

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 11.4.2018

Pronounced on 01.05.2018

First Appeal (M) No. 160 of 2016

Sandeep Kumar Mishra S/o Khelan Prasad Mishra, Aged About 36 Years R/o- Ram Nagar, Ward No. 1, Kawardha, Tahsil And P.S. - Kawardha, District- Kabirdham, Chhattisgarh.

---- Appellant

Versus

Smt. Nikky @ Ritu Mishra W/o Sandeep Kumar Mishra, Aged About 29 Years C/o R/o- Behind Bhadrakali Temple, Nayapara, Behind The House Of Prakash Tripathi, Bemetara, Tahsil And P.S. - Bemetara, District- Bemetara, Chhattisgarh.

---- Respondent

For appellant : Smt. Indira Tripathi, Adv.

For respondent : Shri P.P. Sahu, Adv.

Hon'ble Shri Thottathil B. Radhakrishnan, Chief Justice
Hon'ble Shri Sharad Kumar Gupta, Judge

C.A.V. JUDGMENT

Per Sharad Kumar Gupta, Judge

1. Challenge in this appeal is levied to the judgment and decree dated 25-6-2016 of the Judge, Family Court, Kabirdham(Kawardha), Chhattisgarh in Civil Case No. 10A/2015 whereby and whereunder he dismissed the petition filed by the appellant under Section 13 of the Hindu Marriage Act of 1955 (in brevity 'Act of 1955') for dissolution of marriage solemnized between him and the respondent under the Act of 1955.

2. This is admitted by the respondent that the name, address and other particulars of both the parties shown in the title of the petition are true; both the parties are Hindu Brahmin by caste and governed by the Banaras School of Mitakshara Shakha;

marriage of both the parties was solemnized on 18-6-2006 at Bemetara in accordance with the Hindu customary rights and rituals; in the wedlock one male child namely Kunal Mishra was born 9-8-2007 who is living with her, now she is living in her matrimonial house at Bemetara.

3. In brief, case of the appellant is that the respondent was subjecting him to cruelty. She left his house on 21-11-2012. On 19-12-2013, he filed an application under Section 9 of the Act of 1955 before the Judge, Family Court at Kawardha which was registered as Civil Suit No. 64-A/2013 wherein the Family Court passed the judgment and decree on 20-3-2014 for restitution of conjugal rights against the respondent. More than one year has passed from the aforesaid judgment and decree and there is no restitution of conjugal rights between them.

4. In brief, case of the respondent is that except the admitted facts, other facts of the appellant are denied by her. She had no knowledge about the application, and the judgment and decree of Section 9 of the Act of 1955. She lived before and after the aforesaid judgment and decree with the appellant, that is why the appellant had not filed execution for the aforesaid judgment and decree. She is inclined to live with the appellant and not ready for divorce.

5. After conclusion of the trial, the trial Court passed the aforesaid judgment and decree. Being aggrieved, the appellant preferred this appeal.

6. Smt. Indira Tripathi, counsel for the appellant vehemently argued that the trial Court ignored the fact that there is no

resumption of cohabitation of both the parties even after passing of one year and more from the date of judgment and decree of restitution of conjugal rights. The appellant allegedly had not taken advantage of his own wrong. The material placed on record clearly shows that the respondent had committed cruelty with the appellant. Thus, the aforesaid judgment and decree may be set aside and a decree of divorce may be granted in favour of the appellant.

7. Shri P.P. Sahu, counsel for the respondent argued that the respondent had no knowledge about the judgment and decree of restitution of conjugal rights. She was living with the appellant when he filed the application under Section 9 of the Act of 1955. She was living with him after the aforesaid judgment and decree of Section 9 of the Act of 1955. She is inclined to lead a marital life with the appellant. The appellant did not try to bring her back. He had also not filed any execution. Thus, it would be deemed that he is a wrongdoer. Therefore, the appeal may be dismissed.

8. In the case in hand, after the alleged cruelty, the appellant had preferred an application under Section 9 of the Act of 1955 and obtained the judgment and decree in his favour. These circumstances clearly establish that at the time of filing of the application under Section 9 of the Act of 1955, the appellant had condoned the alleged cruelty. If he had not condoned the alleged cruelty committed by the respondent, then he would not have filed the application under Section 9 of the Act of 1955. Thus, in the case in hand, the alleged cruelty is out of consideration for grant of divorce.

9. **Points for determination :-**

There are following points for determination in this case :-

1. Whether after passing of the judgment and decree of restitution of conjugal rights dated 20-3-2014, for one year or upward, there is no restitution of conjugal rights between the appellant and the respondent ?
2. Whether the appellant is a wrongdoer ?
3. Whether the appellant is entitled to get the decree of divorce against the respondent ?
4. Relief and cost.

Point for determination No. 1 : Finding with reasons:-

10. As per the certified copy of the judgment and decree Annexure A-1, the appellant had filed the application under Section 9 of the Act of 1955 on 19-12-2013 before the Judge, Family Court, Kabirdham which was registered as Civil Suit No. 64-A/2013 wherein on 20-3-2014, the ex-parte judgment and decree were passed against the respondent.

