

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

FAO-M-213 of 2007 (O&M)

Reserved on: 10.8.2017

Date of Decision: August 21, 2017

Amita Joshi

.....Appellant

Vs.

Sandeep Kumar

.....Respondent

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH.

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Present: Mr. A.S. Gill, Advocate for the appellant.

Mr. Malkeet Singh, Advocate for the respondent.

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M.M.S. BEDI, J.

This appeal has been preferred by wife aggrieved by order dated February 3, 2003 passed by District Judge, Jalandhar initially allowing the application under Section 13 B of the Hindu Marriage Act, for short 'the Act' and also dismissing the application filed by the appellant for setting aside the decree passed under Section 13 B of the Act, on the ground that it had been obtained by fraud when she had already led her evidence before the District Judge, by merely entertaining the application under Section 151 CPC holding that the appellant should file appeal before the High Court as per the dictum of Supreme Court in **Balwinder Kaur Vs. Hardeep Singh**,

AIR 1998 SC 764. In view of the said circumstances, the appellant is before this Court to challenge the decree of divorce under Section 13 B of the Act alleging the same to be vitiated being suffering from the vice of fraud. Besides this, the appellant is also challenging the order dated August 16, 2007 by virtue of which District Judge had, in the exercise of power under Section 151 CPC, dismissed the application of the appellant for setting aside the order dated February 3, 2003. The validity of the order dated August 16, 2007 has also been challenged as the said order has caused serious prejudice to the appellant.

Brief facts relevant for the decision of the present appeal are that the marriage of the appellant and respondent was solemnized on December 2, 2001 at Goraya, Tehsil Phagwara, District Jalandhar, as per Hindu rites and rituals. As per applicant, the parties stayed together in the matrimonial home till March 21, 2003. The appellant having been treated adversely, she had also moved an application on March 31, 2003 before the SHO, Police Station Nur Mahal. A petition under Section 12 of the Act was moved by the respondent-husband against the appellant wife. The appellant-wife was proceeded against ex-parte on October 23, 2002 and the matter was fixed for ex-parte evidence of the respondent-husband on January 28, 2003. On the said date, an application was moved for conversion of the said petition into a petition under Section 13 B of the Act for dissolution of marriage by decree of divorce with the mutual consent of the parties, along with an application for waiving the statutory time period of six months for the final settlement of the parties in view of the prolonged matrimonial dispute existing between the parties. The said application was allowed by

judgment and decree of divorce by mutual consent vide order dated February 3, 2003. Copy of the order passed in petition under Section 13 B of the Act has been appended with the appeal as annexure P-1, wherein a mention has been made to the effect that the parties have been living separately for a period of more than one year. The said fact is being disputed by the appellant claiming that she lived in the matrimonial home till March 21, 2003 i.e. even after the decree passed under Section 13 B of the Act.

The appellant moved an application dated March 10, 2004 seeking the setting aside of the order dated February 3, 2003 claiming that the decree had been procured by respondent by playing fraud and by way of misrepresentation, coercion, duress and against the wishes of the appellant. The appellant alleged that the decree dated February 3, 2003 had been obtained by getting the signatures of the appellant in a fraudulent manner. The appellant had been given opportunity to establish her claim of fraud by producing evidence. She appeared as AW2 and submitted her evidence in the shape of evidence. She was cross-examined by Mr. M.K Vijan, Advocate for the respondent on July 27, 2007. Her brother Rakesh Kumar had appeared as AW1. He had deposed in the shape of affidavit. He was cross-examined by counsel for the respondent. PW3 Charanjit Singh was examined-in-chief by his affidavit dated May 28, 2004. He was cross-examined on July 27, 2007. Mela Ram, Ex.-Sarpanch of the Village appeared as PW4 on May 31, 2004 and cross-examined on July 27, 2007. The appellant had been prosecuting her application for setting aside the judgment and decree obtained by fraud under Section 13-B of the Act.

