

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal (M) No. 46 of 2017

- Swati Kekatpurey, W/o Sudhakar Rao Kekatpurey, aged about 53 years, R/o S-15, Sector-1, Extension Avanti Vihar, Post Ravigram, Telibandha, Raipur, District Raipur, Chhattisgarh.

---Appellant

Versus

- Sudhakar Kekatpurey, S/o Late Shri Rampant Kekatpurey, aged about 59 years, R/o Krishak Nagar, Labhandi, Tahsil and District Raipur, Chhattisgarh.

---Respondent

For the Appellant :- Mr. Rahul Tamaskar, Advocate.

For the Respondent :- Mr. Sachin Singh Rajpoot, Advocate

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Order on Board by Justice Manindra Mohan Shrivastava J.
25.02.2020

This appeal is directed against impugned judgment and decree dated 09.02.2017 passed by Family Court, Raipur by which the learned Family Court has granted decree of divorce in favour of respondent/husband and against appellant/wife.

2. An application for grant of decree of divorce was filed by the respondent/husband on the pleadings that the parties were married according to Hindu rites and rituals on 08.02.1985. After one year of marriage, respondent/husband was transferred to Chhindwada (MP) where the parties resided together for about 14 years. Upon reorganization of State of Chhattisgarh, husband was transferred to Dantewada where he used to reside alone and respondent/wife was residing with her father at Raipur. Thereafter, in the year 2006, the husband was transferred to Raipur but, appellant/wife refused

to stay with him. It was further pleaded that the wife was insisting her husband to reside in her parental house as *Ghar Jamai*. Due to this, the differences kept on increasing so much so that even after transfer of husband from Dantewada to Raipur, wife refused to reside alongwith him and is residing separately for six years. Further pleading was that three legal notices were given to wife on 21.09.2007, 24.10.2007 and 06.11.2007 offering her to come back along with children to matrimonial house. But despite that, appellant/wife did not come back to the matrimonial house and thus deprived the husband of martial life and peace for more than six years. It was stated that this act on the part of the wife amounts to cruelty. Decree of divorce was thus sought by the husband.

3. Appellant/wife in her written statement, denied all the allegations and stated that since marriage between the parties, the behavior of husband has been cruel with her due to which, she was compelled to reside with her parents. Replying to the allegations, it was further stated that she never insisted her husband, to reside in her parental house as *Ghar Jamai*. According to wife, it was not she who deserted her husband, but it was the husband, who disowned her and despite efforts made, he did not allow her to reside in matrimonial house due to which, she was compelled by the circumstances to live alongwith her parents at Raipur.

4. The learned Family Court, on the basis of the pleading of the parties, framed issue as to whether the appellant/wife had committed cruelty against the husband and on that basis, whether husband was entitled to decree of divorce. The issue appears to

framed like that in view of pleadings made in the plaint that the act of the wife in refusing to reside with the husband amounts to cruelty. After allowing the parties to lead oral and documentary evidence, learned Family Court, by impugned judgment held that the appellant/wife deserted her husband which is an act not only of cruelty but desertion, entitling the husband to decree of divorce. It is this judgment and decree which is under challenge in this appeal.

5. Learned counsel for the appellant/wife would firstly argue that the Court below has committed gross illegality in granting decree of divorce on the ground that appellant/wife refused to reside with the husband in matrimonial life, which amounts to cruelty. He would submit that the factual averments made in the plaint were related to grounds of desertion and not of cruelty. Therefore, the learned Family Court was not justified in granting decree on the ground of cruelty. Next submission of learned counsel for the appellant is that the learned Family Court fell in error of law as well as facts both, in holding that appellant had left her husband and refused to reside with him despite repeated requests, ignoring that even according to the pleadings and evidence of respondent/husband, he was residing at Dantewada for long time and it has been stated both by the appellant/wife and her mother that when husband was proceeding to transfer on Dantewada, he himself left behind his wife and children stating that it would be proper that they continue to reside at Raipur looking to educational needs of their children. The learned Family Court also ignored to take into consideration clinching evidence that even

during that period, husband was posted at Dantewada, appellant/wife visited her at least on four occasions. In her evidence, appellant/wife has clearly stated that after she received three notices given by her husband, she went along with her children to the house of the husband but her husband refused to allow wife and children to reside with him. Therefore, present is not a case where the appellant/wife deserted her husband but it is a case where husband deserted the wife, therefore, no ground is made out for grant of decree of divorce.

