

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.262 of 2016

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Smt. Suman Mandal, wife of Rajesh Mandal, resident of 39, Patel Babu Road, Mundichak, Police Station – Kotwali, District – Bhagalpur, at present residing at C/o Rajesh Verma @ Munna- 1 Mehdi Place (behind Anand Cinema Hall), Mawa Mandi, Keshar Bagh, Lucknow

... Respondent. ... Appellant/s

Versus

Rajesh Kumar Mandal, son of Late Ram Prasad Mandal, Resident of 39, Patel Babu Road, Mundichak, Police Station- Kotwali, District – Bhagalpur, at present resident of village – Lorikund, Post Keradih, Police Station – Poraiya Hat, District – Godda, Jharkhand

Petitioner ... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Shivendra Kishore, Mr.Md. Najmul Hodda
For the Respondent/s	:	Mr. Bimlendu Mishra Smt. Poonam Mishra

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CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

Heard learned counsel for the appellant and learned counsel for the respondent.

I.A. No. 2953 of 2016 was filed for condonation of delay of one day in preferring the present appeal. Vide order dated 29.8.2017 the delay in filing the appeal has been condoned.

M.A. No. 262 of 2016

The present Miscellaneous Appeal is directed against the judgment and decree dated 3.2.2016 and 16.2.2016, respectively, passed by the learned Principal Judge, Family



Court, Bhagalpur in Matrimonial (Divorce) Case No. 32 of 1999, whereby the marriage between the appellant and the respondent has been dissolved by a decree of divorce even when the grounds of cruelty, desertion and adultery being not proved by the petitioner-respondent-husband. However, the learned Court awarded monthly maintenance of Rs.10000/- from the date of judgment or Rupees Ten Lacs, as permanent alimony.

The factual matrix of the case is that the marriage between the appellant wife and respondent husband was performed on 22.5.1979 as per Hindu rites and rituals. Subsequently the appellant went to her parents' house and stayed there for one and half year and she again came back to Bhagalpur at the husband's house, and stayed there for two years.

On the ground of torture and cruelty being meted out by the respondent-appellant, as also on the ground that Title Suit No. 43 of 1993 was preferred by the respondent-appellant for partition of ancestral property of the petitioner-respondent-husband, Matrimonial (Divorce) Case No.32 of 1999 was filed at Bhagalpur for a decree of divorce by the respondent husband and in the alternative, the prayer for judicial separation was made before the learned Principal Judge, Family Court, Bhagalpur on 11.6.1999, which was admitted vide order dated



19.6.1999 and summons were issued to the appellant wife but she did not appear and lastly, the order for substituted service of notice was made by way of publication in a daily newspaper, but the order was not complied by the respondent husband, as a result the suit was dismissed vide order dated 8.7.2005 passed by the learned Principal Judge, Family Court, Bhagalpur. The said order was challenged in Civil Revision No. 80 of 2006, which led to restoration of the matrimonial case. Thereafter, service of notice through paper publication was made, but the appellant wife did not appear, hence, vide order dated 19.4.2010 the matter was posted for ex-parte hearing on 18.5.2010. Subsequently, the appellant wife appeared and prayed for recall of order for ex-parte hearing and the said order of ex-parte hearing was recalled.

The case of the respondent husband is that when the appellant wife returned after staying for one and half years at her parents' house at Lucknow in 1980, her behaviour got changed, she used to shut the doors of the bedroom from inside over trivial issues, used to throw chili powder over the respondent husband and used to mix salt in his drinking water. It is further case of the respondent that the appellant wife used to consume medicines for termination of pregnancy, as a result, the



couple were never blessed with any child. The appellant wife went to her parents' house without the consent of the respondent husband after taking all her jewellery along with Rupees Fifteen Thousand while the respondent husband was suffering from high fever, in the year 1983. It also came to respondent husband's knowledge that the appellant had taken away all her belongings and the belongings of respondent husband's mother also. Thereafter, she returned in November, 1986 to Bhagalpur along with Deepak Kumar Singh, nephew of the respondent husband, with whom he was not on good terms. The appellant wife conveyed to the respondent that all her belongings were stolen during journey. The appellant wife visited the native place of aforesaid Deepak Kumar Singh, i.e. Bisunpur Jichh and stayed there against the wishes of respondent husband. Since 1991 the appellant wife also deserted the respondent husband. On 2.6.1999 the respondent wife filed Bhagalpur Kotwali P.S. Case No. 244 of 1999 with accusation under Sections 498A and 379/34 of the IPC. Besides this, a partition suit was also filed by the appellant wife at the behest of Deepak Kumar Singh, being Partition Suit No. 43 of 1993.

