

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.600 of 2016

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Praveen Kumar Choudhary Son of Sri Ravindra Chaudhary@Ravindra Kumar Chudhary, Resident of VillageChahuta Bandho- Petti, P.S-Bisfi, District Madhubani

... .. Appellant/s

Versus

1. Archana Choudhary Wife of Praveen Kumar Choudhary, D/O Ram Kumar Jha, Resident of Anandpur Sohara, Police Station- Ashok Paper Mills, District- Darbhanga, At Present Residing with her father namely Ram Kumar Jha, at Phulwari -Sharif, Plot No. B/18 Biral Colony, P.O. P.S. Phulwari Sharif, District- Patna Near Police Chouki in the house of Devendra Sharma.
2. Ram Kumar Jha Son of Late Ram Ballabh Jha @ Ram Bilas Jha, Resident of Village- Anandpur Sohara, P.S. Ashok Paper Mills, District- Darbhanga, At Present Assistant in Apada Prabandhan Vibhag, old Secretariat, Patna, Residing in the house of Devendra Sharma, Birla Colony ,B/18, P.O. P.S. Phulwari Sharif, District- Patna Near Police Chouki
3. Satyam Kumar Choudhary Minor Son of Praveen Kumar Choudhary, Under Guardian Ship of Mother Namely Archana Coudharyl (Respon Resident of village Phulwari -Sharif, Plot No. B/18 Birla Colony, P.O. P.S. Phulwari-Sharif, District- Patna, Near Police Chouki in the house of Devendra Sharma.

... .. Respondent/s

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Appearance :

For the Appellant/s : Mr. Bishwanath Prasad Singh, Advocate
For the Respondent/s : Mr. Shambhu Sharan Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
And
HONOURABLE MR. JUSTICE S. B. PD. SINGH
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE S. B. PD. SINGH)

Date : 19-03-2025

Heard the parties.

2. The present appeal has been filed under Section
19(1) of the Family Court Act, 1984 impugning the
judgment and decree dated 27.04.2016 passed by learned

Principal Judge, Family Court, Hajipur, Vaishali in Divorce Case No. 33/2013/24/2010, whereby the matrimonial suit, preferred by the appellant, for a decree of divorce, on dissolution of marriage, on the ground of cruelty and desertion, has been dismissed.

3. The case of the appellant as per petition filed before the Family Court is that the marriage of the appellant was solemnized with respondent No.1 Archana Chaudhary on 09.03.2008. After marriage, the appellant and respondent No. 1 started living a happy married life in Village-Chahuta (Bandhopatti) but after few months, the behaviour of respondent no. 1 towards the appellant-husband and other in-laws became changed and she started using abusive and filthy languages against her in-laws and the appellant. When the appellant requested the respondent No. 1 to mend her behavior, she threatened to commit suicide or she would administer poison to him. In July, 2008, respondent No. 2 (father of respondent No. 1) came to the house of the appellant and requested him for *Bidagari* of respondent No. 1. After *Bidagari* of respondent No. 1, she went to her Village-Anandpur, Sohora to perform *Madhushrawani*

festival. After festival, the appellant requested for *Bidagari* of respondent No. 1 but respondent No. 2 refused to send respondent No. 1 to her in-laws place at Village-*Chahuta (Bandhopatti)* and took her to his place of service at Patna without consent of the appellant-husband. Fortunately, a male child was born out of the wedlock on 15.01.2009. On the occasion of *Chhathihar* of his grandson, the father of the appellant went to Patna and requested respondent No. 2 to fix a date for *Bidagari* but he refused to the proposal of father of the appellant and told to send the appellant for *Bidagari*. The appellant, thereafter went at the residence of his father-in-law in Patna and requested respondent No. 2 to fix a date for *Bidagari* but respondent No. 2 refused to send his daughter (respondent No. 1) with him to his village. He abused by using filthy languages and threatened him to implicate in a false case. The appellant was offered to live with respondent No. 1 at his in-laws residence. The respondent No. 1 also refused to to cohabit with the appellant whenever he demanded for it.

