

(2006) 11 CAL CK 0010
Calcutta High Court
Case No: F.A. No. 102 of 2003

Smt. Raj Kumari Jaiswal

APPELLANT

Vs

Ramesh Kumar Jaiswal

RESPONDENT

Date of Decision: Nov. 22, 2006

Acts Referred:

- Hindu Marriage Act, 1955 - Section 10(1), 13, 13(1), 17

Citation: AIR 2007 Cal 94 : (2007) 2 CALLT 238 : (2007) 2 DMC 307

Hon'ble Judges: Sanjib Banerjee, J; Kalyan Jyoti Sengupta, J

Bench: Division Bench

Advocate: Saswata Gopal Mukherjee and Dipankar Dandapati, for the Appellant; Mukul Lahiri and Aninda Lahiri, for the Respondent

Final Decision: Dismissed

Judgement

Kalyan Jyoti Sengupta, J.

I have gone through the draft judgment of my learned Brother and I do not think any conclusion different from what my learned Brother has arrived at, can he. drawn in this appeal. I am in total agreement with His Lordship's decision, But I feel I should narrate few words of my own. The wife has impugned the decree for divorce which was passed by the learned trial Judge in a suit initially filed for restitution of conjugal right on refusal of the appellant to resume marital life without any lawful and just excuse. When the suit was filed the desertion of the wife was less than two years which is required statutorily for institution of a suit for dissolution of marriage. In view of subsequent event which occurred on filing of written statement by the wife, the respondent husband got his plaint amended incorporating the ground of mental cruelty and also desertion and asked for alternative relief for dissolution of marriage. In the written statement the wife alleged that respondent husband had contracted a second marriage with one Sm. Lopa Kumari Jaiswal. The learned trial Judge upon reading the pleadings of both the parties framed following issues.

1. Has the petitioner any cause of action against the respondent ?
2. Is the petitioner entitled to get a decree for restitution of conjugal rights as prayed for ?
3. Is the petitioner entitled to get decree for dissolution of marriage as prayed for ?
4. Is the petitioner remarried ?
5. Is the suit maintainable in its present form and prayer ?
6. Is the petitioner subjected to cruelty by the respondent ?

2. Obviously first issue was not pressed for decision, as the respondent/plaintiff did not want the decree for restitution of conjugal rights, and he prayed for the decree for divorce. Issue being No. 5 regarding maintainability of the suit was also not pressed by the appellant. Therefore the trial of the suit was restricted to issue Nos. 3, 4 and 6.

3. Husband/respondent in order to prove his case of desertion to get the decree for divorce, examined himself and with him also examined five other witnesses. The appellant/wife examined herself and she also brought two other witnesses to resist the suit.

4. It appears from the written statement of the wife that she admits the fact of desertion, but she has tried to justify such act of desertion contending that she was ill-treated at the hands of the relatives of the husband. After marriage she was subjected to mental torture with demand of excessive dowry and gifts not having been given at the lime of marriage. That apart her husband contracted second marriage with another woman.

5. The learned Counsel for the appellant Mr. Saswata Gopal Mukherjee contends that the decree for divorce granted by the learned trial Judge on the ground of desertion is not sustainable in the eye of law. According to him mere proof of continuous physical desertion and/or withdrawal from the conjugal life by a spouse is not sufficient to pass decree. It has to be established by the person deserted that there has been an intention of deserting spouse to desert and to run away from the marital obligation and further intention not to return meaning thereby animus deserendi and animus revertendi. He submits that from the evidence it will be evident that there was no intention on the part of the wife not to resume co-habitation or to end permanently the marital tie. She was and is willing to go back to matrimonial home but for the act of cruelty perpetrated by the husband as well as his relations namely sister-in-law and elder-brother and also for the second marriage.

6. In support of his contention he has relied on the Bench decisions of two judgments of this Court reported in (1991) 95 CWN 445 [Kamal Kumar Basu Vs. Kalyani Basu](#), Kamal Kumar Basu v. Kalyani Basu. As regard finding of the learned

Trial Judge of the second marriage is concerned, he submits these allegations have been proved with preponderance of probability which is required in case of civil trial. The learned trial Judge has not appreciated these evidence lawfully. The voter-list prepared by the Election Commission clearly demonstrates the factum of second marriage with the said lady. His client is still ready and willing to go back, therefore, the decree is not sustainable.

7. The learned Counsel for the husband respondent Mr. Mukul Lahiri contends that one decade has gone by, the wife did not go back to husband despite best effort being made, not only by the husband but also by his kins to bring her back. Each and every time she turned down the request of each one of the members of his family. This desertion has been continuing from March 1979. The intention of the husband to take her back is substantiated by the fact that initially the suit was filed for restitution of conjugal right but this action was resisted by filing written statement making false allegation of second marriage. These false allegation has really told upon in the mind of the husband, so much so, that it has become absolutely impossible or rather unsafe to continue the conjugal life with the wife. Once spouse becomes suspicious regarding morality of another spouse, certainly mind of both the persons automatically becomes belligerent. Thus it is no use of keeping the nuptial tie intact on the face of the allegations of bigamy, which is a penal offence.

