

HIGH COURT OF CHHATTISGARH, BILASPUR**Reserved on 24-4-2018****Delivered on 7-5-2018****First Appeal (Misc.) No. 69 of 2013**

(Arising out of the order and decree dated 18-7-2013 of the Additional District Judge, Bhatapara, distt. Raipur in HMA No. 04/2012)

Priyamvada Pradhan W/o Ashish Pradhan aged about 30 Years (now 32 years) R/o Aditya Birla Public School, Grasim Vihar Rawan, Qtr. No. 2017, P.S. Suhela, Tah. Simga, Distt. Baloda Bazar C.G.

---- Appellant**Versus**

Ashish Pradhan @ Dablu S/o Ramawatar Pradhan Aged About 35 Years R/o Kothiya, P.S. Nainhara, Distt. Ghazipur U.P., Uttar Pradesh

---- Respondent

For Appellant : Shri Anand Shukla, Advocate.

For Respondent : None, though served.

Hon'ble Shri Sharad Kumar Gupta, Judge**C.A.V. ORDER**

1. In this appeal, the challenge is levied to the order and decree dated 18-7-2013 of the Additional District Judge, Bhatapara Distt. Raipur, Chhattisgarh in HMA No. 04/2012 whereby and whereunder he dismissed the divorce petition filed by the appellant-wife under Section 13 of the Hindu Marriage Act, 1955 (in brevity 'the Act, 1955') against respondent-husband.

2. This is admitted by the respondent that both the parties are Hindu by religion, their marriage was solemnized on 9-12-2005 in accordance with HINDU rites and rituals at Gazipur (UP), in their wedlock a son namely Arsh was born on 18-10-2006 who is living with her.

3. In brief, the appellant's case is that the respondent had falsely told her

that he had been posted at Raipur in HSBC Bank. He had caused miscarriage of her saying that he does not want child. He was beating and harassing her. He had falsely told her that he had got the job in Nagpur and Lucknow. On 19-9-2010 he attempted sodomy with a minor student of his school.

4. In brief, the respondent's case is that he had been acquitted from the charge of sodomy. The appellant was saying him that he should left his parents and brothers and live in her maternal house. The appellant herself was not inclined to procure child because she wants to do job.

5. Respondent was ex-parte in trial Court. He has filed written statement.

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

7. Shri Anand Shukla, counsel for the appellant vehemently argued that the trial Court did not appreciate the evidence in proper perspective. Appellant's evidence was unrebutted. Thus, the impugned order and decree may be set aside and divorce may be granted to the appellant.

8. No one appears for the respondent at the time of hearing though served.

9. It would be pertinent to mention the provisions of Section 23(2) of the Act of 1955 which reads as under :-

“23. Decree in proceedings.—

(2)Before proceeding to grant any relief under this Act, it shall be the duty of the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties :

Provided that nothing contained in this sub-section shall apply to any proceeding wherein relief is sought on any of the grounds specified in clause (ii), clause (iii), clause (iv), clause (v), clause (vi) or clause (vii) of sub-section (1) of Section 13.”

10. In the matter of **Jagraj Singh -v- Birpal Kaur** [2007(2) SCC 564], Hon'ble Supreme Court held in para 11 and 26 that :-

“11. Bald assertion of the appellant- husband that no court of law can direct a party to remain personally present cannot be accepted. Apart from the matters under the Hindu Marriage Act, 1955, even in civil matters also, a court of law may order either the plaintiff or the defendant to remain personally present in court. For instance, Rule 1 of Order III of the Code of Civil Procedure, 1908 allows appearance of party in person or through his recognized agent or by an advocate. The proviso to the said rule, however, declares that any such appearance shall, if the court so directs, be made by the *party in person*. In appropriate cases, a civil court may direct a party to the suit —plaintiff or defendant, to appear in person.”

“26. A court is expected, *nay*, bound, to make all attempts and endeavours for reconciliation. Sub-section (2) of Section 23 is a salutary provision exhibiting the intention of Parliament requiring the court “in the first instance” to make every endeavour to bring about a reconciliation between the parties. If in the light of the above intention and paramount consideration of the legislature in enacting such provision, an order is passed by a matrimonial court asking a party to the proceeding (husband or wife) to remain personally present, it cannot successfully be contended that the court has no such power and in case a party to a proceeding does not remain present, at the most, the court can proceed to decide the case *ex parte* against him/her. Upholding of such argument would virtually make the benevolent provision nugatory, ineffective and unworkable, defeating the laudable object of reconciliation in matrimonial disputes. The contention of the appellant, therefore, cannot be upheld.”

11. In the case in hand, it is unequivocal from the record of the trial Court that it has not made attempt to compel the attendance of respondent to bring

about a conciliation before proceed ex-parte though the trial Court ought to have done. Instead of doing so, trial Court proceeded exparte against the respondent on 8-1-2013 due to non-appearance of him. Moreover the appellant has pleaded about the cruelty but the trial Court did not give any finding with reason regarding cruelty in the impugned order.

12. Looking to the above mentioned facts and circumstances of the case, this Court sets aside the impugned order and decree passed by the trial Court and finds that in the case in hand, retrial is necessary. Thus, this Court remits the case to the trial Court with the directions that it, in the light of aforesaid provisions of Section 23(2) of the Act of 1955 and the judicial precedent laid down in **Jagraj Singh** (supra), shall proceed to determine the suit in accordance with law and procedure within outer limit of two months from receipt of this order. Evidence recorded during the original trial shall subject to all just exceptions, be evidence during the trial after remand. The trial Court has pronounced the order though it ought to have pronounced judgment.

13. The appellant is directed to appear before the trial Court on 16-5-2018. Record be sent to the trial Court immediately.

14. The appeal is disposed of with above directions.

15. No order as to costs.

Sd/-
(Sharad Kumar Gupta)
JUDGE
7-5-2018