

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No.87 of 2015**

- Sharad Chandra Tiwari S/o Late Narmada Prasad Tiwari Aged About 54 Years R/o Saraswati Nagar, Near Chhattisgarh Cycle Store, Nayapara Road, Ward No. 34, Tahsil And District Durg Chhattisgarh , Chhattisgarh

---- Appellant/Applicant**Versus**

- Smt. Saraswati Tiwari W/o Sharad Chandra Tiwari D/o Late Jeevan Lal Aged About 51 Years R/o Near Hatri Market, Village Sarkhon, Tahsil Janjgir, District Janjgir Champa Chhattisgarh Office Address- Teacher, Purva Madhyamik Shala, Village Sarkhon, Tahsil Janjgir, District Janjgir Champa Chhattisgarh , Chhattisgarh

---- Respondent/Non-applicant

For Appellant	:	Shri R.N. Jha, Advocate
For Respondent	:	Shri Vineet Kumar Pandey, Advocate

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor
Order on Board

Per Manindra Mohan Shrivastava, J.**14/10/2019**

1. This appeal is directed against the impugned judgment and decree dated 26-06-2015 passed by the Principal Judge, Family Court, Durg in Civil Suit No.516-A/2013, whereby appellant's application for grant of decree of divorce on the ground of cruelty and desertion has been rejected.

2. Appellant-husband moved an application before the Family Court, seeking decree of divorce from respondent-wife on the twin grounds of cruelty and desertion. In the application, it was pleaded that at the time of marriage of the parties in the year 2005, the appellant was residing with his old aged mother and two younger brothers and their families at Durg. According to the appellant/husband, respondent-wife was made aware of the family

circumstances and she had agreed that after marriage, she will get her transferred from her maternal place to matrimonial place. In the course of time, mother of the appellant died on 28-12-2005 and his wife expressed her willingness to get her transferred after the end of educational session in June-July, 2006. Further pleading was that thereafter, respondent-wife did not take interest in getting herself transferred from Village Sarkhon to the matrimonial place at Durg and later on, she insisted the appellant-husband to get himself transferred at the place, where she was residing and working. It was further pleaded that the respondent-wife was insisting the appellant to get him separated from two brothers, who were residing along with him and later on, because of the allegations that the appellant's brother were enjoying on the income of the appellant-husband, one of the brother got separated on 01-06-2009. Thereafter, it was pleaded, wife insisted that the other unmarried brother should also be separated and when he did not leave the house, the respondent-wife left the matrimonial house on 15-06-2009 and thereafter, did not return. According to the appellant, the conduct of the respondent-wife in insisting him to live separately from his brothers and not getting herself transferred to Durg and residing at her working place i.e. Village Sarkhon, with no intention to come back to her matrimonial house, entitled the appellant to grant of decree of divorce on the ground of cruelty and desertion both.

3. The respondent-wife in her written statement denied all the allegations and stated that the husband had full notice and knowledge at the time of marriage that she was posted and working at Village Sarkhon. It was pleaded that she borrowed house building loan of Rs.5 Lakhs from the State Bank for construction of house of her father and repaying loan in installments. It was also pleaded that after discussion with her husband, she applied for transfer and she was also taken to the District Education Officer, Durg, by her husband and all

efforts were made for getting her transferred. It was also pleaded that the reason for one of the brother of the appellant to get separated was not due to the respondent-wife, but because of dispute with the appellant-husband. The respondent-wife further pleaded that she had told her husband as he is posted at Gunderdehi and not at Durg, there would be no purpose served in residing at Durg. She further pleaded that she is willing to live in the matrimonial house along with her husband and also pleaded that if ultimately, transfer is not effected, she is prepared to take voluntary retirement also, rather than quitting her married life.

4. The parties led their oral as well as documentary evidence before the Court below.

5. Learned Family Court, upon examination of evidence on record, came to the conclusion that the appellant-husband failed to prove any of the grounds, on which, he can be granted decree of divorce. Both the grounds i.e. cruelty and desertion were not found proved, leading to dismissal of the suit.