6. In reply, learned counsel for respondent/husband would argue that the decree of divorce has been granted in favour of respondent/husband taking into consideration that the appellant/wife deserted the husband. It being an admitted position that in the year 2006, respondent/husband came back to Raipur in connection with his service, the wife was required to prove the date/dates on which she came to the matrimonial house and the date/dates on which, she was unceremoniously shunted out of the matrimonial house. Learned counsel would further submit that it has been specifically pleaded and proved by respondent/husband that when he returned to Raipur he requested his wife to come back, she did not come, which was followed by three registered notices given to her in the year 2007. The evidence of appellant/wife that after receipt of those notices, though, she did not reply, she went to the house of the husband but was not allowed, is not supported with any pleading and it has come for the first time in evidence of the wife, that too, without giving any specific date, month in which she went back to the matrimonial house and was refused entry. Further

submission of learned counsel for respondent is that as far as pleading of cruelty is concerned, neither in the plaint nor in the written statement nor anywhere in the evidence, appellant/wife has stated regarding any specific cruelty on her, except making omnibus allegation. Therefore, that being the only ground taken by the wife in her written statement to justify her living separately from her husband, the act of appellant/wife living separately for long without any cause attributable to the husband amounts to cruelty or in any case, it would amount to desertion and even if, it is held that mere desertion by itself did not amount to cruelty, desertion constitutes one of the grounds on which a decree of divorce can be granted.

7. We have learned counsel for the parties, perused the material on record and impugned judgment.

8. The pleadings made by the respondent/husband are to the effect that the parties were married in the year 1985, they were blessed with two children and initially for one year, they resided at Janjgir and thereafter, they resided for about 14 years at Chhindwada and it has also come on record and is an admitted position that respondent/husband owned certain property at Chhindwada. The other admitted position on record is that after creation of State of Chhattisgarh, the respondent/husband was posted at Dantewada where, for about 4 years, he worked alone where his family and wife were not with him. This fact has been stated in the plaint by respondent/husband and has not been disputed. However, the husband in his evidence has come out with the case that when he was proceeding to Dantewada, he

requested his wife to come along but she refused, whereas the evidence of wife in this regard has been that she was asked by her husband to stay back with children with assurance to take her to Dantewada as soon as appropriate residential arrangements are made. The evidence of the appellant as well as respondent on this account is without any pleading with regard to actual cause of respondent/husband residing alone at Dantewada. However, there is specific evidence led by the appellant/wife (NA-1) that during the period of stay of her husband at Sukma, she had visited Sukma on four occasions. From this evidence, it cannot be said that either wife had deserted the husband or husband did not allow her to reside with him while he was posted and working at Dantewada/Sukma.

9. In Paragraph 5 of the plaint, it has been pleaded that after respondent/husband was transferred to Raipur, his wife refused to reside with him and since then, they have been living separately. It has also been pleaded that on several occasions attempts were made to bring about settlement but appellant/wife refused to reside with her husband. Another important pleading contained Paragraph 7 of the plaint is that three legal notices through counsel were sent to the wife on 21.09.2007, 24.10.2007 and 06.11.2007 by registered post, requesting wife to come back along with children but that was also not replied and wife did not come back and thereby deserted the husband for six years, which is an act of cruelty also. In his evidence, respondent/husband has stated the aforesaid facts of coming back to Raipur, requesting his wife to reside with him, she refusing reside with him, giving of legal notices

but wife not coming to the matrimonial house. In his cross-examination, he denied that after receipt of notices, when the wife came to the matrimonial house along with children to reside, he refused entry. He admits that he has not specifically stated the dates on which he went to bring his wife back to the matrimonial house and when the attempts to settle the disputes were made. He also admits that for about one and a half years before, his wife had attended marriage of his nephew and admits that at the time of death of her father also she had come. Suggestion given to him that his wife and children were not residing with him because of his bad conduct and character, has been denied.

10. AW-2, Alka Lote – sister of respondent/husband has deposed in her affidavit that she went to appellant/wife requesting her to come back and reside with Sudhakar but she refused. She denied that when appellant/wife had gone to the house of the respondent/husband, he refused entry.

11. As far as husband's case that upon his posting from Dantewada to Raipur, the wife did not come to reside with him and further that he sent as many as three notices which have already been exhibited as Ex.A-3, A-4 and A-5, in all these notices, it has been clearly stated that an offer was made by the husband to the wife that she should come back to the matrimonial house along with children. This has also come in his evidence.