8. This allegation of bigamy has not been proved in course of examination-of-witness of the defendants/appellant. In her evidence there is no whisper of the allegations of bigamy though it was her burden to prove when the husband has denied the factum of second marriage. The electoral roll brought by way of evidence is absolutely erroneous and does not prove the fact of bigamy.

9. Therefore from the facts as stated in the pleading of both the parties and the evidence adduced by the parties it is clear that the marriage tie has broken down irretrievably. In support of his contention he has relied on the following decisions:

[Naveen Kohli Vs. Neelu Kohli](#), [Nemai Kumar Ghosh Vs. Sm. Mita Ghosh](#), [Kwality Restaurant, Amritsar Vs. Satinder Khanna](#), [Jyotsna Mukherjee v. Utpal Mukherjee](#).

10. We have heard the contention of the Counsels of both the parties and we have gone through the evidence adduced by the parties. The question arose as to whether the decree passed by the learned Trial Judge was sustainable on the basis of the evidence and material adduced before him or not. In order to grant a decree on the ground of desertion it has now become legally settled position that mere factual separation between the parties is not good enough. The plaintiff has to prove that there must be animus deserendi and further no animus revertendi on part of the deserting spouse. In other words it has to be found by the Court whether factually the spouse complaining of desertion has indeed been deserted by another spouse.

11. In the case reported in [Kamal Kumar Basu Vs. Kalyani Basu](#), it has been settled as the proposition of law that (para 5):

Mere living apart or leaving the home without any intention to bring cohabitation permanently to an end and to bring an end to the entire marital relationship forever does not and cannot constitute desertion. No amount of physical or factual separation would constitute desertion unless the requisite animus deserendi. i.e. intention to bring co-habitation permanently to an end on the part of the wife in leaving the matrimonial home, and no indication of animus revertendi to the matrimonial home.

12. In the case reported in (1991) 95 CWN 445 Kamala alias Rita Bhattacharjee v. Nitya Gopal Bhattacharjee a Bench decision of this Court however, without considering the earlier judgment quoted above has taken the same view.

...there must also be two elements present on the side of the spouse claiming to be deserted, namely, absence of his or her consent and the absence of conduct on his or her part giving the deserting spouse reasonable cause to form the animus deserendi.

13. It depends upon each and every individual facts and circumstances of the case for application of the above principle. In this case from the evidence of husband respondent and his sister-in-law and other persons it is clear that all efforts were made to bring back the appellant to the matrimonial home, and all requests and efforts of the respondent were proved to be ineffectual. From the evidence of the appellant or other witnesses cited by her it does not appear that there was any reason or justification for her to refuse to resume conjugal life. Sweeping allegations of act of cruelty has been made in the pleading. Unfortunately this has not been proved by any cogent evidence. From the evidence it is thus clear that the wife/appellant had no intention to go back rather she all the times intend to desert the respondent husband. Needless to mention that such desertion or separation of the wife/appellant from the respondent/husband was without consent and approval of the husband, else the husband would not have filed the instant suit for restitution of conjugal right.

14. Having found the intention of the wife of not coming back he prayed for decree for divorce on second thought.

15. So we do not think that learned trial Judge has come to any wrong findings on appreciation of fact. That apart the wife respondent as rightly contended by Mr. Lahiri and correctly found by the learned Trial Judge that the appellant on the other hand acted cruelly while making baseless and unsubstantiated allegations of bigamy. It is felt that such plea was taken specifically in the written statement and no attempt has been made even in examination-in-chief orally. It is, however, contended by Mr. Mukherjee that electoral roll is a cogent evidence to prove that respondent/husband has married second time. We are of the view that electoral roll

cannot be accepted as a conclusive proof of any factum as it was obviously prepared and based on a statement made by some other person, who was not called as witness.

16. According to us the value of the electoral roll is nothing but a hearsay evidence and thus it would be unsafe to accept it as conclusive evidence. It may have corroborative value but not the substantive value to reach any conclusion solely relying on it.

17. In a fairly old Bench decision of this Court rendered In case reported in [Nemai Kumar Ghosh Vs. Sm. Mita Ghosh](#), it has been held amongst other that:

If any imputations against the character of any spouse is alleged either by the wife or by the husband without any foundation and the same is based on mere suspicion, even in such cases such baseless allegations of illicit relationship amount to mental cruelty and it will be a valid ground for passing a decree of divorce under the provisions of Section 13(ia) of the Hindu Marriage Act.

