Savitri Pandey vs Prem Chandra Pandey on 8 January, 2002

Equivalent citations: AIR 2002 SUPREME COURT 591, 2002 (2) SCC 73, 2002 AIR SCW 182, 2002 ALL. L. J. 355, 2002 ALL CJ 1 122, 2002 (2) SRJ 553, 2002 (1) SLT 103, (2002) 1 ALL WC 472, (2002) 1 JCR 377 (SC), 2002 (1) LRI 28, (2002) 1 JT 25 (SC), 2002 (1) UJ (SC) 273, (2002) 1 MARRILJ 277, 2002 (1) ALL CJ 22, 2002 (1) JT 25, 2002 UJ(SC) 1 273, 2002 (1) BLJR 378, (2002) 3 CIVILCOURTC 318, (2002) 1 RECCIVR 719, (2002) 6 BOM CR 511, (2002) 1 HINDULR 338, (2002) 2 MAHLR 263, (2002) 2 PAT LJR 256, (2002) 2 JLJR 135, (2002) 2 GUJ LR 1369, (2002) 1 KER LJ 193, (2002) WLC(SC)CVL 116, (2002) 1 SCALE 33, (2002) 1 RAJ LW 183, (2002) 3 GUJ LH 470, (2002) 1 DMC 177, (2002) 1 ANDH LT 55, (2002) 1 CURCC 7, (2002) 22 OCR 280, (2002) 1 UC 299, (2002) 1 SCJ 6, (2002) 46 ALL LR 465, (2002) 2 CAL HN 50, (2002) 2 BLJ 177, (2002) 1 SUPREME 90, (2002) MATLR 224, 2002 (1) MARR LJ 277, (2002) 4 CURCRIR 254, (2002) 1 CAL HN 124, (2002) 1 ALLCRILR 658, (2002) 1 CALLT 32

Author: R.P. Sethi

Bench: R.P. Sethi

CASE NO.:
Appeal (civil) 20-21 of 1999

PETITIONER:
SAVITRI PANDEY

Vs.

RESPONDENT:
PREM CHANDRA PANDEY

DATE OF JUDGMENT: 08/01/2002

BENCH:
R.P. Sethi & Y.K. Sabharwal

JUDGMENT:

SETHI,J.

Alleging cruelty and desertion against the husband, the appellant- wife approached the Matrimonial Court under Section 13 of the Hindu Marriage Act (hereinafter referred to as "the Act") praying for dissolution of her marriage with the respondent by a decree of divorce. She also prayed for direction to the respondent to return her ornaments given to him at the time of marriage. The Family Judge allowed the petition and dissolved the marriage of the parties on the ground of desertion by the husband. The appellant was also granted a decree of Rs.12,000/- towards the price of the scooter, allegedly given at the time of the marriage and payment of Rs.500/- per month as permanent alimony. Both the husband and the wife preferred appeals against the order of the Family Court as the wife was not satisfied with the part of the order refusing to grant a decree in her favour in respect of properties claimed by her and the husband was aggrieved by the order of dissolution of the marriage by a decree of divorce. Both the appeals were disposed of by the impugned order holding that the appellant-wife herself was a defaulting party and neither the allegations of cruelty nor of desertion were proved. The order passed under Section 27 of the Hindu Marriage Act and for permanent alimony was also set aside. The grievance of the appellant-wife is that the High Court was not justified in setting aside the findings of fact arrived at by the Family Court and that she had proved the existence of cruelty and desertion against the respondent. It is contended that as the appellant-wife was proved to have been living separately, it was to be presumed that the respondent had deserted her.

The facts of the case giving rise to the filing of the present appeals are that marriage between the parties was solemnised on 6.5.1987. The appellant-wife lived with the respondent-husband till 21st June, 1987 and according to her the marriage between the parties was never consummated. After 21st June, 1987 the parties started living separately. The appellant alleged that her parents spent more than Rs.80,000/- with respect to the ceremonies of the marriage and also gave several articles in the form of ornaments, valuables, cash and kind as per demand of the respondent. The respondent and his family members allegedly made further demands of Colour TV, Refrigerator and some other ornaments besides hard cash of Rs.10,000/-. The father of the appellant obliged the respondent by giving him Rs.10,000/- in the first week of June, 1987 but could not fulfil the other demands of his parents. The respondent and his family members were alleged to have started torturing the appellants on false pretexts. Aggrieved by the attitude of the respondent and his family members, the appellant states to have filed a petition under Section 13 of the Act seeking dissolution of marriage by a decree of divorce along with prayer for the return of the property and grant of permanent alimony. The respondent also filed a petition seeking divorce and grant of other reliefs. However, on 14.5.1996 the respondent filed an application for withdrawal of his matrimonial case which was allowed on 19.5.1996. The appellant had alleged that the respondent was having illicit relations with a lady residing in Gaya at Bihar with whom he was stated to have solemnised the marriage. The allegations made in the petition were denied by the respondent and it was stated that in fact the appellant-wife was taking advantage of her own wrongs.

