

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO-M-145 of 2015

Date of Decision: December 8th, 2017

Smt. Kulwinder Kaur

...Appellant

Versus

Surinder Singh

...Respondent

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

Present: Ms. Alka Chatrath, Advocate
for the appellant.

Respondent *ex parte*.

AUGUSTINE GEORGE MASIH, J.

Challenge in this appeal is to the order dated 21.03.2011 passed by the District Judge, Amritsar, whereby a petition under Section 13-B of the Hindu Marriage Act, 1955 (hereinafter referred to as 'H.M. Act'), was allowed dissolving the marriage between appellant-Kulwinder Kaur (wife) with the respondent-Surinder Singh (husband) and the order dated 11.12.2014 dismissing an application filed by the appellant-wife for recall of the judgment and decree dated 21.03.2011 on the ground that it has been obtained by the respondent-husband by playing fraud upon the appellant-wife and that the consent for divorce and statements in Court had been obtained from her under duress and threat to eliminate her and their nine months' old son.

2. The admitted facts between the parties are that the appellant-wife belongs to village Aliwal, Tehsil Batala, District Gurdaspur was married to respondent-husband, resident of village Bhoma, Tehsil and District Amritsar, as per Sikh rites at Batala, on

02.03.2008. Dowry articles along with jewellery and clothes were given to the respondent and his relatives. The appellant along with respondent, his mother and widowed sister resided in Guru Arjan Dev Nagar, Putlighar, Amritsar, in a rented accommodation. Out of the wedlock, a son namely Sartaj Singh was born on 10.12.2009 at Beri Hospital, Amritsar. It is thereafter, that a petition for divorce by mutual consent was filed under Section 13-B of the H.M. Act on 17.09.2010. Statement of the parties was recorded in first motion on 18.09.2010. It was stated in the petition that the parties have been residing separately since June 2009, i.e. for a period of more than one year preceding the institution of the petition. Parties again appeared before the Court on 21.03.2011 when their respective statement was recorded in second motion leading to the passing of the judgment and decree dated 21.03.2011 of divorce.

3. An application under Section 151 CPC for setting aside and recall the judgment and decree dated 21.03.2011 was filed by the appellant-wife, who was petitioner No.2 before the trial Court, with the pleadings that the petition under Section 13-B of the H.M. Act had been filed with the averments which were well calculated fraud of respondent-husband, his mother-Sukhjit Kaur and widowed sister-Babli played upon her. As a matter of fact, she was never interested in seeking divorce and was put under threat and was mercilessly beaten, tortured, humiliated and insulted by the respondent, mother-in-law and sister-in-law, even her minor son was snatched and a threat was extended to eliminate him in case the appellant uttered anything before the Court in Amritsar. She was not even permitted to breastfeed him. She was directed to remain quite and

simply affix her signatures wherever directed, failing which dire consequences were to follow. She was living a life under constant fear and threat. This situation had led to the appellant losing her self-confidence, especially when she and her minor son were at the mercy of the respondent, his mother and widowed sister and living a life of a destitute.

4. She, under these circumstances, followed the dictates of the respondent. She was made to sign on vakalatnama and her signatures were also taken on 2/3 papers wherever pointed. On 18.09.2010, she was taken to the District Court, Amritsar, but prior thereto, her minor son Sartaj Singh was snatched from her and after she had given her statement and put her signatures as and when and where pointed out, the minor son was restored to her on reaching home. She was thereafter taken on 21.03.2011 to the Court where once again she was made to go through the earlier process, exercise and ritual as carried out on 18.09.2010. On reaching back home, the minor child was again given back to her. She continued to stay in the matrimonial house at Guru Arjan Dev Nagar, Putligarh, Amritsar, with the respondent and her above-mentioned two in-laws.