18. Thus it is clear that minds of both the spouses is such at present that the marriage has broken down irretrievably.

19. In the case reported in [Smt. Saroj Rani Vs. Sudarshan Kumar Chadha](#), it is held that:

...it is evident that for whatever be the reasons this marriage has broken down and the parties can no longer live together as husband and wife; if such is the situation it is better to close the chapter.

20. The above principle of law without any exception has been followed and accepted subsequently in the case reported in [Naveen Kohli Vs. Neelu Kohli](#), which has been extensively considered and dealt with by my learned brother. Taking conspectus of the case and evidence we are of the view that learned trial Judge has reached correct conclusion. However, we do not think "that in order to prove the case of bigamy in civil action the standard of proof must be beyond reasonable doubt as it requires in case of criminal trial. Of course there must be evidence with preponderance of probability that there has been a case of second marriage not by necessary implication but cogent evidence.

Sanjib Banerjee, J.

21. A question of law has engaged us in this the wife's appeal against a decree of divorce.

22. Counsel for the appellant suggests that it is not enough for a spouse seeking divorce on the legal ground of desertion to establish that the other spouse had left the matrimonial home, but it is for the deserted to prove the absence of reasonable cause. Lack of reasonable cause, it has been urged, has to be established de hors the defence of the wife. The Explanation in the statute that defines desertion, thus, Is

the subject of scrutiny.

23. The judgment and decree have also been assailed on other counts : that the absence of the wife from the marital home could not be constituted as an act of cruelty other than as a ground for divorce on account of desertion: that a few unsubstantiated allegations, In course of trading charges in pleadings, would not necessarily found an acceptable head of cruelty and that irretrievable breakdown had. in the facts, not been established.

24. The marriage took place in end April 1978. By early May, the wife was back at her parents". She returned to the husband in mid-October when, according to him, he discovered that she was pregnant. A daughter came of the wedlock in January of 1979. On the Holi of the following spring. March 1, 1979, she left with the infant and has not returned since. These facts are not in dispute.

25. The husband sought restitution of conjugal rights in August 1980. She contested such proceedings, alleging ill-treatment at her in-laws". After filing her written statement, she made a subsequent application, claiming therein that husband Ramesh Jaiswal had taken one Lopa Kumari as second wife.

26. It is shortly upon such charge being levelled against him that Ramesh sought amendment of his original petition. Such amendment, by which he sought dissolution of the marriage by a decree of divorce, as an alternative, was allowed. Ramesh cited cruelty and desertion : mental agony by reason of her conduct and her wilful absence from the matrimonial home for more than two years.

27. Wife Raj Kumari was afforded an opportunity to file an additional written statement. She now put forth the following grounds in defence:

(a) (Ramesh) was ill-behaved due to dispute over dowry in marriage and always put all sorts of trouble to (Raj Kumari) for squeezing more money from her father.... (Raj Kumari) was...unhappy due to bad behaviour of the petitioner and the members of his family including the petitioner's brother's wife, who virtually controls the family....

(b) ...the petitioner is a person of questionable character. The respondent states that the petitioner has stooped so low that the petitioner has married second time on 30-6-1982 to one Smt. Lopa Kumari Jaiswal, daughter of Sri Kundanlal Jaiswal at Sahebgunj, Faizabad, U.P. The respondent has reported the matter to the learned Court by filing an application u/s 17...the petitioner never looked for comfort and happy life of the respondent...and the members of his family always torture the respondent for inadequate dowry.

(c) The respondent lived in the matrimonial house up to 1 -3-1979. Thereafter the respondent was sent back to her father's house with the newborn baby and since then nobody, (not) even the petitioner, did come to see the petitioner and the baby...the petitioner never discharged his duty and without...reasonable excuse

withdraw from the society of the respondent.

(d) Whenever the father of the respondent went to the petitioner's house to request them to bring the respondent to the matrimonial house, each time he was insulted and the petitioner refused to bring the respondent and the baby back....

28. The proceedings, originally before the City Civil Court, were transferred to the Family Court where evidence was received. The husband testified that on the day of Holi in 1979, his wife had gone to her father's house as per custom. Thus, according to the husband, the wife had the consent at that time of her going. However, according to Ramesh, he was not aware that such going was forever. She had consent to visit, not to leave. According to him, his elder brother's wife (the eldest female member in the husband's joint family) had sent the family maidservant to get Raj Kumari back. Ramesh claimed that he went to his in laws" but was denied access to his wife. On a subsequent visit, according to Ramesh, he carried his daughter home but his father-in-law came to Ramesh's house to claim the infant on behalf of his daughter. Ramesh has testified that he had been to Raj Kumari's parents" on several occasions thereafter and that his brother's wife had also paid a visit and sought to plead with Raj Kumari but was unsuccessful in getting to her.

