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improvements in the shape of buildings, electric installation, etc., shall be sold to satisfy the mortgage debt found to be due to the plaintiff, if the same has not been paid in Court by the date fixed by the trial Court. The plaintiff Bank will also be entitled to get its costs throughout.

COLDSTREAM J.—I agree.

A. N. C.

*Appeal accepted.*

### APPELLATE CIVIL.

*Before Tek Chand and Abdul Rashid JJ.*

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Dec. 21.

UDE SINGH (PLAINTIFF) Appellant

*versus*

MST. DAULAT KAUR (DEFENDANT)

Respondent.

Civil Appeal No. 419 of 1934.

*Hindu Law—Husband's suit for restitution of conjugal rights—when not to be entertained—Deserted wife's suit for maintenance—whether necessary to prove cruelty.*

*Held*, that under Hindu Law, a suit by the husband for restitution of conjugal rights can be defeated on the ground of the desertion of the wife for a long period and continued disregard of his marital obligations towards her; it is not necessary to prove actual physical cruelty.

The Court should, in each case, consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and the suit has not been instituted *bonâ fide*, the suit should be dismissed.

*Bai Jiwi v. Narsingh Lal Bhai* (1), *Dular Koer v. Dwarka Nath Misser* (2), *Babu Ram v. Mst. Kokla* (3), *Budh Singh v. Assa Singh* (4), and *Moonshee Buzloor Ruheem v. Shumsoonnisa Begum* (5), relied upon.

(1) (1927) I. L. R. 51 Bom. 329. (3) (1924) I. L. R. 46 All. 210.  
(2) (1907) I. L. R. 34 Cal. 971. (4) 6 P. R. 1885.

(5) 1867 11 Moo. I. A. 615.

*Held also*, that according to Hindu Law, to entitle a wife to separate maintenance it is not necessary to prove cruelty, if there has been abandonment of the wife.

*And*, mere delay in bringing a suit for maintenance is no justification for its dismissal.

*Sita Bai v. Ram Chandra Rao* (1), followed.

*Sher Singh v. Sham Kaur* (2), and *A. Seenayya v. A. Mangamma* (3), distinguished.

*First Appeal from the decree of Bawa Daswandha Singh, Senior Subordinate Judge, Ludhiana, dated 27th November, 1933, dismissing the plaintiff's suit.*

HARNAM SINGH and S. L. PURI, for Appellant.

JHANDA SINGH and KRISHNA SWARUP, for Respondent.

TEK CHAND J.—This judgment will dispose of Civil Appeal No.419 of 1934 and Civil Appeal No.1703 of 1934 which are between the same parties and arise out of two suits which were tried together by the Senior Subordinate Judge, Ludhiana.

The parties are *Jats* of Ludhiana District and were married in 1910. At the time of the marriage the husband, Ude Singh, was 12 years old, while the wife, *Mussammât* Daulat Kaur, was only 10 years of age. The *maklawâ* ceremony was performed in 1913, and for the succeeding seven years *Mussammât* Daulat Kaur lived in the house of her parents-in-law in *Mauza* Dheru. During this period, Ude Singh lived partly in his village and partly at Amritsar where he prosecuted his studies in the Khalsa College. In due course he obtained the degree of Master of Science of the Punjab University and after serving as

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(1) (1910) 12 Bom. L. R. 373. (2) 1923 A. I. R. (Lah.) 602.

(3) 1927 A. I. R. (Mad.) 1159.

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a teacher in a school for a short time, got an appointment under the Punjab Government in the Fisheries Department. In 1922, Ude Singh married a second time. His younger wife is an educated lady, while *Mussammatt Daulat Kaur* is practically illiterate. It is common ground that since September, 1920, *Mussammatt Daulat Kaur* has lived continuously with her parents in *Mauza Dyalpur*.

In July, 1932, she brought a suit *in forma pauperis* against Ude Singh for maintenance at Rs.25 *per mensem*. In the plaint she alleged that for several years before 1920 she was ill-treated by her husband and his relations, and was frequently beaten. In September, 1920, a severe beating was administered to her, and she was sent against her will to her parents' house, where she has since been living. She averred that she had always been ready and willing to return to her husband, and her father had made several efforts to persuade Ude Singh and his parents to take her back, but without success. She, accordingly, asked for a decree for arrears of maintenance and future maintenance at the rate mentioned above.

Ude Singh denied that he had been cruel to her or had deserted her and alleged that she had voluntarily gone away to her parents' house in September, 1920, and had declined to return in spite of repeated requests by him and his relations.

About eight months after the institution of this suit, on the 6th March, 1933, Ude Singh instituted a suit against *Mussammatt Daulat Kaur* for restitution of conjugal rights, and in the alternative, prayed for a declaration "that the defendant is no longer the plaintiff's wife, that she has no right whatever to succeed to the property which he might leave on his death, nor is she entitled to any maintenance."