5. On the night intervening 26/27.04.2011, respondent-husband, his mother and widowed sister made her sit in the car at around 2:00 AM on the pretext that a message has been received from the brother of the appellant on telephone to reach Aliwal, her native village, immediately. En route, she was assaulted and her minor son forcibly taken from her. At around 3:00 AM, she was pushed out of the car near her parental home. She caught hold of the handle of the car door and was dragged as the car started moving. As she was clinging to the handle, she was hit by the

respondent-husband on the wrist because of which her grip got loosened and the car sped away. She received injuries on the wrist and other parts of the body. Her parents took her to the Government Civil Hospital, Batala in the morning and got her admitted. She remained in the hospital from 27.04.2011 upto 18.05.2011 and on an intimation sent to the police by the doctor, FIR No.34 dated 27.04.2011 was registered at Police Station Ghaniake Bangar. Neither she nor her paternal relations were aware about any decree of divorce dated 21.03.2011 having been passed under Section 13-B of the H.M. Act. It is during investigation of FIR that the police was informed by her in-laws about the decree of divorce and then she came to know about it. An application was immediately filed for setting aside the said judgment and decree after obtaining the copies of the record of the case, on the ground that the fraud has not only been played upon her but also on the Court as there is a wrong averment made in the petition under Section 13-B of the H.M. Act that the appellant and the respondent had been living separately since June 2009, especially in the light of the fact that the delivery of the minor son had taken place on 10.12.2009 at Beri Hospital, Amritsar, while she was residing in her matrimonial house and that her consent for divorce was obtained by fraud, pressure, threat and coercion.

6. In the reply filed by the respondent-husband to the application for setting aside and recall of the judgment and decree dated 21.03.2011, a preliminary objection has been raised about the maintainability of the application. It has been asserted that the petition for divorce under Section 13-B of the H.M. Act was jointly filed and during both the motions, the

appellant and the respondent had admitted the contents of the said petition. The Court had enquired from both the parties where it was reiterated and accepted by the parties. It was also admitted in Court that the minor son Sartaj Singh will remain with the respondent-husband and false allegations have been levelled of fraud, pressure, threat or coercion, rather it is a conspiracy being hatched by the appellant along with her parents and other family members to extort money, especially by getting a false and frivolous FIR registered at her behest. On merits, it has been asserted that the petition was presented by Ms. Rashmi Sodhi, Advocate, and the appellant-wife was made to understand the intent and purpose for which the petition was being filed. As a matter of fact, she herself had admitted in Court about she having received her entire stridhan and that she did not want anything from the respondent. Even the custody of the minor child was given to the respondent as agreed. Allegations about her being thrown out of her matrimonial house and left at her parental home during the early hours of 27.04.2011 have been specifically denied by asserting that it is a mode of extorting money from the respondent. Prayer was thus made for dismissal of the application.

7. Replication was filed and on the basis of the pleadings of the parties, following issues were framed on 16.03.2012:-

1. Whether there are sufficient grounds for setting aside and recalling of judgment and decree dated 21.03.2011 passed by this court, for the reasons mentioned in the application? OPA.
2. Whether Kulwiinder Kaur, is entitled to the custody of Sartaj Singh, minor son of the parties? OPA.

3. Whether the application for setting aside of impugned judgment and decree is not maintainable? OPA.

4. Relief.

8. On the basis of the evidence which has been led by the parties, the Court decided issue No.3 with regard to the maintainability of the application by holding it in favour of the appellant i.e. the application was maintainable. As regards issue No.2, it was stated that the issue regarding custody of the minor child cannot be decided on an application for recall of the decree of divorce granted under Section 13-B of the H.M. Act.

9. Issue No.1 for setting aside and recall of the judgment and decree dated 21.03.2011 was answered in favour of the respondent-husband and against the appellant resulting in the dismissal of the application. Thus, the present appeal challenging the judgment and decree dated 21.03.2011 and the order dated 11.12.2014.

10. Upon notice having been issued, respondent was duly served as per law by publication after other efforts to serve the respondent failed. Respondent-husband chose not to appear before this Court and, therefore, was proceeded against *ex parte* on 15.01.2016. Thereafter the case has been adjourned on various dates and during the interregnum also, none has appeared on behalf of the respondent. In these circumstances, *ex parte* arguments were heard.

