

AFR

HIGH COURT OF CHHATTISGARH, BILASPURFAM No. 154 of 2015

Santosh Singh, S/o. Shri Vinod Singh Thakur, Aged About 38 Years, R/o. Dhimrapur Chowk, Hanuman Mandir Gali, Raigarh, Presently Residing At Near Burhimai Mandir, Raigarh, Chemist Bhawan, Darogapara, Raigarh, Tahsil And District Raigarh, Chhattisgarh

---- Appellant

Versus

Amita Singh, W/o. Santosh Singh, Aged About 39 Years, (D/o. Bholasing, Advocate), Occupation- Service, Shiksha Karmi, R/o. Infront Of Madhav Lodge, Purana Chandaniyapara, Janjgir, Tahsil Janjgir, District Janjgir-Champa, Chhattisgarh

---- Respondents

For Appellant	:	Mr. Sourabh Sharma, Advocate
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For Respondent	:	Mrs. Renu Kochar, Advocate
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Hon'ble Mr. Justice Goutam Bhaduri &
Hon'ble Mrs. Justice Rajani Dubey

Judgment on Board**Per Goutam Bhaduri, J.**13-12-2021

1. This appeal is against the judgment and decree dated 26.09.2015 passed by the Family Court, Raigarh, whereby the petition preferred by the appellant seeking divorce on the ground of desertion was dismissed.
2. The short facts, which is pleaded, before the court below, was that the appellant and respondent got married on 08.07.2010 and they lived together uptill 19.07.2010 for about 11 days. Subsequently, the respondent's family members came and took her away on the ground of some important work. Thereafter, she did not return. It is pleaded on behalf of the plaintiff/ appellant that the appellant

tried to get her back on two occasions on 04.08.2010 and on 14.10.2010 but the same was not acceded to on the ground that auspicious time (*subh-muharat*) was not there. It is further alleged that thereafter the respondent/ wife did not volunteer to join her husband back at any point of time. Subsequently, the appellant/husband filed a suit for restitution of conjugal rights, which was decreed *exparte*. In reply to the petition, the wife contended that she was ready and willing to join the company of the husband but the husband did not turn back to get her back when auspicious time started, which is according to their custom was necessary one. Thereafter, the husband did not make any effort to get her back. It is further contended that though the notice to the application for restitution of conjugal rights was received by the respondent/wife but she could not appear before the Court, as she was stuck in discharge of the Govt. official duties. It is further contended on behalf of the wife that she had not deserted the appellant/husband but infact the appellant/ husband failed to take her back as per the prevailing custom of *duviragaman*. Therefore, no desertion on the part of the respondent was committed.

3. Both the parties have adduced their evidence to the limited extent, which is in support of desertion and contrary to it.
4. The trial Court observed while dismissing the suit that the husband has failed proved the ground of desertion and further even after getting a decree for restitution of conjugal rights, since it was not put to execution; therefore, the intention of the husband was not to resume and restore the family and consequently would not be entitled for any decree of divorce.
5. Learned counsel for the appellant would submit that only on the ground of desertion that the husband has failed to prove the desertion, the dismissal of decree is bad. He would further submit that the evidence of the husband would show that the efforts to

restore the family ties were proved and the evidence is beyond reasonable doubt. It is stated there was no iota of evidence to draw an inference to the fact that husband himself has not acted upon to continue his family life/matrimonial home. He would further submit that the admission on the part of the wife would also show that she was in know of the fact that the restitution of conjugal rights have been filed by husband and the decree was passed but despite that no efforts was made by the wife to join the matrimonial life along with the appellant/husband. Therefore, the decree of divorce is required to be passed. He placed his reliance in AIR 1990 SC 594.

6. Per contra, learned counsel for the respondent would submit that the custom which was prevailing in between the parties that during the ceremony of duviragaman, the husband was required to come personally to take the wife back. It is contended when husband came back to take the wife back the auspicious time was not existing as per the advice of the Pandit and the elders of the family. It is stated under these circumstances when the husband approached in the month of August and October, 2010, he was advised to come back after some time and was particularly advice to come back at particular auspicious time to take her back but the husband failed to turn back. She would submit that in the custom of the appellant and the respondent, the going back of the wife was important custom, therefore, that was required to be followed by both the parties. She would further submit that the finding of the court below on this ground that despite the fact that the husband after getting a decree of restitution of conjugal rights did not get it executed would reflect state of mind and he was actually not interested in restitution of conjugal rights. Therefore, the finding arrived at by the court below is well merited, which do not call for any interference. She placed her reliance in 2013 (4) C.G.L.J. 118 (DB) and would submit that when the decree of restitution of conjugal rights is obtained only to get a technical

advantage then it cannot be used for tool for divorce.

7. Heard learned counsel for the parties, perused the documents and evidence on record.
8. Primarily reading of the petition would show that the decree was sought for under Section 13(1)(ib) and under Section 13(IA)(ii) of the Hindu Marriage Act, 1955. For sake of brevity, the relevant sections are reproduced herein below.

“13. Divorce. - (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

[(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

[(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground-

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.]

9. Primarily the consideration before this court whether a desertion was made by the wife. Admittedly the evidence and the pleading would show that the date of marriage was 08.07.2010 and the parties lived together uptill 19.07.2010. Meaning thereby they only stayed for around 11 days together. As per the evidence of the husband PW-1 (Santosh Singh) which is also corroborated by

the PW-2 Chandraprasad Dewangan, he has stated that after marriage when the wife went back to her maternal home, he along with his brother and friends on 04.08.2010 and thereafter on 14.10.2010 went to get her back but the respondent/wife refused to go back to Raigarh. Therefore from 19.07.2010 the wife has deserted the husband/appellant. In the cross examination, the witness has deposed that on 04.08.2010 when he went to get back her wife, she refused to join his company on the ground that because of auspicious moment was not existing, as such, she was not allowed to go. In continuation, it is stated that she wanted to stay back at her maternal home at Janjgir. In the cross examination of DW-1, the wife, she admitted the fact that after 19.07.2010 as the auspicious moment was not there to go back to the matrimonial home and specially on 04.08.2010, the husband came along with his brother and friends to take her back from Jangir to Raigarh, she did not go with husband. She further stated that because of the reason that no auspicious time (*subh-mahurat*) was there, as such husband was advised to come back after *Devuthni Akadashi* wherein they went back. In further cross-examination, she admits the fact that *Devuthni* festival in 2010 was in November and further admitted that she never went back even after *Devuthni* festival to her Raigarh home of her own.

10. In the statement further it would show that after 04.08.2010, no conversation either by way of exchange of letter or any telephonic talk ever took place in between the husband and wife. The statement of both, the husband and wife, would show that on the issue of the joining the company of husband for want of auspicious time, the wife and the husband did not join the company of each other. The separation of the husband and wife was from 19.07.2010 and till date almost 11 years have passed. The auspicious time are meant for the happy family life; instead in the instant matter, as appears that in name of auspicious time (*subh-muharat*) was used as a tool barrier by wife to start their

matrimonial home. The facts would suggest that the wife contributed more to restrain herself from the company of the husband on that pretext and there is no telephonic conversation or exchange of letter took place for more than 11 years in between the parties.

11. With respect to the finding of the court below that the restitution of conjugal rights decree was not put to execution, therefore, the ground under Section 13(1A) is not made out cannot be sustained. The statement of the wife would show that she was in know of the fact that the application for restitution of conjugal rights was filed by husband and despite the notice by the court, she refused to appear and even failed to make enquiry at any point of time that what happened to the application, which was to her interest. If she was aware of the fact that the application for restitution of conjugal rights is filed, even she was aware of the fact of effort made by husband, might have been certain constraint to appear on the date fixed on such application but had there been any intention to join back the company of the husband, she could have enquired and could have settled the issue. Simply sitting dormant despite knowing of the fact the effort made by the husband for restitution of conjugal rights atleast shows the intention of wife not to join back the company of husband. Even otherwise she could have joined the company of the husband without there being execution of decree.
12. The defence of custom raised by the wife has also not been proved before the trial Court. If the respondent/wife was so sanguine of the fact that in the circumstances and like nature of the case, the factum of auspicious moment would destroy her matrimonial home, she should have step forward which was done by the husband twice but was blocked by the wife. The plea of custom which was required to be proved by wife was not before the court and casual statements were made.

13. In the circumstances of this case, we are of the opinion that despite the effort taken by the husband to restore his matrimonial home, the wife was not cooperative and under the guise of auspicious time to return back, she continued at her maternal home. It is further observed that the wife after knowing the fact that the restitution of conjugal rights before the court could have joined the company of the husband, which would have otherwise solved the entire issue.
14. Under the circumstances, we are of the opinion that the wife knowing full well of the facts has deserted the company of the husband, therefore, the appellant is entitled to get a decree of divorce under Section 13(ib) of the Hindu Marriage Act, 1955. Accordingly, it is ordered that the marriage solemnized on 08.07.2010 in between the appellant and respondent is dissolved under the Hindu Marriage Act by a decree of divorce. The appeal is allowed. The decree be drawn accordingly. No order as to costs.

Sd/-
(Goutam Bhaduri)
Judge

Sd/-
(Rajani Dubey)
Judge

ashok