The two suits were tried together and were decided by the Senior Subordinate Judge of Ludhiana on the 27th November, 1933. The learned Judge found that Ude Singh "felt disgusted with *Mussammat* Daulat Kaur as she was illiterate." that he had been maltreating her, that in September, 1920, she was sent away against her will to her parents' house, and that since then he has deserted her. On these facts he held that the conduct of Ude Singh was such as disentitled him to a decree for restitution of conjugal rights. He, accordingly, dismissed his suit. In *Mussammat* Daulat Kaur's suit he disallowed the claim for arrears of maintenance, but passed a decree in her favour for future maintenance at Rs.10 *per mensem* from the 27th November, 1933.

Ude Singh has preferred a first appeal to this Court against the dismissal of his suit for restitution of conjugal rights (Civil Appeal No.419 of 1934). He also appealed to the District Judge against the decree of the Senior Subordinate Judge in the maintenance suit. The learned District Judge accepted the appeal and dismissed *Mussammat* Daulat Kaur's suit for maintenance leaving the parties to bear their own costs. She has preferred a second appeal to this Court (Civil Appeal No.1703 of 1934). The two appeals have been heard together and are being disposed of by this judgment.

The first question for decision is whether *Mussammat* Daulat Kaur went away voluntarily from her husband's house in September, 1920, and has since willingly resided away from him, or whether she was turned out forcibly and has been neglected and deserted by him. After examining the evidence bearing on the point and hearing counsel at length, I have no

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doubt that the finding of the learned Subordinate Judge on this point is correct. I hold it proved that for some years before 1920, *Mussammat* Daulat Kaur was not properly treated by Ude Singh and his mother and brothers, and that in the month of September of that year, she was beaten and sent away to her parents' house. Ude Singh has since married another lady, and has made no effort whatever to get *Mussammat* Daulat Kaur back in his house and has completely neglected and deserted her. The evidence further establishes that several efforts were made by the father of *Mussammat* Daulat Kaur to persuade the plaintiff and his people to take her back in the family, but they declined to do so. In the course of arguments before us, counsel for *Mussammat* Daulat Kaur stated that even now she was willing to live with the appellant, provided he sincerely desired to keep her with him and made suitable arrangements for her residence and other comforts. The appellant, who was present in person, stated that he was willing to do so, and asked for time to go to his father-in-law's village and bring her back. The case was, accordingly, adjourned, but after several days we were informed that the appellant had made no serious effort to approach the respondent, and that there was no chance of a mutual settlement between the parties.

It is conceded that during the 13 years that she has been away from the plaintiff, he has not given her any maintenance or cared for her in any way. There is little doubt that his suit has been instituted merely as a counter-blast to her suit for maintenance and there is no genuine desire on his part to resume marital relations with her. His *mala fides* is further apparent from the form of the alternative relief asked for in the plaint, namely, that it be declared that the defendant

was "no longer his wife, that she had forfeited her rights as his wife, and in the event of his death she would not succeed to his property as his widow."

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On these findings, it does not seem necessary to examine in detail the various rulings cited by counsel for the parties in the course of the arguments. It is not correct to say, as has been contended by Mr. Harnam Singh, that it is only on proof of continued and repeated physical cruelty that a Hindu wife can successfully resist the husband's suit for restitution of conjugal rights. It is well settled that such a suit can be defeated on various other grounds, one of which is the desertion of the wife for a long period and continued disregard of his marital obligations towards her. As pointed out in *Bai Jiwi v. Narsing Lal Bhai* (1), in a suit for restitution of conjugal rights by a Hindu husband, he is not necessarily entitled to a decree in the absence of a plea of cruelty by the wife. Where it was proved that the husband had deserted his wife and a suit for restitution had not been instituted *bonâ fide*, the Court will not grant him the relief prayed for. As observed by Madgavkar J. (at page 341 of the report), on the one hand, it cannot be laid down that "differences between husband and wife and a desertion which the party responsible might desire to retract should be held to be a sufficient ground so as to leave no *locus pœnitentiæ*." But on the other hand, it cannot be contended "that actual physical cruelty is necessary to enable the wife to resist such a suit." The Court in each case will consider the entire conduct of the parties and if it comes to the conclusion that the husband has been guilty of continued neglect of the wife and has deserted her and

(1) (1927) I. L. R. 51 Bom. 329, 341.

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the suit has not been instituted *bonâ fide*, the suit will be dismissed.

To the same effect are *Dular Koer v. Dwarka Nath Misser* (1), *Babu Ram v. Mst. Kokla* (2) and *Budh Singh v. Assa Singh* (3), which lay down that a husband is entitled to no assistance from the Court when he has deserted the wife, has grossly neglected her, and has allowed years to pass by without making any effort to get her back in his protection.

In this connection, reference may also be made to the following observations of their Lordships of the Privy Council in *Moonshee Buzloor Ruheem v. Shumsoonnissa Begum* (4), the parties to which were Muhammadans, but the principles laid down therein have been applied to Hindus and other communities living in India :—

“ It seems to them clear that if cruelty in a degree rendering it unsafe for the wife to return to her husband’s dominion were established, the Court might refuse to send her back. It may be, too, that gross failure by the husband of the performance of the obligations which the marriage contract imposes on him for the benefit of the wife, might, if properly proved, afford good grounds for refusing to him the assistance of the Court.”

