

FAO-6063-2013

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IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

FAO-6063-2013

Date of decision : 17.02.2016

Dr. Vishesh Malhotra

... Appellant

Versus

Dr. Alka Malhotra

... Respondent

***CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MRS. JUSTICE REKHA MITTAL***

Present: Mr.Ashwani Chopra, Senior Advocate
with Mr.Prateek Sodhi, Advocate
for the appellant.

Mr.Sanjiv Pabbi, Advocate
for the respondent.

REKHA MITTAL, J.

The present appeal lays challenge to the judgment and decree dated 11.09.2013 passed by the District Judge, Gurgaon dismissing the petition filed under Section 13 of the Hindu Marriage Act 1955 by the appellant (husband), seeking divorce on the ground of cruelty and adultery.

The marriage of the parties was performed at New Delhi in the year 1989. Two sons have been born out of the wedlock in the year 1990 and 1995. The appellant has accused his wife of causing mental cruelty inter alia on the following grounds:-

1. Her behaviour towards him and his family members

was humiliating and insulting. On one occasion, she scratched the face of his mother.

2. In July 1993, she pressurised the appellant to live separately from his parents and he succumbed to her pressure. After separation, her abusive behaviour towards the appellant worsened. She called the local police without any cause alleging that her husband and his parents were harassing her.

3. In 1996, the younger son of the parties was diagnosed with Autism i.e. mental retardation due to which the appellant was heart broken. Even at that point of time, she insulted and taunted him on many occasions. She blamed him for the problem of the child saying that it was because of his genetic make-up.

4. In December, 2004, the respondent developed illicit relation with a person from Gurgaon who was a friend of her old boy friend namely Dr. Raj Kumar Rai now in U.K. When he confronted her, she stated that she had strayed out of marriage a number of times previously and if he would dare to object than she would implicate him falsely in a criminal case as the law is in favour of a woman.

5. On account of her abusive and cruel behaviour, he was compelled to shift to rental accommodation in a flat at DLF City, Phase IV, Gurgaon.

The respondent filed the written statement controverting the averments set up in the petition. It is averred that the appellant is a hot tempered person, gets furious upon small things and is in the habit of assaulting the respondent. He hit the respondent with a paper weight and she was constrained to call the police to save her life. She has denied all the material averments in the petition levelling allegations in regard to her misconduct or extra marital affair. It is further averred that the petitioner has raised vague and general allegations just to create a ground for filing the petition.

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

1. *Whether the petitioner is entitled for the decree of divorce on the grounds mentioned in the petition?OPP*
2. *Relief.*

The trial Court permitted the parties to adduce evidence in support of their respective contentions.

The appellant appeared in the witness box and examined Prem Parkash Malhotra his uncle PW1, Mrs. Krishna Malhotra PW2, Sarvesh Malhotra PW3, Dheeraj Yadav PW5, Ram Lal Dikshit PW6 and Asha Dikshit PW7. To rebut evidence of the appellant, the respondent stepped into a witness box as RW1 and examined Ashish Arora RW2.

The learned trial Court, on a detailed consideration of pleadings of the parties, evidence adduced and the judgments cited came to hold that the appellant (husband) has failed to substantiate his

allegations that either the respondent (wife) is guilty of causing cruelty of the kind that can form the basis for divorce or could prove the allegations of adultery when otherwise the alleged adulterer has not been impleaded as a party.

Feeling aggrieved against the judgment and decree passed by the learned trial Court, the instant appeal has been preferred by the appellant (husband).

Counsel for the appellant Sh.Ashwani Chopra, Senior Advocate has urged that the respondent (wife) is guilty of treating the appellant with cruelty but the learned trial Court has failed to take cognizance of the important facts and circumstances brought on record. To bring home his contention, counsel has pressed into service the following instances namely:-

- i) In December 1989, the respondent levelled false allegations against mother of the appellant that she (mother) had stolen her gold chain.
- ii) She scratched the face of her mother in law and abused her in April 1991.
- iii) She called the local police without any reason in the year 1993 and 2005, bringing disrepute to the appellant and his family.
- iv) The younger son of the parties was diagnosed suffering from Autism with mental retardation. The respondent accused the

appellant for medical condition of the child by saying that it was due to his faulty genetic make-up.

Counsel for the respondent, while refuting contentions of counsel for the appellant, has submitted that the learned trial Court has correctly appreciated the entire controversy in the light of available facts and circumstances and judgments referred by counsel for the appellant and arrived at a well considered conclusion that the appellant (husband) has failed to substantiate his plea that the respondent (wife) is guilty of causing cruelty of the kind which can form the basis for divorce. In addition, it is submitted that assuming for the sake of arguments that the respondent (wife) committed some misconduct in December 1989, April 1991, in the year 1993 and 1996, the same otherwise stands condoned as the parties admittedly resided together as husband and wife till 2008. Another submission made by counsel is that the petition filed by the appellant in regard to alleged misconduct of the wife for the period from 1989 to 1996 is otherwise barred under Section 23 of the Hindu Marriage Act. In the last, it is submitted that the appellant himself is a guilty spouse and thus cannot be allowed to take advantage of his own wrong by levelling unfounded allegations assassinating character of his wife.