The appellant wife entered appearance and filed her written statement on 14.3.2011 admitting the performance of marriage



between her and the respondent on 22.5.1979. She claimed of smooth marital relationship for 12 years, but subsequently the respondent husband developed illicit relationship with one Shailja Kumari, the daughter of Surender Choudhary. On protest being made, cruelty was inflicted upon the appellant wife, as a result she was compelled to leave the matrimonial house and go to her parents' house at Lucknow. The brother-in-law of the respondent husband Tarkeshwar also used to inflict torture along with the respondent husband. Thereafter all the belongings of appellant wife were taken away by the respondent husband and by the said Tarkeshwar. It is further case of the appellant wife that only when she was left with no source of maintaining herself, she became compelled to file Partition Suit No. 43 of 1993. In her written statement, the appellant wife also claimed maintenance of Rs.10000/- per month. The appellant wife is still ready to resume the conjugal life.

During the pendency of the matrimonial case, a petition under Section 26 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as the Act of 2005) read with Section 25 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act,1955) dated 9.11.2005 was



filed for the relief under various provisions of the Act of 2005 and for permanent alimony under Section 25 of the Act, 1955.

On the basis of the pleadings of the parties, altogether six issues were framed, which read as follows:

- “i. Whether the matrimonial case as framed maintainable?
- ii. Whether the plaintiff/petitioner has valid cause of action for filing this case ?
- iii. Whether the petitioner is entitled for decree of divorce/judicial separation as claimed for ?
- iv. Whether the O.P./respondent is legally wedded wife of the petitioner and entitled for any alimony/maintenance allowance as claimed in the written statement ?
- v. Whether the respondent/O.P. is entitled for protection under relevant provision of domestic violence act, 2005 ?
- vi. To what other relief or reliefs, if any, the petitioner is entitled to in the eye of law and the court in this case ?”

The respondent husband being petitioner before the learned Court below, examined himself as P.W. 1, whereas the appellant wife examined herself as D.W. 2, while Ram Vinod Singh deposed as D.W. 1. Apart from that, documentary evidence from both sides were also exhibited with regard to the litigation



between the parties.

The learned Court below came to a definite finding that the grounds of adultery has not been proved since aforesaid Deepak Kumar Singh who is known to the respondent husband, being his nephew, could not have the opportunity to refute the charges since he has not been made party. Finding was also recorded that the appellant husband also failed to prove the grounds of desertion and cruelty, rather it is the appellant wife who has been subjected to cruelty and desertion. The learned court below further came to a finding that the appellant wife is entitled to permanent alimony and maintenance but no relief under Domestic Violence Act of 2005 can be claimed in the matrimonial proceeding. The relevant finding is recorded in paragraph nos. 15 and 16 of the impugned judgment which read as follows:

“15. In the light of the discussions made above, this court is of humble view that the marriage between the parties has irretrievably broken down due to large desertion between the parties, but it is petitioner who has committed desertion and cruelty against the O.P. prima facie, this court is of further view that an unanswered misunderstanding has occurred between the two parties regarding



their alleged illicit relations with other person and the O.P. is entitled for reasonable permanent alimony/maintenance in this case, but the provision of domestic violence Act are not applicable in this case in her favour in any way. Under the facts and circumstances submitted above and also discussions made so far.

16. Therefore, it is held that the petitioner is entitled for a decree of divorce against the O.P. as the marriage has already irretrievably broken down between the parties due to long desertion, cruelty and misunderstanding as submitted above, that the O.P. is legally wedded wife of the petitioner and she is entitled for reasonable permanent alimony/maintenance allowance from the petitioner according to their status and standard of living, but the provision of domestic violence Act, are not applicable in this case in favour of the O.P. and accordingly, issue no. (iii) is decided in favour of the petitioner, in affirmative, issue no.(iv) decided in favour of the O.P. and issue no. (v) is decided in favour of the petitioner as discussed and submitted above.”

