

**IN THE HIGH COURT OF ORISSA AT CUTTACK**

**SA No.245 of 1994**

In the matter of an appeal under section 100 of the Code of Civil Procedure assailing the judgment and decree dated 20.07.1994 and 04.08.1994 respectively passed by the learned 2<sup>nd</sup> Additional District Judge, Bhubaneswar in Title Appeal No.77/3 of 1990/89 setting aside the judgment and decree dated 30.01.1989 and 14.02.1989 respectively passed by the learned Sub-Judge, Bhubaneswar in O.S. No.28 of 1987 (I).

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***Puspalata Rout***

....

***Appellant***

-versus-

***Damodar Rout***

....

***Respondent***

**Appeared in this case by Hybrid Arrangement**  
**(Virtual/Physical Mode):**

***For Appellant*** - Mr.A.N.Routray. (Advocate)

***For Respondent*** - Mr.B.H. Mohanty, Sr. Adv  
Mr.D.P. Mohanty & R.K. Nayak  
(Advocates)

**CORAM:**

**MR. JUSTICE D.DASH**

**Date of Hearing & Judgment :07.04.2022**

The Appellant, by filing this Appeal under Section 100 of the Code of Civil Procedure (for short, 'the Code'), has assailed the judgment and decree dated 20.07.1994 and 04.08.1994 respectively passed by the learned 2<sup>nd</sup> Additional District Judge, Bhubaneswar in Title Appeal No.77/3 of 1990/89.

By the same, the First Appeal filed by the present Respondent (Plaintiff) has been allowed and the judgment and decree dated

30.01.1989 and 14.02.1989 respectively passed by the learned Sub-Judge, Bhubaneswar in O.S. No.28 of 1987 (I) have been set aside.

At this stage, it may be mentioned that the Appellant (Defendant) is the wife of the Respondent (Plaintiff). Before the Trial Court, the Respondent (husband), as the Plaintiff, had initiated a proceeding under section 13 of the Hindu Marriage Act (hereinafter called as 'the HM Act') seeking a decree of dissolution of marriage between them. The Trial Court, having dismissed the suit. The Respondent (Husband) being aggrieved by it, had carried the First Appeal wherein he has been successful in obtaining a decree of divorce. Hence, the Appellant (wife), who was the Defendant in the Trial Court, is before this Court.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. Facts necessary for the purpose are stated as under:-

On 18.06.1979, the marriage between the parties took place and out of said wedlock, they have been blessed with two sons.

It is alleged that the Defendant's father being a rich man, she was used to a high standard living and that was interfering in the marital life, as the Defendant's father was a petty contractor. It is further stated that due to non-availability of Government quarters, the Plaintiff was not in a position to take the Defendant to the place of service for their stay together and, therefore, she was staying with his family members including the three unmarried sisters. It is stated that despite all the desire of the Plaintiff to bring the Defendant to his service place, it could not be possible because he was not in a position to afford the house rent for a suitable house for their living at the place of service. It

is stated that the Defendant ultimately left the village on 16.12.1980 with her father when the Plaintiff was there at Puri. It is the further case of the Plaintiff that he as well as the Defendant jointly filed an application in the Court of the learned Sub-Judge, Bhubaneswar for dissolution of marriage on mutual consent and a decree was passed when the Plaintiff had also paid a sum of Rs.10,500/- to the Defendant. This was, however, challenged by the Defendant on the ground that her consent in that regard had been fraudulently obtained. The Plaintiff having contested the said proceeding, ultimately became unsuccessful and final order of dissolution of marriage of the parties, on mutual consent, stood set aside. Thereafter, the present suit has been filed by the Plaintiff (husband) for dissolution of marriage on the ground desertion.

4. The Defendant (wife) contested the proceeding. Having narrated as to how fraud had been practiced by the Plaintiff upon her as well as upon the Court, on the earlier occasion when the decree of dissolution of marriage on mutual consent had been obtained by the Plaintiff, it has all through been pleaded that there was never any desertion from her side and her separate stay was for all such reasons which are attributable to the Plaintiff, his behavior, attitude and style of living in neglecting the Defendant in every respect and not taking any care whatsoever.

5. Faced with the rival pleadings, the Trial Court having framed eight (8) issues, has rightly taken up issue nos.5 and 6 which relate to the ground on which the Plaintiff has claimed divorce. Upon discussion of evidence and their evaluation, the Trial Court has given a finding that no case of desertion has been established by the Plaintiff by leading clear, cogent and acceptable evidence for the period as required. With

such finding, the suit having been dismissed, the aggrieved Plaintiff (husband) had carried the First Appeal. The First Appellate Court has allowed the Appeal recording a finding on issue nos.4 and 5, which are contrary to that of the Trial Court.

6. This Appeal has been admitted on the substantial questions of law as indicated in Paragraph 8(1) to 8(4) of the Memorandum of Appeal.

At the outset, learned counsel for the parties fairly submit that the substantial question of law as at paragraph 8(3) of the Memorandum of Appeal should be answered first, as according to them, the answer to that substantial question of law, if is recorded in favour of the case of the Defendant, who was contesting the divorce proceeding; the other substantial question of law would no more survive for being answered.

The substantial question of law as at paragraph 8(3) of the Memorandum of Appeal runs as under:-

“Whether the decision of the lower appellate court on the question of desertion was correct both on facts and in law in-as-much as the lower appellate court had not given finding that animus deserendi had been established?”

