M vs.m S

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Court : Delhi

Decided On : Apr-23-2019

Appellant : M

Respondent : M S

Judgement :

$~51 * IN THE HIGH COURT OF DELHI AT NEW DELHI % Date of Judgment:

23. d of April, 2019 + MAT.APP.(F.C.) 76/2017 and C.M. Appl. No.16759/2017 M ..... Appellant Through: Ms. Geeta Luthra, Sr. Advocate with Mr. Anshul Duggal, Mr. Altamish Siddiki and Mr. Prateek Yadav, Advocates alongwith appellant in person. CORAM: M S Versus Through: Mr. Rajesh Raina, Advocate alongwith respondent in person. ..... Respondent HON'BLE MR. JUSTICE G.S.SISTANI HON'BLE MS. JUSTICE JYOTI SINGH G.S. SISTANI, J.

(ORAL) 1. Challenge in this appeal is to the order dated 22.02.2017 passed by the Family Court in a petition filed by the respondent/husband seeking dissolution of marriage under Section 13(1A)(ii) of the Hindu Marriage Act, 1955 (hereinafter referred to as HMA) by which a decree of divorce has been granted.

2. The necessary facts which are required to be noticed for disposal of this appeal are that the marriage between the appellant/wife and the respondent/husband was solemnized on 23.04.2000 as per Hindu rites and ceremonies at New Delhi. Two children were born out of their wedlock. The first child was born on 26.02.2001,

who is in the care and MAT.APP.(F.C.) 76/2017 Page 1 of 26 custody of the respondent/husband and the second child was born on 29.11.2004 who is in the care and custody of the appellant/mother. The parties have been residing separately since 22.07.2007. A petition under Section 9 of HMA seeking a decree for restitution of conjugal rights was instituted by the respondent/husband on 03.11.2007 which was allowed on 01.02.2011. After waiting for the statutory period of one year, the respondent/husband filed a petition under Section 13(1A)(ii) of the HMA seeking dissolution of marriage on 23.03.2012. The petition was allowed which has led to the filing of the present appeal.

3. Ms. Geeta Luthra, learned senior counsel for the appellant/wife submits that the learned Family Court has erred in passing the impugned order and has passed the same without application of judicial mind. It is contended that the Family Court has not read the pleadings as a whole and has passed the judgment and decree in haste. It is also contended that in the absence of any evidence having been led by the respondent/husband and having failed to discharge the onus cast upon him to prove his case the petition seeking decree of divorce should have been dismissed and accordingly the impugned order is liable to be dismissed. Counsel further submits that the Court had in fact committed a factual error which was admittedly not pointed out by counsel appearing for either of the parties and an issue was framed on 20.11.2013 which did not arise from the pleadings of the parties. It is submitted that post 20.11.2013 various opportunities were granted to the respondent/husband to lead evidence however despite repeated opportunities, the respondent/husband did not lead evidence. Thereafter, the appellant/wife was granted time to lead evidence. The MAT.APP.(F.C.) 76/2017 Page 2 of 26 counsel also submits that once the respondent/husband had failed to prove his case, the petition seeking divorce under Section 13(1A) (ii) of HMA should have been dismissed at that stage itself. Admittedly, the respondent/husband did not lead any evidence. Subsequently, on an application filed by the respondent/husband under Order 14 Rule 5 of CPC, the issue was amended and the earlier issue was in fact deleted. Thereafter, no opportunity was sought or granted by either of the parties to lead evidence and based on the admitted pleadings the Family Court has allowed the petition seeking divorce. Counsel further submits that the admission was neither categorical nor unequivocal. The pleadings were considered not as a

whole and a judgment was passed. It is contended by Ms. Luthra, learned counsel for the appellant/wife that the proper course would have been that in the absence of any evidence, the petition of the respondent/husband should have been dismissed. Ms. Luthra, learned senior counsel has relied upon Hirachand Srinivas Managaonkar vs. Sunanda reported at (2001) 4 SCC125(paras 11); Captain B. R. Syal vs. Smt. Rama Syal reported at 1968 SCC On Line P&H5 and Shridhar Dada Kate vs. Usha Shridhar Kate reported at 1987 Mh LJ.81 (paras 7 and 9).

