

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 17.04.2018

Pronounced on 24.04.2018

First Appeal (M) No. 26 of 2006

- Smt Shivkumari Kashyap, aged about 21 years, wife of Shri Manharan Lal Kashyap, D/o Shri Gendlal Kashyap, Resident of Village Sarvan Devri, Police Station Ratanpur, Tahsil Kota, District Bilaspur (CG)

---- Appellant

Versus

- Manharan Lal Kashyap, aged about 23 years, son of Shri Amirchand Kashyap, Resident of Village Saral Patera, Police Station and Tahsil Lormi, District Bilaspur (CG)

---- Respondent

For Appellant	: Shri P.P. Sahu, Advocate
For Respondent	: None appears

SB : Hon'ble Shri Justice Sharad Kumar Gupta

CAV Judgment

1) Challenge in this appeal is levied to the judgment and decree dated 03.11.2006 of the Second Additional District Judge, (FTC) Mungeli, District Bilaspur CG passed in Civil Suit No.9-A/2005, whereby and whereunder he allowed the divorce petition filed by respondent-husband under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act, 1955').

2) This is admitted by appellant-wife that marriage of both parties was solemnized on 11.05.2003 in village Sakhandevri in accordance with Hindu rites and rituals, after the marriage respondent had

brought her to his house after Gauna (a custom after marriage), she had signed on the stamp paper, she had lodged a report regarding demand of dowry against respondent and his family members, the charge-sheet is pending before the JMFC, Mungeli, she has filed an application under Section 125 Cr.P.C. before the Family Court, Bilaspur. Now, she is living separately from him.

3) In brief, the respondent's case is that on honeymoon appellant prevented him to commit sexual intercourse and there is no physical relation between them. When he went to Delhi, appellant told his father that she wants to live with her lover Jamuna Prasad and if she is not permitted to go then she will falsely implicate his entire family in dowry case. Despite of the advice, appellant left his house. She lodged the aforesaid report on 10.01.2005. Now, she is living with her lover Jamuna Prasad.

4) After conclusion of the trial, the trial Court pronounced judgment and decree as aforesaid. Being aggrieved appellant preferred this appeal.

5) Shri P.P. Sahu, counsel for appellant vehemently argued that the trial Court has not appreciated the evidence properly. Respondent failed to establish the ground of cruelty. He himself is a wrongdoer as he performed the second marriage. The trial Court ignored this fact that a wrongdoer could not take advantage of his own wrong. Thus, the impugned judgment and decree may be set aside.

6) None appeared for respondent though served.

7) In brief, the appellant's case is that she had discharged her marital obligation. Marriage was consummated. Respondent and his family members were harassing her on account of demand of a motor cycle and Rs. 45000/- as dowry. Respondent and his family members after pressurizing, got her signature on the stamp paper. It was not given to her for reading. After ousting her, he has performed second marriage with Vimla on 23.12.2004.

8) Points for determination :-

The following points are there for determination in this case :-

- (1) Whether after solemnization of the marriage, appellant has treated respondent with cruelty ?
- (2) Whether respondent is a wrongdoer ?
- (3) Whether respondent is entitled to get the decree of divorce on ground of cruelty ?
- (4) Relief and costs.

Point for determination No.1 - Findings with reasons :-

9) The said affidavit is marked as Ex. A1.

10) AW1 Manharan Lal Kashyap says in para 4 of his statement given on oath that appellant had voluntarily executed aforesaid affidavit.

11) AW2 Laxmi Sevak Pathak, Advocate and Notary says in para 1 and 2 of his statement given on oath that appellant had come along with written affidavit. She was physically sound and after reading, hearing and understanding the contents of the affidavit she had signed.

12) AW3 Kumhi says in para 1 of his statement given on oath that appellant after reading, hearing and understanding the contents of the affidavit had signed on it in his presence.

13) NAW1 Smt. Shivkumari Kashyap says in para 7 of her statement given on oath that respondent and his family members got her to sign on the stamp paper against her wish after beating and pressurizing her. Stamp paper was not given to her for reading.

14) There is no such evidence in record on strength of which it could be said that AW2 Laxmi Sevak Pathak, AW3 Kumhi Yadav, had stated aforesaid statements because they were interested with respondent or prejudiced with appellant.

15) Appellant has not examined any person, whom she had immediately intimated after the execution of Ex.A1 that allegedly after beating and pressurizing, her signature had been taken on Ex.A1. Moreover, she has not proved any letter wherein said fact has been mentioned. Moreover, she has not examined any report lodged by her in any police station wherein said fact has been mentioned. Moreover, she has not proved any document of their community wherein said fact has been mentioned. Moreover, she

has not proved any notice given by her to him wherein said fact has been mentioned. Moreover, she has not initiated any legal proceeding to cancel the Ex.A1. For not doing so she has not offered any explanation. In these circumstances, this Court believes aforesaid statements of para 4 of AW1 Manharan Lal Kashyap, para 1 and 2 AW2 Laxmi Sevak Pandey, para 1 of AW.3 Kumhi Yadav, and disbelieves the aforesaid statement of para 7 of NAW1 Smt. Shivkumari Kashyap.