6. Assailing legality and validity of the impugned judgment and decree passed by the Family Court, learned counsel for the appellant would argue that as far as ground of cruelty is concerned, the appellant has not only specifically pleaded in the plaint, but also led his own evidence as also his younger brother-Shailendra Tiwari that the respondent-wife insisted upon the appellant to get him separated from brothers on the allegations that the appellant's brothers were enjoying on his income and due to this allegation, one of his brother got separated on 01-06-2009. This allegation of the husband having been pleaded and proved, clear ground of cruelty is made out, as held by the Supreme Court in the case of **Narendra v. K. Meena**¹, relied upon by the Division Bench of this Court in the case of **Prabir Kumar Das v. Smt. Papiya Das**². He would further

¹ AIR 2016 SC 4599

² FAM No.97/2014, decided on 29-01-2018

argue that as far as ground of desertion is concerned, even the respondent-wife has admitted that after 2010, she never visited the house of the appellant. Her pleading and evidence is that she had visited the house of the appellant-husband, after receiving the notice on the application for grant of decree of divorce, is liable to be disbelieved and her evidence is vague and unspecific. Further submission is that the respondent-wife, by her conduct, has showed that she was never interested in residing with her husband, because she never made serious efforts to get herself transferred from Village Sarkhon to Durg i.e. matrimonial house. This conduct on the part of the respondent-wife shows her intention of deserting her husband and marital relations with the appellant to come to an end for all times to come. It is also submitted that where parties have been living separately since long time and there is no possibility of re-union, the only remedy left with the Court is to grant decree of divorce, as held by the Division Bench of this Court in the case of **Smt. Vijaya Laxmi Soni v. Raj Kumar Soni**³.

7. On the other hand, learned counsel for the respondent-wife would submit that the allegation of cruelty is nowhere specifically pleaded, much less proved. The allegations are vague and there is variance in pleading and evidence as also contradiction in the evidence of appellant-husband and what has been stated by his brother on the aspect of cruelty. It is also submitted that one of the brother of the appellant-husband, who got himself separated on 01-06-2009, has not entered into the witness box to say that because of quarrel with the wife of the appellant, he had to leave the house. The allegation that the respondent-wife would be insisting the appellant-husband to get him separated from his brothers, has rightly been disbelieved by the learned Family Court, because the respondent-wife herself was not residing at Durg, but residing at Village

3 2009(2) CGLJ 72 (DB)

Sarkhon. Mere allegation that brothers of the appellant-husband were enjoying on the income of her husband, would not amount to cruelty. On the aspect of desertion, it is argued that the respondent-wife has clearly stated that in the beginning of educational session, she had to come back to Village Sarkhon on 15-06-2009 and not because she is having an intention of deserting her husband. It is also argued that the respondent-wife has pleaded and stated in her evidence that in the month of October, when she went to the matrimonial house, doors were shut and she was made to return unceremoniously and therefore, she cannot be blamed on the allegation of desertion. It is also argued that the appellant has admitted that in the year 2010, after election, when he became seriously sick on account of Jaundice, he had stayed with his wife in the Village Sarkhon for two months, where the respondent-wife served husband to overcome from the disease-Jaundice. Therefore, it cannot be said that the wife had any intention of deserting her husband.

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

10. Appellant-husband filed an application for seeking decree of divorce on the ground of cruelty and desertion both. Learned Family Court was of the view that both the grounds were not found proved.

In the application for grant of decree of divorce filed by the appellant-husband, towards allegation of cruelty, in para 4 & 5, it has been pleaded that the respondent-wife did not take any interest to get herself transferred to matrimonial place and insisting her husband to get himself transferred to Village Sarkhon to live along with wife. The other aspect of allegation is that the wife insisted the husband to get him separated from his brothers, due to which, one of brothers ultimately got separated on 01-06-2009 and when unmarried brother alone remained in the house, wife insisted the husband to get him separated from this brother also, but when the appellant did not agree to the same, she left

him on 15-06-2009 and never returned. The reply/written statement of the wife shows that these allegations have been specifically denied.

