

HIGH COURT OF CHHATTISGARH, BILASPUR
FAM No. 162 of 2015

- Smt. Anita Tiwari W/o Rakesh Tiwari, Aged About 35 Years
Occupation Shiksha Karmi Class 3, Govt. Primary School Arajkunj,
Post Maharum, Via Dongargaon, District Rajnandgaon Chhattisgarh,
Another Address C/o Shri Narayan Prasad Pandey, Sanjay Nagar
Balod, P. O. Balod, District Durg Chhattisgarh.

---- Appellant

Versus

- Rakesh Kumar Tiwari S/o Rajnihora Tiwari, Aged About 40 Years R/o
Near Goswami Sadan, Bazar Chowk, Changorabhatha, P. O. Sundar
Nagar, Tahsil and District Raipur Chhattisgarh.

---- Respondent

For Appellant	: Shri B.P. Singh, Advocate
For Respondent	: Shri Aman Sharma, Shri Pritam Tiwari, Advocates

D.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava

Hon'ble Smt. Justice Vimla Singh Kapoor

Order on Board

Per Manindra Mohan Shrivastava, J.

27/01/2020

This appeal is directed against the impugned judgment and decree dated 15.10.2015 passed by Family Court, Raipur in Civil Suit No. 104-A/2011 by which the learned Family Court has allowed respondent's application for grant of decree of divorce on the ground of cruelty.

2. Respondent/husband moved an application for grant of decree of divorce by moving an application under Section 13 (i) (b) of the Hindu Marriage Act on the pleadings that the parties were married on 05.09.2009 at Balod. The respondent came out with the case that he has been subjected to cruelty as well as desertion both in as much as

right from the day, marriage was solemnized between the parties, despite repeated urges made by the husband, the appellant/wife did not agree for cohabitation (sexual intercourse). In support of this case, the appellant came out with pleadings regarding the parties staying after marriage on 06.05.2009 when appellant/wife did not agree for physical relationship. It was also pleaded that again, during the period they resided together from 24.05.2009 to 30.05.2009, appellant/wife denied having cohabitation. During the period 14.10.2009 to 19.10.2009, though, parties resided together, the appellant again did not allow the respondent to have physical relationship. From 09.02.2010 to 21.02.2010, though, parties resided together, the appellant/wife did not allow any physical relationship and cohabitation. In para 16 it was pleaded that after marriage, there has not been a single cohabitation between the parties and the appellant/wife has deserted the husband without any reasonable cause. On such pleadings the appellant sought decree of divorce.

3. In the rebuttal of pleadings, appellant/wife filed statement and all the allegations as contained in the plaint were specially denied. In respect of various dates and period during which the parties resided together and which, according to the respondent/husband, went without any physical relationship, the appellant/wife specifically stated that there was physical relationship and cohabitation between the parties. She had stated that the appellant had married knowing fully well that she was in employment. The version of appellant/wife was that as her transfer could not be effected to the place where her husband was working, the husband started insisting that she should

leave her job but was refused and that was the main reason for dispute between the parties.

4. The learned Family Court framed issue as to whether the appellant/wife had committed cruelty and it was proved and whether on this ground respondent/husband was entitled to grant of decree of divorce. Upon scrutiny of oral and documentary evidence led by the parties, learned Family Court came to the conclusion and recorded a finding that the respondent/husband succeeded in proving that despite repeated request of the respondent/husband, wife was not prepared and she denied cohabitation which amounted to cruelty. On this ground alone, the learned Family Court granted decree of divorce in favour of the husband giving rise in this appeal.

