

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 99 of 2017

- Ajay Kashyap, aged about 30 years, S/o Ramkrishna Kashyap, R/o Manish Suhag Bhandar, Mohan Talkies Road, Jamnipali, Indranagar, Tahsil Katghora, District Korba, Chhattisgarh.

---- Appellant

Versus

- Smt. Shashi Prabha Kashyap, W/o Ajay Kashayap, aged about 30 years, R/o Behind Block Colony, Thana Kasdol, District Balodabazar, Chhattisgarh.

---- Respondent

For the Appellant	:-	Mr. Parag Kotecha, Advocate.
For the Respondent	:-	Mr. Hemant Kesharwani, Advocate.

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

Order on Board by Justice Manindra Mohan Shrivastava J.

02.09.2020

Heard.

2. This appeal is directed against impugned judgment and decree dated 11.05.2017 passed by Family Court, Camp Court, Katghora, District Korba (CG) in Civil Suit No.06-A/2016 by which appellant's application for grant of decree of divorce has been rejected.

3. Appellant/husband filed an application for grant of decree of divorce on the pleadings *inter alia* that the marriage of the parties was solemnized on 29.05.2013 according to Hindu rites and customs at Kasdol, District Baloda Bazar. Appellant pleaded that after marriage, the wife initially discharged marital obligation but, later on, she started frequently visiting her parental house without informing the appellant and despite repeated request respondent/wife stated that she would come back as and when she

desires. It was also pleaded that after return, respondent used to enter into quarrel and abuses. Later on, respondent/wife insisted the husband to live separately from his parents and when this was opposed, respondent started subjecting the appellant to physical and mental cruelty in many ways. In addition to pleading of cruelty, the appellant also pleaded that the respondent/wife had left the matrimonial house on 02.11.2013 along with her father and since then, she did not return, despite repeated request made and has finally left the appellant stating that she would never return to matrimonial house. In this manner respondent/wife completely deprived the appellant of the marital relationship and deserted him.

4. Respondent/wife, on the other hand, opposed the grounds raised, specifically denying the allegation of cruelty and desertion and stated that it is the appellant who has been subjecting her to cruelty. She has also pleaded that, though, the husband had moved an application under Section 9 of the Hindu Marriage Act for Restitution of Conjugal Rights, in those proceedings, the respondent/wife appeared and expressed her willingness to reside with the husband but the appellant/husband refused to bring her back and withdrew his application.

5. After having filed written statement, the respondent/wife was proceeded ex-parte. Appellant led his evidence. The appellant's witnesses were not cross-examined by the respondent. Respondent did not lead any evidence. Learned Family Court however, recorded a finding that appellant failed to prove ground of

cruelty even if his evidence is taken as un-controverted piece of testimony.

6. Assailing legality and validity of the impugned judgment and decree, learned counsel for the appellant, relying on **AIR 2019 CG 154** (Abhilash Kumar Gupta Vs. Smt. Shweta Baldev Gupta) would argue that in the present case, though, respondent/wife filed written statement denying plaint allegations, thereafter she remained ex-parte. She did not cross-examine the appellant's witnesses nor led any evidence in rebuttal therefore, the un-controverted piece of testimony of the appellant and his witnesses ought to be relied upon and decree granted in favour of the appellant.

The second limb of submission of counsel for the appellant is that appellant has not only specifically pleaded in the application but also led cogent reliable evidence which remained un-controverted to prove that respondent/wife had deserted the appellant since 02.11.2013 and therefore, the appellant also became entitled to grant of decree of divorce on the ground of desertion but the learned Family Court did not examine this aspect of the matter and dismissed the application for grant of decree of divorce only, confined to finding that the appellant failed to prove ground of cruelty.

7. On the other hand, learned counsel for the respondent/wife argued that the judgment and decree of the learned Family Court does not warrant any interference because there is specific finding

recorded that even though, respondent/wife remained ex-parte, the pleadings and evidence led by the appellant do not make out a case of cruelty. It is argued that even if the respondent has not led any evidence nor cross-examined the witnesses of the appellant, the appellant's burden to prove cruelty by requisite standard continues and the appellant is not absolved of this burden.

On the aspect of desertion, contention of learned counsel for the respondent/wife is that even if it is accepted that the respondent/wife had gone to her parental house on 02.11.2013, the appellant thereafter moved an application under Section 9 of the Hindu Marriage Act for Restitution of Conjugal Rights and in those proceedings, respondent/wife appeared and expressed her willingness to go back to her matrimonial house but the appellant refused to take her back and withdrew his application. Thus, it is clear that it is not the respondent/wife but it is the appellant who deserted the respondent and therefore, no decree of desertion could be granted in favour of the appellant.

