**

C.W.P. 14659 of 1994

6th March, 1995

*Constitution of India, 1950—Arts. 226/227—Selection for grant of Retail Outlet—Challenge on the ground that the selected candidate ineligible—Alternative remedy—Exercise of writ jurisdiction.*

*Held, that it is correct that normally High Court does not go into the disputed questions of fact while hearing a petition under Article 226 of the Constitution. However, so far as the present case*