

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Reserved on 25-4-2018****Pronounced on 08-05-2018****FAM No. 95 of 2017**

[Arising out of judgment and decree dated 10-3-2017 in Civil Suit No. 12-A/2016 of the Additional District Judge, Bhanupratappur, Distt. North Bastar Kanker (CG)]

Devashish Sarkar S/o Mahendra, Aged About 35 years Caste Namoshudra, R/o Village P.V.37, Police Station and Tahsil Pakhanjur, District North Bastar Kanker, Chhattisgarh

---- Appellant**Versus**

Smt. Suparna Sarkar W/o Devashish Sarkar, aged about 30 years Caste Namoshudra, R/o Village P.V.38, Police Station and Tahsil Pakhanjur, District North Bastar Kanker, Chhattisgarh

----Respondent

For appellant	: Shri D.N. Prajapati, Advocate
For respondent	: Shri C.J.K. Rao, Advocate

Hon'ble Shri Sharad Kumar Gupta, Judge**C.A.V. JUDGMENT**

1. Challenge in this appeal is levied to the judgment and decree dated 10.03.2017 of the Additional District Judge, Bhanupratappur, district North Bastar, Kanker C.G. in Civil Suit No. 12A/ 2016 vide Annexure A-1 whereby and whereunder the trial Court dismissed the divorce petition filed by appellant-husband under section 13 of the Hindu Marriage Act, 1955 (in brevity 'the Act of 1955') against the respondent- wife.

2. This is admitted by the respondent that marriage of both parties was solemnized in the year 2006 in residential place of her father village PV48 in accordance with Bengali rights and

rituals, after the marriage she resided in his house at village PV37 where they led the conjugal life, now she is living separately from him in her paternal house.

3. In brief, appellant's case is that two years after the marriage she started quarreling with him, she used to go to her maternal house without intimating him, she is living separately from him since eight years back. She used to give threat to him to implicate in a false dowry case. He had tried to bring her back, but she refused to live with him.

4. In brief, the respondent's case is that she lived in his house at village PV37 till June, 2016. He harassed her saying that she is less educated and he got less dowry. She had not procreated child, thus, he was taunting that she is barren. Due to harassment, she came in her maternal house after June, 2016.

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

6. Shri D.N. Prajapati, counsel for the appellant vehemently argued that the trial Court has failed to appreciate the evidence properly. The aforesaid judgment and decree of the trial Court are bad in the eyes of law. Thus, the impugned judgment and decree may be set aside and a decree of divorce may be granted.

7. Shri C.J.K. Rao, counsel for the respondent argued that the impugned judgment and decree are in accordance with law and do not call for any interference by this Court, thus, the appeal

may be dismissed.

8. Points for determination :-

There are following points for determination in this case :-

(1) Whether after solemnization of the marriage, the respondent treated the appellant with cruelty ?

(2) Whether the respondent has deserted the appellant 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 ?

(3) Whether the appellant is entitled to get the decree of divorce for dissolution of the marriage on the grounds of cruelty and desertion ?

(4) Relief and costs.

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

9. Looking to the convenience, points for determination No.1 and 2 are disposed of simultaneously.

10. The trial Court has not framed issue regarding desertion, though it ought to have done it. The evidence available on record shows that the appellant and the respondent have adduced evidence regarding desertion. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding desertion 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 (in brevity ' the CPC'), this Court finds that it may pronounce the judgment in this appeal.

11. AW1 Devashish Sarkar says in para 3, 8, 11 and 13 of his statement given on oath that the respondent was quarreling with him on petty matters. He is living separately from her since 8 years back, she was threatening that she will implicate him in false dowry case.

12. AW2 Chitranjan Mandal says in para 4 of his statement given on oath that he was present in a meeting held regarding quarrel between appellant and respondent.

13. AW3 Ashok Das says in paras 3, 8 and 11 of his statement given on oath that 2 – 2½ years after the marriage the respondent was abusing the appellant. She used to go without intimating any member of the appellant's family. She is living separately from him since 7-8 years back.

14. NAW1 Suparna Sarkar says in paras 2 and 8 that she is living in her maternal house since 5 -6 months back. He was making quarrel with her.

15. NAW2 Prabash Malik says in paras 4 and 6 that the respondent is living in her maternal house since 5-6 months back. Her father had told that the appellant is misbehaving with her.

16. 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.”

17. 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.”

18. In **Gurinder Singh v Bhupinder Caur** {Mrr.L.J. 2008 (1) 261} 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 a 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.”

19. Hon'ble Supreme Court in **Adhyatma Bhattar Alwar v Adhyatma Bhattar Sri Devi** {2002 (1) SCC 308} has laid 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.”