29. Ramesh examined elder brother Kali Prasad and Kali Prasad's wife. Kali Prasad claimed that it was his impression that Raj Kumari's father desired Ramesh to move in with his daughter. He also denied, in cross-examination, suggestions relating to any claim of dowry.

30. Kali Prasad's wife Sabitri said she had been insulted and driven away from Raj Kumari's house by her mother and denied the suggestion put in cross-examination that she had gone to Raj Kumari's house without any intention of bringing her back.

31. Raj Kumari's evidence in relation to her going to her father's house on March 1, 1979 and the reasons for her not returning were thus:

...I went to my father's house on 1-3- 1979 and I am living there since then. The petitioner filed an application for restitution of conjugal rights on 21-8-1980 and I filed written statement on 1-4-1981 praying for dismissal of the suit. The petitioner filed an application praying for decree of divorce on 4th Dec, 1985 and I filed a reply on 22-6-1986 praying for dismissal of the prayer for amendment. I am always ready and willing to live with my husband. No one came to take me back to the petitioner's house and that is why I stayed in the house of my father.... Not a fact that the petitioner repeatedly told me to come to my house but I refused. I want to live with my husband.

In cross-examination, the wife had this to offer:

The petitioner had gone to my father's house on the first marriage anniversary on 27th April, 1979. Not a fact that I refused to go with him when the petitioner wanted to take me out of the house. It is a fact that I did not go out of the house on that

day, but I was ready to go with him. The petitioner had gone to my house in Durga Puja 1979. I was in the house, but I do not know why I could not go with him. The petitioner had come to my father's house on the birthday of my daughter on 22-1-1981. Not a fact that the petitioner had gone to my father's house on 22/25 occasions and I refused to go with him. I do not know if the elder brother's wife of the petitioner was driven out of my house when she had gone to take me back. I was not in the house.... Not a fact that my parents wanted the petitioner to live in my father's house and this is the cause of the dispute.

32. In support of Raj Kumar's case, her elder brother testified that his sister was ready to go back to her husband, but Ramesh did not come to take her back on the day of Holi in 1979.

33. Though, no case of second marriage was made out by Raj Kumari or on her behalf in the oral testimony, she relied on two pieces of paper in support of such grave charge. She produced an extract from the voters' list of the Burtolla Constituency and a certificate from the local legislator in support of such extract. According to the wife, the Ramesh Jaiswal listed against serial 457 in that extract and shown to be a resident of premises No. 59, Badridas Temple Street was her husband and that against the following serial number the name of her husband's second wife appeared.

34. The Court below has recorded that in addition to such charge, it had also been claimed on Raj Kumari's behalf that Ramesh had sired a son from the second, illegal marriage. No attempt was, however, made by Raj Kumari to substantiate such further grievous charge.

35. Against this backdrop, the Court below found that the husband had proved cruelty; first, by reason of the vicious unsubstantiated charges by the wife and, second, on account of withdrawing herself from the matrimonial home without just cause. The Court below also found that the bond had irretrievably broken down.

36. Inasmuch as the petition was originally filed sometime in 1980, notwithstanding that the amendment to incorporate the prayer for divorce was made long after April 1981, the Court below held that there was no legal desertion as the petition had originally been filed within the period of two years from the commencement of desertion.

37. On behalf of the appellant, the decision reported at [Kamla @ Rita Bhattacharjee Vs. Nitya Gopal Bhattacharjee](#), was cited for the proposition that the husband alleging desertion had to prove that there had been no reasonable cause for the wife's staying away. The same passages, as relied upon on behalf of the appellant, were pressed into service on behalf of the respondent, giving rise to the vexed question referred to above. In addition, the appellant placed reliance upon [Madan Mohan Manna Vs. Smt. Chitra Manna](#), for the principle that unless the statutory two-year period from the commencement of desertion had expired before the filing

of the petition for divorce on such ground, there was no legal desertion [Kamal Kumar Basu Vs. Kalyani Basu](#), was relied upon for the proposition that animus deserendi had to be established by the spouse founding desertion as ground for divorce. It was also claimed that as Ramesh had, in his pleadings, levelled a charge of unchastity, the effect of Raj Kumari's un-proven accusation of Ramesh's second marriage stood negated and the judgment reported at [Vijaykumar Ramchandra Bhate Vs. Neela Vijaykumar Bhate](#), was placed in support of the same. It was also urged that cruelty was made of graver and weightier stuff than what Ramesh put on display [A. Jayachandra Vs. Aneel Kaur](#), was relied upon towards such end. Finally [Chetan Dass Vs. Kamla Devi](#), was cited to show that irretrievable breakdown of marriage was not to be concluded lightly.

