AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 145 of 2016

Duleshwar Prasad Deshmukh aged 59 Years, S/o Shri Jhaduram Deshmukh, R/o Kalaparampara, Ashish Nagar (East) Krishna Talkies Road, Bhilai, Durg, District- Durg Chhattisgarh

---- Appellant

Versus

Smt. Kirtilata Deshmukh Aged 54 Years, R/o M. I. G. 110, Amadi Nagar Hudco, Bhilai, District- Durg Chhattisgarh, Teacher- BSP Middle School No. 19, Sector- 5, Bhilai Nagar, District- Durg Chhattisgarh

Respondent

For appellant– Shri Anurag Dayal Shrivastava, Advocate.
For respondent – Shri B.P. Singh, Advocate.

Hon'ble Shri Justice Goutam Bhaduri &

Hon'ble Shri Justice Radhakishan Agrawal

Judgement

Per Goutam Bhaduri, J.

24/08/2022

Heard.

1. Present appeal is against the judgement and decree dated 13/05/2016 passed by the learned family court in Civil Suit No.218-A/14 whereby an application filed by the husband seeking divorce was dismissed.

2. Brief facts of this case are that the parties were married on 15/05/1982. A dispute arose in between the parties in 1990 and eventually a deed of divorce as per the custom was executed on 28/01/1994. It is further case of the appellant that since such customary divorce was not recognized by the employer i.e. wherein both the appellant and the respondent were working, as such the husband filed an application under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the

Act of 1955') on 14/11/1995. The respondent/wife remained ex-parte and an ex-parte decree of divorce was passed on 20/03/1996. Subsequently, the appellant performed second marriage on 2nd July, 2001 and thereafter an application was filed under Order 9 Rule 13 of CPC to set aside the earlier ex-parte decree dated 20/03/1996.

3. The learned family court set aside the ex-parte decree on 15/03/2003. Thereafter, the initial suit continued and eventually it was dismissed by the impugned order dated 13/05/2016. It is further case of the appellant/husband that the wife filed a civil suit No.3-A/2018 for declaration with a prayer that the customary divorce which was obtained on 28/01/1994 is bad in law and would not be operative, the suit was eventually dismissed and however the wife succeeded in the appeal by judgement dated 26/11/2019. In such judgement the appellate court observed that since the appeal pertaining to same issue is pending before the High Court any finding given by the High Court would prevail over the finding of the appellate court.

4. The contention of the wife was that her signature was obtained on a blank paper by the husband on the pretext of purchasing a land and the wife believing the version of husband had signed those papers. It is further stated that the husband committed fraud and hatched conspiracy in preparing the deed of divorce, therefore the deed of divorce would not be applicable to the parties. The learned family court after evaluating the facts and evidence dismissed the suit. Hence, this appeal.

5. Learned counsel for the appellant would submit that as per the statement of the wife herself she admitted the custom of the like nature to get separated by custom name “Chod-Chutti” is operative in the family and society and therefore such deed was executed. He would further submit

that the statement of the mother of the respondent/wife would also show that she admitted the fact that such custom of divorce by “Chod-Chhuttti” is prevailing in the society which is not been rebutted. Consequently, once the custom is admitted then the other provision of the Act of 1955 would not be applicable as such nature of custom would be saved under Section 29(2) of the Act of 1955. He would further submit that the finding of the learned family court is that the signature on document of divorce was admitted as such the burden would be shifted to the wife to establish that the signature were obtained on a blank paper. He would further submit that the finding of the learned family court to the effect that the signature of wife were not obtained by fraud on document of divorce Ex.P-1 and such finding has not been assailed by the wife by way of a cross objection under Order 41 Rule 22 of CPC. In a result, those finding would be binding on the parties. He would further submit that the learned family court travelled beyond the evidence and therefore came to a finding of dismissal without considering the fact that apart from the divorce the ground of desertion also existed. Therefore appeal may be allowed and judgement and decree of the trial court be set aside.

