THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE
HON'BLE SHRI JUSTICE ANAND PATHAK
&
HON'BLE SHRI JUSTICE RAMKUMAR CHOUBEY

ON THE 29th OF OCTOBER, 2026

FIRST APPEAL NO.1654/2024

LOMESH KUMAR BAHETWAR

Versus

SMT. SARITA BAHETWAR

Appearance:

Shri Atul Shukla - Advocate for the appellant.

None for the respondent, though served.

JUDGMENT

Per: Justice Ramkumar Choubey

This appeal under Section 28 of the Hindu Marriage Act, 1955 (hereinafter referred to as "the HMA"), read with Section 19 of the Family Courts Act, 1984, has been preferred by the appellant assailing the judgment and decree dated 26.07.2024 passed by the learned Second Additional Principal Judge, Family Court, Jabalpur, in RCS HM No.1060/2023, whereby his petition seeking dissolution of marriage by a decree of divorce was dismissed.

2. The factual matrix of the case is that the marriage between the appellant-husband and the respondent-wife was solemnized on 07.12.2009 at Kohka, District Gondia (Maharashtra) in accordance with Hindu rites and ceremonies. They lived together harmoniously for several years, and two children were born of the wedlock, namely, a daughter, Suhana, and a son, Gaurav. Unfortunately, their son died on 31.05.2021 after an illness.

2.1 According to the appellant, after the death of their son, the respondent went to her parental home situated at Village Kohka on 06.06.2021, stating that she wished to meet her parents. She took their daughter with her. The appellant was posted at Jabalpur and was residing with his mother. Thereafter, over a period of time, the respondent started misbehaving and became aggressive. The respondent insisted on going to her parental home and the respondent accordingly left the matrimonial home stating that she would return within a few days. However, she did not return and, when the appellant contacted her by telephone, she categorically refused to return to the matrimonial home.

2.2 The appellant made efforts to bring her back. He sent a letter dated 07.01.2022 to the respondent, requesting her to return, but she did not reply. Thereafter, the appellant submitted an application to the Pariwar Paramarsh Kendra on 02.02.2022, but the respondent remained absent from the said Kendra.

2.3 The appellant has further alleged that on 05.04.2022, the respondent came to the matrimonial home along with certain persons, took her belongings,

jewellery and other articles, and thereafter left. In this regard, he claims to have made a complaint to the Superintendent of Police, Jabalpur, on 07.04.2022.

2.4 The appellant filed the petition under Section 13(1) of the HMA seeking a decree of divorce on the grounds of cruelty, desertion and adultery, as stated in the relief clause of the petition. Significantly, the petition was instituted on 12.09.2023, whereas the decree for restitution of conjugal rights under Section 9 of the HMA had already been passed on 01.07.2023. However, neither the factum of passing of the said decree nor its alleged non-compliance was pleaded as a ground for dissolution of marriage in the petition. The appellant sought to rely upon the said decree during the course of trial, contending that the respondent had not complied with it and that he was consequently entitled to a decree of divorce on that basis.

3. The learned Family Court recorded that the appellant had failed to prove cruelty and desertion as grounds for divorce by cogent evidence. The appellant had not filed copies of the application submitted before the Pariwar Paramarsh Kendra, Jabalpur, on 02.02.2022 and the complaint made to the Superintendent of Police, Jabalpur, on 07.04.2022 to corroborate his statements. It further observed that the appellant had not filed the judgment or decree passed in the proceedings under Section 9 of the HMA. The learned Family Court consequently dismissed the petition by the impugned judgment and decree. Hence, this appeal.

4. Learned counsel for the appellant has assailed the impugned judgment, contending that the learned Family Court failed to properly appreciate the appellant's unrebutted testimony on oath and placed undue emphasis on the absence of certain supporting documents. It is submitted that the decree passed in the proceedings under Section 9 of the HMA is a relevant judicial record and that the respondent has not resumed cohabitation despite the said decree. It is further submitted that the respondent remained absent from the proceedings under Section 9 of the HMA and did not contest the present petition for divorce before the learned Family Court. According to learned counsel, the learned Family Court committed an error in discarding the appellant's unrebutted evidence. Thus, it is prayed that the impugned judgment and decree be set aside and the petition for divorce be allowed.

