

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No.165 of 2016

Subran Dansena, S/o Bharat Dansena, Aged About 38 Years, R/o Oorja Nagar, Jhalka Bahaar, Basanpali, Indira Nagar, Tamnar, District Raigarh, Chhattisgarh
---- Appellant

Versus

Kamla Bai Dansena W/o Subran Dansena, Aged About 30 Years R/o Village Katangpali, Post Boda, P.S. Saria, District Raigarh, Chhattisgarh
--- Respondent

For Appellant	:	Mr. Faiz Kazi, Advocate appears under instructions from Mr. Saleem Kazi, Advocate
For Respondent	:	None appears

DB : Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board by Manindra Mohan Shrivastava, J.

11/02/2020

Heard.

1. This appeal is directed against impugned judgment and decree dated 02.09.2015, by which, learned Family Court has rejected appellant's application for grant of decree of divorce.
2. An application for grant of decree of divorce was filed by the appellant before the Family Court, Raigarh on 26.06.2014 on the pleadings that the parties were married on 25.04.2005 and were residing in joint family. After few years, they were blessed with a son. Further pleading was that later on, the respondent-wife started entering into frequent quarrel stating that she is not willing to reside with the appellant's parents and due to the dispute, finally, he had to leave his parents and arranged for separate residence but even then, respondent-wife continued to quarrel and started threatening to implicate in a false case of dowry. Later on, respondent-wife started quarreling with the neighbours and left the matrimonial house without information. The appellant advised wife to come back as she was carrying pregnancy but wife did not come back and she delivered second child in her parental house. He again

requested but she did not come back. The respondent wife submitted an application on 04.10.2006 before the conciliation centre and after that she started living with the appellant for few days but again disputes surfaced. The respondent-wife again indulged in quarrelsome behaviour and also unwanted and unwarranted interaction with outsiders and when she was advised not to do so, she again left the matrimonial house and since then, she is residing separately. Further, pleading was that on 01.05.2009, an application for grant of decree of divorce was made by the appellant before the Family Court which was dismissed. Since before moving of application in the year 2009, the respondent wife is residing separately. The appellant again made an effort after dismissal of the suit to bring his wife back by calling community meeting, in which, respondent wife refused to come but also stated that she is not willing to reside with her husband and she did not even accept the proposal of giving divorce. As the wife has deserted him since last 6-7 years and that he has been subjected to cruelty, a decree of divorce may be granted in his favour with effect from 25.04.2009.

3. Rebutting all the allegations made in the plaint, respondent-wife pleaded that it was not she but the appellant who had been subjecting her to cruel behaviour and because of his behaviour, she had gone to the parental house. It was also pleaded by her that according to respondent-wife, the husband indulged in abuse and assault and that the husband is not willing to keep his wife along with him.

4. On the basis of the pleadings of the parties, learned Trial Court framed issues with regard to cruelty and desertion. As earlier suit was also dismissed, an issue as to whether the subsequent suit was barred by res-judicata was also framed.

5. Learned Trial Court though held that the suit is not barred by res-judicata, it held that the appellant-plaintiff failed to prove cruelty and desertion both and thus dismissed the suit.

6. Learned counsel for the appellant argues that though, issue of cruelty on the same set of facts and allegations could not be raised again and again by him, but as far as desertion is concerned, the same has been proved by specific pleadings and clinching evidence led by the appellant. It is contended that the husband has not only specifically pleaded but also led evidence that since 2009, the respondent-wife has left the matrimonial house of her own and

thereafter, though several attempts were made by the appellant, including community meeting convened to bring his wife and children back in the year 2014, the respondent-wife is not willing to come back to the matrimonial house. He would further argue that the appellant has specifically stated in his affidavit under Order XVIII Rule 4 CPC and the other witnesses of the appellant have also stated that in the year 2009, the respondent-wife deserted the appellant and thereafter, she did not return to the matrimonial house. Further submission is that the finding of the Court below that the appellant is not willing to keep his wife in the matrimonial company, though the wife is willing to reside with the appellant is based on a complete mis-appreciation of evidence. The context and the time at which such statement was made by appellant has not been properly appreciated. He would submit that the appellant's statement in the cross-examination has to be read in the context of the background that despite several efforts made as the wife is not prepared to come back, therefore, he has applied for grant of decree of divorce on the ground of desertion and therefore, now he is not prepared to bring his wife back.

7. Learned counsel for the appellant also submits that the respondent-wife in her cross-examination has admitted that the appellant came to her in Village Katangipali many times which proved that the appellant has made several efforts to bring his wife back but it is the respondent, who has completely deserted the husband since 2009 and therefore, he is entitled to decree of divorce atleast on the ground of desertion, if not on the ground of cruelty.