11. A.W. 1 Sandeep Kumar Mishra and A.W. 2 Khelan Prasad Mishra who is the father of the appellant, both in para 5 of their statements given on oath say that even after passing of one year and more the respondent did not comply with the aforesaid judgment and decree.

12. N.A.W. 2 Smt. Nikki alias Ritu Mishra in para 5 and 6 of her statement given on oath says that she had discharged her marital obligation after 20-3-2014. She had resided in the house of the appellant up till 15 days before Diwali festival of 2014.

13. N.A.W. 1 Smt. Chandrakala Tiwari who is mother of the respondent, in para 5 and 6 of her statement given on oath says that in the year 2014, the respondent was living in appellant's house at Kawardha; on 9-8-2014 she (witness) had gone to the appellant's house at Kawardha to celebrate birthday of her grandson Kunal. Up till 15 days before the Diwali festival of 2014, the respondent had resided in the house of the appellant.

14. N.A.W. 3 Rajesh Pathak in para 2 of his statement given on oath states that he had brought the mother of the respondent on 9-8-2014 from Bemetara to appellant's house at Kawardha by Scorpio vehicle. After celebration of birthday, he brought back the mother of the respondent to Bemetara.

15. N.A.W. 2 Smt. Nikki alias Ritu Mishra says in para 9 during her cross examination that she came to know about the aforesaid case when she received the notice at Bemetara, the appellant had told her that there is no need of her appearance before the Court, he would get the case dismissed. This is true that she had not preferred any appeal or revision against the aforesaid judgment and decree because she was living in Kawardha. This is not the respondent's case. Moreover, this is not the respondent's case that when she came to know about the aforesaid judgment and decree, then she inquired from the appellant as to why the aforesaid judgment and decree have been passed against his commitment. Moreover, when the appellant allegedly did not fulfill his commitment, then aforesaid explanation for not challenging aforesaid judgment and decree by appeal or revision does not appear to be simple, natural and

normal. These circumstances go against the respondent's case regarding this point for determination.

16. The respondent has not examined any neighbor of the appellant or any person of the same locality who could say that respondent had lived with the appellant in his house after the aforesaid judgment and decree. Moreover, the respondent failed to prove any letter wherein aforesaid fact and explanation have been mentioned. Moreover, the respondent had not proved any report lodged by her wherein aforesaid fact and explanation have been mentioned. Moreover, the respondent had not proved any document of their community wherein aforesaid fact and explanation have been mentioned. Moreover, the respondent has not proved any notice given by her to the appellant wherein aforesaid fact and explanation have been mentioned. For not doing so, there is no plausible explanation from her. Due to these circumstances, the respondent's case regarding this point for determination becomes weak.

17. The respondent has not proved any paper regarding alleged booking of vehicle. She has also not examined the alleged owner of the vehicle Shiv Sahu. For not doing so, there is no explanation from her. Due to these circumstances, respondent's case regarding this point for determination gets adversely affected.

18. A.W. 1 Sandeep Kumar Mishra says in para 10 and 11 during his cross examination that this is true that he himself, his sisters, his mother and the respondent had gone to Jagannathpuri, Orisa and stayed together in monastery of

Shankaracharya. The respondent had paid Rs. 211/- as service charge. A.W. 2 Khelan Prasad Mishra says in para 8 during his cross examination that this is true that his daughters, the appellant, the respondent and his wife had gone to Jagannathpuri, Orisa. As per the receipt Ex. NA1, on 30.12.2013, Rs. 211/- has been donated to the Jai Jagatguru Shankaracharya Dharmik and Punyarth Nyas. These circumstances are prior to the aforesaid judgment and decree, thus, do not give rise to any such presumption that the respondent had lived with the appellant after passing of the aforesaid judgment and decree.

19. AW1 Sandeep Mishra says in para 18 that he had not filed any execution for the aforesaid judgment and decree. Mere, non-filing of execution regarding the aforesaid judgment and decree does not establish that the respondent was allegedly living with appellant after the pronouncement of the aforesaid judgment and decree.

20. After appreciation of the evidence where some circumstances go against the respondent's case regarding this point for determination, where due to some circumstances the respondent's case regarding this point for determination becomes weak, where due to some circumstances her case regarding this point for determination gets adversely affected, then, this Court believes the aforesaid statements of para 5 of A.W. 1 Sandeep Kumar Mishra, A.W. 2 Khelan Prasad Mishra and disbelieves the aforesaid statements of para 5 and 6 of N.A.W. 1 Smt. Chandrakala Tiwari, N.A.W. 2 Smt. Nikki alias Ritu Mishra, aforesaid statement of N.A.W. 3 Rajesh Pathak.

21. After appreciation of the evidence discussed herebefore, this Court finds that after passing of the judgment and decree of restitution of conjugal rights dated 20-3-2014, for one year and upward, there is no restitution of conjugal rights between the appellant and the respondent.