5. Assailing legality and validity of impugned judgment and decree of divorce, learned counsel appearing for the wife would contend before us that the learned Court below, while recording a finding that there was no cohabitation between the parties, has not correctly and properly appreciated the evidence led by the parties and despite very emphatic pleading and evidence of the wife that during short period of stay in the matrimonial house along with her husband, there was physical cohabitation, has been rejected and husband's version has been accepted. It is argued that from the evidence of the appellant, it is an emphatic assertion that there was physical relationship between the parties during period/periods they stayed together. The evidence of the wife is supported from what has been stated by the husband's father in his cross examination that the only cause of dispute between the husband and wife was that his son was insisting that the daughter-in-law should get herself transferred and reside at Raipur but this could

not happen. It is further submitted that the respondent/husband made various complaints vide letters Exhibits P-1, P-2 and P-3 before the authority but no such grievance was raised and for the first time, by giving a legal notice, a new concocted ground was made out. Further submission of learned counsel for the appellant is that the wife has stated that she had taken a house at the place of her employment Arajkunj and the husband has admitted in his cross examination that though he visited Arajkunj on more than one occasion, he never stayed overnight. Learned Counsel for the appellant would lastly argue that once there is successful marital relationship and the parties are staying together, there is a strong presumption of cohabitation between the parties and it was a very heavy burden on the husband to prove otherwise that despite they having stayed together for many days, there was no physical relationship.

It is also submitted that the application was otherwise defective because, though, the husband sought decree of divorce on the ground of desertion by titling his application under Section 13 (1) (kha), with pleadings of desertion, the learned trial Court treated it to be case where the husband was praying for decree of divorce on the ground of cruelty. Therefore, it is argued, the judgment decree is liable to be set aside only on this ground. In support of his submission learned counsel for the appellant placed reliance upon the decision of the Supreme Court in the Case of **Samar Ghosh Vs. Jaya Ghosh** reported in (2007) 4 SCC 511.

6. Per contra, learned counsel for the respondent, defending the judgment and decree of divorce argues that the respondent/husband made very categoric and emphatic pleading that since the date of

marriage, appellant/wife was not willing to have any sexual relationship with the husband. He would argue that respondent/husband came out with very specific pleadings with regard to the date and place and the period during which the parties resided together from time to time after marriage, coupled with specific plea that on each occasion, though husband was willing and despite request, the appellant/wife did not allow the husband to have cohabitation. The evidence with regard to these specific dates of residing together have been clearly stated in affidavit under Order 18 rule 4 CPC. The specific evidence in paragraphs 9, 10, 11 and 13 of the affidavit have not been specifically controverted in his cross examination. He would emphasise that in fact in the cross examination there is no specific suggestion given to controvert the evidence that there had been no cohabitation between the parties during the periods they had stayed together. He would submit that in such a case, the evidence of the respondent/husband has to be accepted as uncontroverted piece of evidence as held in **Muddasani Venkata Narsaiah (D) Th Lrs Vs. Muddasani Sarojana**, reported in AIR 2016 SC 2250.

7. He would further argued that the father of the respondent/husband has also corroborated the statement of the husband in this regard that the husband had informed his father that the wife was not willing to have any cohabitation with the husband. Learned counsel for the respondent further argued that though, the wife had deposed in her evidence that cohabitation had taken place between the parties, her evidence on this aspect has been specifically controverted in her cross examination. Therefore, it is argued, on the scales of probability, the evidence led by the husband being a positive evidence has rightly

been accepted by the learned trial Court and that of the wife that there was cohabitation has been rejected. He would further submit that the contents of documents Exhibits P-1, P-2 and P-3 cannot be used against the husband unless the husband was controverted with the said document. Learned counsel for the respondent would further argue that in view of the decision of the Supreme Court in **Savitri Pandey Vs. Prem Chandra Pandey** reported in AIR 2002 SC 591, where there is no cohabitation between the parties at the instance of one of the spouse, while other is willing, it will not only amount to cruelty by the spouse who is denying sexual relation but it would also amount to desertion of marital relationship.

