

HIGH COURT OF CHHATTISGARH, BILASPUR

W.P.(227) No. 117 of 2018

Shiv Kumar Agarwal, S/o. Shri Satyanarayan, Aged About 42 Years, R/o. Sakti, Tehsil – Sakti, District Janjgir Champa, Chhattisgarh.

---- Petitioner

Versus

Rupali Agarwal, W/o. Shri Shivkumar Agrawal, Aged About 33 Years, R/o. Anath Bal Sewa Ashram Sahyog Nagar Uppalbadi, Post Office Nagpur (Maharashtra) Current Address : Vishram Nagar, Backside Of Power Gird, Near Police Station, Backside Of Water Tank, Jaripatka, Police Station Jaripatka District Nagpur (Maharashtra)

---- Respondent

 For Petitioner : Ms. K. Tripati Rao, Advocate
 For Respondent : Mr. Prasoon Agrawal, Advocate

Hon'ble Shri Justice Goutam Bhaduri

Order On Board

03.05.2018

Heard

1. The present petition is against the order dated 11.01.2018 whereby the application for amendment filed by the petitioner & respondent was dismissed.
2. The brief facts of this case are that the petitioner Shiv Kumar Agrawal was married to Rupali Agawal on 27.05.2003 thereafter they were blessed with three children. It is contended on behalf of the petitioner that since the petitioner was physically disabled, as such, the petitioner & respondent wife slow by slow got separated both mentally & physically and eventually an application under Section 13(B) of Hindu Marriage Act was filed before the Court below on 04.09.2017. In such application, it was stated that due to family dispute, the applicant and non-applicant was living

separately in the same roof in different rooms and ultimately on 30.06.2017 the non-applicant has taken another house.

3. Learned counsel for the petitioner submits that an application was filed under Order 6 Rule 17 of C.P.C. whereby it was sought to be pleaded that from 03.03.2016 till 30.06.2017 though the petitioner & respondent were living under the same roof but were used to live separately in different rooms and the matrimonial obligation in between the parties were not performed and eventually on 30.06.2017 the wife left for Nagpur. It is stated that therefore from 03.03.2016 the petitioner & respondent were living separately. It is contended that the amendment to this effect when was filed was dismissed on the ground that *prima facie* it appears that the petitioner & respondent were not living separately for a period of one year prior to filing of the petition under Section 13(B) of Hindu Marriage Act, as such, same was dismissed. The counsel submits that the said averments can only be proved during the evidence and when both the parties submit that the parties were living separately, there was no other occasion before the Court to accept the same and without evidence at the threshold the petition could not have been dismissed, therefore, the order suffers with illegality.
4. Learned counsel for the respondent wife supports the contention of the petitioner and submits that earlier to filing of the petition under Section 13(B) of the Hindu Marriage Act both husband & wife were living separately though were occupying the same house.
5. Perused the petition under Section 13(B) of the Hindu Marriage Act filed by husband & wife wherein at para 6, it is stated that both

husband & wife were living separately in the same house at different places and were not performing the matrimonial obligation to each other and thereafter from 30.06.2017 they were residing separately. The application for divorce is filed on 04.09.2017. In the proposed application for amendment, both the parties contended that they were living separately from 03.03.2016 though were occupying the same roof up till 30.06.2017 and matrimonial obligation in between the parties were not performed. Reading of the application would show that on 03.03.2016 some dispute occurred in between the parties, which resulted into altercation and thereafter the wife on 03.03.2016 to 09.06.2016 went to maternal home at Nagpur. Eventually on 10.06.2016 when acknowledgment letter was executed in between the parties it was acknowledged that no further complaint would be registered.

6. The Supreme Court in case of ***Smt. Sureshta Devi v. Om Prakash*** reported in ***1992 AIR 1904*** has defined the word 'living separately'. It is stated that living separately for a period of one year has to be gathered from the circumstances and the antecedents thereto which include that the parties do not desire to perform the matrimonial obligation and they have been living separately for a period of one year immediately preceding the presentation of petition. It has also be gathered from the fact that the parties have not been able to live together, which seems to indicate the concept of broken down marriage and third requirement is that they have mutually agreed that the marriage should be dissolved. Relevant para of the judgment is quoted herein below:

“The 'living separately' for a period of one year should be immediately preceding the presentation of the petition. It is necessary that immediately preceding the presentation of petition, the parties must have been living separately. The expression 'living separately', connotes to our mind not living like husband and wife. It has no reference to the placing of living. The parties may live under the same roof by force of circumstances, and yet they may not be living as husband and wife. The parties may be living in different houses and yet they could live as husband and wife. What seems to be necessary is that they have no desire to perform marital obligations and with that attitude they have been living separately for a period of one year immediately preceding the presentation of the petition. The second requirement that they have not been able to live together' seems to indicate the concept of broken down marriage and it would not be possible to reconcile themselves. The third requirement is that they have mutually agreed that the marriage should be dissolved.”

7. In the facts of this case, the amendment which is sought for by both the parties they have stated that they were living separately from 03.03.2016 and from 03.03.2016 till 30.06.2017 though the parties were occupying the same roof but were living in the separate rooms and no matrimonial obligation was performed to each other. When it is the case of both the parties i.e. husband & wife that they were not living together from 03.03.2016 and when the facts were brought by way of amendment then the trial Court could have tested the genuineness of the averments at the time of the statement of the parties before it. The denial of the amendment at the threshold would amount to extracting the evidence from the pleading and to test authenticity of the same.
8. In the circumstances, the order of denial of the amendment petition itself at the threshold cannot be sustained and the same is

set aside. The amendment so proposed is allowed. The trial Court shall be at liberty to test the veracity of the submission made in the pleading at the time of the evidence.

9. With such observation, the petition stands disposed off.

Sd/-
(Goutam Bhaduri)
Judge

Ashok