38. On behalf of the husband, another decision also cited by the appellant [A. Jayachandra Vs. Aneel Kaur](#), was relied on. In addition [Nemai Kumar Ghosh Vs. Sm. Mita Ghosh](#), was placed to suggest that unsubstantiated allegations of poor conduct did, indeed, amount to cruelty within the meaning of Section 13(1)(ia) of the Hindu Marriage Act, 1955. [Kwality Restaurant, Amritsar Vs. Satinder Khanna](#), was cited for the proposition that a false accusation of second marriage constituted cruelty. For what constitutes irretrievable breakdown of marriage 1998 (1) CHN 318 Smt. Jyotsna Mukherjee v. Sri Utpal Mukherjee was placed on behalf of the husband.

39. The reasonableness of the Act of desertion need not have engaged us, given that the Court below disregarded desertion per se as a ground for granting divorce. But there is an apparent mistake in that regard as the Court below considered the date of institution of the petition and not the date of the making of the amendment application or the passing of the order of amendment as the effective date. It is because such error needs to be corrected that we need to examine the reasonableness of the cause shown by the appellant-deserter and the extent to which the complaining spouse has to prove the unreasonableness of such cause.

40. Not all amendments date back to the time of institution of the proceedings. Subsequent events can, by their very nature, not date back, yet have a bearing on the relief or on the additional relief sought. The husband had not filed for divorce in 1980. He could have abandoned the petition for seeking restitution of conjugal rights and started afresh for divorce. When he sought amendment in 1985. even discounting the period of apparent desertion up to the time that he had applied for restitution of conjugal rights, a period of more than two years had elapsed that the state of apparent desertion continued. The ground of desertion had, therefore, to be taken as made as on the date of making of the application for amendment and could not be said to have related back to the date of filing of the original proceedings.

41. Notwithstanding the Court below disregarding the ground urged u/s 13(1)(ib) of the Act, the parties proceeded to prosecute and defend such ground. The third issue framed by the Family Court implies that desertion remained a live ground. The third

issue was framed by the Family Court on the following lines:

(3) Is the petitioner entitled to get a decree of dissolution of marriage as prayed for ?

42. The husband had prayed for divorce both for cruelty and for desertion.

43. In this first appeal, counsel for the appellant laboured to justify the act of desertion, which was sought to be rebutted on behalf of the husband.

44. Both sides claimed that the decision reported at [Kamla @ Rita Bhattacharjee Vs. Nitya Gopal Bhattacharjee](#), supported their respective cases. In that decision, a Division Bench of this Court considered the law as laid down in [Bipin Chander Jaisinghbhai Shah Vs. Prabhawati](#), and in Lachman Utamchand Kirpalani's case reported at AIR 1964 SC 40.

45. Upon culling out the principles of law enunciated in such Supreme Court decisions, it was concluded that even when the deserting spouse does not prove just cause for living apart, the complaining spouse had still to satisfy the Court that the desertion was without just cause. The following oft-noticed passage of Bipin Chandra's case (supra) was relied upon (para 10):

If a 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, (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.... Desertion is 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.

46. It was also recognized that such legal principle had subsequently been applied by the Supreme Court in the [Lachman Utamchand Kirpalani Vs. Meena alias Mota](#), case and the following passage from that subsequent Supreme Court judgment was noticed (para 20):

Once desertion, as defined earlier, is established there is no obligation on the deserted husband (taking the case where he is the deserted spouse) to appeal to the deserting spouse to change. Her mind, and the circumstance that the deserted husband makes no effort to take steps to effect a reconciliation with the wife does not debar him from obtaining the relief of judicial separation for once desertion is proved the deserting spouse, so long as she evidence no sincere intention to effect a reconciliation and return to the matrimonial home, is presumed to continue in desertion. Of course, the matter would wear a different complexion and different considerations would arise where before the end of the statutory period of 2 years and even thereafter before the filing of the petition for judicial separation the conduct of the deserted spouse was such as to make the deserting spouse desist from making any attempt at reconciliation. If he or she so acts as to make it plain to the deserting spouse that any offer on the part of the latter to resume cohabitation would be rejected, then the deserting spouse could obviously not be blamed for not bringing the desertion to an end. Or again, if before the end of the period of two years or the filing of the petition his or her conduct is such as to provide a just cause for the deserting spouse for not resuming cohabitation, the petition cannot succeed, for the petitioner would have to establish that desertion was without just cause during the entire period referred to in Section 10(1)(a) of the Act before he can succeed.

47. On facts, Their Lordships found that the husband in that case had "hopelessly failed to prove the alleged desertion" by the wife upon the wife having developed intimacy with another man. The Court believed the wife's account of being assaulted and driven out from the matrimonial home and the wife's charge of the husband subsequently living in with another woman. With respect, it appears that in applying the legal principles in relation to animus deserendi, what ultimately weighed with Their Lordships was as much the account of reasonableness as proffered by the wife as the husband's failure in evidence to demonstrate the lack of reasonableness of the wife's act of desertion.

