Delhi High Court
Kusum Lata vs Satish Kumar Khanna on 4 November, 1993
Equivalent citations: 1993 IVAD Delhi 595, 1993 (27) DRJ 516
Author: D Jain
Bench: D Jain
JUDGMENT D.K. Jain, J.

(1) This First appeal by the wife is directed against the order dated 07 August 1989 passed by the Addl. District Judge, Delhi, decreeing the petition of the husband for divorce against the appellant wife under section 13(1)(i-b) of the Hindu Marriage Act, 1955 (for short the Act), dissolving their marriage and passing a decree for divorce.

(2) Kusumlata, She was teaching in a government school at Shahdara and lived in her parental house in Ghaziabad, U.P. Satish Kumar Khanna, the respondent-husband lived in Delhi with his widowed mother and sister. They were married on 21 November 1971 in accordance with the Hindu rites and both lived in matrimonial home at Delhi intermittently for about eight years. There is no issue from this wedlock. The appellant left her matrimonial home and started living in her parental home at Ghaziabad with effect from 07 March 1979. On 12 April 1979, the respondent filed a petition under section 13(1)(i-b) of the Act, seeking divorce on the ground of cruelty and desertion. It was dismissed on 21 July 1980 vide order Ex.PI, as it was held to be premature, having been filed before the expiry of two years from the alleged desertion on 07 March 1979. The respondent again filed this petition for divorce on 15 April 1987, which was subsequently amended. He claimed that the appellant cared little for his mother and sister; pressurised him to live separately from the rest of the family, his widowed mother being of 75 years, he cannot leave her and his sister; the appellant often left the matrimonial home without his consent and finally left on her own on 07 March 1979, since when they are living apart, he wanted to settle, kept on waiting but the wife did nothing; there is no scope for reconciliation and their marriage be dissolved and a decree of divorce be passed.

(3) In reply, the appellant-wife did not deny having left her matrimonial home on 07 March 1979. She, however, denied other allegations by the husband and stated that her mother-in-law and sister-in-law were of quarrelsome nature and used to abuse her. She used to go to her parental home but with the husband's consent. She claimed that though a gentleman, her husband was a miser and a greedy person and wanted her entire pay to be given to him, without doling out anything for her pocket expenses, she was required to transfer her bank account and endorse her fixed deposit receipt in his favor, to which she declined and was turned out; she had always been ready and willing to go back to the matrimonial home and during reconciliation proceedings, in the earlier divorce petition on 29May 1979,she offered to go back and live with the husband as his wife, which offer was declined by him. According to her, shortly thereafter, she went to the husband's house on 01 August 1980, was thrown out and again tried in September 1980 but was not let in, however, she succeeded in getting into the house in October 1981, re-started living with him happily till 1982. Her mother got ill, she came to see her, asked her husband to come to see his mother-in-law, which he did. She was still prepared to go back to her matrimonial home but would not be accepted as the husband is not sincere. She also pleaded that the divorce petition brought after eight years of the alleged desertion is not maintainable.

(4) After issues, the evidence was recorded. The respondent appeared as PW1 and produced his sister Ms.Sudershan Khanna (Public Witness -2) and a neighbour Smt. Satya Sharma (PW-3). As PW1, he stated that his wife was irresponsible, did not attend to the household affairs;in all stayed with him for 24/25months and after two months or so used to leave for her parents' house; she quarrelled and wanted him to live separately from his mother and sister and that she finally left his house on 07 March 1979, his father died when he was only 4/5 years old. He and his sister (Public Witness 2) stated about appellant's leaving finally on 07 March 1979 and never returning. PW-3 supported them in their stand that the wife had not been living in that house for over seven years. Cross-examined, the husband (Public Witness -1) admitted that he made no attempt at all, all the while, to get her back; and that his first divorce petition was dismissed on 21 July 1980 vide order, copy Ex.PI. He denied that he had visited his wife at Ghaziabad after 07 March 1979 and also denied her suggestion about her attempts to live with him in 1980 or 1981 or her coming to him with relations for a compromise or having lived with her from 1981 to 1982 or continued living with her till April 1986. Ha candidly stated that he was not prepared to take her back even if she offered to come back now.

