

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 27 of 2015**

Abhilash Kumar Gupta S/o Late Radheshyam Gupta Aged About 34 Years R/o C/o Smt. Laxmi Devi Gupta, House No. M.I.G./1/53, Sardar Patel Nagar, Post Office-Jamnipali, Tahsil-Katghora, Police Station-Darri, District-Korba, C.G. **----Appellant**

Versus

Smt. Shweta Gupta D/o Baldev Gupta Aged About 27 Years R/o C/o Baldev Gupta, Timki Bazar, Takiya Road, Nagpur-18 Maharashtra, **---- Respondent**

For Appellant	:	Mr. Uttam Pandey, Advocate
For Respondent	:	Mr. Vedant Bhelonde, Advocate appears on behalf of Mr. P.R. Patankar, Advocate

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava**Hon'ble Shri Justice Gautam Chourdiya****Judgment On Board****10/09/2018****Per Manindra Mohan Shrivastava, J.**

1. This appeal is directed against impugned judgment and decree dated 07.01.2015 passed by the Family Court, Katghora, District Korba in Civil Suit No.77-A of 2014 to the extent that the learned Family Court has granted a decree of judicial separation.

2. The appellant filed an application for grant of decree of divorce on the ground of cruelty and desertion against the respondent on the pleadings inter alia that ever since the marriage of the parties solemnized on 17.06.2012 at Jabalpur, the respondents have been subjecting the appellant and his family member to cruelty. In the application, it was averred that the respondent have been misbehaving, insulting and subjecting to cruelty the appellant and his ailing mother, relatives, friends. It was also pleaded that the respondent was not prepared to do any household work, continuously taunted the appellant that he is a poor beggar whereas, respondent belongs to a rich family. It was further pleaded that respondent was always harassing by making false

allegation that the appellant was an impotent person unable to perform sexual intercourse. It was further pleaded that old and ailing mother of the appellant was being harassed. The respondent engaged in frequent quarrel. She threw chilly powder in the eyes of the appellant's mother and subjected her to all kinds of cruelty. It was also averred that the respondent was of loose character, flirt and at times, engaged with third person and always making an allegation against the appellant so much so that one day, during sexual intercourse, she made serious allegation against the appellant that he is an impotent person which caused serious agony to the appellant. Finally, on 04.08.2012 respondent went back to her matrimonial house along with her brother and, thereafter she never came back. It was also alleged that she had taken away gold silver ornaments, camera, mobile along with her. It was further pleaded that the respondent lodged false report in the police station alleging cruelty on which, offence under Section 498-A of IPC was registered against the appellant and his mother and he had to obtain bail from the Court. It was also pleaded that a false case under Domestic Violence Act was also lodged and in this manner, the life of the appellant has been made miserable.

3. The respondent remained ex parte. Learned Family Court recorded the evidence of the appellant-plaintiff Abhilash Kumar Gupta as PW1 and Smt. Laxmi Devi Gupta (PW2), mother of the appellant, Indrachandra Gupta (PW3), brother of the appellant, Sanjeev Shukla, his friend (PW4).

4. Learned trial Court, however, held that small and trivial disputes between the husband and wife could not be treated to have constituted 'cruelty' as meant under Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act of 1955'). Further, learned trial Court held that though the evidence of wife residing separately is there, as the appellant has not made serious effort to bring his wife back, it cannot be said to be a case of complete desertion.

5. Curiously enough, with the said finding, learned trial Court proceeded to grant decree of judicial separation invoking his discretion under Section 13-A of the Act of 1955.

6. Learned counsel for the appellant argued that with overwhelming pleadings and evidence having remained completely uncontroverted, as the respondent remained ex parte, learned trial Court was obliged under the law

to hold in favour of the appellant that the appellant was not only subjected to cruelty but respondent wife had also deserted without any reasonable cause. He further submits that though, recording a very cryptic finding, decree of a judicial separation has been granted on the basis of uncontroverted pleadings and evidence. The appellant was entitled to decree of divorce both on the ground of cruelty and desertion.