48. It is not as if de hors the wife's evidence, the husband's account was disbelieved. Again, with respect, that is the test. The principle does not require that in all cases that the complaining spouse adduces evidence to establish the non-existence of any justifiable cause for desertion. The legal burden of proving lack of reasonable cause rests on the complaining spouse. The deserted can demonstrate from surrounding circumstances that the inference was inescapable that the deserter had left without cause. The deserter may seek to rebut such inference. In this rebuttal it is not required to affirmatively establish reasonable cause. But when a cause is put forward, its reasonableness has to be judged.

49. It is now that the facts in [Lachman Utamchand Kirpalani Vs. Meena alias Mota](#), need to be briefly recalled. In that case the wife had left the matrimonial home in the spring of 1954 and a petition for divorce followed on the ground of desertion in

the autumn of 1956. According to the petitioning husband, the wife had left their Colaba residence without his permission and was living in, the then, Poona with their son. The wife's parents were residents of Poona. Though the husband claimed to have attempted to bring the wife back and such matter was denied by the wife, it was found to be irrelevant as it was held that the deserted spouse had no obligation to bring back the deserter. The wife spent the most part of the two years between 1954 and 1956 in Singapore after having spent a month in May 1954 in, the then, Bombay to organise her travel papers but unbeknown to the husband that she was in Bombay.

50. The trial Judge had granted divorce on the ground of desertion in that case, which was upset by the Bombay High Court. The majority view of Their Lordships of the Supreme Court was in favour of the husband despite the strict test as to animus deserendi being applied.

51. It is vital to notice, at this stage as to how the majority view of the Supreme Court came to be. Having discussed the law and laid down the parameters, the matter was dealt with as follows:

(22) We shall now proceed to consider the facts in the light of these principles with the view to find out whether the appellant has proved that the respondent had deserted him without just cause for the requisite period. We start with the admitted circumstance that the respondent left the husband's home on February 26, 1954. It was not suggested that the husband threw her out or that she left because of any expulsive conduct on his part. There is therefore no suggestion or case that she left for any justifiable cause. The next question that would fall for determination is whether she left with consent....

52. On the basis of the evidence before the Trial Judge, the majority view of the Supreme Court was that the wife had left the matrimonial home without the husband's direct or constructive consent. The one limb of the Explanation, that of lack of consent, having been found in favour of the husband-complainant, the evidence was again looked into in order to ascertain whether the other limb of the Explanation, that of lack of reasonable cause, had been established. In seeking to ascertain this, the majority judgment proceeded thus:

(24) The next matter for enquiry is as to the animus which prompted the respondent to leave the appellant's house. There was admittedly no incident which led to the departure from the matrimonial home which could throw light on that question nor is there any contemporaneous declaration of the respondent. The learned trial Judge has set out the history of the relationship of the parties even since their marriage up to 1954 as the background in which the simple act of leaving should be viewed for the purpose of determining the animus with which the act was done. The learned Judges of the High Court considered that this was not a proper approach to the question. Without deciding on the correctness of the approach of the learned

trial Judge, we shall proceed on the basis that the learned Judges were rightly in discarding the earlier history of the relationship between the parties as irrelevant for determining whether the respondent in removing herself from her husband's house did or did not intend her withdrawal to be permanent and with a view to disrupt their marriage and terminate their married life. We shall consequently confine ourselves to the events and matters which transpired after she left the appellant's home to determine what her intention was at the time when she left it.

(25) The first matter to which reference must be made is the fact that after reaching Poona on February 26, 1954 until the end of May of that year she never wrote any letter to her husband. If, as we have found earlier, she left the appellant's house without his consent or even knowledge, the failure on her part to intimate to him as to where she had gone would certainly be a relevant circumstances indicative of the animus which implied her to leave the home. This is, no doubt, a slight circumstance, but she has really no explanation to offer for her silence and particularly so when taken in conjunction with the case that she put forward that she left her husband's place with the blessing of her parents-in-law and almost at the suggestion of her husband in order that her health might improve.

(26) The next circumstance which, however, is very much more important, is her declaration on the occasion when the appellant and Dr. Lulla visited her at Poona towards the end of May. The learned trial Judge, as stated earlier, has accepted that Dr. Lulla and the appellant did visit her at Poona as spoken to by them and that her story denying this meeting is false. The learned Judges of the High Court also did not accept her denial of the meeting, but they however refused to attach any importance to the evidence of Dr. Lulla for the reason that he was unable to specify the exact words of the questions put to her and her answers. We do not agree with the learned Judges about the value to be attached to the evidence of Dr. Lulla. The relevant portion of Dr. Lulla's evidence runs thus:

I told her (the respondent) to go back to Bombay and then settle the differences whatever they were between the petitioner and the respondent but she said that she was not prepared to go back for ever. There was no further talk between myself and respondent. The petitioner had a talk with the respondent first and then I had a talk with the respondent. It cannot recollect what the petitioner actually told the respondent. The respondent did not mention the differences which she had with the petitioner. She only stated that she was not prepared to come back to the petitioner for ever.