4. Mr. Rajesh Raina, learned counsel for the respondent/husband submits that it is a case of a dead marriage. Parties have been residing separately since the year 2007. The appellant/wife did not join the company of the respondent/husband despite a decree having been passed for restitution of conjugal rights on 01.02.2011. Steps were taken by the respondent/husband and his family members to bring the appellant/wife back home, to which she refused. The learned counsel MAT.APP.(F.C.) 76/2017 Page 3 of 26 for the respondent/husband has further submitted that admissions made in the pleadings are sufficient and that there was no requirement of leading any evidence and thus there is no infirmity in the procedure followed by the Family Court. He relies upon the judgments passed in the cases of Nagindas Ramdas vs. Dalpatram Ichharam and Ors. reported at AIR (1974) SC471and Parivar Seva Sansthan vs. Veena Kalra reported at AIR (2000) Delhi 349 (para 9 and 10). The sum and substance of the argument of learned counsel for the respondent/husband is that once it is admitted that there was no cohabitation between the parties post passing of the decree on 01.02.2011, no other evidence was required and a decree of divorce was bound to follow. Learned counsel has also relied upon Ram Kali Vs. Gopal Dass reported at ILR (1971) 1 Del 6, a Full Bench judgment of this Court to highlight that the aim and objective of the legislature in inserting sub-Section (ia) and (ib) with Section 13(1A) is that in case there was no resumption of cohabitation or any restitution of conjugal rights between the parties, the Court should assume that the relations between the parties have reached the stage of no return. The following observations have been relied upon: Keeping the above principles in view, we are of the opinion that the intention of the legislature while amending the Act by Act, 44 of 1964 was that the non-resumption of cohabitation or absence of restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards, after the

passing of a decree for judicial separation or for restitution of conjugal rights, would not constitute a wrong within the meaning of clause (a) of sub-section (1) of Section 23 of the Act, so as to disentitle the spouse, against whom the earlier decree for judicial separation or for restitution of conjugal rights had been granted, from obtaining the relief of dissolution of MAT.APP.(F.C.) 76/2017 Page 4 of 26 marriage by a decree of divorce. The underlying object of the legislature in inserting sub-section (1A) in Section 13 seems to be that if there has been no resumption of cohabitation or no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards, after the passing of a decree for judicial separation or for restitution of conjugal rights, the Court should assume that the relations between the parties have reached a stage where there is no possibility of reconciliation and as such it might grant the decree of divorce. The aforesaid object is in consonance with the modern trend not to insist on the maintenance of union which has utterly broken down. It would not be a practical and realistic approach, indeed it would be unreasonable and inhuman, to compel the parties to keep up the facade of marriage even though the rift between them is complete and there axe no prospects of their ever living together as husband and wife. We may in this context refer to the following observations of Viscounts Simon, L.C. the case of Blunt v. Blunt, 1942-3 All England Reports 76 (4), while specifying the considerations which should prevail with the Courts in matrimonial matters: in To these four considerations I would add a fifth of a more general character, which must indeed be regarded as of primary importance, viz., the interest of the community of large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down. It is noteworthy that in recent years this last consideration has operated to induce the Court to exercise a favourable discretion in many instances where in an earlier time a decree would certainly have been refused. 5. Reliance is also placed on Smt. Gajna Devi Vs. Purshotam Giri reported at AIR (1977) Delhi 178, more particularly paras 13 and 15, which we reproduce below: MAT.APP.(F.C.) 76/2017 Page 5 of 26 13. The provision of law came up for consideration before a Full Bench of this court in Ram Kali v. Ram Gopal, ILR (1971) 1 Delhi 6 (1), where the Full Bench speaking through H.R.

Khanna C.J.

(as his lordship then was), after considering a number of authorities and the provisions of law, observed that to non-suit such a petitioner by invoking clause (a) of sub- section

(1) of section 23 would have the effect of defeating the manifest purpose of the amending Act and reducing it to futility, and a construction which would lead to such a result must be avoided and the provisions should be so construed that they operated in harmony and the duty of the courts was to place such construction on a statute as shall suppress the mischief and advance the remedy. The court relied upon the observations of Maxwell on the Interpretation of Statutes, 12th Edition, to the effect that, if the choice is between two interpretations, the narrower of which would fail to achieve the manifest purpose of the legislation, we should avoid a construction which would reduce the legislation to futility and should rather accept the bolder construction based on the view that Parliament would legislate only for the purpose of bringing about an effective result. I am bound by the observations of the Full Bench and nothing has been urged in arguments to persuade me to have any view not in consonance with the same and I respectfully agree with the views expressed in the authority. XXXX XXXX XXXX15 In my opinion, the two provisions may be completely thus harmonised. The matrimonial offence which was the foundation of the previous decree for judicial separation or restitution of conjugal rights cannot be used as a valid defence against the petitioner in a subsequent petition for divorce instituted under section 13 (1A) of the Act. The petitioner for divorce, whether innocent or guilty, cannot be deprived of his/her rights on the grounds which existed prior to the passing of the previous decree. In my view, the expression petitioner is not in any way taking advantage of his or her own wrong occurring in clause (a) of section 23(1) of the Act does not apply to taking advantage of the statutory right to obtain dissolution of MAT.APP.(F.C.) 76/2017 Page 6 of 26 marriage which has been conferred on him by section 13 (1A) of the Act subsequent to the passing of the decree for judicial separation or restitution of conjugal rights. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree or resumption of cohabitation

after its passing. Nevertheless, if after the passing of the previous decree, any other facts or circumstances occur, which in view of sub-section

(1) of section 23 of the Act disentitle the spouse from obtaining the relief of dissolution of marriage by a decree of divorce under section 13 (1A) of the Act, the same can be legitimately taken into consideration and must be given due effect.