5. An application under Order XLI Rule 27 of the Code of Civil Procedure, 1908, marked as I.A. No.23860/2025 has also been filed seeking permission to bring on record the certified copy of the judgment and decree dated 01.07.2023 passed in Case No.597/2022. The appellant has explained that the proceedings under Section 9 of the HMA had been referred to in the divorce petition, but the certified copy of the judgment and decree dated 01.07.2023 could not be exhibited before the learned Family Court due to an inadvertent omission. However, the said explanation does not address the absence of a specific pleading seeking dissolution of marriage on the ground of non-compliance with the decree.

6. Having heard learned counsel for the appellant and perused the record, this Court considers it appropriate to first deal with the application under Order XLI Rule 27 CPC. The appellant has filed this application for taking additional evidence i.e. the judgment and decree dated 01.07.2023 passed in the proceedings under Section 9 of HMA for restitution of conjugal rights. Order XLI Rule 27 CPC provides for production of additional evidence in Appellate Court. The general rule is that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary before an Appellate Court. Additional evidence at appellate stage cannot be allowed unless any of the conditions enumerated under Order XLI Rule 27 CPC are satisfied. It is settled law that additional evidence can only be permitted in certain circumstances and not as a matter of course. An Appellate Court may allow additional evidence in any of the following situations; (i) if the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (ii) if the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produce by him at the time when the decree appealed against was passed, or (iii) if the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

7. On going through the petition for divorce filed by the appellant before the learned Family Court, it is evident that no pleading has been made in the

petition with regard to the ground of divorce under Section 13(1A)(ii) of the HMA. The petitioner has not pleaded about the non-compliance of the decree of restitution of conjugal rights as a ground of divorce and no attempt was made to amend the petition for inserting such ground either before the learned Family Court or this Court. It is a well settled proposition of law that no evidence can be looked into without relevant pleadings. The Supreme Court in ***Trojan and Company v. RM. N.N. Nagappa Chettiar, (1953) 1 SCC 456*** has held that; "the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found. Without an amendment of the plaint, the Court was not entitled to grant the relief not asked for and no prayer was ever made to amend the plaint so as to incorporate In an alternative case." In ***Syed and Company and Others v. State of Jammu & Kashmir and others, 1995 Supp (4) SCC 422***, the Apex Court while affirming the order of High Court rejecting application under Order XLI Rule 27 CPC on the ground that a party could not be allowed to lead evidence on a plea not taken by it, reiterated the settled law that no evidence could be let in without the pleading.

8. Furthermore, the document i.e. judgment and decree dated 01.07.2023 was well within the knowledge of the appellant at the inception of divorce petition but the same was not produced before the learned Family Court at any stage of trial. None of the conditions enumerated in Order XLI Rule 27 CPC is satisfied. Therefore, the application for taking additional evidence is untenable and cannot

be allowed. In view of the aforesaid factual and legal position, the application (I.A.No.23860/2025) under Order XLI Rule 27 CPC is hereby dismissed.

9. The appellant, Lomesh Kumar (PW1), stated that he was married to the respondent and produced the relevant marriage certificate (Ex.P-3) and another certificate (Ex.P-4C), wherein the names of the appellant and the respondent are mentioned as the father and mother of their daughter, respectively. The oral testimony of the appellant, as well as the marriage certificate (Ex.P-3), has remained unrebutted. The oral and documentary evidence establishes that the respondent is a legally wedded wife of the appellant and that both the appellant and the respondent are parties to the marriage.

10. This Court now turns to the merits of the appeal. The appellant sought a decree for divorce initially on the grounds of adultery, cruelty and desertion as per the relief clause of the petition. There are neither pleadings nor even an iota of evidence on record with regard to act of adultery on the part of the respondent. Therefore, a decree of divorce on the ground of adultery as per Section 13(1)(i) of the HMA is not warranted.

