



NAFR

HIGH COURT OF CHHATTISGARH, BILASPURFAM No. 71 of 2017

- Sanjeev Kumar Sahu :

---- Appellant

Versus

- Smt. Priyanka Sahu

---- Respondent

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For Appellant	:	Shri Rahul Mishra, Advocate
For respondent	:	None, despite service of notice.

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Hon'ble Shri Justice Goutam BhaduriHon'ble Shri Justice Radhakishan AgrawalJudgment on BoardPer Goutam Bhaduri, J.06/09/2022

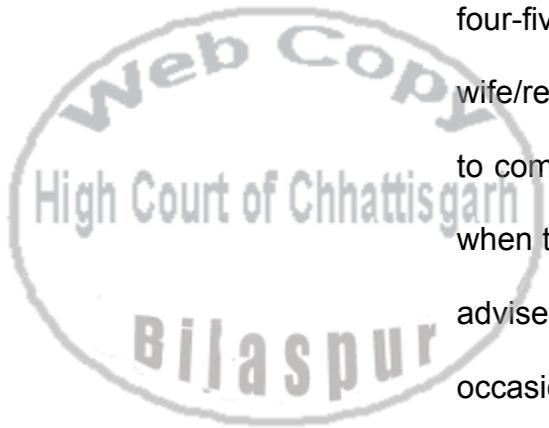
Heard.

1. The present appeal is against the judgment and decree dated 24.01.2017, passed in Civil Suit No. 18-A/2016 by



the learned Family Court, Baikunthpur, District Koriya wherein the petition filed by the husband (appellant herein) seeking divorce on the ground of desertion has been dismissed.

2. The appellant/ husband pleaded that he was married to the respondent on 28.11.2013 and after marriage the respondent/ wife joined the company of the appellant. Thereafter, as per the ritual known as " *Chauti Bidai* " four-five people from the in-laws side came and took the wife/respondent along with them and advised the husband to come after 15 days to take the wife back. After 15 days when the husband went to the house of wife, again he was advised to come back after 15 days. He on different occasions also tried to contact the wife by phone also and lastly on 21.04.2014, when he finally went to take her back, he was advised to come after 10 days. Therefore, it is the contention of the husband that without any sufficient cause the wife has deserted the husband and all the efforts to bring the wife back failed. Thereafter, when the wife did not joined the company of the husband, the husband filed an application under Section 9 of Hindu Marriage Act, 1955 ( for short ' Act of 1955' ) for restitution of conjugal rights bearing No. 32A/ 14, wherein order was passed on 24.02.2015, for restitution of conjugal rights despite that





when the husband went with the society members to bring her back on 20.02.2015, she refused to come along with the husband, therefore, before filing the petition on 16.03.2016 prior to 2 years of the date, the wife has deserted the husband without any lawful cause.

3. The respondent/ wife filed the written statement and it was alleged that because of torture and demand of dowry she was forced to stay away and she has not deserted the husband and denied all the allegations made . It is further contended that she informed about the torture to the family members but she was advised to adjust herself but eventually the wife could not adjust because of the torture meted out to her and consequently she had to leave her matrimonial house. Therefore, it is stated that the wife has not deserted the husband.

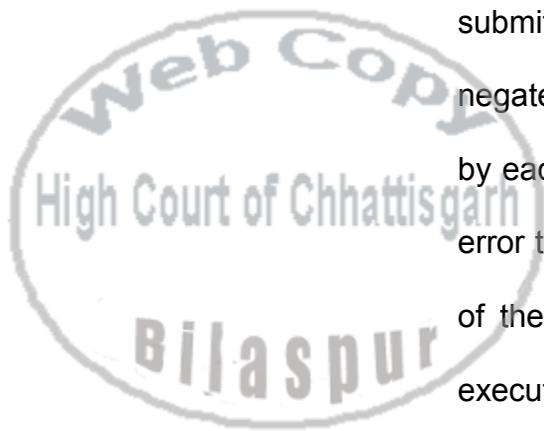
4. During the proceeding before the learned Family court, the wife proceeded ex-parte on 22.12.2016. The husband examined himself as PW-1 and one Jai Prakash Sahu as PW-2 and Deepak Kumar as PW-3 . The husband was examined and cross examined by the counsel of the wife on 27.09.2016. Subsequent statement of the witnesses shows that as the wife was proceeded ex-parte, as such unilateral statement was recorded of PW-2 (Jai Prakash Sahu) and PW-3 (Deepak Kumar) and after examination of





the witnesses, the learned Family court dismissed the application of the husband. Hence this appeal.

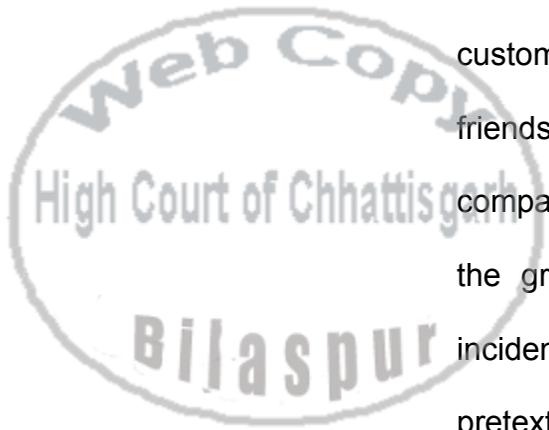
5. Learned counsel for the appellant/ husband would submit that there is nothing on record to show that any cruelty was meted out to the wife for the reason she was living separately. On the contrary, records would show that husband tried to bring back the wife and made sufficient efforts but she did not joined back his company. He further submits that the statement of the witnesses have not been negated and the fact of desertion has been corroborated by each other. Therefore, the Learned family court fell into error to draw the finding that since the decree of Section 9 of the Act, 1955 for restitution of conjugal right was not executed by the husband, as such, the ground of desertion was denied. He would further submit that finding of learned Family court is completely perverse and imaginary and cannot be sustained. Thus, the husband is entitled for divorce on the basis of the facts on record.
6. No representation is made on behalf of the wife. She remained ex-parte.
7. We have heard learned counsel for the appellant and perused the records.
8. Perusal of the records would show that primary grounds on