11. As to whether such conduct of the wife would constitute cruelty, we may consider it apposite to refer to judgment of the Supreme Court in the case of **Narendra** (supra), wherein it has been held that the persistent effort of the respondent-wife to constrain the appellant-husband to be separated from the family would be torturous for the husband and constitutes an act of cruelty. Similar is the view taken by the Division Bench of this Court in the case of **Prabir Kumar Das** (supra). Therefore, it has to be seen whether the appellant-husband has proved this ground.

12. The evidence of the husband as stated in para 4 & 5 of his affidavit under Order 18 Rule 4 CPC is that the wife was insisting the husband to get himself transferred to Village Sarkhon and that she expressed that she is not inclined to live in the joint family and further that she has made allegation that his brothers were enjoying on the income of the appellant-husband, due to which, one of the brothers was got separated on 01-06-2009. However, this particular statement that one of the brothers, because of the allegations made by the wife that they were enjoying on the income of the husband, decided to get himself separated, has not been supported from the evidence of that brother because he has not entered into the witness box. Moreover, the pleading and evidence shows that the wife used to make allegations against the brothers of the appellant that they were dependent on the income of her husband and it is because of this allegations that one of the brothers of the appellant-husband was got separated.

13. It has come in the evidence and undisputed position on record that even at the time of marriage, the respondent-wife was posted in Village Sarkhon and was earning. That means, the respondent-wife was actually not residing with the appellant-husband at Durg. It is relevant to note from the evidence on record as

well as admitted position that the appellant-husband was posted and working at Gunderdehi, not at Durg. According to him, he was actually residing at Durg, but then the fact remains that the wife was actually not residing at her matrimonial house at Durg. Evidence has come on record that whenever the respondent-wife used to come to reside at Durg along with her husband during holidays, during that period, some allegations were made by the wife on her own perception that brothers of the appellant-husband were enjoying on the income of the appellant-husband and dependent on the income of the appellant-husband. That by itself would not constitute cruelty. The allegations that one of the brothers of the appellant-husband got separated on 01-06-2009, because of such allegations, could be proved from the evidence of that brother, who has not been examined.

Otherwise also, such allegation of wife insisting the appellant-husband to get him separated from his brothers, who were dependents and enjoying on the income of the appellant-husband, particularly when the wife herself is not residing with the appellant-husband, but she is residing elsewhere, such allegations are quite improbable and exaggerated. All that can be derived from the evidence is that the wife was under impression that the brothers of the appellant-husband were enjoying and dependent on the income of the appellant-husband, to which, she had certain objection also. However, that by itself would not constitute cruelty unless it is proved from the evidence that there was persistent insistence by the wife that brothers of the appellant-husband should get separated from the appellant-husband. Present is not a case where the wife was insisting the husband to get separated from his old aged parents, who were fully dependent on her husband, as held in the case of **Narendra** (supra). Brothers of the appellant-husband do not appear to be dependents, because according to the evidence, one of the brothers was got separated, was

working in Bhilai Steel Plant and other brother (Applicant Witness No.2)- Shailendra Tiwari is Practicing Lawyer and looking to his age, it cannot be said that he was dependent on his brother. The appellant himself is working as Veterinary Assistant in the Hospital at Gunderdehi. Viewed from this angle also, the appellant's case and the evidence that the wife would be making such allegations that the brothers are dependent on the husband and enjoying income of the appellant-husband, is rendered improbable and afterthought allegations. On such evidence, it cannot be said that the cruelty is of such nature, so as to entitle the appellant-husband to grant of decree of divorce. There may be disputes for the reason that the parties were not residing together. Even we accept for the argument sake that the respondent-wife was making allegations that brothers of the appellant-husband were enjoying income of the husband and they were dependent on the appellant-husband, by any stretch of imagination, would not constitute cruelty. As to what would amount to cruelty, the Supreme Court has elaborately dealt with the aspect in the case of **Samar Ghosh v. Jaya Ghosh**⁴, wherein the Supreme Court has indicated illustrative cases where inference of mental cruelty can be drawn, as observed in para 101 of the judgment, which is reproduced hereinbelow:-

“101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of “mental cruelty”. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty,

4 (2007) 4 SCC 511

frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrel, normal wear and tear of the married life which happens in day-to-day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilisation without medical reasons and without the consent or knowledge of his wife and similarly, if the wife undergoes vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in

such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.”