6. Reliance is also placed on Pushkar Gupta vs. Narender Kumar Gupta reported at (2016) 234 DLT453 The relevant paras 15 to 18 read as under: 15. In the case reported as ILR (1971) Del.6 Ram Kali v. Ram Gopal the Full Bench of this Court held that mere non- compliance of decree for restitution of conjugal rights does not constitute wrong for purpose of Section 23(1)(a) of Hindu Marriage Act, 1955 so as to deny divorce to the defaulting spouse. After considering the provisions of law it was held that: to non-suit such a petitioner by invoking clause (a) of subsection

(1) of section 23 would have the effect of defeating the manifest purpose of the amending Act and reducing it to futility, and a construction which would lead to such a result must be avoided and the provisions should be so construed that they operated in harmony and the duty of the courts was to place such construction on a statute as shall suppress the mischief and advance the remedy.

16. Following the decision of the Full Bench of this Court in Ram Kali v. Ram Gopal(Supra) in a subsequent decision reported as AIR1977 Delhi 178 Ganja Devi v. Purshotam Giri the legal position was reiterated as under: MAT.APP.(F.C.) 76/2017 Page 7 of 26 Section 23 existed in the statute book prior to the insertion of Section 13(1A).Had Parliament intended that a party which is guilty of a matrimonial offence and against which a decree for judicial separation or restitution of conjugal rights had been passed, was in view of Section 23 of the Act, not entitled to obtain divorce, then it would have inserted an exception to Section 13(1A) and with such exception, the provision of Section 13(1A) would practically become redundant as the guilty party could never reap benefit of obtaining divorce, while the innocent party was entitled to obtain it even under the statute as it was before the amendment. Section 23 of the Act, therefore, cannot be construed so as to make the effect of amendment of the law by insertion of Section 13(1A) nugatory....the expression Petitioner is not in any way taking

advantage of his or her own wrong occurring in Clause (a) of Section 23(1) of the Act does not apply to taking advantage of to obtain dissolution of marriage which has been conferred on him by Section 13(1A).. In such a case, a party is not taking advantage of his own wrong, but of the legal right following upon of the passing of the decree and the failure of the parties to comply with the decree. the statutory right

17. In the decision reported as AIR 1977 SC2218 Dharmendra Kumar v. Usha Kumarthe Apex Court while approving the decision of this Court in Ram Kali v. Ram Gopal(Supra) and Ganja Devi v. Purshotam Giri (Supra) held that mere compliance of decree for restitution of conjugal rights would not by itself amount to any wrong to disentitle the spouse against whom the decree for restitution of conjugal rights was obtained. It was held that: In our opinion the law has been stated correctly in Ram Kali v. Gopal Das (supra) and Gajna Devi v. Purshotam Giri (supra). Therefore, it would not be very reasonable to think that the relief which is available to the spouse against whom a decree for restitution has been passed, should be denied to the one who does not insist on compliance with the decree passed in his or her favour. In order to be a MAT.APP.(F.C.) 76/2017 Page 8 of 26 to be something more wrong within the meaning of Section 23(1)(a) the conduct alleged has than a mere disinclination to agree to an offer of reunion, it must be misconduct serious enough to justify denial of the relief to which the husband or the wife is otherwise entitled.

18. Thus, the legal position as declared by the Supreme Court is that if the withdrawing spouse is disobedient to the decree of restitution of conjugal rights and both the spouses continued to live separately as before, each of them is entitled to dissolution of marriage by availing the statutory remedy.

7. The counsel for the respondent/husband also relied upon the cases of Smt. Prem Lata vs. Man Mohan Chawla reported at 1979

(2) ILR (Del) 765, more particularly para 12 to 14 and Dharmender Kumar vs. Usha Kumar reported at 1977 AIR2218

8. We have heard learned counsels for the parties and have considered their rival submissions.

9. The arguments of Ms. Luthra, learned senior counsel can be summarized as under: (i) In the absence of any evidence being led by the respondent/husband that he has made any effort to bring the appellant/wife back to the matrimonial home, the petition seeking divorce under Section 13(1A)(ii) of HMA was liable to be dismissed. (ii) There are no categorical admissions in the reply filed by the appellant/wife.

10. The arguments of Mr. Raina, learned counsel for the respondent/husband can be summarized as under: (i) It is an admitted case between the parties that post passing of MAT.APP.(F.C.) 76/2017 Page 9 of 26 the decree for restitution of conjugal rights on 01.02.2011, the parties did not reside together and that there was no cohabitation between the parties. (ii) Once such an admission was available in the pleadings, no evidence was required and the Family Court has rightly allowed the petition filed by the respondent/husband seeking divorce under Section 13(1A)(ii) of HMA.