8. There is no representation made by respondent despite service of notice.

9. It is not in dispute that the appellant had earlier filed a suit on 01.05.2009 seeking a decree of divorce on the ground of cruelty. That suit has been dismissed and the judgment and decree passed in that case has attained finality. In the present case, the appellant has not made very specific pleading with regard to cruelty and even according to him, his wife has left him 6-7 years before filing of the suit.

10. In para 6 to 9 of his pleadings, the appellant states that his wife has deserted him since 2009. There is neither any pleadings much less any iota of evidence on record to prove that after filing of the earlier suit, the husband-wife came together to reside and then again some cruelty was committed on

the appellant by the respondent-wife. Whatever vague and unspecific pleading of cruelty are there in the plaint, are only in respect of the period prior to filing of the earlier suit that is prior to 01.05.2009. If that be so, the appellant's claim for grant of decree of divorce on the ground of cruelty in the second round is clearly barred by principles of res-judicata. The finding of the learned Court below in this regard therefore does not warrant any interference.

11. As to whether the appellant is entitled to decree of divorce on the ground of desertion, would require consideration of the pleadings and evidence in that regard led by the appellant and also as to what evidence has been led by respondent-wife in rebuttal of appellant's case.

12. In the plaint, the appellant has pleaded in paragraph 6 that pursuant to meeting organized in Family Conciliation Centre on 04.10.2006, respondent wife again started residing with him but after few days, she again started quarreling and unwarrantedly meeting and contacting outsiders which, upon being objected to, was taken otherwise and the wife again left the matrimonial house. According to this pleading, wife left the matrimonial house sometimes in the year 2006. In the plaint, Ex.P/2 filed in the earlier suit on 01.05.2009, it has been averred that the wife left the matrimonial house on 22.04.2009. In para 8 of the plaint, the pleadings is that the parties are not residing since 2009. In his affidavit under Order XVIII Rule 4 CPC, the appellant has stated in para 6 that the parties are not residing together since the time of presentation of application for grant of divorce in the year 2009.

13. Plaintiff's witnesses Tekram and Amritlal have also stated that the husband wife are not residing together since 2009. Therefore, from the plaint, averment and pleadings of the appellant, it is appellant's own case that his wife is not residing with him since 2009 i.e. about 4 years prior to filing of the suit.

14. While the evidence of the appellant is that, though, he made an attempt to bring his wife and children back and community meeting was also held, the wife did not return which has been stated by the appellant's witnesses in their evidence, the respondent-wife (DW1) has stated in her evidence that she was subjected to cruelty and as the appellant was quarrelsome and making false allegation against her, she was compelled to reside in a separate accommodation taken on rent and thereafter, the appellant did not come to take her and children back. In her cross-examination, it has been elicited that

the appellant had come to her in Village Katangipali two to four times which statement she had later on, contradicted. However, it has not come in evidence that this was an incident subsequent to 2009. There is no specific and reliable evidence led by the appellant to establish that despite efforts made by him, his wife did not come back. The respondent wife has come out with specific case that it was because of the maltreatment and false allegation, particularly with regard to her chastity that she was compelled to reside separately in a rented accommodation along with her children. Learned Trial Court has taken into consideration the admission of the appellant in his own cross-examination where he admits that though, his wife is prepared to reside along with him, he is not inclined to keep his wife with him.

15. Where both the parties have made allegation and counter allegation and while the appellants states that wife left the matrimonial house, the wife has stated that she was subjected to ill-treatment and false accusation therefore, she was compelled to reside in a separate accommodation, the admission of the appellant in his cross-examination tilts the balance in favour of respondent-wife and therefore, on scales of probability, we are inclined to accept the version of respondent wife rather than what has been stated by the appellant. The admission on the part of the appellant that his wife is still willing to reside with him clearly shows that there was no *animus desrendi* on the part of the wife to desert her husband so as to say that the ground for decree of divorce on the ground of desertion is made out in favour of the appellant. Mere, separate residence is not proof of desertion by itself, unless it is coupled with clinching evidence that the other spouse left the company with clear intention of completely deserting the spouse for all times to come. This aspect could not be proved by the appellant by leading clinching evidence. Therefore, we do not find any good ground to interfere with the judgment of learned Family Court, by which, appellant's application for grant of decree of divorce has been dismissed. The appeal being devoid of merits, is therefore, dismissed.

Sd/-

(Manindra Mohan Shrivastava)

Judge

Sd/-

(Vimla Singh Kapoor)

Judge