

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 96 of 2015

Dewesh Khandelwal S/o Shri Radhey Shyam Khandelwal Aged About 43 Years
Occupation- Service, R/o Village Bilaspur, Mohalla Diprapara, Near C.G.
Agrawal Dharamshala High Court Road Bilaspur, P.S. Kotwali, P.O. Tehsil And
District- Bilaspur, Chhattisgarh,

---- Appellant

Versus

Smt. Neha Khandelwal W/o Shri Dewesh Khandelwal Aged About 33 Years
Occupation- House Hold Work, R/o Village Bilaspur, Mohalla Diprapara, Near
C.G. Agrawal Dharamshala High Court Road Bilaspur, Tehsil And District-
Bilaspur, Chhattisgarh, Presently Residing- C/o Shri Om Prakash Khandelwal,
386 Samta Colony, P.S. Kotwali, P.O. Tehsil And District Raipur, Chhattisgarh

---- Respondent

FAM No. 97 of 2015

Dewesh Khandelwal S/o Shri Radhey Shyam Khandelwal Aged About 43 Years
R/o Diprapara, Near Chhattisgarh Agrawal Dharamshala, High Court Road
Bilaspur, Police Station Kotwali, Post Office Tehsil And District- Bilaspur,
Chhattisgarh Defendant,

---- Appellant

Versus

Smt. Neha Khandelwal W/o Shri Devesh Khandelwal Aged About 33 Years R/o
Samta Colony 386 Raipur, P.S. Kotwali, P.O. Tehsil And District Raipur,
Chhattisgarh Plaintiff, Chhattisgarh

---- Respondent

For Appellants	:	Shri Pramod Verma, Senior Advocate with Shri Virendra Verma, Advocate
For Respondent	:	Shri Shailendra Sharma, Advocate

**D.B. :Hon'ble Mr. Justice Manindra Mohan Shrivastava &
Hon'ble Mrs. Justice Vimla Singh Kapoor**

Judgment On Board

31/01/2020

Per Manindra Mohan Shrivastava, J.

1. This order shall govern disposal of First Appeal (M) 96 of 2015 and First Appeal (M) 97 of 2015.

FA(M) 96 of 2015

2. FA(M) 96 of 2015 is directed against judgment and decree dated 17.7.2015 passed by learned Second Additional Sessions Judge, Family Court, Raipur in Civil Suit No.255-A of 2008 by which the learned Family Court has dismissed the appellant's application for grant of decree of divorce.
3. An application for grant of decree of divorce was initially filed by the appellant-husband on the basis of mutual consent between the parties. Later on, by way of amendment, the appellant-husband included pleading that the respondent-wife is not residing with the appellant since 13.3.2005 and, therefore, a decree of divorce be granted.

Respondent-wife opposed the application and submitted that she had never entered into an agreement for divorce by mutual consent. Her pleadings was that the agreement dated 1.4.2007 is not outcome of free consent of the parties but it was result of pressure due to which, her signature were obtained on the document, though, she was not willing to give divorce to the husband.

4. On the pleadings of the parties, learned Family Court framed issues. The first issue was whether the respondent-wife had acted with cruelty. The second issue was whether the respondent-wife deserted her husband for a period of two years prior to date of filing of application.
5. After allowing the parties to lead their oral and documentary evidence, learned Family Court came to the conclusion the appellant -husband has failed to prove both the grounds and dismissed the application.
6. Learned counsel appearing for the appellant contended that though application, as originally filed, was for grant of decree of divorce by mutual consent, later on, the application was appropriately amended to include the ground of desertion also. He would also submit that the contents of the

agreement dated 1.4.2007 and the evidence led before the Court proves that the respondent-wife left the matrimonial house on 13.3.2005 to perform 'pooja' in her parental house and, thereafter, she never returned to the matrimonial house and having thus deserted the appellant that too without any reasonable cause, the appellant was entitled to decree on the ground of desertion.

