

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

Sr. No.321

FAO-M-218-2003 (O&M)

Pronounced on : 5th December, 2015

Kashmir Kaur

.... Appellant

VERSUS

Sukhdev Singh

..... Respondent

CORAM: **HON'BLE MR. JUSTICE RAJIVE BHALLA**
HON'BLE MR. JUSTICE HARI PAL VERMA

Present: **Mr.P.S.Jammu, Advocate, for the appellant.**

Mr.Balsher Singh, Advocate, for the respondent.

RAJIVE BHALLA, J.

The appellant-wife challenges judgment and decree dated 02.09.2003, passed by the Additional District Judge, Sirsa, dissolving her marriage with the respondent-husband on the ground of desertion.

A brief narrative of the facts would be appropriate.

The parties were admittedly married on 04.03.1991 at Village Jivan Nagar Theri, District Sirsa as per Hindu rites and ceremonies. After their marriage, parties resided together at village Amritsar Kalan, District Sirsa and were blessed with a child Harmeet Singh. The husband (respondent) filed a petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as the “1955 Act”) for restitution of conjugal rights, in September, 1995, alleging

that the appellant had deserted him in September, 1993 without any reasonable cause. An ex-parte decree for restitution of conjugal rights was passed by the District Judge, Sirsa, on 28.02.2000. The respondent, thereafter, filed a petition for divorce, pleading that as cohabitation has not resumed and the appellant has failed to abide by the decree of restitution of conjugal rights, dated 28.02.2000, it stands proved that the appellant has withdrawn from the society of the respondent without any just cause.

The appellant filed a written statement, denying averments in the petition, alleging that the respondent has made false statements, concealed and suppressed material facts and pleaded that she was thrown out of the matrimonial home in January, 1993 after she was beaten. The appellant also pleaded that she has filed FAO-M-54-2000 against the ex-parte decree dated 28.02.2000, which is pending in the High Court. The respondent-husband filed a replication. After considering the pleadings and the evidence, the trial Court framed the following issues: -

- “1. Whether the respondent has treated the petitioner with such degree of cruelty as would amount to matrimonial offence? OPP
2. Whether the respondent has deserted the petitioner without any reasonable excuse? OPP
3. Whether the petitioner has no cause of action to file the petition? OPR

4. Whether the petition is not maintainable in the present form? OPR
5. Relief.”

After framing issues, both parties were called upon to lead evidence.

The respondent examined himself as PW-1, tendered affidavit Ex.PA in evidence and deposed that the appellant-wife had left the matrimonial home and their 1½ years child in January, 1993 without any reasonable cause and since then has not returned. The respondent also pressed into service judgment dated 28.02.2000, ordering restitution of conjugal rights in support of his prayer for divorce.

The appellant-wife, on the other hand, examined herself as RW-1, tendered affidavit Ex.RW1/A and asserted that she was forced to leave the matrimonial home in January, 1993 as she was treated with cruelty. The appellant also deposed that FAO-M-54-2000 against the decree for restitution of conjugal rights is pending before the High Court.

After considering the pleadings and the evidence, the trial Court allowed the petition by granting a decree of divorce on the ground of desertion. The trial Court held that the respondent-husband has proved that the appellant-wife is guilty of desertion and has failed to prove any cruelty or maltreatment to justify her living

apart. The trial Court also noticed that apart from the appellant no family member has stepped into the witness box to support her statement. The trial Court also held that even after the lapse of one year from the passing of the decree of restitution of conjugal rights, matrimony has not commenced thereby proving that the appellant is not interested in resuming cohabitation. A relevant extract from the judgment, reads as follows: -

“12. After hearing both the sides at length, going through the evidence on record carefully, giving thoughtful considerations to the rival contentions of the parties and the authoritative pronouncements relied upon by the learned counsel for the petitioner, I am of the considered view that the arguments advanced by the learned counsel for the petitioner are forceful whereas the arguments advanced by the learned counsel for the respondent are devoid of force. From the statement of Sukhdev Singh petitioner and copy of judgment dated 28.2.2000 (Ex. P-1) passed by the learned District Judge, Sirsa, it is proved that a decree for restitution of conjugal rights was passed by the learned District Judge, Sirsa on 28.2.2000. After passing of the judgment and decree dated 28.2.2000, admittedly no cohabitation took place between the parties and even the decree dated 28.2.2000 was not complied with by the respondent. The present petition was instituted on 10.5.2001 i.e. after a lapse of period of one year and as has been held by the Hon'ble Punjab and Haryana High Court in Surjit Kumar's case (supra), as there was no stay granted in favour of the respondent, therefore, the petitioner has

cause of action to file petition under section 13 of the Hindu Marriage Act. Even from the statement of PW-1 Sukhdev Singh and from the judgment Ex. P-1, it is proved that the respondent has deserted the petitioner in January, 1993 without any reasonable cause or excuse and since then she has not returned to the fold of her man. The petitioner has been deprived of enjoyment of married life. Hence, as held by the Hon'ble High Court in Jasbir Kaur's case (supra) the same amounts to cruelty. The respondent has treated the petitioner with cruelty. Hence, all the three grounds of divorce set up by the petitioner i.e. desertion, cruelty and non-compliance of judgment and decree dated 28.2.2000 passed in a petition U/s 9 of the Hindu Marriage Act, 1955, are proved. Hence, the findings on these issues are returned in favour of the petitioner and against the respondent.”