11. The order sheets of the Family Court which have been placed on record would show that a single issue was framed on 20.11.2013, which reads as under: for Replication Parties in person with their respective counsel. the counsel 20.11.2013 Present: filed by petitioner, copy given to the opposite party. Pleadings are already complete. From the pleadings of the parties, following issues are framed for disposal of the present petition:-

"1. Whether the petitioner was treated with cruelty as per the averments made in the petition?. (OPP) 2. No other issue arises or pressed. Put up on 10.02.2014 for PE by way of affidavit, copy of which be supplied in advance to the respondent. Relief. (K S MOHI) Judge-01, Family Court Saket Courts Complex New Delhi/20.11.2013. 12. On 10.02.2014, again a somewhat similar issue was framed, which reads as under: 10.02.2014 MAT.APP.(F.C.) 76/2017 Page 10 of 26 Present:

... Petitioner

in person with proxy counsel Ms. Jyoti. Respondent in person with counsel Shri Baldev Singh. From Pleadings are already complete. the pleadings of the parties, following issues are framed for disposal of the present petition:-

"1. Whether the petitioner was treated with cruelty by the respondent as per the averments made in the petition?. (OPP) 2. No other issue arises or pressed. Put up on 22.04.2014 for PE by way of affidavit, copy of which be supplied in advance to the respondent. Relief. (RAKESH SIDDHARTHA) Principal Judge, Family Court, Saket Courts Complex, New Delhi/10.02.2014 13. Thereafter, the respondent/husband was granted time to file the affidavit by way of evidence which was filed on 17.12.2014. Thereafter, the matter was adjourned from time to time and the following order was passed on 31.08.2015:

... Petitioner
in person Respondent in person with Counsel. 31.08.2015 Present:

... Petitioner
tenders his evidence by way of affidavit. PW1 examined partly. His further examination in chief is deferred at this request as his counsel is not available today. It is noted that on the last date of hearing neither petitioner nor his counsel had appeared and last opportunity was MAT.APP.(F.C.) 76/2017 Page 11 of 26 given to the petitioner to lead his evidence, if any. Today again the petitioner is seeking an adjournment due to non availability of his counsel. Although, petitioner does not deserve any indulgence of this court, however, in the interest of justice, one final opportunity is given to the petitioner to lead evidence subject to cost of Rs.500/-. Put up for further examination of PW1 on 29.1.2016. (POONAM A. BAMBA) Principal Judge, Family Courts, South, Saket, New Delhi/31.08.2015 14. The matter was adjourned to 29.01.2016, however, since none was present on behalf of the respondent/husband, the evidence of the respondent/husband was closed and time was granted to the appellant/wife to lead evidence. The matter was then again adjourned from time to time. Last opportunity was granted to the appellant/wife to lead evidence on 08.08.2016. On 06.01.2017, right of the appellant/wife to lead evidence was closed. It is only thereafter that an application under Order 14 Rule 5 of CPC was filed by the respondent/husband seeking

amendment of issue which was allowed and the following issues were framed: On the pleadings of the parties, issues are re framed as under:-

"1. Whether there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year after the passing of decree for restitution of conjugal rights in a proceeding to which they were parties?. OPP2 Whether the petitioner is entitled to decree of divorce, as prayed for?. OPP3 Relief. MAT.APP.(F.C.) 76/2017 Page 12 of 26 15. Thereafter, neither the parties sought further opportunity to lead evidence nor it was granted and the matter was listed for final hearing.

16. The first question which arises for our consideration is as to whether upon passing of a decree for restitution of conjugal rights and the parties not having been cohabited for a period of one year or more subsequent to the decree having passed as claimed by one of the spouse; should the same automatically result in a decree of divorce under Section 13(1A) of HMA.

17. At the outset, it would be necessary to extract Section 13(1A) of HMA which reads as under: (1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground: (i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or (ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties. 18. In the case of Cap. B.R. Syal (supra), a Single Judge of Punjab & Haryana High Court has extensively dealt with the issue in question. The relevant portion read as under: The essence of a decree for restitution of conjugal rights is that the husband desiring the company of the wife makes an effort through the court for its assistance in order to restore his wife back to him so that they may be able to lead conjugal life. MAT.APP.(F.C.) 76/2017 Page 13 of 26 Intrinsically, the plaintiff in proceedings for restitution of conjugal rights is the aggrieved party who desires to live with his spouse. The facts