7. The other submission is that contents of the application and the evidence also makes out a case of cruelty.
8. Learned counsel for the respondent-wife, on the other hand, opposing the submission, would submit that the entire pleadings in the application for grant of decree of divorce were based only on so called mutual consent which was allegedly entered into by the respondent-wife. He would submit that there are absolutely no pleadings to constitute a case of cruelty much less, any evidence in that regard. According to him, despite amendment made in the plaint, there are no specific pleading so as to constitute a ground of desertion also. He would submit that the appellant's own case was that parties are residing separately on the basis of so called agreement dated 1.4.2007 and where the parties have mutually withdrawn company of each other, one cannot claim decree of divorce on the ground of desertion.
9. We have heard learned counsel for the parties and perused the records of FA (M) No.96 of 2015.
10. The bare perusal of the application for grant of decree of divorce, as was originally filed by the appellant-husband, distinctly reveals that it was an application for grant of decree of divorce on the basis of mutual consent. The perusal of the application and the contents of the pleading clearly reflect that it was an application for grant of decree of divorce on mutual consent on the pleading that after 13.3.2015, parties are residing separately. The effort of the appellant- husband to bring his wife back having failed and there being no cordiality left between the parties, they had decided to divorce by mutual consent. Agreement to that effect was executed on 1.4.2007. There is no pleading whatsoever with regard to cruelty committed by the respondent-wife on the appellant-husband.

However, later on, when after filing of the application, respondent-

wife did not admit the claim made in the application for grant of decree of divorce on mutual consent, the appellant amended his plaint and added following para:-

“(15) 1 (अ) यह कि यदि माननीय न्यायालय द्वारा आपसी सहमति पत्र दिनांक 1.4.2007 को मान्य नहीं किया जाता तो भी लगातार दिनांक 13.03.2005 के पश्चात् आवेदक एवं अनावेदिका के मध्य पति पत्नि का दाम्पत्य संबंध नहीं रह जाने के कारण भी आवेदक को विवाह विच्छेद की डिक्री प्रदान की जावे ।”

11. Even if this pleading is admitted as it is, it hardly constitute a pleading of desertion. All that which has been said in the aforesaid pleading is that after 13.3.2005, no marital relations are remaining between the parties, therefore, a decree of divorce be granted. There is hardly any pleading with regard to desertion by respondent-wife. Apparently, present is a case where the appellant- husband moved an application for grant of decree of divorce on mutual consent on the basis of agreement dated 1.4.2007, but the respondent- wife in the Court did not agree for the same. As it is the appellant's own case that parties are residing separately on the basis of agreement dated 1.4.2007, it does not amount to desertion as understood under Section 13 (1) (i-b) of the Hindu Marriage Act. In order to establish desertion, it has to be proved that while one party was willing, the other party without reasonable cause has left the company of the other spouse. In the present case, as the entire case of the appellant- husband itself rest on the pleading that the parties are residing separately pursuant to agreement dated 1.4.2007, no case for grant of decree of divorce is made out. Therefore, this appeal has no merit and is accordingly dismissed.

FA(M) 97 of 2015

12. FAM No.97 of 2015 is arising out of order dated 17.7.2015 by which learned Family Court, Raipur has allowed the application for restitution of conjugal rights filed by the respondent -wife.

13. An application for restitution of conjugal rights was filed by respondent-wife before the Family Court on the pleadings, inter alia, that after solemnization of marriage between the parties on 13.2.2005, with the consent of her in-laws and husband, she went to her parental house to

perform 'gangaur pooja' but, thereafter, her husband and her family members did not take her back to matrimonial house. It was further pleaded in para- 4,5 & 6 of the plaint that though, number of efforts were made and even the respondent-wife was taken to the matrimonial house by her brother, the appellant and his family members did not accept respondent-wife and they started insisting that respondent should agree for divorce by mutual consent and started exerting pressure on her and so called document of agreement dated 1.4.2007 was prepared which was not outcome of free consent of respondent-wife.

14.The appellant -husband came out with the pleadings that after wife went to her parental house to perform 'gangour pooja' on 13.3.2005, she never returned. The appellant-husband made several efforts but despite that, the respondent-wife herself did not come back to the matrimonial house. The averment that efforts were made by the wife and her family members to sent her back to the matrimonial house, but the appellant did not accept respondent, was also specifically denied.