However, the learned Court below passed the judgment of



dissolution of marriage on the ground that the marriage has irretrievably broken down and the same is under challenge in the present Miscellaneous Appeal.

Learned counsel for the appellant wife submits that the judgment and decree under appeal is bad in facts and law as well. The respondent husband has failed to prove the ground of adultery, desertion and cruelty but in spite of that the decree of divorce has been granted on the ground of irretrievable breakdown of marriage, although adultery, desertion and cruelty has not been proved nor any evidence has been led to that effect. It is further submitted that the materials on record reflect that the respondent husband was leading adulterous life and it was he who actually deserted the appellant wife and inflicted cruelty upon her. The impugned judgment is against the weight of evidence adduced.

Learned counsel for the respondent husband submits that since the appellant and respondent were residing separately for a period of more than 21 years, the marriage between them had virtually broken down and hence, the judgment and decree under appeal does not need any interference. The appellant wife, in fact, inflicted torture by filing Title Suit at the behest of Deepak Kumar Singh, the nephew of the respondent husband



who is not in good terms with him and moreover, she also filed criminal cases against the respondent husband.

It is further submitted on behalf of the respondent husband that it is well settled law that when the marriage is virtually dead, there is no purpose of allowing the continuance of the same to survive for the name sake.

On the joint prayer of the appellant and the respondent, vide order dated 4.7.2019, the matter was referred to the Mediation Centre of Patna High Court Legal Services Committee. The report of the mediator dated 20.8.2019 reflects that the issue could not be resolved through the process of mediation.

The basic issue in the present appeal is as to whether even without proving the relief claimed or the pleadings, the relief can be granted or as to whether the relief of dissolution of marriage on the ground of irretrievable breakdown of the same can be granted without any pleading or leading of evidence to that effect when the same is not a ground of dissolution of marriage under Section 13 of the Act and whether the relief under Domestic Violence Act can be claimed in a matrimonial suit for divorce ?

Let us first examine whether the petitioner/respondent



had been able to make out a cause of action.

Order VII Rule 1 of the Code of Civil Procedure (hereinafter referred to as the Code) prescribes the particulars to be contained in a plaint. Clause (e) of Order VII Rule 1 suggests that a plaint should contain the facts constituting the 'cause of action' and when it arose.

In Black's Law Dictionary, the 'cause of action' has been defined as the fact or facts which gives a person a right to seek judicial relief. The Osborne's Concise Law Dictionary defines 'cause of action' as the fact or combination of facts which gives rise to right or action. In Strand's Judicial Dictionary, the 'cause of action' has been defined to be the entire set of facts that give rise to an enforceable claim.

The Hon'ble Supreme Court in the case of Dahiben Vs. Arvinbhai Kalyanji Bhansusali, reported in 2020 SCC Online 562 defined 'cause of action' in paragraph 13 of the judgment which reads as follows:

"13. "Cause of action" means every fact which would be necessary for the plaintiff to prove, if traversed, in order to support his right to judgment. It consists of a bundle of material facts, which are necessary for the plaintiff to prove in order to entitle him to the reliefs claimed in the suit.



In Swamy Atmanand v. Sri Ramakrishna Tapovanam this Court held :

“24. A cause of action, thus, means every fact, which if traversed, it would be necessary for the plaintiff to prove an order to support his right to a judgment of the court. In other words, it is a bundle of facts, which taken with the law applicable to them gives the plaintiff a right to relief against the defendant. It must include some act done by the defendant since in the absence of such an act, no cause of action can possibly accrue. It is not limited to the actual infringement of the right sued on but includes all the material facts on which it is founded”

(emphasis supplied)

In T. Arivandandam v. T.V. Satyapal & Anr. this Court held that while considering an application under Order VII Rule 11 CPC what is required to be decided is whether the plaint discloses a real cause of action, or something purely illusory, in the following words : -

“5. ...The learned Munsiff must remember that if on a meaningful – not formal – reading of the plaint it is manifestly vexatious, and meritless, in the sense of not disclosing a clear right to sue, he should exercise his power under O. VII, R. 11, C.P.C. taking care to see that the ground mentioned therein is



fulfilled. And, if clever drafting has 8 (2005) 10 SCC 51. 9 (1977) 4 SCC 467. 18 created the illusion of a cause of action, nip it in the bud at the first hearing ...”
(emphasis supplied)

Subsequently, in I.T.C. Ltd. v. Debt Recovery Appellate Tribunal, this Court held that law cannot permit clever drafting which creates illusions of a cause of action. What is required is that a clear right must be made out in the plaint.