14. In another judgment in the case of **V. Bhagat v. D. Bhagat(Mrs.)**⁵, it has been held that mental cruelty as provided in Section 13(1)(i-a) can broadly be defined as that conduct which inflicts upon the other party, such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is also held that while arriving at such conclusion, regard must be had to the social status, educational level of the parties, the society they move in, the possibility or otherwise of the parties ever living together in case they are already living apart and all other relevant facts and circumstances which it is neither possible nor desirable to set out exhaustively. It was also highlighted that what is cruelty in one case may not amount to cruelty in another case. It is a matter to be determined in each case having regard to the facts and circumstances of that case.

15. In **Naveen Kohli v. Neelu Kohli**⁶, the Supreme Court explained cruelty, that has to be understood in the ordinary sense of the term in matrimonial affairs. If the intention to harm, harass or hurt could be inferred by the nature of the conduct or brutal act complained of, cruelty could be easily established. But the absence of intention should not make any difference in the case. There may be instances of cruelty by unintentional but inexcusable conduct of any party.

16. At this stage, looking to the present circumstances and the grounds urged in the present case, it is also relevant to refer to some of the observations made by the Supreme Court in the case of **Narendra** (supra), which was a case

⁵ (1994) 1 SCC 337

⁶ (2006) 4 SCC 558

where the wife was alleged to insist the husband to get separated from his parents. Observations made in paras 12, 13 & 14 of the aforesaid case, are as below:-

12. "The respondent wife wanted the appellant to get separated from his family. The evidence shows that the family was virtually maintained from the income of the appellant husband. It is not a common practice or desirable culture for a Hindu son in India to get separated from the parents upon getting married at the instance of the wife, especially when the son is the only earning member in the family. A son, brought up and given education by his parents, has a moral and legal obligation to take care and maintain the parents, when they become old and when they have either no income or have a meagre income. In India, generally people do not subscribe to the western thought, where, upon getting married or attaining majority, the son gets separated from the family. In normal circumstances, a wife is expected to be with the family of the husband after the marriage. She becomes integral to and forms part of the family of the husband and normally without any justifiable strong reason, she would never insist that her husband should get separated from the family and live only with her.

13. In the instant case, upon appreciation of the evidence, the trial court came to the conclusion that merely for monetary considerations, the respondent wife wanted to get her husband separated from his family. The averment of the respondent was to the effect that the income of the appellant was also spent for maintaining his family. The said grievance of the respondent is absolutely unjustified. A son maintaining his parents is absolutely normal in Indian culture and ethos. There is no other reason for which the respondent wanted the appellant to be separated from the family—the sole reason was to enjoy the income of the appellant. Unfortunately, the High Court considered this to be a justifiable reason.

14. In the opinion of the High Court, the wife had a legitimate expectation to see that the income of her husband is used for her and not for the family members of the respondent husband. We do not see any reason to justify the said view of the High Court. As stated herein-above, in a Hindu society, it is a pious obligation of the son to maintain the parents. If a wife makes an attempt to deviate from the normal practice and normal custom of the society, she must have some justifiable reason for that and in this case, we do not find any justifiable reason, except monetary consideration of the respondent wife. In our opinion, normally, no husband would tolerate this and no son would like to be separated from his old parents and other family members, who are also dependent upon his income. The persistent effort of the respondent wife to constrain the appellant to be separated from the family would be tortuous for the husband and in our opinion, the trial court was right when it came to the conclusion that this constitutes an act of "cruelty".

17. The nature of pleading and evidence, as has been led by the husband and upon scrutiny of material on records to find out whether cruelty has been established, we find ourselves unable to accept that serious allegations were

made by the respondent-wife that the brothers of the appellant-husband were enjoying on the income of the appellant-husband and it appears to be quite improbable. According to the evidence of the appellant himself, both the brothers of the appellant are self dependent and not unemployed person. Secondly, even if it were to be assumed that the such allegations were made by the wife, the pleadings and evidence in this regard are extremely vague in nature without giving any specific instances of such allegations. Brother of the appellant, who got separated in June, 2009, has not been examined. Moreover, wife herself was not residing at Durg, but she used to come at Durg only during leave. Therefore, on totality of the evidence on record, we do not find that the evidence on record is sufficient to come to the conclusion that the wife committed cruelty on the husband of such a nature, that a decree of divorce is required to be granted in favour of the husband.

