

In the High Court of Punjab and Haryana at Chandigarh

FAO No. M-124 of 2009

Date of Decision: 29.10.2015

Indra Bhardwaj

---Appellant

versus

Rajesh Bhardwaj

---Respondent

**Coram: Hon'ble Mr. Justice Rajive Bhalla
Hon'ble Mrs. Justice Rekha Mittal**

**Present: Mr. Deepak Gupta, Advocate
for the appellant**

**Mr. N.S.Shekhawat, Advocate
for the respondent**

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not?
3. Whether the judgment should be reported in the Digest?

Rekha Mittal, J.

The present appeal lays challenge to the judgment and decree dated 7.2.2009 passed by the Additional District Judge, Gurgaon whereby the petition under Section 13(1)(ia)(ib) of the Hindu Marriage Act, 1955 for dissolution of marriage of the parties by a decree of divorce, filed by the respondent-husband has been allowed.

The marriage of the parties was solemnized on 1.7.1994 at Gurgaon according to Hindu rites and ceremonies. Two children namely Baby Bhavika and Master Garv were born out of the wedlock on 14.2.1996 and 9.10.2000 respectively. At present, both the children are in custody of

the appellant-wife.

The respondent has prayed for a decree of divorce on the grounds of cruelty and desertion. It is pleaded that behaviour and conduct of the appellant towards him (respondent), his parents, relatives and friends had been cruel. She always tried to demean them in the eyes of others, used to misbehave with them, denied love, affection and attention to them. The elder brother of the respondent is an officer in the Indian Air Force, younger brother late Captain Umang Bhardwaj aged 25 years was also serving in the Indian Army and died on 19.11.2002 during an anti terrorist operation in Jammu and Kashmir. On account of his death, his parents suffered a great setback and shock. At that time, the respondent was posted at Manesar and shifted his residence from Manesar to Gurgaon to live with his parents to share their grief. After shifting to Gurgaon, the appellant started finding one reason or the other to create a scene and pick up a fight with his parents on petty matters and ridiculed them without any rhyme or reason. On 15.2.2003, the appellant left the matrimonial home alongwith the children on the pretext that she was going to her parental house on a usual visit for 4-5 days but did not return.

The appellant filed the written statement, in turn, denied all the allegations accusing her being guilty of cruelty and desertion. It is averred that the respondent and his parents harassed and maltreated her from the very beginning. Her mother-in-law had taken all the cash and jewellery from her soon after the marriage. She was humiliated on the pretext that she had not brought a car from her parents and she had no right to sit in the car. Her mother-in-law pressurized her to seek share in the property of her

(appellant's) father and threatened that in case she would not take a share in her father's property, she would not give her anything. At the time of pregnancy, she was subject to emotional and mental torture and was not given proper diet and attention. She has vehemently denied the allegations that she left the matrimonial home on 15.2.2003 with the averments that she lived with the respondent up to 17.1.2006 when she was thrown out of the house by saying that 'he wanted the divorce'. It has further been pleaded that the respondent in the garb of going to see his parents at Gurgaon at weekends used to meet one Sangeeta Bagchi with whom he has illicit relations. She had seen them in compromising position in a car at various occasions and for that reason also the respondent used to torture her. She has stated that she is ready to live with the respondent even if he had illicit relations with Sangeeta Bagchi and further prayed for dismissal of the petition.

The controversy between the parties led to framing of following issues by the learned trial Court:-

1. Whether the respondent insulted and misbehaved with the petitioner and he was subjected to cruelty by respondent?
OPP
2. Whether the petitioner was willfully deserted by the respondent-wife without any sufficient cause and the petitioner is entitled for a decree of divorce?OPP
3. Relief

Both the parties were called upon to adduce evidence in support of their respective contentions. The respondent examined himself,

his parents, maternal uncle Major Sughan Singh PW5, paternal uncle Braham Parkash PW7 besides Subedar (retired) Braham Nand PW1, Smt. Santosh Sharma PW2 and Major K.C.Sharma PW6. To rebut evidence of the respondent, the appellant appeared in the witness box.