If, however, by clever drafting of the plaint, it has created the illusion of a cause of action, this Court in Madanuri Sri Ramachandra Murthy v. Syed Jalal held that it should be nipped in the bud, so that bogus litigation will end at the earliest stage.

The Court must be vigilant against any camouflage or suppression, and determine whether the litigation is utterly vexatious, and an abuse of the process of the court.”

In the present case, the cause of action of the respondent husband in the matrimonial case, was adultery, desertion and cruelty. Hence, it is for the respondent husband who claimed relief to produce evidence in support of his pleading/cause of action.



In the present case, the respondent husband has only examined himself. It is well settled law that merely because there are allegations and counter allegations, a decree of divorce cannot follow nor on mere delay in disposal of divorce proceeding by itself is a ground for dissolution of marriage. In the case of V. Bhagat Vs. D. Bhagat, reported in (1994) 1 SCC 337, the Hon'ble Supreme Court has held that on mere allegations and counter allegations, marriage cannot be dissolved. Paragraph 21 of the judgment reads as follows:

"21. Before parting with this case, we think it necessary to append a clarification. Merely because there are allegations and counter allegations, a decree of divorce cannot follow. Nor is mere delay in disposal of the divorce proceedings by itself a ground. There must be really some extra-ordinary features to warrant grant of divorce on the basis of pleading (and other admitted material) without a full trial. Irretrievable breakdown of the marriage is not a ground by itself. But while scrutinising the evidence on record to determine whether the ground(s) alleged is/are made out and in determining the relief to be granted, the said circumstance can certainly be borne in mind. The unusual step as the one taken by us herein can be resorted to only to clear up an insoluble mess, when the Court finds it in the interest of both



parties."

The expression 'cruelty' has not been defined in the Act but day-to-day wear and tear cannot be treated as cruelty. Cruelty can be mental or physical. It is easy to prove the physical cruelty by means of direct evidence but it is difficult to prove the mental cruelty by direct evidence. Cruelty can be a ground for dissolution of marriage which is willful and justifiable conduct to the extent that it causes danger to life, limb or health, bodily or mental, or as to give rise to a reasonable apprehension of such a danger.

Cruelty has been defined in the case of Praveen Mehta Vs. Inderjit Mehta, reported in (2002) 5 SCC 706. Paragraph 21 of the judgment reads as follows:

"21.Cruelty for the purpose of Section 13(1)(i-a) is to be taken as a behaviour by one spouse towards the other, which causes reasonable apprehension in the mind of the latter that it is not safe for him or her to continue the matrimonial relationship with the other. Mental cruelty is a state of mind and feeling with one of the spouses due to the behaviour or behavioural pattern by the other. Unlike the case of physical cruelty, mental cruelty is difficult to establish by direct evidence. It is necessarily a matter of inference to be drawn from



the facts and circumstances of the case. A feeling of anguish, disappointment and frustration in one spouse caused by the conduct of the other can only be appreciated on assessing the attending facts and circumstances in which the two partners of matrimonial life have been living. The inference has to be drawn from the attending facts and circumstances taken cumulatively. In case of mental cruelty it will not be a correct approach to take an instance of misbehaviour in isolation and then pose the question whether such behaviour is sufficient by itself to cause mental cruelty. The approach should be to take the cumulative effect of the facts and circumstances emerging from the evidence on record and then draw a fair inference whether the petitioner in the divorce petition has been subject to mental cruelty due to conduct of the other."

In the present case, though allegations of cruelty has been levelled with regard to closing doors of bedroom, throwing chili powder on the respondent husband and mixing salt in the water and other food materials and apart from that, the allegation that the appellant wife was having illicit relationship with Deepak Kumar Singh, but no evidence to that effect has been led to prove such allegations and as such the cause of action does not



stand proved.