18. As far as ground of desertion is concerned, this is required to be appreciated in the background that at the time of marriage itself, both the appellant-husband and respondent-wife were employed and posted as government servant at two different places. The appellant-husband is posted and working as Veterinary Assistant at Gunderdehi, whereas the respondent-wife is posted and working at Village Sarkhon, District Janjigr-Champa. This fact was known to both the parties. In the pleadings and the evidence, the appellant-husband has come out that the respondent-wife has not taken any steps for getting herself transferred to Durg, whereas the respondent-wife has very specifically pleaded that she made an application for getting herself transferred to Durg and even her husband had gone along with her to get her transferred. Respondent-wife, N.A.W.-1 in para 2 of her evidence has stated that she had applied for transfer and number of applications were moved on 04-04-2010, 01-05-2010, 22-06-2010 to the government. She has stated that on 04-04-2010,

she had submitted an application and also contacted the then District Education Officer along with her husband and enquiry was also made with regard to vacancies and informed that certain vacancies were available, then application was also made to the higher authorities for her transfer. This evidence of the respondent-wife has remained uncontroverted in her cross-examination.

The appellant-husband in para 16 of his cross-examination has admitted that he had assured his wife that after marriage, he will get her transferred to Durg or any nearby places.

19. From the aforesaid evidence, it is clear that the respondent-wife cannot be blamed by saying that she did not apply for transfer. The very fact that the respondent-wife was moving application for getting herself transferred from Village Sarkhon to Durg, shows that there was no intention on the part of the respondent-wife to desert her husband.

The respondent-wife has very specifically pleaded and led evidence that after completion of panchayat election in the year 2010, the appellant-husband become sick, suffering from jaundice and during that sickness, he resided along with his wife for two months and the respondent-wife served her husband, so that he gets well. This fact has been admitted by the appellant-husband himself in his cross-examination. In para 25 of his cross-examination, the appellant-husband has admitted that in the year 2010, after election, when he became sick, he was taken by his wife to her maternal place and there, he had taken treatment and at that time, his wife had fully served him.

20. In view of the aforesaid evidence and admitted position regarding the appellant having stated in his evidence that the respondent-wife served her husband for two months at maternal place, when he become sick, the allegation against the respondent-wife, deserting her husband on 15-06-2009, is liable to be rejected.

The respondent-wife has not pleaded, but she has stated that when she received notice of legal proceedings of divorce from the appellant-husband in the month of October-2010 and came to the matrimonial house at Durg, then she was not allowed to enter into the house and shunted out by her brother-in-law, younger brother of appellant-husband and the appellant-husband did not object towards conduct of his brother in not allowing his wife to reside in the matrimonial house. From this evidence, it is clear that the wife had no intention to desert her husband.

21. Merely, separate living without any intention, does not amount to desertion within the meaning of the term as defined under Section 13 of the Hindu Marriage Act. A decree of divorce on the ground of desertion can be granted only when it is established that the other party had completely deserted with all intention to bring marital relations to come to an end. In the present circumstances of the case, where the respondent-wife was posted and working at some other place, it is proved that she had made applications for her transfer to matrimonial house to live along with her husband and she visited her matrimonial house in the month of June, 2009 and coupled with the evidence of respondent-wife that when she visited matrimonial house in the year, 2010, she was not allowed to enter into the house, it is difficult to hold that the wife deserted her husband with an intention to bring their marital relations to come to an end. Therefore, ground of desertion is also not made out.

22. In the result, we do not find any good ground to interfere with the impugned judgment and decree passed by the Court below. The appeal fails and hereby dismissed. Let appellate decree be accordingly drawn.

SD/-
(Manindra Mohan Shrivastava)
Judge

SD/-
(Vimla Singh Kapoor)
Judge