(5) The appellant, appearing as Rw 1, stated that the respondent-husband, though a gentleman, but a miser, blindly followed his mother and sister's directions, who were of quarrelsome nature, and that she always visited her parents with his consent. She further stated that her husband wanted her entire salary being handed over to him and the disputes arising when she demanded money for pocket expenses or keeping anything for it. She denied that her salary was deposited straight to her bank account or that her nominee of that account was her brother and stated that after marriage she nominated her husband for it. She supported her allegations about the .respondent requiring her to transfer her bank accounts, deposits in Pure Drinks (Rs.20,000.00) and fixed deposit in Union Bank (Rs.8000.00 and Rs.7000.00), which she declined to do so. She also stated that she lived with her husband in the matrimonial home from 1981 to 1986. Cross-examined, she stated that her brother used to visit her then almost twice a month and that she wrote letters to her mother and got letters from them in her matrimonial home.

(6) On the above evidence, the learned trial court concluded that the wife left the matrimonial home on 07 March 1979 without any cause or respondent's consent, her stand to patch up allegedly made in 1980; living with the husband again from 1981-82 and extended to 1986 was concocted; there was no resumption of cohabitation after 07 March 1979; the wife had deserted the husband since then and accordingly dissolved their marriage and passed the impugned decree for divorce. ' (7) I have heard learned counsel for the parties, perused the record, have considered the whole matter and I am inclined to agree with the findings of the learned trial court.

(8) The judgment of the trial court is assailed on the grounds that it violates the provisions of section 23(1)(a) of the Act as the husband is taking advantage of his own wrong, he had been accessory to, connived at or condoned the alleged desertion, the divorce petition has been filed after a long delay and additionally the trial court violated the provisions of section 23(2) of the Act in not attempting to bring about reconciliation and, therefore, the divorce petition was not maintainable, and the order is without jurisdiction.

(9) Desertion as a ground for divorce does not really mean a mere separation from the matrimonial home. Legal desertion comprises of two components, namely, (i) the fact of separation (factum deserendi) and (ii) the intention of a party to bring cohabitation permanently to an end (animus deserendi). It is not enough, therefore, to prove that a spouse left the matrimonial home without any reasonable excuse and against the wishes of the other. It is also to be further established that the intention of the deserting spouse was to bring cohabitation permanently to an end. The basic authority on the point is Bipinchandra Jaisinghbhai Shah vs. Prabhavati, which has been followed in Lachman Utamchand Kirpalani vs. Meena alias Mota, . In Bipinchandra Jaisinghbhai Shah's case (supra), on an elaborate consideration of several English decisions in which the question of ingredients of 'desertion' were considered, the Supreme Court held as under-

".....IFa spouse 'abandons the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. 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."

"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 or it may be that the separation and the animus deserendi coincide in point of time."

(10) In Loch man Utamchand Kirpalani's case (supra), dealing further with the question of burden of proof in these cases, the Supreme Court reiterated that the burden of proving desertion - "factum" as well as "animus deserendi" - is on the petitioner and he or she has to establish beyond reasonable doubt to the satisfaction of the court the desertion throughout the entire period of two years before the petition us well as that such desertion was without just cause. In other words, the Supreme Court observed, even if a wife, where she is a deserting spouse, does not prove just cause for her living apart, the petitioner- husband has still to satisfy the court that the desertion was without just cause.

(11) In the instant case, the evidence adduced by. the parties indicates that the appellant's relations with her mother-in-law and sister-in-law, living with the respondent- husband, were not cordial, the appellant, during her total stay of 24/25 months with the respondent used to leave for her parents' house often, she finally left the matrimonial home on 07 March 1979 on her own without any

ostensible cause and since then has been living away from her husband in her parental home at Ghaziabad. There is no corroboration to her stand of her visits to husband's house on 01 August 1980, September 1980, her living with the husband from October 1981 to 1982 or till 1986, as per suggestion put to the husband in his cross-examination. Her stand on the point has been different and not worthy of credence. There is no corroboration to her stand about her alleged attempts for compromise made with or through relations. According to her, letters were written by her from her matrimonial home and received by her there, her brother used to visit her often but neither any letter has been produced nor the brother or any other relation been examined to support her. If any letters were written by her from her husband's house, or received by her there, it is highly improbable that all were lost or destroyed, particularly keeping in view the past history of the relations, fairly educated as she is. If so, she would certainly have preserved them. The appellant has been living away from her husband right from 07 March 1979 onwards is amply proved and is not seriously disputed. No attempt to patch up or return to the respondent has been made out. The animus deserendi, right from 07 March 1979, is, therefore, there. No justification for this behavior or consent of the husband therefore is made out. Her offer to return, made during the earlier divorce petition and later repeated during the course of hearing of this appeal, and declined by the husband again, in the totality of circumstances can not be said to be sincere or genuine. She took no practical and meaningful steps to return permanently. During the period of 8 years, of living apart from her husband, preceding the filing of the second divorce petition, except for the offer made during the first divorce proceedings, which was a sort of stratagem, she having herself left the matrimonial home exhibited no contrition or anxiety to return to the husband and resume her marital obligations. In fact, she willfully neglected the respondent. Her story of attempt to patch up, as noticed above, allegedly made in 1980 etc., vehemently denied on oath by the husband, is neither corroborated nor trust worthy. It does not inspire confidence. The offer, thus, was not sincere and genuine but to defeat the divorce petition.

(12) Of course, the husband also made no attempt to bring her back nor is prepared to take her back now, but as observed in LachmanUtamchand Kirpalani'scase (supra), once desertion, as defined earlier, had taken place, there was no obligation on the deserted husband to appeal to the deserting wife to change her mind. The appellant having left the matrimonial home Of her own on 07 March 1979 without immediate provocation or justifiable cause, nor made any serious attempt to come back, the factum and intention to leave permanently having been proved, her defense of offer to return and plea of return and living again with the husband being fake, the two offers made during two divorce proceedings being planned pleas, a device for defense - no duty was cast on the respondent to entreat her to relent and come back. He cannot be said to have taken advantage of or been accessory to or connived at the wife's deserting him. Plea of section 23(1)(a) is not available to the appellant. In my view, the learned trial court was right in rejecting her version and hold that she has been living away from her husband right from 07 March 1979 without cause or consent of the husband and the elements of desertion, as noted above, had been proved.

(13) The next question raised by learned counsel for the appellant and arising for consideration is whether the trial court ought to have dismissed the divorce petition on the ground that there was unnecessary or improper delay on the part of the respondent to institute the petition.

(14) Mr. H.D.Aneja, learned counsel for the appellant, strenously urged that there was unnecessary or improper delay on the part of the respondent to institute the divorce petition in 1987, when the alleged desertion took place in the year 1979. He submitted that the respondent having failed to explain the said delay satisfactorily, the trial court should have dismissed the petition on that score. In support, he has relied on Tarsem Lal vs. Smt. Santosh, 1980 (6) H.L.R.344,Gumam Singh vs. Chand Kaur alias Jaswinder Kaur,1950 (6) H.L.R. 134,Jagannath vs. Yallubai, 1984(1)H.L.R. 136, Kuldip Chand Malhotra vs. Smt. Kanta, 1984 (10) H.L.R.517 and om Prakash Dhawan vs. Meena Dhawan, Ii (1992) Dmc 350. Section 23(1)(d) of the Act is as follows: "23-DECREEin proceedings.-(1) In any proceedings under this Act, whether defended or not, if the court is satisfied that - (d) there has not been any unnecessary or improper delay in instituting the proceedings, and then, and in such a case, but not otherwise, the court shall decree such relief accordingly."