11. The legal conception of cruelty and the degree of cruelty required to constitute a ground for divorce have not been defined under the Act. Clause (ia) sub-section (1) of Section 13 simply states "treated the petitioner with cruelty". However, it is a settled position of law that the cruelty contemplated under the Act is conduct of such type that the petitioner cannot reasonably be expected to live with the respondent. The ground of cruelty must be established to show that

it has resulted in a situation in which the spouses can no longer reasonably be expected to live together, as observed by the Supreme Court in the case of ***Naveen Kohli v. Neelu Kohli, AIR 2006 SC 1675.***

12. A perusal of the statement of the appellant, Lomesh Kumar (PW-1), examined on 11.07.2024, reveals that although he deposed regarding differences between the parties and the circumstances leading to their separation, he did not state any specific facts in his examination-in-chief to substantiate the allegations of cruelty pleaded in the divorce petition. His testimony primarily concerns the respondent's departure to her parental home, her continued stay there, the efforts allegedly made by him to bring her back, and the proceedings instituted for restitution of conjugal rights. No independent oral or documentary evidence has been adduced to substantiate the specific allegations of cruelty levelled against the respondent in the petition. Thus, the allegations of cruelty, as pleaded, have not been established by cogent evidence on record. Consequently, the ground of cruelty cannot be sustained merely on the basis of the averments made in the petition, in the absence of corresponding evidence establishing the alleged matrimonial misconduct.

13. The appellant has made general statements regarding the behaviour of the respondent. The marriage was solemnized in the year 2009. The appellant and respondent lived together for several years. Respondent had gone to her parental house in the year 2021. There is no specific stance given by the

appellant either in the petition or in his statements showing the cruel conduct of the respondent towards the appellant or his family members. The conduct of the respondent does not appear to constitute cruelty of such gravity and weight so as to come to a conclusion that the appellant cannot reasonably live with the other spouse. What the appellant averred in his petition, that has not been established by his lonesome oral testimony, rather, indicative of ordinary wear and tear of married life of both the spouses. Even the facts proved by the unrebutted evidence do not constitute the cruelty as a ground for dissolution of marriage. The findings recorded by the learned Family Court are based on proper appreciation of evidence adduced before it.

14. In the facts and circumstances of the present case, reference may be made to ***Gurbux Singh v. Harminder Kaur, 2010 AIR SCW 6160*** wherein it was held that "the married life should be assessed as a whole. Mere trivial irritations, quarrels, normal wear and tear of married life which happens in day-to-day in all families would not be adequate for grant of divorce on the ground of cruelty." Therefore, the matrimonial offence of cruelty has not been established under Section 13(1)(ia) of the HMA.

15. The next ground of divorce urged by the appellant is desertion. Section 13(1)(ib) of HMA provides for dissolution of marriage where "the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition". The Explanation to

Section 13(1) defines 'desertion' as desertion of the petitioner by the respondent without reasonable cause and without the petitioner's consent or against the petitioner's wish, and includes the willful neglect of the petitioner. Desertion essentially involves the abandonment of one spouse by the other, without reasonable cause and with intention of bringing cohabitation permanently to an end. The essential question is whether that act could be attributable to an *animus deserendi*.

16. The Supreme Court in ***Bipin Chander v. Prabhawati, AIR 1957 SC 176*** has answered this question in the following terms;

> "20. Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. 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, 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…."

Reference may also be made to ***Rohini Kumari v. Narendra Singh, (1972) 1 SCC 1*** and ***Geeta Mangtani v. Jagdish Mangtani, AIR 2005 SC 3508.*** The Apex Court in ***Mayadevi v. Jagdish Prasad, AIR 2007 SC 1426,*** observed that desertion is 'a withdrawal not from a place, but from a state of things'. The mere fact that the parties have lived separately for two years is not sufficient, the Court must also be satisfied that the separation constitutes desertion in the legal sense, including the

requisite intention to bring cohabitation to an end and the absence of consent or reasonable cause.