Now, it will be seen that this evidence is categorical. It consists of two parts. The first is as regards the gist of the conversation between the appellant and the respondent when they were together. He admits he was not present when they talked to each other and it is the question and answer at that stage, i.e. between the appellant and the respondent that the witness is unable to state to the Court. The second part of the evidence, is in relation to the questions that he himself put to the respondent.

There is no ambiguity in his evidence either about the questions which he put nor about the answers which she gave. The comment of the learned judge that the witness was unable to reproduce the exact words of the question put to the respondent and the words of her answer does not obviously apply to this second part of the witness's testimony. If Dr. Lulla be treated as a truthful witness, and even the learned Judges of the High Court did not express any view to the contrary it is clear that the respondent had specifically stated to him that she would never come back to her husband's home. There is thus clear evidence and satisfactory proof that besides the factum of desertion there was also the animus deserendi at the time when she left the husband's house or at least at the time of this meeting at Poona at the end of May, 1954.

53. Upon such facts as set out above, rested the Supreme Court's conclusion in that case that animus deserendi on the part of the wife had been established.

54. Implicit in the connotation of "desertion" in Section 13(1)(ib) are the two aspects of factum and intention : the physical act of remaining away for the statutory period and the intention to permanently end cohabitation. The intent has two further facets : the absence of the complaining partner's consent and the lack of reasonable cause for desertion.

55. Even without the relevant. Explanation in the statute, "desertion" as a ground for divorce would include the ingredients spelt out in the Explanation. The Explanation merely makes it explicit and does not either add to or detract from the judicial responsibility required to be discharged before granting a divorce for desertion.

56. Explanations to statutory provisions, as they generally are, are clarificatory in nature; setting down permissible boundaries for interpretation. The Explanation now appearing in the Hindu Marriage Act at the end of Sub-section (1) of Section 13 is not materially at variance with the Explanation following Section 10(1) of the original Act. The language of an Explanation is a pointer as to the purpose and construction of that which is sought to be explained.

57. The Explanation in Section 10(1) of the original Act that fell for the Supreme Court's consideration in the Kirpalani case, conveyed the same meaning as is done by the present Explanation. The original Explanation ran thus:

Explanation.◆ In this Sub-section, the expression "desertion", with its grammatical variations and cognate expressions, 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.

58. The Explanation which has replaced the above in the statute now runs as follows:

Explanation.♦ 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.

59. Of the other decisions cited before us, there is another which needs to be studied in this context. In rebuttal to the husband's assertion of lack of reasonable cause in her desertion, the wife's excuse, in the decision reported at [Kamal Kumar Basu Vs. Kalyani Basu](#), was the husband's insistence on his elder sister staying at the matrimonial home. The wife, in that case, asserted that she had not permanently forsaken the husband and was agreeable to get back in an atmosphere where the husband's elder sister was no longer present. The Division Bench of this Court in that case held that the wife's conduct did not amount to total repudiation of the marriage or the obligations demanded thereunder. Again, we notice that the test was applied by holding that the husband had failed to demonstrate the lack of reasonable cause in the light of the wife's testimony. The Court found that the husband had brought about a situation which compelled the wife to escape, a situation that the husband was not ready to remedy.

60. Reasonable cause for leaving the matrimonial home amounts to, willy-nilly, constructive desertion. The deserter is presented with a conduct or atmosphere that compels such spouse to abandon the matrimonial home. Though this spouse may physically be leaving the matrimonial home, it is the other who is guilty of desertion.

61. It is in such context that the act of desertion, now that we hold that Ramesh was entitled to press the ground of legal desertion, has to be tested. It has to be enquired as to the animus which prompted Raj Kumari to leave the matrimonial home. Just as in the Lachman Kirpalani's case, there is no claim of any incident which led to Raj Kumari's departure. Her going to her father's was not unusual on that auspicious day. It is, thus, that we need to confine ourselves to the events and matters which transpired after Raj Kumari left the matrimonial home to determine what her intention was at the time when she left it.

62. Raj Kumari has admitted in her evidence that Ramesh subsequently called at his in-laws". It also stands admitted that there were occasions that Raj Kumari refused to meet her husband or her husband did not get access to her at his in-laws". It is further evident that Raj Kumari even chose not to go out with her husband despite his request.