(15) On a bare reading of the section there cannot be any quarrel with the ratio decindendi of the authorities relied upon by learned counsel for the appellant that if there is unnecessary or improper delay on the part of a party in instituting the petition for divorce etc., the petition can be dismissed on that ground alone. Whether delay is unnecessary or improper is a question of fact. For it each case has to be examined on its facts and circumstances. While delay of a given period may be unnecessary, unreasonable or improper in some cases, the delay of that or a larger period may not be unreasonable in another case. Broadly speaking, if a ground in cases of Restitution of Conjugal rights or annulment of marriage or of other cases of avoidance of marriage is one which is or could be discovered or noticeable soon after the marriage and there is no uncertainty about it, such as impotency, hazardous disease, like schizophrenia or leucoderma etc; offensive or loose character, and the petition is not filed expeditiously without much delay, giving an impression of connivance, or the cause for the delay is not explained, the delay would be unnecessary or .improper. If however, the cause of complaint is not discovered or discoverable early or the cause of delay is explained, the delay would not be improper or unnecessary. Besides, in cases where a divorce is sought on the ground of desertion, the considerations are different. A deserted spouse may not act with the speed he is supposed to act in the case falling in the earlier category, referred to hereinabove, in order to afford sufficient opportunity to the erring spouse to relent, mend his or her ways and resume forsaken marital obligation. Lapse of time in such cases cannot necessarily be taken as unnecessary or improper delay. Thus, each case would depend on its own facts. Support is lent to this view by three decisions of this Court, relied upon by Mr. O.N.Vohra, learned counsel for the respondent. These are , Smt.Nirmoo vs. Nikka Ram, and Mrs. Rita Nijhawan vs. Mr.Bal Kishan Nijhawan, 1973 (9) Dlt 222.

(16) Of the authorities cited by learned counsel for the appellant, Tarsem Lal vs. Smt. Santosh, (supra), is a case of restitution of conjugal rights by the husband against his wife in which four years' delay in filing petition was held to be fatal as no attempt for rapprochement had been made, the husband was carrying on illicit relations with another woman, the petition was motivated and was filed to avoid maintenance proceedings. In Gurnam Singh vs. Chand Kaur (supra), a case for annulment of marriage on the ground that the opposite spouse was an idiot and a lunatic and had been suffering from schizophrenia before and after the marriage, the delay of nine years was held to be unreasonable and the petition, besides on merits, was dismissed on the ground of delay. Jagannath vs. Yallubai (supra), a petition for divorce on the ground of fraud, as the wife was alleged

to be suffering from leucoderma, discovered on the first night by the husband, who refused to consummate the marriage, a delay of four years was held to be unnecessary and fatal. Kuldip Chand Malhotra vs. Smt. Kanta, (a case of adultery), om Prakash Dhawan vs. MeenaDhawan (supra), related to cases of unexplained delay of seven years and 13 years respectively and petitions were held liable for dismissal. These cannot be said to be authorities for the proposition, canvassed at the Bar, that the delay, if any, in filing a divorce petition is per se fatal. The authorities cited by learned counsel for the appellant are inapplicable to the facts of the present case.

(17) In (supra), H.R.Khanna,J.of this Court (as he then was) held that under the Indian law the delay would stand in the way of granting relief to the petitioner under the Act only if it is unnecessary or improper and nototherwise. Having regard to the facts of that case. His Lordship further held that there had been no culpable delay as the parties had reached a stage where there was no possibility of reconciliation, it would hardly be proper to insist on the maintenance of the union, which had utterly broken down. It was observed that though the Indian law had been borrowed from English law, the precedents of that country would not strictly speaking be applicable here. Considering the different customs and culture of the two societies, it was further observed that the modern trend is to exercise liberal discretion in cases where formerly decrees would have been refused on grounds of unnecessary delay. The delay of six years in that case was held to be not a bar to grant of a decree for divorce primarily for the reason that the parties had reached a stage where the marital ties had utterly broken down and there was no possibility of reconciliation between them. The view was upheld in appeal. . The ratio of the authority is applicable to the facts of the case in hand.