of this case were, however, quite the opposite. It was the wife who all along wanted to live with her husband and was making a number of attempts to achieve that object. The husband was not genuinely an aggrieved party as his wife had never denied to him the right of living together. In other words, what the husband sought by making an application under section 9 of the Act, was a matter of the keenest desire on the part of the wife which she was anxious to comply with. The facts and the circumstances suggest that the request for restitution of conjugal rights on his part was merely a pretence and sham and the proceedings were intended for an extraneous and a different purpose. He could not obtain divorce on grounds referred to in section 13(1) of the Act. There is no suggestion of adultery, nr of conversion to a different religion, or of unsoundness of mind, or the wife's suffering from leprosy, or a venereal disease, or that she had entered into any religious order or had not been heard of as being alive for a period of seven years. Not one of these grounds was available to the husband and the proceedings for restitution of conjugal rights seemed to be the only convenient handle in order to cut the marital bonds. It was the husband who without any cause was keen to snap vinculum matrimonii. The proceedings under section 9 were resorted to as a device for attaining his purpose, namely, to obtain a divorce from a wife against whom the charges justifying a divorce could not be levelled and who was free from blame or blemish and was physically and mentally sound. In the case of restitution of conjugal rights, the grievance of the petitioner is that the respondent has withdrawn from the society of the other and desires that this should not be done. The petitioner seeks cohabitation. The respondent, opposing a decree for the restitution of conjugal rights in order to succeed, has to urge and establish one of the grounds for which a judicial separation, or nullity of marriage or divorce could be decreed. The petitioner seeks a renewal of cohabitation with the spouse who has started living separately. At one time, under .. . MAT.APP.(F.C.) 76/2017 Page 14 of 26 . ecclesiastical law, restitution of conjugal rights was understood as a compulsory renewal of cohabitation between a husband and wife who have been living separately. The significant feature of petition for restitution of conjugal rights is that it is a remedy aimed at preserving the marriage and not at dissolving it, as in the case of divorce, or judicial separation. The court cannot enforce sexual intercourse but only cohabitation. That being the purpose of the petition for

restitution of conjugal rights, the petitioner must show that he is sincere, in the sense, that he has a bona fide desire to resume matrimonial cohabitation and to render the rights and duties of such cohabitation. The petitioner who is sincere in that sense is entitled to a decree even though the parties may not evince any affection for each other. A petitioner has, therefore, to satisfy the court of his sincerity in wanting to resume cohabitation with the respondent; if the decree is disobeyed, then the petitioner may move the court for obtaining a decree for dissolution of marriage in accordance with law and procedure. When a decree for restitution of conjugal rights is passed, the respondent is directed to comply with it and if compliance is refused the respondent is at fault and the decree-holder may then seek divorce under section 13 of the Act. But in this case the tables were turned on her and despite her best efforts, she was hindered from complying with the decree because of the unco-operative attitude of the husband. The exigencies of service enabled him to stay for long periods in non-family stations. Even when he could have lived with her, he did not let her come near him. It is rather a case of the respondent, being anxious to comply with the purpose underlying proceedings for restitution of conjugal rights. What the husband formally sought in the petition for restitution of conjugal rights, he, by his conduct, opposed its compliance. In his statement in court in these proceedings, he did not mince words and expressly said, that he would not take her back. Learned counsel for the husband has not been able to indicate any incident, or any fact or circumstance from which it was possible to conclude that the husband was genuinely wanting restitution of conjugal rights. Conversely, he has not been able to indicate any fact or . MAT.APP.(F.C.) 76/2017 Page 15 of 26 circumstance showing that the wife was not keen to live with the husband. Only one circumstance has been expressed, that her letters were written without any genuine intention of complying with the decree, because if she wanted to comply with the decree, she would not have made an application for setting it aside. It was urged that it was within her power to comply with the decree by walking into the house of her husband. It was argued, that the mere fact that she asked for the setting aside of decree was sufficient to show, that she never wanted restitution of conjugal rights and the only correct course for her to adopt, was to go to the executing court and say that she was willing to go to her husband and the court should send for him to take her. This

would have been in token of compliance with the decree. As already stated, the wife was not rightly advised to ask for the setting aside of the ex parte decree and it would have been better to inform the court that she wanted to comply with the decree. It seems to me, that her position was that there was never an occasion when she denied conjugal rights to her husband and he need not have petitioned the court for their restitution. Her other grievance was that she was not served with the notice and ex parte decree was obtained by keeping from her the knowledge of such proceedings. She wanted the ex parte decree to be set aside because of her keenness to live with her husband. (Emphasis Supplied) 19. In our view, the answer is in the negative. A person who may have no ground to seek divorce may create such a situation that the wife is forced to leave the matrimonial home. He may thereafter file a petition for restitution of conjugal rights and seek a decree and thereafter take no steps to allow the wife to return to the matrimonial home and thereafter file a petition under Section 13 (1A) of HMA. In effect, the fall back of the decree for restitution of conjugal rights is to successfully avoid the other spouse and thereafter seek a decree of divorce. Thus, to avoid such a foul play, the subsequent petition seeking MAT.APP.(F.C.) 76/2017 Page 16 of 26 a decree of divorce under Section 13(1A) of HMA is to be examined seriously and the Family Court must arrive at a conclusion and must be satisfied that post passing of the decree for restitution of conjugal rights, the person who has obtained the decree took all reasonable steps available to enforce the decree. Once the petitioner is able to prima- facie show that genuine steps were taken and not that the whole procedure followed was merely a pretense and sham in which case the onus would thus shift upon the respondent to show that the steps were either not taken or it was impossible to join the company for different reasons which may have been urged. In this case, the stand of the respondent/husband who has sought a decree of restitution of conjugal rights has been that he had offered the appellant/wife to join his company. Various averments made in the petition filed by the respondent/husband have been relied upon, more particularly paras 11 to 13 and 19 to 23, which read as under: 11. That the petitioner and his family members made many efforts to bring the respondent back to her matrimonial home, but the respondent and her mother clearly told the petitioner and his family members that she will not go back to her matrimonial home inspite of the fact that the petitioner

