

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

688

FAO-M-193 of 2012 (O&M)

Date of Decision: 29.10.2018

BALWINDER KUMAR THAPA

....Appellant.

Vs.

USHA KUMARI THAPA

.... Respondent.

**CORAM:- HON'BLE MR. JUSTICE RAKESH KUMAR JAIN
HON'BLE MR. JUSTICE ANUPINDER SINGH GREWAL**

Present: Mr. Gurnam Singh, Advocate
for the appellant.

Ms. Madhu Dayal, Advocate
for the respondent.

ANUPINDER SINGH GREWAL, J.

This appeal is directed against the judgment and decree dated 16.4.2012 whereby the petition preferred by the appellant husband under Section 13 (i), (i-a) & (i-b) of the Hindu Marriage Act, 1955 (hereinafter referred to as 'the Act') read with Marriage Laws (Amendment) Act, 1976 for dissolution of marriage on the grounds of cruelty and desertion, was dismissed.

It was the case of the appellant-husband that he had married the respondent at Chandigarh on 3.3.1990 as per Hindu rites without any exchange of dowry. The parties had lived and cohabited after marriage at Chandigarh. Two children namely Kamal and Samridi were born out of the wedlock. They had been studying and residing under one roof with the respondent-wife while the appellant was residing in a separate room in the same house. The appellant was working in PGI as Senior X-

Ray Technician while the respondent was also working in PGI as Staff Nurse. However, the respondent had, later, gone to United Kingdom and the appellant had joined her company and lived there for about 2-3 years. Thereafter, the parties came back and joined their duty with their respective departments. The respondent is stated to have changed her behaviour on her return from U.K. although the appellant was always treating respondent with love and care and had been handing over his salary to her which she had deposited in her bank account. In August, 2006, the respondent is alleged to have defamed the appellant in the presence of his close friends and relatives and had said that she did not want to live with him and wanted to settle abroad to which the appellant objected. The appellant had called the respectables and the matter was compromised but the respondent was unwilling to live as his wife. It was also stated that after lapse of two months, the respondent again misbehaved with the appellant as she wanted to go abroad along with her children but on the refusal of the appellant, she threatened to involve him in criminal case. A criminal case was lodged against the appellant and after undergoing protracted trial, he was acquitted. Another case under Section 107 and 151 Cr.P.C., which had been initiated by the respondent, was decided in favour of the appellant. They had been sleeping under separate rooms since the year 2008 and the respondent left his company and when the appellant tried to contact her, she started abusing him. The appellant had earlier filed a similar petition seeking divorce in the year 2008, which was withdrawn by him on 30.07.2008 after the respondent had put in appearance in Court and apologised. However, the respondent is stated to have again defamed the appellant

and left his company and since 25.8.2008, the parties are residing separately.

The notice of the petition was issued to the respondent. Her sister Asha had appeared before the Court on 3.10.2011 and stated that the respondent had gone abroad. Thereafter, she was ordered to be served through substituted service but nobody put in appearance on her behalf and she was proceeded against *ex parte*.

Ex parte evidence was led by the appellant and he himself appeared as PW-1, while his son Kamal Thapa appeared as PW-2 and one Ram Kumar had appeared as PW-3 and thereafter *ex parte* was closed.

The trial Court, by the impugned judgement, arrived at the conclusion that the appellant had not been able to make out a case for grant of decree of divorce on the basis of cruelty and desertion.

Learned counsel for the appellant has contended that the appellant had been treated in a cruel manner by the respondent as she had lodged several criminal cases against him and had also deserted him without any cause. The trial Court erred in dismissing his petition. He also contended that the parties are now residing separately since August, 2008 and there being no chance of reconciliation, the marriage needs to be dissolved. He has relied upon the judgments of the Supreme Court in the cases of **Sanat Kumar Agarwal Vs. Nandini Agarwal, 1990 (1) SCC 475**, **Geeta Jagdish Mangtani Vs. Jagdish Mangtani (2005) 8 SCC 177**, **Adhyaatmam Bhaamini Vs. Jagdish Ambalal Shah (1997) 9 SCC 471** and Division Bench of this Court in case of **Gurnam Singh Vs. Satwant Kaur 2007 AIR (Punjab) 79**.

On the other hand, learned counsel for the respondent has contended that it was the conduct of the appellant in treating the respondent in a cruel manner, which compelled her to leave his company and he cannot derive any benefit therefrom. In support of her contention, she has relied upon the judgments of the Supreme Court in **Chetan Dass Vs. Kamla Devi (2001) 4 SCC 250**, **Ravi Kumar Vs. Julmi Devi (2010) 4 SCC 476**, **Neelam Kumar Vs. Daya Rani (2010) 13 SCC 298** and **Gurbux Singh Vs. Harminder Kaur (2010) 14 SCC 301**.

We have heard learned counsel for the parties and perused the record.