8. We have heard learned counsel for the parties and perused the material on record.

9. The finding of the learned Family Court that the appellant failed to prove the grant of cruelty does not warrant any interference. The pleading and the evidence which has been led by the appellant is mostly with regard to wife frequently visiting her parental house. Though it has been stated that she indulged in quarrel and assault, no specific evidence in this regard has been

led. Further, no specific evidence with regard to contents of conversation with Sanjay has been filed. Thus the pleading and evidence with regard to cruelty are vague and un-specific therefore, in our considered opinion, learned Family Court has not committed any error of law or fact in holding that the appellant failed to prove cruelty so as to entitle him to a decree of divorce on that ground.

10. However, we find that even though the appellant has raised specific pleadings and also led evidence of desertion, learned Family Court has completely omitted from consideration, this ground taken by the appellant. Even though, the learned Family Court has taken cognizance of this specific pleading of the appellant and also evidence led in that regard, we find that there are absolutely no discussion on that evidence much less appreciation followed by any categorical finding either way on the issue of desertion.

11. Specific pleadings with regard to wife leaving the matrimonial house along with her father on 02.11.2013, refusal to come back to matrimonial house despite husband's repeated request made, specific denial to return with statement that she would never come back to the matrimonial house, completely giving-up all matrimonial obligation have been made in Paragraphs 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 23, 24 and 26 of the plaint.

These pleadings were denied by the respondent/wife in her written statement wherein she came out with the case that it is not she but the husband who deserted her. In her pleading wife made allegation of cruelty against the husband and also pleaded that the application for restitution of conjugal rights filed by the husband was withdrawn by him and during the proceedings, though, wife was willing to come back to matrimonial house, the appellant/husband was not inclined to take her back.

12. The respondent however, remained ex-parte after filing her written statement. The appellant in his affidavit under Order 18 Rule 4 CPC has made very specific statement with regard to respondent/wife leaving the matrimonial house on 02.11.2013 along with her father. In Paragraphs 11 to 16 the appellant clearly stated in his affidavit that after the respondent/wife left the matrimonial house on 02.11.2013, she never returned. It has also been stated that after 02.11.2013 the wife has not taken any interest nor has talked to the appellant and she has completely given-up all her matrimonial obligation. This particular evidence on his affidavit has not been controverted by subjecting the witness to any cross-examination.

Similar is the evidence of another witness Ram Krishna Kashyap – the father of the appellant. He has also stated in his affidavit regarding the respondent/wife deserting the appellant and thereafter not returning to the matrimonial house.

13. Even though respondent/wife pleaded that she was subjected to cruelty, she has not led any evidence whatsoever to prove cruelty meted out to her so as to constitute a reasonable ground for refusing to reside with the husband.

Furthermore, respondent/wife has neither cross-examined any of the appellant's witnesses nor has led any evidence that the appellant/husband, during proceeding to restitution of conjugal rights, refused to take the wife back to matrimonial house despite willingness of respondent/wife to return to matrimonial house.

That the husband subjected to respondent/wife to cruelty and he was not willing to take her back and therefore, he withdrew his application for restitution of conjugal rights, was the burden of the respondent to prove which the respondent failed to discharge either by eliciting evidence by way of cross-examination of appellant's witness or by leading any cogent evidence of herself or any other witness. Therefore, the un-controverted piece of testimony of the appellant with regard to desertion has to be accepted. In AIR 2019 Chhattisgarh 154, Abhilash Kumar Gupta (Supra) a Division Bench of this Court has clearly held in Paras 10 to 14 that the pleading and evidence led by the parties which have remain un-controverted with regard to cruelty and desertion if made out, the party would be entitled to decree of divorce on the proved grounds. In this case, though cruelty could not be established even if the evidence is taken as uncontroverted, we are of the view that the uncontroverted evidence of desertion

supported by specific pleadings, does make out a case of grant of decree of divorce on the ground desertion.

14. In the result, the appeal is allowed. Even though no ground for divorce is made out on the ground of cruelty, we grant a decree of divorce in favour of the appellant on the ground of desertion. Impugned judgment and decree is accordingly set aside and a decree of divorce on the ground of desertion is granted in favour of the appellant and against respondent.

Let appellate decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge

Ajay