

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 102 of 2012**

Judgment Reserved On : 04/07/2017

Judgment Passed On : 13/09/2017

- Som Kumar Bahidar S/o Nimaicharan Bahidar Aged About 44 Years
Occupation Lawyer, R/o Chaple Tah Kharsia Distt Raigarh C G

---- Appellant**Versus**

- Smt. Jyoti W/o Som Kumar Bahidar Aged About 40 Years D/o Krisna
Vallabh Patnayak, Occupation Service, R/o Tamnar Tah Tamnar Distt
Raigarh C G

---- Respondent

For Appellant : Shri Sanjay Agrawal, Advocate.
For Respondent : Shri Abhishek Saraf, Advocate.

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

C A V JUDGMENT

The following judgment of the Court was passed by **Prashant Kumar Mishra, J.**

1. This is husband's appeal under Section 19(1) of the Family Courts Act, 1984 (for short 'the Act') assailing the legality and validity of the judgment rendered by the Family Court, Raigarh, dismissing his application under Section 13 of the Hindu Marriage Act, 1955 (for short

'the Act, 1955') for grant of divorce on the ground of cruelty and desertion.

2. The appellant/husband (for brevity 'husband') moved the subject application with the averment that they were married at Tamnar, District Raigarh on 3.7.2002 and thereafter the respondent/wife (for brevity 'wife') came to his residence at Village Chaple. During the first night, the wife informed him that she has been married contrary to her wishes/ desires and he is not a person as per her dreams. Thus the marriage was not consummated on that day. In due course, she started behaving indifferently and used to get irritated on trivial issues. She would regularly state that since she has been married contrary to her wishes, she does not want to reside with the husband. After one month of marriage, she went to her parental village and as agreed, she was required to come back after 15 days but she did not return nor sent any information to the husband. On 30th August, 2002, the husband went to village Tamnar with one friend to bring back his wife but she refused to return to the matrimonial house. Her relatives stated that she would be sent to Chaple after a week. She did return on 5.9.2002 but soon after her relatives left the husband's house, she started raising dispute and quarrel and threatened to commit suicide to falsely implicate the husband and his relatives in a criminal case. On 3.12.2002, she went back to her parental house and since thereafter she did not return. The husband made efforts and went to the wife's residence on 17.9.2003

along with his friends and relatives to bring back his wife, however, she refused to join and resume matrimonial chord.

3. The wife contested the application and denied plaint allegations. She further averred that the husband's relatives threw the articles gifted at the time of marriage under her feet and stated that the husband has not been gifted golden chain and the motorcycle has been registered in the wife's name. According to her, her husband and mother-in-law used to extract rigorous work from her and were always finding fault with the meals prepared by her. She was always instructed to prepare different dishes for different member of the family and was made to do entire household work. Thus, she was treated with cruelty. She would deny that on 30th August, 2002 or on 17.9.2003, the husband came to her parental house. According to her, her first visit to her parental house happened because according to custom, newly wedded wife would not stay in her in-laws' house in the month of **Sawan**. She would categorically state that before marriage she was obtaining training for becoming a LIC agent, examination of which was scheduled on 25.8.2002, therefore, she went to write the examination with the consent of her husband. However, written statement is discreetly silent as to the efforts made by her to resume matrimonial chord after 17.9.2003. According to her, the husband did not attend the rituals after the death of her father on 1.5.2005.
4. Both the parties examined their witnesses. The husband was examined

as AW-1; his younger brother Ramesh Kumar Bahidar was examined as AW-2; Narayan Prasad Patel was examined as AW-3 and Bhojram was examined as AW-4 whereas, the wife examined herself as NAW-1; Gangadhar was examined as NAW-2; Khemraj was examined as NAW-3 and Anil Kumar Patnaik was examined as NAW-4. The affidavit of one Radha was filed under Order 18 Rule 4 CPC but she was not produced for cross-examination, therefore, her affidavit is inadmissible in evidence. The trial Court has found that the husband has failed to prove the ground of cruelty and desertion.

5. We shall deal and discuss with the evidence about cruelty and desertion *in seriatim*.

CRUELTY

6. The law as to matrimonial offence of cruelty by one or other spouse has been elucidated by the Supreme Court in catena of decisions.
7. The Supreme Court in **V. Bhagat v. D. Bhagat (Mrs.)**¹ held that mental cruelty in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such

¹ (1994) 1 SCC 337

conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such as to cause injury to the health of the petitioner. While arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. What is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case. If it is a case of accusations and allegations, regard must also be had to the context in which they were made.

