

Delhi High Court
Smt. Vimal Kanta vs Shri J.M. Kohli on 13 January, 2011
Author: Kailash Gambhir
IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 24.9.2010

Judgment delivered on: 13.01.2011

FAO No. 46/1995

Smt. Vimal KantaAppellant Through: Mr. Rajat Navet, Advocate.

Vs.

Shri J.M. KohliRespondent. Through: Ms. Geeta Luthra, Sr. Advocate
with Mr. Abhishek Aggarwal, Adv.

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

1. Whether the Reporters of local papers may be allowed to see the judgment? Yes
2. To be referred to Reporter or not? Yes
3. Whether the judgment should be reported
in the Digest? Yes

KAILASH GAMBHIR, J.

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1. The appellant at this old age of 80 years is before this court in appeal to challenge the judgment and decree of FAO No. 46/1995 Page 1 of 25 divorce passed by the learned trial court vide order dated 30.9.94 on the ground of desertion envisaged under Section 13 (1)(ib) of the Hindu Marriage Act, 1955, thereby dissolving the marriage between the parties.

2. A conspectus of facts of the present appeal is that the marriage between the parties was solemnized on 20.6.1953 as per Hindu rites and ceremonies and a female child was born out of this wedlock on 14.7.1954, who has been living throughout with her mother i.e. the appellant herein. The respondent husband had filed a divorce petition on the grounds of cruelty and desertion as long back as 12.10.1982. The appellant had contested the said petition with all the zeal at her command and both the parties entered the trial with accusations and cross accusations. The respondent examined himself and 10 other witnesses so as to prove the allegations of cruelty as well as desertion while the appellant on the other hand examined herself and three other witnesses to prove her defence. Based on the pleadings and documentary evidence adduced by the FAO No. 46/1995 Page 2 of 25 parties, the learned trial court dismissed the petition of the respondent so far the ground of cruelty was concerned but decreed the divorce petition on the ground of desertion under Section 13 (1) (ib) of Hindu Marriage Act.

3. Feeling aggrieved with the same, the appellant preferred the present appeal on 13.2.95, which was taken up by this court on 23.2.1995. Since there was some delay on the part of the appellant in preferring the present appeal, and possibly taking advantage of the same, the respondent got remarried on 30.12.94 and a female child was also born out of the said remarriage on 31.7.2000. Before finally hearing this matter, a lot of persuasive efforts were made not only by this Court but also by the predecessor judges of this court to bring about an amicable settlement between them but all such efforts turned futile as both the parties remained totally reluctant and rigid to budge from the hostile positions taken by them. In most of the hearings, the appellant remained present with her elderly daughter of 56 years while the respondent, an old man of 83 years, FAO No. 46/1995 Page 3 of 25 remained present with his comparatively young wife of 47 years, contesting the present appeal with great fervour.

4. So far the allegations of cruelty leveled by the respondent against the appellant are concerned, this court need not go into the same as already the learned trial court has held that the ground could not be satisfactorily established by the respondent husband as envisaged under Section 13(1) (ia) of the HMA. So far the challenge to the decree granted by the learned trial court on the ground of desertion is concerned, the main argument advanced by the counsel for the appellant was that the basic ingredients of desertion were not proved by the respondent husband. The contention raised by the counsel for the appellant was that once the respondent husband has failed to prove the acts of cruelty on the part of the appellant wife, then the respondent leaving the matrimonial home due to the cruel acts of the appellant wife could not have arisen. Counsel thus alleged that the respondent husband failed to prove and establish on record that there was any intention on the FAO No. 46/1995 Page 4 of 25 part of the appellant wife to bring cohabitation permanently to an end. Counsel also submitted that the respondent husband in his own statement admitted the fact of his continuous visits to the house at Munirka till September, 1982, besides the fact that he had opened a bank account in the name of the appellant on 25.1.1980 and of attending a Kriya ceremony with the appellant after 24.12.1979. To the same effect was the deposition of RW-2 Mr. R.S. Dohare who also deposed in his evidence that the respondent used to visit Munirka even after 24.12.1979. Counsel also submitted that even the testimony of the appellant testifying that the respondent husband even used to stay overnight after 24.12.1979 remained unrebutted. Counsel also submitted that the learned trial court failed to properly appreciate the dictum of law laid down by the Apex Court in Bipin Chander Vs. Prabhawati AIR 1957 SC 176.