17. The Supreme Court in ***Lachman Utamchand Kirpalani v. Meena, AIR 1964 SC 40*** held as under:-

> 50. ... 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 word or conduct from cohabitation. The expression "willful neglect" included in the section does not introduce a new concept in Indian law unknown to the English law, but is only an affirmation of the doctrine of constructive desertion. The said doctrine is not rigid but elastic and without doing violence to the principles governing it, it can be applied to the peculiar situations that arise in an Indian society and home. No inspiration could be derived from S. 9 of the Act in order to construe the scope of the expression "without reasonable cause" and whether there is a reasonable cause or not is a question of fact to be decided on the facts of each case."

18. The conduct of the deserted spouse is also relevant. While considering whether the conduct of the deserted spouse would excuse the deserting spouse from making efforts to end the desertion or attempt reconciliation, the Court must have regard to the facts of the particular case to ascertain the actual impact on the mind of the deserting spouse of anything said or done by the deserted spouse. A notice by one spouse asking the other to resume cohabitation is not, by itself, sufficient to prove desertion, as opined by the Delhi High Court in ***Nitu v. Krishnalal, AIR 1990 Del. 1***. The Madras High Court in ***P. Kalyanasundaram v. K. Paquialatchamy, AIR 2004 Mad. 43,*** viewed that an offer to rejoin the other

spouse after desertion cannot establish *animus revertendi* unless the offer is actually acted upon.

19. In the present case, the appellant has pleaded desertion as a ground for dissolution of marriage and has also, during the course of trial, relied upon the non-compliance with the decree for restitution of conjugal rights passed under Section 9 of the HMA. The appellant appears to have attempted to sail in two boats at the same time. On the one hand, he pursued proceedings under Section 9 of the HMA and obtained a decree for restitution of conjugal rights against the respondent; on the other hand, he urged for divorce on the ground of desertion before the expiry of the statutory period of one year prescribed for constituting a ground of divorce under Section 13(1A)(ii) of the HMA, as the petition for divorce was filed prior to the expiration of minimum one year period from the date of decree for restitution of conjugal rights.

20. In ***Smt. Bhavna Adwani v. Manohar Adwani, AIR 1992 MP 105***, the learned Single Judge of this Court observed that "there is no legal prohibition under the provisions of the Hindu Marriage Act for a spouse to seek a decree for restitution of conjugal rights or, in the alternative, a decree of divorce on the ground of desertion." However, in a later decision of **Tulsa Bai v. Rajendra Singh, 1996 M.P.L.J. 81,** a learned Single Judge of this Court, on a factual background almost similar to the one in the present case, observed as under:-

> "6. It cannot be the intention of the Legislature that a party may avail of both the remedies under Sections 9 and 13 of the Act simultaneously, as has been done in the present case. In the present

> case, a decree for restitution of conjugal rights has been obtained by the husband Rajendra Singh which means he is ready to keep the wife Smt. Tulsa Bai with him. The other suit which has been filed by him is on the ground of (ib) of Section 13(1) of the Act and this ground is the ground of desertion. Here, the husband being a person having obtained a decree for restitution of conjugal rights and without waiting for the restitution of conjugal rights upto a period of one year or upward after the passing of the decree has filed a suit on the ground under Section 13(1)(ib) which cannot be permitted under the law. Since in the present case, a decree for restitution of conjugal rights was obtained by the husband on 17-1-1991, subsequent filing of the suit on the ground of desertion under Section 13(1)(ib) before expiry of period of one year of the date of the decree of restitution of conjugal rights was bad in law."

21. The aforesaid decision of ***Bhavna Adwani*** (supra) is distinguishable on its facts from the case at hand. The filing of petition seeking diametrically opposite relief of decree for restitution of conjugal rights or, in the alternative, a decree of divorce on the ground of desertion can entitle the appellant to obtain the decree for either of the claimed relief. But, where the deserted spouse had already obtained a decree for restitution of conjugal rights against the deserting spouse, he had demonstrated his intention to resume matrimonial cohabitation. The subsequent institution of the divorce petition on the ground of desertion, before expiry of the statutory period of one year from the date of passing of the decree under Section 9 of the HMA does, by itself, negate the appellant's *animus revertendi;* that is, his intention to resume cohabitation at the time when he sought restitution of conjugal rights.

