

HIGH COURT OF CHHATTISGARH, BILASPUR**Order Reserved on : 20.03.2019****Order delivered on: 24.04.2019****Writ Petition (227) No.128 of 2019**

Ramesh Kumar Dhruve, S/o-Hemuram Dhruve, Caste-Gond, Age-34 years, R/o-Village-Bohardih, P.S.-Gurur, District-Balod (CG)

-----Petitioner**Versus**

Smt.Dikeshwari Dhruve, W/o-Ramesh Kumar Dhruve, Caste-Gond, Age-29 years, R/o-Village-Odenahdih, P.S.-Gurur, District-Balod (CG)

----- Respondent

For Petitioner	:	Ms Aditi Singhvi, Advocate
For Respondent	:	Mr.Ravi Maheshwari, Advocate

Hon'ble Shri Justice Sanjay K. Agrawal**C.A.V. Order**

1. The petitioner/defendant takes exception to the impugned order dated 11.1.2019 passed by the First Additional Principal Judge, Family/Circuit, Balod (hereinafter called as "Family Court"), whereby his application under Order 7 Rule 11 of the Code of Civil Procedure, 1908 (hereinafter called as "CPC") has been rejected by the Family Court stating that it has no merit.

2. Ms Aditi Singhvi, learned counsel for the petitioner/defendant, would submit that admittedly the petitioner/defendant and the respondent/plaintiff both are members of Gond Tribe and they are governed by their own customs, as such, by virtue of provisions

contained in Section 2(2) of the Hindu Marriage Act, 1955 (hereinafter called as “the Act of 1955”), application under Section 9 of the Act of 1955 filed by the respondent/plaintiff for restitution of conjugal rights would not be maintainable. He relied upon the judgment of the Supreme Court in the matter of Dr.Surajmani Steela Kujur v. Durga Charan Hansdah and another¹.

3. Mr.Ravi Maheshwari, learned counsel for the respondent/plaintiff, would support the impugned order.

4. I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

5. Admittedly, both the parties are Gond by caste. The respondent/plaintiff filed an application under Section 9 of the Act of 1955 for restitution of conjugal rights, in which the present petitioner/defendant filed an application stating that by virtue of the provisions contained in Section 2(2) of the Act of 1955, the provisions contained in the Act of 1955 would not be applicable and therefore, application under Section 9 of the Act of 1955 would not be maintainable and liable to be dismissed, which was opposed by the respondent/plaintiff by filing the reply.

6. Learned Family Court by its impugned order simply rejected the application stating that it is the matter of evidence and can be decided

¹ (2001) 3 SCC 13

after recording evidence of the petitioner. The petitioner/defendant has raised a specific plea that by virtue of the provisions contained in Section 2(2) of the Act of 1955, the provisions contained in the Act of 1955 including the application under Section 9 of the Act of 1955 would not be applicable to them, therefore, no decree for restitution of conjugal rights can be granted and application is liable to be rejected relying upon the judgment of the Supreme Court in **Dr.Surajmani Steela Kujur** (supra), but learned Family Court has not addressed the issue raised by the petitioner herein before the said Court and rejected the application holding that it can be decided after recording evidence. Such a course is impermissible in law. Learned Family Court ought to have considered the merits of the application whether the suit is maintainable or not or it is barred by Section 2(2) of the Act of 1955. Maintainability of suit goes to the route of the matter and if it is held to be not maintainable, then the petitioner/defendant may not be required to proceed further and context the suit on merits, therefore, plea regarding the suit having been barred by Section 2(2) of the Act of 1955 ought to have been decided by learned Family Court by reasoned and speaking order, as such, the impugned order passed by the Family Court is clearly impermissible and unsustainable in law.

7. In view of above, the impugned order is set aside and application under Order 7 Rule 11 of the CPC is restored to the file of Family Court, Balod for hearing and disposal in accordance with law. Since main application was filed on 10.5.2018, the said Court is directed to

consider and decide the application under Order 7 Rule 11 of the CPC afresh within 45 days from the date of receipt of a copy of this order after hearing the parties.

8. The writ petition is allowed with the aforesaid observation leaving the parties to bear their own cost(s).

Sd/-

(Sanjay K.Agrawal)
Judge

B/-