

Parmeshwari  
Dass Wadhera  
v.  
The Commis-  
sioner of  
Income-tax

Bhandari, C. J.

For these reasons I am of the opinion that there is sufficient material on the record to justify the conclusion that the adventure in question was an adventure in the nature of trade. The question referred to us must, therefore, be answered in the affirmative. The Department will be entitled to the costs of this Court which we assess at Rs. 250.

Falshaw, J.

FALSHAW, J.—I agree.

B.R.T.

#### APPELLATE CIVIL

Before Shamsheer Bahadur, J.

Mst. MATO,—Appellant.

*versus*

SADHU,—Respondent.

F.A.O. No. 174 of 1958.

1959  
Sept., 2nd

*Hindu Marriage Act (XXV of 1955)—Section 10—Decree for judicial separation—Whether can be granted to a guilty party—Desertion—Meaning of.*

*Held*, that a decree for judicial separation can be granted to a petitioner who comes to court with clean hands, that is, free from matrimonial misconduct. A guilty party in a matrimonial suit cannot obtain relief either by way of judicial separation or by way of divorce.

*Held*, that 'desertion' implies abandonment against the wish of the person charging it. In order to succeed on a plea of desertion, it must be shown by the wife that she was obliged to leave her husband's home because of his conduct and against her own wishes. Where the wife states that the reason for her departure from the matrimonial home was the persistent refusal of the husband to discharge his matrimonial obligations and that after leaving his home she started the life of promiscuous adultery, it cannot be said that the husband was guilty of desertion

or cruelty towards her. She cannot be heard to say that her husband's conduct was responsible for her fall from virtue. In essence, desertion is a forsaking or abandonment of one of the spouses by the other.

*First appeal from the order of Shri Ram Gopal Kohli, Senior Sub-Judge, Hoshiarpur; exercising the powers of District Judge, Hoshiarpur, dated the 15th day of July; 1958, dismissing the application under section 10 of the Hindu Marriage Act, No. 25 of 1955, for judicial separation.*

D. S. KEER; for Appellant.

ABNASHA SINGH, for Respondent.

#### JUDGMENT

SHAMSHER BAHADUR, J.—This is an appeal by Mst. Mato whose petition for judicial separation from her husband Sadhu under section 10 of the Hindu Marriage Act has been dismissed by Mr. Ram Gopal Kohli, exercising the powers of a District Judge at Hoshiarpur. Mst. Mato was married to Sadhu in September, 1950. Both the husband and the wife are Adharmis and belong to Dasuya Tahsil in Hoshiarpur District. In the petition allegations were made that Mst. Mato had been given a beating by the husband on many occasions and ultimately she was turned out by him from the matrimonial home. It was alleged that the last time she was turned out by the husband was three years before the petition for judicial separation was filed on 23rd of December, 1957. In the petition it was also alleged that the husband Sadhu was living in adultery though the petitioner was not able to "name with whom he is committing adultery". In short the judicial separation was sought under clauses (a), (b) and (f) of Sub-section (1) of section 10 of the Hindu Marriage Act on grounds respectively of desertion, cruelty and adultery.

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The allegations of the wife were traversed by the husband. It was denied that any cruelty was perpetrated by the husband on his wife or that he ever deserted her. According to the husband, Mato left for her parents' home taking her clothes and jewellery which were given to her at the time of marriage. Despite his efforts, she has refused to come back to resume married life with the husband. It was alleged that the wife is living in adultery and an illegitimate daughter was born to her.

The statement made by the petitioner in Court as P.W. 7 on 26th of June, 1958, precludes her, in my opinion, from claiming the relief of judicial separation. On her own showing, she was taken back to her husband's house on two or three occasions by her father and the Panchayat, and she left her husband's home because he refused to discharge his marital duties towards her. To use her own words, "I asked him for sexual intercourse but he refused to do so. I told him that if he would not have sexual intercourse with me I would go to some other man for this purpose. In spite of my threat he did not agree to have sexual intercourse with me. It was in these circumstances, that due to natural necessity I contracted illicit relations with *others*. I have now connection with only one man and not with several. I do not know his name and I am not prepared to tell the place of that person. He is not Mara of Noshehra."

A decree for judicial separation can only be granted to a petitioner who comes to Court with clean hands, that is, free from matrimonial misconduct (Latey on Divorce, 14th Edition, page 182). In *Hill v. Hill* (1), it was held that "a guilty party in a matrimonial suit cannot obtain relief either

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(1) I.L.R. 47 Bombay, 657

by way of judicial separation or by way of divorce". In coming to this decision, Marten J., followed the authority of *Otway v. Otway* (1).

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Moreover, the case for desertion, in my opinion, has not been established. For one thing, Rulia, father of the petitioner, stated as A.W. 1 :—

"It was in rainy season that she was last turned out. It would be two years complete for desertion in the next Sawan".

In other words, according to Rulia, the statutory period of two years required under clause (a) of sub-section (1) of section 10 of the Hindu Marriage Act had not expired before the present petition was lodged. Desertion implies abandonment against the wish of the person charging it. The husband has stated both in the written statement and in his evidence, that he is always prepared to have the petitioner back in the matrimonial home. The reason attributed by the petitioner for leaving her husband's home does not harmonise with the case of desertion. In order to succeed on a plea of desertion, it must be shown by the wife that she was obliged to leave her husband's home because of his conduct and against her own wishes. She stated plainly in her evidence that the reason for her departure from the matrimonial home was the persistent refusal of the husband to discharge his marital obligation. If the wife had stuck to a chaste life after she had been refused cohabitation, her position would have been understandable, but the life of promiscuous adultery which she followed is not consistent either with the case of desertion or cruelty as set up by her. She cannot be heard to say that her husband's conduct was responsible for her fall from virtue. In essence, desertion is a forsaking or abandonment of one of the

(1) (1888) 13 P.D. 141

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spouses by the other. Can it be said that the husband has forsaken the wife? I think the evidence points to a contrary conclusion. The husband has at all times been ready and willing to receive the wife who had been making all kinds of allegations against him.

This brings me to the allegation of adultery which is made another ground for seeking the relief of judicial separation. According to the petitioner, her husband was having illicit intercourse with his brother's wife. Mst. Giano, who is the mother of five children, has denied that she has illicit connections with her *devar* who is the respondent in this case. Batna, R.W. 2, is the brother of Sadhu respondent and has denied any illicit connection between his wife Giano and the respondent. Apart from the bald statement of the petitioner, there is no other evidence to support the charge of adultery against the respondent.

Rulia, A.W. 1, has exposed the case of the petitioner in its stark reality. He stated that the marriage of his daughter Mato to Sadhu was performed as a part of an exchange transaction; his own son was married to the cousin of Sadhu. The son of Rulia having died, his wife left the house and accordingly Rulia brought back his own daughter from the house of Sadhu. In face of this statement, it is difficult to sustain either desertion or cruelty as set up by the petitioner.

In my opinion, the trial Judge has rightly declined to exercise his discretion in favour of the petitioner. I would, accordingly, dismiss this appeal. I would, however, leave the parties to bear their own costs.

B.R.T.