

(1998) 04 MP CK 0014

Madhya Pradesh High Court

Case No: First Appeal No. 136 of 1996

Archna

APPELLANT

Vs

Ajay Kumar

RESPONDENT

Date of Decision: April 29, 1998**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 13, 13(1)

Citation: (1999) 1 DMC 23**Hon'ble Judges:** S.B. Sakrikar, J**Bench:** Single Bench**Advocate:** Brijesh Pandya, for the Appellant; S.L. Ahiwasi, for the Respondent**Final Decision:** Allowed

Judgement

S.B. Sakrikar, J.

The appellant has directed this appeal against the judgment and decree dated 15.5.1996, rendered by IX Additional District Judge, Indore in Hindu Marriage Case No. 157/92, thereby allowing the petition of the respondent/ husband for grant of divorce on the ground of desertion u/s 13(1)(ib) of the Hindu Marriage Act, 1955 (for short, "the Act").

2. Briefly stated the facts of the case are that the appellant and respondent are husband and wife and their marriage was solemnized according to Hindu customs and rites on 10.7.1989. The appellant and respondent, after their marriage lived together as husband and wife till 31st January, 1990. It is not disputed that from 31.1.1990, appellant/wife Archna was living separately at her parental home at Ujjain. The respondent-husband filed a petition against the appellant/wife on the ground of cruelty and desertion, for grant of decree of divorce under the provisions of Section 13 of the Act. The petition was contested on behalf of the appellant. The Trial Court on framing issues and recording evidence of the parties, allowed the petition and granted decree of divorce against the appellant only on the ground of

desertion u/s 13(1)(ib) of the Act. Aggrieved, the appellant has filed this appeal against the impugned judgment and decree of the Trial Court.

3. The Counsel for the appellant contended that from the evidence on record desertion of the respondent by the appellant without reasonable cause and without consent or against the wish of the respondent is not proved. As such no decree for divorce on the ground of desertion is sustainable and deserves to be demolished.

4. As against this, the Counsel for the respondent contended that from the evidence on record it is established that the appellant (wife) has wilfully neglected respondent/husband and voluntarily without any reasonable cause left matrimonial home and separated from the respondent without his consent and in the circumstances, the Trial Court has committed no error in passing the decree for divorce against the appellant on the ground of desertion under the provisions of Section 13(1) of the Act. The Counsel relied on the following decisions of this Court.

(i) Satyapal Govindram v. Radha Satyapal 1993 MPLJ 603.

(ii) [Smt. Bhavna Adwani Vs. Manohar Adwani](#), .

(iii) Indra v. Shailendra 1992 MPLJ 864.

5. I have considered rival submissions of the Counsel for the parties and carefully perused the record. u/s 13 of the Act, petition for divorce can be presented by either of the spouse of marriage for dissolution of marriage by a decree of divorce on the grounds stated u/s 13 of the Act. u/s 13(1)(ib) of the Act, a petition for grant of divorce can be presented on the ground that other party to the marriage has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. In Explanation to the aforesaid Section 13 added by Act 68 of 1976 it is stated that--

"In this Sub-section, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate-expressions shall be construed accordingly."

6. In view of the aforesaid provisions heavy burden lies on the petitioner who sought relief on the ground of desertion to prove four essential conditions namely:

(i) the factum of separation;

(ii) animus deserendi;

(iii) absence of his or her consent and the absence of his or her conduct giving reasonable cause to deserting spouse to leave matrimonial home.

The ground of desertion must be proved by the petitioner beyond any reasonable doubt and as a rule of prudence the evidence of the petitioner shall be

corroborated. In short the proof required in a matrimonial case is to be equated to that in a criminal case. The burden of proof to establish that the deserting spouse has just cause or not to leave the matrimonial home lies on the petitioner. On examining the evidence in the instant case, in view of the aforesaid position of law it is not disputed that the appellant/wife was living separately for a period of more than two years continuously before filing of the petition for divorce by the respondent u/s 13 of the Act. The appellant was living separately from her husband since 31st May, 1990 and the petition for divorce was filed in the Trial Court on 20.4.1992 i.e. after expiry of statutory period of two years. With regard to other contentions required to be proved for the act of desertion, both the parties led oral evidence in support of their contentions. The respondent/petitioner Ajaykumar examined himself, his father Rajaram (PW 3), and Shardabai (PW 2) whereas appellant Archna examined herself, her father Gaurishankar (DW 2), and witness Harishankar (DW 3). Ajaykumar (PW 1) and Rajaram (PW 3) in their statements have stated that on 31.1.1990, appellant Archna without any information or consent of the respondent voluntarily left his house and started living with her parents at Ujjain.