The learned trial court on consideration of pleadings of the parties, issues framed for adjudication, evidence adduced and rival submissions made by respective counsels, held in favour of the respondent that the appellant-wife is guilty of treating the respondent with mental cruelty, deserting him by withdrawing from his society since 15.2.2003 and as a result, marriage of the parties was dissolved by granting the decree of divorce.

Feeling aggrieved by the judgment and decree passed by the learned trial court, the present appeal has been preferred by the appellant-wife.

Counsel for the appellant has submitted that the respondent-husband has raised general, vague and non-specific accusations to claim that he was subject to cruelty by his wife. It is argued that the learned trial court has determined issue No. 1 against the appellant primarily by taking into consideration two instances culled out in para 11 of the judgment and discussed in paras 12 to 15 while referring to certain judgments **Vijaykumar Ramchandra Bhate vs. Neela Vijaykumar Bhate, 2003(2) Civil Court Cases 487, Manjit Kaur vs. Avtar Singh, 2001 Matrimonial Law Reporter 459** and the judgments referred to in para 17. According to learned counsel, it is none of the plea of the respondent that he suffered mental cruelty as the appellant left the matrimonial home on 15.2.2003. It

has further been argued that though the respondent has denied the factum of illicit relation with Sangeeta Bagchi but it has been admitted by him that he had been meeting the said lady.

With regard to desertion, it is argued that the appellant resided with the respondent in the year 2005 in South City and she also resided with her husband in the parental house of the respondent in Sector 17, Gurgaon in the year 2007. It is vehemently argued that the appellant never had an intention to put the marital ties to an end and the respondent cannot take advantage of his refusal to stay with his wife who is single handily looking after both the children in the best possible manner and the daughter of the parties has joined professional course of Engineering at Bangalore and is a student of 2nd year. The learned trial court has committed a grave error rather illegality in accepting claim of the respondent for a decree of divorce either on the ground of cruelty or desertion.

Counsel for the respondent, on the contrary, would support the judgment passed by the learned trial court with the submissions that the findings recorded by the trial court are based upon a detailed and meticulous appreciation of the allegations set up in the petition, evidence adduced and in the light of ratio laid down in various authorities referred to in the judgment. Counsel has pressed into service misconduct of the appellant-wife in walking out of the matrimonial home on 15.2.2003, barely 2½ months after untimely and unfortunate demise of younger brother of the respondent (Capt. Umang Bhardwaj) when the family needed the appellant the most to share their grief. The appellant not only walked out of the matrimonial home at that crucial juncture but also used very harsh and

offending words reproduced in para 14 of the petition. She has assassinated character of her husband by raising unsubstantiated allegations that the respondent is maintaining illicit relations with Sangeeta Bagchi, whom the respondent treats as a sister being a friend of his sister namely Savita. The appellant left the matrimonial home on 15.2.2003 and refused to resume cohabitation despite sincere and persistent efforts made by the respondent.

We have heard counsel for the parties and perused the records.

It is pertinent to mention at the outset that no specific allegations have been levelled by the respondent in regard to misconduct/mis-behaviour of the appellant from the date of marriage in 1994 till November 2002 that would require consideration much less acceptance. No date, month and year of the alleged cruel treatment or maltreatment of the respondent has been stated in compliance with the provisions of Rule 4 (vii) of Punjab and Haryana High Court Rules and Orders Volume-II Chapter 1 Part E. As a matter of fact, there is no allegation of physical cruelty by the appellant.

The learned trial court has taken into consideration two instances to hold that the appellant-wife treated the respondent with cruelty while granting the decree of divorce.

Before adverting to those instances and the supporting materials, we would like to record that the married life is to be reviewed as a whole and a few isolated incidences over a period of years may not amount to cruelty. The ill conduct must persist for a fairly lengthy period and the relationship should have deteriorated to an extent that either party finds it extremely difficult to live with other party any longer.

The learned trial court in para 11 of the judgment has discussed the two instances of mental cruelty namely; (1) insensitivity of the appellant towards the respondent and his parents; (2) the appellant has levelled unfounded allegations against the respondent regarding his illicit relation with another woman.

We would like to deal with the second instance before addressing the issue of insensitivity of the appellant. The appellant has alleged that the respondent is maintaining extra marital relations with one Sangeeta Bagchi with whom she had seen the respondent in a car on several occasions. The respondent has not denied his relations with Sangeeta Bagchi but pleaded that Sangeeta Bagchi is the friend of his younger sister Savita and she is still her friend, therefore, Sangeeta Bagchi is their family friend. He has further admitted that he had frequent visits to her (Sangeeta Bagchi) husband's house and he knows Sangeeta Bagchi for the last 4-5 years.

The father of the respondent Col. Kanwar Bhardwaj was examined as a witness and in the concluding para of his cross examination he has deposed in this regard, quoted thus:-

“Savita is my daughter. I know Sangeeta Bagchi one of the resident of Sector 17 Gurgaon. It is wrong to suggest that she is having frequent visit to our house. She is residing in a rental house in Sector 17 Gurgaon. She is in service. I know her and her family including husband, in law etc. since 2002. Petitioner does not visit to her house. She was not friend of my daughter but she used

to be our family friend.”

A plain reading of the statement of the respondent and his father in regard to relationship of the family with Sangeeta Bagchi would make it evident that there are serious contradictions in their stand. Col. Kanwar Bhardwaj has categorically denied if Sangeeta Bagchi is the friend of his daughter. He has even denied that his son (respondent) visits the house of Sangeeta Bagchi. It is not the plea that the respondent has friendship with husband of Sangeeta Bagchi. On the other hand, the appellant in her testimony has re-asserted her plea that the respondent is having illicit relations with Sangeeta Bagchi. As the appellant did not examine any other witness to corroborate her version, therefore, the evidence may not be sufficient to record a clear cut finding that the respondent is having illicit relation with Sangeeta Bagchi.

The question that now arises for consideration is whether failure of the appellant to substantiate the allegations in regard to relationship of the respondent with Sangeeta Bagchi amounts to mental cruelty to form the basis for a decree of divorce. A similar issue was raised before Hon'ble the Apex Court in **Ramchander vs. Ananta 2015(2) Civil Court Cases 144**. A relevant extract from para 15 of the judgment is quoted hereunder:-

“The last instance of cruelty alleged by the husband is the allegation made by the wife that he has been involved in an extra marital affair with the daily rated mazdoor lady working under him. It is true that the defendant-wife has named the said lady with whom her husband allegedly was having an affair.

The plaintiff-husband though admitted that the said lady was working under him, has specifically denied the said allegation. The courts below have concurrently found that the wife has not substantiated the said allegation. Mere failure to prove such allegation would not entitle the husband to a decree of divorce as rightly held by the High Court. The conduct of the wife that had been complained of appears to be not so grave and weighty that it can be treated to be more serious than ordinary wear and tear of married life.”

The factual discussion made hereinabove when examined in the light of aforesaid observations by the Apex Court, we are unable to affirm the findings of the learned trial court that the appellant is guilty of causing mental cruelty to the respondent-husband.

The learned trial court has not adverted to allegations pleaded in para 14 of the petition. A relevant extract therefrom reads as follows:-

“That the petitioner was stunned to know from his parents one day that the respondent used to often tease/abuse them by passing remarks such as “Tumhara ladka kya mara, tumne to meri aur mere bachon ki zindgi narak bana di, jaise ki ek tumhara hi ladka mara hai, sari duniya mein roz pata nahi kitne log marte hain. Tumhari vajaf se hamhe yahan tumhare saath narak bhogna par raha hai.” The parents of the petitioner told this misbehaviour of the respondent to the petitioner after quite some time. When the petitioner enquired about it from the respondent, she retaliated in the same tone saying “ Isme kya

galat kaha diya hai maine, tumri to bager kisi issue ke chik-chik karne ki aadat hai.” These words of the respondent hurt the petitioner very much, as he was unable to face his parents after this. Still the petitioner tried hard to console himself, in the larger interest of the family and the children.”

