

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
NAGPUR BENCH : NAGPUR

SECOND APPEAL NO.349 OF 2019

Smt. Geeta w/o Santosh Gupta
 Aged about: 31 years, Occupation :
 Household, R/o, C/o Ramkumar
 Jagdish Gupta, Mahadula (Koradi) ... Appellant
 Tah. Saoner, District Nagpur (Ori. Respondent on RA)
 // **VERSUS** //

Shri Santosh s/o Ashok Gupta,
 aged about 34 years, occupation : Labour
 R/o Krushnapura Ward, Bhandara, ... Respondent
 Tahsil & District Bhandara. (Ori. Petitioner/appellant on RA)

Shri. M.B. Turankar, Advocate for the Appellant/original respondent
 Shri S.S. Ghate, Advocate for respondent/original petitioner

CORAM : ANIL S. KILOR, J.

DATED : 10th DECEMBER, 2021.

ORAL JUDGMENT :

This appeal is arising out of the judgment and decree dated 15.01.2018 in Regular Civil Appeal No.95 of 2015 passed by the learned Principal District Judge, Bhandara, allowing the appeal and thereby setting aside the judgment and decree of the learned Civil Judge Senior Division, Bhandara passed in Hindu Marriage Petition No.54 of 2012, dated 28.08.2015 and further granting the decree of divorce in favour of the petitioner husband.

2. The brief facts of the present case are as follows: (The parties are referred to as per their status before the trial Court)

3. The respondent/original petitioner filed a petition under Section 9 read with Section 13-(1)(i-b) of the Hindu Marriage Act, 1955 against the appellant/original respondent for restitution of conjugal right and in alternative for dissolution of marriage.

4. It is the case of the petitioner that the marriage was solemnized on 21.06.2007 between the petitioner and the respondent. He has further alleged that he was subjected to cruelty at the hands of the respondent.

5. It is further case of the petitioner that on 12.02.2010, the respondent left the house of the petitioner and thereafter, the petitioner tried to bring her back, but as the respondent refused to come for cohabitation, the petition for restitution of conjugal right and in alternative for dissolution of marriage, was filed.

6. The respondent by filing written statement-Exh.10 resisted the petition.

7. The learned trial Court after considering the oral as well as documentary evidence placed on record held that the respondent subjected the petitioner with cruelty and she withdrew from the company of the petitioner without any reasonable cause. However, in spite of recording finding as regards to the cruelty in favour of the petitioner, the decree of restitution of conjugal right was passed vide judgment and decree dated 28.08.2015.

8. The petitioner feeling aggrieved by the same, preferred an appeal on the ground that though it has been held by the learned trial

Court that the petitioner has proved his case against the respondent on the ground of cruelty and though the trial Court has held that the petitioner has proved that the respondent had withdrawn from the company of the petitioner without any reasonable cause, the decree of divorce ought to have granted.

9. In appeal, namely Regular Civil Appeal No.95 of 2015, the learned lower Appellate Court vide judgment and decree dated 15.01.2018 allowed the appeal and thereby dissolved the marriage of the petitioner and the respondent, the same is under challenge in this appeal.

10. I have heard learned counsel for the respective parties.

11. This Court, while issuing the notice in this matter on 20.08.2019, has framed the following substantial question of law:

“Whether the appeal was maintainable ?”

12. Shri Turankar, learned counsel for the appellant submits that the petition was filed for restitution of conjugal right and in alternative for dissolution of marriage and once the decree of restitution of conjugal right was passed, it cannot be said that the petitioner is an aggrieved person. Therefore, he submits that the petitioner cannot be termed as an aggrieved person and therefore, the appeal at the behest of the petitioner is not maintainable.

13. He further points out that the decree passed by the learned trial Court for restitution of conjugal right has been satisfied by the respondent by joining the company of the petitioner and therefore, the challenge

raised to the decree of trial Court in the appeal is not tenable and learned lower appellate Court ought to have dismissed the appeal on this sole ground.

14. He further submits that the decree has not been granted on the ground of cruelty, but it was on the ground of desertion which is not proved. He further submits that there was no desertion for a period of two years and therefore, the said finding is contrary to law.

15. On the other hand, Shri Ghate, learned counsel for the respondent/original petitioner submits that once the trial Court has given positive finding on the basis of oral as well as documentary evidence produced by the petitioner that the petitioner was subjected to cruelty at the hands of the respondent and she has withdrawn from the company of the petitioner without any reasonable cause, the learned trial Court ought to have passed the decree of dissolution of marriage as the ground for dissolution of marriage was satisfied.

16. It is submitted that in view of above referred error committed by learned trial Court, the appeal was preferred. Hence, it cannot be said that the appellant cannot be termed as an aggrieved person by the decree. Moreover, he submits that it is not a case of the respondent that there was no prayer made by the petitioner for dissolution of marriage.

17. Shri Ghate, learned counsel for the petitioner further submits that the respondent did not cross-examine the petitioner and the oral evidence led down by the petitioner has gone unchallenge. However, to give one chance to the respondent instead of passing the decree of

dissolution of marriage, the decree of restitution of conjugal right was passed by the trial Court.

18. To consider the rival contentions raised by both the parties, I have gone through the record and also perused the judgments and decree of both the Courts-below.

19. After going through the record, it is revealed that the ground as raised before this Court about the maintainability of the appeal before the first Appellate Court, was never raised and it was raised first time before this Court in second appeal, which is not permissible.

20. Before trial Court, the petitioner was not cross-examined by the respondent and she did not lead any evidence in support of her case.

21. Against the finding of cruelty and finding in respect of the conduct of the respondent in withdrawing herself from the company of the petitioner without any reasonable cause, it was never challenged by the respondent by filing any cross-objection.

22. The above referred facts are sufficient to hold that as all the pre-requisite for the passing the decree of dissolution of marriage are present, the decree of restitution of conjugal right was erroneously passed by the learned trial Court.

23. In light of the admitted fact that in a petition before the trial Court, a prayer for dissolution of marriage was made and looking to the peculiar facts of this case, it can safely be said that, the appeal filed before

the learned first Appellate Court, challenging denial of decree of dissolution of marriage, was maintainable.

24. In that view of the matter, I do not find any merit in the present appeal. Accordingly, I have answered the substantial question of law in above terms.

25. The appeal is **dismissed**.

26. No order as to costs.

[ANIL S. KILOR, J.]