

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.541 of 2012

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Bhola Kumar S/O Sri Jai Prakash Sah R/O Mohalla - Gayatri Nagar, Police Station
Jamalpur, District - Munger

.... Appellant/s

Versus

Seema Devi @ Dolly W/O Bhola Kumar R/O Mohalla - Gayatri Nagar, Police
Station-Jamalpur, District - Munger, At Present D/O Sri Bhuneshwar Sah, Resident
Of Village And P.O. Simpur, P.S. Kharagpur, District - Munger

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Birendra Singh
 Mr. Ram Sevak Choudhary

For the Respondent/s :

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
AND
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH)

Date: 17-04-2015

This is an appeal, under Section 15 of the Family Courts Act, 1984, challenging the judgment and decree, dated 7th July, 2012, passed by learned Principle Judge, Family Court, Munger, in Title Suit (Matrimonial) No. 01 of 2008, whereby and whereunder the learned Principal Judge has dismissed the suit on contest, the suit having arisen out of matrimonial dispute seeking, under Section 3(1)(i)(i-a) of the Hindu Marriage Act, 1955, a decree of divorce. The appellant-husband herein was the petitioner before the Court below.

2. The matter has been placed for hearing under Order 41 Rule 11 of the C.P.C. and is being disposed of, finally, at this stage itself.

3. From the impugned judgment and decree, it



would appear that the appellant and respondent were married as per Hindu rites and customs on 12.05.2003. In his petition, seeking divorce under Section 3(1)(i)(i-a) of the Hindu Marriage Act, the applicant alleged that the behaviour of respondent-wife, from the very first day of their marriage, had been quite abnormal and despite the appellant's best efforts, the respondent did not mend her ways. He alleged that he suspected that the respondent had been having and maintaining illicit relationship with many persons and despite the fact that the appellant had no sexual contact with the respondent since March, 2007, their last cohabitation being on 16.02.2007, he learnt that respondent wife was carrying pregnancy of 5 to 6 months. It further transpires from the order under appeal that the appellant further alleged that the respondent had earlier refused to come back to matrimonial home and, thus, deserted the petitioner.

4. It would further appear, from the order under appeal, that the respondent, while contesting the suit, denied the allegation of cruelty as well as her illicit relationship with any person and asserted that non-fulfillment of the demand for dowry, made by the husband-appellant and his near relatives, was the reason behind institution of the matrimonial suit. She denied that she had illicit relationship with any person.

5. On the basis of rival pleadings, following three issues were framed by the learned Court below:-

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- I. "Whether the respondent has treated the petitioner with cruelty after marriage?
 - II. Whether the respondent is living in adultery?
 - III. Relief."

6. The parties adduced evidence in support of their respective pleadings before the Family Court. The appellant examined, in his favour, four witnesses, who included his Father (P.W.-1), Mother (P.W.-2), Uncle (P.W.-3) and the appellant (P.W.-4) himself. The mother of the respondent and the respondent herself deposed as (D.W.-1) and (D.W.-2) respectively before the Court below.

7. This is not disputed that the respondent had filed a Complaint Case, being Complaint Case No. 899C/2009, alleging commission of offence, under Section 498-A of the Indian Penal Code, against the appellant and his family members.

8. Upon perusal of the impugned judgment and decree, it appears that the appellant (P.W.-4), in his evidence, before the Family Court, deposed that he had not stated the names of the persons from whom he had learnt about the character of his wife. It also transpires that the appellant admitted that he had not raised any grievance or lodge any complaint before any person or body alleging ill-treatment at the hands of his wife, the answering respondent.

9. Upon analyzing the evidence of the father (PW



1) and the mother (PW 2) of the appellant and taking into account the evidence of the respondent and her mother, learned Court below came to a finding that the appellant had failed to prove that the respondent had treated the appellant with cruelty after marriage. Learned Court below found such allegations of cruelty against the respondent wife to be vague and not specific. As regards the allegation of adultery, learned Court below found that the appellant could not prove the allegation of adultery, firstly, for the reason that there was no adequate evidence to establish this fact and, secondly, the learned Court below refused to accept the allegation that the respondent was carrying pregnancy of 5 to 6 months in the year 2007, whereas the appellant had no sexual contact with the respondent for the reason that the appellant could neither prove the alleged pregnancy nor could he prove, by examining the doctor of the concerned Primary Health Centre, Haweli Kharagpur, the abortion, which the respondent was alleged to have undergone.

10. Mr. Birendra Singh, learned counsel appearing for the appellant, has submitted that the respondent had, admittedly, lodged a complaint case, making allegations of commission of offence under Section 498-A of the Indian Penal Code, against the appellant and his family members. He submits, with certain degree of vehemence, that institution of the said criminal case amounts to cruelty towards the



appellant and has contended accordingly that the learned Court below failed to take into account this aspect and erred in law by not granting decree of divorce. He submits that in any event, the marriage between the appellant and respondent has irretrievably broken down and the learned Court below ought to have considered this aspect and granted decree of divorce in favour of the appellant.

11. Learned counsel for the appellant has next submitted that the judgment and decree of the learned Court below is vitiated on the ground that no effort for re-conciliation was made as mandatorily required under Section 9 of the Family Courts Act, 1984 as also by Section 23(2) of the Hindu Marriage Act, 1955. Mr. Birendra Singh, learned counsel, in support of his submissions, placed reliance upon a Division Bench decision of this Court reported in **A.I.R. 1972 Pat 392 (Raj Rani V. Harbans Singh Chhabra)** and the decision of Kerala High Court, reported in **A.I.R. 2008 Ker. 84 (Bini V. Sundaran K.V.)**.