Firstly, the respondent has not mentioned the date and month of the said incident, therefore, depriving the appellant proper opportunity to controvert these allegations though she has denied the same in unequivocal terms. As per case of the respondent, the appellant left the matrimonial home on 15.2.2003 and never returned. Indisputably, Umang Bhardwaj died on 19.11.2002. By way of inference, the aforesaid incident could be in between 19.11.2002 to 15.2.2003. The respondent has pleaded that his parents told him about this misbehaviour of the appellant after quiet some time. The expression 'after quite some time' certainly indicates to something more than several weeks or few months. If it is so, where was the occasion for the respondent to confront the appellant with the alleged revelations made to him by his parents.

We would hasten to add that mental cruelty is a state of mind and feeling with one of the spouses due to behaviour or behavioural pattern by the other. The concept of cruelty varies from time to time, place to place and from individual to individual in its application according to social status, economic conditions and various other considerations for the persons involved in marital disharmony. Each case is to be judged on its facts.

The parents of the respondent appeared in the witness box to support the cause of their son. In their affidavits tendered in chief

examination, allegations contained in para 14 of the petition are reproduced in verbatim, clearly copied from the petition. It is not pleaded in para 14 that the respondent confronted his wife with the offending text in the presence of his parents. That being not so, how the parents could know about the factum of confrontation much less the response of the appellant. The appellant has specifically denied these allegations in the written statement and during cross examination of the witnesses of the respondent. The testimony of Ms. Shiksha Bhardwaj (mother of the respondent) is not worthy of credence as she, for the reasons best known, has told a blatant lie that Rajesh never resided in South City and after resigning from the army, he shifted to her house and thereafter did not reside anywhere else except in Sector-17. On the contrary, it is an admitted position of the case that after resigning from army service in November 2003, the respondent remained working with Ranbaxy (a private company) and resided in South City for about two years. In the light of aforesaid, we are of the considered opinion that allegations contained in para 14 do not lend credence to support the plea of mental cruelty.

This brings the Court to the first instance taken note of by the learned Trial Court viz. the appellant having left the matrimonial home on 15.2.2003, a short after demise of younger brother of the respondent on 19.11.2002 in anti terrorist operation in Jammu and Kashmir. At that time, the respondent, admittedly, was posted at Manesar and residing there with his family. The parties alongwith their children started residing with parents of the respondent to share their grief. The respondent has averred that the appellant alongwith children left the matrimonial house on

15.2.2003 on the pretext that she was going to her parental house on a casual visit for a period of 4-5 days. It means that even if the appellant had gone to her parents on 15.2.2003, she had gone there after due intimation to the respondent. It is not plea of the respondent that either on 15.2.2003 or prior thereto, the couple had any arguments much less something serious. It is also not the plea that he raised any objection about her going to her parental house.

The respondent has further pleaded that as the appellant did not join company of her husband since 15.2.2003, thus, she is guilty of desertion. On the contrary, the appellant in the written statement has denied that she left the house of her in laws in Sector-17 Gurgaon on 15.2.2003 or she did not return to her matrimonial home. She has stated that she lived with her husband upto 17.1.2006 at A 1-34, South City II and they lastly resided together as husband and wife at House No. 774/17, Gurgaon. The respondent-husband was working as Major in the Indian Army and was posted at Manesar, the last station of his posting before he resigned from army service in November 2003. After resignation from Army service, he joined service in Ranbaxy and was provided accommodation by the employer in South City-II, admittedly a part of Gurgaon. The respondent in his cross examination has stated that he stayed in the house at South City-II for a period of about two years. It is not clear on record as to from which date to which date, the respondent resided in South City-II. However, during cross examination, he has admitted that the appellant visited his premises at South City once and that was in the year 2005. He has further admitted that the appellant visited him at Sector 17, Gurgaon once and she

stayed with him in Sector 17, Gurgaon for about 15 days. A relevant extract from his testimony reads as follows:-

“I left service when I was posted at Manesar. I came back to Sector 17 but the respondent went to her parents house. The respondent never resided with me in Sector 17 after I resigned from the service. After the death of my younger brother she stayed with my parents for one and half month or two months. I moved to south City in 2005. That house was on company lease. About Rs.4500/- used to be deducted from my pay towards rent for this accommodation at South City. The respondent had visited my premises at South City once only. She came for a day only but did not stay in the night. I cannot say when she came and when she left. She had come with the children and left with the children. I cannot tell the date and month of the visit but it was in the year 2005. I remained in South City for about one year. I did not obtain any other house after leaving South City. Volunteered that I straightway went to the house of my parents in Sector 17. I left South City soon after I left my service of that company. Volunteered that I had left prior thereto. I worked there for about two years. After resigning that service I have not joined any other service. The respondent visited me at Sector 17 once and she stayed with me in Sector 17 for about 15 days. The children also resided with me. I cannot tell the date and year about her visit.”