11. It is the contention of the learned counsel for the appellant that keeping in view the facts and circumstances and the evidence which has been led by the appellant, it is apparent that the consent which is sought to have been given by the appellant was neither voluntary nor was it out of a

sweet will or desire, rather she was coerced, pressurised, threatened and so mentally and physically weakened that she was not in a position to take a decision on her own and was in a situation where not only was she herself but even her only minor son Sartaj Singh was under threat of being eliminated at the hands of respondent. In support of this contention, she has referred to the application which has been filed before the Court and her evidence in the form of affidavit Exhibit AW6/A tendered by her when she appeared as AW-6. Reference has also been made to the statement of her brother Palwinder Singh, AW-5. As regards the incidence during the intervening night of 26/27.04.2011, reliance has been placed on the statement of HC Sukhwinder Singh, AW-4, copy of the FIR No.34 dated 27.04.2011 (Exhibit A5) registered under Section 323, 324, 325 and 326 of the Indian Penal Code. Reference has also been made to the statement of Satwant Singh AW-3, Computer Operator, Civil Hospital, Batala, who has proved the bed head ticket Exhibit A-4, wherein he has stated that she remained admitted in hospital from 27.04.2011 upto 18.05.2011.

12. As regards the factual error in the petition under Section 13-B of the H.M. Act, wherein it was mentioned that the parties have been residing separately since June 2009, counsel has placed reliance upon the admission card of the appellant in Beri Hospital, Amritsar, where she was got admitted by her husband wherein the address mentioned was of the matrimonial house. In support thereof, she has relied upon the statement of AW-1 Pardeep Kumar Devgan, Supervisor, Beri Maternity Centre. Exhibit A-1 is also proved, according to which an intimation was sent by the hospital to the Municipal Corporation, Amritsar, for registration of the

birth of the child of the parties. Similarly, Sandeep Singh AW-2, Clerk, office of the Registrar (Births and Deaths), Municipal Corporation, Amritsar, has proved the birth entry Exhibit A-3. Reference has also been made to the reply filed to the application by the respondent-husband, wherein he had admitted that the appellant had been admitted in the hospital by him and he had given the address as 4321, Shri Guru Arjan Dev Nagar, Putligarh, Amritsar, which is his residential address. This fact has also been admitted in cross-examination by the respondent-husband and has further admitted that the documents in Beri Hospital, Amritsar, bears his signatures. She asserts that the respondent has not produced any other evidence except for himself as RW-1 and counsel Shri Satbir Singh Sandhu, Advocate, RW-2. Reference has also been made to the cross-examination of the counsel RW-2, wherein said counsel, had admitted that Ms. Rashmi Sodhi had not signed any document in Court when statement of both the petitioners was recorded in Court at second motion and the petition was allowed. Counsel for the appellant has also referred to the certified copy of judgment and decree dated 21.03.2011 where attendance of only Shri Satbir Singh Sandhu, Advocate, has been marked and not of Ms. Rashmi Sodhi, Advocate to assert that she was never engaged as a counsel by the appellant. Her further assertion is that not only a fraud has been played upon the appellant but also on the Court and, therefore, the order dated 11.12.2014 and judgment and decree dated 21.03.2011 deserve to be set aside by allowing the present appeal.

13. On considering the pleadings, the evidence on record as also the submissions made by counsel for the appellant, we are of the considered

view that the present appeal deserves to be allowed.

14. Fraud, whether it is played upon a party or on a Court, strikes the very root of justice and, therefore, cannot be made the foundation of any relief which can be claimed or granted by the Court. In case an order or decree has been obtained by playing fraud on the party or the Court, the said order or decree cannot sustain and deserves to be set aside. Present is such a case where, a helpless wife and a mother of an infant, in a pitiable condition, has been forced to toe the line and dictates of a dominant and powerful husband.

