

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH.

FAO 5867 of 2015 (O&M)

Date of Decision: May 02, 2018

Poonam

.....Appellant

Vs.

Ravinder Singh and others

.....Respondents

CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI.
HON'BLE MR. JUSTICE GURVINDER SINGH GILL.

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Present: Mr.R.P.S. Sidhu, Advocate for
Mr. S.K. Bawa, Advocate for the appellant.

None for respondent No.1.

Mr. J.S. Ghumman, Advocate for respondent No.2.

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M.M.S. BEDI, J.

For the reasons mentioned in the application, the delay in filing of the appeal is condoned. Application stands disposed of.

The appellant- wife has preferred an appeal under Section 19 of the Family Courts Act aggrieved by the dismissal of her suit for cancellation of judgment and decree dated September 30, 2010 passed in a matrimonial case HMA Case No. 447 of July 17, 2009 by virtue of which an ex-parte decree of divorce has been passed in her favour dissolving the marriage of the appellant with respondent No.1.

Brief controversy which is involved in the present case is that a decree of divorce had been passed in favour of the appellant-wife ex-parte against respondent No.1 on the ground of cruelty on September 30, 2010 in which she was represented by her Advocate Shyambir Singh- respondent No.2. The appellant challenged the ex-parte judgment and decree passed in her favour on the ground that she had engaged one counsel to file a petition for maintenance under Section 125 Cr.P.C. whereas her sister Sudesh had filed a petition for divorce against her husband. Counsel had obtained signatures on some blank papers and filed two petitions both under Section 13 of the Hindu Marriage Act for divorce. Both petitions were decided on the same day i.e. September 30, 2010. Contents of the petition were never read over to the appellant nor explained by her counsel as a result of which ex-parte decree was passed in her favour which was liable to be set aside. Suit was filed by the appellant for cancellation of the judgment and decree under Section 31 (1) (2) of the Specific Relief Act but the said suit has been dismissed by the District Judge, Family Court, Gurgaon with special cost of Rs.10000/-.

The case of the appellant as pleaded in her plaint is that she was married to respondent No.1- defendant Ravinder Singh on March 9, 2008. A son Daksh was born from the wedlock on January 31, 2009. Her sister Sudesh was married to the brother of her husband, namely, Mahesh on the same day. Sufficient dowry was given by her father to both the daughters but respondent No.1 and his family members were not satisfied with the dowry and demanded more articles and a Car. On inability of parents of the appellant, the appellant and her sister were beaten and harassed. All the

expenditure for the birth of her child was borne by her father. On the occasion of 'chuchak' ceremony, respondent No.1 and his family members again demanded dowry. When her father expressed inability to meet the demand, the appellant was thrown out of the matrimonial home on April 5, 2009 after giving her beatings. She has been residing separately with her son with her parents since then. The allegations of fraud were pleaded to the effect that the appellant and her sister Sudesh had engaged defendant No.2 as counsel for filing two petitions i.e. one petition under Section 125 Cr.P.C. on her behalf whereas the other petition on behalf of her sister Sudesh for divorce. Counsel had obtained signatures on blank papers and filed two petitions for divorce under Section 13 of the Hindu Marriage Act on behalf of the appellant bearing HMA Case No. 447 dated February 17, 2009 and another petition on behalf of Sudesh bearing HMA Case No. 446 of February 17, 2009. Both the petitions were decided on September 30, 2010. The appellant had no knowledge that divorce petition had been filed on her behalf as it was neither read over to her nor explained to her by her counsel. She had no knowledge about the ex-parte judgment and decree having been passed in her favour. The appellant became aware of the same on November 23, 2010 when she received certified copy of the decree dated September 30, 2010 from her counsel. The name of father was wrongly mentioned as Rajinder Singh in the petition whereas his name was Kanwar Singh. The appellant claimed that respondent No.2 Sh.Shyambir Singh, Advocate had acted in collusion with respondent No.1 and taken advantage of the confidence reposed in him and filed divorce petition on behalf of both sisters for which he was never authorized. Appellant claims that she had not

signed power of attorney placed on record in divorce petition. Her marital life was satisfactory and she did not desire to take divorce. As a matter of fact her case was adjourned for evidence in the maintenance proceedings for September 30, 2010 and not for the divorce case. Defendant- respondent No.2 had given her affidavit in divorce case and had fraudulently obtained decree of divorce. Her sister Sudesh was very much present in Gurgaon Courts but her complaint under the Protection of Women from Domestic Violence Act was also got dismissed in default intentionally by the counsel. Proceedings had been initiated by them against the said Advocate. The ex-parte judgment and decree dated September 30, 2010 had been illegally passed as such it was sought to be set aside.