63. The only grounds, feebly put forward as reasonable cause, were Raj Kumari's perception of Sabitri being "a dangerous woman" (though, we are not told of the circumstances which could justify such perception) and of no one having gone to get Raj Kumari back. The first of the two grounds remains vague and is considerably diluted, if not completely negated, by Sabitri having come to the box. Such ground

needs further to be discounted by Sabitri's testimony that she had gone to get Raj Kumari back. In response to such assertion by Sabitri, there was only a suggestion in cross-examination that Sabitri had not gone to Raj Kumari's parents' place with the intention of getting her sister-in-law back to the matrimonial home. Even making allowance for any imperfect transaction of what was presumably testimony given and conducted in Hindi, the lack of any suggestion to Sabitri as to her alleged dangerous conduct is glaring.

64. Again, by Sabitri's testimony and Raj Kumari's admission of Ramesh having been to his in-laws' on a number of occasions during the period of desertion, the second ground has no legs to stand on.

65. Ramesh, we conclude, had been able to establish that there was no reasonable cause for his wife's departure and continued absence from the matrimonial home. Such conclusion is inescapable on the basis of the materials before us and upon applying the strict test.

66. Ramesh had discharged the legal burden of proof as to desertion as laid down by law. In discharge of that burden, he relied on his visits to his in-laws' and attempt by his elder brother's wife to try and convince Raj Kumari to get back. The evidence relating to such visits remained uncontroverted. There is enough material for the Court to infer that Raj Kumari had deserted Ramesh without cause. It is apparent that despite his overtures, she was unwilling to return. Upon proof of the fact of refusal on the part of the deserter to return, such spouse may seek to rebut the inference of desertion.

67. In this case the wife's rebuttal of the inference was weak and unsubstantiated. A provisional burden had been raised by the state of the evidence that Raj Kumari faltered at. It is the distinction between the legal burden of proof as required by the statute and the provisional burden based on evidence that provides the answer to the question raised in his appeal.

68. Having established the visits to his in-law's after the Holi of 1979, Ramesh had shown that he had no intent to expel or forsake his wife, Raj Kumari has admitted to some of the visits. In such state of evidence, it was for her to show just cause albeit to a lesser degree than affirmatively establishing it. We see no reason why she could not meet her husband at times or even want to go out with him. If she had done better in her charge of the alleged second marriage, there may have been some basis for her disinclination in the association with her husband. But, as we notice later, such charge was not substantiated. The inference of desertion, in the circumstances, remained well-nigh unrebutted.

69. What now remains is as to whether the ground of cruelty as urged by Ramesh in the Court below, had been established. Raj Kumari not only levelled a charge of second marriage but also threw in the additional charge of an issue from the illegal marriage, for good measure. In her additional objection filed upon amendment, she

had claimed that the alleged second marriage took place in Sahebgung in Faizabad District of Uttar Pradesh. She, therefore, claimed to have some details which she chose later not to re-assert or substantiate. Ramesh could not be expected to do any more to show that he had not married a second time than denying the suggestion when called back to the box. There was just no material, whether of the alleged second marriage or of the alleged illegitimate son, produced.

70. But again such charges have to be viewed against Ramesh's allegation of un-chastity against the wife. In his oral evidence Ramesh did not repeat such charge. Raj Kumari, on the other hand, was unsuccessful in proving the charge of second marriage despite getting Ramesh back on the box and the reliance on the voters' list.

71. The final discussion remains as to whether the marriage had irretrievably broken down. The couple had each other's company whether they enjoyed such company is not known for the few days after marriage and then the three months before the birth of the daughter and a month or so thereafter. Then came the desertion and Raj Kuinari's (sic). whether or not at her parents' behest, to even meet or go out with Ramesh. Ramesh pursued her with the application for restitution of conjugal rights and only upon being faced with the charge of second marriage sought divorce, again in the alternative. Raj Kuinari resisted Ramesh's plea of restitution of conjugal rights and evinced the intent of permanently severing the relationship in suggesting that Ramesh ought to be proceeded against for his criminal act of the alleged second marriage.

72. Raj Kuinari, we are informed, was a student of class VIII when the two were married in 1978. Ramesh had refused to attend the reconciliation proceedings attempted by the City Civil Court. By the time this appeal has advanced to its final leg, it has been the most of three decades that the parties have been in the (sic) and tenuous bond.

73. These circumstances have also to be seen in the light of the animosity between the parties. It is best that the bond, if it even existed in spirit, be snapped.

74. For the reasons above, the appeal fails. As we have held that the husband was entitled to divorce on the additional ground of desertion, the judgment and decree of the Family Court stand modified. The effect, however, remains the same.

75. There will, however, be no order as to costs.

76. Urgent xerox certified copy of this judgment, if applied for, be given to the parties on the usual undertakings.