Point for determination No. 2 : Finding with reasons:-

22. It would be pertinent to mention the relevant portion of Section 23 (1) (a) of the Act of 1955 which reads as under:-

“23. Decree in proceedings -

(1) In any proceeding under this Act, whether defended or not, if the court is satisfied that -

(a) any of the grounds for granting relief exists and the petitioner [except in cases where the relief is sought by him on the ground specified in sub-clause (a), sub-clause (b) or sub-clause (c) of clause (ii) of section 5] is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief, then and in such a case, but not otherwise, the Court shall decree such relief accordingly.”

23. In **Smt. Bimla Devi v. Singh Raj** {AIR 1977 P H 167} Hon'ble Full Bench of the High Court of Punjab and Haryana has observed that the decree of restitution of conjugal rights has been passed in favour of husband against wife, it is wife who has not complied with the decree, due to which there is no restitution of conjugal rights as between them for more than two years, then, notwithstanding Section 23(1)(a), wife is entitled to dissolution of marriage.

24. In **Radhakumari v. Dr. K.M.K. Nair** {AIR 1988 Ker 235}

Hon'ble Division Bench of the High Court of Kerala has observed that the failure on 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(1-A)(ii) of the Act if there was no resumption of cohabitation between the parties for a period of one year or more after 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, dis-entitling him to the relief of divorce.

25. In **Dharmendra Kumar v Usha Kumari** {AIR 1977 SC 2218} the Hon'ble Supreme Court has observed that in order to be a 'wrong' within the meaning of Section 23(1)(a), the conduct alleged has to be something more than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

26. From the aforesaid judicial precedents in **Smt. Bimla Devi (supra)**, **Radhakumari (supra)** and **Dharmendra Kumar (supra)** the legal position which emerges is that when the applicant gets the decree for the restitution of conjugal rights against the non-applicant, and applicant does not file execution of such judgment and decree, does not attempt to bring her back, does not comply with the aforesaid judgment and decree where the non-applicant is ready for the union, then applicant could not be deemed as to be wrongdoer and applicant would be entitled to

get the decree of divorce under Section 13 (1-A)(ii) of the Act of 1955 subject to the fulfillment of the conditions of this Section and other conditions of Section 23 of the Act of 1955. Similarly, if non-applicant does not comply such decree, non-applicant is not ready to lead conjugal life with the applicant, then non-applicant is also entitled to get decree of divorce under Section 13 (1-A)(ii) of the Act of 1955 subject to the fulfillment of the conditions of this Section and other conditions of Section 23 of the Act of 1955. If there is no restitution of the conjugal rights for one year or upwards after passing of the decree of the restitution of conjugal rights, and other conditions of Section 23 of the Act of 1955 are fulfilled, then any of the parties would be entitled to get the decree of divorce irrespective of this fact who was not inclined to comply with the aforesaid decree.

27. A.W.1 Sandeep Kumar Mishra, A.W.2 Khelan Prasad Mishra say in para 6 that they had tried to bring back the respondent after one week of the aforesaid judgment and decree but the respondent refused to come back.

28. This has been earlier decided that after passing of the aforesaid judgment and decree, for one year and upwards there was no resumption of cohabitation between the appellant and the respondent, thus, the aforesaid statements of AW1 Sandeep Kumar Mishra, AW2 Khelan Prasad Mishra appear to be normal, natural and simple. Thus, this Court believes on them.

29. Looking to the aforesaid judicial precedents in **Smt. Bimla Devi (supra)**, **Radhakumari (supra)** and **Dharmendra Kumar (supra)** this Court finds that non-filing of execution by the

appellant does not amount him to be a wrongdoer.

30. This has been earlier decided that appellant had tried to bring back the respondent, if for the sake of argument, it is deemed that the appellant has not tried to bring back the respondent, even then looking to the aforesaid judicial precedents in **Smt. Bimla Devi (supra)**, **Radhakumari (supra)** and **Dharmendra Kumar (supra)**, this Court finds that it does not amount the appellant as a wrongdoer.

31. After appreciation of the evidence discussed herebefore, this Court finds that the appellant is not a wrongdoer. Thus, this Court decides point for determination No.2 accordingly.

Point for determination No. 3 : Finding with reasons:-

32. This has earlier decided that there was no restitution of the conjugal rights between the appellant and the respondent for one year and upwards after passing of the judgment and decree of the restitution of conjugal rights, the appellant is not a wrongdoer. There is no violation of other conditions of Section 23 of the Act of 1955. Thus, this Court finds that the appellant is entitled to get the decree of divorce. Thus, this Court decides point for determination No.3 accordingly.

Point for determination No. 4 : Finding with reasons:-

33. After complete appreciation of the evidence, this Court finds that the appellant has succeeded to prove his case. Thus, following orders are passed:-

1. Appeal is allowed and the impugned judgment and decree passed by the trial Court are hereby set aside.

2. The marriage solemnized between the appellant and the respondent is dissolved by the decree of divorce from today.

3. Both the parties shall bear their own costs.

A decree be drawn up accordingly.

Sd/-

(Thottathil B. Radhakrishnan)
Chief Justice

Sd/-

(Sharad Kumar Gupta)
Judge