8. Yet again the Supreme Court in **Parveen Mehta v. Inderjit Mehta**², has held thus:

“21. Cruelty for the purpose of Section 13(1) (i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to

² (2002) 5 SCC 706

be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subjected to mental cruelty due to conduct of the other.”

9. In **A. Jayachandra v. Aneel Kaur**³, the Supreme Court held that the expression ‘cruelty’ has not been defined in the Act. Cruelty can be physical or mental. Cruelty which is a ground for dissolution of marriage may be defined as wilful and unjustifiable conduct of such character as to cause danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger. The question of mental cruelty has to be considered in the light of the norms of marital ties of the particular society to which the parties belong, their social values, status, environment in which they live. Cruelty, as noted above, includes mental cruelty, which falls within the purview of a matrimonial wrong. Cruelty need not be physical. If from the conduct of the spouse same is established and/or an inference can be legitimately drawn that the treatment of the spouse is such that it causes an apprehension in the mind of the other spouse, about his or her mental welfare then this conduct amounts to cruelty. In a delicate human relationship like matrimony, one has to see the probabilities of the case. The concept, proof beyond the shadow of doubt, is to be applied to

³ (2005) 2 SCC 22

criminal trials and not to civil matters and certainly not to matters of such delicate personal relationship as those of husband and wife. Therefore, one has to see what are the probabilities in a case and legal cruelty has to be found out, not merely as a matter of fact, but as the effect on the mind of the complainant spouse because of the acts or omissions of the other. Cruelty may be physical or corporeal or may be mental. In physical cruelty, there can be tangible and direct evidence, but in the case of mental cruelty there may not at the same time be direct evidence. In cases where there is no direct evidence, the courts are required to probe into the mental process and mental effect of incidents that are brought out in evidence. It is in this view that one has to consider the evidence in matrimonial disputes.

10. In **Naveen Kohli v. Neelu Kohli**⁴, the Supreme Court held that the word “cruelty” has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case. There may be instances of cruelty by unintentional but inexcusable conduct of any party. The cruel treatment may also result from the cultural conflict between the parties. Mental cruelty can be caused by a party when the other spouse levels an allegation that the petitioner is a mental patient, or that he requires expert psychological treatment to restore his mental health, that he is

4 (2006) 4 SCC 558

suffering from paranoid disorder and mental hallucinations, and to crown it all, to allege that he and all the members of his family are a bunch of lunatics. The allegation that members of the petitioner's family are lunatics and that a streak of insanity runs through his entire family is also an act of mental cruelty.

11. In **Ramchander v. Ananta**⁵, the Supreme Court has again held that instances of cruelty are not to be taken in isolation but cumulative effect of facts and circumstances emerging from evidence on record and then drawing a fair inference whether plaintiff has been subjected to mental cruelty due to conduct of other spouse has to be culled out.

12. The principle is, thus, settled that whether in the facts and circumstances of a given case, the plaintiff has been able to make out a case of grant of divorce on the ground of cruelty would depend upon the nature of pleadings and evidence in that case and there can be no straitjacket formula nor an exhaustive list of instances can be prepared, where cruelty is said to have been committed by one or other party to the marriage. Cruelty can also not be inferred by applying any formula because the said question is to be determined keeping in view the social status of the parties, their financial and other conditions, the atmosphere and the kind of employment or vocation which they carry out would all be important to interfere whether on the given set of allegations it has become difficult for the plaintiff to live with the other side and the

⁵ (2015) 11 SCC 539

behavior of such degree which amounts to cruelty.

13.If we examine the evidence apropos the ground of cruelty, it is to be seen that the husband has alleged ordinary wear and tear of marital chord in day-to-day happening as cruelty committed by the wife. The present is not a case where the wife has made false allegation of dowry or did anything in furtherance of her threat to commit suicide or humiliated the husband in front of friends, relatives or in any public place nor it appears that she refused to cohabit with the husband. The husband has stated that the marriage was not consummated during the first night but there is no further averment that the marriage never got consummated during her stay in the matrimonial house for a longer period from 3.7.2002 till 17.9.2003. Mere words spoken by the wife during first night or subsequently that her marriage was fixed contrary to her wishes would not amount to cruelty as it is understood and taken as matrimonial offence under Section 13 (1)(b) of the Act, 1955. We are in agreement with the finding recorded by the trial Court on this count that the husband has failed to prove the ground of cruelty.