15. The Hon'ble Supreme Court in the case of *S.P. Chengalvaraya Naidu (Dead) by LRs. Versus Jagannath (Dead) by LRs. and others* 1994 (1) SCC 1 has held that the Courts of law are meant for imparting justice between the parties. One who approaches the Court, must come with clean hands but a party whose case is based on falsehood has no right to approach the Court and can be summarily thrown out at any stage of the litigation. A judgment or decree obtained by playing fraud on the Court is a nullity and *non est* in the eyes of law. Such a judgment or decree whether it be of the first Court or by the highest Court has to be treated nullity by every Court, whether superior or inferior and the said judgment and decree can be challenged in any Court even in collateral proceedings. In *Indian Bank Versus Satyam Fibres (India) Pvt. Ltd.* (1996) 5 Supreme Court Cases 550, it has been held that when a fraud is committed before or on the Court, the same amounts to abuse of process of Court and the Court can exercise its powers of review if a petition is filed alleging a fraud having been committed before or on the Court. The Court is further obliged to decide the

question regarding fraud by recording evidence and in appropriate cases, it can recall its decree/order as it would amount to abuse of process of Court. It has further been held by the Supreme Court in *United India Insurance Co. Ltd. Versus Rajendra Singh (2000) 3 Supreme Court Cases 581* that the Court or Tribunal, in exercise of its inherent powers can recall an order or decree secured by fraud or misrepresentation if such allegations come to its notice and the Court is convinced that it had been obtained by practising fraud or misrepresentation.

16. Before moving on to the facts of this case, it needs to be mentioned that one of the requirements under Section 13-B of the H.M. Act for filing a petition for divorce by mutual consent, is that the parties should be residing separately for at least a period of one year preceding the institution of the petition. When a petition under Section 13-B of the H.M. Act stands instituted, what is expected and required of the Court, as per the provisions of Section 13-B read with Section 23 of the H.M. Act is to ascertain as to whether one year has actually passed by since the parties have been residing separately and have not been cohabitating. The Court, therefore, is expected and required to satisfy itself that the said assertion was correct and there is no connivance or collusion and the consent has not been obtained by force, fraud or undue influence.

17. Section 23 of the H.M. Act when read as a whole, in the light of the language used therein, relates to the power and duty of the Court when it comes to the granting or denying the relief recognised under the Act. It puts fetters upon the relief which can be granted under the H.M. Act. A decree can be denied to a party who, in any way, intends/takes advantage

of his or her own wrong or disability for the purpose of claiming relief. The proceedings under the H.M. Act have thus been put on a higher pedestal as compared to ordinary suits as regards the standard of proof required for establishing the ground for relief which should be beyond reasonable doubt and that too to the satisfaction of the Court. This is despite the fact whether any defence has been projected or not by the other side. Thus, it is not only a responsibility but a duty cast on the Court to satisfy itself that the requirements of law in the Act are fully met and the safeguards provided in Section 23 of the H.M. Act duly observed and taken care of prior to passing of the decree. The terms on which emphasise has been laid upon are connivance, condonation, collusion, unnecessary and improper delay which, when found present in a case, are absolute bar to the grant of relief wherever they apply to a particular ground on which the relief is being sought. This means that even if a party is able to establish the ground for granting relief, the said relief can be denied in a case where the Court is satisfied that the said party is taking advantage in any manner of his or her own wrong or disability and/or has connived, colluded, condoned the act, cruelty complained of or improperly delayed or had been accessory to in any manner for the purpose of getting relief. The basic principle of justice envisaged in this Section is that a wrongdoer should not be permitted to take advantage of his or her own wrong or disability while seeking relief at the hands of the Courts in any matrimonial proceedings. The touchstone, thus, for clearing the requirement of Section 23 of the H.M. Act is the satisfaction of the Court with regard to fulfilling the requirement of the parameters as laid down in this Section and no straightjacket rule of thumb

can be laid down for the said purpose as it would depend upon the facts, evidence and circumstances of each case.

