

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**F.A.M. NO. 73 OF 2018**

- Smt. Vinita Giri, W/o Santosh Giri, aged about 28 years, Caste Goswami, Present Address- Adarsh Nagar Kunkuri, Tahsil Kunkuri, District Jashpur (C.G.)

... Appellant**versus**

- Shri Santosh Kumar Bharti, S/o Shri Thakur Bharti, aged about 32 years, Caste Goswami, R/o Birti, Post Banpura, Tahsil Siwan (Chainpur) District Siwan (Bihar)

... Respondent

For Appellant	:	Mr. Manoj Kumar Sinha, Advocate.
For Respondent	:	None for Respondent.

Hon'ble Shri Justice P. Sam Koshy**Hon'ble Smt. Justice Rajani Dubey****Order on Board****[28/10/2021]****Per, P. Sam Koshy, J.**

1. Aggrieved by the Judgment dated 15.1.2018 passed by the Family Court, District Jashpur in Civil Suit No.20A/2015, the present Appeal has been filed by Appellant/Plaintiff under Section 19(1) of the Family Court Act, 1984.
2. Vide the impugned Judgment, the Family Court had rejected the Application filed by Appellant under Section 13(1)(i)(ia)(ib) of the Hindu Marriage Act, 1955 (hereinafter referred to as, "the Act of 1955").
3. Facts of the case in brief are that the Appellant and the Respondent both had entered into a marriage under the Hindu rules and principles on 10.7.2005. For the initial couple of years, the marriage life between the two was cordial, smooth and comfortable. Out of their wedlock, a daughter was also born to them on 1.9.2007. The delivery of the said girl child was at the native place of the Appellant, i.e., at Kunkuri, District Jashpur. It is alleged by the Appellant that after the delivery of the girl child in September, 2007, the attitude of the Respondent suddenly changed towards the Appellant

drastically and thereafter the Respondent has been subjecting the Appellant to torture and harassment both mentally and physically and started ill-treating the Appellant subjecting her to cruelty.

4. Contention of the Appellant was that in the year 2009 she had participated in the recruitment drive for appointment in the Central Industrial Security Force (CISF). She got selected in the said recruitment process and was appointed on the post of Constable and her initial posting was at New Delhi. After the Appellant had joined her services at New Delhi, the Respondent started further torturing her continuously by assaulting her on many occasions and also using abusive languages and threatening her of life and of dire consequences. On a couple of occasions, she had reported the matter to the Station House Officer, Police Station Dwarka, Sector-9 in respect of the physical assault that the Respondent was giving to her.

5. Further contention of the Appellant was that, apart from the physical and mental torture that the Respondent was inflicting on her, he also is said to be having an illicit relationship with another lady to which the Appellant had confronted the Respondent when he again assaulted her and chased her out of the house.

6. According to the Appellant, in spite of the best efforts that she has made for the conciliation between them to save the matrimonial relationship, when all the efforts failed, she filed the Application before the Family Court under Section 13(1)(i)(ia)(ib) of the Act of 1955 seeking divorce from the Respondent. However, the Court below has, in spite of the fact that the Respondent has not adduced any cogent evidence before the Court below, erred in dismissing her Application without proper appreciation of the evidence that have come on record. Thus, the Appellant has prayed for the setting aside of the Judgment and for allowing of the present Appeal by granting divorce.

7. Another contention which was strongly harped upon by the Appellant is that right from the year 2007-08 i.e. for a period of about 13-14 years, there has been no cohabitation between the Appellant and the Respondent and they have been living separately and that there is no chance of reconciliation between the two. Thus, accepting the act on the part of Respondent in not taking care of the Appellant and there being no interaction between the two for more than a decade, it should be considered as desertion on the part of Respondent in terms of Section 13(1)(i)(ib) of the Act of 1955 and the marriage be dissolved by granting divorce.

8. The Appellant further contended that divorce be also granted so that she can perform marriage again in the larger interest of herself and also for the girl child staying with her, particularly for the reason that sine she has been working at a place like New Delhi, her social security needs to get protected and thus prayed for allowing of the Appeal.

9. There has been no representation on behalf of the Respondent in spite of proper service and also in spite of paper publication being made in the local News Paper having wide coverage at the place where the Respondent is residing as per the address mentioned in the cause-title of the memo of Appeal.

10. Since there was no representation on behalf of the Respondent, we proceed to consider the submissions and contentions put forth on behalf of the Appellant and on the basis the records of the Court below.

11. What is relevant at this juncture to take note of is that, in the Application which the Appellant had filed before the Family Court, Kunkuri, District Jashpur, firstly, there is an allegation of cruelty to the extent of harassment and torture allegedly made by Respondent on her. Secondly, there is an allegation of desertion on the part of Respondent since 2007

onwards. Thirdly, there was an allegation of the Respondent having an illicit relationship with another lady.

12. Perusal of the records would show that the Appellant had at the first instance filed an Application before the Family Court at Dwarika i.e. the place where the Appellant was staying when she was posted at New Delhi. The said divorce case subsequently was withdrawn by the Appellant. The ground for withdrawal of the said case seems to be the subsequent transfer of the Appellant from New Delhi to Shimla (Himachal Pradesh). However, thereafter she instead preferred the case before the Family Court at Kunkuri, District Jashpur (Chhattisgarh) i.e. the paternal native place of the Appellant.

13. As regards the contention of physical and mental torture of the Appellant, except for Exhibits D-3 & D-4 there has been no other evidence which has been led by the Appellant, *inasmuch* as the Appellant has not known about the outcome of all those alleged complaints made and neither the same have been discussed nor has the Appellant shown any evidence of having pursued with those complaints before the Authorities concerned. Therefore, this Court feels that that those complaints in writing seem to have been got prepared only for the purpose of filing of the present suit.

14. Further, as regards the contention of the Appellant that the Respondent is having an illicit relationship with another lady, there has been no details of the said woman in the life of Respondent provided nor has there been any sort of details adduced, produced or stated except for the bald oral statement made by the Appellant. Mere allegation by itself is not sufficient to be accepted as a proof, particularly when there is an allegation of character assassination.

15. Now, so far as the ground that the Appellant has raised in respect of desertion by the Respondent is concerned, it would be relevant at this juncture to take note of the following statement given by the Appellant herself in her cross-examination :-

“46. ...यह कहना सही है कि प्रतिवादी के द्वारा दामपत्य पुर्नस्थापना हेतु आवेदन सिवान के न्यायालय में प्रस्तुत किया गया था। साक्षी का स्वतः कथन है कि जब मैं दिल्ली न्यायालय में तलाक हेतु आवेदन प्रस्तुत की उसके बाद प्रतिवादी के द्वारा सिवान में उक्त आवेदन प्रस्तुत किया गया था।

47. यह कहना गलत है कि मैं सिवान में उपस्थित हुई थी। मुझे न्यायालय का नोटिस प्राप्त हुआ था। मैं वर्तमान में प्रतिवादी के साथ नहीं रहना चाहती।”

16. From the afore given cross-examination, what clearly reflects and which is thus an admitted fact, is that the Respondent in between has initiated a proceeding for restitution of conjugal rights, coupled with the admission on the part of the Appellant that she does not want to stay with the Respondent any further and the recent development where the Appellant herself has moved an Application seeking permission for remarriage. All this establishes the fact that in-fact it was the Appellant who wanted the divorce as she was not willing and ready to live any further with the Respondent-Husband.

17. The plain reading of the aforesaid evidence and the statement recorded before the Court below, would clearly establish the fact that the Appellant has miserably failed to make out a case under Section 13(1)(i)(ia) (ib) of the Act of 1955. To that extent, the finding of the Family Court therefore does not warrant any interference nor can the finding of the Family Court be held to be arbitrary and bad in law or contrary to the evidence on record.

18. In view of the fact that the Appellant-Plaintiff has not been able to show any cogent, strong and convincing grounds or evidence on the basis of which her Application under Section 13(1)(i)(ia)(ib) of the Act of 1955 could have been allowed, the appeal of the Appellant therefore is totally devoid of merits.

19. Now comes to the issue which the Appellant has raised in the present Appeal for allowing of the Application for grant of divorce.

20. According to the Appellant, she has been staying separately with the Respondent for almost a decade. Now there has been no interaction between the two for all these period of about ten years. There has been no cohabitation between the two during the intervening period even for once. In addition to this, there is also no communication between the two during all this period either personally (physically) or communication by electronic media, nor is there any communication through the social media. Taking all these facts, the request of the Counsel for the Appellant is, to consider the marriage to have been irretrievably breakdown and therefore a decree of divorce be granted on this ground.

21. In view of the aforesaid contention, the point to be considered at this juncture is, whether the aforementioned ground raised by the Appellant in the course of argument in the First Appeal before this Court could be a ground for this Court to allow the Appeal and to grant divorce under the given circumstances.

22. It would be relevant at this juncture to refer to Section 13 of the Act of 1955 dealing with the divorce. It gives numerous circumstances under which a person can claim dissolution of the marriage. For convenience sake, Section 13(1) of the Act of 1955 is being reproduced herein under:

“13. Divorce. (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

[(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or]

[(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or]

[(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or]

(ii) has ceased to be a Hindu by conversion to another religion; or

[(iii) has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder of such a kind and to such an extent that the petitioner cannot reasonably be expected to live with the respondent.”

23. It is under this provision of law that the Appellant has moved an Application for divorce which stood rejected by the Family Court, against which the present Appeal has been filed.

24. A plain reading of the aforesaid provision of law would clearly reflect that the divorce on the ground of irretrievable breakdown of marriage is not envisaged anywhere in Section 13 of the Act of 1955. The fact that it is not made a ground for divorce under Section 13 means there has been a deliberate exclusion by the Legislature of this ground. Thus, since it has been deliberately excluded by the Legislature, the High Court in exercise of its Appellate power under Section 19 of the Family Courts Act cannot add a Clause to Section 13 of the Act of 1955 for the purpose of allowing the Appeal and for grant of divorce. If at all, if the High Court entertains such an Appeal on this ground, it would amount to exceeding the jurisdiction otherwise conferred upon the Court under the law.

25. The Hon'ble Supreme Court in the case of “**Visnu Dutt Sharma Vs. Maju Sharma**” [AIR 2009 SC 2254], in Paragraphs 11 & 12, dealing with the aspect of irretrievable marriage, has held as under:

"11. On a bare reading of Section 13 of the Act, reproduced above, it is crystal clear that no such ground of irretrievable breakdown of the marriage is provided by the legislature for granting a decree of divorce. This Court cannot add such a ground to Section 13 of the Act as that would be amending the Act, which is a function of the legislature.

12. Learned counsel for the appellant has stated that this Court in some cases has dissolved a marriage on the ground of irretrievable breakdown. In our opinion, those cases have not taken into consideration the legal position which we have mentioned above, and hence they are not precedents. A mere direction of the Court without considering the legal position is not a precedent. If we grant divorce on the ground of irretrievable breakdown, then we shall by judicial verdict be adding a clause to Section 13 of the Act to the effect that irretrievable breakdown of the marriage is also a ground for divorce. In our opinion, this can only be done by the legislature and not by the Court. It is for Parliament to enact or amend the law and not for the courts. Hence, we do not find force in the submission of the learned counsel for the appellant."

26. Another aspect which needs consideration is that, in the case of “**Naveen Kohli Vs. Neelu Kohli**” [2006 (4) SCC 558], the Hon'ble Supreme Court in-fact had made a recommendation to the Government of India for amendment of the Act of 1955 so as to incorporate irretrievable breakdown of marriage as a ground for divorce.

27. True it is that the Hon'ble Supreme Court in the past has entertained many Petitions and have granted decree of divorce on the ground of the marriage having become irretrievable. However, a plain reading of those

judgments of the Hon'ble Supreme Court would make it clear that the Supreme Court while entertaining all those Petitions and Appeals had exercised the powers conferred upon the Supreme Court under Article 142 of the Constitution of India. This, in other words, means that the Hon'ble Supreme Court also had to exercise the extraordinary powers conferred upon it under Article 142 of the Constitution of India while granting decree of divorce on the ground of irretrievable marriage, which, under normal circumstances, the High Court would not be permitted to take those judgments of the Hon'ble Supreme Court as a precedent for entertaining the Appeal on the ground of irretrievable marriage. If the High Court entertains the Appeal under Section 19 of the Family Courts Act, particularly when the divorce petition has been dismissed by the Family Court on merits and the ground for allowing the Appeal by the High Court being irretrievable marriage, it would amount to adding another ground under Section 13(1) of the Act of 1955 by way of a judicial pronouncement which is otherwise impermissible under the law. It is only the Legislature which has been empowered to amend the statutes and the role of the Courts is only to ascertain whether the statutes enacted by the Legislature has been in any manner violated or not.

28. The High Court of Allahabad in the case of “**Ashwani Kumar Kohli Vs. Smt. Anita**”, decided on 17.11.2016 in First Appeal No.792 of 2008, in Paragraphs 7 & 8, has held as under:

"7. Therefore, point for adjudication in this appeal is "whether a decree of reversal can be passed by granting divorce to the appellant on the ground which was not subject matter of adjudication before the Court below and is being raised for the first time in appeal".

8. Under the provisions of Act, 1955 there is no ground like any "irretrievable breakdown of marriage", justifying divorce. It is a doctrine laid down by judicial precedents, in particular, Supreme Court in exercise of powers under Article 142 of the Constitution has granted decree of divorce on the ground of irretrievable breakdown of marriage."

29. Given the aforesaid judicial pronouncements and the law as it stands, coupled with the fact that the records show that the Respondent in the instant case has filed an Application for restitution of conjugal rights, this Court finds it difficult to accept the ground of the Appellant for holding the marriage to have become irretrievable only on the submissions made by the Appellant or her Counsel.

30. Under the circumstances, this Court is left with no other option but to dismiss the Appeal. The Appeal accordingly stands dismissed.

Sd/-
(P. Sam Koshy)
JUDGE

Sd/-
(Rajani Dubey)
JUDGE