DESERTION

14.According to the husband, after the marriage on 3.7.2002, she stayed in her matrimonial house for few weeks and went to her parental house in the month of '**Sawan**'. When the husband went to bring back his wife on 30th August, 2002, she refused but was subsequently dropped at her

matrimonial house by her father and brother on 5.9.2002. Thereafter she again went to her parental house on 3.12.2002. The husband would state in his evidence that he had gone to the wife's residence at Tamnar on 17.9.2003 to bring her back, however, she refused to join his company and perform marital obligations and duties. The husband's brother (AW-2) Ramesh Kumar Bahidar and (AW-4) Bhoj Singh Rathiya had also accompanied the husband when he went to bring back his wife on 17.9.2003. They have supported the appellant's case. (AW-4) Bhoj Singh Rathiya is the friend of the appellant. In para-10 of his cross-examination, he has categorically mentioned about the person who accompanied the husband when he had gone to bring back his wife on 17.9.2003.

15. When we read the evidence of wife and husband in juxtaposition, it would be noticed that the wife has not denied the basic plaint case that the husband had come to her residence to bring her back on 17.9.2003. In her examination-in-chief, she would state as if she stayed in her matrimonial house till 9.12.2002.

16. The more important statement of the wife is contained in paras-28 to 31 wherein she would admit that after 9.12.2002 (this date is stated by the husband as 3.12.2002) she never returned to her husband's house on her own. She also admits that she has never sent any letter to her husband to take her back nor moved the petition for restitution of conjugal rights. She has also admitted that in her service record, her details are

mentioned as Jyoti, Daughter of Krishna Vallabh Patnaik, meaning thereby that she has not mentioned her husband's name in the service record. In para-31, she would categorically admit that during or after the marriage, the husband or his relatives have not demanded any dowry.

17.The wife's witness (NAW-2) Gangadhar would also admit that the wife is residing separately for the last about 10 years and despite his persuasion she is not agreeing to join the company of her husband. He further admits that neither the husband nor his family members had ever treated the wife with cruelty in his presence.

18.It is also to be noted that the wife has stated in her written statement as well as in her deposition that she was made to do all household works like washing, cleaning, dusting (Jhadu Pocha) etc. through-out the day, however, (NAW-2) Gangadhar admits that in the husband's residence the servants are employed for doing the household works. (NAW-3) Khemraj has stated in his cross-examination that after 9.12.2002, the wife's father had brought her to drop in the house of the husband, however, no such statement has been made by the wife nor her father has entered the witness box. This witness has not made any other significant statement.

19.The wife's brother (NAW-4) Anil Kumar Patnaik also admits in para-11 of his cross-examination that during his stay in the husband's house, he

never witnessed his sister doing any cleaning, dusting work. This witness would also admit that he had never gone to the husband's house nor has ever enquired from his sister about the appellant or her in-laws. For a very important event of 17.9.2003, he says that he is not aware that the husband had come to their house on this date to take his wife back.

20. We shall now advert to the legal principle as to when the ground of desertion can be said to be proved for grant of decree of divorce.

21. In **Bipinchandra Jaisinghbai Shah Vs. Prabhavati** {AIR 1957 SC 176}, history and development of a concept of “desertion” as a cause of action for grant of decree of divorce has been spelt out. Quoting English authors and Halsbury's Laws of England, the Supreme Court observed thus in para-10:-

“(10) What is desertion? “Rayden on Divorce” which is a standard work on the subject at p.128 (6th Edn.) has summarised the case-law on the subject in these terms:-

“Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party”.

The legal position has been admirably summarised in paras 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.), Vol.12, in the following words:-

“In its essence desertion means the intentional

permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated.

The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence”.

The Supreme Court thereafter in the same paragraph held that the quality of permanence is one of the essential elements which differentiates desertion from willful 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. The petition for divorce bears the burden of proving those elements in the two spouses respectively.