On the basis of the pleadings of the parties, the following issues were framed:

"1. Whether the defendant has treated the petitioner with cruelty? If so, its effect?

2. Whether the petitioner is entitled to relief under Sec.27 of the Hindu Marriage Act? If so, its effect?

3. Whether the defendant is entitled to any relief? If so, its effect?

4. To what relief, parties are entitled?"

It may be noticed that no issue with regard to alleged desertion was insisted to be framed. With respect to the issue of cruelty, the Family Court concluded that no evidence had been led to prove the allegations. The Court, however, held: "but it is proved that the respondent had deserted the petitioner, hence the petitioner will get or is entitled to for a decree of divorce". On appreciation of evidence led in the case, the Division Bench of the High Court held:

"We also do not find any evidence that the wife has been treated with cruelty by the husband. We are also of the view that there is no evidence that petitioner is deserted."

We have heard the learned counsel for the parties and perused the record.

Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other. In the instant case both the trial court as well as the High Court have found on facts that the wife had failed to prove the allegations of cruelty attributed to the respondent. Concurrent findings of fact arrived at by the courts cannot be disturbed by this Court in exercise of powers under Article 136 of the Constitution of India. Otherwise also the averments made in the petition and the evidence led in support thereof clearly shows that the allegations, even if held to have been proved, would only show the sensitivity of the appellant with respect to the conduct of the respondent which cannot be termed more than ordinary wear and tear of the family life.

No decree of divorce could be granted on the ground of desertion in the absence of pleading and proof. Learned counsel for the appellant submitted that even in the absence of specific issue, the parties had led evidence and there was sufficient material for the Family Court to return a verdict of desertion having been proved. In the light of the submissions made by the learned counsel, we have opted to examine this aspect of the matter despite the fact that there was no specific issue framed or

insisted to be framed.

> "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 for 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. After referring to host of authorities and the views of various authors, this Court in Bipinchandra Jaisinghbhai Shah v. Prabhavati [AIR 1957 SC 176] held that if a spouse abandons the other in a state of temporary passions, for example, anger or disgust without intending permanently to cease cohabitation, it will not amount to desertion. It further held:
>
> "For the office 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 different 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 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 ort 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 decide 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."

Following the decision in Bipinchandra's case (supra) this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena alias Mota [AIR 1964 SC 40] by holding 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. For the offence of desertion so far as deserting spouse is concerned, two essential conditions must be there (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. For holding desertion proved 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.

To prove desertion in matrimonial matter it is not always necessary that one of the spouse should have left the company of the other as desertion could be proved while living under the same roof. Desertion cannot be equated with separate living by the parties to the marriage. Desertion may also be constructive which can be inferred from the attending circumstances. It has always to be kept in mind that the question of desertion is a matter of inference to be drawn from the facts and circumstances of each case.

There is another aspect of the matter which disentitles the appellant from seeking the relief of divorce on the ground of desertion in this case. As desertion in matrimonial cases means the withdrawal of one party from a state of things, i.e., a marital status of the party, no party to the marriage can be permitted to allege desertion unless he or she admits that after the formal ceremonies of the marriage, the parties had recognised and discharged the common obligation of the married life which essentially requires the cohabitation between the parties for the purpose of consummating the marriage. Cohabitation by the parties is an essential of a valid marriage as the object of the marriage is to further the perpetuation of the race by permitting lawful indulgence in passions for procreation of children. In other words, there can be no desertion without previous cohabitation by the parties. The basis for this theory is built upon the recognised position of law in matrimonial matters that no-one can desert who does not actively or wilfully bring to an end the

existing state of cohabitation. However, such a rule is subject to just exceptions which may be found in a case on the ground of mental or physical incapacity or other peculiar circumstances of the case. However, the party seeking divorce on the ground of desertion is required to show that he or she was not taking the advantage of his or her own wrong.

In the instant case the appellant herself pleaded that there had not been cohabitation between the parties after the marriage. She neither assigned any reason nor attributed the non-resumption of cohabitation to the respondent. From the pleadings and evidence led in the case, it is apparent that the appellant did not permit the respondent to have cohabitation for consummating the marriage. In the absence of cohabitation between the parties, a particular state of matrimonial position was never permitted by the appellant to come into existence. In the present case, in the absence of cohabitation and consummation of marriage, the appellant was disentitled to claim divorce on the ground of desertion.

No evidence was led by the appellant to show that she was forced to leave the company of the respondent or that she was thrown away from the matrimonial home or that she was forced to live separately and that the respondent had intended animus deserendi. There is nothing on record to hold that the respondent had ever declared to bring the marriage to an end or refuses to have cohabitation with the appellant. As a mater of fact the appellant is proved to have abandoned the matrimonial home and declined to cohabit with the respondent thus forbearing to perform the matrimonial obligation.

In any proceedings under the Act whether defended or not the court would decline to grant relief to the petitioner if it is found that the petitioner was taking advantage of his or her own wrong or disability for the purposes of the reliefs contemplated under Section 23(1) of the Act. No party can be permitted to carve out the ground for destroying the family which is the basic unit of the society. The foundation of the family rests on the institution of a legal and valid marriage. Approach of the court should be to preserve the matrimonial home and be reluctant to dissolve the marriage on the asking of one of the parties.

For upholding the judgment and decree of the Family Court, Shri Dinesh Kumar Garg, the learned counsel appearing for the appellant submitted that as after the decree of divorce the appellant had remarried with one Sudhakar Pandey and out of the second marriage a child is also stated to have been born, it would be in the interest of justice and the parties that the marriage between them is dissolved by a decree of divorce. In support of his contention he has relied upon judgments of this Court in Anita Sabharwal v. Anil Sabharwal [1997 (11) SCC 490], Shashi Garg (Smt.) v. Arun Garg[1997 (7) SCC 565], Ashok Hurra v. Rupa Bipin Zaveri [1997 (4) SCC 226] and Madhuri Mehta v. Meet Verma [1997 (11) SCC 81].

To appreciate such a submission some facts have to be noticed and the interests of public and society to be borne in mind. It appears that the marriage between the parties was dissolved by a decree of divorce vide the judgment and decree of the Family Court dated 8.7.1996. The respondent-husband filed appeal against the judgment and decree on 19.1.1997. As no stay was granted, the appellant solemnised the second marriage on 29.5.1997, admittedly, during the

pendency of the appeal before the High Court. There is no denial of the fact that right of at least one appeal is a recognised right under all systems of civilised legal jurisprudence. If despite the pendency of the appeal, the appellant chose to solemnise the second marriage, the adventure is deemed to have been undertaken at her own risk and the ultimate consequences arising of the judgment in the appeal pending in the High Court. No person can be permitted to flout the course of justice by his or her overt and covert acts. The facts of the cases relied upon by the learned counsel for the appellant are distinct having no proximity with the facts of the present case. In all the cases relied upon by the appellant and referred to hereinabove, the marriage between the parties was dissolved by a decree of divorce by mutual consent in terms of application under Section 13B of the Act. This Court while allowing the applications filed under Section 13B took into consideration the circumstances of each case and granted the relief on the basis of compromise. Almost in all cases the other side was duly compensated by the grant of lumpsum amount and permanent provision regarding maintenance.

This Court in Ms.Jorden Diengdeh v. S.S. Chopra [AIR 1985 SC 935] suggested for a complete reform of law of marriage and to make a uniform law applicable to all people irrespective of religion or caste. The Court observed:

> "It appears to be necessary to introduce irretrievable breakdown of marriage and mutual consent as grounds of divorce in all cases. .... There is no point or purpose to be served by the continuance of a marriage which has so completely and signally broken down. We suggest that the time has come for the intervention of legislature in these matters to provide for a uniform code of marriage and divorce and to provide by law for a way out of the unhappy situation in which couples like the present have found themselves.
>
> Marriage between the parties cannot be dissolved only on the averments made by one of the parties that as the marriage between them has broken down, no useful purpose would be served to keep it alive. The legislature, in its wisdom, despite observation of this Court has not thought it proper to provide for dissolution of the marriage on such averments. There may be cases where, on facts, it is found that as the marriage has become dead on account of contributory acts of commission and omission of the parties, no useful purpose would be served by keeping such marriage alive. The sanctity of marriage cannot be left at the whims of one of the annoying spouses. This Court in V. Bhagat v. Mrs.D.Bhagat [AIR 1994 SC 710] held that irretrievable breakdown of the marriage is not a ground by itself to dissolve it.
>
> As already held, the appellant herself is trying to take advantage of her own wrong and in the circumstances of the case, the marriage between the parties cannot be held to have become dead for invoking the jurisdiction of this Court under Article 142 of the Constitution for dissolving the marriage.
>
> At this stage we would like to observe that the period of limitation prescribed for filing the appeal under Section 28(4) is apparently inadequate which facilitates the

frustration of the marriages by the unscrupulous litigant spouses. In a vast country like ours, the powers under the Act are generally exercisable by the District Court and the first appeal has to be filed in the High Court. The distance, the geographical conditions, the financial position of the parties and the time required for filing a regular appeal, if kept in mind, would certainly show that the period of 30 days prescribed for filing the appeal is insufficient and inadequate. In the absence of appeal, the other party can solemnise the marriage and attempt to frustrate the appeal right of the other side as appears to have been done in the instant case. We are of the opinion that a minimum period of 90 days may be prescribed for filing the appeal against any judgment and decree under the Act and any marriage solemnised during the aforesaid period be deemed to be void. Appropriate legislation is required to be made in this regard. We direct the Registry that the copy of this judgment may be forwarded to the Ministry of Law & Justice for such action as it may deem fit to take in this behalf.

There is no merit in these appeals which are dismissed with costs throughout.

.....J. (R.P. SETHI) .....J. (Y.K. SABHARWAL) January 8, 2002