It is apparent from the record that the respondent- husband had filed an application under Section 151 CPC for dismissal of the application of the appellant on the ground that the application was not maintainable in view of Section 28 of the Act in the light of the judgment in **Balwinder Kaur's** case (supra). Vide order dated August 16, 2007, the learned District Judge dismissed the application of the appellant- wife by allowing the application under Section 151 CPC of the respondent holding that the remedy of the appellant was to file an appeal before the High Court against the judgment and decree and not by way of approaching the Court by an application under Section 151 CPC for setting aside the same in the exercise of inherent powers of the Court. The operative part of the judgment passed by Sh.Gurdev Singh, the then District Judge, Jalandhar, reads as follows:-

“8. *Learned counsel for the applicant in support of his arguments cited 1993 (Supplement) Civil Court Cases 308 (Kishan Chand Versus Rajinder Kaur), 2000 (3) Civil Court Cases 92, (Balwinder Singh Versus Karnail Singh). In those cases consent decrees in the civil suits were passed on the basis of the statement made by the parties. It was held therein that appeal against such a decree is not maintainable and the same can be challenged only by review or regular suit and not by regular appeal. The ratio of these rulings cannot be applied to the facts of the present case as this decree was not obtained in a civil suit but was obtained in a petition under Section 13 B of the Act. Section 28 of the Act lays down that all the decrees made by the Court shall subject to the provisions of sub –section 3 be appealable as*

decrees of the Court made in the exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeal ordinarily lie from the decision of the Court given in exercise of its original jurisdiction. This very section came up for consideration before the Hon'ble Supreme Court in Balwinder Kaur Versus Hardip Singh (1998 (1) Apex Court Journal 127). In that case the appellant had come up with the plea that she was made to file petition for divorce in which the respondent proceeded against ex-parte and she was made to obtain the decree of divorce by producing exparte evidence though she never wanted to obtain such a decree. She filed an appeal against that decree alleging that fraud was committed upon her by her husband for filing divorce petition which she never intended to file. The Hon'ble High Court summarily dismissed the appeal and appellant was advised to file a separate suit for setting aside the decree on the ground of fraud. The circumstances revealed that her stand was prima facie probable. It was held by Hon'ble Supreme Court that the High Court was not justified in rejecting the appeal without satisfying itself that the requirement of law had been satisfied. The High Court should not have summarily dismissed the appeal. Order directing the appellant to file a separate suit for setting aside the decree of divorce on the ground of fraud was not held to be sustainable.

9. *From this authoritative ruling of the Hon'ble Supreme Court it is very much clear that an appeal lies against the decree passed under the Act*

including a decree alleged to have been obtained by fraud. The remedy of the applicant was to file an appeal before the Hon'ble High Court against the said judgment and decree. She could have approached this Court with an application under Section 151 CPC for setting aside the same in exercise of the inherent powers of the Court. Those inherent powers under Section 151 CPC can be invoked only when there is no other specific remedy provided under the Act. When specific remedy by way of appeal under Section 28 of the Act has been provided, this application is not maintainable.

10. *Accordingly, the application filed by petitioner No.1 is hereby accepted and the application filed by applicant under Section 151 CPC for setting aside the judgment and decree dated 3.2.2003 is hereby dismissed. However, no order is made as to costs. File be consigned to the record room.*

Pronounced in open Court. Sd/-Gurdev Singh

Dated: 16.8.2007 District Judge, Jalandhar."

A perusal of the above said order indicates that the application of the appellant for setting aside the decree under Section 13 B of the Act on the basis of fraud, coercion and undue influence has been dismissed; after she had spent 4 years in producing evidence by entertaining an application under Section 151 CPC of the respondent-husband by holding that the remedy of the appellant-wife was to file an appeal before the High Court. The appellant in the said circumstances has filed the present appeal under the observations of the District Judge and sought the setting aside of the decree dated February 3, 2003.

Counsel for the respondent Mr. Malkeet Singh has vehemently contended that the District Judge has rightly dismissed the application of the appellant in the exercise of jurisdiction vested in it. He claims that the remedy available to the appellant for filing appeal under Section 28 of the Act had not been availed within a period of limitation and the decree of divorce having become final, the present appeal deserves to be dismissed.