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

9. Learned trial Court has granted a decree of divorce in favour of husband on the basis of cruelty. The impugned judgment and decree of the learned trial Court also shows that the learned trial Court has recorded a finding that despite willingness on the part of the husband, the appellant/wife did not allow any sexual relationship between the parties and this has been accepted by the Court below as amounting to cruelty between the parties. Obviously, at the time when the application was filed before the Court below, even two years has not elapsed since the parties had been residing separately. Therefore, the learned court below has not considered this aspect from the point of view as to whether a case of decree of divorce is granted on the ground of desertion as well.

10. The pleadings of the appellant in his plaint are with regard to husband and wife residing together for few days at different intervals

before filling of the application before the Court and that during those period, the appellant and respondent did not have any sexual intercourse. The pleadings are also to the effect that during the period of stay, though respondent/husband repeatedly desired to have cohabitation, appellant/wife refused on every occasion. According to appellant pleadings :-

- (i) After marriage on 06.05.2009 the parties stayed together but wife complaining of illness did not allow sexual relationship.
- (ii) From 24.05.2009 to 30.05.2009 the parties resided together and during these Fridays also the wife did not allow physical relationship and when the husband attempted to accept it wife started quarreling.
- (iii) Though parties stayed together between the period from 14.10.2009 to 19.10.2009, respondent did not establish any physical relationship and kept on quarreling.
- (iv) During the period of stay from 09.02.2010 to 21.02.2010 there were no communication and appellant/wife refused to have any physical relationship.

11. The appellant/wife in her pleadings has specifically denied each of these incidents and has specifically pleaded regarding physical cohabitation between the parties.

12. The marriage between the parties on 05.05.2009 being an admitted position, the dates on which the respondent/husband has pleaded that he and his wife resided together in the matrimonial house is also an admitted position. The dispute however is whether there was any cohabitation between the husband and wife during the period when they stayed together before filing of the application before the Court below. On this aspect also the appellant and respondent have

come out with their specific averment in their pleadings. While the husband's pleading has been that there was no cohabitation, the appellant/wife assert that there was cohabitation between the parties.

13. The evidence of the husband examined as PW-1 is contained in his affidavit under Order 18 rule 4 CPC. If we look into this affidavit, the affidavit is more or less, verbatim repetition of what has been stated by the husband in his pleading before the court below with regard to four incidents of the husband and wife living together without any cohabitation. The learned counsel for the appellant has very emphatically argued before this Court that, though, in paragraphs 9, 10, 11 and 13 these incidents have been clearly stated, in his cross examination these evidence has not been controverted. We have carefully gone into the evidence and the cross examination of the husband Mr. Rakesh Tiwari. In para 27 of the cross examination following has been stated by the witness which is extracted herein below :-

“27. यह कहना सही है दिनांक 05.05.2009 को विवाह होने के पश्चात दिनांक 07.05.2009 तक प्रतिवादिनी मेरे साथ रही है। यह सही है कि मेरा चंगोराभाटा में मकान है। यह कहना गलत है कि चंगोराभाटा स्थित मकान में मेरे एवं प्रतिवादिनी के मध्य दाम्पत्य संबंध स्थापित हुए।..”

14. A specific suggestion was given to the respondent/husband in his cross examination that in his house at Changorabhatha, that marital relations were established between the parties which has been denied. From this evidence it is amply clear suggestion to controvert the evidence of the husband was given that in the matrimonial house at Changorabhatha, marital relations were established. This suggestion has been denied by the husband.

15. An argument has been taken that word “दामपत्य जीवन” as suggested, does not mean sexual relation. We are unable to accept this argument. If “दामपत्य जीवन” was considered to be something else, there was no reason for this witness to deny the suggestion. The evidence of the witness is to be read in the context of the dispute between the parties and it cannot be read in isolation, divorced from the context of the case. The entire case of the respondent/husband rests on the pleading that there was no cohabitation taking place between the husband and wife and despite repeated urges, appellant/wife was not willing to go for sexual relationship. The suggestion which has been given is clearly indicated of sexual relationship of the parties and it cannot be taken to mean that it was something other than sexual relationship. In fact “दामपत्य संबंध”, is wide enough to engulf in it, sexual relationship also which is part of marital relationship. Therefore, we are unable to accept the submission of learned counsel for the respondent that the evidence of the husband sexual relationship had not taken place between the parties on account of specific refusal on the part of the wife, has remained uncontroverted piece of testimony.