5. Based on these submissions, counsel for the appellant submitted that the respondent failed to prove the ground of desertion or even the constructive desertion on FAO No. 46/1995 Page 5 of 25 the part of the appellant wife. In support of his arguments, counsel for the appellant placed reliance on the judgment of the Division Bench of this court in Kiran Sharma Vs. Shradha Nand 44 (1991) DLT 90.

6. Refuting the said submissions of the counsel for the appellant, Ms. Geeta Luthra, learned Senior Advocate appearing for the respondent fully supported the judgment of the learned trial court. Counsel submitted that the judgment of the learned trial court is a well reasoned judgment and the appellant has failed to point out any illegality or infirmity in the same. Counsel for the respondent also submitted that the respondent was thrown out of the Munirka house on 24.12.1979 and this fact was duly proved on record by the respondent through an affidavit of the appellant dated 24.12.1979 wherein she clearly stated that she along with her daughter asked the respondent to live separately from them temporarily. Besides the said affidavit, the respondent has also proved on record an endorsement on the carbon copy of the said FAO No. 46/1995 Page 6 of 25 affidavit as Ex.R-1 which endorsement would further strengthen the plea of the respondent that he had left the Munirka house as per the desire of the appellant and her daughter. Counsel thus submitted that on the said very date i.e. 24.12.1979, not only there was a separation between the parties but also there was a clear intention on the part of the appellant wife to bring the cohabitation permanently to an end. Counsel thus submitted that the appellant has no case to assail the findings of the learned trial court and the same be accordingly upheld.

7. I have heard learned counsel for the parties at considerable length and gone through the records.

8. It is an unfortunate case of a geezer whose marriage turned ruinous right at the very beginning. As per the respondent, after solemnization of the marriage of the parties on 20.6.1953, the appellant did not stay with him even for a day as the locality where the respondent was residing was not to her liking (Kashmiri Gate). The respondent along with his parents arranged a house in Patel FAO No. 46/1995 Page 7 of 25 Nagar and shifted there in August 1953. Again presence of the parents of the respondent was objected to by the appellant, who then shifted to their old house in December 1953. Both the parties again shifted in a quarter at Lodhi Road in February 1954 which was allotted in the name of the brother of the appellant who was then unmarried, and the said quarter was near to the parental house of the appellant. A female child was born out of the said wedlock on 14.9.1954 and in March 1955 the parties again shifted back to their old house at Kashmiri Gate. In July 1955, the appellant was taken away by her parents on the pretext of her participation in the engagement ceremony of her younger brother when some jewellery items were also alleged to have been borrowed by the parents of the appellant from the parents of the respondent. Since thereafter a crisscross legal battle started between the parties. The respondent had filed a declaratory suit on 20/21.3.1957 to claim that the contents of the locker being maintained in the name of the mother of the appellant belonged to the respondent. The respondent had also filed a FAO No. 46/1995 Page 8 of 25 suit for restitution of conjugal rights under Section 9 of the Hindu Marriage Act in March 1957. The appellant on the other hand had filed a suit for maintenance u/s 488 Cr.P.C, 1898 (the old Act) in March 1957. The respondent had also filed another suit to seek judicial separation under Section 10 of the Hindu Marriage Act in 1960. The respondent had also preferred an appeal after his case seeking restitution of conjugal rights was dismissed on 28.2.62. It is in this appeal, with the intervention of the presiding judges, both the parties were persuaded to stay together and thereafter the appellant had agreed to join the matrimonial home on the condition that the respondent should continue to pay the maintenance amount of Rs.300 per month till she starts getting a salary. Even despite the said compromise, the appellant did not join back the matrimonial home and it was only in the year 1966 that the appellant had agreed to join back the company of the respondent while he was residing at a newly built house at Punjabi Bagh. After the year 1966 both the parties lived together till 24.12.1979 and in this manner both the parties could stay together only for a FAO No. 46/1995 Page 9 of 25 period of thirteen years since their marriage of 29 years till the filing of the petition for divorce on 1982. The narration of aforesaid background as set out by the respondent in his divorce petition is necessary to highlight the fact that both the parties were never at peace and their relations became strained right from the very inception of their marriage and the only silver lining in their relationship was birth of a female child on 14.9.1954. How much trauma and misery the child must have suffered right from the day of coming in her senses watching her parents fight such fierce legal battle cannot even be imagined. However, now 16 years have passed since the filing of the present appeal and the court is confronted to adjudicate upon a mordant situation where the marriage is dead but the parties are fighting the battle, so deadly, for the last 28 years.

9. The appellant has filed the present appeal on the ground that the findings of the learned trial court with regard to desertion are perverse. The question as to what FAO No. 46/1995 Page 10 of 25 precisely constitutes "desertion" has been elaborately discussed in a catena of judgments of the Hon'ble Supreme Court as well as various High Courts and also in several English cases. "Desertion" in a sense means the intentional permanent abandonment of a spouse by the other, without consent and without reasonable cause. It is a settled legal position that desertion is not a physical withdrawal from a place, but from a state of things, from which one can easily draw a conclusion that it is not a physical separation alone but there is a complete withdrawal on the part of the deserting spouse to bring cohabitation permanently to an end between them. The learned trial court referred to the judgment of the Apex Court in Bipin Chander's case (Supra) where the concept of desertion has been defined in the following words:

"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." FAO No. 46/1995 Page 11 of 25

10. The above legal position was reiterated by the Apex Court in the Constitution Bench decision in Lachman Utamchand Kirpalani vs. Meena Alias Mota (1964) 4 SCR 331 and other subsequent judgments. Hence to establish desertion the two essential elements to be proved by the petitioner are the factum of separation and animus deserendi. In the facts of the case at hand, it is the case of the respondent husband that he was forced to leave the company of the respondent on 24.12.79. It is not in dispute between the parties that the parties lived separately thereafter. The factum of separation is thus not disputed. Coming to the second ingredient of animus deserendi, it is to be seen whether the intention of the deserting spouse was to bring the cohabitation permanently to end. The affidavit PW 2/3 proved on record is an affidavit dated 24.12.1979 where the appellant has admitted that she asked the respondent to live separately temporarily. It is important to reproduce the same here:

FAO No. 46/1995 Page 12 of 25 "1. That I am living with my husband, Shri J.M.Kohli, A.S.W. C.P.W.D., New Delhi and my daughter, Renu Kohli at C-1/F, D.D.A Flats, Munirka.

2. That I and my daughter have asked Shri J.M.Kohli to live separately from us temporarily since inspite of the best efforts by us we could not live peacefully together. Therefore, Shri Kohli would shift and would live separately from us temporarily. I have no complaint against him."

The signatures on the above affidavit have been admitted by the appellant and the veracity of the above document cannot be questioned in the face of the above admission. It is also important to mention that in the document Ex R 1 proved on record, there is a handwritten endorsement by the respondent that he is vacating the said premises as per the desire of the appellant. It would be pertinent to reproduce the same here:

"I am vacating C-1/F DDA Flats today the 24.12.79 as desired by Mrs. Vimla Kohli and Miss Renu for the betterment of all. I shall be paying maintenance/pay monthly personally each month and shall help them as and when required on intimation to me on my office telephone No.611475. The unpaid monthly instalment of C-1/F, Munirka till today to be paid to D.D.A. shall be paid by me."

sd/ J.M.Kohli.

24.12.79"

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11. It is evident from the above said affidavit that the cohabitation between the parties ended on 24.12.1979. It is the contention of the appellant that it was a temporary separation and cannot be taken to mean that the intention of the appellant was to bring the cohabitation to end permanently. It is a settled legal position that the factum of separation and animus deserendi are not to always co exist and that the animus can be inferred from the subsequent conduct of the deserting spouse. Here it would be pertinent to refer to the judgment of the Apex Court in the case of Bipin Chander (supra) where it was held that: "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 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 deserendi coincide in point of time.."

FAO No. 46/1995 Page 14 of 25 Therefore, though the parties separated on 24.12.1979 temporarily but the animus for bringing the cohabitation to end was later developed and can be inferred from the subsequent

events in the present case as the appellant made no efforts for reconciliation or did any act to restore the wrecked relationship. Also in the case of Savitri Pandey vs. Prem Chandra Pandey (2002) 2 SCC 73 after referring to judgments in Bipin Chander and Lachman Utamchand, the Apex Court held that :

"8. "Desertion", for the purpose of seeking divorce under the Act, means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. In other words it is a total repudiation of the obligations of marriage. Desertion is not the withdrawal from a place but from a state of things. Desertion, therefore, means withdrawing from the matrimonial obligations, i.e., not permitting or allowing and facilitating the cohabitation between the parties. The proof of desertion has to be considered by taking into consideration the concept of marriage which in law legalises the sexual relationship between man and woman in the society for the perpetuation of race, permitting lawful indulgence in passion to prevent licentiousness and procreation of children. Desertion is not a single act complete in itself, it is a continuous course of conduct to be determined under the facts and circumstances of each case.