4. Ultimately, respondent No. 1 agreed to live with the appellant but she was not ready to live in village-

Chahuta. Therefore, she was brought to a rented house in Darbhanga. On 21.06.2010, respondent No. 1 called her uncle, aunt and mother. They started abusing the appellant's family members and asked them to leave the house, upon which the appellant's father and other family members were forced to leave the house. The appellant's mother-in-law forcefully took away his son and told that her daughter (respondent No. 1) would not live with the appellant. Hence, by the action and activity of respondent Nos. 1 and 2, the appellant sustained physical and mental torture and the acts of the respondent Nos. 1 and 2 had damaged the respect and prestige of the appellant's family in the society. The appellant, therefore, prayed that the marriage between the appellant and respondent No. 1 be declared dissolved and a decree of divorce be passed in his favour.

5. It is pertinent to mention here that on 04.03.2010 the appellant had filed Matrimonial Case No. 24 of 2010 under Section 9 of the Hindu Marriage Act, 1955 before the Principal Judge, Family Court, Madhubani for the restitution of conjugal rights. In the aforesaid case, respondent No. 1 had appeared on 17.05.2010 and filed her

show-cause. Subsequently, on 29.07.2010, an amendment application was filed on behalf of the appellant to convert the matrimonial suit filed under Section 9 of the Hindu Marriage Act into a petition filed under Section-13 of the Hindu Marriage Act, 1955. After hearing both sides, the amendment application was allowed on 18.09.2010 by learned Trial Court and an order was passed to convert the case under Section 9 of the Hindu Marriage Act, 1955 into a Divorce Case under Section 13 Hindu Marriage Act, 1955. Thereafter, a coordinate Bench of this Court, vide order dated 28.6.2012 passed in Misc. Jurisdiction Case No. 2712 of 2011, with consent of both sides had transferred the Divorce case No. 24 of 2010 from the Court of learned Principal Judge, Family Court, Madhubani to the Court of learned Principal Judge, Family Court, Hajipur, Vaishali.

6. In response to the summon/notice issued by the Court, respondent/O.P appeared and filed her reply/written statement.

7. In her written statement/reply, the respondent No. 1 has stated that marriage of the respondent No. 1 with the appellant was solemnized on 09.03.2008 as per Hindu

Rights and Customs In the marriage, her father (respondent No. 2) spent worth Rs. 5 lakh. After marriage, the appellant and respondent No. 1 started living as husband and wife but after sometimes, the in-laws family members including the appellant started torturing the respondent No. 1 for demand of dowry. Ultimately, her father (respondent No. 2) took her with him. A male child was born on 15.01.2009, out of the wedlock. The father (respondent No. 2) of the respondent No. 1 met all the expenses incurred at the time of delivery and other expenses. The appellant never came for Bidagari at the parental house of the respondent No. 1. The respondent No. 1 went along with the appellant at her matrimonial house after compromise in a case filed by the appellant for restitution of conjugal rights but the behaviour of her in-laws towards respondent No. 1 did not change and they started threatening, abusing and assaulting the respondent No. 1 for demand of dowry, as a result of which, respondent No. 1 filed Complaint Case No. 1518 of 2011 on 16.08.2011 before learned Chief Judicial Magistrate, Darbhanga against the appellant and other in-laws for the offences punishable under Section 498(A) and Section 3/ 4

of the Dowry Prohibition Act. The respondent No. 1 never denied for cohabitation to the appellant and she is always ready to live with the appellant but it is the appellant who does not want to keep respondent No. 1 with him.

8. On the basis of the rival contentions of both the parties, following issues were framed in this case by the learned Trial Court :-

1. Whether the case as framed is maintainable?

2. Whether the petitioner has cause of action to file this case?

3. Whether the opposite party has deserted the petitioner continuously for a period of more than two years since preceding the presentation of the instant case?

4. Whether the petitioner was subjected to cruelty by the opposite party?

5. Whether the petitioner is entitled to relief as claimed for?

6. Whether the petitioner is entitled to any other relief or reliefs?

9. During course of trial, altogether five witnesses have been produced on behalf of the appellant which are P.W. 1 Praveen Kumar Chaudhary(appellant), P.W. 2 Manoj

Thakur, P.W. 3 Bhogendra Chaudhary, P.W. 4 Dashrath Kamat and P.W. 5 Ravindra Chaudhary (father of the appellant).