As against this, appellant Archna (DW 1), Gauri Shankar (DW 2) and Harishankar (DW 3) in their statements have categorically stated that on 31.1.1990 respondent Ajaykumar came to his in-laws house at Ujjain alongwith Archna and left Archna to her parental home at Ujjain. They have also stated that after the aforesaid incident, Ajaykumar made no efforts to take Archna back to her matrimonial home at Indore. A minor discrepancy is found in the statement of Archna and her father on the point who accompanied Archna on 31.1.1990 at the time of leaving her to her parental home at Ujjain. Archna (DW 1) in her statement stated that on the aforesaid occasion her husband Ajaykumar took her to Ujjain from Indore and left her to her parental home, whereas Gaurishankar in his statement stated that on the aforesaid date, Archna was accompanied by her father-in-law who left Archna to their house at Ujjain. The statement of Archna in this respect stands corroborated from the statement of Harishankar (DW 3). As such the evidence of the appellant on this point appears more reliable in comparison to the evidence of respondent Ajaykumar that under what circumstances, appellant Archna living separately from the respondent since 31.1.1990.

7. Ajay Kumar (PW 1) in his statement also stated that after 31.1.1990 his sister Rachana and thereafter his nephew Pramod Sharma and his maternal uncle went to the parents' house of Archna at Ujjain and tried to take her back to her matrimonial home at Indore but Archna and her parents refused to send her back to her matrimonial home at Indore. For corroboration of the aforesaid statements, respondent did not examine his sister Rachana, nephew Pramod Sharma or his maternal uncle. As such from the evidence of the respondent, it is not proved that respondent made any efforts for taking his wife Archna back to her matrimonial home at Indore. From the evidence of the respondent it is also not proved that

appellant Archna is living separate from her husband/respondent without any reasonable cause. As per findings of the Trial Court on issue No. 1, it is also not proved that appellant Archna will fully neglected the respondent and behaved with cruelty with the respondent and his family members. On the point of burden of proof with regard to act of desertion this Court in case of Satyapal (supra) referring the decision of the Apex Court in case of [Lachman Utamchand Kirpalani Vs. Meena alias Mota](#), : AIR 1964 SC 40, has been that:

"To sum up the legal position the legal burden is upon the petitioning spouse to establish by convincing evidence beyond any reasonable doubt that the respondent abandoned him or her without reasonable cause. The petitioner must also prove that there was desertion throughout the statutory period and there was no bona fide attempt on the respondent's part to return to the matrimonial home and that the petitioner did not prevent the other spouse by his or her action by words or conduct from cohabitation."

8. In case of Indira (supra), this Court also held as under:

"Desertion, is not only living separately, but living separately must be accompanied by an intention to bring the relationship to a permanent end or animus deserendi. Where wife had, in her written statement, made an unconditional statement that she was willing to go and stay with the husband, she had also repeated this in her statement on oath but the respondent has been resisting any such effort, it cannot be said that the wife had been staying away from the husband with an intention to bring the matrimonial relationship to an end."

9. In the present case the appellant in her statement has categorically stated that she is willing to live with her husband as his wife. From the evidence it also emerged that after 31.1.1990 on the occasion of death of mother of the respondent Ajay Kumar, the appellant went to her matrimonial home but she was not permitted to enter the house by the respondent and her in-laws. The aforesaid facts clearly show that the appellant had not voluntarily left her matrimonial home without consent or against will of the respondent. Neither she had willfully neglected the respondent nor living separately from her husband with an intention bringing marital relationship to a permanent end.

10. In view of the facts and the evidence and also the law applicable to the case at hand, in my considered opinion, Trial Court has committed an error in deciding issue No. 2 against the appellant and granting decree for divorce u/s 13(1)(ib) of the Act on the ground of desertion. The judgment and decree of the Trial Court being contrary to the law and facts deserve to be set aside.

11. In the result, this appeal succeeds. The impugned judgment and decree of divorce passed by the Trial Court are set aside and the petition filed by the respondent for grant of divorce is, accordingly, dismissed. The respondent shall bear costs of this appeal and also pay the costs of the appellant. The Counsel fee is

fixed at Rs. 1,000/- for each side. The costs payable to the appellant shall be adjusted from the amount paid to the appellant for prosecuting this appeal in compliance with the order passed u/s 24 of the Act.

12. Decree be drawn up accordingly.