22. It is pertinent to observe that the obligation to comply with a decree for restitution of conjugal rights rests upon the judgment-debtor, and no

corresponding obligation is cast upon the decree-holder to initiate execution proceedings merely to secure compliance with such a decree. Thus, it was incumbent upon the respondent to comply with the decree passed under Section 9 of the HMA, and the appellant was not legally required to first seek its execution before relying upon the respondent's non-compliance as a circumstance relevant to his claim for divorce under Section 13(1A)(ii) of the HMA. However, the appellant was to demonstrate that as a deserted spouse, he continued to affirm the marriage, could have applied for execution of the decree for restitution of conjugal rights under Order XXXI Rule 32 of the CPC, against the respondent. The statutory requirement under the aforesaid provision mandates that non-restitution of conjugal rights to continue for a period of one year or upwards after the passing of the decree. Therefore, notwithstanding the respondent's obligation to comply with the decree, the appellant was required to allow the said statutory period to elapse before seeking dissolution of marriage even on the ground of desertion.

23. As regards the proof of ground of desertion under Section 13(1)(ib) of the HMA, mere evidence of separate residence, by itself, is not sufficient to establish desertion within the meaning of the provision. The appellant was required to establish, on the basis of the evidence adduced, that the respondent had deserted him without reasonable cause and without his consent or against his wish, with the requisite intention to bring cohabitation permanently to an end. Although the

appellant, Lomesh Kumar (PW-1), referred in his testimony to the respondent's departure to her parental home and the subsequent circumstances, his evidence does not specifically substantiate the material allegations pleaded in the petition so as to establish all the essential ingredients of desertion.

24. The parties had lived together as husband and wife from 2009 to 2021 and had two children out of the wedlock. According to the appellant's own case, the respondent left for her parental home while undergoing considerable mental anguish following the untimely demise of their son. The appellant also referred to a letter dated 07.01.2022, an application submitted before the Pariwar Paramarsh Kendra on 02.02.2022, and a complaint made to the Superintendent of Police on 07.04.2022, purportedly evidencing his efforts to bring the respondent back. However, copies of these documents were not produced before the learned Family Court and did not form part of the record. Consequently, the appellant could not substantiate his assertion that he had made sincere efforts to bring the respondent back. The pleadings, in the absence of satisfactory evidence establishing the facts asserted therein, cannot themselves constitute proof of desertion. The learned Family Court has recorded the finding based on proper appreciation of evidence adduced before it. On an overall assessment of the evidence on record, the appellant has failed to discharge the burden of establishing the ground of desertion under Section 13(1)(ib) of the HMA.

25. Much emphasis is placed on the respondent's inaction as she did not choose to appear and contest the claim put forth by the appellant before the learned

Family Court. The words *"In any proceeding under this Act, whether defended or not, if the court is satisfied"* occurring in Section 23(1) of the HMA underscores the importance of the power and duty of the Court in the matter of granting any of the reliefs recognised under the HMA. The Court must be vigilant to see that all the requirements of law are fulfilled and the safeguards provided therein are duly observed. Section 23(1) of the HMA requires the Court to satisfy itself that a statutory ground for relief exists, whether or not the petition is defended. In this regard, reference may be made to ***Dr. N.G. Dastane v. Mrs. S. Dastane, AIR 1975 SC 1534,*** concerning the standard of proof applicable to matrimonial proceedings. Indubitably, the respondent did not contest the case before the Family Court, as well as before this Court, but, the respondent's failure to contest the proceedings is not, by itself, treated as proof of the appellant's case. The burden must lie on the appellant to establish his case to the satisfaction of the Court.