16) After appreciation of the evidence discussed herebefore, this Court finds that appellant has executed Ex.A1 voluntarily, knowingly, understandingly the contents of Ex.A1.

17) AW1 Manharan Lal Kashyap says in para 2 and 3 of his statement given on oath that, on honeymoon appellant prevented him to commit sexual intercourse and there is no physical relationship between them. When he went to Delhi appellant told his father that she wants to live with her lover Jamuna Prasad.

18) NAW1 Smt. Shivkumari Kashyap says in para 3 and 5 of her statement given on oath that she had discharged her marital obligation. She never told that she will live with Jamuna Prasad.

19) NAW2 Gend Ram Kashyap who is the father of appellant says in para 1 of his statement given on oath that his daughter had led the conjugal life with respondent.

20) NAW3 Puna Ram Kashyap who is the uncle of appellant says in para 2 of his statement given on oath that appellant had led the conjugal life with respondent.

21) Shri P.P. Sahu, counsel for appellant cited **Savitri Pandey Vs Prem Chandra Pandey** {AIR 2002 SC 591}, wherein in para 6 Hon'ble Supre Court has held as follows :

“6. Treating the petitioner with cruelty is a ground for divorce under Section 13(1)(ia) of the Act. Cruelty has not been defined under the Act but in relation to matrimonial matters it is contemplated as a conduct of such type which endangers the living of the petitioner with the respondent. Cruelty consists of acts which are dangerous to life, limb or health. Cruelty for the purpose of the Act means where one spouse has so treated the other and manifested such feelings towards her or him as to have inflicted bodily injury, or to have caused reasonable apprehension of bodily injury, suffering or to have injured health. Cruelty may be physical or mental. Mental cruelty is the conduct of other spouse which causes mental suffering or fear to the matrimonial life of the other. "Cruelty", therefore, postulates a treatment of the petitioner with such cruelty as to cause a reasonable apprehension in his or her mind that it would be harmful or injurious for the petitioner to live with the other party. Cruelty, however, has to be distinguished from the ordinary wear and tear of family life. It cannot be decided on the basis of the sensitivity of the petitioner and has to be adjudged on the basis of the course of conduct which would, in general, be dangerous for a spouse to live with the other.”

22) He further cited **Ravi Kumar Vs Julmidevi** {(2010) 4 SCC 476} wherein in para 14, Hon'ble Supreme Court has held as follows:

“14. Looking to the materials which have come on record in this case, it is clear that the wife had sufficient ground to live separately. In this case, the evidence of the daughter is very crucial. The daughter in her evidence categorically stated that her father used to beat her mother. She denied that her mother abused her father but she repeatedly deposed that her father used to beat her mother and the reasons of which are not known to her.

23) In **G.V.N. Kameswara Rao vs. G. Jabilli**; M.L.J. 2002 (1) 317, the Hon'ble Supreme Court has held as under :

“Cruelty can be said to be an act committed with an intention to cause sufferings to the opposite party and it has become intolerable for other to suffer any longer and to live together is impossible. This is to be judged not from a solitary incident, but on an overall consideration of all relevant circumstances. Austerity of temper, rudeness of language, occasional outburst of anger may not amount to cruelty, though it may amount to misconduct.”

24) In **Prabhash Saxena v Smt. Ranjana Saxena** {Mrr.L.J. 2002 (1) 502} Hon'ble Delhi High Court has laid down the following judicial precedent:

“A consistent course of conduct inflicting immeasurable mental agony and torture may well constitute cruelty within the meaning of Section 13(1)(ia) of the Act. Mental cruelty may consist of verbal abuses and insults

by using filthy and abusive language leading to constant disturbance of mental peace of other party.”

25) In Ex.A1 this is specifically mentioned that there is no sexual relationship between appellant and respondent. She had a love affair with someone else. Marriage was not consummated. She is leaving her in-laws house voluntarily on 28.04.2004. This has been earlier decided that appellant had executed Ex.A1 voluntarily, knowingly, understandingly the contents of Ex.A1. Thus, this Court believes on aforesaid statements of para 2 and 3 AW1 Manharan Lal Kashyap and disbelieves on aforesaid statements of para 3, 5 of NAW1 Smt. Shivkumari Kashyap, para 1 of NAW2 Gend Ram Kashyap, para 2 of NAW3 Puna Ram Kashyap.

26) After the appreciation of the evidence discussed herebefore this Court finds that from the honeymoon till leaving the house of the respondent, appellant had prevented respondent to commit sexual intercourse with her, she has a love affair with someone else. These acts amount to cruelty.

27) AW1 Manharan Lal Kashyap says in para 3 that appellant had told that if she is not permitted to go with her lover Jamuna Prasad then she will falsely implicate him and his entire family members in a dowry case.

28) NAW1 Smt. Shivkumari Kashyap says in para 6 that respondent and his family members were demanding a motor cycle and Rs. 45000/- cash as dowry.

29) NAW2 Gend Ram Kashyap says in para 2 that one week after Gauna respondent and his family members demanded a motorcycle and Rs. 45000/- cash as dowry.

