

In the High Court of Punjab and Haryana at Chandigarh

FAO No. M-217 of 2014

Date of Decision:19.10.2015

Parvinder Kaur

---Appellant

versus

Arvinder Pal Singh

---Respondent

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

**Present: Mr. Gurcharan Dass, Advocate
for the appellant**

**Mr. Arun Walia, Senior Advocate
with Mr. Sarvedaman Rathore, 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 13.3.2014 passed by the Additional District Judge, Ludhiana allowing the petition filed by the respondent-husband under Section 13 of the Hindu Marriage Act, 1955 (for short -“HMA”) and dissolving marriage of the parties.

The respondent prayed for a decree of divorce on the grounds that the appellant-wife is guilty of treating the respondent-husband with cruelty and she has withdrawn from company of the respondent without any

sufficient and reasonable cause since August 1993.

The parties tied nuptial knot on 12.10.1988 and two children namely Sonu and Silky were born out of the wedlock on 12.9.1989 and 21.12.1990 respectively. As per the allegations raised in the petition, the appellant treated the respondent with cruelty from the very beginning of the marriage. She insisted upon the respondent to have a separate residence and he was constrained to hire accommodation in January 1990 at Amritsar. She forced the respondent to dispose of his business at Amritsar and settle at Ludhiana where her parents are residing. She had been abusing the respondent and his family members. The family members of the respondent avoided visiting his house due to the bad behaviour of the appellant. The respondent disposed of his entire business at Amritsar, brought an amount of Rs. 1,50,000/- while shifting to Ludhiana along with the appellant and children. He also shifted all his house hold articles in one room given to his family by parents of the appellant. The amount of Rs.1,50,000/- was handed over to the appellant and she alleged that she had handed over the same to her brother for investment in the business of cycle parts in which she was made a partner. In the month of February 1993, brother of the appellant namely Amar Singh alias Tonny and other declared that they had suffered loss in business and directed the respondent to bring more money by getting his share from his parents. They also gave threats and insulted the respondent and he came back to Amritsar in August 1993. An application dated 12.2.2001 was submitted by him to the Senior Superintendent of Police, Amritsar against aforesaid Amar Singh alias Tonny. The respondent and his family members tried to settle the matter

with joint efforts of Daljit Singh, Varinder Kaur, Harjinder Singh, Sudarshan Walia and other respectables but the appellant refused to come back to Amritsar and insisted that the appellant should live as '*ghar jawai*' at Ludhiana after getting his share from his parents.

The respondent filed a petition under Section 9 of the HMA in which ex parte decree was passed by the Court on 24.4.2003. The appellant refused to join her husband after passing of the decree rather filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the decree. She also filed an application under Section 24 of the HMA which was allowed and ultimately the petition under Section 9 of the HMA was dismissed as withdrawn. Thereafter, the appellant filed an application under Section 125 of the Code of Criminal Procedure in which she levelled false and frivolous allegations against the respondent and his family members. The application was decided by the Court of Judicial Magistrate Ist Class, Ludhiana vide order dated 4.10.2008 and the appellant was held not entitled to any maintenance from the respondent but minor children were granted maintenance till they attain majority. The appellant has treated the respondent with mental as well as physical cruelty by giving abuses, insulting him and withdrawing herself from company of the appellant without any sufficient reason or cause. She left company of the respondent with an intent to permanently end the marital ties since August 1993.

The appellant-wife filed the written statement raising preliminary objection that the respondent is estopped by his act and conduct to file the petition. He filed a petition under Section 9 of the HMA at Amritsar and when the appellant filed an application under Section 24 of

the HMA, the respondent withdrew the petition on 10.3.2007. The petition had been filed with undue delay and laches. She had denied all the allegations which have been made the basis for accusing her of treating the husband with cruelty as well as deserting him without any cause or reason. It is further averred that as the respondent was not doing well in business, he agreed to shift to Ludhiana where brother of the appellant helped him in establishing business and provided accommodation for residence. The respondent could not cope up with burden of business and withdrew from company of the appellant in August 1993. The respondent did not co-operate with the appellant and the children nor bothered about their welfare. He had always been neglecting the family and abandoned the society of the appellant. No effort was made by the respondent for rehabilitation of the appellant since August 1993 till the filing of the petition in the year 2009. All other material allegations set up in the petition are denied with a prayer for dismissal of the same with costs.

