HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No. 102 of 2005

Fanendra Singh Thakur

Versus

Smt. Kanta Bai @ Uma Bai

C A V JUDGMENT

Post for pronouncement of judgment on..1../11/2017

Sd/-
Sharad Kumar Gupta
Judge

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FIRST APPEAL No 102 of 2005

Reserved on 27.10.2017

Delivered on 21.11.2017

(Arising out of judgment/decree dated 24.03.2005 in Civil Suit No. 26A/2004 of the learned Third Additional District Judge(FTC), Janjgir-champa)

- Fanendra Singh Thakur aged about 35 years, S/o Shri Bhagwat Singh R/o Kheja, PO Paharia, Tahsil – Janjgir, Distt. Janjgir – Champa Chhattisgarh.

----Appellant

Versus

- Smt. Kanta Bai @ Uma Bai aged about 30 years, D/o Shri Teeman Singh, R/o Village Jharra, PO – Sarwai, Champa. Distt. Janjgir – Champa.

---- Respondent

For Appellant	:	Shri Manoj Paranjpe, Shri Anurag Singh and Miss Rasool Bhawnani, Advocates
For Respondent	:	Shri Ravindra Agrawal and Shri Abhijit Mishra, Advocates

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Hon'ble Shri Justice Sharad Kumar Gupta

CAV JUDGMENT

1. In this first appeal the challenge levied is to the judgment and decree dated 24.03.2005 passed by the Third Additional District Judge(FTC), Janjgir-Champa in Civil Suit No. 26A/2004 whereby and whereunder he dismissed the appellant's application for dissolution of marriage solemnised under the Hindu Marriage Act, 1955 (hereinafter called as 'the Act 1955').

2. It is admitted by the respondent that her marriage was

solemnized with the appellant on 14.06.1993 in accordance with Hindu rites and rituals in village Jharra. Both the parties are Hindu by religion. Out of their wedlock a son namely Kailash Singh aged about 5 years was born. She had resided with the appellant till January, 1995. Thereafter, she is living separately from him. At the time of the funeral and 10th day ceremony of her brother Vansh Narayan the family members of the appellant had come in her matrimonial house. He had filed an application of restitution of conjugal rights wherein the Court had passed a decree of restitution of conjugal rights against her. Earlier he had also filed an application for divorce which had been decided by the Court.

3. In brief the appellant's case is that the respondent is living separately from him without any just and sufficient cause since 1994. He had tried for bringing her back but she refused to live with him. The decree for the restitution of conjugal rights has been passed on 07.02.2003. thereafter, he again tried her to bring back but she does not want to live with him.

4. In brief the case of respondent is that except the admitted facts, other facts of the appellant are denied. She is ready to live with him. The appellant and his family members were harassing her. He never tried to bring her back. He never filed execution regarding the decree of restitution of conjugal rights. During the pendency of the suit, he has performed another marriage with Babli in the month of April, 2004.

5. Being aggrieved with the judgment and decree, the

appellant preferred this appeal.

6. Shri Anurag Singh, learned counsel for the appellant argued that there was no cohabitation between the parties within a period of one year from the date of the decree of the restitution of conjugal rights. Thus, the trial Court ought to have decreed the appellant's suit. Therefore, the impugned judgment and decree are bad in the eye of law and deserve to be set aside.

7. Shri Abhijit Mishra, learned counsel for the respondent submitted that because the appellant did not try to get back the respondent after passing of the judgment and decree of the restitution of the conjugal rights, he is wrong doer and he can not take advantage of his own wrong. The judgment and decree are in accordance with the law and do not call for any interference.

8. Section 13 of the Act, 1955 deals with the grounds for the divorce. Provision of Section 13(1A) reads as under:-

> "**13 Divorce –** (1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground:-
>
> (i)....
>
> (ii) That there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

9. In **Smt. Bimla Devi v. Singh Raj {AIR 1977 P H 167}** the full Bench of the High Court of Punjab and Haryana has held that where the decree of restitution of conjugal rights is in favour

of husband against wife and the wife does not comply with the decree and there was no restitution of conjugal rights as between the parties to the marriage after the passing of the decree for restitution of conjugal rights for a period of more than two years, then the wife is entitled to dissolution of marriage, notwithstanding Section 23(1)(a).