15.Learned Family Court after allowing the parties to lead oral and documentary evidence came to the conclusion that the appellant- husband had withdrawn from the company of respondent-wife without any reasonable cause and that the respondent- wife, in her pleading as well as in her evidence, clearly stated that she is still willing to reside with her husband, whereas, no such willingness has been expressed by the appellant. On such consideration, the application for restitution of conjugal rights was allowed.

16.Assailing legality and validity of aforesaid judgment and decree, learned senior counsel appearing for the appellant- husband would argue that the pleadings and the evidence of respondent-wife to seek decree of restitution of conjugal rights do not make out a case of withdrawal of company of his wife by the appellant. He would argue that on respondent's own admission, she had gone to parental house on 13.3.2005 to perform certain 'pooja'. Thereafter, she never came back. He submits that it is not a case that wife came to matrimonial house but, thereafter, she was again unceremoniously shunted out from the matrimonial house or that she was not allowed to stay in the matrimonial house or that the husband himself

left the matrimonial house and thereafter withdrawing himself from the company of his wife. He would submit that pleading in para-4 & 5 of the plaint neither constitute withdrawal of company, much less proved from any clinching evidence. As far as pleading of para-6 is concerned, it is argued that the evidence to prove this allegation is inconsistent and not reliable because it is improbable that the respondent- wife despite having reached the house of the appellant-husband along with her brother would say that the husband and her relatives should come to her parental house and take her back. Further submission is that the respondent- wife was not willing to reside with her husband, but only when the appellant filed an application for grant of decree of divorce on mutual consent on the basis of agreement dated 1.4.2007 executed between the parties that as a counter case, application for restitution of conjugal rights was filed by the wife.

17. On the other hand, learned counsel for the respondent- wife would argue that there is not only pleading but also evidence of withdrawal of company by the husband. He would submit that the pleadings contained in para-4,5,6 of the application and evidence led in that regard proves that time and again, attempts were made to resume the matrimonial relationship by the respondent-wife with her relatives but no response was given and at one point of time, husband and his family members refused to allow the wife to resume matrimonial relationship by living in the matrimonial house. In his submission, this constitute withdrawal of company and, therefore, the burden was on the husband to prove reasonable cause for which there is no evidence led in that behalf.

18. We have heard learned counsel for the parties and perused the records of the case.

19. Application for grant of decree of restitution of conjugal rights is based on the pleading that after marriage between the parties, respondent-wife had gone to parental house on 13.3.2005, to perform 'gangaur pooja'. The pleading, as contained in para-3 of the application, are that after consent of her in laws including her husband, on the request of her parents, she was brought by her brother to parental house at Raipur where she performed 'gangour pooja'. In para -4 of the application, it has been pleaded that after 'pooja' when her parents requested the husband to take the wife back to

matrimonial house, husband avoided.

Further in para-5 of the application, it has been pleaded that when despite relentless efforts, the husband did not come to Raipur to take the wife back, the family members of the wife again requested through their community. But again, the husband and his family members did not accept her.

In para-6, it has been pleaded that when despite lapse of two years no one came to take the wife back to matrimonial house, she had gone to Bilaspur along with her brother and requested that she may be brought back to matrimonial house upon which, the husband again assured to come to Raipur and take her back but thereafter, neither the husband nor his parents came and the proposal was declined and in this manner she has been deserted by her husband.

20. Except the pleading that she had gone to her parental house for performing 'pooja' with the consent of her in-laws, all other pleadings have been denied by the husband and it has been pleaded that it is the husband who made several efforts to bring his wife back to the matrimonial house but the respondent-wife and her parents and other relatives were not inclined to send her back to the matrimonial house.
21. A decree of restitution of conjugal rights can be granted under Section 9 of the Hindu Marriage Act when either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, and the Court is 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. The explanation appended to the aforesaid provision also provides that 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.
22. The aforesaid provision itself requires the party praying for decree of restitution of conjugal rights to first establish that the other party has withdrawn from the society. Once it is proved, in view of provision contained in explanation, the burden would shift to other party to establish that he has been reasonable excuse for withdrawal from the society.