20. Shri D.N. Prajapati, counsel for the appellant cited para 16 of the judgment of this Court in **Smt. Vijaya Laxmi Soni v. Rajkumar Soni [2009 (2) C.G.L.J. 72 (DB)]** wherein the Hon'ble Division Bench has held as under :

“16. After appreciating the evidence available on record, the Court below has recorded a finding that the appellant, who is wife of the respondent, has treated him with cruelty and has failed to discharge her marital obligation. Even she has threatened the respondent to implicate him falsely in cases. Yet, the Court below has not passed order for dissolution of marriage by a decree of divorce and has passed the decree of judicial separation. Findings of the Court below on issue No. 1 clearly show that there is no chance of restitution of conjugal rights or reunion. In the facts and circumstances of the case, dissolution of marriage by a decree of divorce was the only remedy left, but the Court below has not passed the decree of divorce, which was fully possible on the basis of proved facts in this case. ”

21. He further cited para 42 of the judgment of the Hon'ble

Supreme Court in **Malathi Ravi, M.D. v. B.V. Ravi, M.D. [(2014)**

7 SCC 640] wherein the Division Bench has held as under :-

“42. For the present, we shall restrict our delineation to the issue whether the aforesaid acts would constitute mental cruelty. We have already referred to few authorities to indicate what the concept of mental cruelty means. Mental cruelty and its effect cannot be stated with arithmetical exactitude. It varies from individual to individual, from society to society and also depends on the status of the persons. What would be mental cruelty in the life of two individuals belonging to a particular strata of the society may not amount to mental cruelty in respect of another couple belonging to a different stratum of society. The agonised feeling or for that matter a sense of disappointment can take place by certain acts causing a grievous dent at the mental level. The inference has to be drawn from the attending circumstances.”

22. AW1 Devashish Sarkar says in para 26 of his cross examination that in August, 2016 his father-in-law had taken back her. He says in para 27 that this is true that the respondent resided in his house after the marriage till August, 2016. PW3 Ashok Das says in para 23 during his cross examination that this is true that she is living in her maternal house since August, 2016. This is true that prior to August, 2016 she was residing in appellant's house. Appellant had given the suggestion to NAW2 Prabhash Malik in para 33 during his cross examination that this is true that she is living in her maternal house since 5-6 months back.

23. AW1 Devashish Sarkar says in para 29 that this is true that no child was born in their wedlock. PW2 Chitranjan Mandal says

in para 10 during his cross examination that his statement is hearsay. He says in para 15 that this is true that he had not seen the quarrel of the appellant and the respondent.

24. Appellant has not proved any report lodged by him in any police station alleging that, two years after the marriage she started quarrel with him, she used to go in her maternal house without intimating him, she is living separately from him since eight years back. She used to threat him to implicate in a false dowry case. He has failed to prove any document of their community wherein said facts have been mentioned. He has failed to prove any notice given by him to her wherein said facts have been mentioned. For not doing so there is no plausible explanation offered by him.

25. Looking to the above mentioned facts and circumstances this Court finds that the aforesaid judicial precedents in **G.V.N. Kameswara Rao** (Supra), **Prabhash Saxena** (Supra), **Gurinder Singh** (Supra), **Adhyatma Bhattar Alwar** (Supra), and **Malthi Ravi M.D.** (supra) are applicable against the appellant's case and in favour of the respondent's case regarding these points for determination.

26. After appreciation of the evidence discussed herebefore this Court disbelieves on aforesaid statements of paras 3, 8, 11 and 13 of AW1 Devashish Sarkar, paras 4 of AW 2 Chitranjan Mandal in this reference that allegedly the respondent was making quarrel with the appellant, paras 3, 8 and 11 of AW3 Ashok Das and believes on aforesaid statements of paras 2, 8

of NAW1 Suparna Sarkar, paras 4 and 6 of NAW2 Prabhash Malik.

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

28. After the appreciation of the evidence discussed herebefore this Court finds that after the solemnization of the marriage, respondent has not treated appellant with cruelty, she has not 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 the appellant has failed to prove grounds of cruelty and desertion. Thus, in the case in hand, no question arises that instead of decree of judicial separation, decree of divorce may be granted. Thus, the appellant does not get any help from the aforesaid judicial precedent laid down in **Smt. Vijay LaXMI Soni** (supra).

30. Looking to the above mentioned facts and circumstances, this Court finds that appellant is not entitled to get the decree of divorce for dissolution of the marriage on the grounds of cruelty

and desertion. Thus, this Court decides point for determination No.3 accordingly.

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

31. After the complete appreciation of the evidence discussed herebefore this Court finds that the appeal is devoid of merit, thus the impugned judgment and decree of the trial Court are hereby affirmed to above extent and the appeal is dismissed.

32. Appellant shall bear his own costs and costs of respondent also.

33. A decree be drawn up accordingly.

**Sd/-
(Sharad Kumar Gupta)
Judge**