It is pertinent to observe here that the decree of divorce under Section 13 B of the Act was granted on February 3, 2003 by Sh.R.M. Gupta, the then District Judge, Jalandhar. The petition was dated January 28, 2003 and the same had been allowed on February 3, 2003 by entertaining the same by dispensing with the statutory period of six months i.e. without giving a reasonable time of at least six months to the parties to rethink and ponder over their decision to dissolve the marriage by the decree of divorce by mutual consent. The Apex Court in **Anil Kumar Jain Vs. Maya Jain**, (2009) 10 SCC 415 and **Manish Goel Vs. Rohini Goel**, (2010) 4 SCC 393 has specifically clarified that the statutory period of six months under Section 13 B of the Act should not ordinarily be exempted. It is also important to observe here that the application for setting aside the decree under Section 13 B of the Act had been filed by the appellant- wife on April 9, 2003 i.e. within a period of approximately two months i.e. 'before the expiry of six months'. The present case is a glaring example of a prejudice which is likely to be caused to one of the spouses in case the statutory period of six months provided under Section 13 B of the Act is not permitted to lapse. The appellant had raised the objection before the District Judge that since the decree of divorce by mutual consent had been obtained by

fraud, the said decree could be challenged before the same Court where the decree by mutual consent had been obtained. In this context, reliance had been placed on two judgments which have been referred to in para 8 of the judgment dated August 16, 2007 but the learned Judge has observed that the ratio of the rulings would not be applicable to the facts of the case as it is not a case where decree was obtained in civil suit but it had been obtained in a petition under Section 13- B of the Act and Section 28 of the Act which provides that all decrees made by the Court shall be appealable. Surprisingly, relying upon the judgment in **Balwinder Kaur's** case (supra) it was held that appeal would lie against any decree passed under the Hindu Marriage Act including a decree alleged to have been obtained by fraud. It was held by the learned District Judge, Jalandhar that the remedy lies with the appellant to file an appeal against the judgment and decree under Section 13 B of the Act.

We have carefully analyzed the said observations of the learned District Judge in context to the facts and circumstances of the **Balwinder Kaur's** case (supra). In the said case the wife was made to get an ex-parte decree of divorce against her husband while she neither intended to get divorce nor she voluntarily filed divorce petition against her husband by filing a petition of divorce on September 4, 1995. She claimed that a fraud had been played on her by her husband as well as on the Court as she was duped to file a petition for divorce. She had pleaded that a compromise had been effected in Police Station, Rajpura on July 21, 1995 and her husband had withdrawn a petition on February 14, 1996 filed under Section 9 of the Act on July 4, 1995. Her husband had also accepted that he never wanted

divorce. The wife alleged fraud by the husband and filed an appeal under Section 28 of the Act. The High Court had dismissed the appeal under Section 28 of the Act and relegated the parties to the alternative remedy of filing a civil suit. The wife had approached the Supreme Court. The Supreme Court had set aside the order passed by the High Court and had criticized the approach of the High Court stating that the High Court should have seen if the proceedings before the District Judge were in accordance with the procedure prescribed and as per law applicable, as filing a separate suit for setting aside the decree of divorce on the ground of fraud, was otherwise hardly a solution to the case. Ultimately the matter was referred to the original Court of District Judge to try and proceed with the petition in accordance with law. The operative part of the judgment of the Apex Court in **Balwinder Kaur's** case (supra) reads as follows:-

- “15. In the circumstances aforesaid, the High Court should not have summarily dismissed the appeal. By doing so it has also failed to exercise its power of superintendence under Article 227 of the Constitution. The High Court should have been if the proceedings before the District Judge were in accordance with the procedure prescribed and as per the law applicable. To direct the appellant to file a separate suit for setting aside the decree of divorce on the ground of fraud otherwise is hardly a solution to the case.*
- 16. As to the correctness otherwise of the allegations made by the appellant or the stand taken, by the respondent, we do not wish to comment as it might prejudice the case of either of the parties as we are*

considering of remanding matter back to the District Judge for trial of the case afresh.

- 17. Accordingly, the appeal is allowed, the impugned judgment dated September 27, 1996 of the High Court and as well as that of District Judge dated December 4, 1995 are set aside. The matter will go back to the learned District Judge to try and proceed with the petition in accordance with law.*
- 18. A copy of this judgment shall be sent to the District Judge, Patiala immediately and the parties are directed to appear in that court on December 17, 1997.”*