10. On behalf of the respondent/O.P., six witnesses have been produced who are O.P.W. 1 Archana Chaudhary (wife/respondent No. 1), O.P.W. 2 Uday Chandra, O.P.W. 3 Sitaram Jha, O.P.W. 4 Vidya Nand Jha (uncle of respondent No. 1), O.P.W. 5 Naveen Kumar Jha (brother of respondent No. 1) and O.P.W. 6 Ram Kumar Jha (respondent No. 2).

11. After conclusion of the trial, the learned Principal Judge, Family Court has held that appellant has not proved that he was subjected to cruelty at the hands of the respondent No.1 as well as deserted by the respondent No. 1 and the case filed by the appellant is not maintainable and also the appellant has no valid cause of action to file the instant case. Accordingly, the Trial Court came to the conclusion that the appellant was not entitled for decree of divorce on the ground of cruelty as well as desertion and the suit was accordingly dismissed.

12. Thereafter, being aggrieved and dissatisfied with the aforesaid judgment and decree passed by the learned

Court below in Matrimonial (Divorce) Case No. 33 of 2013, the present appeal has been filed by the appellant.

13. Learned counsel appearing on behalf of the appellant has submitted that the judgment and decree passed by the learned Court below is bad and appears to be mechanically passed without application of judicious mind. The wife-respondent No. 1 had deserted the appellant since 2009. The appellant made several attempts to bring back respondent No. 1 to her matrimonial house but she was not interested to continue matrimonial relationship with the appellant. The appellant resides at his village-*Chahtua (Badhopatti)* in the district of Madhubani and after marriage, he took the respondent No. 1 at his village home but after sometimes, the behaviour of the respondent No. 1 towards the appellant and other in-laws family members were changed and she started creating trouble to the in-laws in their day-to-day affairs and ultimately in July, 2008, she called her father(respondent No. 2) and went along with him at Patna without consent of the appellant or any other family member. The appellant and his family members made all efforts to reconcile the matter and ultimately, the

respondent No. 1 agreed to live with the appellant on a condition that appellant would take a house on rent at Darbhanga as she was not ready to live with the appellant in his village house. The appellant took a house on rent at Darbhanga where the respondent No. 1 resided with the appellant for a short span of time and ultimately on 21.06.2010, respondent No. 1 called her family members. They came at the rented house of appellant at Darbhanga and abused and misbehaved with the appellant and his other family members and forcefully took away his son (respondent No. 3) and the respondent No. 1 as well and threatened to implicate in a false case. During her stay with the appellant, the respondent No. 1 never cohabit with the appellant.

14. *Per contra*, learned counsel appearing on behalf of the respondents has submitted that the impugned judgment and decree is just legal and in accordance with law. The learned Trial Court has rightly appreciated the evidence adduced on behalf of both the parties in the right perspective and has correctly dismissed the suit for divorce filed on behalf of the appellant.

15. In view of the rival contentions, evidences and the arguments adduced on behalf of both the parties, the main points for determination in this appeal are as follows:-

(i) Whether the appellant is entitled to the relief sought for in his petition/appeal.

(ii) Whether the impugned judgment of Principal Judge, Family Court, Patna is just, proper and sustainable/tenable in the eyes of law.

16. Before going into the merits of the case, this Court has to examine that whether amendment petition filed under Order 6 Rule 17 CPC for converting the petition filed under Section 9 of the Hindu Marriage Act into a petition under Section 13 of the Hindu Marriage Act is permissible as it would change the nature of the case. Initially the appellant had filed a petition under section 9 of the Act seeking restitution of conjugal rights condoning all the alleged lapses on the part of the respondent-wife and thereafter the relief was sought to be amended by seeking divorce. Both these pleas were diametrically opposed to each other and if the said amendment was permitted, the mandatory separation of 2 years prior to filing the case of

divorce would remain unsatisfied as the amendment would relate back to the date of filing of the petition under section 9, which had been filed on a date which is less than 2 years from the date of separation. It transpires from the record that the petition under section 9 of the Act was filed by the appellant on 04.03.2010 for restitution of conjugal rights mentioning therein that marriage took place on 09.03.2008. In the aforesaid case, respondent-wife had appeared and filed her written statement. Thereafter, an amendment application was moved on 29.07.2010 with a prayer that instead of section 9, section 13 should be permitted to be substituted converting the petition of restitution of conjugal rights into that of divorce on the ground of cruelty by respondent No. 1 with the appellant and other family members.