has also offered to make arrangement for separate and independent house and had made several requests to return to her matrimonial home, but every effort of the petitioner as well as his family members and other honourable members of the society went in vain.

12. That the petitioner and his family members had made efforts for the respondent to return at her matrimonial home. The efforts were also made by the respectable persons of the society. Despite all these efforts, the respondent adamantly did not join the company of the petitioner, at her matrimonial home MAT.APP.(F.C.) 76/2017 Page 17 of 26 xxxx xxxx and all efforts of the petitioner, his family as well as respectable persons of the society went in vain.

13. That when all the efforts to bring back the respondent to her matrimonial home failed, the petitioner was constrained to file a petition for restitution of conjugal rights vide HMA No.235/2010 titled as Manmohan Singh Vs. Mrs. Mamta, before the learned District Judge, Delhi. The respondent was duly served the summons with the copy of the petition. xxxx 19. That despite the passing of judgment and decree on 01.02.2011 with the clear direction to the respondent to join the company of the petitioner, the respondent has failed to join the company of the petitioner at her matrimonial home without any rhyme or reason. It is submitted that the Honble Court had held that there was uncontroverted testimony of the petitioner, several efforts were made him and his family members and other middlemen to reconcile the matter between the parties and the efforts were also made by the petitioner during the court proceedings, but it was the respondent who refused to join his company without assigning any concrete reason. The Honble Court has further observed that there appears no collusion between the parties, rather the conduct of the respondent herself was uncooperative and she shied away from entering the witness box and present her defence which forced the Court to draw an adverse inference against her and thus the issue whether the petitioner is entitled to the decree of restitution of conjugal rights was decided in favour of the petitioner and against the respondent.

20. That it is submitted that even after passing of the judgment and decree dated 01.02.2011, the petitioner and his family members along with the respectable

members of the society had made various efforts to bring back the respondent to her matrimonial home in an amicable manner, however, the respondent has again deliberately and without assigning any reason failed to join the company of the petitioner. The efforts MAT.APP.(F.C.) 76/2017 Page 18 of 26 were made in March 2011 when the grandfather of the petitioner was seriously ill. The petitioner and his family members approached the respondent and her family members, however, the respondent remained adamant in not joining the company of the petitioner. Again efforts were made in the month of April 2011, but the same went in vain.

21. That various efforts have been made through Panchayats, family members, respectable persons of the society on various occasions from April 2011 to January 2012, however, all the efforts made to bring back the respondent to her matrimonial home have failed.

22. That the petitioner has been left with no option but to file the present petition as the respondent is not interested in joining the company of the petitioner and to lead a matrimonial life with the petitioner.

23. That it is further submitted that since the passing of the decree/judgment dated 01.02.2011, there has been on restitution of conjugal rights between the parties to the marriage for more than a period of one year since the passing of the decree/judgment dated 01.02.2011. It is further submitted that the respondent is guilty of wilful desertion as would be evident from her conduct during the proceedings u/s 9 HM Act as well as her subsequent conduct after the passing of the decree/judgment dated 01.02.2011 in the said proceedings. 20. It has been strongly urged before us that the averments made in the aforesaid paragraphs have not been denied by the appellant/wife and thus the admission is clear and unequivocal. Based on these admissions, there was no necessity for leading the evidence and the Family Court has rightly allowed the petition. The following paragraphs of the corresponding reply to the petition filed by the appellant/wife herein are being reproduced below : MAT.APP.(F.C.) 76/2017 Page 19 of 26 xxxx xxxx 11. That the contents of para no.11 of the main petition are wrong, incorrect and not admitted. The petitioner never tried to bring her back from the matrimonial

house as stated in the said para. It is further wrong to allege that he had made a promise before the respondent that she will be provided the separate accommodation from his family. In fact even before the mediation cell the petitioner also refused to give her to separate accommodation. The respondent has no hesitation to restore the matrimonial life if the petitioner provides her the separate accommodation in the matrimonial house. xxxx 19. That the contents of para no.19 of the main petition are wrong, incorrect and not admitted to that extent that the respondent did not want to join the matrimonial life or to refuse to join the matrimonial house. In fact the respondent is ready to join the matrimonial house if the petitioner is ready to provide the separate accommodation to the respondent so that there would be no interference for the side of in-laws and the respondent may life peacefully and without any interference from any side. It is further wrong to state that any middle man or any respectable person for the side of the petitioner has made any sincere efforts to reconcile the matter as alleged. Rest of the para is a matter of record and needs no comments at this stage.

