

**IN THE HIGH COURT OF UTTARAKHAND AT
NAINITAL**

First Appeal No. 47 of 2011

Santosh Kumar S/o Pitambar Dutt Budakoti, R/o Village
& Post Mawakot, Patti Motadhak Tehsil Kotdwar District
Pauri Garhwal.

..... Appellant.

Versus

Smt. Asha Budakoti W/o Sri Santosh Kumar R/o Village
& Post Nimbuchaur, Patti Motadhak Tehsil Kotdwar
District Pauri Garhwal.

..... Respondent

Mr. Anil Dabral, Advocate, present for the appellant.
Mr. D.C.S. Rawat, Advocate, present for the respondent.

And

First Appeal No. 38 of 2011

Smt. Asha Budakoti W/o Sri Santosh Kumar R/o Village &
Post Nimbuchaur, Patti Motadhak Tehsil Kotdwar District
Pauri Garhwal.

.....Appellant.

Versus

Santosh Kumar S/o Pitambar Dutt Budakoti, R/o Village &
Post Mawakot, Patti Motadhak Tehsil Kotdwar District Pauri
Garhwal.

..... Respondent

Mr. D.C.S. Rawat, Advocate, present for the appellant.
Mr. Anil Dabral, Advocate, present for the respondent.

Hon'ble Prafulla C. Pant, J.
Hon'ble V.K. Bist, J.

Both these appeals are directed against the judgment and order dated 30th of April, 2011, passed by Principal Judge, Family Court, Pauri Garhwal, in Matrimonial Suit No. 114 of 2008, whereby said court has passed the decree of judicial separation on the petition filed by the husband, for divorce under Section 13 of Hindu Marriage Act, 1955.

2) Heard learned counsel for the parties, and perused the lower court record.

3) Brief facts of the case are that Santosh Kumar got married to Asha Budakoti on 01.12.2000, in Kotdwar, District Pauri Garhwal, following the Hindu rites. The petitioner Santosh Kumar (husband) has pleaded in the divorce petition that his wife Asha Budakoti was a teacher in Primary School, in Amlesa, and after her marriage, she lived for a short time with her husband in Duggadda, but thereafter, she expressed her desire to stay in her parental house, and left the company of her husband, on the pretext that she has to complete her studies for B.Ed. Course. It is alleged by the husband in the petition for divorce that his wife for one reason or the other continued to live with her parents. It is also alleged that on 14.07.2003, the husband got sent the notice to his wife, on which, she joined the company of her husband for a day and went back to her parental house and did not return. With these pleadings, on the ground of desertion, the petitioner prayed for a decree of divorce. It is

also pleaded by the husband that he is under going mental tension due to conduct of his wife.

4) Asha Budakoti (wife of Santosh Kumar) filed her written statement before the trial court and contested the Suit for divorce. However, she admitted that she was married to Santosh Kumar. In her written statement, she pleaded that she was subjected to cruelty by her husband and in-laws, who made demand of dowry, as such she was forced to leave her husband's house. But it is admitted by her in her written statement that in the year 2003, she joined the company of her husband for a day.

5) On the basis of pleadings of the parties, following issues were framed by the trial court:-

- i) Whether the respondent has treated the petitioner with cruelty?
- ii) Whether the respondent has deserted her husband since year 2000, without any sufficient cause?
- iii) Whether the petitioner is entitled to decree of divorce against his wife?

6) After recording the evidence of both the parties, and considering the documentary evidence on record, the trial court came to the conclusion that the petitioner has successfully proved that his wife deserted him for more than two years without any sufficient reason, and he was treated with cruelty. However, considering the age of the parties to matrimony (38 years that of the husband, 36 years that of the

wife), the trial court instead of passing decree of divorce granted decree of judicial separation with the observation that after a prescribed period, the parties are at liberty to move for divorce.

7) Aggrieved by judgment and order dated 30th of April, 2011, passed by Principal Judge, Family Court, Pauri Garhwal, in Matrimonial Suit No. 114 of 2008, the parties have filed these separate appeals.

8) Learned counsel for the parties made their submissions before this Court and pleaded that both these appeals be decided together today.

9) Admittedly, the petitioner Santosh Kumar got married to respondent Asha Budakoti on 01.12.2000, in Kotdwar, District Pauri Garhwal, following the Hindu rites. It is also submitted by learned counsel for the parties that the parties to matrimony have no issue out of the wedlock. It is also not disputed between the parties that both the parties to matrimony are teachers working in different schools of District Pauri Garhwal.

10) Learned counsel for the husband (Santosh Kumar) submitted that the trial court has erred in law in not granting decree of divorce after holding that the wife had treated her husband with cruelty and deserted him for a period of more than two years without sufficient reason. On the other hand, learned counsel for the wife pleaded that the findings

recorded by the trial court on the issue of cruelty, and that of desertion are incorrect.

11) In the affidavit filed by Santosh Kumar before the trial court, it is asserted that merely after a period of three days of her marriage, his wife left his house and went to her parental house, on the ground that she wanted to complete her education. It is also stated in the affidavit filed on behalf of the petitioner Santosh Kumar (in the form of examination in chief) that his wife left with her jewellery and her belongings showing her clear intention that she did not want to live with her husband. In this connection, it is further stated in the affidavit that had the conduct of his wife being bonafide, after completing her education, she would have come to his house to join his company. It is also stated that when the petitioner got sent the notice dated 14.07.2003 to respondent, she made bald allegation against him in her reply, and after coming for a day went back disclosing that it was not possible for her to live with her husband. PW1 Santosh Kumar has been subjected to lengthy cross-examination but nothing has come out in his testimony, which makes it not reliable.

12) On the other hand, the wife (Asha Budakoti) in her affidavit (in the form of examination in chief) has stated that she used to go to her husband's house during vacations and holidays. She further stated that her husband and in laws used to harass her for non-fulfilment of demand of dowry.

She has further stated that she has not deserted her husband, nor committed any cruelty against him.

13) It is true that when the wife is working woman doing job outside, at times, it is not possible for her to stay in her husband's house, but not joining the company for a long period of more that five years and not coming to her husband's house even during holidays and vacations, certainly makes it a case of desertion as against the husband. DW1 Asha Budakoti in her cross examination has admitted that since September, 2003, she never went to her husband's house. It is pertinent to mention here that the divorce petition was filed in the year 2008. She further admitted in her cross examination that since July, 2001, there had been no conjugal relations between her and her husband.

14) In the above circumstances, having gone through the statements of parties to matrimony and their witnesses, who have supported respective cases we concur with the finding of fact recorded by the trial court that Asha Budakoti (wife) has deserted her husband (Santosh Kumar) for a period of more that 2 years. It is argued on behalf of the husband before this Court that from the place of posting where the wife is working, on her way to her parental house, her husband's house was on the road but she never bothered to come to him.

15) For the reasons as discussed above, we are of the view that the trial court has erred in law in not granting

decree of divorce prayed by the husband even after holding that grounds for divorce made out. Even otherwise, after the decree of judicial separation passed by the trial court, now more than two years have passed, the parties have still not joined the company of each other.

16) In the above circumstances, First Appeal No. 47 of 2011, filed by the husband is allowed, and First Appeal No. 38 of 2011, is dismissed. The petition of divorce filed by Santosh Kumar (husband) under Section 13 of Hindu Marriage Act, 1955, is allowed, and the marriage between the parties to matrimony is hereby dissolved.

(V.K. Bist, J.)

13.06.2013
JM

(Prafulla C. Pant, J.)