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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: August 30, 2016*

+ **MAT.APP.(F.C.) 43/2015**

MANISH BABRA Appellant

Represented by: Mr.S.K.Dayal, Advocate.

versus

RENU Respondent

Represented by: Respondent in person.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRATIBHA RANI, J. (Oral)

CM No.6875/2015

1. For the reasons stated in the application 253 days' delay in filing the appeal is condoned.

2. Application is disposed of.

MAT.APP.(F.C.) 43/2015

1. The appellant/husband is aggrieved by the order dated July 01, 2014 whereby the petition filed by the respondent/wife under Section 9 of Hindu Marriage Act, 1955 for restitution of conjugal rights has been allowed by the learned Principal Judge, Family Court after examining the parties under Order X CPC.

2. Perusal of the impugned order shows that on July 01, 2014, learned Principal Judge, Family Court passed a decree of restitution of conjugal rights only on the basis of statement of the parties recorded on May 22, 2014.

3. The statement made by the appellant/husband before the learned Principal Judge, Family Court is following effect:-

'I am the respondent in the present case and I do not wish to stay with respondent (sic. Petitioner) and I have also filed a divorce petition.'

4. The respondent/wife has made the following statement before the learned Principal Judge, Family Court:-

'I am petitioner in the present case and I wish to stay with my husband and he has withdrawn from my society without any justifiable cause.'

5. On April 17, 2015 while staying the operation of impugned order this Court made the following observation:-

'.....Assailing the legality and correctness of the impugned order, the learned counsel for the appellant submits that just on an one line statement of the appellant recorded under Section 10 of the Code of Civil Procedure, the learned Principal Judge, Family Courts, Saket has passed a decree of restitution of conjugal rights under Section 9 of the Hindu Marriage Act, 1955 in favour of the respondent.'

Heard on the application for seeking stay of the impugned judgment as well as for condonation of delay.

We find considerable force in the contention raised by the learned counsel for the appellant. The respondent had filed a petition under Section 9 of the Hindu Marriage Act, 1955 seeking restitution of conjugal rights. In the said petition, the learned Principal Judge, Family Courts has recorded the statement of both the parties under Section 10 of the Code of Civil Procedure. The respondent in her statement stated that she wishes to stay with her husband and that her husband had withdrawn himself from her society, without any justifiable cause. The appellant – husband in his statement stated that the respondent does not wish to stay with him and therefore he has already filed a divorce petition.

*Taking into consideration the aforesaid one line statement made by the appellant, the learned Principal Judge, Family Courts felt satisfied that his said statement clearly indicates that the appellant has withdrawn from the society of his wife and as such the respondent – wife is entitled to a decree of restitution of conjugal rights. **We are quite disgusted to see the reasoning given by the Presiding Judge, who is a Principal Judge of South District, Family Courts, Saket Courts Complex, New Delhi. We fail to comprehend as to how the learned Presiding Judge could feel satisfied on such a bald statement made by the appellant that he has withdrawn from the society of the respondent.** Any party seeking a decree under Section 9 of the Hindu Marriage Act, 1955, has to plead and prove by evidence that the other spouse has withdrawn from his/her society without reasonable excuse and the Court on being satisfied of the veracity of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly. Section 9 further provides that where a question arises whether there has been a reasonable excuse for withdrawal from the society of another, the burden of proving the same shall lie with the person who has withdrawn from the society of the other. Shockingly, there was no evidence on record either proved by the appellant or by the respondent and merely on the basis of a bald statement made by the appellant, the learned Principal Judge, Family Courts has passed a decree under Section 9 of Hindu Marriage Act, 1955 in favour of the respondent-wife.*

While, staying the operation of the aforesaid judgment and decree passed by learned Principal Judge, Family Court, we deem it necessary to put a word of caution to the learned Judge to be more careful and diligent in dealing with such kind of cases and not adopt such a lackadaisical and casual approach.

Issue notice of the appeal as well as of the applications to the respondent by ordinary process as well as by registered post/AD, returnable on 26th August 2015. Respondent is also directed to be served through the counsel representing her before the learned Trial Court.

Till then, the operation of the impugned judgment dated 01.07.2014 shall remain stayed.'

6. In the petition filed by the respondent/wife under Section 9 of Hindu Marriage Act, 1955 number of accusations have been made against the appellant/husband and his family which could have been established only after recording of evidence.
7. The appellant/husband has already filed a petition seeking dissolution of marriage under Section 13(1)(ia) of Hindu Marriage Act, 1955. The petition filed by the respondent/wife was required to be considered in that backdrop and not on the one line statement of the parties recorded under Order X CPC by the learned Principal Judge, Family Court especially when serious allegations have been made against each other in the petition as well as the written statement.
8. Only on the basis of examination of the parties under Order X CPC and thereby allowing the petition under Section 9 of Hindu Marriage Act, 1955 the appellant/husband could not have been compelled by the learned Principal Judge, Family Court to condone the alleged acts of cruelty. The learned Principal Judge, Family Court failed to consider that both the reliefs i.e. as sought by the appellant/husband for dissolution of marriage and by the respondent/wife for restitution of conjugal rights cannot be granted together.
9. The impugned order being passed without affording an opportunity to the parties to lead evidence is illegal and the same is hereby set aside.
10. The petition under Section 9 of Hindu Marriage Act, 1955 is restored before the learned Principal Judge, Family Court for adjudication as per law alongwith the divorce petition filed by the appellant/husband seeking dissolution of marriage on the ground of cruelty.

11. LCR be sent back alongwith copy of this order.
12. No costs.

CM No.6877/2015

Dismissed as infructuous.

**PRATIBHA RANI
(JUDGE)**

**PRADEEP NANDRAJOG
(JUDGE)**

AUGUST 30, 2016
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