

HIGH COURT OF CHHATTISGARH, BILASPUR**Reserved on 17.04.2018****Delivered on 02.05.2018****First Appeal (Misc.) No. 188 of 2017**

- Upendra Gupta S/o Shri Ganesh Prasad Gupta Aged About 43 Years Caste Halwayee, R/o Village Marhattha, P. S. And Tahsil Pratappur, District Surajpur Chhattisgarh.

---- Appellant**Versus**

- Sunita Gupta W/o Shri Upendra Gupta D/o Shri Ramlakhan Gupta, Aged About 38 Years Caste - Halwayee, R/o Village Vishrampur, Minus Colony, Qtr. No. 408, District Surajpur, Chhattisgarh.

---- Respondent

For Appellant	:	Shri Sanjay Dewangan on behalf of Shri P.K. Patel, Advocates
For Respondent	:	None.

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

1. In this appeal, the challenge is levied to the judgment and decree dated 23.09.2017 of the Second Additional District Judge, Surajpur, Chhattisgarh in Civil Suit No. 2-A/2015 whereby and whereunder he dismissed the divorce petition filed by appellant-husband under Section 13 of the Hindu Marriage Act, 1955 (in brevity 'the Act, 1955') against respondent-wife.

2. This is admitted by respondent that both the parties are Halwayee by caste and governed from Hindu Law, marriage of both parties was solemnized in year 2002 in accordance with Hindu rites and rituals, in wedlock three daughters have born, she had lodged a dowry case in year

2013 against him, she has filed an application for allowance for the maintenance against him in the Court of Surajpur, now she is living separately from him.

3. In brief, appellant's case is that respondent was making quarrel with him suspecting that he has illicit relation with another woman, she is living separately from him for more than two years. He had tried to bring her back but she had refused to live with him.

4. In brief, respondent's case is that after the marriage appellant was harassing her on account of demand of a motorcycle and Rs. 50,000/- cash. He has contracted second marriage with Sarita, who is living with him. He had ousted her after beating.

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

6. Shri Sanjay Dewangan, counsel for the appellant vehemently argued that the trial Court did not appreciate the evidence in proper perspective. Thus, the impugned judgment and decree may be set aside and divorce may be granted to the appellant.

7. No one appears for the respondent at the time of hearing though served.

8. **Points for determination** : -

There are following points for determination in this Case -

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

(2) Whether respondent has deserted appellant for a continuous period of not less than two years immediately preceding presentation of the petition

without reasonable cause 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.

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

9. The Trial Court did not frame issue regarding cruelty though it ought to have been done by the Trial Court. The evidence available on record shows that both the parties have adduced evidence regarding the cruelty. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding the cruelty 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 the judgment in this appeal.

10. 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.”

11. 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.”

12. AW1 Upendra Gupta does not say clearly and strongly that respondent allegedly was suspecting that he had illicit relation with another woman, she allegedly used to make quarrel with him. AW2 Rajesh Kumar Dubey does not say clearly and strongly that she was suspecting that appellant had illicit relation with another woman.

13. As per the certified copy of the judgment dated 27.11.2014 Ex. P/6 appellant was acquitted from the offence punishable under Section 498A IPC after extending him benefit of doubt by the Additional Sessions Judge, Pratappur, District – Surajpur.

14. There is no such evidence in record on the strength of which it could be said that respondent had lodged false report against appellant.

15. Looking to the above mentioned facts and circumstances, this Court finds that above mentioned judicial precedents laid down in **G.V.N. Kameswara Rao (supra)** and **Prabhash Saxena (supra)** are applicable against the appellant's case regarding this point for determination.

16. After appreciation of the evidence discussed herebefore this Court finds that appellant failed to prove that after solemnization of the marriage, respondent had treated him with cruelty. Thus, this Court decides point for determination No.1 accordingly.

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

17. The Trial Court did not frame issue regarding desertion though it ought to have been done by the Trial Court. The evidence available on record shows that both the parties have adduced evidence regarding the desertion.

The evidence available on record is sufficient to enable this Court to pronounce judgment. Non-framing of additional issue regarding the 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, this Court finds that it may pronounce the judgment in this appeal.

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 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.”

20. AW1 Upendra Gupta says in para 4 of his statement given on oath that respondent had left his house on 20.09.2013.

21. As per the alleged Ikrarnama dated 19.09.2013 Ex.P/1, respondent left the house of appellant on 19.09.2013.

22. In alleged report Ex.P/12 it has been mentioned that respondent allegedly left appellant's house on 19.09.2013.

23. Appellant has filed divorce petition on 05.02.2015.

24. From above facts, this Court finds that respondent is not living separately from appellant at least for two years or upwards prior to filing of divorce petition.

25. Looking to the above mentioned facts and circumstances, this Court finds that above mentioned judicial precedents laid down in **Gurinder Singh (supra)** and **Adhyatma Bhattar Alwar (supra)** are applicable against the appellant's case regarding this point for determination.

26. After appreciation of the evidence discussed herebefore, this Court finds that appellant failed to prove that respondent has deserted him for a continuous period of not less than two years immediately preceding presentation of the petition without reasonable cause and without the consent or against the wish of him. Thus, this Court decides point for determination No.2 accordingly.

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

27. This has been earlier decided that appellant failed to prove grounds of cruelty and desertion, thus, this Court finds that appellant is not entitled to get the decree of divorce on the grounds of cruelty and desertion. Thus, this Court decides point for determination No. 3 accordingly.

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

28. After the complete appreciation of the evidence discussed herebefore, this Court finds that appeal is devoid of merit and deserves to be set aside. Thus, the impugned judgment and decree of the trial Court are affirmed as to

above extent. The appeal is dismissed.

29. Appellant shall bear his own costs as well as costs of respondent.

30. A decree be drawn up accordingly.

Sd/-

(Sharad Kumar Gupta)
JUDGE