7. Learned counsel for the respondent opposes and submits that the judgment and decree passed by the learned trial Court is based on the judicial discretion available to the family Court under Section 13-A of the Act of 1955. The trial Court having found that the dispute between the husband and wife was of trivial nature which cannot be treated as cruelty and that the appellant had not made serious effort to bring his wife back to the matrimonial house, rightly granted decree of judicial separation.

8. We have heard learned counsel for the parties and perused the records.

9. We inquired from learned counsel for the parties as to whether the respondent challenged the ex parte judgment and decree. It has been stated at the bar by learned counsel for the parties that though an application for setting aside ex parte decree was moved before the family Court, the application was finally rejected. We also inquired whether the respondent had filed any appeal against the order rejecting application for setting aside ex parte decree. On this count also, we have been informed that respondent has not filed any appeal before this Court.

10. The pleadings and evidence led by the plaintiff have remained uncontroverted. We are required to see whether the plaintiff has made pleadings in support of his case for cruelty and desertion and whether he has led evidence to prove the same.

11. Specific pleading has been made in the plaint by the appellant alleging that the respondent, ever since married, had been misbehaving with the appellant and his family. It has been averred that respondent was misbehaving and not giving due respect to the elder members of the family, insulting appellant and his mother, not taking any interest in household works,

passing remarks against the appellant that he is rustic beggar and impotent person. It was also pleaded that the respondent indulged in frequent quarrel and '*marpeet*' with the mother and the appellant. She had also thrown chilly powder in the eyes of his mother and she was also subjected to physical assault. It was also pleaded that the respondent had openly scolded the appellant as an old beggar. It was specifically pleaded that during the course of cohabitation in the night, the respondent made serious allegation against the appellant and scolded him saying that he is an impotent person which caused serious agony to the appellant so much so that he started weeping. In this manner, the respondent continuously harassed and subjected the appellant to cruelty. It was also specifically pleaded that the respondent was a lady of easy virtue and was frequently entering into friendship with other persons and finally she left the matrimonial house on 04.08.2012 and thereafter, never returned and then lodged criminal cases against the appellant and his mother.

12. The aforesaid pleadings have been proved from overwhelming evidence led by the appellant and other three witnesses. All the allegations which have been pleaded in the pleadings have been specifically stated in affidavit under Order 18 Rule 4 CPC which include the allegation of taunting and openly declaring the appellant as an impotent person, quarreling and assaulting the mother, thrown chilly powder in the eyes. Similar is the evidence of other three witnesses, who have clearly stated regarding the aforesaid act.

13. It has been specifically pleaded and proved that on 04.08.2012, the respondent left the matrimonial house. Those pleadings and evidence have remained uncontroverted. It was for the respondent to prove that she had reasonable cause in not residing with husband ever since 04.08.2012.

14. Thus, from the aforesaid pleadings and uncontroverted evidence led by the appellant, both the allegations of cruelty as well as desertion are fully made out and the appellant was entitled to decree both on the ground of cruelty and desertion.

15. We find that learned Family Court has granted a decree of judicial separation instead of granting decree of divorce in exercise of its discretion

under Section 13-A of the Act of 1955 which reads as under :-

“13.A -Alternate relief in divorce proceedings - In any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.”

No doubt, the said provision confers on the Court's, discretion either to grant decree of divorce on the grounds stated in Section 13 (barring clauses (ii), (vi), (vii) of sub-section 1) or to grant decree of judicial separation, however, the said discretion is required to be exercised judiciously and not in mechanical manner. The respondent remained ex parte. The pleadings and evidence on record remained uncontroverted which not only proved cruelty but also desertion. Thus, there was absolutely no material or circumstance before the trial Court to exercise its discretion to depart from the normal rule and grant of decree of judicial separation, by taking recourse to the discretion conferred under Section 13-A of the Act of 1955.

16. In the result, we modify the impugned judgment and decree in the manner that the appellant is held entitled to decree of divorce both on the grounds of cruelty and desertion. The appeal is accordingly allowed. The appellate decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Gautam Chourdiya)
Judge