6. Per contra, learned counsel for the respondent would submit that as per the evidence of the plaintiff/husband himself it would show that he was not a member of the kurmi samaj and in case the appellant/plaintiff was not a member of kurmi samaj he cannot avail the benefit of custom. He would further submit that when the customary divorce is granted through the intervention of the society, there is no evidence on record to show that any meeting was convened before such deed of divorce was executed. As a result, a doubt which was expressed by the learned family court in respect of the divorce of “Chod-Chutti” would not be admissible.

7. We have heard learned counsel for the parties and perused the evidence.

8. Pleading and the evidence of the husband would show that after the marriage they stayed together, however since 1990 difference arose in between them about the compatibility so much so they started living separately at different houses. Subsequently, it was pleaded that eventually when the conciliation could not be arrived at in between the parties the document “Chod-Chutti” was executed which is marked as Ex.P-1.

9. Perusal of the Ex.P-1 would show that both the appellant and the respondent had dissolved their marriage with mutual consent with a further understanding that no right would prevail over the property of each other reciprocally as they were living separately for a considerable period of time. It was further agreed that both the parties would be free to perform the second marriage and to secure the future of the children; the children would be in custody of wife, as she was working as a teacher. As witness to the deed 10 persons had signed it. According to such Ex.P-1 the customary divorce under the caption “Chod-Chutti” was executed in between the parties on 28/01/1994. Incidentally the question is raised whether such custom if established whether would still survive notwithstanding the provision of section 4 which gives the overriding effect to the Act of 1955 and in effect repeals all existing law whether in shape of an enactment, custom or usage which are inconsistent with the Act. This word makes abundantly clear that matters expressly saved from the operation of the Act continue to be governed by previous laws statutory or otherwise.

10. Section 29 of the Act of 1955 contains savings and repeals. Sub

section 2 of Section 29 reads as under:-

> “29. Savings -(1) xxxxxxx
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> (2) Nothing contained in this Act shall be deemed to affect any right recognised by custom or conferred by any special enactment to obtain the dissolution of a Hindu marriage, whether solemnized before or after the commencement of this Act.”

11. It is manifestly clear from plain reading of sub-section 2 of Section 29 of the Act of 1955, that a marriage can still be dissolved in accordance with the custom governing the parties or under any other law providing for the same. The operating words of sub- section (2) of section 29 of the Act of 1955 i.e. “nothing contained in this Act shall be deemed to affect any right recognised by custom” would lead to demonstrate that the provisions of the Act do not nullify the existence of any custom which confers a right on a party to obtain a dissolution of a Hindu marriage. Normally according to the Hindu Marriage Act, the dissolution of a marriage by the custom is not recognized but the saving clause of sub-section (2) of section 29 recognizes the customary divorce unless it is against the public policy.

12. Result would be that a Hindu marriage may be dissolved either under Section 13 of the Act of 1955 or under any special enactment in accordance with the custom applicable to the parties. Section 29(2) of the Act of 1955 does not disturb the practice of customary divorce occupied before the Act came into force. In other words the explanation carved out by sub section (2) of section 29 operates as an effect that there has been infact customary divorce can be given effect to.

13. For custom to have a colour of a rule of law, it is necessary for a party claiming it to plead and thereafter to prove such custom is ancient.