(18) The rigid rule of delay prevalent in England, noticed in Air 1967 Delhi 152 (supra) by H.R. Khanna, J., seems to have undergone a change in that country too. In Backer vs. Backer, (1966) 1 All E.R. 894, Lord Denning, M.R. while holding that delay in filing a petition for divorce on the ground of desertion was not fatal, relied upon on the following observations of Hodson, L.J. in Crump vs. Crump. "IN dealing with the question of desertion it seems to me entirely different considerations apply and the fact that a person does not, immediately the three years lapses, take proceedings for divorce is not of itself a matter calling for adverse criticism at all. Infact one would regard it rather from the opposite point of view. It would in many cases, and perhaps in most cases, be praiseworthy if a person who had been deserted by their spouse did not at the first possible moment when the law allowed it petition for divorce. One knows in a great many cases such spouses endure with patient hope for many years before taking advantage of the right which is now available to them."

(19) The sum and substance, therefore, is that mere delay is not an absolute bar to the grant of decree of divorce in cases of desertion. Whether it is unnecessary or improper depends upon the facts of each case. In the instant case, both the spouses are over 50 years in age, they have been away from each other for the last 14 years and there has been no serious effort for patch up during this long period, both are as cold as ever and the marital tie appears to have been irretrievably broken. Though no specific explanation to late filing of the divorce petition is given by the respondent, I feel that no useful purpose would be served in prolonging uncertainty and agony any longer on the ground of delay, which taken as a bar is based on the theory of condensation and estoppel. Judging the case by all these standards, in my view, the delay in filing the divorce petition should not operate as a bar to the grant of divorce to the respondent.

(20) The only remaining question left for consideration is whether the provision of section 23(2) of the Act, providing for attempt for reconciliation is mandatory and its non- observance per se renders the judgment of the trial court without jurisdiction. Learned counsel for the appellant has contended that the said provision is mandatory and casts a duty on the court to make an endeavor to bring about reconciliation between the parties before proceeding to grant any relief under the Act. He submits that in the present case, no such effort having been made by the trial court, the decree for divorce granted by it is null anti-void. Reliance is placed on Smt. Manju Singh vs. Ajay Bir Singh, ,V.K.Gupta vs. NirmalaGupta, 1980(6) H.L.R.290(SC),andRajniPachori vs. Kamlesh Pachori, I (1988) Dmc 350 (M.P.).

(21) Section 23(2) of the Act runs as follows: "23.(1)..... (2) Before pro

(22) A reading of the aforesaid provision suggests that a duty is cast on the court to m

(23) The provision does cast a duty on the court to make every endeavor to bring about reconciliation between the parties. However, in my view, the phrase in the section, underlined above, unequivocally shows that it is not an absolute rule. The provision is couched in such words which do provide a discretion to the court to consider whether having regard to the nature and circumstances of the case, it will or not be possible to bring about a reconciliation or not. Therefore, on the plain, clear and unambiguous wording of the said section, it is not possible to hold as an abstract proposition of law that the provision is mandatory and absolute in the sense that its non-observance will necessarily make the order without jurisdiction. Similar view is expressed in Smt. Leelawati vs. Ram Sewak, and Dilipbhai Chhaganlal Patel vs. State of Maharashtra and another, Air 198 Bombay 128.

(24) In Smt. Manju Singh vs. Ajay Bir Singh (supra), relied on by the learned counsel for the appellant, while expressing the opinion that section 23(2) of the Act gives a direction to the court that before proceeding to grant any relief, it shall endeavor to bring about reconciliation. Sultan Singh, J. (as he then was), observed that the provision is mandatory. The use of the word "direction", in my view, itself shows that the mandate of the section is not absolute but directory. The court in such cases has to seriously consider the need for initiating reconciliation in all cases and having regard to the nature and circumstances of a case.make an attempt in that behalf. Besides, the judgment is confined to the facts of its own case.InV.K.Gupta vs. NirmalaGupta (supra) no positive opinion on the issue has been expressed.

(25) I am satisfied that the learned trial court was justified in granting a decree for divorce to the respondent husband and there is no reason to interfere with the same. As a result, the appeal fails and is hereby dismissed but without any order as to costs.