12. Clearly in the present case, the appellant is the deserting spouse and her intention can be inferred from her FAO No. 46/1995 Page 15 of 25 conduct. The very fact that the appellant did not make any efforts to restore the matrimonial relations would show that she did not want to live with the respondent husband after she separated from him temporarily and hence that lent an element of permanence to the temporary separation. This fact is also strengthened by her cross examination where she admitted that since the day she was living separately from the respondent, she never made any effort for reconciliation because there was no such opportunity. Also, PW 6, Sh. Atma Ram Birdhi in his examination stated that when the respondent had met with an accident, and even otherwise when he stayed in the rented premises of PW 6, the appellant never visited him. It is thus clearly borne out from the above that there was animus deserendi on the part of the appellant and she had deserted the respondent without reasonable cause.

13. Coming to the other argument of the counsel for the appellant that the respondent visited the house at Munirka even after 24.12.1979 and that there was no desertion FAO No. 46/1995 Page 16 of 25 before filing of the petition, it is an admitted fact that the respondent husband used to visit the Munirka house to meet his daughter. Much stress was laid by counsel for the appellant on the evidence of RW 2 Shri R.S Dohare, where he stated that the respondent used to live with the appellant whenever he visited her in the flat. Also, the fact that the appellant admitted that he gave an application for opening of a bank account in the name of the appellant on 25.1.1980 and that he attended the Kirya ceremony of a relative of the appellant on 7.2.1981 would go on to prove that there was no desertion even after 24.12.1979, the counsel contended. It is not the case of the appellant that there was any resumption of cohabitation between the parties after 24.12.1979. The visits, as admitted by the respondent were to meet his daughter. Even otherwise, the visits of the respondent cannot be taken to mean that they both lived as husband and wife. Such casual visits, unless otherwise proved, cannot be taken as if the parties had restored their marital relations. Paradoxically, however both the events, that is opening of the bank account and attending the Kriya FAO No. 46/1995 Page 17 of 25 ceremony go on to show that the respondent was fulfilling his duties as a husband and was still willing to live with the appellant and their daughter but it is the appellant who did not respond to his efforts. Here it would be useful to refer to the judgment of the Apex Court in the case of Adhyatma Bhattar Alwar vs. Adhyatma Bhattar Sri Devi (2002) 1 SCC 308 where it was held that :

"The clause lays down the rule that desertion to amount to a matrimonial offence must be for a continuous period of not less than two years immediately proceeding the presentation of the petition. This clause has to be read with the Explanation. The Explanation has widened the definition of desertion to include 'willful neglect' of the petitioning spouse by the respondent. It states that to amount to a matrimonial offence desertion must be without reasonable cause and without the consent or against the wish of the petitioner. From the Explanation it is abundantly clear that the legislature intended to give to the expression a wide import which includes willful neglect of the petitioner by the other party to the marriage.

Hence, it would be clear from the law settled by the Apex Court that the explanation to Section 13 talks about willful neglect of the petitioner by the respondent in case of desertion. In the present case as well the appellant never bothered about the whereabouts of the respondent husband and hence such conduct of the appellant further strengthens FAO No. 46/1995 Page 18 of 25 the case of the respondent to claim divorce on the ground of desertion.

14. The court in the case of Adhyatma Bhattar (supra) further observed:

11. This Court in the case of Smt. Rohini Kumari v. Narendra Singh,; [1972]2SCR657 , while considering the case of judicial separation on the ground of desertion under Section 10(1)(a) of the Act read with the Explanation, held:

"...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.

In Lachman Utamchand Kirpalani v. Meena alias Mota, this Court had occasion to consider the true meaning the ambit of Section 10(1)(a) of the Act read with the Explanation. Reference was made in the majority judgment to the earlier decision in Bipin Chander Jaisinghbhai Shah v. Prabhawati, in which all the English decisions as also the statement contained in authoritative text books were considered. After referring to the two essential conditions, namely, the factum of physical separation and the animus deserendi which meant the intention to bring the cohabitation permanently to an end as also the two elements so FAO No. 46/1995 Page 19 of 25 far as the deserted spouse was concerned i.e.(1) the absence of consent and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the intention aforesaid, it was observed while examining how desertion might come to an end:

"In the first place, there must be conduct on the part of the deserted spouse which affords just and reasonable cause for the deserting spouse not to seek reconciliation and which absolves her from her continuing obligation to return to the matrimonial home. In this one has to be regard to the conduct of the deserted spouse. But there is one other matter which is also of equal importance, that is, that the conduct of the deserted spouse should have had such an impact on the mind of the deserting spouse that in fact it causes her to continue to live apart and thus continue the desertion. But where however, on the facts it is clear that the conduct of the deserted spouse has had no such effect on the mind of the deserting spouse there is no rule of law that desertion terminates by reason of the conduct of the deserted spouse."

