

HIGH COURT OF CHHATTISGARH, BILASPUR

FAM No. 215 of 2016

Rina Pandey, Aged 28 years, Wife of Praveen Kumar Pandey, Caste Brahmin, Resident of Bakimongra, Tahsil Katghora, District Korba (C.G.)

---- Appellant

Versus

Praveen Kumar Pandey, Aged 32 yrs, S/o. Shambhu Nath Pandey, Caste Brahmin, Permanent resident of village Terkha, Nawadih, Present local address Resident of village Gwala Basti Gayatrinagar, Post Indranagar, P.S. Telco, Jamshedpur, District Purvi Singh, Bhumi (Jharkhand)

---- Respondent

For the Appellant :- Mr. Ritesh Verma
For the Respondent :- None

Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor,

Judgement on Board By
Manindra Mohan Shrivastava, J.

21.01.2020

Heard.

1. This appeal is directed against the judgment and decree dated 11.08.2016 passed by the Family Court Camp Katghora District Korba in Civil Suit No. 07-A/2010 by which the appellant's application for grant of decree of divorce has been dismissed.
2. An application under Section 13 of the Hindu Marriage Act was filed by the appellant seeking decree of divorce on the pleading

interalia, that soon after the marriage of the appellant with the respondent on 23rd June 2004, she was subjected to cruelty. In the application, it was pleaded that once an attempt was made to harm her by administering a drug. It was also pleaded that the respondent husband, in the state of intoxication, used to beat and abuse her. But somehow, the wife was tolerating in the hope of improvement. It was also pleaded that once her brother and mother had come to the matrimonial house during festival, she was abused and also assaulted by the respondent. Further, pleading was that later on, when the father of the appellant fell sick, she went to parental house in the month of September along with her brother and the appellant used to frequently visit. On 22.09.2007, the appellant gave birth to a child. It was further pleaded that the respondent husband has deserted her since more than 2 years and is not taking any care either of the appellant or his son. It was further pleaded that the respondent married another woman and is enjoying marital life.

3. The allegation made in the application were denied by the respondent husband by stating that the wife is residing in the house of her father of her own and she has left the matrimonial house. It was also pleaded that he was not informed regarding birth of his son and when he went to meet his son, he was abused and assaulted and was not allowed to meet. Allegation of second marriage was also denied by the respondent husband. He further stated that he is still prepared to take his wife back to the matrimonial house and has also moved an application under

section 9 of the Hindu Marriage Act for restitution of conjugal rights.

4. After allowing the parties to lead oral and documentary evidence, the trial Court, on both the issues of cruelty and desertion found that no case is made out for grant of decree of divorce on the aforesaid ground and dismissed the suit, giving rise to the present appeal.
5. Assailing legality and validity of the impugned judgment and decree, the appellant also moved an application under Section 27 of the Hindu Marriage Act for return of 'Stridhan' on the pleading that a draft of Rs. 1,31,000/- was given to the respondent and cash of various items worth of Rs. 1,00,000/- were given at the time of marriage by the father of the appellant. On such pleading, prayer for return of Stridhan was made which claim was denied by the respondent.
6. Learned trial Court after allowing the parties to lead oral and documentary evidence, recorded the finding that the appellant is not entitled to decree of divorce on the ground of cruelty or on the ground of desertion. As far as the return of Stridhan is concerned, it was held that the claim of appellant is also not well founded on any clinching evidence and that prayer was also rejected.
7. Learned counsel for the appellant would argue that not only on the aspect of cruelty but also on the desertion, specific pleadings was made by the appellant and not only the appellant but in the

evidence of other witnesses led by her it is clearly stated that soon after the marriage, she was subjected to cruelty, an attempt was made to administer some drug and also that she was subjected to physical violence time and again. He would further argue that specific pleading that after wife went to parental house to attend her ailing father, though, husband used to visit but after birth of her son, the respondent stopped coming, has also been proved from the clinching evidence and merely because the respondent husband was granted an *ex parte* decree of restitution of conjugal rights, it could not be presumed that it is the appellant and not the respondent who has deserted her husband. Learned counsel for the appellant would further argue that as far as return of Stridhan in the form of money and items are concerned, despite specific evidence and admission on the part of the respondent that he has received Rs. 1,00,000/-, the Court below has not granted any relief and rejected that application. Lastly, it is submitted that in any case as the parties are residing separately since 2007 i.e. more than 12 years by now, and there is no hope of they reuniting, the marriage is now irretrievably broken. Therefore, it is argued, that a decree of divorce may be granted only on this ground. In support of his submission on this aspect learned counsel for the appellant has relied upon decision in the matter of **S. Latha Kunjamma v. K. Anil Kumar AIR 2008 Kerla 203.**

8. There is no one appearing for the respondent.

9. As far as the appellant's claim for grant of decree on the ground of desertion is concerned, we find that though the appellant pleaded and also led evidence to the effect that after she went to the house of her father to attend him, husband used to visit her but after the child was born on 22.09.2007, he stopped visiting, we find that the respondent husband in his reply itself has stated that he has moved an application for restitution of conjugal rights. In the cross examination of the appellant, who examined herself as her first witness, it has been admitted that an application under Section 9 of the Hindu Marriage Act was filed and it was proceeded *ex parte*. The brother of the appellant namely Ajit Kumar (PW-2) has also clearly stated that in his evidence that a notice regarding institution of an application for restitution of conjugal rights under Section 9 of the Hindu Marriage Act was sent and he along with his sister had gone to attend the case but, later on, they could not attend the case. The respondent has clearly stated in his evidence that he has moved an application for restitution of conjugal rights and decree has been passed in his favour and despite that his wife did not come and he is still willing to take his wife back to the matrimonial life. In his cross examination, it has been elicited that he had also instituted execution proceedings towards execution of decree of restitution of conjugal rights has been admitted.
10. From the aforesaid material evidence on record, it is proved that the respondent husband was willing to keep his wife and towards that he also moved an application for restitution of conjugal

rights, his application was eventually allowed in his favour and decree was granted against the appellant. Even though the appellant said that the decree was *ex parte* one, there is nothing on record to show that the appellant took any step to get that *ex parte* judgment decree set aside. On the face of a decree of restitution of conjugal rights operating against the appellant, the appellant can not be heard saying that she has been deserted by her husband. Therefore, the appellant is not entitled to decree of divorce on the ground of desertion because it is well settled that mere residing separately is not enough unless it is also proved that there was *animus deserendi* on the part of other spouse to bring the marital relation to an end for all times to come and with that intention, he has withdrawn himself from the company of the other spouse. How could a husband be blamed of deserting his wife when he has moved the Court for grant of decree of restitution of conjugal rights and has been granted a decree for restitution of conjugal rights which was put to execution by him by instituting execution proceedings.

11. This leads to another ground on which the decree has been sought. The allegation of cruelty, if we may say so, is blissfully vague. Neither in the application, nor in the evidence, specific details of the cruelty have been stated. What is more important to notice that these allegations are said to be pertaining to year 2004-06 but the application for grant of decree of divorce on the ground of cruelty has been filed by the appellant in the year 2010. The allegation that at one point of time, some drug was

administered to harm, cannot be accepted because it has been admitted in the evidence that, in this regard, no report was lodged in any police station nor is there any evidence that it was brought before any forum at the community level. Making such an allegation as basis of cruelty by filing an application for grant of decree after four year, without clinching evidence, is not acceptable.

12. The submission of learned counsel for the appellant is that in any case as marriage irretrievably broken only on this ground can be granted, is also not acceptable because this Court in the case of **Vijay Kumar Gupta v. Smt. Kiran Bala** passed in **FAM No. 138 of 2012 on 29.11.2019**, has clearly held that on such ground no decree can be granted by this Court in exercise of appellate jurisdiction. In view of the aforesaid decision of this Court, we find ourself unable to accord with the view taken by the Kerala High Court in the case of **S. Latha Kunjamma v. K. Anil Kumar AIR 2008 Kerala 203**.

13. As far as the allegation that the husband has contracted the second marriage, there is no clinching proof except photocopy of voter list submitted in which at one place, name of one Nitu is shown and the name of her husband shown as Praveen Kumar Pandey. On such evidence, by itself, it can not be proved that the respondent husband contracted second marriage.

14. As far as the Stridhan is concerned, the wife has come out with the pleading that at the time of marriage cash and gift times were also given. The appellant has examined herself as PW-1. She stated in her evidence that apart from cash of Rs. 1,31,000/-, gift items worth of Rs. 1,00,000/- were also given at the time of marriage to her. This part of her evidence has remained uncontroverted in her cross examination and no suggestion has been given regarding that statement being incorrect. We also find that though, formally, bills with regard to the articles have not been proved, nevertheless, these bills were filed before the learned trial Court by the appellant wife. The bills stand in the name of the brother of the appellant. Therefore, keeping in view specific pleading and evidence regarding receipt of Rs. 1,00,000/-, uncontroverted evidence of PW-1 regarding payment of Rs. 1,31,000/- and gift items worth of Rs. 1,00,000/- and that bills were also filed, we are inclined to allow the appellant's claim with regard to return of Stridhan was Rs. 2,31,000/-.

15. In the result the appeal is partly allowed. As far as judgment and decree to the extent it rejects appellant's application for grant of decree of divorce on the ground of cruelty and desertion is dismissed. The appellant's prayer for return of Stridhan, however, is allowed. The respondent shall return cash of Rs. 1,31,000/- and also the articles. If those articles are not available in place thereof cash of Rs. 1,00,000/- would be payable by the respondent to the appellant.

16. Let the appellate decree be drawn up accordingly. The appeal stands partly allowed.

Sd/-

Manindra Mohan Shrivastava
Judge

Sd/-

Vimla Singh Kapoor
Judge

Santosh