The other ground upon which divorce has been sought is desertion. The expression 'desertion' has also not been defined under the Act but it is abandonment of one spouse by the other without other's consent and without reasonable cause. In the case of Savitri Pandey Vs. Prem Chandra Pandey, reported in (2002) 2 SCC 73, 'desertion' has been circumscribed by the Apex Court in paragraph 9 of the judgment, which reads as follows:

"9. Following the decision in Bipinchandra case this Court again reiterated the legal position in Lachman Utamchand Kirpalani v. Meena by holding that in its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent, and without reasonable cause. For the offence of desertion so far as the deserting spouse is concerned, two essential conditions must be there (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. For holding desertion as proved the



inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation."

In the present case, the respondent husband has not produced any evidence to prove desertion, rather the appellant wife has brought the evidence on record that she was compelled to leave the matrimonial house due to torture inflicted by the respondent husband.

It is surprising that the learned Principal Judge, Family Court, Bhagalpur, in spite of giving specific finding that the respondent husband has failed to prove the ground of desertion and cruelty or adultery, rather he has also specified in his finding that the evidence on record suggest that it is the husband who inflicted cruelty upon the appellant wife and deserted her, yet the learned Principal Judge, Family Court, Bhagalpur has dissolved the marriage on the ground that the marriage has irretrievably broken down, which has neither been pleaded nor any evidence was led to that effect.

Section 13 of the Act does not stipulate irretrievable



breakdown of marriage as the ground for dissolution of marriage. However, in many cases the Hon'ble Supreme Court in exercise of jurisdiction under Article 142 of the Constitution of India has dissolved the marriage on the ground of irretrievable breakdown of the same. The 71st Report of Law Commission of India briefly dealt with the concept of irretrievable breakdown of marriage which was submitted to the Government on 7th April, 1978. In this report, it was recommended that in last few decades, it is found that in the courts the matrimonial suits are being filed less on the principle based on fault of the party theory but more on the doctrine of breakdown of marriage. Hence, the number of matrimonial proceedings based on matrimonial offence theory or fault of party theory has been outnumbered by the irretrievable breakdown of marriage theory. Thus, it has been recommended for incorporation of irretrievable breakdown of marriage as a ground under Section 13 of the Act for dissolution of marriage. However, it has not been incorporated till date.

In several cases, the Hon'ble Supreme Court has exercised power under Article 142 of the Constitution of India. However, such power, in view of this Court, cannot be exercised by the High Court or the Principal Judge, Family Court as has been



held in the case of Anil Kumar Jain Vs. Maya Jain, reported in (2009) 10 SCC 415. Paragraph nos. 28 and 29 of the judgment read as follows:

“28. It may, however, be indicated that in some of the High Courts, which do not possess the powers vested in the Supreme Court under Article 142 of the Constitution, this question had arisen and it was held in most of the cases that despite the fact that the marriage had broken down irretrievably, the same was not a ground for granting a decree of divorce either under Section 13 or Section 13-B of the Hindu Marriage Act, 1955.

29. In the ultimate analysis the aforesaid discussion throws up two propositions. The first proposition is that although irretrievable break-down of marriage is not one of the grounds indicated whether under Sections 13 or 13- B of the Hindu Marriage Act, 1955, for grant of divorce, the said doctrine can be applied to a proceeding under either of the said two provisions only where the proceedings are before the Supreme Court. In exercise of its extraordinary powers under Article 142 of the Constitution the Supreme Court can grant relief to the parties without even waiting for the statutory period of six months stipulated in Section 13-B of the aforesaid Act. This doctrine of irretrievable break-down of marriage is not available even to the High Courts which do not have powers similar to those



exercised by the Supreme Court under Article 142 of the Constitution. Neither the civil courts nor even the High Courts can, therefore, pass orders before the periods prescribed under the relevant provisions of the Act or on grounds not provided for in Section 13 and 13-B of the Hindu Marriage Act, 1955.”