20. That the contents of para no.20 of the main petition are wrong, incorrect and not admitted. It is further wrong to state that the petitioner and his parents and the respectable persons for the side of the petitioner have visited at the house of the respondent and discussed the said issue and asked the respondent to restore the matrimonial life. It is further wrong to state that the petitioner has ever visited in the month of March and April, 2011 and asked the respondent to join the company of the petitioner. They never feel or realize his mistake committed by him during the period of the stay of the respondent in the matrimonial house and never made any sincere effort to restore the matrimonial life. MAT.APP.(F.C.) 76/2017 Page 20 of 26 21. That the contents of para no.21 of the main petition are wrong, incorrect and not admitted because no Panchayat was organized by the respondent on the said issue. It is also further wrong to state that any respectable persons have interfered or discussed on the said issue. It is also further wrong to allege that any middle man or the respectable person of the society has come at the house of respondent for the purpose to bring her back in the matrimonial house. It is totally a false and self made story and beyond the truth.

22. That the contents of para no.22 of the main petition are wrong, incorrect and not admitted. It is wrong to state that the respondent is not interested to restore the matrimonial life or refuse to live with the petitioner. The respondent is ready to join the matrimonial life if the petitioner is ready to provide the separate accommodation under the roof of the matrimonial house so that there will be no interference in the private life of the respondent.

23. That the contents of para no.23 of the main petition are wrong, incorrect and not admitted. It is the petitioner who has compelled the respondent to leave the matrimonial house and thereafter the petitioner has never made any effort to restore the matrimonial life. During her stay in the matrimonial house, the petitioner has never visited at the house of the respondent. The petitioner was waiting for the time so that he may file suit for divorce on the ground of desertion. In fact the petitioner has the malafide intention only to seek divorce from the respondent instead to restore the matrimonial life. 21. In reply to para 11 of the petition seeking divorce, the respondent/husband has taken a categorical stand that the respondent/husband and his family members made many efforts to bring the appellant/wife back to her matrimonial home but she and her mother clearly informed them that she would not go back to the MAT.APP.(F.C.) 76/2017 Page 21 of 26 matrimonial home despite the fact that the respondent/husband had offered to make arrangement for a separate and independent house. An averment has also been made that every effort of the respondent/husband as well as family members and respectable members of the society went in vain. In reply to this paragraph, the appellant/wife has denied the contents of the petition as wrong and incorrect and has not admitted. It has categorically been stated by the appellant/wife that the respondent/husband never tried to bring her back to the matrimonial home as has been stated in afore-mentioned paras. It was also denied that the respondent/husband had made a promise that he would be providing a separate accommodation from his family. The appellant/wife has further stated that even before the mediation cell, the respondent/husband has refused to give a separate accommodation and she had no hesitation to restore the matrimonial house, if the respondent/husband provides her a separate accommodation in the matrimonial house. Almost somewhat similar averments have been made by the respondent/husband in paras 18 to 23 of the petition,

which we reproduce below : 18. That finally on 01.02.2011 in the presence of the respondent, Ms. Seema Maini, ADJ, Delhi pronounced the judgment whereby the petition under section 9 of the HM Act for restitution of conjugal rights filed by the petitioner was allowed and a decree was passed in favour of the petitioner with the direction to the respondent to join the company of the petitioner.

19. That despite the passing of judgment and decree on 01.02.2011 with the clear direction to the respondent to join the company of the petitioner, the respondent has failed to join the company of the petitioner at her matrimonial home without any MAT.APP.(F.C.) 76/2017 Page 22 of 26 rhyme or reason. It is submitted that the Honble Court had held that there was uncontroverted testimony of the petitioner, several efforts were made him and his family members and other middlemen to reconcile the matter between the parties and the efforts were also made by the petitioner during the court proceedings, but it was the respondent who refused to join his company without assigning any concrete reason. The Honble Court has further observed that there appears no collusion between the parties, rather the conduct of the respondent herself was uncooperative and she shied away from entering the witness box and present her defence which forced the Court to draw an adverse inference against her and thus the issue whether the petitioner is entitled to the decree of restitution of conjugal rights was decided in favour of the petitioner and against the respondent.

