

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 16.04.2018

Pronounced on 19.04.2018

First Appeal (M) No. 91 of 2011

- Dayachand Porte (Dayachandra Wrongly Mentioned), S/o Mangal Singh Porte, R/o Village Dhanura, Post Parasi, Tahsil Marwahi, Dist. Bilaspur (C.G.)

---- Appellant

Versus

- Kamlabai W/o Dayachand Porte, D/o Johan Singh Shyam, R/o Village Dadiya, Post Karhanni, Tahsil Marwahi, Dist. Bilaspur (C.G.)

---- Respondent

For Appellant	: Shri Dharendra Prasad Mishra, Advocate
For Respondent	: None

Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

1) Challenge in this appeal is levied to the judgment and decree dated 11.07.2011 of the Additional District Judge, Pendra Road, district Bilaspur passed in Civil Suit No.19-A/2011, whereby and whereunder he 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 both the parties are Gond by caste, marriage of them was solemnized in accordance with the rights and rituals in 1997 at village Dadiya, after the marriage, she resided in her in-laws' house along with appellant in village Dhanora for 10-15 days and thereafter, she went her maternal house, two-three months after, she again came to her in-laws' house, now she

is living in her maternal house since back three years from filing of the written statement.

3) In brief, the appellant's case is that respondent was saying that she does not like him, she does not want to lead conjugal life with him. She used to go frequently in her maternal house without the permission of him. On 20.04.2006, she voluntarily left his house. He had tried for her to return back to his house, but, she refused to live with him.

4) In nutshell, respondent's case is that appellant was saying her that he does not like her and he will perform second marriage. He had ousted her from his house after beating. She is inclined to live with him.

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

6) Shri Dharendra Prasad Mishra, the learned counsel for appellant strenuously argued that the trial court has not properly examined the evidence and reached to the wrong conclusion. Thus, aforesaid judgment and decree may be set aside and a decree of divorce may be granted.

7) None appears for respondent though served.

8) **Points for determination :-**

The following points are 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 suit of appellant is maintainable ?
- (4) Whether appellant is entitled to get the decree of divorce on the ground of cruelty and desertion ?
- (5) Relief and costs.

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

- 9) Looking to the convenience points for determination No. 1 & 2 are decided simultaneously.
- 10) AW1 Dayachand Porte says in para 4 and 5 of his statement given on oath that respondent used to say that she does not like him, her family members have performed her marriage forcibly, she is not inclined to lead conjugal life with him, she was making frequent quarrels with his parents. She used to go frequently in her maternal house without obtaining his permission.
- 11) AW2 Amin Singh Maravi, AW3 Sewa Das say, in para 3 and 4 of their statements given on oath that, respondent used to say that she does not like appellant, her family members have performed her marriage forcibly, she is not inclined to lead conjugal life with appellant, she was making frequent quarrels with the parents of

appellant. She used to go frequently in her maternal house without obtaining permission from appellant.

12) NAW1 Kamlabai says in para 2 of her statement given on oath that appellant was making quarrel with her saying that she is not beautiful, he was not taking care of her. He had ousted her after beating.

13) NAW2 Gyan Singh who is the cousin of respondent says in para 2 of his statement given on oath that respondent used to say that appellant was making quarrel with her saying that she is not beautiful, he was not taking care of her, he had ousted her after beating.

14) AW1 Dayachand Porte says in para 13 and 19 of his cross examination that he has studied PGDCA. His mother had told him that respondent is one year elder than him. AW2 Amin Singh says in para 11 during his cross examination that he does not know why appellant and respondent are living separately. AW3 Sewa Das says in para 6 of his cross examination that he does not know what is the dispute between appellant and respondent. NAW1 Kamlabai says in para 3 during her cross examination that she is illiterate.

15) In alleged information of non-cognizable offence Ex.P 1 and alleged Rajinama Ex.P 2 this is not mentioned that, respondent allegedly used to say appellant that she does not like him, her marriage has performed forcibly, she is allegedly not inclined to lead conjugal life with him. She was allegedly making quarrel with his parents. She allegedly used to go her maternal house frequently without obtaining permission from him. Thus, appellant does not get

any help from Ex.P1 and Ex.P2 regarding these points for determination.

