

HIGH COURT OF CHHATTISGARH, BILASPUR

Reserved on 17.04.2018

Pronounced on 25.04.2018

First Appeal (M) No. 228 of 2017

- Dilip Das, aged about 38 years, S/o Shri Priylal Das, R/o Village Bande Bazar, Thana Bande, District Uttar Bastar Kanker (CG)

---- Appellant

Versus

- Smt Monica Das, aged about 25 years, W/o Shri Dilip Das, R/o Village Bande Colony, At present R/o PV 19, Thana Pakhanjore, Distt- UB Kanker (CG)

---- Respondent

For Appellant	: Shri Parag Kotecha, Advocate
For Respondent	: Shri Rajesh Tiwari, Advocate

SB : Hon'ble Shri Justice Sharad Kumar Gupta

CAV Judgment

1) Challenge in this appeal is levied to the judgment and decree dated 23.11.2017 of the Additional District Judge, Bhanupratappur, North Bastar, Kanker CG passed in Civil Suit No.18A/2016, whereby and whereunder he allowed the petition of respondent- wife filed under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act, 1955') against appellant- husband.

2) This is admitted by appellant that name of both parties, his address are true, there was love affair between both parties, she resided in his house as wife, on their physical relationship one child named Rahul has born who is residing with him.

3) In brief, the respondent's case is that on 10.03.2008 both the parties performed marriage in Markanda Temple, Gadchiroli,

Maharashtra, thereafter, again marriage was performed in her maternal house in accordance with customary rights and rituals. Five years after the marriage, appellant ousted her making false allegation on her character. He has got a false affidavit from a man that he had married with her. She had given registered notice dated 07.07.2016 to appellant.

4) In brief, appellant's case is that his marriage was not solemnized with respondent. On 05.10.2015 respondent absconded with a man named Vishnu Paul. On 09.10.2015, she has given the statement before Sub-Divisional Officer, Pankhajur that she does not like to live with him and wants to live with Vishnu Paul. He himself, she and Vishnu Paul had executed affidavits regarding this matter on 09.10.2015.

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

6) Shri Parag Kotecha, counsel for appellant, strenuously argued that respondent failed to prove that she is his legally wedded wife. Thus, Section 9 of the Act, 1955 does not attract in the case in hand. Trial Court did not appreciate evidence in proper perspective. Impugned judgment and decree are bad in eyes of law, thus, they may be set aside.

7) Shri Rajesh Tiwari, counsel for respondent argued that impugned judgment and decree are in accordance with law and

based on legally admissible evidence. Thus, no interference is called for by this Court. Thus, appeal may be set aside.

Points for determination :-

The following points are there for determination in this case :-

- (1) Whether the petition of respondent is maintainable ?
- (2) Whether appellant has without reasonable excuse withdrawn from the society of respondent?
- (3) Relief and costs.

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

- 8) The trial Court has not framed issue regarding maintainability of the petition, though the trial Court ought to have done it because it is a legal issue. The evidence available on record shows that appellant and respondent have adduced evidence regarding this point for determination. The evidence available on record is sufficient to enable this Court to pronounce the judgment. Non-framing of additional issue regarding this point for determination does not cause any prejudice to either of the parties. Thus, looking to the provisions of Order 41 Rule 24 of the Civil Procedure Code, 1908 (in brevity 'the CPC'), this Court finds that it may pronounce the judgment in this appeal.
- 9) In the matter of **Santosh Kumar Pandey v Smt. Ananya Pandey** {AIR 2013 C.G. 95} the Hon'ble Division Bench of this Court has

laid down the judicial precedent, relevant portion of para 11 is reproduced below :-

“11.....A bare perusal of Section 9 of the Act, 1955 would go to show that in order to make an application under Section 9 ibid for seeking a decree for restitution of conjugal rights, the plaintiff must be either husband or wife, as the case may be as an admitted fact. In other words, the sine qua non for maintaining an application under Section 9 ibid is the existence of relationship of husband and wife as an admitted fact between the parties. It is only when the parties do not dispute their very existence of marriage between them and when the relationship of husband and wife inter se is not disputed by both, he/she becomes entitled to file an application under Section 9 ibid against each other seeking decree for restitution of conjugal rights. In such proceedings, the Court cannot decide the issue relating to the very existence of the marriage inter se parties, but the Court has to decide that one party has withdrawn from the society of the other without any reasonable cause. In our considered opinion, therefore, in a case where the very existence of marriage between the parties is in issue, the same falls outside the purview of Section 9 ibid for its decision.”

10) In the case in hand at the outset appellant has denied the solemnization of the marriage with respondent as pleaded by respondent. In other words, alleged marriage is not admitted by appellant. In the case in hand, the existence of marriage is in issue. This is not the respondent's case that competent civil Court has declared that she is the legally wedded wife of appellant. In these circumstances and looking to the judicial precedent laid down in

Santosh Kumar Pandey (supra), this Court finds that the petition of respondent is not maintainable as the existence of the marriage is disputed. Thus, this Court decides point for determination No.1 accordingly.

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

11) This has been earlier decided that petition of the respondent is not maintainable. Thus, it could not be said that appellant has without reasonable excuse withdrawn from her society. Thus, this Court decides point for determination No.2 accordingly.

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

12) This has been earlier decided that respondent's petition is not maintainable, thus this Court finds that the trial Court has committed gross illegality. Hence, the appeal is allowed and the impugned judgment and decree of the trial Court are hereby set aside.

13) Looking to the facts and circumstances of the case it is ordered that both parties will bear their own costs.

14) A decree be drawn up accordingly. .

Sd/-
(Sharad Kumar Gupta)
JUDGE