It was further observed that the desertion is a 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 the 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 or it may be that the separation and the *animus deserendi* coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. If a deserting spouse takes advantage of the *locus*

poenitentiae thus provided by law and decides to come back to the deserted spouse by a *bona fide* offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court.

22. At this stage, it is to be noted that while dealing with the issue concerning divorce and marital offence, Lord Goddard, CJ, in the case of **Lawson V. Lawson**, 1955-1, All ER 341 observed that “These cases are not cases in which corroboration is required as a matter of law. It is required as matter of precaution...”

23. In **Lachman Utamchand Kirpalani Vs. Meena @ Mota** {AIR 1964 SC 40}, the Supreme Court has held that desertion in its essence means the intentional permanent forsaking and abandonment of one spouse by

the other without that other's consent and without reasonable cause.

24. In **Smt. Rohini Kumari Vs. Narendra Singh** {AIR 1972 SC 459}, the Supreme Court yet again held that desertion does not imply only a separate residence and separate living. It is also necessary that there must be a determination to put an end to marital relation and cohabitation.

25. In **Geeta Jagdish Mangtani Vs. Jagdish Mangtani** {AIR 2005 SC 3508}, the Supreme Court, after narrating the evidence available in the case, held that the conclusion is inevitable, that there was never any attempt on the part of the wife to go to husband's house, therefore, from this fact alone *animus deserendi* on the part of the wife is clearly established. She has chosen to adopt a course of conduct which proves desertion on her part and that it was without a reasonable cause. Such a course of conduct over a long period indicates total abandonment of marriage. It also amounts to willful neglect of the husband by the wife.

26. In a more recent judgment in the matter of **Malathi Ravi, M.D. Vs. B.V. Ravi, M.D.** {(2014) 7 SCC 640}, the Supreme Court has approved its earlier judgment on the point in the matter of **Savitri Pandey Vs. Prem Chandra Pandey** {(2002) 2 SCC 73} and has reiterated the same view regarding desertion and the nature of proof required in law to establish the marital offence.

27. Having summarised the settled legal position as to the nature of marital

offence of desertion and when the said ground can be said to have been established by the deserted spouse, we shall now consider the evidence on this aspect.

28.As earlier discussed, neither the wife nor her witnesses have deposed that she had any intention to resume marital chord with the husband at any point of time after she left the marital home on 3.12.2002 or 9.12.2002, as the case may be. On the contrary, she admits in her cross-examination that neither she has attempted to return to her marital home nor requested her husband or his parents to take her back. She has not made any effort for restitution of conjugal rights by moving any petition under Section 9 of the Act, 1955. If she was treated with cruelty, she should have convened meeting of elderly persons or Caste Panchayat, but there is no evidence to this effect. Moreover, in her service book, she still carries the name of her father and is not showing to her employer that she is a married woman. She also admits during cross-examination that her husband or relatives have never demanded any dowry. She would make a feeble effort to make out a case of reasonable cause for living separate by stating that the articles gifted at the time of marriage were thrown under her feet and that she was made to do all the household works like cleaning, dusting etc.. However, firstly the same amounts to ordinary wear and tear of day-to-day's life and secondly, this is proved false by the statement made by her own witness NAW-2 Gangadhar, who admits that in her matrimonial house servants have

been employed for doing the household work.

29. In the state of evidence on record, there appears clear intention on the part of the wife to permanently forsake and abandon the husband without his consent and reasonable cause. The twin essential conditions of separation and intention to bring cohabitation permanently to an end (*animus deserendi*) on the part of the wife has been fully proved by the conduct and behaviour of the wife. For the initial act of separation, there appears no consent of the husband nor there is a slight hint of any consent on the part of the husband condoning or being a cause for the wife to desert him.

30. The conduct of the wife clearly proves that she has no desire to live with the husband since after December, 2002 till the date of filing of the petition, which is the period more than the statutory period of 2 years.

31. In our considered view, the appellant has fully proved the ground of desertion as enumerated under Section 13 (1)(b) of the Act, 1955 and he is entitled for a decree of divorce on the ground of desertion.

32. Accordingly, the Appeal is allowed and the marriage between the parties solemnized on 3.7.2002 is dissolved by a decree of divorce.

33. A Decree be drawn up accordingly.

Sd/-
Judge
(Prashant Kumar Mishra)

Sd/-
Judge
(Arvind Singh Chandel)

Barve