7. Mr.A.Routray, learned counsel for the Appellant (wife) submits that in the present case, the evidence on record let in by the parties when are accepted on their face value, it cannot be said that those are enough for grant of divorce on the ground of desertion from the side of the Defendant. He further submits that the facts and circumstances of the case, as it reveal from the evidence on record, when are taken into account in their proper perspectives, the minimum period that the law requires for the parties to have been in separate living on account of desertion by one, is not going to be fulfilled. He, therefore, submits that the First Appellate Court having not bestowed its attention on these

important aspects without any justifiable reason, has granted the decree of divorce.

8. Mr.D.P.Mohanty, learned counsel for the Respondents (husband) submits all in favour of the finding recorded by the First Appellate Court. According to him, when admittedly for a long period, the parties are living separately having no connection between them whatsoever, in that event the intention on the part of the Defendant to desert the Plaintiff has to be presumed. He, however, submits that the evidence on record when reveal that the Defendant had voluntarily left the house of the Plaintiff without any reasonable and justifiable cause attributable to the Plaintiff and then with her continuance in the separate residence for such a long period, clearly a case of desertion as projected by the Plaintiff is made out and, therefore, the First Appellate Court did commit no mistake in passing a decree dissolving the marriage between the two.

9. Keeping in view the submissions made, I have carefully gone through judgments passed by the Courts below.

10. Admitted facts stand that on 18.06.1979, the marriage between the parties had taken place. First son was born to the said wedlock on 12.05.1980 and thereafter, they were blessed with another son on 19.08.1981. As ill luck would have it, even before expiry of half a year from the birth of the second son, who was then under complete care of the Defendant (mother), the Plaintiff filed an application under section 13-B(1) of the HM Act wherein it has been said that this Defendant was also the party and the application was a joint one presented by both before the Court. The Court then decreed the same vide O.S. No.48 of 1982. The decree being passed on 10.08.1982, the Defendant, on

23.08.1982, filed an application under Order 47 Rule 1 read with section 151 of the Code for recall of the said order dissolving the marriage between the parties by a decree of divorce upon mutual consent. The ground taken was that the consent of the Defendant had been obtained by the Plaintiff by practicing fraud upon her as well as upon the Court passing the decree on mutual consent. Registering Misc. Case No.575 of 1982, the Court then sat upon to have an enquiry into the matter. Finally, the decree for divorce stood recalled as the Court arrived at a satisfaction that the Plaintiff, by practicing fraud upon the Defendant as well as on the Court, had managed to obtain the same. The Plaintiff being aggrieved by that order of recall of the judgment and decree of dissolution of marriage between the parties on mutual consent, had carried the matter finally to this Court in C.R. No.469 of 1984. That has been decided by this Court on 15.05.1986. This Court then affirmed the order passed by the original Court. Thus, the decree passed on mutual consent stood nullified. When the matter stood thus, the present suit has been filed on 27.07.1987.

**11.** Section 13 (i-b) of HM Act narrates that any marriage 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 has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. Position of law is well settled that mere separate living for any length of time by one party does not amount to desertion on his/her part and the most fundamental and essential element of desertion is the intention on the part of the party deserting the other. In the present case, when the facts finally stand decided that the Plaintiff (husband) had obtained the consent of the Defendant (wife) by practicing fraud upon the Defendant (wife) and the

Court as well, the cause for separate stay of the parties for the entire period till that date of finalization of the recall proceeding by the order of this Court on 15.05.1986, cannot be attributed to the Defendant (wife) as we cannot say for a moment that she had all the intention to desert the Plaintiff and there was the 'animus deserendi'. The pleading as well as the evidence of the Plaintiff (husband) are silent on the score that thereafter since from which particular date, the Defendant (wife) expressed her intention that under no circumstance, she does not want to stay with the Plaintiff (husband) under one roof keeping the marital tie alive and thereby refusing to perform all her social and moral obligation arising out of the marital tie towards the Plaintiff. Moreover, the Plaintiff (husband) having been found by the Court to have practiced fraud in obtaining the consent of the Defendant (wife) in finally obtaining the decree of divorce on mutual consent thereby practicing fraud also upon the Court in the earlier proceeding wherein the decree has been annulled on that ground; in my considered view, he cannot thereafter take advantage in asserting that the Defendant (wife) had deserted him for all those period and seek dissolution of marriage on that ground of desertion as if he after that, having taken a holy deep got freed from all the blames. In addition to the above, it is also seen that the Trial Court, on just and proper analysis of evidence, had said that here it is clear that the Plaintiff deserted the Defendant and she had not stayed separately with an intent to severe the marital tie which this Court finds to have been erroneously upset by the First Appellate Court.

For all the aforesaid, the answer to the substantial question of law as at paragraph 8(3) of the Memorandum of Appeal stands returned in favour of the Defendant (wife) in saying that the First Appellate Court is not right in setting aside the judgment and decree passed by the Trial

Court whereunder the Plaintiff (husband) had been rightly declined to be granted with the relief of dissolution of his marriage with the Defendant (wife) in refusing to draw a decree of divorce.

**12.** In the result, the Appeal stands allowed with costs throughout.

***(D. Dash),  
Judge.***

*Basu*