17. It would be pertinent in reproduce the relevant portions of sections 9 13, 13A and 14 of the Hindu Marriage Act, 1955, which are as follows:-

"9. Restitution of Conjugal Rights - When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may

apply, by petition to the district court, restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation- where a question arises whether there has been reasonable excuse for withdrawal from the society, the burden of proving reasonable excuse shall be on the person who has withdrawn from the society.

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

i) has, after the solemnisation of the marriage, had voluntarily sexual intercourse with any person other than his or her spouse: or (ia) has, after solemnisation of the marriage, treated the petitioner with cruelty; or (ib) has deserted the petitioner for a continuous period of not less than 2 years immediately preceding the presentation of

the petition; or

(ii).....

Explanation- In this subsection, the expression "desertion" means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

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

(i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(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.

.....

13A. Alternate relief in divorce proceedings - in any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of subsection (1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

14. No petition for divorce to be presented within one year of marriage - (1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of presentation of the petition one year has elapsed since the date of the marriage.

18. It is pertinent to mention here that it is the case of the appellant that respondent No. 1 left the rented house of the appellant on 21.06.2010 and went along with her

mother, uncle and aunt which suggests that after filing of the restitution petition on 04.03.2010, respondent No. 1 went along with the appellant and resided there as wife in the house of the appellant. Therefore, filing a petition for amendment in the restitution case and praying for conversion of the restitution case into Divorce case suggests that appellant had not come in the Court with clean hands. Hence, on this ground alone, the matrimonial suit appears to be premature in view of provision (1-b) of sub-Section 1 of Section 13 of the Hindu Marriage Act which lays down that deserting party must have been living separately for two years before filing of suit for dissolution of marriage.

19. It is well settled law that when any facts or pleadings sought to be amended, which would change or tends to change the very nature of the case or suit, will not be permissible in the eye of law. In this case, earlier the appellant had filed a case under Section 9 of the Hindu Marriage Act for restitution of conjugal rights. If the grounds sought to be amended for Section 13 of the Hindu Marriage Act, was available with him then why he had filed the petition under Section 9 of the Hindu Marriage Act for

restitution of conjugal rights. It is not answered by the appellant and what were the new facts which were not in his knowledge at the time of filing of the case under Section 9 of the Hindu Marriage Act, is also not mentioned. Moreover, if the amended facts for grant of divorce under Section 13 of the Hindu Marriage Act is allowed, it will change the nature of the suit, which is not permissible in the eye of law. So, it can be safely held that in the facts and circumstances discussed above, the amendment allowed and accordingly conversion of the case from Section 9 of the Hindu Marriage Act to that of Section 13 of the Hindu Marriage Act is not in accordance with law and accordingly, it is not permissible.

20. So far as, the ground of cruelty for taking divorce is concerned, the word 'cruelty' has not been defined in specific words and language in the Hindu Marriage Act, 1955, but it is well settled position that cruelty is such of character and conduct as cause in mind of other spouse a reasonable apprehension that it will be harmful and injurious for him to live with O.P.- respondent.

21. It is observed by the Hon'ble Apex Court in

leading case of Samar Ghose vs. Jaya Ghose reported in 2007 (4) SCC 511 that a sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty. More trivial irritations, quarrel, normal wear and tear of the married life which happens in day-to-day live would not be adequate for grant of divorce on the ground of mental cruelty.