18. Now adverting to the present case, the marriage of the parties was solemnised on 02.03.2008 and they cohabitated in their matrimonial house. As claimed in the petition, they had been living separately since June, 2009. It is not in dispute that a male child named Sartaj Singh was born on 10.12.2009. It is an admitted fact that the delivery of the said child took place in Beri Maternity Hospital, Putlighar, Amritsar and respondent-husband was the person who had got her admitted there and had given the residential address of the patient i.e. appellant-Kulwinder Kaur as 4321, Shri Guru Arjan Dev Nagar, Putlighar, Amritsar, which is the matrimonial house where the appellant and respondent along with his mother and widowed sister were residing since the marriage of the parties. These facts are admitted by the respondent in his cross-examination also when he appeared as RW-1 and has further admitted his signatures on the form-cum-admission card of the hospital. No evidence has been produced by the respondent-husband to contradict the assertion and the evidence which has been brought on record by the appellant in the form of statement of AW-1 Pardeep Kumar Devgan, Supervisor, Beri Maternity Hospital, AW-2 Sandeep Singh, Clerk, office of the Municipal Corporation, Amritsar, who has proved records of the hospital as well as the intimation which has been sent by the hospital to the Municipal Corporation, Amritsar, and the entry of birth of the child of the parties in the Municipal records of Amritsar respectively. It has been categorically admitted by the respondent in his cross-examination that he had got the appellant admitted in hospital for

delivery of their only child Sartaj Singh. It has nowhere come on record nor is it stated by the husband that the wife had either come herself or that he had brought her to the hospital for delivery from her paternal house from village Aliwal in Batala Tehsil. This shows that the parties were living together at the time of delivery of the child.

19. Assuming the assertion of the respondent is to be accepted that the appellant had been residing separately since June 2009 in her parental house in Batala, which is at a distance of approximately 75 kilometres from Amritsar, there appears to be no justification or occasion for her to have gone for delivery of her child, especially when there was no complication, to Beri Hospital situated in Putlighar, Amritsar, which is adjacent to and in the same area where her husband-respondent was residing.

20. It requires to be mentioned here that there is a categorical statement given by the appellant while appearing as AW-6, wherein she has stated that she had been residing in her matrimonial house till 26/27.04.2011 night. In her cross-examination, not even a suggestion to the contrary has been put to her which indicates that the respondent has not disputed her statement which she had given in evidence about they being living together as husband and wife in the matrimonial house.

21. Now moving on to the fact of registration of FIR No.34 dated 27.04.2011 registered at Police Station Ghaniake Bangar, under Sections 323, 324, 325 and 326 of the Indian Penal Code, Exhibit A-5 which has been duly proved by Head Constable Sukhwinder Singh who appeared as AW-5. AW-3 Satwant Singh, Computer Operator, Civil Hospital, Batala, has proved the bed head ticket of Kulwinder Kaur, Exhibit A-4 and has also

stated that she remained admitted in Government hospital from 27.04.2011 upto 18.05.2011. This does throw light upon the fact that the appellant had received various injuries because of which she remained admitted in hospital for more than 20 days.

22. It would not be out of way to mention here that the FIR was registered on the basis of the intimation given to the police by the hospital. It has been asserted by the appellant that in the intervening night of 26/27.04.2011. she was made to sit in the car at around 2:00 AM by the respondent, his mother and widowed sister, by stating that they had received a message from her brother that they must reach her parental village Aliawal immediately. They reached the village at 3:00 AM when her son was snatched and she was thrown outside her parental house from the moving car but she clung to the handle of the car door. Since the car was moving, she was dragged because of which she suffered injuries on her body and legs. The respondent-husband gave her a blow on the left wrist because of which, the grip got loosen and she fell down from the car. From the evidence referred to above, as led by the appellant-wife, one thing is clear that the appellant had received injuries in the night intervening 26/27.04.2011 as she was admitted in the hospital on 27.04.2011 morning as per the hospital records and the statements of AW-3 Satwant Singh and other witnesses. This further throws light on the fact that both the parties had been residing together even after passing of the decree dated 21.03.2011 under Section 13-B of the H.M. Act.