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

Before advertng to the rival submissions made by counsel for the parties, it would be appropriate to examine as to what constitutes

cruelty to form the basis for a decree of divorce. Cruelty has not been defined in the Act. Cruelty may be mental or physical or both. It is settled by catena of decisions that mental cruelty can cause more serious injury than the physical one. It is to be determined by taking into consideration the entire facts of the case and the matrimonial relations between the spouses. To constitute cruelty, there must be such willful treatment of the party which caused suffering of body and mind either as an actual fact or by way of apprehension in such a manner as to render the continued living together of spouses harmful or injurious having regard to the circumstances of the case.

This brings the Court to the facts of the case in hand. As has been noticed hereinbefore, counsel for the appellant has pressed into service four instances to contend that the wife is guilty of causing mental cruelty to the husband. The respondent has denied the allegations in regard to alleged occurrences in December 1989 and April 1991, in the written statement as well as in her testimony on oath. There is no cogent and convincing evidence on record to substantiate these allegations. However, the respondent has admitted that she called the police when she was caused injury by her husband with a paper weight. If the husband has caused injury to his wife, no fault can be found in her effort to seek police help.

As a matter of fact, the only instance which is worthy of consideration is the allegation that the respondent accused the husband for

medical problem of the younger son of the parties by raising an issue of his defective genetic composition. The exact date of birth of the child is not on record but it appears that the child was born some time in the year 1995/1996. A relevant extract from para 11 of the petition in this regard reads as under:-

“That in 1996 the younger son of the petitioner (Kushal) was diagnosed with Autism with a possible mental retardation. Since petitioner was heart broken at the development, respondent did not leave any chance to insult and taunt the petitioner even at that time. She blamed the petitioner for the problem of the child saying that it was because of the petitioner's genetic make-up that the child has suffered this medical problem.”

The respondent has denied these allegations with a plea that she has special love for the child and is doing everything possible under the sky to gear and rear him (the child) so that he becomes a useful member of the society.

It is not the case of the appellant that the respondent (wife) was persistent in her accusation that the husband is responsible for medical problem of the child. The respondent, in cross-examination has admitted that she had told the appellant (husband) that their younger son was diagnosed with Autism due to his genetic make-up. A relevant extract from her testimony reads thus:-

“It is correct that I had told the petitioner that our younger son was diagnosed with autism due to genetic

make up of the petitioner. Volunteered – as and when we went to some psychologist he would ask us about the family history of the disease. But the petitioner would hide the same and would beat me up afterwards. It is incorrect to suggest that there is no such family history of the petitioner.”

A bare reading of the aforesaid extract would make it evident that the respondent (wife), a doctor by profession, told her husband about his genetic make-up as she perceived that the husband was trying to hide some information when the child was examined by a psychologist and inquiry was made by him if there was any family history. As the respondent was not persistent in her accusation and got an impression in good faith that the husband was trying to hide something from the doctor (s) and thus told the husband that the child has suffered due to genetic make-up of his family and that too in the year 1996, in our considered opinion, cannot constitute a ground for divorce. On the contrary, the appellant is guilty of levelling unfounded allegations of extra marital relation of the respondent with a friend of her alleged old boy friend namely Dr. Raj Kumar Rai (now in U.K.). Counsel for the appellant is fair enough to concede that the husband has failed to substantiate his plea by leading any evidence much less cogent and convincing. As the husband has raised false and baseless allegations assassinating his wife's character, he otherwise disentitles him to pray for a decree of divorce, on the basis of an incident which took place way back in the year 1996, by filing a

petition in the year 2010.

Section 23 of the Act provides that where a divorce has been sought on the ground of cruelty, the petitioner has to prove that he has not in any manner condoned the alleged cruelty. Another requirement of Section 23 is that there should not be unnecessary or improper delay in instituting the proceedings. As the parties resided together till the year 2008 and it was the husband who walked out of the matrimonial home, long cohabitation of the parties as husband and wife for a period of about 12 years since 1996 would suffice to conclude that the appellant has condoned the alleged acts of cruelty purportedly occurred in the year 1989, 1991, 1993 and 1996. In this view of the matter, we do not find any error much less illegality in the impugned judgment. We would hasten to note that the parties have a grown up son who is suffering from mental disorder and needs joint efforts of his parents to move further in life. That being so, the mere fact that the parties are living separately for the past 7 years would not persuade us to put an end to marital ties, between the parties.

No other point has been raised.

For the foregoing reasons, finding no merit, the appeal is dismissed leaving the parties to bear their own costs.

(RAJIVE BHALLA)
JUDGE

(REKHA MITTAL)
JUDGE

February 17th, 2016.

Davinder Kumar