For the foregoing reasons, I hold that Ude Singh’s suit was rightly dismissed, and, accordingly, I would dismiss Civil Appeal No.419 of 1934 with costs.

Coming now to *Mussammat Daulat Kaur’s* suit for maintenance which was decreed by the trial Court, but has been dismissed by the District Judge, I have

(1) (1907) I. L. R. 34 Cal. 971.

(3) 6 P. R. 1885.

(2) (1924) I. L. R. 46 All. 210.

(4) (1867) 11 Moo. I. A. 615.

no doubt that the learned Judge misdirected himself as to the law bearing on the point. He has found as a fact that *Mussammatt* Daulat Kaur was beaten by Ude Singh and his brothers in 1920 after which she was taken by Ude Singh's brother to her parents' house and left there. He has not dissented from the finding of the trial Judge that during the long period that has since elapsed, he has not made any effort to take her back in the family or otherwise arranged for her comforts. He has, however, held the wife disentitled to maintenance on two grounds, (1) that she delayed bringing the suit for ten years, and (2) that there was no proof of continued and repeated physical violence by the husband towards her. The learned Judge, after holding that she was beaten in September, 1920, has observed: "the plaintiff does not allege that she was beaten on any other day and it would appear from her statement that the beating was an ordinary one as only fists are said to have been used." I confess I am wholly unable to appreciate the significance of this observation. I cannot believe that the learned Judge meant to lay down that in order to sustain a deserted wife's suit for maintenance it is necessary for her to prove that she had been subjected to repeated violence, and that injuries had been inflicted on her person by means of a stick or some other more effective weapon. There is no warrant for such a suggestion, and counsel for the respondent frankly admitted his inability to support the reasoning of the learned Judge on this point. As pointed out in *Sita Bai v. Ram Chandra Rao* (1), "according to Hindu Law, to entitle a wife to separate maintenance it is not necessary to prove cruelty, if there has been

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abandonment of the wife." In the present case not only have abandonment and desertion been established, but it has been proved that she was actually beaten at least on one occasion, immediately after which she was sent away to her parents. It is hardly necessary to say that mere delay in bringing a suit for maintenance is no justification for its dismissal.

The learned District Judge has referred to *Sher Singh v. Sham Kaur* (1) and *A. Seenayya Reddi v. A. Mangamma* (2), but the facts of both those cases were quite different. In the former case the wife had been voluntarily living apart from her husband and had refused to return to him without any sufficient cause. In the latter case, all that was laid down was that in the absence of proof of continued ill-treatment amounting in law to legal cruelty and in the absence of clear proof of abandonment on the part of the husband, the wife cannot claim maintenance. It appears that in that case the wife had voluntarily departed from the husband's house and separate maintenance was claimed on the mere ground that the husband had married a second wife, which, of course, is not a sufficient reason under Hindu Law to sustain such a claim.

After careful consideration, I have no doubt that in the case before us, *Mussammatt Daulat Kaur* is clearly entitled to maintenance and her suit was rightly decreed by the trial Court. The amount fixed by the Court is by no means excessive, and no objection was raised before us on this score.

For the foregoing reasons, I would accept Civil Appeal No. 1703 of 1934, set aside the judgment and decree of the learned District Judge, and grant

(1) 1928 A. I. R. (Lah.) 502.

(2) 1927 A. I. R. (Mad.) 1159.

*Mussammatt* Daulat Kaur a decree for maintenance against her husband, *Sardar* Ude Singh, at Rs.10 *per mensem* from the 27th November, 1933.

The respondent, Ude Singh, shall pay *Mussammatt* Daulat Kaur's costs in all the Courts in both appeals.

ABDUL RASHID J.—I agree.

A. N. C.

*Husband's appeal dismissed.*

*Wife's appeal accepted.*

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### APPELLATE CIVIL.

*Before Addison and Din Mohammad JJ.*

MAQBUL AHMAD (DEFENDANT) Appellant

*versus*

MST. AFZAL-UL-NISA

(PLAINTIFF)

ABDUL JABBAR & OTHERS

(DEFENDANTS)

} Respondents.

1935

Jan. 3.

**Civil Appeal No. 433 of 1931.**

*Partition — Suit for — Defendants desiring separation of their shares—whether Court should grant their requests—Stamp duty on decree — same as on “instrument of partition” — Indian Stamp Act, II of 1899, sections 2 (15), 29 (g) and article 45 : Court-fees—whether payable on application for execution of “stamped” decree.*

In a partition suit of the property left by one A. H., a Muhammadan, one of the defendants, M.A. (the present appellant) prayed that his 7/16th share in specific houses should also be partitioned and awarded to him. The trial Court held that M. A. was not entitled to a partition decree unless he came before the Court as a plaintiff or paid the proper Court-fee.

*Held*, that in a partition suit each party stands in the position of a plaintiff with reference to the others and if any of the defendants desires that his share should also be