22. In this context, we are tempted to quote the golden observation made by the Hon'ble Apex Court during decision in case of Narain Ganesh Dastane vs. Sucheta Naraih Dastane reported in, AIR 1975, 1534, which are as follows:-

"One other matter which needs to be clarified is that though under Section 10(1) (b), the apprehension of the petitioner that it will be harmful or injurious to live with the other party has to be reasonable, it is wrong, except in the context of such apprehension, to import the concept of a reasonable man as known to the law of negligence of judging of matrimonial relations. Spouses are

undoubtedly supposed and expected to conduct their joint venture as best as they might but it is no function of a court inquiring into a charge of cruelty to philosophise on the modalities of married life. Some one may want to keep late hours of finish the day's work and some one may want to get up early for a morning round of golf. The court cannot apply to the habits or hobbies of these the test whether a reasonable man situated similarly will behave in a similar fashion. "The question whether the misconduct complained of constitutes cruelty and the like for divorce purposes is determined primarily by its effect upon the particular person complaining of the acts. The question is not whether the conduct would be cruel to a reasonable person or a person of average or normal sensibilities, but whether it would have that effect upon the aggrieved spouse. That which may be cruel to one person may be laughed off by another, and what may not be cruel to an Individual under one set of circumstances may be extreme cruelty under another set of circumstances". The Court has to deal, not with an ideal husband and ideal wife (assuming any such exist) but with the particular man and woman before it. The

ideal couple or a near-ideal one will probably have no occasion to go to a matrimonial court for, even if they may not be able to draw their differences, their ideal attitudes may help them overlook or gloss over mutual faults and failures."

23. After going through the above entire documentary and oral evidence adduced on behalf the appellant-husband, it is crystal clear that appellant-husband has failed to prove the cruel behaviour of the respondents towards him and his family members by the strength of cogent, relevant and reliable evidence, while burden of proof of cruelty rests upon the appellant-husband of this case, because, he has sought relief of divorce on the basis of cruel behaviour of the respondent No.1 towards him. Not even single incident with reference to specific date of alleged cruelty has been urged in the plaint before the Family Court. Moreover, wife (respondent No. 1) is still ready to live with the appellant. Furthermore, alleged certain flimsy act or omission or using some threatening and harsh words may occasionally happen in the day-to-day conjugal life of a husband and wife to retaliate the other

spouse but that cannot be a justified/sustainable ground for taking divorce. Some trifling utterance or remarks or mere threatening of one spouse to other cannot be construed as such decree of cruelty, which is legally required to a decree of divorce. The austerity of temper and behaviour, petulance of manner and harshness of language may vary from man to man born and brought up in different family background, living in different standard of life, having their quality of educational qualification and their status in society in which they live.

24. Thus, considering the above entire aspects of this case and evidence adduced on behalf of both the parties, we find that appellant has failed to prove the allegation of cruelty, much less, the decree of cruel behaviour of respondent which is legally required for grant of decree of divorce under section 13(1) (ia) of the Hindu Marriage Act.

25. So far as ground of desertion is concerned, it has come in the evidence of the appellant-husband (PW-1) that marriage of the appellant with respondent No. 1 was solemnized on 09.03.2008 and after marriage, they started

living as husband and wife. In July, 2008, respondent No. 2 took his wife(respondent No. 1) with him. A male son was also born out of the wedlock on 15.01.2009 and on the occasion of *Chhathiyar*, father of the appellant (P.W.2) went there. Again, the appellant also went there to take back his wife (respondent No. 1). The appellant (P.W. 1) further deposed in his examination-in-chief that after compromise, respondent No. 1 went at the rented house of the appellant at Darbhanga but again on 21.06.2010, she deserted the appellant and went along with her mother, aunt and uncle. The aforesaid deposition of the appellant (P.W.1) is itself sufficient to suggest that respondent No. 1 had not deserted the appellant for a considerable period of two years which may be a legal ground for dissolution of marriage. So, on the ground of desertion also, the appellant is not entitled to get any decree of divorce. Thus, the appellant-husband has also failed to prove that the respondent-wife has deserted the appellant-husband.

26. Hence, we find no merit in the present appeal warranting any interference in the impugned judgment. The Family Court has rightly dismissed the matrimonial case of

the appellant seeking divorce.

27. The present appeal is dismissed accordingly,
affirming the impugned judgment.

(S. B. Pd. Singh, J)

(P. B. Bajanthri, J)

Shageer/-

AFR/NAFR	AFR
CAV DATE	05/12/2024
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