

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

(214)

FAO-M-287-2007

Date of Decision: August 16, 2018.

Sinder Kaur

.... Appellant

Versus

Surinder Singh

..... Respondent

**CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL**

Present: Mr. Ashish Grover, Advocate, for the appellant.

None for the respondent.

M.M.S. BEDI, J (ORAL)

Appellant Sinder Kaur wife of respondent Surinder Singh, has preferred this appeal against the judgment and decree dated 25.09.2007 allowing petition under Section 13 of the Hindu Marriage Act filed by the respondent-husband and granting decree of divorce to the respondent-husband on the ground of desertion only.

It is pertinent to observe here that the respondent-husband had obtained an ex parte decree of divorce on 19.10.2001 from the Court of Shri D.S. Sheoran, Additional District Judge, Jagadhari. The appellant-wife filed an application under Order 9 Rule 13 CPC as a result of which ex parte decree of divorce dated 19.10.2001 was set aside and the divorce petition of the respondent-husband was ordered to be considered after enabling the appellant to file written statement.

The original claim of the respondent in his petition under Section 13 of the Hindu Marriage Act was that the parties had married on

12.04.1989 at Ludhiana. Thereafter, a son was born on 30.12.1990 at Yamunanagar. The appellant-wife allegedly, on 30.09.1991, had gone to Ludhiana along with her brother on the pretext of seeing her ailing mother but she did not return despite repeated telephone calls. Thereafter, the appellant-wife had allegedly written a letter dated 18.04.1992 that she had severed all the ties with the respondent and did not want to live with him any more and had asked for her belongings. A panchayat was allegedly convened on 05.02.1994. Thereafter, the appellant-wife started living with the respondent in his house and a female child was born on 02.01.1995. Another female child was born on 04.09.1996. The appellant-wife, allegedly, left the house of the respondent on 15.06.1997 in his absence and took away all the jewelery. The respondent-husband leveled allegations that the appellant-wife was staying in the house of one Mohinder Singh at Bhatia Nagar, Yamunanagar. The appellant along with wife of Mohinder Singh had come to the house of the respondent and took one iron box containing clothes and other valuable articles and left for Bikaner on 16.06.1997 without knowledge and consent of the respondent.

When the appellant was given opportunity to file written statement after setting aside of the ex parte judgment and decree of divorce, as mentioned hereinabove, she has taken up a plea that she had been mercilessly beaten and turned out of the matrimonial home on 30.09.1991. She denied all the allegations.

The trial Court framed the following issues:-

“1. Whether the respondent has treated the petitioner with cruelty on the grounds alleged in the petition, if so, to what effect? OPP.

2. *Whether the respondent has deserted the petitioner since 16.06.1997 without any sufficient and reasonable cause, if so, to what effect? OPP.*
3. *Whether the petition is not maintainable? OPR.*
4. *Whether the petitioner has no come to the Court with clean hands? OPR.*
5. *Relief."*

The respondent appeared as PW-1 and examined Inder Raj Kapoor as PW-2, Gurjeet Singh as PW-3 and Balwant Singh as PW-4 whereas the appellant herself appeared as RW-4. Besides this, she examined her father Acchhar Singh as RW-1, Sohan Singh as RW-2 and Gorakh Nath as RW-3.

On appreciation of evidence, the lower Court gave finding on issue No.1 against the respondent holding that he had not been dealt with cruelty by the appellant. However, on issue No.2, the lower Court held that the appellant had deserted the respondent-husband.

Aggrieved by the findings of the lower Court, the appellant-wife has preferred this appeal.

It is not out of place to observe here that the appeal was filed in the year 2007. Thereafter, the respondent had been served and appearing before this Court through Mr. Robin Dutt, Advocate. The appeal was admitted on 24.07.2009. A sum of Rs.2500/- per month was assessed as maintenance pendente lite. The respondent had been appearing before the Permanent Lok Adalat when an attempt for reconciliation was made. Thereafter, the respondent opted to absent himself as such he was proceeded against *ex parte* on 05.08.2016. The lower Court record was requisitioned on 24.10.2016. The lower Court record was received on 16.03.2017.

Counsel for the appellant had sought time to inspect the record. Though the respondent had engaged a counsel but no attempt was made to put in appearance. On 29.08.2017, in the interest of justice, we deemed it appropriate to issue a notice by registered post as well as by ordinary process to the respondent to put in appearance before this Court and clear the entire arrears of maintenance pendente lite with effect from 24.07.2009. Court notices were sent by registered post. The respondent had put in appearance before this Court on 30.10.2017. He was asked to clear the arrears of maintenance and was given an opportunity to engage a counsel to defend himself. He was again directed to appear on 01.12.2017 along with the arrears of maintenance pendente lite. On 01.12.2017, the respondent did not appear. Case was taken up on 30.01.2018 when he again opted not to appear. Case was adjourned to 23.03.2018 to clear the entire arrears. Again he opted to absent himself, as a result of which we were constrained to strike off his defence in the appeal and fix the case for final disposal.

Case has been taken up for final disposal today.

We have gone through the judgment of the lower Court pertaining to the finding on issue No.2.

Counsel for the appellant, in the light of judgment in **Rajinder Kaur Vs. Kuldeep Singh, 2009 (2) R.C.R. (Civil) 114**, submits that the appeal deserves to be allowed merely on the ground that the arrears of maintenance have not been paid by the respondent.

We express a doubt regarding the proposition of law that non-payment of the arrears of maintenance will *ipso facto* result in allowing of the appeal without considering the merits especially when the respondent

has been proceeded against *ex parte*.

Without expression of any opinion regarding the correctness of the desertion in the said judgment, we are of the opinion that no absolute law has been laid down in the said judgment by the Single Bench.

In the interest of justice, we have carefully gone through the record which has been received and perused the statement of the appellant made in the Court while appearing as a witness as RW-4. In the written statement, the appellant-wife had given the reasons for non-joining the company of the respondent. She stated that she had been harassed on account of family members of the respondent demanding dowry besides a car. She has stated in her statement that she was ready to live with the respondent as his wife and wanted to serve her children who wanted to stay with the respondent.

The lower Court, while deciding issue No.2, seems to have ignored the legal proposition before a decree of divorce granted on the basis of desertion. The actual factum of desertion for a period of more than two years is required to be seen taking into consideration the intention to desert. The most important ingredient i.e. animus deserendi has not been established, in the present case as the evidence produced by the appellant indicates that panchayats were convened and efforts were made for bringing about cohabitation between the parties.

Counsel for the appellant has submitted that the appellant-wife is ready to join the company of the respondent and never had an intention to desert her husband and other family members.

In view of said circumstances, the judgment of the lower Court on issue No.2, deserves to be set aside and decree of divorce granted to the respondent also deserves to be struck down on merits as well as for the reasons of respondent having not paid the arrears of maintenance. He does not have any right to contest the appeal, his defence in the appeal having been struck off.

In view of said circumstances, the appeal is allowed and judgment and decree dated 25.09.2007 passed by Additional District Judge, Yamunanagar, is hereby set aside. Finding of the lower Court on issue No.2 is reversed. Decree of divorce granted to the respondent nullifying the marriage on the ground of desertion is set aside henceforth.

Decree sheet be drawn accordingly.

(M.M.S. BEDI)
JUDGE

August 16, 2018
harsha

(ANUPINDER SINGH GREWAL)
JUDGE

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