

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 16.04.2018

Pronounced on 19.04.2018

First Appeal (M) No. 58 of 2012

- Ashok Kumar Sambhakar S/o Late Abhayram Sambhakar, R/o Shihava Road, Dhamtari, At Present Medical Officer, Community Health Centre, Koyalibeda, Dist. Kanker, C.G.

---- Appellant

Versus

- Smt. Sheeta Singh W/o Ashok Kumar, Occupation – Service, Working at Central Co-operative Bank, Main Branch, G.E. Road, Rajnandgaon C.G.

---- Respondent

For Appellant	: Smt. Indira Tripathi, Advocate
For Respondent	: None

Hon'ble Mr. Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

1) Challenge in this appeal is levied to the judgment and decree dated 12.01.2012 of the District Judge, Kabirdham (Kawardha) passed in Civil Suit No.3-A/2010, whereby and whereunder she dismissed the petition of appellant filed under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act, 1955').

2) This is admitted by respondent that name, address, other particulars of both the parties shown in the title of the petition are true, the marriage of both the parties was solemnized in 1996 in accordance to customary rights and rituals in Dhamtari, at the time of marriage, appellant was studying M.S. at Raipur and she was employed in Central Cooperative Bank, Rajnandgaon, after the marriage, they resided in Rajnandgaon as husband and wife, in 1999, appellant was appointed as Assistant Surgeon in C.H.C.

Bodla, they also resided in Bodla, she used to travel up and down from Rajnandgaon to Bodla, in 2006 appellant was transferred from Bodla to village Koyalibeda, district-Kanker.

3) In brief, appellant's case is that he had told to respondent that either she resign the service or get her transfer to any branch near Bodla. From January, 2005 she stopped to come to his house at Bodla. Thereafter, in March, 2006 he had also told her to live with him at Koyalibeda, but she was not ready.

4) In nutshell, respondent's case is that she used to come to the place of her husband till March, 2010. In March 2010, she had gone to her husband in village Koyalibeda and found that one woman, namely, Suko Netam is living with him as wife. He was also coming to her house at Durg.

5) After completion of trial, the trial Court passed the aforesaid judgment and decree. Being aggrieved, appellant preferred this appeal.

6) Smt Indira Tripathi, learned counsel for appellant vehemently argued that the trial Court has not appreciated the evidence properly which was available on record. It is not necessary that before filing of the divorce petition, an application for restitution of the conjugal rights be filed. The respondent has deserted appellant, thus, there is no remedy available to appellant except for applying divorce.

7) None appears for respondent, though served.

8) Points for determination :-

There are following points for determination in this case :-

- (1) Whether respondent has subjected appellant with cruelty ?
- (2) Whether respondent has deserted appellant for a continuous period of not less than two years immediately preceding the presentation of the petition without reasonable and without the consent or against the wish of him ?
- (3) Whether appellant is entitled to get the decree of divorce on the ground of cruelty and desertion ?
- (4) Relief and costs.

Points for determination No.1 & 2 - Findings with reasons :-

- 9) The trial Court has not given the finding with reason on issue of cruelty saying that this ground has not been raised by appellant but this approach is not correct because appellant has pleaded in para 14 of the plaint that respondent refused to lead a conjugal life which amounts cruelty. Therefore, the trial Court ought to have given finding with reason on issue of cruelty.
- 10) Looking to the convenience, points for determination Nos. 1 & 2 are decided simultaneously.
- 11) AW1 Ashok Kumar Sambhakar says in para 8 and 9 of his statement given on oath that from January, 2005 respondent stopped visiting him, he went so many times to respondent at Rajnandgaon but respondent refused to live with him. She deprived him from his conjugal rights. After the transfer in Koyalibeda, in March, 2006 he had told her to live with him in Koyalibeda but respondent did not agree.

12) AW2 Chaitram says in para 3 of his statement given on oath that from 2005, respondent stopped to come in appellant's house at Bodla.

13) NAW1 Smt. Sheeta Singh says in para 4 and 5 of her statement given on oath that she had continuously visited appellant at village Bodla and also in village Koyalibeda. Appellant does not want to keep her without any reason. Appellant used to come at Durg and stay in her house.

14) NAW2 Harishankar Singh who is the younger brother of respondent says in para 3 and 4 of his statement given on oath during posting at Bodla appellant used to come in respondent's house. Respondent had gone to appellant's house at village Koyalibeda. Appellant had refused to keep her.

15) Smt. Indira Tripathi, counsel for the appellant placed reliance on the judgment of Hon'ble Supreme Court in **Adhyatma Bhattar Alwar v Adhyatma Bhattar Sri Devi** {2002 (1) SCC 308}, relevant portion of para 13 is as under:-

“13. Coming to the case at hand, it is revealed from the evidence on record, as discussed in the judgments of the Trial Court and the High Court that the respondent had gone to her parents house for birth of the child, which apparently cannot be construed as an expression of her desire to forsake her husband permanently; but after the birth of her child when attempts were made by the appellant, his parents and relations, she laid down a condition that the appellant should live in a separate house from his parents taking the plea that her father-in-law had attempted to molest her, which explanation she signally failed to establish. In the meantime, father of the appellant expired some time in 1988, putting an end to the so-called reason of misbehavior

of her father-in-law. There is nothing on record that thereafter she expressed her desire to join her husband at the matrimonial home. It is relevant to state here that the appellant is the only son of his parents and as expected, he was not willing to establish a separate residence leaving his parents to live alone in their old age. The cumulative effect of the circumstances and the conduct of the respondent is that she had given expression of *animus deserendi*. Thus, the two ingredients of the matrimonial offence of desertion i.e. separation in fact and *animus deserendi* have been established by the appellant.....”