It is apparent that FIR No.339 under Sections 323, 325 IPC was registered at Sector 39, Chandigarh on 1.9.2007 by the respondent against appellant/husband alleging therein that she had been beaten up by him on a trivial issue. She had been abused and given slaps and fist blows by the appellant due to which, she had suffered an injury on her lower jaw and other parts of the body. To escape from the clutches of the appellant, she locked herself inside a bathroom and later went to her sister's house and narrated the occurrence to her and the complaint was lodged. The appellant had been acquitted as the respondent did not turn up to record her statement in Court.

Learned counsel for the respondent has contended that it was only because the respondent did not want to harm the appellant that she did not appear in the Court as her deposition in Court would have led to the conviction of the appellant in the wake of the medical evidence on record.

Furthermore, the allegations leveled by the appellant that the respondent had misbehaved and defamed him appear to be vague and

nebulous. There is absence of evidence with regard to the nature of the language and the words uttered by the respondent. PW-3, who is a colleague of the appellant working in PGI, had deposed regarding behavior of the respondent but such oral evidence by itself, would not be sufficient to arrive at the conclusion that the appellant was treated with cruelty by the respondent, especially when this evidence itself is quite vague.

The judgments cited by the counsel for the appellant are distinguishable on facts from the instant case. In the case of **Sanat Kumar Aggarwal Vs. Nandini Aggarwal (supra)**, the wife had left the matrimonial home without any justifiable ground and the cause of desertion was attributable to a custom known as 'Gurawat' (Salta-Palta) wherein brothers and sisters of one family are married to brothers and sisters of another family. It was the failure of a previous marriage of their relatives which had led to the differences to the extent that it was not possible for them to live together and it was in such circumstances that decree of divorce on the ground of desertion had been granted.

In the case of **Geeta Jagdish Mangtani Vs. Jagdish Mangtani (supra)**, the wife had left her matrimonial home as she was posted as a Government School Teacher at another place and had not made any effort to visit her husband's place even during long summer vacation. It was held that her conduct in abandoning the marriage and willful neglect of husband amounted to desertion entitling her husband to a decree of divorce.

In the case of **Adhyaatmam Bhaamini Vs. Jagdish Ambalal Shah (supra)**, the husband had been granted *ex parte* decree of divorce by the trial Court on the ground of cruelty and

desertion. The wife had challenged *ex parte* proceedings and sought remand of the case to family Court for adjudication on merits. It was held that there is no reason to disagree with the view of the High Court that she had deliberately remained absent to protract the proceedings. The Supreme Court did not interfere with the findings of the trial Court and the High Court but enhanced alimony which had been fixed by the Family Court. It was noticed that the claim of the wife in the joint properties was under consideration before the Family Court. However, in the instant case, the evidence which was led by the appellant *ex parte*, by itself was not sufficient to prove cruelty and desertion on the part of the respondent-wife.

In the case of **Gurnam Singh Vs. Satwant Kaur (supra)**, cogent evidence had been led by the husband regarding cruelty on the part of the wife towards the husband and his family members. The evidence had gone unrebutted and because of overwhelming evidence on record, the decree of divorce had been granted by the Additional District Judge. The finding had been reversed by the Single Judge and it was held by the Division Bench that despite overwhelming evidence on record, the Single Judge had set aside the judgment and decree without any discussion. In the case at hand, cogent evidence is woefully lacking.

It is well settled that in the event that conduct of a spouse is of a nature which compels the other to leave his company, then he/she cannot derive any advantage therefrom. In other words, a spouse cannot take the benefit of his own wrong. I may refer to the case of **Chetan Dass Vs. Kamla Devi (supra)**, wherein it was held that as the wife had left the matrimonial home because of reasonable cause as she was subjected to humiliating treatment, the husband cannot derive any

benefit or seek a decree of divorce on the ground of desertion. Reference can also be made to the case of **Ravi Kumar Vs. Julmi Devi (supra)**, wherein the wife was living separately from the husband, who had sought a decree of divorce on the ground of desertion. It was held that it is necessary for the husband to prove that there is *animus deserendi* on the part of the wife and he has also to prove that he has not conducted himself in a manner which furnishes reasonable cause for the wife to stay away from the matrimonial home.

It is established from the record that the conduct of the appellant himself was such that the respondent was compelled to leave his company. She had been beaten up by the appellant on several occasions and, therefore, her absence from there matrimonial home is on justifiable grounds.

Consequently, we do not find any merit in this appeal which stands dismissed and the judgment and decree passed by the lower Court is hereby affirmed. Decree sheet be prepared accordingly.

(RAKESH KUMAR JAIN) (ANUPINDER SINGH GREWAL)
JUDGE JUDGE

29.10.2018.

SwarnjitS

Whether speaking/reasoned : YES/NO

Whether reportable : YES/NO