Counsel for the appellant submits that apart from the self-serving statement made by the respondent, there is no other evidence on record to prove that the appellant deserted the respondent. The appellant was turned out of the matrimonial home as she was maltreated and could not fulfill the demands for dowry. The trial Court has dissolved the marriage on the ground that after the passing of the decree for restitution of conjugal rights, cohabitation has not resumed, disregarding the fact that there is no evidence on record that the respondent ever made any attempt to seek execution of the decree or rehabilitate the appellant. The trial Court has wrongly held that expiry of a period of one year

automatically entitles the husband to a decree of a divorce without considering that it was for the respondent to prove that despite his efforts the appellant did not resume cohabitation or refused to join him. Counsel for the appellant further submits that onus to prove desertion lies upon the respondent. The sole statement made by the respondent has been accepted by the trial Court as the gospel truth without considering that the appellant-wife has denied the allegation of desertion. Counsel for the appellant also contends that it would be inconceivable that a wife would leave her one year old child without any cause.

Counsel for the respondent-husband, on the other hand, submits that in case the appellant was serious about cohabitation, she could have made an attempt to join the respondent, in their matrimonial home, whether before or even after she came to know of the decree for restitution but surprisingly apart from filing an appeal against the decree of restitution of conjugal rights, did not come forward to resume cohabitation. The best efforts by the respondent came to naught as the appellant did not agree to resume matrimony and most significant of all FAO-M-54-2000 filed against the decree of restitution of conjugal rights, which was ordered to be heard along with the present appeal was dismissed in default alongwith the present appeal on 28.08.2014. An application for restoration was, however, filed in the present appeal alone, thereby proving that the appellant has accepted the findings recorded in the decree for

restitution of conjugal rights.

We have heard counsel for the parties, perused the impugned judgment and decree and appraised the pleadings and the evidence on record.

The parties were married on 04.03.1991. A child was born to them in 1992. The appellant is alleged to have left the respondent and their child in 1993 and never returned. The respondent filed a petition for restitution of conjugal rights. The petition was decreed by directing restitution. The appellant filed FAO-M-54-2000 challenging this judgment and decree.

A period of one year having expired without resumption of matrimony, the respondent filed a petition for divorce by pleading that as cohabitation has not resumed for a period of one year, the marriage may be dissolved by grant of a decree of divorce. The appellant-wife put in appearance, filed a reply controverting averments in the petition and prayed for dismissal of the petition. After parties led evidence, the trial Court decreed the petition for dissolution of marriage on the ground of desertion as cohabitation has not resumed pursuant to the decree for restitution of conjugal rights.

The appellant has filed the present appeal, challenging the judgment and decree dissolving their marriage. As the appeal filed against the decree directing restitution of conjugal rights was already pending both appeals were ordered to be heard together. The

appeals were dismissed in default on 28.08.2014. The appellant admittedly filed an application for restoration of the present appeal but did not file an application for restoration of FAO-M-54-2000 (the restitution decree). It may, therefore, be safely presumed that the appellant has accepted the findings recorded by the trial Court in the judgment directing restitution of conjugal rights namely that the appellant is responsible for withdrawing from matrimony.

A perusal of the pleadings and the evidence on record reveals that parties have been living apart since 1993. The minor child left behind by the appellant is now a major. The decree for restitution of conjugal rights has attained finality. The pleadings and the evidence do not contain any particulars of the allegation that the appellant-wife was beaten and turned out of the house. The allegation remains unsubstantiated for want of any corroborative evidence or any evidence that the appellant thwarted attempts by the respondent to resume cohabitation. The trial Court has, therefore, rightly held that as there is no restitution of conjugal rights, the respondent is entitled to a decree of divorce. It would be once again appropriate to point out that the appellant-wife has not filed an application for restoration of the appeal filed against the judgment and decree passed against for restitution of conjugal rights, thereby, in our considered opinion, adding weight to the contentions of the respondent that the appellant has deserted the respondent and is not interested in pursuing matrimony any further.

Consequently, we affirm the judgment and decree dated 02.09.2003, passed by the Additional District Judge, Sirsa, and dismiss the appeal.

[RAJIVE BHALLA]
JUDGE

5th December, 2015
shamsher

[HARI PAL VERMA]
JUDGE