12. In support of his submission, Mr. Birendra Singh, learned counsel, has relied on a Division Bench decision of Madhya Pradesh High Court reported in **A.I.R. 2012 MP 40 (Dinesh Nagda Vs. Shantibai Dinesh Nagda)** that institution of criminal case against the appellant by the respondent amounts to cruelty towards the appellant and on that ground, the appellant deserves granting of a decree of

divorce.

13. In course of his submissions, learned counsel for the appellant has, however, not disputed the evidence adduced by the parties. On appreciation of the evidence as recorded in the matrimonial proceeding, we find that the appellant failed to prove the allegation of adultery and we do not find any perversity in the finding that the said allegation was based on mere suspicion. As regards the scurrilous allegation of the appellant that he had found respondent carrying pregnancy, though he had no physical contact with the respondent, we find that the learned Court below rightly held that the appellant failed to prove by examining the doctor of the place, where the respondent allegedly gave birth to a still-born baby. This fact, too, thus, could not be said to have been proved.

14. We do not find much substance in the submission made on behalf of the appellant, while placing reliance upon Section 9 of the Family Courts Act, 1984 and Section 23 (2) of the Hindu Marriage Act, 1955, that having no effort been made for re-conciliation, the judgment and decree, under appeal, refusing to grant decree of divorce, shall stand vitiated. Reliance placed by learned counsel for the appellant, in this regard, on a Division Bench judgment of this Court reported in case of **Raj Rani V. Harbans Singh Chhabra** (supra) is, in our opinion, misconceived. This Court, rather,

held in the case of **Dinesh Nagda Vs. Shantibai Dinesh Nagda** (supra), that failure, on the part of the trial court, to make efforts to re-conciliation between the parties would not effect its jurisdiction to try the case.

15. We may hasten to clarify that though it is the duty of a family Court to make endeavour for reconciliation, failure to make such endeavour will not *ipso facto* vitiate a decree, which may have been, otherwise, passed on the basis of the pleadings of the parties, evidence on record and the law relevant thereto.

16. In our opinion, institution of criminal case by the wife against the respondent and family members will *per se* not constitute cruelty for the purpose of seeking divorce unless it is held by a Court of competent jurisdiction that the said complaint/allegation was false and vexatious. Admittedly, the said criminal case is still pending adjudication before a criminal court of competent jurisdiction.

17. In the facts and circumstances of the present case, the plea, that the judgment and decree of the Family Court under appeal, stood vitiated for non-compliance of the provisions of Section 9 of the Family Courts Act and Section 23(2) of the Hindu Marriage Act is not available to the appellant inasmuch as the family Court has refused to grant the decree of divorce.

18. The submission, that since the marriage



between the parties has irretrievably broken down and on this ground also, this Court should grant a decree of divorce in the facts and circumstances of the case, cannot be accepted. Decree of divorce can be granted only on one or the other grounds mentioned in Section 13 of the Hindu Marriage Act, 1955. Breaking down of marriage irretrievably is certainly not a ground mentioned therein for grant of decree of divorce. This Court, in exercise of appellate jurisdiction under Section 15 of the Hindu Marriage Act, 1955, and as a matter of fact, no court, except Supreme Court, while exercising extraordinary plenary powers under Article 142 of the Constitution of India, has jurisdiction to dissolve a Hindu Marriage on the ground that the marriage has irretrievably broken down. This aspect of the matter has been considered by the Supreme Court in its recent decision, **K. Srinivas Vs. K. Sunita**, reported in **2015(1) P.L.J.R. (SC) 126**, and has been answered, at paragraph No. 3, in the following words,

"Irretrievable breakdown of marriage as a ground for divorce has not found statutory acceptance till date. Under Article 142 of the Constitution, the Supreme Court has plenary powers "to pass such decree or make such order as is necessary for doing complete justice in any case or order pending before it." This power, however, has not been bestowed by our Constitution on any other Court. It is for these reasons that we



have confined arguments only to the aspect of whether the filing of a false criminal complaint sufficiently proves matrimonial cruelty as would entitle the injured party to claim dissolution of marriage. It will be relevant to mention that the Law Commission of India in its Reports in 1978 as well as in 2009 has recommended the introduction of irretrievable breakdown of marriage as a ground for dissolution of marriage; the Marriage Laws (Amendment) Bill of 2013 incorporating the ground has even received the assent of the Rajya Sabha. It is, however, highly debatable whether, in the Indian situation, where there is rampant oppression of women, such a ground would at all be expedient. But that controversy will be considered by the Lok Sabha."

19. In the light of the observations made, and the conclusions arrived at, in **K. Srinivas v. K. Sunita** (supra), it becomes clear that no law having been enacted treating irretrievable break down of marriage as a ground for divorce, a Family Court or even High Court does not have the power to grant a decree of divorce on the ground that a marriage has irretrievably been broken down. However, in exercise of its power under Article 142 of the Constitution of India, since the Supreme Court has the plenary power "to pass such decree or make such order as is necessary for doing complete justice in any case or order pending before it", it

clearly follows that the Supreme Court may, if it deems necessary in order to do complete justice, dissolve a Hindu marriage on the ground that the marriage has irretrievably broken down.

20. In the result and for the reasons discussed above, we are clearly of the view that appeal does not deserve admission and is accordingly dismissed at the stage of admission itself.

(Chakradhari Sharan Singh, J.)

I. A. Ansari, J. I agree.

(I. A. Ansari, J.)

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