The respondent filed replication reiterating his stand taken in the petition while controverting the pleas raised in the written statement.

The controversy between the parties led to framing of following issues:-

1. Whether the petitioner is entitled to get decree of divorce on the grounds set up in the petition u/s 13 of the HMA? OPP
2. Whether the petitioner is estopped by his own act and conduct from filing the present petition? OPR
3. Whether the petition is bad for undue delay and laches, if so, its effect? OPR
4. Relief.

The learned trial court permitted the parties to lead evidence in support of their respective claims. The respondent appeared in the witness box and examined Karam Singh PW2, Sudarshan Walia PW3 and Kanwaljit Kaur PW4. To rebut evidence of the respondent, the appellant examined herself and Paramjit Singh, her brother RW-2.

The learned trial court on consideration of evidence on record and submissions made by counsel for the parties came to hold that the appellant-wife is residing away from the matrimonial house since 1993 and efforts of the respondent-husband to bring her back proved futile which further proves that the wife has no intention to resume cohabitation and, therefore, it is a fit case to grant decree of divorce on the ground of desertion as well as cruelty for denial of conjugal bliss to the husband for the past more than 21 years without any reasonable cause. However, the learned trial court has declined to accept plea of cruelty in view of allegations of behaviour of the appellant towards the respondent and his family members.

Feeling dissatisfied with the verdict of the learned trial court, the present appeal has been preferred by the appellant-wife.

Counsel for the appellant, Sh. Gurcharan Dass, Advocate would urge that the learned trial court failed to appreciate evidence in right perspective and as a result committed a grave error in holding that the appellant-wife is guilty for separate living of the parties since August 1993 or the respondent-husband made any effort to bring her back to the matrimonial home and those efforts proved futile due to refusal of the appellant to resume cohabitation. It is further argued that even the findings

with regard to the appellant being guilty of cruelty are based upon the factum of the parties living apart since August 1993 when as a matter of fact, the respondent himself is a guilty spouse. According to learned counsel, the respondent failed to adduce any tangible evidence in regard to his efforts to bring the appellant and the children back to the matrimonial home who rather left the appellant and the children at the mercy of parental family members of his wife. It has come on record that respondent-husband never visited his wife or children since September 1993 and, therefore, there is no material on record to support findings of the learned trial court that the respondent-husband made efforts to bring his wife and children back to the matrimonial home.

Counsel for the respondent-husband, on the other hand, has supported the judgment of the learned trial court with the submissions that admittedly the parties are staying away from each other since August 1993. The appellant neither through the process of Court nor otherwise made any effort to resume cohabitation with her husband. She raised an unreasonable and unwarranted demand on the respondent to live as '*ghar jawai*' at Ludhiana. She deprived the respondent of his conjugal rights since August 1993, therefore, she is guilty of causing mental cruelty to the respondent. The learned trial court on a careful and meticulous consideration of the pleadings, evidence and arguments advanced by respective parties, is justified in its conclusion that the appellant is guilty of deserting the respondent and depriving him of conjugal bliss for the past more than two decades, validly constituting ground for dissolution of marriage of the parties.

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

The marriage of the parties was performed on 12.10.1988 and two children were born out of the wedlock. The parties resided at Amritsar till January 1992. The respondent along with his wife, children and their belongings shifted to Ludhiana to start some business. The parent family of the appellant was working at Ludhiana and they had been doing business of manufacturing spare parts of cycles, may be, at a small scale. The couple along with their children were provided residential accommodation in the house maintained by parental family of the appellant. In August 1993, the respondent alone came back to Amritsar and since then the parties are living separately.

The learned trial court has not found any merit in plea of the respondent that the appellant-wife subjected the respondent to cruelty due to her alleged mis-conduct during stay of the parties together since their marriage up to August 1993 when the respondent-husband came back to Amritsar. The respondent has neither filed any cross objection to challenge these findings of the learned trial court nor counsel for the respondent has made any submission in this regard. Even otherwise, we have gone through the pleadings of the parties, evidence on record and submissions made before the trial court and find no reason to differ with the findings of the learned trial court that any general allegations raised by the respondent in regard to conduct or behaviour of the appellant-wife during their stay at Amritsar or Ludhiana do not constitute cruelty to form the basis for decree of divorce.

