

IN THE HIGH COURT OF ORISSA AT CUTTACK

MATA No.13 of 2020

Smt. Subasini Moharana

.....

Appellant

Mr. Samir Kumar Mishra, Advocate

Versus

Sri Pramod Kumar Sahani

.....

Respondent

Mr. Gokulananda Parida, Advocate

CORAM:

**JUSTICE S. TALAPATRA
JUSTICE SAVITRI RATHO
ORDER
02.11.2022**

Order No.

12.

1. This matter is taken up through Hybrid Mode.
2. Heard Mr. S.K. Mishra, learned counsel appearing for the Appellant and Mr. Gokulananda Parida, learned counsel appearing for the Respondent.
3. By means of this Appeal, the judgment dated 22.11.2019 delivered in Civil Proceeding No. 206 of 2017, by the Judge, Family Court, Baripada, Mayurbhanj has been challenged, primarily on two grounds viz.

(a) *Irretrievable breaking down of marriage* is not available as ground under Section 13 of the Hindu Marriage Act, 1955, and

(b) The ground of desertion has not been proved according to the standards.

4. Mr. S.K. Mishra, learned counsel has in the course of his submission referred to the following observation of the Judge, Family Court:

“So, the circumstances shows that the parties had their long misunderstanding with each other for which their marital relationship was ruptured gradually. As the parties have no marital relationship with each other since long, the amicable settlement could not be made between the parties. It is found that the parties are living separately that of other independently since long and in the meantime they have filed different cases against each other. So considering the entire materials available on record I hold that the marriage between the parties is irretrievably broken down having no chance in future for their reunion, hence in my considered view it is better to dissolve their marriage by giving them chance to stay separately that of other and to spend the rest part of their life peacefully. So in such circumstances the petitioner husband is entitled for dissolution of his marriage with respondent/wife as it is prayed for. But while dissolving the marriage between the parties it is now to consider the quantum of permanent

alimony to be provided to the wife/respondent by the petitioner. Admittedly, the petitioner is a Govt. servant having his source of income, so I hold that he is capable of paying permanent alimony to the respondent/wife towards her future maintenance.”

5. On the aspect of desertion, it has been observed by the Judge, Family Court as follows:

“Similarly the present suit is found maintainable in the eye of law as the respondent/wife has willfully deserted her husband that gave cause of action in favour of the petitioner to file the present suit. So, the suit is found maintainable in the eye of law.”

As sequel, it is held that *desertion* has been sufficiently proved by the petitioner.

6. Mr. Mishra, learned counsel has quite robustly submitted that to prove desertion, three elements are to be essentially proved. Those are:

- (i) Living separately from one spouse by the other at least for a period of two years;

(ii) Despite serious attempts and efforts for reconciliation, but for refusal without sufficient cause by the spouse who has been living separately from the matrimonial home, the conjugal life could not be restituted; and

(iii) Principle of *animus deserendi* has been confirmed to the hilt. For purpose of counting the statutory period, as prescribed under Section 13 (1) (ib) of the Hindu Marriage Act, 1955, desertion commences when the fact of separation and *animus deserendi* co-exist.

7. According to Mr. Mishra, learned counsel, element of *animus deserendi* is completely absent in the case in hand. Mere residing separately for a long term does not constitute desertion.

8. Mr. Parida, learned counsel has submitted that the original Respondent had also filed an appeal, which abated for his untimely death, which occurred on 11.11.2020, during pendency of this appeal. By the order dated 21.04.2022, this Court substituted Velentina Sahani, only daughter of the original respondent in his place. Mr. Parida, learned counsel has further submitted that the

grounds taken in the matrimonial suit are (a) desertion and (b) irretrievable breaking down of marriage.

9. Having appreciated the submission of learned counsel for the parties, we are of the view that in *Samar Ghosh vrs. Jaya Ghosh: (2007) 4 SCC 511*, the Apex Court has in unambiguous terms observed that irretrievable breaking down of marriage is not available as a ground for divorce under Section 13 of the Hindu Marriage Act, 1955. For this authoritative declaration, the earlier decisions of the Apex Court on irretrievable breaking down of marriage as the ground for seeking divorce are no more available. Those decisions were rendered, in exercise of the special power conferred upon the Supreme Court, under Article 142 of Constitution of India. Even a reference has been made by a bench of the Apex Court on whether the power under Article 142 of the Constitution can be made in deviation from the statutory ambit. The statute does not admittedly provide such ground. The said reference is yet to be decided. But *Samar Ghose* (supra) has made the law determinative. Hence the ground of irretrievable breaking down of marriage stands discarded. So far as the desertion is

concerned, we have already discussed. Three elements as noted before, are told essentially proved to establish the ground of desertion, but those have not been proved. In the cumulative assessment, the impugned judgment cannot be sustained and accordingly, the judgment dated 22.11.2019 delivered in the Civil Proceeding No. 206 of 2017 by the Judge, Family Court, Baripada, Mayurbhanj is set aside.

10. Consequently, the proceeding for dissolution of marriage, filed by the original respondent since deceased, stands dismissed.

11. Draw the decree accordingly.

12. The physical records, if any received by the Registry, be sent down.

13. Urgent certified copy of this order be granted on proper application.

(S. Talapatra)
Judge

(Savitri Ratho)
Judge