16) She further relied on the judgment of Hon'ble Supreme Court in **Geeta Jagdish Mangtani v. Jagdish Mangtani** {2005 (8) SCC 177} , relevant portion of para 5 is as under:-

“5.there has been no attempt on the part of the wife to stay with the husband. She is a school teacher and it is common knowledge that in schools there are long vacations during summer months, more so, in Government schools where the wife teaches. At least during those holidays she could have visited the husband at Ulhasnagar along with her son and stayed with him. There is nothing on record to show that any such attempt was ever made by her to visit the husband during this entire period. She has stated in her evidence that the husband used to come and stay with her during her vacations. This has been denied by the husband. Therefore, the conclusion is inevitable, that there was never any attempt on the part of the wife to go to husband's house i.e., matrimonial home of the parties after she left on 22-6-1993. 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. In the facts and circumstances of the case, it cannot be said that this desertion on the part of the wife was with a reasonable cause. Such a course of conduct over a long period indicates total abandonment of marriage and cannot be justified on ground of monetary consideration alone as a

reasonable cause to desert. It also amounts to wilful neglect of the husband by the wife.”

17) In the case in hand significant feature is that respondent is also an employee of the Central Cooperative Bank and posted at Rajnandgaon. It is not expected from a woman employee to resign her service and join the company of husband.

18) AW1 Ashok Kumar Sambhakar says in para 15 during his cross examination that on the complaint of respondent a case has been registered against him under Section 498-A IPC at Durg. Moreover, AW2 Chaitram says in para 6 during his cross examination that he does not know whether that appellant and respondent have the relationship as husband and wife. He does not know whether that respondent has resided in village Koyalibeda with appellant.

19) Appellant has not examined any neighbour of village Koyalibeda, who could say that respondent allegedly never resided with appellant in village Koyalibeda. Appellant has not proved any letter wherein it has been mentioned that from 2005 respondent had refused to lead a conjugal life with him at village Bodla, he had tried so many times to bring her from Rajnandgaon but she refused to live with him, he had also told her to live with him at village Koyalibeda but she was not ready. Appellant has not proved any report lodged by him in any police station wherein said facts have been mentioned. Appellant failed to prove any document of their community wherein said facts have been mentioned. Appellant has failed to prove any notice given by him to respondent wherein said

facts have been mentioned. For not doing so there is no explanation from him.

20) This is not the appellant's case that he had allegedly made attempts to go and stay at respondent's house during holidays but she had refused and not permitted him to join her company.

21) Appellant has filed the divorce petition near about 4 years after March, 2006. He failed to explain such inordinate delay in filing divorce petition.

22) Looking to the aforesaid circumstances this Court finds that appellant does not get any help from the judicial precedents laid down by Hon'ble Supreme Court **Adhyatma Bhattar Alwar (Supra)** and **Geeta Jagdish Mangtani (Supra)**.

23) In **Gurinder Singh v Bhupinder Caur** {Mrr.L.J. 2008 (1) } Hon'ble Punjab and Haryana High Court has laid down the following judicial precedent: -

“Desertion means the separation of one spouse from other with an intention of bringing cohabitation permanently to an end without reasonable cause and consent of the other spouse and with an intention not return or resume cohabitation. Mere severance of relation or separation without desertion is not sufficient. Desertion is not walking out of a house but is withdrawn from a home. Desertion consists in withdrawn not from a place but from the state of thing.”

24) Hon'ble Supreme Court in **Adhyatma Bhattar Alwar (Supra)** has laid down the following judicial precedent:-

“For the offence of desertion two essential conditions must be there; (1) the factum of separation and (2) the intention to

bring cohabitation permanently to an end (*animus deserendi*). 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 house to form the necessary intention.”

25) Looking to the above mentioned facts and circumstances this Court finds that the aforesaid judicial precedents laid down in **Gurinder Singh Supra) and Adhyatma Bhattar Alwar (Supra)** are applicable against appellant regarding point for determination No.2.

26) Looking to the facts and circumstances mentioned herebefore, this Court disbelieves the aforesaid statements of para 8 and 9 of AW1 Ashok Kumar Sambhakar, para 3 of AW2 Chaitram and believes the aforesaid statements of para 4 and 5 of NAW1 Smt. Sheeta Singh, para 3 and 4 of NAW2 Harishankar Singh.

27) After appreciation of the evidence discussed herebefore this Court finds that there is no such evidence on record which shows that respondent has an intention to bring cohabitation permanently to an end (*animus deserendi*) without reasonable cause and consent of appellant, respondent has an intention not to return or resume cohabitation with appellant.

28) After the appreciation of the evidence discussed herebefore this Court finds that appellant failed to prove that respondent has subjected appellant with cruelty and she has deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition without reasonable cause and

without the consent or against the wish of him. Thus, this Court decides points for determination No. 1 and 2 accordingly.

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

29) This has been earlier decided that respondent has not subjected appellant with cruelty and she has not deserted him. Thus, this Court finds that appellant is not entitled to get the decree of divorce on the ground of cruelty and desertion.

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

30) After complete appreciation of the evidence discussed hereinbefore, this Court finds that there is no substance in this appeal. Thus, the impugned judgment and decree of the trial Court are hereby affirmed as to aforesaid extent. The appeal deserves to be and is hereby dismissed.

31) Appellant shall bear his own costs as well as costs of Respondent.

32) Decree be drawn up accordingly.

Sd/-
(Sharad Kumar Gupta)
JUDGE