10. In **Radhakumari v Dr. K.M.K. Nair {AIR 1988 Ker 235}** the High Court of Kerala has held that the failure on the part of the husband in not enforcing the decree for restitution of conjugal rights will not disentitle him from getting a decree for divorce under Section 13(1A)(ii) of the Act if there was no resumption of cohabitation between the parties for a period of one year or more after the passing of the decree for restitution of conjugal rights. As a matter of fact, the lower Court rightly held that there is no material in this case evidencing any conduct on the part of the appellant husband which would amount to a wrong within the meaning of Section 23(1)(a) of the Act, disentitling him to the relief of divorce.

11. In **Dharmendra Kumar v. Usha Kumar {AIR 1977 SC 2218}** the Hon'ble Supreme Court has observed that where after a little over two years of passing of decree of restitution of conjugal rights in her favour, the wife applied for dissolution of marriage under Section 13(1A)(ii) and the husband in his written statement alleged that the wife refused to receive or reply to the letters written by the husband and did not respond to his other attempts to make her agree to live with him, this allegation, even if true, did not amount to misconduct grave enough to disentitle

the wife to the relief she asked for.

12. As per the above mentioned judicial precedents, it is noticeable that any party to marriage may file a petition for dissolution of the marriage by a decree of divorce on the ground that a decree for the restitution of the conjugal rights as between them has been already passed, a period of 1 year or upwards has been already elapsed from the date of the decree and there has been no restitution of conjugal rights between them and Court may grant the decree of divorce irrespective of this fact that decree holder or respondent had not complied with the said decree or he/she had not filed the execution to comply the said decree. Failure on part of enforcing said decree should not amount to wrong within the meaning of Section 23(1A) of the Act, 1955, subject to the provisions of Section 23 of the Act, 1955.

13. In the case in hand as per Ex.P/3 and Ex.P/4 a decree for the restitution of conjugal rights was passed on 07.02.2003. The appellant has filed an application for dissolution of the marriage on 25.02.2004. Thus, it is notable that after the expiration of 1 year from 07.02.2003 said application has been filed.

14. It is admitted by the respondent that she is living separately since January, 1995. It is not the case of the respondent that there was any cohabitation between them within a period of 1 year after the passing of the said judgment and decree for restitution of conjugal rights. Thus, this Court finds that there was no restitution of conjugal rights between her and the appellant for a period of one year or upwards after the passing of

said decree for the restitution of conjugal rights.

15. Looking to facts and circumstances of the case, this Court is *prima facie* satisfied that any of the grounds for granting relief exists and the appellant is not in anyway taking advantage of his own wrong or disability for the purpose of such relief. Thus this Court finds that there is no violation of provision of Section 23(1) (a) of the Act,1955.

16. Looking to the facts and circumstances of the case this Court is *prima facie* satisfied that application is not presented or prosecuted in collusion with the respondent. Thus this Court *prima facie* finds that there is no violation of provision of Section 23(1)(c) of the Act, 1955.

17. Looking to the facts and circumstances of the case this Court is *prima facie* satisfied that there has not been any unnecessary or improper delay in institution the proceeding. Thus this Court finds that there is no violation of provision of Section 23(1)(d) of the Act, 1955.

18. Looking to the facts and circumstances of the case this Court is *prima facie* satisfied that there is no other legal ground why relief should not be granted. Thus this Court finds that there is no violation of provision of Section 23(1)(e) of the Act, 1955.

19. This Court in the first instance had made endeavor to bring about reconciliation between the parties on 26.08.2004, but it was failed. Thus this Court has complied the provision of Section 23(2) of the Act.

20. Looking to the facts and circumstances of the case this Court *prima facie* does not find that instead of passing of a

decree for divorce, it may be just to pass any decree for judicial separation.

21. Looking to the above mentioned facts and circumstances and aforesaid judicial precedents, this Court finds that the appellant is entitled to get decree for the dissolution of the marriage on the ground that after passing of the said judgment and decree, there has been no restitution of conjugal rights between them for a period of 1 year or upwards.

22. After the complete and full appreciation of the evidence, this Court allows the appeal. The impugned judgment and decree dated 24.03.2005 which is related with dismissal of the divorce application, is hereby set aside.

23. The following order and decree is to be passed.

> The marriage solemnized between the appellant Fanendra Singh Thakur and Smt. Smt. Kanta Bai @ Uma Bai in accordance with Hindu Law is hereby dissolved from the date of this judgment i.e. 01.11.2017.
>
> The respondent shall bear her own cost as well as cost of the applicant.
>
> Advocate fee is payable according to the Schedule.

The decree be drawn accordingly.

Sd/-
Sharad Kumar Gupta
Judge

Kishor