Appellant/wife has not disputed receipt of these notices. However, in her evidence she has stated that after receiving notices, she went to the house of the husband but she was not allowed entry. Firstly, this statement is without any pleading that

after receipt of notices, she went to the house of the husband but refused entry. Secondly, she has not stated the date and month when she went to the house of the husband. On the face of such notice in writing, receipt of which has not been disputed by wife, it cannot be said that the husband was not willing to keep his wife and children along with him otherwise, he would have never sent such legal notices. Such efforts made by the husband to bring his wife and children back could be treated to be only a misleading act if it is proved that, after receipt of the notices, though, wife went to the house of the husband, she was not allowed entry. But as there was no such pleading and in the evidence also no specific date and month has been mentioned, we are unable to accept this version of the appellant/wife that after receipt of notices, she went to the house of her husband but was not allowed entry. That means, despite receiving notices, appellant/wife did not go to the house of the husband. These three notices were given by respondent/husband to the appellant in the year 2007 i.e. soon after respondent/husband was posted from Dantewada to Raipur.

12. Appellant/wife in her written statement, came out with the case that she was compelled to reside in the house of her parents at Raipur because the respondent/husband had subjected her to cruelty. However, the pleadings in this regard are blissfully vague, giving no details of such cruelty much less, the period or nature of cruelty alleged to be committed on the wife. In her evidence also, not a single instance of cruelty, physical or mental, has been stated in her evidence. This cause shown by the wife in the written statement is thus not at all proved.

13. Learned counsel for the appellant/wife highlighted the evidence in which, it has come that the wife attended the marriage of nephew and also came to attend the last ceremony upon death of her father-in-law. As far as attending marriage of nephew at different station is concerned, that by itself, would not mean that the wife has not deserted her husband. The date on which, husband's father died has not been mentioned and is not known when she visited the house after death of her father-in-law. The wife having failed to prove any cruelty meted out to her nor able to prove that after receipt of three notices, she went to the house of the husband to reside along with him since year 2007, the finding of learned Court below that the wife refused to reside along with the husband since 2007 does not warrant any interference.

14. Learned counsel for the appellant has also stated that during the course of evidence of appellant and respondent while appellant has stated that she is willing to reside with her husband, respondent has stated that he is no longer interested to reside with the wife and this specific evidence could be taken as a case of desertion by the husband and not by the wife.

The statements of the parties were recorded in the year 2015. The grounds of cruelty and desertion are required to be considered as on the date of filing of the application. If the husband has succeeded in proving that the wife deserted him since 2007 and refused to reside with him, any statement made in 2015 in the Court that now she is willing to reside with the husband or the statement of the husband made out of disguise that at this distance

of time, he is not inclined to reside with his wife, will not non-suit the husband, if the grounds are otherwise made out.

15. We find that the learned Court below has granted decree of divorce on the ground of cruelty by holding that the act of the appellant/wife in refusing to reside with the husband amounts to cruelty. Merely because the wife has refused to reside with the husband for which she may not have any reasonable cause, that by itself, cannot be treated to be a case of cruelty. But definitely, this would constitute a ground of divorce in view of provision contained in Section 13 (1) (i) (b) which provides that the marriage can be dissolved by decree of divorce on the ground that the other party has deserted the petitioner for continuous period of not less than two years immediately preceding the presentation of petition. This legal requirement stands proved from the pleadings and evidence of the respondent/husband.

16. Even though, it would not be construed as a ground, we also find that the parties are living separately since last more than 12 years and there is no likelihood of them coming together because all efforts of mediation settlement have also failed in the trial Court as well as before this Court.

17. Therefore, we are not inclined to interfere with the impugned judgment and decree of grant of divorce, though, we hold that the respondent/husband is entitled to grant decree of divorce not on the ground of cruelty but on the ground of desertion.

18. At the last, learned counsel for the appellant submitted that the appellant/wife is entitled to permanent alimony as provided

under Section 25 of Hindu Marriage Act. We find that no such prayer was made before the Family Court and therefore, the Family Court had no occasion to deal with this aspect. Even then, if we would have decided this issue, had there been relevant material with regard to the financial status, earning, properties etc. which the parties may be possessed of. As there is not enough material on record to decide this aspect, we leave the appellant/wife to separately move an application for grant of permanent alimony under Section 25 of Hindu Marriage Act before the Family Court.

19. Appeal is thus dismissed. Parties to bear their respective costs. Let appellate decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Ajay

Sd/-

(Vimla Singh Kapoor)
Judge