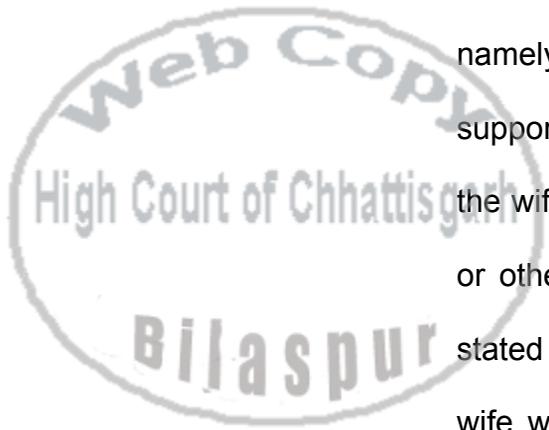
which divorce was sought for was on the ground of desertion. Till PW-1 husband was examined and cross examined the wife appeared before the learned family court and subsequent proceedings was ex-parte. The date of marriage 28.11.2013 is not in dispute. PW-1 the husband has stated that after the marriage, the wife joined the company of the husband at his village Pandavpara. Thereafter, as per custom named as "Chauthi Bidai" the wife went back to her parental home and as per the custom after 15 days when the husband along with some friends went to bring her back, she did not joined the company of the husband and refused to come with him on the ground that she would join after some time. This incident occurred time and again and eventually on some pretext or other the wife avoided to join the company of the husband. In the cross examination of the husband suggestion was made that application under section 9 of the Act of 1955 for restitution of conjugal right which was decreed in favour of the husband was not put into execution.

9. Suggestion was also made that after decree under Section 9 of the Act of 1955 no efforts were made by the husband to get the wife back from her parental home. The aforesaid suggestion on the contrary would show that the wife was





very much aware of the decree under Section 9 of the Act of 1955 which was passed in favour of the husband for restitution of conjugal rights. In between husband and wife, it is mutual respect and compatibility and if the fact was known to the wife that husband even knocked the door of the Court to get back the company of the wife but even after that if she did not joined the company, *prima facie*, inference would be drawn that she did not want to join the company of the husband. The witnesses PW-2 and PW-3 namely Prakash Sahu and Deepak Kumar have supported the contention that the husband tried to bring the wife back from her parental home but on some pretext or other the wife refused to join him. It has been further stated by PW-1 husband, PW-2 and PW-3 that when the wife was asked to join the company, she refused on the ground that marriage was against her will and it was on pressure of mother, father and brother-in-law. In the circumstances of the case, when the wife even after knowing the fact that order of restitution of conjugal right has been passed which means that the wife has to join the company of the husband to restore the marriage, if did not joined would show that the statement of the witnesses that the wife did not want to join the company of the husband appears to be more logical.





10. In the matter of **Bipinchandra Jaisinghbai Shah v Prabhavati**<sup>1</sup> the Supreme Court observed and discussed about "What is desertion?". Para 10 of the said dictum is quoted below for ready reference :

(10) What is desertion? "Rayden on Divorce" which is a standard Work on the subject at p. 128 (6th Edn.) has summarised the case-law on the subject in these terms:-

"Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarised in paras 453 and 454 at pp. 241 to 243 of Halsbury's Laws of England (3rd Edn.) Vol. 12, in the following words:-

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases.

Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state

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<sup>1</sup> AIR 1957 SC 176





of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition or where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandon the other spouse in a state of temporary passion, for example, anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion.' For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there, namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (*animus deserendi*). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential





conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce; under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances of each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If, in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co-exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the animus deserendi coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied, of bringing cohabitation permanently to a close. The law in England has prescribed a three year period and the Bombay Act prescribes a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bonafide offer of resuming the matrimonial some with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end and if the deserted spouse unreasonably refuses the offer, the latter may be in desertion and not the former. Hence it is





necessary that during all the period that there has been a desertion the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like any other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law, the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard, C.J. in the case of Lawson v. Lawson(1) may be referred to:-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution....."

11. Translating the aforesaid dictum into the facts and circumstances of the present case, it would show that after marriage wife went to her parental home in pursuit of some custom but when the husband went to get her back she refused on the ground that she was not happy with the marriage. Though in the written statement averments were made that she was subjected to torture for demand of dowry but nothing has been placed on record to support the contention and only bald statement has been made and even in the cross examination of the husband (PW- 1) no suggestion of the like nature was made. In the circumstances, simply for the reason that the husband did not put into execution the decree of section 9 of the Act of 1955, the inference cannot be drawn that the husband





actually did not want the company of the wife. On the contrary, the facts would show that the wife has deserted the husband prior to 2 years from the date of filing of the application of divorce on 16.03.2016.

12. Under the circumstances, we are of the view that the judgment and decree of the learned Family court is liable to be set aside. Accordingly, we allow the appeal and in consequence it is ordered that the marriage in between the appellant/ husband and the respondent/ wife dated 28.11.2013 shall be dissolved by decree of divorce.

13. A decree be drawn accordingly.

Sd/-

(Goutam Bhaduri)

Judge

Sd/-

(Radhakishan Agrawal)

Judge