The pleading and the evidence of PW-1 the husband it has been pleaded that according to the custom which is prevailing in their society and the family the Ex.P-1 document was executed. The statement of the respondent at para 8 would show that she admitted the fact that in civil suit No.139-A/2001 she made a statement and admitted that in their society divorce by “Chod-Chutti” custom is recognized. She further made statement in respect of Ex.P-1 that she has no personal animosity with the witness to such deed. It demonstrates that the witnesses to such deed were not interested or attached with any party to such deed. The mother of the respondent Smt. Chandra admitted at para 9 that as per the social custom if the document is scribed as “Chod-Chutti” and divorce is obtained it is recognized in the society. The witness PW-2 M.K. Dilliwar who has supported existence of such custom. He has stated that customary divorce was being routed through the society. Meaning thereby the customary divorce are being recognized. The learned family court in its order has observed that no document have been filed in respect of any meeting of the society and held that inference cannot be drawn that the society has accepted the customary divorce which was drawn by the document Ex.P-1. In our view such finding by the learned trial court is beyond all pleading and evidence on record. There is no fact or evidence on record to show that before such divorce is granted it should be preceded by a mandatory meeting of the society. Instead the witness to the Ex.P-1 they have unequivocally supported the fact that they as a member of the society they intervened while such customary divorce was being executed by the parties. Therefore only because of the fact that document Ex.P-1 was not preceded by a meeting of the society the effect of Ex.P-1 cannot be nullified or doubted. The finding therefore by the trial court cannot be sustained on this issue.

14. Now coming back to the authenticity of Ex.P-1. The trial court in its order at para 19 had given a finding that the signature on Ex.P-1 was not obtained on any blank paper inasmuch as the respondent is also educated and was in service. The defendant/wife though stated that it was obtained on a blank paper but such contention after evaluation of the facts and evidence was negated by the trial court. There is no cross objection against this finding is filed by wife. Order 41 Rule 22 of CPC purports that any respondent, though he may not have appealed from any part of the decree, but may also state that the finding against him in the Court below in respect of any issue ought to have been in his favour and may also take cross objection. Since the entire nucleus of the subject emanates from the document Ex.P-1 which is a document of “Chod-Chutti” of customary divorce, the wife though took a plea that it was obtained on a blank paper but this fact were not established before the court instead when the finding of the court below was otherwise, in absence of any cross objection to such finding, the finding of trial court would reach its finality.

15. Having admitted the existence of Ex.P-1 the perusal of it would show the intention of the parties. The document Ex.P-1 contains the fact that the parties before execution of such document in January 1994 they were living separately for three years and it was written that they cannot adjust each other and hence decided to get separate. It also contains the fact that both the parties would be free after such document to remarry and even the custody of the children were also decided. It further contend that even if the name of the wife was recorded by the husband in official record as a nominee that would be deemed to be cancelled after execution of such document. In these circumstances, the facts would show that since three years prior to 1994 the parties were living separately

and there is no effort of any reunion till date and as of now they are living separately since 28 years and the circumstances would show that there is irretrievable break down of the marriage and the parties have deserted each other both mentally and physically.

16. In the matter of **Bipinchandra Jaisinghbai Shah v Prabhavati**[1] 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:-
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> "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".
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> 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:-
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> "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.
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> 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 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

1 AIR 1957 SC 176

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

17. Translating the aforesaid principles into the facts of this case, it would show that in respect of the desertion of spouse, in order to establish desertion, there must be two essential conditions namely;(i) the factum of separation; and (ii) the intention to bring cohabitation permanently to an

end. The reading of the evidence and the document Ex.P-1 would show that the parties have separated since long and with the passage of time it do not show that there is any intention of reunion. Therefore, under these circumstances, we are inclined to allow this appeal.

18. Accordingly, the appeal is allowed and judgement and decree dated 13/05/2016 passed by the learned family court in Civil Suit No.218-A/14 is set aside. It is declared that the marriage dated 15/05/1982 shall stand dissolved under Section 13 of the Hindu Marriage Act, 1955 by decree of divorce primarily on the ground of 'Chod-Chutti' document Ex.P-1 dated 28/01/1994 followed by the desertion of each other.

19. A decree be drawn accordingly.

Sd/-
(Goutam Bhaduri)
Judge

Sd/-
(Radhakishan Agrawal)
Judge

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Head Lines

FAM No.145 of 2016

Customary divorce and separation reduced into writing followed by separation would be a valid divorce when custom is proved.

यदि रूढ़ि साबित है, तब अलग रहने के कारण लिखित में लिया गया रूढ़िगत तलाक एक वैध तलाक होगा।