16) Appellant has failed to prove any letter wherein said facts have been mentioned. Appellant has failed to prove any report lodged by him in any police station wherein said facts have been mentioned. Appellant has 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.

17) Appellant has preferred divorce petition 3 years 4 months after from 20.04.2006. He is failed to explain why he has not filed earlier divorce petition.

18) 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.”

19) 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.”

20) 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.”

21) 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.”

22) Looking to the above mentioned facts and circumstances this Court finds that aforesaid judicial precedents in G.V.N. Kameswara Rao (Supra), Prabhash Saxena (Supra), Gurinder Singh (Supra) and Adhyatma Bhattar Alwar (Supra) are applicable against

appellant and in favour of respondent regarding these points for determination.

23) Looking to the above mentioned facts and circumstances this Court disbelieves the aforesaid statements of para 4 and 5 of AW1 Dayachand Porte, para 3 and 4 of AW2 Amin Singh Maravi , AW3 Sewa Das and believes the aforesaid statements of para 2 of NAW1 Kamlabai and NAW2 Gyan Singh.

24) 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 deserandi*) without reasonable cause and consent of appellant. Respondent has an intention not to return or resume cohabitation with appellant.

25) 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 :-

26) The trial Court did not frame issue regarding maintainability of the suit 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 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.

27) This is admitted position that both the parties are Gond by caste.

28) It would be pertinent to mention the provisions of Section 2 of the Act, 1955:-

“2. Notwithstanding anything contained in sub-section (1), nothing contained in this Act shall apply to the members of any Scheduled Tribes within the meaning of clause (25) of Article 366 of the Constitution unless the Central Government, by notification in the Official Gazette, otherwise directs.”

29) As per the provisions of the (SCHEDULED TRIBES) ORDER 1950 (C.O.22) of the constitution of India serial No. 16 'Gond' is Scheduled Tribe in C.G. State.

30) Appellant has failed to show that the Central Government has specified in official gazette by notification that the Act, 1955 is applicable to members of Gond scheduled tribes in Chhattisgarh State.

31) In **Surajmani Stela Kujur v Durgacharan Hansdah**, {AIR 2001 SC 938}, Hon'ble Supreme Court has laid down the following judicial precedent :-

"In this appeal the parties are admittedly tribals, the appellant being an Oraon and the respondent a Santhal. In the absence of a notification or order under Article 342 of the Constitution they are deemed to be Hindus. Even if a notification is issued under the Constitution, the Act can be applied to Scheduled Tribes as well by a further notification in terms of Sub-section (2) of Section 2 of the Act. It is not disputed before us that in the Constitution (Scheduled Tribes) Order, 1950 as amended by Scheduled Castes and Scheduled Tribes Order (Amendment) Acts 63 of 1956, 108 of 1976, 18 of 1987 and 15 of 1990, both the tribes to which the parties belong are specified in Part XII. It is conceded even by the appellant that "the parties to the petition are two tribals, who otherwise profess Hinduism, but their marriage being out of the purview of Hindu Marriage Act, 1955 in light of Section 2(2) of the Act, are thus governed only by their Santhal customs and usage".

32) Looking to the above mentioned facts and circumstances, this Court finds that suit of appellant is not maintainable. Thus, this court decides point for determination No.3 accordingly.

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

33) This has been earlier decided that appellant has failed to prove the grounds of cruelty and desertion, the suit of appellant is not maintainable, thus this Court finds that appellant is not entitled to get the decree of divorce on the ground of cruelty and desertion. Thus this Court decides point for determination No.4 accordingly.

Point for determination No.5 - Findings with reasons :-

34) 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.

35) Appellant shall bear his own costs as well as costs of respondent.

36) Decree be drawn up accordingly.

Sd/-
(Sharad Kumar Gupta)
JUDGE