

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 205 of 2016**

- Mamta Singh Thakur W/o- Chitrabhuwan Singh Thakur, aged about 30 years (wrongly mentioned as 26 years), caste- Kshatriya, R/o- Village- Peeapsatti, P.S. & Tahsil- Akaltara, District- Janjgir-Champa (C.G.).

---- Appellant

Versus

- Chitrabhuwan Singh Thakur S/o- Ramlal Singh Thakur, aged about 36 years, caste- kshatriya, R/o- village- Peeapsatti, P.S. & Tahsil – Akaltara, District- Janjgir-Champa (C.G.)

---- Respondent

For Appellant

For Respondent

Mr. F.S. Khare, Advocate

None

Hon'ble Shri Justice Prashant Kumar MishraHon'ble Shri Justice Arvind Singh Chandel**Judgment On Board By**
Justice Prashant Kumar Mishra**31/08/2017**

1. The matter is listed for further orders, however, the respondent having failed to appear before this Court and the record of the trial Court being available, we proceeded to hear the matter finally.
2. This appeal under Section 19 (1) of the Family Courts Act, 1984 has been preferred by the appellant-wife assailing the legality and validity of the impugned decree, whereby the Family Court, in a proceeding under Section 13 of the Hindu Marriage Act, 1955 (henceforth 'the Act') for a decree of divorce, has allowed a decree for judicial separation under Section 10 of the Act.

3. It is contended that in the facts and circumstances of the case, the Family Court should have allowed a decree for divorce rather than a decree for judicial separation because the respondent was *ex-parte* before the trial Court. The appellant-wife has proved all the plaint allegations by examining herself and her witness- Bhairo Singh. The uncontested evidence should have weighed with the trial Court in granting a decree for divorce.
4. We have meticulously perused the entire record of the trial Court to find out as to why the trial Court has allowed the decree for judicial separation instead of granting a decree for divorce. The scrutiny of records and examination of pleadings would reveal that the appellant-wife has not made any pleading to say that the parties are not colluding in the matter. Such pleading is statutorily required in view of the provisions contained under Section 20 (1) of the Act which provides that “*every petition presented under this Act shall state as distinctly as the nature of case permits the facts on which the claim to relief is founded and, except in a petition under Section 11, shall also state that there is no collusion between the petitioner and the other party to the marriage*”. This declaration has been held to be mandatorily required because the parties to a marriage can not abandon the marital institution to defeat the sanctity of marriage. On account of this material statutory defect, the plaint was not properly constituted and it should have been dismissed at the threshold.
5. The pleading of lack or absence of collusion assumes significance in view of the fact that the record contains copy of *Hamdast* notice for which there was no order by the trial Court on any date of hearing. The

notice which was purportedly refused by the respondent is signed by two witnesses whose addresses are not mentioned in the service report nor the witnesses have been examined by the trial Court to ascertain the correctness of the endorsement made by the process server, before declaring the respondent *ex-parte*. The notice of this appeal has also not been served on the respondent in person. The notice has been served on his father who allegedly jointly resides with the respondent. In our considered view, in a marital dispute the notice should be served as far as possible, on the person concerned and not on any member of the joint family. It is not a property dispute where one or the other member of the family may have some interest in the property involved but the issue pertains to the marital life of an individual.

6. In addition to the above procedural defects, it is also to be noticed that the impugned judgment records a finding that the evidence available does not establish the ground of cruelty in favour of the appellant-wife. The trial Court has also not discussed in detail nor has recorded any conclusive finding on the issue of desertion. The appellant-wife has sought a decree for divorce on these two grounds only and on no other ground.
7. Under Section 13 A of the Act, a discretion has been conferred on the trial Court to grant alternate relief in divorce proceeding. It provides that in any proceeding under this Act, on a petition for dissolution of marriage for a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-section (1) of Section 13, the Court may, if it considers just so to do

having regard to the circumstances of the case, pass instead a decree for judicial separation. The provision nowhere says that when it is not possible for the Court to pass a decree for divorce, it may still grant a decree for judicial separation. The discretion to grant alternate relief is exercisable only when the grounds enumerated in Section 13 for grant of divorce has been made out by the plaintiff. In a case, where the trial Court finds that the plaintiff has failed to establish any such ground urged under Section 13 of the Act, a decree for judicial separation cannot be granted. The discretion to grant alternate relief is to be exercised by the trial Court on sound judicial principles as established and settled and not on mere whim and fancy. Reference may be made to a division bench judgment of Gauhati High Court passed in Smt. Snigdha Chaya Devi v. Shri Akhil Chandra Sarma, AIR 1992 Gauhati 95; another judgment by division bench of Himachal Pradesh High Court in Smt. Madhu Sood v. Anil Kumar Sood, AIR 1999 Himachal Pradesh 17 and a single bench judgment of Bombay High Court in Prabhakar S. Nikam v. Satyabhama P. Nikam, AIR 2008 Bombay 129.

8. In view of the discussion made above even the decree of judicial separation should not have been allowed by the trial Court. Therefore, we set-aside the impugned judgment and decree dated 05/05/2016.
9. The appeal is partly allowed to the extent indicated above.

Sd/-

Judge
Prashant Kumar Mishra

Sd/-

Judge
Arvind Singh Chandel

FAM No. 205 of 2016

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HEADLINES

1. Decree for judicial separation cannot be allowed under Section 13A of the Hindu Marriage Act, 1955, if grounds for divorce under Section 13 of the Act is not made out.
2. Divorce suit not pleading absence of collusion between parties; plaint not properly constituted, deserves outright dismissal.