However, it is well settled law that irretrievable breakdown of marriage can be a relevant factor to decide the issue of cruelty and desertion, but that cannot be a sole ground. In the present case, the learned Principal Judge, Family Court, Bhagalpur even after coming to a finding that the respondent husband has failed to prove the ground of cruelty, desertion or adultery, has dissolved the marriage. The Court cannot grant relief which has not been prayed for. In the case of Kalyan Singh Chouhan Vs. C.P. Joshi, reported in (2011) 11 Supreme Court Cases 786, the Hon’ble Supreme Court held that the Court cannot consider a fact which is beyond the pleading and the party has to prove the pleadings through evidence. Paragraph 18 of the judgment reads as follows:

“In Gajanan Krishnaji Bapat v. Dattaji Raghobaji Meghe this Court held that the court cannot consider any fact which is beyond the pleadings of the parties. The parties have to take proper pleadings and establish by adducing



evidence that by a particular irregularity/illegality the result of the election has been materially affected.”

It is trite law that the Court cannot make out a third case contrary to the pleadings and evidence on record. The learned Court below has failed to understand that there is no pleading with regard to the irretrievable breakdown of marriage in the plaint. It is well settled law that in absence of pleading, evidence, if any, produced by the party cannot be considered as has been held in the case of Ram Sarup Gupta Vs. Bishun Narain Inter College, reported in (1987) 2 SCC 555. Paragraph 6 of the judgment reads as follows:

“6. ... It is well settled that in the absence of pleading, evidence, if any, produced by the parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleading and that all necessary and material facts should be pleaded by the party in support of the case set up by it. The object and purpose of pleading is to enable the adversary party to know the case it has to meet. In order to have a fair trial it is imperative that the party should settle the essential material facts so that other party may not be taken by surprise. The pleadings however should receive a liberal construction; no pedantic



approach should be adopted to defeat justice on hair-splitting technicalities. Sometimes, pleadings are expressed in words which may not expressly make out a case in accordance with strict interpretation of law. In such a case it is the duty of the court to ascertain the substance of the pleadings to determine the question. It is not desirable to place undue emphasis on form, instead the substance of the pleadings should be considered. Whenever the question about lack of pleading is raised the enquiry should not be so much about the form of the pleadings; instead the court must find out whether in substance the parties knew the case and the issues upon which they went to trial. Once it is found that in spite of deficiency in the pleadings parties knew the case and they proceeded to trial on those issues by producing evidence, in that event it would not be open to a party to raise the question of absence of pleadings in appeal.”

Moreover, if there is delay in disposal of the matrimonial suit or appeal, that cannot be a ground for dissolution of marriage.

Above all, it is the fundamental principle of civil law that relief to be granted can be only with reference to the prayer made in the pleadings, as has been held by the Hon’ble Supreme Court in the case of Bachhaj Nahar Vs. Nilima Mandal and Anr., reported in (2008) 17 SCC 491. Paragraph 23 of the judgment



reads as follows:

“23. It is fundamental that in a civil suit, relief to be granted can be only with reference to the prayers made in the pleadings. That apart, in civil suits, grant of relief is circumscribed by various factors like court fee, limitation, parties to the suits, as also grounds barring relief, like res judicata, estoppel, acquiescence, non-joinder of causes of action or parties, etc., which require pleading and proof. Therefore, it would be hazardous to hold that in a civil suit whatever be the relief that is prayed, the court can on examination of facts grant any relief as it thinks fit. In a suit for recovery of rupees one lakh, the court cannot grant a decree for rupees ten lakhs. In a suit for recovery possession of property ‘A’, court cannot grant possession of property ‘B’. In a suit praying for permanent injunction, court cannot grant a relief of declaration or possession. The jurisdiction to grant relief in a civil suit necessarily depends on the pleadings, prayer, court fee paid, evidence let in, etc.”

In the present case, in the plaint there was not pleading for the dissolution of marriage on the ground of irretrievable breakdown. Though such prayer cannot be made as there is no such ground incorporated under Section 13 of the Act for



dissolution of marriage but the marriage has been dissolved not only contrary to the established law but contrary to the principles that without any pleading and relief prayed for dissolution of marriage on the ground of irretrievable breakdown, the same has been granted in the present case. Hence, the impugned judgment is bad in law and facts as well.