After going through the above said judgment we fail to understand as to how the learned District Judge has arrived at a conclusion in para 9 of his order dated August 16, 2007 that the remedy of the appellant, as per the ratio of the ruling of the said judgment was to file an appeal before the High Court and not by way of application under Section 151 CPC for setting aside the same. The Apex Court in **Balwinder Kaur’s** case (supra) has made a reference to Section 21 of the Act by virtue of which the provisions of CPC have been made applicable to the proceedings in Hindu Marriage Act. In the said judgment, the provisions of appeal under Section 28 of the Act have been compared with the provisions of appeal under Section 96 CPC and observation has been made that rules of the procedure are made to sub-serve the cause of justice and not to frustrate it. The Court had observed in para 13 of the judgment that as the fraud has been alleged by the wife in getting the petition for divorce filed through her whereas she never wanted divorce, High Court was not justified in rejecting the appeal and relegating her to the remedy of filing a separate suit. The learned

District Judge has misconstrued the judgment of the Apex Court and wrongly allowed the application of the respondent as such the order dated August 16, 2007 is apparently illegal and improper which deserves to be set aside.

In **Anita Vs. R. Ram Bilas**, 2003 (1) CCC 284 (AP), a decree under Section 13-B of the Act had been obtained. One of the spouses had challenged the same claiming that the fraud had been played on the Court. It was held that if fraud is played on the party, a separate suit has to be filed but when fraud is played on the Court, then the review petition is maintainable.

The appellant has specifically pleaded that the fraud has been played on the Court as well as on her. Taking into consideration the observations of **Balwinder Kaur's** case (supra), the plea of fraud for seeking review of the order passed under Section 13 B of the Act was to be considered by the District Judge. The learned District Judge has wrongly discarded the case law produced before him in support of the contention that when a consent decree has been obtained by fraud played on the Court, the proper course for the party was to move the Court that had rendered the decision. In this context, the following judgments are relevant:-

- “1. R. Rajanna Vs. S.R. Venkataswami, AIR 2015 SC 706;
2. Horil Vs. Keshav and another, AIR 2012 SC 1262;
3. Santosh Puri Vs. Anil Puri, 2012 (24) RCR (Civil) 294;

4. Jugal Kishore Somani Vs. Raja Ram, 2009 (5) RCR (Civil) 637;
5. Wassan Singh and ors. Vs. Lakha Singh and another, 2005 (2) RCR (Civil) 791;
6. Naron Abubacker Kasam Vs. Shanthilal Babulal Jain, 2010 (3) KHC 208.

The above said judgments have been rendered in context to the compromise decrees by the Civil Courts but the principle of law laid is equally applicable to the proceedings under Hindu Marriage Act and the decree of divorce under Section 13 B of the Act. In **Sarabjit Singh Vs. Gurpal Kaur**, 2013 (3) RCR (C) 125, relying upon **Indian Bank Vs. M/s Satyam Fibers (India) Pvt. Ltd.**, AIR 1996 SC 2592, it was held as follows:-

“Since fraud effects the solemnity, regularity and orderliness of the proceedings of the Court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that court. Similarly, where the court is misled by a party or the Court itself commits a mistake which prejudices a party, the Court has the inherent power to recall its order. The Court has also the inherent power to set aside a sale brought about by fraud practiced upon the Court or to set aside the order recording compromise obtained by fraud.”

We are of the considered opinion that as the District Judge had opted to stop the proceedings after the evidence had already been completed by the appellant in her application for seeking the setting aside of the decree under Section 13-B of the Act on the plea of fraud. It will, therefore, be

prudent and in the interest of justice to relegate the parties to approach the District Judge, Jalandhar for adjudication of the application in accordance with law.

Petition is allowed by setting aside the order dated August 16, 2007 and the parties are relegated to the District Judge, Jalandhar for completion of the adjudication of the application filed by the appellant on April 9, 2003 from the stage when the application under Section 151 CPC was filed by the respondent- husband. The application under Section 151 CPC filed by the respondent to drop the proceedings, is dismissed. Parties are directed to appear before the District Judge, Jalandhar on September 29, 2017 through their counsel for further proceedings in the application with a further direction to the District Judge, Jalandhar to conclude the proceedings within a period of six months after appearance of both the parties.

It is made clear that no opinion is expressed regarding the allegations of fraud raised by the appellant lest it should prejudice the rights of any of the parties during the proceedings.

(M.M.S. BEDI)
JUDGE

August 21, 2017
sanjay

(AUGUSTINE GEORGE MASIH)
JUDGE

Whether speaking/ reasoned:	Yes/ No.
Whether reportable:	Yes/No.