(Emphasis supplied)

Hence in the face of the above settled law, it is evident that the conduct of the respondent in visiting the appellant at Munirka would not dislodge the fact of desertion.

15. The counsel for the appellant also placed reliance on the judgment of the division bench of this court in the case of Kiran Sharma (supra) to support his argument that as cruelty could not be established by the respondent hence the circumstances which compelled him to leave the house could not be established which would infer that the respondent left the house on his own will. The contention of FAO No. 46/1995 Page 20 of

25 the counsel is devoid of any merit as the law is clear that there has to be an absence of consent of the deserted spouse. In the endorsement to the affidavit reproduced above, it is distinctly stated that the respondent is vacating the Munirka house as per the desire of the appellant. This is enough to show the absence of consent on the part of the respondent husband. In this regard the learned trial court has relied upon the testimony of PW 6, and rightly so, where he stated that the respondent husband was his tenant from April, 1980 to Feb 1982 at Safdarjung Enclave and that when he occupied the tenanted premises, he had only one box, bedding, some utensils and one coat. Before April 1980 the respondent resided in village Katmarna Sarai. The respondent had also proved the rent receipts on record. Had the respondent left the house on his own will he would have at least made arrangements to live decently beforehand as he had his own house in Punjabi Bagh which was on rent. The circumstances clearly show that the respondent was turned out of the house as otherwise he would not have only meager things when he came to occupy the tenanted FAO No. 46/1995 Page 21 of 25 premises. The other essential with regard to the deserted spouse as held by a plethora of judgments reproduced above is the absence of conduct which would reasonably cause the deserting spouse to form his/her intention to bring cohabitation to an end. In the facts of the present case, in the affidavit PW2/3 reproduced above, the appellant has clearly deposed that she has no complaint from the respondent husband. Had the respondent husband been cruel to the appellant, it was for her to show that the husband had left the house on his own accord and is taking advantage of his wrongs as envisaged under section 23 which would thus create a bar for the respondent to seek a decree of divorce on the ground of desertion. However no such plea has been raised by the appellant in this regard in the pleadings or in the evidence. The judgment in the case of Kiran Sharma thus would not be applicable to the facts of the case at hand as there the husband left the matrimonial home as he had illicit relations with another woman which the wife could successfully establish that the husband was FAO No. 46/1995 Page 22 of 25 trying to take advantage of his wrong in claiming the decree of divorce on the ground of desertion.

16. Before parting with the judgment, this court is constrained to observe that this is an unfortunate case where the parties have spent more than half of their lives in the alleys of the courts. Marriage is a union where the husband and wife spend their entire life building a bond of trust, love and friendship which would be their support during the last years of their lives. Having the other spouse by the side at the fag end, to cherish the moments of their times spent together, is an asset which clearly the parties were devoid of in the present case. The parties were involved in mud slinging at each other for so many years that they did not realize that they would not have the time to start their lives afresh. At this juncture of 80 years, the appellant wanted the decree of divorce to be set aside which made me inquisitive to know the reason behind it. Was it because that the appellant wanted to be a legally wedded wife till her last breath with the pride of the red vermillion FAO No. 46/1995 Page 23 of 25 adorning her or was it because she had her eyes on the enrichments that would ensue if she still has the status of the wife of the respondent or was it because there was nothing but pure vengeance to settle the score with the respondent that propelled the appellant to fight this arduous legal battle when practically her marital life turned catastrophic long back. However, the answer to this is still shrouded in mystery. In any case, the irresistible conclusion is that it is a dead and ominous marriage, and adjudicating it has led this court to have a grave concern over the time taken to decide matrimonial cases. This court would not shy away from observing that the years which should have been spent by the parties to start on a clean slate have been spent with the lawyers and in the court rooms. When parties approach the portals of law for dissolving their matrimony, it should be the endeavour of the courts to expeditiously decide these matters so that parties can get on with carving out their future plans. But more often the situation arises, like in the present case, that the grueling litigative voyage leaves the parties helpless and hapless. The vicious circle of FAO No. 46/1995 Page 24 of 25 litigation has contributed to the demise of their hopes, promises and dreams. This case has indeed left me with a bitter aftertaste.

17. In the light of the foregoing, this court is of the view that the respondent has successfully proved the ground of desertion. Hence, in the totality of the facts and circumstances this court does not find any illegality or perversity in the findings arrived at by the learned court below and the same are accordingly upheld. The appeal is hereby dismissed.