23. Although the stand of the respondent-husband is that they had been actually residing separately since June 2009 and that they had never

cohabitated thereafter but the evidence, as discussed above, clearly brings out that the parties indeed had been living together in Amritsar till 26/27.04.2011. Thus it stands established that on the day when the petition was presented i.e. 18.09.2010 and the statements on first motion were recorded, one year had not elapsed since they were living separately, rather even on the second motion stage i.e. 21.03.2011 when the statements were recorded, they were residing together in the matrimonial house. The mandate under Section 13-B of the H.M. Act having not been fulfilled, the judgment and decree dated 21.03.2011 cannot sustain and deserves to be set aside.

24. Moving on to the assertion of the appellant that the consent for divorce under Section 13-B of the H.M. Act was neither voluntary nor out of her free will and desire, rather the same was a result of coercion, undue influence, threat and pressure exerted on her, this ground also appears to be correct. It is not in dispute that the parties, after the marriage, had been residing together as husband and wife in the matrimonial house in Amritsar and that the minor child Sartaj Singh was born in Amritsar. Therefore, it is apparent that the appellant had been residing with the respondent and it has also come in evidence that while she was doing her matriculation, she was married on 02.03.2008 to the respondent. Nothing has come on record to indicate that the appellant continued her studies or had any training or obtained any professional qualification. This indicates that she was not well educated and had no professional qualification. She, therefore, was at the mercy of the husband. The allegations, therefore, as made in the petition with regard to the torture, snatching away of the minor child and not even

permitting her to breastfeed her infant child leading to the ill health of the appellant putting her under shock, mental stress and strain leading to depression and complete loss of self-confidence with the apprehension of losing her son and she herself being eliminated because of the threats of the husband, cannot be ruled out especially with three hostile people around her in the house i.e. the respondent-husband, his mother and widowed sister as against a young girl who was a matriculate only. She, under these circumstances, had no option but to follow the dictates of her husband-respondent, who made her sign on certain papers and power of attorney. In these circumstances and the situation in which she was, there is every possibility that she would not have spoken out before the Court except for what she was made to speak because of fear of losing her child and even her own life. This apprehension of the appellant-wife culminated into truth as is apparent from the whole episode which followed i.e. she was thrown at the gate of her parental house on the night intervening 26/27.04.2011 after snatching her son. The statements, therefore, given by her in the Court in the proceedings under Section 13-B of the H.M. Act, cannot be said to be voluntary and thus, in these circumstances, the judgment and decree dated 21.03.2011 cannot hold good.

25. We are of the considered opinion that the trial Court failed to exercise its powers and to perform its statutory duty as mandated under Section 13-B and Section 23 of the H.M. Act despite the facts and circumstances as stated above having been brought to its notice and knowledge. As per the findings recorded above, this Court is satisfied that the mandate and requirement of the statute as laid down in Section 13-B and

Section 23 of H.M. Act have not been fulfilled and thus the relief claimed could not have been granted by the trial Court. Further there can be no doubt that it is a clear case where fraud has been played upon the Court by the parties and, therefore, on this ground also, the judgment and decree dated 21.03.2011 cannot sustain.

26. In view of the above, the present appeal is allowed.

27. Impugned order dated 11.12.2014 passed by the District Judge, Amritsar, dismissing the application under Section 151 CPC filed by the appellant for setting aside and recall of the judgment and decree dated 21.03.2011, is hereby set aside.

28. The application of the appellant is allowed. The judgment and decree dated 21.03.2011 passed by the District Judge, Amritsar, are hereby set aside and the petition under Section 13-B of the H.M. Act stands dismissed.

(M.M.S. BEDI)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

December 8th, 2017

Puneet

Whether speaking/reasoned: Yes/No

Whether Reportable: Yes/No