

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 19/04/2017****Judgment delivered on 03 /05/2017****FAM No. 8 of 2013**

- Smt. Lata Kosle, Aged about 34 years, W/o Devdas Kosle, R/o Near the House of Shri Dhurandhar Advocate, Mukta Nagar, Police Station Durg, Tahsil & District Durg (C.G.)

---- Appellant**Versus**

- Devdas S/o Udhoram Kosle, Aged about 39 years, R/o Gire Kunj Complex, I.C.I. Computer Institute, Dhamtari Road, Raipur P.S. Raipur, District Raipur (C.G.) at present R/o Village – Bharenga, Post Khorpa, Tahsil & Police Station – Abhanpur, District Raipur (C.G.)

--- Respondent

For Appellant	:	Shri D.N. Prajapati, Advocate.
For Respondent	:	Shri G.M. Hasan, Advocate.

Hon'ble Shri Justice Pritinker Diwaker**Hon'ble Shri Justice R.C.S. Samant****(CAV) Judgment by Shri R.C.S. Samant J.**

1. This appeal has been preferred against the judgment and decree dated 12-12-2012 passed by Third Additional Principal Judge, Family Court, Durg (C.G.) in Civil Suit No.23-A/2012 by which petition of the appellant under Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act') was dismissed.

2. The petitioner filed an application under Section 13 of the Act stating that she is married wife of the respondent and their marriage was solemnized on 05-05-2005 in accordance with Hindu Customs. While residing in her matrimonial home, the respondent never gave her matrimonial pleasure and any assistance in leading marriage life. On the

contrary, respondent is a drunkard who did not heed to the advise given by the appellant to abstain from drinking. On seeing this situation, the appellant completed her studies and found a part time job, even then, no change was found in the respondent who continued in his drinking habit and in harassing the appellant mentally by quarrelling with her all the times, because of which she could never lead a life of peace and happiness with the respondent. The respondent has never intended to change his habit and on the contrary, he continuously harassed and tortured the appellant for demand of money. He also demanded money from the parents of the appellant so as to start any business. The appellant had a daughter from respondent out of this wedlock with whom, the respondent behaved in a very unnatural and debased manner who used to take naked bath with daughter, due to which the appellant was gravely hurt by the perversity of respondent and decided to live separate, hence she is living separately since 1 ½ years prior to the date of filing of application. While residing separately, the respondent continued to harass the appellant by making telephonic calls. Looking to these circumstances created by him, the appellant prayed for dissolution of marriage.

3. Registered notice sent to the respondent was returned unserved with a report of the postal employee that he refused to take delivery of the postal article. The Court below considering the summons duly served, proceeded *ex-parte* in the case vide order dated 21-02-2012 of the order sheet.

4. After affording an opportunity of leading *ex-parte* evidence of the appellant/applicant, learned Family Court has passed the impugned order

by which the grounds alleged in the application were found not proved and the petition for divorce was dismissed.

5. The grounds in the appeal are these, that the Family Court has erroneously passed the judgment dismissing the petition of the appellant. The case of the appellant was proved by the unopposed *ex-parte* evidence brought before the Court. The trial Court failed to appreciate the evidence and for the reasons, the judgment and decree passed, is perverse and contrary to the law. It is prayed that the impugned judgment and decree be set aside.

6. It is submitted by learned counsel for the appellant that the evidence led by the appellant was *ex-parte* and not subjected to any cross-examination, there had been no reason to disbelieve the statement made by the witnesses of applicant. Hence, the finding of the trial court that the case of appellant is not proved is totally erroneous and needs to be set aside.

7. It is submitted by learned counsel for the respondent that due service of notice was not effected on the respondent and he had no opportunity to contest the case. It prayed that the case be remanded to the trial Court to afford opportunity to the respondent to contest the case.

8. Considering the grounds urged in this appeal, the question before this Court is whether the trial Court has proceeded and decided the petition in accordance with law?

9. Notices were issued to the respondent on two addresses mentioned

in the petition. From the first address, registered notice was returned unserved as the respondent could not be found on the given address. The second address provided was permanent address, from where notice has been returned with a note of postal employee that receiver refused to take delivery of the postal articles. Thereafter, learned Family Court proceeded *ex-parte*.

10. On perusal of the order sheets of the trial Court, it is apparent that no effort has been made by learned Judge of Family Court to bring about the settlement between the parties as is required under Section 9 of the Family Courts Act, 1984. Although the order as to service is proper under the provisions of Order 5 Rule 9 (5) of Code of Civil Procedure, even then, it was the duty of the Family Court to make an effort to bring about a settlement between the parties, for which a repeat notice may have been issued to be served on the respondent. Looking to this fact that the Family Court has not made any effort as mandated under Section 9 of the Family Courts Act and also as required under Section 23(2) of the Hindu Marriage Act, 1955, that the respondent/non-appellant present in this appeal has shown interest to make a settlement with the appellant, it seems proper that an opportunity should be given to bring about compromise between the parties before considering all the grounds of decree of divorce. Hence, for these reasons under the provisions of Order 41 Rule 23 A of CPC, this matter can be remanded to the trial Court after setting aside the impugned judgment and decree.

11. In the result on the basis of observations made above, the impugned judgment and decree passed by the trial Court is set aside. The case is

remanded back to the Judge, Family Court with a direction to afford opportunity to the respondent party to submit reply to the petition under Section 13 of the Hindu Marriage Act, 1955 and also afford opportunity to the appellant to make suitable amendment in her petition. Further after making endeavour to bring about settlement between the parties, in case no compromise is arrived at, the case be decided on merit after affording opportunities to adduce evidence and submit arguments to both the parties in accordance with law.

Sd/-
(Pritinker Diwaker)
Judge

Sd/-
(R.C.S. Samant)
Judge