30) NAW3 Puna Ram Kashyap says in para 3 that one week after Gauna respondent and his family members demanded a motorcycle and Rs. 45000/- cash as dowry.

31) NAW4 Narayan Patel says in para 3 of his statement given on oath that 2-3 months after Gauna respondent and his family members started demanding dowry.

32) NAW5 Dindayal Sahu says in para 2 of his statement given on oath that respondent was demanding dowry.

33) Appellant has not examined any neighbour of respondent who could state that respondent and his family members were allegedly demanding a motorcycle and cash Rs. 45000/- as dowry. She has not proved any letter wherein said fact has been mentioned. She has not proved any report lodged by her in any police station immediately after the demand. She has not proved any document of their community wherein said fact has been mentioned. She has not proved any notice given by her to respondent wherein said fact has been mentioned. For not doing so there is no explanation offered by appellant. Appellant has lodged aforesaid report after leaving the respondent's house. In these circumstances, this Court believes on aforesaid statement of para 3 of AW1 Manharan Lal Kashyap and disbelieves on aforesaid statements of para 6 of

NAW1 Shivkumari Kashyap, para 2 of NAW2 Gend Ram Kashyap, para 3 of NAW3 Puna Ram Kashyap, para 3 of NAW4 Narayan Patel, para 2 of NAW5 Dindayal Sahu.

34) After appreciation of the evidence this Court *prima facie* finds that aforesaid allegation and report are without any concrete ground, and are baseless. Levelling such allegation and lodging such report themselves amount to cruelty.

35) In these circumstances, this Court finds that aforesaid judicial precedents laid down in Savitri Pandey (Supra), G.V.N. Kameswara Rao(Supra), Prabhash Saxena (Supra) are applicable against appellant regarding this point for determination and appellant does not get any help from the aforesaid judicial precedent laid down in Ravi Kumar (Supra).

36) After appreciation of the evidence discussed herebefore, this Court finds that appellant had treated respondent with cruelty by preventing him to commit sexual intercourse with her, by saying that she has love affair with someone else, by making false allegation of demand of dowry and lodging a false report. Thus, this Court decides point for determination No.1 accordingly. This finding will not be binding in any criminal proceeding.

Point for determination No.2 - Findings with reasons :-

37) The trial Court has not framed issue regarding 'wrongdoer' though the trial Court ought to have done it. The evidence available on record shows that appellant and respondent have adduced

evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions of Order 41 Rule 24 of the Civil Procedure Code, 1908, this Court finds that it may pronounce judgment in this appeal.

38) NAW1 Smt. Shivkumari Kashyap says in para 8 that respondent has remarried with Vimla @ Mithla.

39) NAW3 Puna Ram Kashyap says in para 4 that respondent remarried with Vimla @ Mithla and living with her.

40) NAW5 Dindayal Sahu says in para 2 that he has seen that respondent is living with his second wife.

41) As per the copy of the order sheet of the Family Court, Bilaspur dated 25.08.2006 Ex.NA1 respondent had admitted that he has kept one woman named Mithla. In this circumstance, this Court believes aforesaid statements of para 8 of NAW1 Smt. Shivkumari Kashyap, para 4 of NAW3 Puna Ram Kashyap, para 2 of NAW5 Dindayal Sahu.

42) After appreciation of the evidence discussed herebefore this Court finds that respondent has contracted second marriage with Vimla @ Mithla. Thus, this Court finds that respondent is a wrongdoer. Thus, this Court decides point for determination No. 2 accordingly.

Point for determination No.3 - Findings with reasons :-

43) It would be pertinent to mention the relevant portion of Section 23 (1) (a) of the Act, 1955 which reads as under:-

“23. Decree in proceedings -

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -

(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, then and in such a case, but not otherwise, the Court shall decree such relief accordingly.”

44) This has been earlier decided that appellant has subjected respondent with cruelty.

45) Shri P.P. Sahu, counsel for appellant cited **Nazario Alfred Magalhaes Vs Smt. Maria Fatima Varela** {AIR 2005 Bombay 380} wherein in para- 14, Hon'ble Bombay High Court has held as follows :

“14. The husband in the present case is the wrongdoer. He is living in adultery. He wants to take advantage of his own wrong. In this backdrop the finding of the learned trial Judge that the husband has miserably

failed to prove the *animus deserendi* and his case of desertion in the context of the prevailing law is not at all established cannot be faulted.”

46) This has also been earlier decided that respondent is a wrongdoer, thus, looking to this circumstance and looking to the aforesaid provisions of Section 23(1)(a) of the Act, 1955, looking to the judicial precedent laid down in Nazario Alfred Magalhaes (Supra) this Court finds that respondent cannot take advantage of his own wrong and he is not entitled to get the decree of divorce on the ground of cruelty. Thus, this Court decides point for determination No. 3 accordingly.

Point for determination No.4 - Findings with reasons :-

47) After complete appreciation of the evidence discussed herein before, this Court allows the appeal and set aside the judgment and decree of the trial Court to the above extent.

48) Parties shall bear their own costs.

49) A decree be drawn up accordingly.

Sd/-
(Sharad Kumar Gupta)
JUDGE