

212

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO-M No.58 of 2015

Date of Decision: 04.04.2016

Satvir Kaur

.....Appellant

Vs

Parminder Singh

.....Respondent

**CORAM: HON'BLE MR. JUSTICE M. JEYAPPAUL
HON'BLE MR. JUSTICE RAJ MOHAN SINGH**

Present: Mr. G.S. Salana, Advocate
for the appellant.

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

RAJ MOHAN SINGH, J.

[1]. This appeal is directed against the judgment and decree dated 17.11.2014 passed by Additional District Judge, Fatehgarh Sahib, whereby petition under Section 13 of the Hindu Marriage Act (hereinafter referred to as 'the Act') for dissolution of marriage between the parties was dismissed *ex parte*.

[2]. Appellant-petitioner filed petition under Section 13 of the Act against the respondent on the ground of cruelty and desertion. Marriage of the appellant was solemnized with the respondent on 25.09.2008 according to Sikh rites and

ceremonies. Both the parties cohabited as husband and wife, but no child was born out of their wedlock.

[3]. Appellant alleged that huge amount was spent by her parents in the marriage towards dowry. Sufficient dowry was given to the respondent and his family members which was for exclusive use of the appellant. The appellant performed all marital obligations towards the respondent and his family members as a dutiful wife, but the respondent and his family members were not happy with the dowry given by the parents of the appellant in the marriage. Respondent and his family members kept on harassing appellant for want of dowry and she was not allowed to use the dowry articles and gold ornaments which were exclusively meant for her. Respondent and his family members kept on demanding dowry in the form of cash worth Rs.20 lacs for migration of the respondent to England along with appellant. On showing her inability, appellant was given merciless beatings. Respondent withdrew himself from the society of the appellant in May 2009 at Khamanon and started living in village Amrara.

[4]. Appellant went to Australia in July 2009. Respondent refused to accompany her despite granting visa. Even after reaching Australia, appellant kept on making calls to the respondent and requested him to give up all his demands.

Appellant came to India in June 2010, but she was not allowed to join matrimonial house, despite convening of Panchayat by the respectables. Appellant went to United Kingdom on 12.09.2012 and started residing there. Even after reaching United Kingdom, she made numerous calls to the respondent, but he flatly refused to respond to the calls of the appellant as he was not interested in the appellant, rather he was interested in solemnizing second marriage. With this background, the petition under Section 13 of the Act came to be filed at the instance of the appellant.

[5]. Respondent was served with notice through ordinary mode of service as well as substituted mode of service i.e. publication in Daily Tribune. Despite substituted mode of service, respondent did not appear before the trial Court and was proceeded against *ex parte* vide order dated 30.08.2014.

[6]. Thereafter *ex parte* evidence of the appellant was taken. Appellant got examined PW1 Swaran Kaur, who was her mother and attorney holder, PW-2 Bala Singh and PW-3 Surinder Singh. Swaran Kaur power of attorney of the appellant appeared in the witness box and deposed on affidavit, reiterating all the averments of the petition. Special power of attorney was duly exhibited on record as Ex.P1, passport of the appellant was exhibited as Ex.P2. PW-2 Bala Singh and PW-3

Surinder Singh also corroborated the version of the Swaran Kaur, thereby reiterating the stand taken by the appellant. The evidence adduced by the appellant went unrebutted.

[7]. Trial Court dismissed the petition on the ground that passport on record is not complete inasmuch as that the remaining pages of the passport of the appellant itinerary to Australia and England have been withheld for the reasons best known to the appellant. The appellant has not filed any document on record of application filed by her with respondent for her migration and migration of the respondent to Australia. Withholding of such information was taken to be an instance, not constituting desertion and cruelty, rather it was observed that the appellant herself has withdrawn from the society of the respondent and has filed the petition just to get rid of the respondent.

[8]. The attitude of the respondent does not constitute any *animus deserendi* as it was not demonstrated that the respondent was willing to live with other spouse and the appellant was living separately on account of disinclination of the respondent. Mere living separately does not constitute desertion unless and until *animus deserendi* is proved.

[9]. We have considered the submissions made by learned counsel appearing for the appellant.

[10]. The *ex parte* evidence led by the appellant remained un rebutted as the respondent was proceeded against *ex parte*. At the relevant time the petition was filed by special power of attorney i.e. mother of the appellant as the appellant was abroad. It has been brought out in our notice during course of arguments that appellant has come to India. The instances of cruelty and desertion are the subject matter of personal knowledge of the appellant. Narration of facts given in the pleadings have been brought on record in the testimony of power of attorney which were duly supplemented by other witnesses viz. PW-2 Bala Singh and PW-3 Surinder Singh.

[11]. During the proceedings before the trial Court, respondent was proceeded against *ex parte* after publication made in the newspaper. During pendency of the present appeal also an effort was made to trace out the address of the respondent who was residing in foreign country. Notice was issued to him, but the same was not received back served or otherwise. Since the respondent was living in foreign country, therefore, his exact address could not be known to anyone. Respondent was proceeded against *ex parte* on account of publication made in the newspaper. The mode of service adopted by the trial Court can be considered to be a sufficient mode of service which was pressed into service for effecting

service upon the respondent. This Court is satisfied that the respondent cannot be served by any other mode of service except the one which was resorted to by the trial Court.

[12]. Since the petition was filed by special power of attorney and now the appellant has arrived in India, petition was dismissed by the trial Court on technical ground. Since respondent is living abroad and the parties have not come to matrimonial platform since long, therefore, if, something remains obscure can be filled in by giving an opportunity to the appellant to prove her case. The respondent was *ex parte* before the trial Court and has not rebutted the evidence of the appellant. At any rate, the respondent would not have rebutted the evidence of the appellant, had she appeared herself instead of her special power of attorney. In view of aforesaid, no prejudice, in any case, is going to be caused if an opportunity is given to the appellant to appear herself in place of her attorney. The evidentiary value of the evidence so led by the appellant would be appreciated by the trial Court on her examination before the trial Court.

[13]. Having considered the issue, we are of the firm opinion that cause of justice should be preferred over the technicalities. Substantial cause of justice cannot be sacrificed on the altar of technicalities. The trial Court would have appreciated the

controversy differently, had the appellant appeared in person to espouse the cruelty and desertion which were in subjective and personal knowledge of the appellant. We propose to provide an opportunity to the appellant to appear herself as witness instead of Attorney.

[14]. Therefore, in view of aforesaid, an opportunity is granted to the appellant to get herself examined before the trial Court in order to substantiate her plea of cruelty and desertion. Since the pleas of cruelty and desertion are the subjective things which were in personal knowledge of the appellant, therefore without meaning anything on merits at this stage, it would be just and proper to remand this case before the trial Court. The trial Court would be obligated to provide reasonable opportunity to the appellant to adduce her evidence by getting herself examined and thereafter trial Court shall proceed to decide the appeal within reasonable time.

[15]. With this observation, the impugned judgment and decree passed by the trial Court stands set aside. The case is remanded to the trial Court for disposal in terms of the above direction. The appellant is directed to appear before the trial Court on 16.05.2016.

(RAJ MOHAN SINGH)
JUDGE

April 04, 2016/*Atik*

(M. JEYAPPAUL)
JUDGE