16. Where the husband and wife have lived together and spent days and night together, any party who is denying sexual relationship bears a very heavy burden to prove otherwise. The respondent/husband has relied upon and led before the Court three important documentary evidence Exhibits P-1, P-2 and P-3 which are three reports submitted in the police station. But in none of these documents, there is any statement given that the husband had a grievance against the wife for the reason that she was not allowing

physical relationship to be maintained despite insistence on the part of the husband.

17. The arguments of learned counsel for the respondent that the contents of these document could not be used against the respondent unless the witness was confronted with these documents, is not acceptable because these are the documents which have been relied upon by the respondent himself and this is the documentary evidence led by him in support of his case. Obviously the respondent/husband was relying upon the contents of the documents. Therefore, in that case, the important circumstance that these three letters given by respondent/husband in the police station did not contain any complaint on his part that appellant/wife was not having any kind of cohabitation, goes against the husband.

18. Though the father of the respondent/husband Ramnihora Tiwari (PW-2), in his affidavit has stated that his son informed him that his wife (the appellant/wife) was not willing to have sexual relationship, in para 18 of his cross examination it has been clearly elicited that the dispute between his son and daughter-in-law was only for this reason that his son was insisting that the daughter-in-law should get herself transferred at Raipur and stay there.

19. Respondent/husband's own witness Sudama Sharma (PW-3), who, according to the pleadings of the parties and his own evidence was the mediator in getting the marriage settled between the parties has also deposed in para 3 of his evidence that the husband had approached him stating that his wife Anita is not willing to reside with him and is entering into quarrel and is not willing to come back from her parental house. In the evidence of this witness also, there is no

specific evidence supporting the case of the respondent/husband that the appellant/wife was not willing to have cohabitation with her husband. In the cross examination of this witness, he admit that the cause of dispute between the parties was that the husband was insisting for transfer of the wife to Raipur.

20. The wife has categorically stated in her evidence that every time she stayed with her husband, there had been physical relationship and cohabitation between the parties. The evidence of appellant/wife is supported from the evidence of her own mother Smt. Krishan Pandey (DW-2).

21. If we weigh the evidence led by both the parties on the scales of probability, the evidence led by the husband is liable to be disbelieved. This is for the reasons which we have discussed with reference to the evidence led by the parties herein above. Firstly, when the marriage is admitted and the parties also admitted that they have been residing together, the spouse who pleads that there was no physical cohabitation, is under a heavy burden to prove this fact. Secondly, the father of the respondent/husband has admitted in his evidence that in his cross examination that the only reason for dispute between the husband and wife was relating to posting of the wife and his son was insisting that his wife should get herself transferred and reside at Raipur in the matrimonial relationship. Thirdly, the evidence of Sudhama, the mediator, also supports the case of the wife and not of the husband because according to him, the husband stated that the cause of dispute between the parties was because of wife residing at some other place and engaged in a job.

22. In view of above consideration, it is difficult for us to hold that appellant/wife refused to have physical relationship with the respondent/husband and thereby committed cruelty upon him.

23. The evidence on record with regard to whether the wife left the husband with *animus deserendi* and thereby deserted her husband, need not be gone into by us because in the present case, the Court below has granted decree of divorce only on the ground of cruelty and not on the ground of desertion. In fact the application for grant of decree of divorce was filed only on 11.04.2011 whereas the pleading of the respondent/husband was that the wife has finally left the matrimonial house on 07.11.2010.

24. In view of above consideration, the impugned judgment and decree passed by the learned Court below is unsustainable in law and is therefore, set aside and respondent/husband's application for grant of divorce is rejected.

Let appellate decree be drawn accordingly. Parties to bear their respective costs.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge