

CANCELLED

IN THE HON'BLE HIGH COURT OF CHHATTISGARH AT
BILASPUR

F.A.(M) No. 03 /2009

Division Bench

APPELLANT/
Non-applicant

Smt. Vimla Patnaik W/o.
Birendra Bahidar, aged about-
38 years, R/o. Village-
Tamnar, Tahsil Gharghoda,
District- Raigarh (C.G.)

A.R. No. 126/09.....
Presented by Basant Dewangan
Dated 13/01/09.....

VERSUS

RESPONDENT/
Applicant

Birendra Bahidar S/o.
Vishesh Bahidar, aged
about- 39 years, Caste-
Mahanti, Village- Gharghoda,
Tahsil-Gharghoda, District-
Raigarh (C.G.)

MISCELLANEOUS APPEAL UNDER SECTION 19(1) OF FAMILY

COURT ACT, 1984



HIGH COURT OF CHHATTISGARH AT BILASPUR

DB: Hon'ble Shri Justice I.M. Quddusi and
Hon'ble Shri Justice Prashant Kumar Mishra

First Appeal (M.) No.3 of 2009

Smt. Vimla Patnaik

versus

Birendra Bahidar

JUDGMENT FOR CONSIDERATION

Sd/-
Prashant Kumar Mishra
Judge

Hon'ble Shri I.M. Quddusi, J.:

Sd/-
I.M.Quddussi
Judge

Post for 31-03-2011

Sd//
Prashant Kumar Mishra
Judge



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HIGH COURT OF CHHATTISGARH AT BILASPUR

**D.B.: Hon'ble Shri Justice I.M. Quddusi and
Hon'ble Shri Justice Prashant Kumar Mishra**

First Appeal (M.) No.3 of 2009

Appellant

Smt. Vimla Patnaik

versus

Respondent

Birendra Bahidar

Present:

Shri Amit Sharma, counsel for the appellant.

Shri Govind Dewangan, counsel for the respondent.

Appeal under Section 19(1) of the Family Courts Act, 1984

JUDGMENT

(Delivered on 31 - 03 - 2011)

Per Prashant Kumar Mishra, J.:

In this appeal under Section 19(1) of the Family Courts Act, 1984 (henceforth 'the Act, 1984'), the appellant/wife is challenging the judgment and decree dated 5-12-2008 passed by the Family Court, Raigarh in Civil Suit No.22-A/2007 allowing the respondent/husband's application under Section 9 of the Hindu Marriage Act, 1955 (henceforth 'the Act, 1955') for restitution of conjugal rights.

2. Facts of the case, briefly stated, are that the parties to the proceedings were married at Village Tamnar, District Raigarh in July, 1998 and a son Master Shubham was born out of the wedlock, who was aged about 7 years at the time of submission of the subject application for restitution of conjugal rights. According to the

husband, the appellant/wife went to her parental house when the child was in womb and thereafter she has never come back to her marital house. During the intervening period, she had taken back all the articles which she had brought as gift/dowry and has refused to reside with him and is presently serving as Anganbadi Worker. It was further stated by the husband that the wife is residing separately without any justifiable cause and is refusing to perform her marital obligations and consistent efforts made by him to bring her back yielded no result. Instead, she sent messages that the husband should come to her place and live with her.

3. The appellant/wife, in her reply, denied that she had left her marital house when the child was in womb. She stated that even after birth of Master Shubham, she stayed with her husband for about 1½ years at Gharghora, however, during this period, the husband's behaviour was not proper and he was always misbehaving and treating her with cruelty. She was assaulted and left at her parental house in May, 2001. At this time, the husband was working in the Adim Jati Sewa Sahakari Samiti Maryadit, Gharghora, where he committed embezzlement for Rs.1,22,000/- and was absconding. He was later on arrested and remained in jail for about 9 months. However, even after his release from jail, he had not taken care of the appellant as well as of the child. She denied that she had taken back all the articles of gift/dowry. According to the wife, she joined services as an Anganbadi Worker because of compulsion and for the purpose of maintaining her child.

4. In course of trial, the respondent/husband examined Bahadur Oraon as AW-1, Sanjeev Nishad as AW-2 and he himself was examined as AW-3. On the other hand, the appellant/wife examined Vijay Shankar Bahidar as NAW-1, Bhikharilal as NAW-2 and she herself was examined as NAW-3.

5. The family Court has allowed the application after finding that the appellant/wife is residing separately without any justifiable cause.

6. The sole question to be considered in this appeal is whether the family Court is correct in holding that the appellant/wife is residing separately without any justifiable cause and as to whether the application under Section 9 of the Act, 1955 deserves to be allowed.

7. The respondent/husband's witness No.1 Bahadur Oraon has stated that the husband and wife remained together for about 1½-2 years after the marriage. AW-2 Sanjeev Nishad has also stated that they resided together for about 3-4 years. Whereas, according to the husband, the wife left the marital home when the child was in womb. On the other hand, the appellant's witness No.1 Vijay Shankar Bahidar has stated that they are residing separately because of dispute between them. NAW-2 Bhikharilal states that the husband was absconding and was not traceable for about 6 years. The appellant/wife has stated that she was not being taken care of properly by the husband and he was absconding from 2000 to 2005. She further states that she cannot leave the services of Anganbadi

Worker and, therefore, she cannot be compelled to live at the marital house.

8. From the evidence available on record, it would appear that after the marriage and the birth of Master Shubham, the husband committed embezzlement and remained absconding for about 5-6 years. He remained in jail for about 9 months and during this period, the appellant/wife, out of compulsion and necessity, joined the services of Anganbadi Worker to maintain her son. She is in service at Tamnar, whereas the husband resides at a different place and is not doing any permanent job. If the appellant is compelled to live with her husband, she may be required to resign from the job or she may be removed because an Anganbadi Worker has to be a resident of the same village. Her service as Anganbadi Worker is necessary to maintain the child. There is no evidence that the respondent/husband is doing any permanent job. Thus, in the totality of the material available on record, it cannot be said that the appellant/wife is residing separately without any justifiable cause. In fact, her service as Anganbadi Worker is necessary in order to live a decent life for herself and for her minor son.

9. Learned Single Bench of Madras High Court has held in paragraph 3 of the judgment in ***N.R.Radhakrishnan vs. N. Dhanalakshmi***, AIR 1975 Madras 331, thus:

"3. It is, therefore, clear that the respondent is not refusing, much less unreasonably refusing, to give her wifely company to the appellant. There is, therefore, no legal ground for granting restitution of conjugal rights, which would necessarily involve the resignation by the

respondent of a valuable job which fetches her Rs.250 per mensem and without which she and her child may probably be thrown out to the wolves."

10. The Court below has ignored this crucial aspect of the matter while allowing the application under Section 9 of the Act, 1955. When the husband is not doing any permanent job and the wife is performing the duties of an Anganbadi Worker to maintain herself and her child, it cannot be said that she is living separately without any justifiable cause. In the opinion of this Court, the Court below has committed illegality in allowing the application for restitution of conjugal rights. Thus, in the facts and circumstances of the case and the material available on record, this Court is of the considered opinion that the present appeal deserves to be allowed.

11. Consequently, the first appeal is allowed, the impugned judgment and decree is set aside and the respondent's application under Section 9 of the Act, 1955 is dismissed. There shall be no order as to costs.

12. A decree be drawn-up accordingly.

Sd/-
I.M.Quddussi
Judge

Sd//
Prashant Kumar Mishra
Judge