23. The pleadings contained in para 3 & 5 and the evidence led in this regard by both the parties make it an admitted position that wife had gone to her parental house to perform 'gangaur pooja' and this was on the request made by her parents and with permission of husband and in-laws. It cannot be said to be unceremoniously shunting out of the matrimonial house so as to constitute withdrawal of company by the husband by throwing his wife out of the matrimonial company.
24. Averment contained in para-4 of the application are to the effect that though request was made by the parents of the wife to the husband to take his wife back, he only avoided and did not come, per se did not amount to withdrawal of company. In this paragraph there is no averment made that the wife went to the house of the husband and she was not allowed to stay.
25. Para-5 of the application contained pleading that when despite several efforts made husband did not come to bring his wife back to matrimonial house, family members of the wife requested the husband through their community to take the wife back. Further pleading is that despite efforts, the husband and his family members did not accept.
26. In her affidavit under Order 18 Rule 4 CPC, respondent -wife Smt. Neha Khandelwal has stated in para-6 that when despite several efforts, she was not taken back to matrimonial house, her father himself took her to the matrimonial house but the husband without any excuse refused to keep her in the matrimonial house due to which she came back to her parental house at Raipur. The pleading contained in para-5 of the application is that an attempt was made by her family members to convince the husband and her family members to take her back. Evidence in para-6 of the affidavit under Order 18 Rule 4 CPC is therefore at variance with what has been pleaded in para-5 of the application, to the extent that the wife in her pleading has not stated that she had also gone along with her family members or to say her own father. But then according to her, she herself had gone along with her father and she was insulted and thereafter the husband refused to keep her in the matrimonial house without any reason due to which she came back to parental house. This part of the evidence is not controverted in her cross-examination. It is not a case that the affidavit, evidence is that only her father had gone to the matrimonial house who

requested to husband and family members to take the appellant- wife back, her evidence is that she herself had gone along with father. This evidence has remained uncontroverted.

27. In para-6 of the pleading also, the wife has pleaded that when she was not taken back to matrimonial house, she had gone with her brother and requested the husband and his parents to take her back in the matrimonial house to which only assurance was given. Thereafter, the husband did not come. The evidence of her brother Hitesh Khandelwal (AW2) fully supports this specific pleading that the applicant- wife was taken to matrimonial house. Hitesh Khandelwal (AW2) in para-2 & 3 of his affidavit, categorically stated that he had gone to Bilaspur along with Neha and also along with his mother and father but the husband and his parents not only refused to keep Neha in the matrimonial house but also insulted. In his cross-examination, this specific evidence has not been controverted and on the other hand, a suggestion has been given that after 'pooja' he had taken Neha to matrimonial house at Bilaspur. The suggestion that when the husband was not found she was left behind the matrimonial house is denied. This witness further deposes that when the parents refused to allow applicant-wife a place in the matrimonial house, she was brought back to Raipur.

28. While the wife in her evidence has stated more than once that she is willing to reside with the husband, respondent-appellant has not come out with any specific plea either in his written statement or in the evidence as to when and on which date he had gone to the house of the wife to take her back.

29. From consideration of aforesaid evidence, it is clearly proved that it is the husband who had withdrawn from the company of his wife. The act of withdrawal from the company is established from the uncontroverted testimony of Neha, the wife as also her brother. According to the uncontroverted evidence in this regard, the wife had gone to house of the appellant on two occasions but on both the occasions, she was not allowed to stay in the matrimonial house and her request was turned down. This act on the part of husband amounts to withdrawal from company of the wife. Once that is established, according to explanation appended to

Section 9 of the Hindu Marriage Act, the burden shift on the husband. It is not a case where the appellant-husband has come out with the case that he had actually withdrawn from the company of his wife on account of any settlement between the parties. His case has been that he kept on making efforts to bring his wife back but the wife herself did not come back and her parents did not allow her to go back to matrimonial house and once that plea fails, the appellant- husband is left with no pleading or evidence of reasonable excuse from withdrawal of company. In the result, we also conclude that the respondent-wife made out a case for restitution of conjugal rights.

30. In view of the above consideration, we find no merits in the appeal against judgment and decree of restitution of conjugal rights. This appeal is also dismissed.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge