

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR**FAM No. 254 of 2016**

Deendayal Jaiswal S/o Kaushal Prasad Jaiswal, Aged About 31 Years Caste- Kalar, R/o Mahuapara, Nagpur, P.S.- Pondi, Tehsil- Manendragarh, District Korea, Chhattisgarh

---- Appellant**Versus**

Smt. Sandhya Jaiswal W/o Late Shri Basant Lal Jaiswal, Aged About 30 Years Caste- Kalar, R/o Village Nagpur Chouraha, P.S. Pondi, Tehsil Manendragarh, District Korea, Chhattisgarh

----Respondents

For Petitioner	:	Ms. Indira Tripathi, Advocate
For Respondent	:	Mr. Vivek Shrivastava, Advocate

Hon'ble Mr. Justice P. Sam Koshy
Hon'ble Mrs. Justice Rajani Dubey, J.J.

Order on Board**Par, Hon'ble Mr. Justice P. Sam Koshy****15/11/2021**

1. The present is a plaintiff's first appeal assailing the impugned judgment and decree dated 06.10.2016, passed in Civil Suit No. 17-A/2014 passed by the Family Court, Manendragarh, District Koriya. Vide the impugned judgment, the Court below has dismissed the suit seeking divorce moved by the appellant/plaintiff under Section 13(1)(i)(a)(i)(b) of the Hindu Marriage Act. As per the pleadings of the appellant/plaintiff, the marriage between the appellant and the respondent took place on 23.10.2003 under the Hindu Rites.
2. It is the contention of the appellant that at the time of marriage the respondent was not employed. However, in the year 2008 the respondent/wife got employed as an Anganbadi Karyakarta and was

posted at Mahuapara, Nagpur Chouraha under Tehsil Manendragarh, District Koriya. The contention is that around 2 years prior time from the date of filing of the suit by the appellant on 01.04.2014, the respondent is said to have left the company of the appellant and has gone to her parental home along with her daughter namely Palak. It is also alleged that the appellant had tried to bring the respondent back to his home on many occasions, but the attempts failed and finally he was left with no other option, but to file the suit for divorce under Section 13(1)(i)(a)(i)(b) of the Hindu Marriage Act. In the suit the appellant had taken the specific plea of desertion by the wife.

3. The second ground was that the respondent/wife was said to be having an illicit relationship with one Ajeet Pathkar and with whom she was living in adultery and thus the appellant was entitled for a decree of divorce. Lastly it was contended by the learned counsel for the appellant that from the pleadings itself it is evident that the appellant and the respondent have been staying separately for a period of more than 8 years and that neither of the parties want to stay together and therefore the marriage has to be considered to be one which is irretrievable and treating the marriage to be irretrievable, this Court may allow the appeal and setting aside the impugned judgment and decree may pass a judgment allowing the application and issuing a decree of divorce.
4. On the contrary, the respondent/wife entering appearance filed a detailed reply wherein she has categorically denied all the allegations and alleged that it was the appellant, who had been living in adultery. That it was for all these reasons he wanted divorce and therefore on

the basis of the false and baseless allegations the suit for divorce has been filed. The Court thereafter taking into consideration all the facts and circumstances of the case and also the evidences which were recorded on either side, the Court below finally vide the impugned order has dismissed the suit for divorce.

5. Assailing the impugned judgment the learned counsel for the appellant highlighted the fact that from the evidence which has come on record it is evidently clear that the respondent/wife was staying separately from the appellant two years prior from the date of filing of the suit for divorce and that she has been sharing a house along with one Ajeet Pathkar and therefore the fact that she was living in adultery stands proved.
6. Having heard the contentions put forth on either side and on perusal of record what is necessary to be considered at this juncture is the statement of the appellant/plaintiff himself before the Court below. The statement of the appellant was recorded in the year 2016. The suit for divorce was filed by the appellant on 01.04.2014. Now in his evidence before the Court below the appellant has in very categorical terms admitted the fact that he was having an affair with another lady known as Amlesh and whom he has later kept along with him and from the said relationship with Amlesh, there is also a son born. He has also admitted the fact that he had started staying with the said lady even before the appellant and the respondent could have got a decree of divorce. In his evidence the appellant has further admitted the fact that in the records the appellant has got his name entered as the husband

of the second lady Amlesh and has also admitted the paternity of the son born to the said lady Amlesh.