On due consideration of statement of the respondent more

particularly the aforesaid extract and the sequence of events, it can be safely held that plea of the respondent is untrue that the appellant-wife never returned to the matrimonial home after 15.2.2003.

The appellant tendered into evidence her duly sworn affidavit Ex. RW1/A and reiterated her stand taken up in the written statement that she resided with her husband in South City-II, Gurgaon upto 17.1.2006 and at House No. 774, Sector-17 Gurgaon from 1.4.2007 to 27.5.2007. She was subject to lengthy cross examination by the counsel opposite. There is no challenge to her version in regard to her stay with the husband in South City-II Gurgaon upto 17.1.2006 and at House No. 774, Sector-17, Gurgaon from 1.4.2007 to 27.5.2007. Not only this, in response to a question put to her, she has deposed in the following terms:-

“It is correct that my husband had taken Master Garv in Pauri Garhwal in 2007. Volunteered, while we were staying in Sector-17 House No. 774.”

It was never put to the appellant by opposite counsel that she alongwith the children never stayed in House No. 774, Sector 17, Gurgaon in the year 2007. As per settled position in law, if the testimony of a witness on a material fact is not challenged during cross examination, it amounts to an admission on the part of opposite party.

Taking into consideration the facts deduced in the cross examination of the respondent coupled with version of the appellant that remains unchallenged during cross examination, it certainly leads to an inference that the parties resided together even after 15.2.2003 that falsify and belie plea of the respondent that the appellant never returned to the

matrimonial home after 15.2.2003. It may not be true that the appellant remained residing with her husband upto 17.1.2006 in South City-II but in view of discussion made hereinbefore, the parties resided together after 15.2.2003 in House No. 774, Sector-17 Gurgaon in the year 2007. As the parties resumed cohabitation and resided together in the year 2007, the plea of desertion is no longer available to the respondent for grant of decree of divorce. This apart, in order to establish plea of desertion, the petitioner has to prove that apart from the factum of physical separation for a continuous period of more than two years before institution of proceedings, the guilty spouse had been residing separately with an intent to put the marital ties to an end. The appellant-wife alongwith children came to her husband in the year 2005 as well as in the year 2007. She stayed with her husband for certain days in the parental house of the respondent. Conversely, there is no evidence adduced by the respondent as to what effort was made by him to bring his wife back to matrimonial home. There is nothing on record suggestive of the fact that the appellant-wife ever intended to put the marital ties to an end. She has always remained ready to save her matrimony for the sake of children as well as herself and her intention in this direction gets approval from the fact that she has contested the divorce proceedings all throughout and did not agree for divorce on any terms when we had an interaction with the parties on two occasions before hearing the arguments.

The learned trial court, for the reasons best known, did not notice the aforesaid facts that came on record during cross examination of the respondent-husband and the facts re-asserted by the

appellant in her statement on oath, thus, committed a serious error in holding that the appellant-wife is guilty of withdrawing from society of the respondent, sufficient to establish the plea for grant of divorce on the ground of desertion. In view of the above, we have no hesitation to hold that the findings recorded by the learned trial court are the result of misreading of evidence, ignoring material evidence on record and non-application of mind, thus cannot be allowed to sustain.

It would be pertinent to add that as the parties resided together after 15.2.2003, the first instance of cruelty coined by the trial court otherwise stands condoned. The learned trial court misconstrued and misdirected itself by holding that the appellant is guilty of withdrawing from society of the respondent.

For the reasons aforesaid, the appeal is allowed, the judgment and decree passed by the learned trial court is set aside. The petition filed by the respondent for dissolution of marriage of the parties by a decree of divorce is dismissed with costs throughout.

(Rajive Bhalla)
Judge

(Rekha Mittal)
Judge

29.10.2015

PARAMJIT