26. It is a firmly established rule that the ground for relief in matrimonial proceedings must be proved. The standard of proof in case of all proceedings under the HMA is that the Court must be satisfied on a preponderance of probability that the ground for relief has been established. Ordinarily, the Court expects the evidence of a spouse alleging a matrimonial offence against the other spouse to be corroborated. However, there is nothing to prevent the Court from passing a decree even on the uncorroborated testimony of the petitioner. As observed by the Supreme Court in ***Bipin Chander*** (supra), the requirement of corroboration is not a rule of law but just a rule of prudence.

27. A Single Bench of this Court in ***Neelam Tiwari v. Sunil Tiwari, AIR 2009 MP 225***, held that "It is settled law that the marriage bond shall not be set aside lightly or without strict enquiry. The general standard and degree of proof required in such cases need not reach certainty, but it must carry a high degree of probability, because of the gravity of the issue." Relying on ***Dr. N.G. Dastane v. Mrs. S. Dastane*** *(supra)*, the Single Judge further held that the proceedings under the HMA are civil in nature and that the standard applicable to criminal proceedings need not be applied. It is not necessary to prove the allegations beyond reasonable doubt. This is because a criminal trial involves the liberty of the subject, which cannot be taken away on the basis of a mere preponderance of probabilities. It would, therefore, be wrong to import such a standard into a civil proceeding.

28. So far as the ground under Section 13(1A)(ii) of the HMA is concerned, the appellant instituted proceedings under Section 9 of the HMA for restitution of conjugal rights on 13.06.2022 before the learned Principal Judge, Family Court, Jabalpur. By judgment and decree dated 01.07.2023, the petition was allowed *ex parte*, and the respondent was directed to resume cohabitation and restore conjugal relations with the appellant. The appellant, however, instituted the petition for divorce on 12.09.2023, before the expiry of the statutory period of one year from the date of the said decree. Further, the appellant had neither pleaded non-compliance with the decree as a ground for dissolution of marriage under Section 13(1A)(ii) of the HMA nor sought amendment of the pleadings to incorporate such a ground, either before the learned Family Court or before this

Court. No issue was, therefore, framed, and no evidence was led or adjudication made on merits with regard to the alleged non-compliance with the decree for restitution of conjugal rights. The fact that the statutory period may have elapsed during the pendency of the proceedings cannot cure the absence of the requisite pleadings or substitute an adjudication on a ground which was never put in issue. Consequently, the appellant cannot claim a decree of divorce on the said ground in the present proceedings.

29. On a cumulative consideration of the pleadings and the evidence available on record, this Court is of the considered opinion that the appellant has failed to establish his case for grant of a decree of divorce on either of the grounds pressed into service. In view of the foregoing discussion, we find no sufficient ground to interfere with the judgment and decree dated 26.07.2024 passed by the learned Second Additional Principal Judge, Family Court, Jabalpur, in RCS HM No.1060/2023.

30. The appellant had instituted the petition for divorce on 12.09.2023, before the expiry of the statutory period of one year from the decree for restitution of conjugal rights dated 01.07.2023. The ground contemplated under Section 13(1A)(ii) of the HMA was neither specifically pleaded in the divorce petition nor subsequently incorporated by way of amendment. No issue was framed and the said ground was not adjudicated on merits by the learned Family Court for want of appropriate pleadings and evidence. Thus, the question of dissolution of marriage on the ground of non-compliance with the decree for restitution of conjugal rights

was not examined on merits in the present proceedings. The appellant would, however, be at liberty to avail such remedy as may be available to him under Section 13(1A)(ii) of the HMA, in accordance with law, upon fulfillment of the statutory requirements.

31. Consequently, the appeal, being devoid of merit, is hereby dismissed. The impugned judgment and decree are affirmed. The liberty recorded in the preceding paragraph shall remain subject to the observations made therein. Let the decree be drawn up accordingly.

(ANAND PATHAK)
JUDGE

(RAMKUMAR CHOUBEY)
JUDGE

sudesh

Digitally signed by
SUDESH KUMAR SHUKLA
Date: 2026.11.17 13:56:01
+05'30'