

AFRHIGH COURT OF CHHATTISGARH, BILASPURReserved on 16-4-2018Pronounced on 23-04-2018First Appeal (M) No. 122 of 2015

- Nathu Ram S/o Mahora Aged About 46 Years Caste- Panika, Occupation- Agriculturist, R/o Village - Bisati Navapara, Police Station- Bhatgaon, District Surajpur, Chhattisgarh.

---- Appellant

Versus

- Smt. Leelawati W/o Nathu Ram Aged About 44 Years Caste- Panika, R/o Village-Bhatgaon Bandhpara, Police Station- Bhatgaon, District- Surajpur Chhattisgarh Presently R/o At Jenjhripara, Shivaripara, Ward No. 1, P. S. Bhatgaon, District Surajpur Chhattisgarh.

---- Respondent

For appellant : Shri Alok Tiwari on behalf of Sudeep Agrawal,
Advocates
For respondent : Shri D. Kushwaha, Advocate

Hon'ble Shri Sharad Kumar Gupta, JudgeC.A.V. JUDGMENT

1. Challenge in this appeal is levied to the judgment and decree dated 24.02.2015 passed by the Additional District Judge, Surajpur, district Surajpur in Civil Suit No. 48A/ 2012 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,1955') against the respondent- wife.

2. This is admitted by respondent that marriage of both the parties was solemnized 24 years prior to 06.09.2012 in accordance with customary and Hindu rights and rituals, her behaviour was normal, she had filed an application

under Section 125 Cr.P.C., in the Court of the Chief Judicial Magistrate, Surajpur in 2011 which was disposed of, now she is living in her maternal house.

3. In brief, appellant's case is that in wedlock, four children have born, respondent was always with intoxication, she was giving threatening to get him killed, she left his house three years ago and spending adulterous life.

4. In brief, the respondent's case is that appellant has an illicit relation with a woman, named Janaki, earlier application of Section 125 Cr.P.C. was disposed of on account of a compromise, he ousted her after beating, she again filed an application under Section 125 Cr.P.C., in the Court of CJM, Surajpur, wherein an interim order was passed against the appellant, to avoid liability of maintenance he filed this petition subsequently.

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

6. Shri Alok Tiwari, counsel for appellant vehemently argued that the trial Court 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 D Kushwaha, counsel for 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 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 cause and without the consent or against the wish of him ?

(3) Whether after solemnization of the marriage, she had voluntary sexual intercourse with any person, other than her spouse ?

(4) Whether appellant is entitled to get the decree of divorce for dissolution of the marriage on the ground of cruelty, desertion, sexual intercourse with other person ?

(5) Relief and costs.

Points for determination No. 1, 2 and 3: Findings with reasons :-

9. Looking to the convenience, points for determination No.1, 2 and 3 are disposed of simultaneously.

10. The trial Court has not framed issues regarding cruelty, desertion, voluntary sexual intercourse with any

other person, though the trial Court ought to have done it. The evidence available on record shows that appellant and respondent have adduced evidence regarding these points for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issues regarding these points for determination 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.

11. NAW1 Leelawati says in para 7 during her cross-examination (recorded on 12.11.2014) that this is true that she is living in village Bhatgaon since back 5 years.

12. AW- 1 Nathuram says in para 3 and 4 of his statement given on oath that, respondent was always in intoxication, she was giving threatening to get him killed. She had illicit relation with a person, and now, is living with that person.

13. AW- 2 Bhagwan Bharat, who is the cousin of the appellant in para 3 and AW 3 Basant S/o Mohan in para- 2 say in their statements given on oath that, respondent had illicit relation with a person, she is living with that person.

14. NAW- 1 Leelawati, NAW- 2 Basant S/o Dadai, who is the brother of respondent say in para 2, 3 and 4 of their statement given on oath that the appellant has illicit relation

with Janaki Bai, he was beating respondent regularly, he had ousted her after beating, she has filed an application for the maintenance in the Court of CJM, Surajpur, wherein an interim order has been passed in favour of her, to avoid liability, appellant has filed this divorce petition.

15. 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.”

16. 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.”

17. 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.”

18. 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.”

19. Appellant has not pleaded in his divorce petition the name of that person with whom respondent has illicit relation and with whom she is residing. AW- 1 Nathuram, AW- 2 Bhagwan Bharat and AW- 3 Basant also do not disclose clearly and strongly the name of that person, in their statements.

20. AW- 1 Nathuram says in para 8 that this is true that earlier application for the maintenance was disposed of on account of compromise, and thereafter, they lived together. If respondent had alleged illicit relation with some person, then, naturally appellant did not do compromise and live with her.

21. AW- 1 Nathuram says in para 9, 10 and 11 that this is true that subsequently, respondent has filed an application for maintenance which is pending. He does not know that he filed the report in Police Station before or after his appearance in the maintenance case. He does not say clearly and strongly that he filed divorce petition before filing the maintenance case by respondent. Thus, this possibility cannot be ruled out that allegedly to avoid the liability of maintenance, he filed the divorce petition.

22. He further says in para 11 that his one child is living with respondent. AW2 Bhagwan Bharat, AW3 Basant say in para 8 that this is true that children are living with respondent. In these circumstances, it does not appear natural that, respondent allegedly is living with another person.

23. Appellant has not examined any neighbour of the respondent's house who could state that allegedly respondent is living with such person. He has not proved any letter wherein it has been mentioned that, respondent was usually living intoxicated, she was giving threatening to

get him killed, she had illicit relation with some other person, she is allegedly living with such person. He has failed to prove any report lodged by him in any police station wherein said facts have been mentioned. He has not proved any document of their community wherein said facts have been mentioned. He has not proved any notice given by him to her wherein said facts have been mentioned. For not doing so, no explanation has been offered by him.

24. 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) and Adhyatma Bhattar Alwar (Supra) are applicable against the appellant's case and in favour of the respondent's case regarding points for determination No. 1 and 2.

25. 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.

26. After appreciation of the evidence discussed herebefore this Court disbelieves on aforesaid statements of para 3, 4 of AW1 Nathu Ram, para 3 of AW2 Bhagwan

Bharat, para 2 of AW3 Basant and believes on aforesaid statements of para 2, 3 and 4, para 2 of NAW1 Leelawati, NAW2 Basant in this reference that respondent allegedly has not treated appellant with cruelty, allegedly she has not deserted him, allegedly she is not living with some other person.

27. After appreciation of the evidence discussed herebefore this Court finds that appellant failed to prove that, after solemnization of the marriage, respondent treated appellant with cruelty, 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, after solemnization of the marriage she had voluntary sexual intercourse with any person, other than her spouse. Thus, this Court decides points for determination No. 1, 2 and 3 accordingly.

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

28. This has been earlier decided that appellant has failed to prove ground of cruelty, desertion, sexual intercourse with other than spouse. Thus, this Court finds that appellant is not entitled to get the decree of divorce for dissolution of the marriage on the ground of cruelty, desertion, sexual intercourse with other person. Thus, this Court decides point for determination No.4 accordingly.

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

29. After 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 the above extent and the appeal is dismissed.

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

31. A decree be drawn up accordingly.

Sd/-
(Sharad Kumar Gupta)
Judge