20. That it is submitted that even after passing of the judgment and decree dated 01.02.2011, the petitioner and his family members along with the respectable members of the society had made various efforts to bring back the respondent to her matrimonial home in an amicable manner, however, the respondent has again deliberately and without assigning any reason failed to join the company of the petitioner. The efforts were made in March 2011 when the grandfather of the petitioner was seriously ill. The petitioner and his family members approached the respondent and her family members, however, the respondent remained adamant in not joining the company of the petitioner. Again efforts were made in the month of April 2011, but the same went in vain.

21. That various efforts have been made through Panchayats, family members, respectable persons of the society on various occasions from April 2011 to January 2012, however, all the efforts made to bring back the respondent to her matrimonial home have failed.

22. That the petitioner has been left with no option but to file the present petition as the respondent is not interested in joining the company of the petitioner and to lead a matrimonial life with the petitioner. MAT.APP.(F.C.) 76/2017 Page 23 of 26 23. That it is further submitted that since the passing of the decree / judgment dated 01.02.2011, there has been on restitution of conjugal rights between the parties to the marriage for more than a period of one year since the passing of the decree / judgment dated 01.02.2011. It is further submitted that the respondent is guilty of wilful desertion as would be evident from her conduct during the proceedings u/s 9 HM Act as well as her subsequent conduct after the passing of the decree / the said proceedings. judgment dated 01.02.2011 in 22. In response to para 20 afore-quoted, the respondent/husband has alleged that he and his family members alongwith other respectable members of the society had made various efforts to bring back the appellant/wife but she refused to join the company which has been clearly disputed and denied. Even the month and year has been denied. Upon careful examination of the pleadings upon which the Family Court has relied and held the same to be clear and unequivocal admission, we are unable to accept the view taken by the Family Court. We may however clarify that although we are of the firm view that a petition under Section 13(1A) of HMA will be looked into seriously and not to be treated in a general way. However, in case, the unequivocal admission made by the parties in the pleadings, the Court may pass a decree under Order XII Rule 6 of CPC. While the Family Court cannot be faulted as despite repeated opportunities having been granted, the respondent/husband did not lead evidence. The appellant/wife also did not lead any evidence. Thus, the Family Court decided the matter on the material available on record.

23. Counsel for the respondent/husband further submits that in the written MAT.APP.(F.C.) 76/2017 Page 24 of 26 statement, the appellant/wife did not state that during the period of one year, the respondent/husband or she made any effort

to join his company and thus, the petition filed by the respondent/husband seeking divorce under Section 13(1A) of HMA should have been allowed. We find no force in the submission so made by the counsel for the respondent/husband for the reason that the initial onus was on the respondent/husband to prove that he took genuine steps to bring the appellant/wife to the matrimonial home. It is also evident from the fact that the respondent/husband did not seek execution of the decree for restitution of conjugal rights passed in his favour. He never issued a legal notice in writing to the appellant/wife and he did not lead evidence that the respondent/husband or his family members visited the house of the appellant/wife to bring her back. We have found that the petition filed by the respondent/husband seeking divorce under Section 13(1A) of HMA is vague and is silent with respect to the date and time as no part of the impugned order shows the names of the person, who had accompanied the respondent/husband and his family members. Accordingly, we find the order of the Family Court cannot be sustained. The appeal is allowed. The order of the Family Court is set aside.

24. At this stage, learned counsel for the respondent/husband submits that both the parties should be allowed to lead evidence. He submits that repeated opportunities were granted to the parties for completion of pleadings and thereafter, issues were framed. However, on an application filed by the respondent/husband, the issues were amended by an order dated 17.02.2017 and the matter was adjourned to 22.02.2017 and on 22.02.2017, the judgment was pronounced. It is MAT.APP.(F.C.) 76/2017 Page 25 of 26 submitted that after the issues were amended opportunity was sought to lead evidence but it was not granted. Both the parties agree that the matter may be remanded back and one opportunity may be granted to the parties to lead evidence.

25. We are of the view that once the issues were amended, time should have been granted to the parties to lead evidence and thereafter, the judgment should have been passed. Accordingly, keeping in view that the matter pertains to the year 2012 when the petition seeking divorce was filed by the respondent/husband and in the year 2007, a petition seeking decree of restitution of conjugal rights was filed. We grant one opportunity to the respondent/husband to lead evidence before the Family Court. The matter will be listed before the Family Court on 12.07.2019

for directions. Similar time frame will be fixed for the appellant/wife. No unnecessary adjournment would be granted to either of the parties and the matter would be decided expeditiously. Accordingly, the appeal alongwith the pending application stands disposed. Trial court record will be sent back.

26. The respondent/husband, who appears in person, undertakes to the Court that all arrears will be cleared within a period of 30 days from today. The statement made today shall be treated as undertaking made to the Court. The respondent has been apprised about the consequence of breach of the undertaking. G.S.SISTANI, J JYOTI SINGH, J APRIL23 2019//ck MAT.APP.(F.C.) 76/2017 Page 26 of 26