This brings the Court to the plea that the appellant is guilty of

withdrawing from the society of the respondent without any reasonable cause or excuse and thus amounts to desertion. The ground of desertion is also relevant in the context of depriving the respondent of conjugal bliss.

The learned trial court in para 12 of the judgment has taken note of essential ingredients of desertion, quoted thus:-

1. The factum of separation.
2. The intention to bring cohabitation permanently to an end (animus-deserendi).

It is an admitted position of the case that there is physical separation of the parties since August 1993 till date. The material questions for consideration are whether the appellant or the respondent withdrawn from matrimony and which of them intended to bring cohabitation permanently to an end and whether the respondent-husband has not taken advantage of his own wrong in obtaining the decree.

The learned trial court in para 19 of the judgment has held that the respondent (petitioner therein) made efforts to bring the wife back though all proved futile but nothing has been brought on the file by the respondent(appellant herein) as to what effort had been made by her parents to reconcile the matter with the respondent which clearly proves that the wife has no intention to resume cohabitation.

On a careful reading of the statement of the respondent and two witnesses examined by him namely Sudarshan Walia (his mother) and Kanwaljit Kaur (a relative), in our considered opinion, the findings of the learned trial court that the respondent made efforts to bring the wife back to the matrimonial home and those efforts proved futile cannot be sustained. It

further appears that these findings are unfounded and the result of misreading of evidence on record.

The respondent appeared in the witness box and tendered into evidence his affidavit which is almost a reproduction of the averments set up in the petition. However, in his cross examination conducted on 18.8.2012, he has stated that in January 1992, he along with his family had shifted to Ludhiana. His mother and father did not turn up to meet their grand son Tarvinder Singh nor came to meet him even. His maternal aunt along with him and his maternal uncle Daljit Singh (since expired) had come to meet father of his wife. He did not remember as to on which date and year he came to Ludhiana. He had not taken any panchayat nor any relative had come to Ludhiana in the shape of panchayat to persuade the respondent to join his society before filing of petition under Section 13 of the HMA. There was no impediment in filing the present petition under Section 13 of the HMA for the period from 1992 to March 2009. In the later part of the cross examination, he has candidly stated "I am not ready till today to join the company of my wife".

Sudershan Walia, mother of the respondent, filed affidavit Ex. PW3/C running into 10 pages, tendered in examination in chief. A plain reading of deposition of this witness does not give an inkling that any effort was made by the respondent or his family members including his parents to bring the appellant and the children back to Amritsar. On the contrary, the affidavit goes a long way to show that every effort has been made by the mother to bring certain facts on record so that the appellant should not claim any right in the property or business of the family at Amritsar. There is not

even a whisper in her statement that any effort much less serious one was made by the respondent or his family members to persuade the appellant to come back to the matrimonial home.

Kanwaljit Kaur (PW4) in the concluding para of affidavit Ex. PW4/A tendered in her examination in chief has deposed that on request of the respondent, she along with her husband visited house of appellant's parents at Ludhiana in September 1997 and the appellant flatly refused to come to Amritsar to live with the respondent and demanded that in case, he wanted to settle his matrimonial home, he should come to Ludhiana after obtaining his share in his mother's house at Amritsar. Kanwaljit Kaur never intervened in any of the affairs of the parties prior to her alleged visit to Ludhiana in September 1997. As she never had any interaction with the appellant prior thereto, her visit to Ludhiana to persuade the appellant to resume cohabitation with her husband is of no relevance or significance. The matter would have been different had she been one of the members of any panchayat or accompanied the respondent with an intent to persuade the appellant to join company of her husband. This apart, Kanwaljit Kaur has stated that the appellant refused to come back to Amritsar and demanded that her husband should come to Ludhiana to reside with her, therefore, did not express any such intention that either she is no longer interested in matrimony or wanted to put the marital ties to an end, to satisfy the second ingredient of desertion. We would hasten to add that statement of Kanwaljit Kaur is not at all sufficient to prove that the respondent-husband made efforts for resuming cohabitation.

There is another aspect of the matter. In the year 2001, the

respondent filed an application under Section 9 of the HMA for restitution of conjugal rights, obtained an ex parte decree but neither filed an application for its execution nor otherwise initiated any steps in this regard. The said ex parte decree dated 21.4.2003 was set aside as application filed by the appellant-wife was allowed. The appellant filed an application under Section 24 of the HMA claiming compensation for herself and the minor children. The application for restitution of conjugal rights was later withdrawn for the reasons best known to the respondent. From the afore-discussed facts, it can safely be inferred that claim of the respondent to seek restoration of conjugal rights lacked bona fide. Rather the very fact that the respondent withdrew the application for restitution of conjugal rights leads to an irresistible conclusion that the respondent-husband had no intention for restitution of conjugal rights and the application might have been filed with a view to create a ground for divorce. As has been noticed hereinbefore but for the sake of repetition, there is no evidence much less cogent and convincing to prove that the respondent-husband made any effort for brining the appellant back to the matrimonial home. As the respondent came back to Amritsar leaving his wife and children at Ludhiana and thereafter did not bother to bring his wife back to the matrimonial home or resume cohabitation with him, he cannot be allowed to take advantage of his own wrong and seek a decree of divorce by accusing his wife being guilty of desertion or cruelty for depriving him of conjugal rights.

To be fair to the respondent husband, a plea has been raised that the appellant wife has been denied maintenance under Section 125 Cr.P.C. on the premise that she has withdrawn from society of the respondent.

Concededly, the proceedings under Section 125 Cr.P.C. have not attained finality. In addition, those proceedings are not exactly civil in nature. Even otherwise, as the respondent has failed to prove one of the essential ingredients of desertion, he cannot prove the said ground on the basis of findings recorded in proceedings under Section 125 Cr.P.C.

Section 23 of the HMA provides that in any proceedings under the HMA whether defended or not, a decree cannot be passed if any of the bars envisaged in Section 23 is existing. Clause (d) of Section 23(1) of the HMA provides that there should not be any unnecessary or improper delay in instituting the proceedings. In the case at hand, the parties are residing separately since August 1993. The respondent-husband has admitted during his cross examination that there was no impediment in filing the petition for divorce from 1993 to March 2009. There is no explanation for delay of 16 years in filing the petition for divorce either on the ground of desertion or cruelty. The petition under Section 9 of the HMA was filed after 10 years of separate living of the parties without any explanation for the said delay. Even otherwise, the respondent was not serious in pursuing his remedy for restitution of conjugal rights as he withdrew the petition and did not await its decision on merits. The learned trial court has not adverted to the provisions of Section 23(1)(d) of the HMA while holding in favour of the respondent.

This brings us to another issue that though irretrievable break down of marriage is not a ground for divorce but if marriage is beyond repairs on account of bitterness created by the Acts of the husband or the wife or both, the courts take irretrievable break down of marriage as a

weighty circumstance amongst others necessitating severance of marital ties . In the present case, the mere fact that the parties are staying away from each other for the past more than 20 years alone is not sufficient to conclude that the marriage is beyond repairs and, therefore, the decree of divorce passed by the trial court is liable to be affirmed. It is pertinent to mention that there are two children born out of the wedlock and both of them have received good education up to graduation or post graduation. The children stayed with the mother and were being maintained by parental family of the appellant. It appears that maintenance was awarded for the children in the proceedings under Section 125 Cr.P.C. but there is no clear evidence on record if the respondent had paid maintenance without any default. The children of the parties are of marriageable age. It is not clear if either of the children have got married by now. Taking a commutative view of the facts and circumstances of the present case, it is difficult to uphold the decree of divorce passed by the learned trial court.

In view of what has been discussed hereinbefore, the appeal is allowed, the judgment and decree passed by the trial court is set aside. The petition for divorce filed by the respondent is dismissed leaving the parties to bear their own costs.

(REKHA MITTAL)
JUDGE

(RAJIVE BHALLA)
JUDGE

19.10.2015

PARAMJIT