7. On the contrary from the evidence that has been recorded by the respondent/wife, though she has admitted that she knows a person namely Ajeet Pathkar, she has categorically denied of her illicit relation with Ajeet Pathkar, except the fact that Ajeet Pathkar is a family friend and is also known to her family. This also stands established from the statement of the witnesses No.2 on behalf of the respondents/wife i.e. mother of the respondent, who in her evidence has accepted that Ajeet Pathkar is like her son and who has supported the respondent/wife, when she was neglected by the appellant herein.
8. From the aforesaid evidence, what is necessary to be adjudicated upon at this juncture is, whether the Court below has committed any error of facts or law while deciding the suit filed by the appellant.
9. It is worth mentioning at this juncture that the appellant in the instant case had filed the suit seeking dissolution of marriage dated 23.10.2013 between the appellant and the respondent. The application seeking divorce was filed under Section 3(1)(i)(ia)(ib) of the Hindu Marriage Act, 1955. The primary ground raised by the appellant seeking dissolution of marriage was the contention of desertion on the part respondent-wife for the past more than a couple of years and the alleged refusal on the part of the respondent-wife to live along with the appellant-plaintiff. Another ground that the respondent-wife having left the company of the appellant without any justifiable and reasonable ground. Lastly, it was contended that the respondent-wife was also

living in adultery and on this ground also the appellant was entitled for a decree of divorce.

10. In this context, 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.”

11. 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.
12. 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.

13. 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."

14. 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. However, till date the Act of 1955 has not been amended as recommended for. This, in other words, means that the ground of irretrievable breakdown of marriage as on date is not available as a ground of divorce.

15. 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.

16. 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."

17. Given the aforesaid statutory provisions and also the judicial pronouncements as it stand, if we look into the evidence of the parties adduced in the instant case, it is evident that the respondent-wife has been staying separately from the appellant-husband for quite some time. At the same time, it has to be seen whether there was any justifiable reason or a reasonable cause available for the respondent-wife to stay separately.
18. From the evidence before the Court below, the appellant in his evidence itself has categorically admitted of having a relationship with another lady, namely Amlesh from Nagpur and that he was having a love affair and she was permitted to stay along with him and later on

there was also a son born to the said lady, Amlesh. In his cross-examination, the appellant has admitted the fact that in the official records he has been shown to be the husband of the said lady, Amlesh and also the father of the son born from the relationship. This being the admitted factual matrix of the case, it is established that it was the appellant who was having an illicit relationship with another lady with whom he has also a son born and it was during the existence of the marital relationship with the respondent-wife. It is the appellant who was living in bigamy and which is a sufficient, reasonable, cogent and justifiable ground for a wife to live separately from her husband, particularly when there was another lady staying along with her husband.

19. As regards the counter allegation of the appellant that the respondent-wife was living in adultery and was staying with another person, namely Ajeet Pathkar, there is no strong evidence produced by the appellant to substantiate this ground so far as the two living together or the two having any physical relationship. At the same time, there is also no evidence brought in by the appellant to establish the allegation of the respondent treating the appellant with cruelty. Moreover, the mother of the respondent-wife on the contrary has accepted in her evidence that the said person, Ajeet Pathkar, is known to the family and is like her son and he has been instrumental in getting a house for the respondent-wife to stay. All of which disproves the contention of the appellant so far as the ground on which he has sought for the dissolution of the marriage.

20. From the evidence of the respondent-wife, it is evidently clear that the appellant was having an affair with another lady, Amlesh, for quite some time. In spite of that, the respondent-wife has clearly in her evidence also stated that she intends to live with the appellant-husband, particular taking into account that she has two children from the wedlock with the appellant and for their upbringing she intends to stay together with the appellant.
21. Given the facts and circumstances of the case, this Court is of the firm view that the Court below has not committed any error on law or on facts in reaching to the conclusion that the grounds seeking for dissolution of marriage is not made out. Further taking into consideration the aforesaid judicial pronouncements, the contention of the appellant that the marriage has become irretrievable and therefore divorce be granted also cannot be accepted at this juncture.
22. For the said grounds reasons affirming the impugned judgment and decree, the present Appeal being devoid of merits deserves to be and is accordingly dismissed. No order as to costs.
23. A decree be drawn up accordingly.

Sd/-
(P. Sam Koshy)
Judge

Sd/-
(Rajani Dubey)
Judge