The learned trial Court has rightly not considered the ground of adultery for dissolution of marriage since adulterer was not made party in the proceeding. Rule 16 of the Patna High Court Hindu Marriage Rules stipulates that the adulterer is a necessary party when the dissolution of marriage or judicial separation is sought on the ground of adultery. However, on certain grounds the Court may allow the petitioner not to make an adulterer as party if he is dead or if he could not know his name instead of due diligence. Rule 16 of the Rules reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is



excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

Similar provision has been made under Rule 214(16) of the Civil Court Rules, which reads as follows:

“16. Co-respondent in husband’s petition.- In any petition presented by a husband for divorce on the ground that the wife is living in adultery or judicial separation on the ground that the wife has, since the solemnization of the marriage, been guilty of adultery, the petitioner shall make the alleged adulterer, if alive, a co respondent in the said petition, unless he is excused from so doing by an order of the Court which may be made on any or more of the following grounds which shall be supported by an affidavit in respect of the relevant facts.-

(i) that the respondent is leading the life



of a prostitute, and that the petitioner knows of no person with whom the adultery has been committed;

(ii) that the name of the alleged adulterer is unknown to the petitioner, although he has made due efforts for its discovery;

(iii) that the alleged adulterer is dead;

(iv) for any other sufficient reason that the Court may deem fit to consider.”

So far as grant of relief claimed by the appellant wife under the Protection of Women From Domestic Violence Act of 2005 is concerned, the learned Court below has wrongly held that such relief cannot be claimed in matrimonial proceeding. Section 26 of the Act of 2005 clearly lays down that the relief under the Act can be claimed in any legal proceeding in civil court, family court or a criminal court. Section 26 of the Act of 2005 reads as follows:

“26. Relief in other suits and legal proceedings.- (1) Any relief available under Sections 18,19,20,21 and 22 may also be sought in any legal proceeding, before a civil court, Family Court of a criminal court affecting the aggrieved person and the respondent whether such proceeding was initiated before or after the commencement of this Act.



(2) Any relief referred to in sub-section(1) may be sought for in addition to and along with any other relief that the aggrieved person may seek in such suit or legal proceeding before a civil or criminal court.

(3) In case any relief has been obtained by the aggrieved person in any proceedings other than a proceeding under this Act, she shall be bound to inform the Magistrate of the grant of such relief.”

The only rider under Section 26(3) of the Act of 2005 is that if any relief has been obtained by the aggrieved person in any proceeding other than a proceeding under this Act, then she has to disclose it to the Court where the application under the Act of 2005 has been filed. The above principle is further fortified under Section 36 of the Act of 2005 which suggests that the Act of 2005 is not in derogation of the provision of any other law. Section 36 of the Act of 2005 reads as follows:

“36. Act not in derogation of any other law.-
The provisions of this Act shall be in addition to, and not in derogation of the provisions of an other law, for the time being in force.”

In the case of R.D. Vs. BD, reported in 2019(4) RCR (Civil) 802, a Division Bench of the High Court of Delhi held



that the maintenance can be granted under Section 20 of the Act of 2005, in spite of the fact that the interim maintenance under Section 125 of the Code of Criminal Procedure has already been granted. Paragraph nos. 15 and 16 of the judgment read as follows:

“15. A careful perusal of Section 20 of DV Act shows that it provides maintenance to the aggrieved person as well as her children, if any, which would be in addition to an order of maintenance under Section 125 of the Code of Criminal Procedure or any other law for the time being in force. Further, Section 26 of DV Act stipulates that any relief available under Sections 18 to 22 of DV Act may also be sought in any legal proceedings before a civil court, Family court or a criminal court and such relief may be sought in addition thereto. Whereas Section 36 of DV Act clearly stipulates Act not in derogation of any other law – The provisions of this Act shall be in addition to, and not in derogation of the provisions of any other law, for the time being in force.

16. A conjoint reading of the aforesaid Section 20, 26 and 36 of DV Act would clearly establish that the provisions of DV Act dealing with maintenance are supplementary to the provisions of other laws and therefore maintenance can be granted to the aggrieved person (s) under the DV Act which would also be in addition to any order of



maintenance arising out of Section 125 of Cr.P.C.”

Hence, the learned Court below has erred in facts as well as in law in holding that no relief can be granted under the Act of 2005 in matrimonial proceeding as claimed by the appellant in the matrimonial proceeding.

In view of the discussions made above the judgment and decree under appeal is absolutely perverse. Hence, it is set aside.

The appeal is allowed accordingly.

(Dinesh Kumar Singh, J)

(Arvind Srivastava, J)

anil/-

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