The suit was contested by respondent No.1 claiming that it was not maintainable. The appellant was estopped by her own act and conduct from filing suit. She had no cause of action against respondent No.1 and had not approached the Court with clean hands. He admitted the fact that the appellant and her sister were married to him and his brother Mahesh, respectively on the same day and that a son had born to the parties. He pleaded that the appellant had left the matrimonial home with her son on June 1, 2009 and had never returned back despite issuance of legal notice. Many efforts were made through panchayat but the appellant showed her intention to get divorce as such she had filed a petition for divorce. There was no error or fraud on the part of defendant No.2 in filing the petition for divorce. Other allegations of demand of dowry and cruelty were also denied. Respondent No.2, Advocate also contested the suit alleging that the appellant was highly educated lady being B.A., B.Ed. and was well aware of

the facts. The appellant had signed divorce petition; power of attorney and application under Section 24 of the Hindu Marriage Act, for short 'the Act'. Despite receipt of notice from respondent No.1 she refused to join him in the presence of SHO, Police Station, Bilaspur and DCP (South), Gurgaon. The appellant wanted to extract money from respondent No.1 and therefore, instituted proceedings. It was denied that petition under Protection of Women from Domestic Violence Act had been got fraudulently dismissed. The complaint filed against respondent No.2 was false. Respondent No.2 also claimed under Order 7 Rule 11 CPC that suit did not disclose any cause of action against him as such the suit should be dismissed. The appellant had not explained the material fact that her complaint to the Bar Council of Punjab and Haryana against respondent no.2 had been dismissed. She had made similar false application to the police in order to harass and humiliate him. The matter had been investigated and respondent No.2 was found innocent. The appellant- plaintiff had signed all the requisite documents and had also instituted a complaint under Section 498 A IPC against her husband as their relationship was not cordial. Respondent No.2 claimed that he had been unnecessarily impleaded in the case. Respondent No.2 Advocate denied that he was instructed to file a petition under Section 125 Cr.P.C. As a matter of fact for preparing divorce petition and other documents, the draft had been sent to the appellant with marking as such she signed the same. She was personally present at the time of presentation of the petition and had signed the relevant pages. The appellant had actively participated throughout the legal proceedings and her education is B.E., B.Ed. Her father had collected ex-parte decree of divorce from his office as such the plaintiff-

appellant could not claim that the decree of divorce was not in her knowledge. Respondent No.2 had been found innocent by the Bar Council as such the present proceedings were not maintainable.

On the pleadings of the parties, following issues were framed:-

- “1. Whether judgment and decree dated 30.9.2010 passed in case No. 447 of 17.7.2010, titled as Poonam versus Ravinder is null and void and is liable to be cancelled as prayed for? OPP.
2. Whether the suit is not maintainable in the present form? OPR.
3. Whether the plaintiff is estopped by her own act and conduct from filing the present suit? OPR
4. Whether the plaintiff has no cause of action to file the present suit? OPR
5. Relief.”

Issue Nos. 1 to 4 were taken simultaneously being inter-linked with each other. On appreciation of evidence the suit of the plaintiff was dismissed holding that the appellant and her family members were aware of the factual position and did not intend that both the sisters should return to their matrimonial home. There was no room left for doubt about the veracity of the decree passed in favour of the appellant. It was held that the appellant was M.A., B.Ed. and her father is 7th class pass. The appellant had admitted that she was conversant with English though very not fluent. Once she admits that she is educated and literate person and affixed her signatures on some document, the lower Court arrived at a conclusion that the appellant

herself had engaged respondent No.2 as an Advocate and filed the divorce petition and there was no ground to hold that the decree dated September 30, 2010 passed under Hindu Marriage Act titled Poonam Vs. Ravinder was liable to be cancelled.

Aggrieved by the above said judgment and decree, the appellant wife has preferred this appeal. The appeal was mainly contested before this Court by respondent No.2, an Advocate who had filed petition for divorce under the instructions of the appellant. Mr. Atul Yadav once appeared for respondent no.1 but no one had put in appearance on behalf of respondent No.1 husband for three consecutive dates as such he was proceeded against ex-parte and the appeal was heard on merits.

The present case is of unique nature which has been filed by a litigant after a decree has been in her own favour claiming that she had never sought the said decree on the facts and circumstances existing and established. A fraud is alleged to have been played on her as well as on the Court by filing a petition for divorce on her behalf. It is not disputed that on the similar allegations, on the same date her sister who is married to the real brother of respondent No.1 had also filed a divorce petition and had been granted decree of divorce on the same day. The appellant claims that as a matter of fact on the basis of conduct of her husband of having treated her badly she had intended to seek maintenance for her son and for herself without knowing that a decree of divorce that too ex-parte against her husband, was being obtained.

Counsel for respondent No.2 has urged that respondent No.2 had performed his professional duties at the instance of the appellant as well

as her sister who had been granted decree of divorce on the similar allegations and that the appellant is an educated lady having B.A., B.Ed. cannot be presumed to be unaware of the contents of the pleadings and the nature of the proceeding launched by her.

We have carefully considered all the circumstances of this case and gone through the statements of appellant as PW3 and Sudesh, sister of the appellant who appeared as PW4, statement of her father Kanwar Singh who appeared as PW5, statement of Chetna Mehta who appeared as PW2 and statement of employee of the Sessions Court, Gurgaon as PW1. We have also gone through the copy of the divorce petition-Poonam Vs. Ravinder Ex.P1, an application for interim maintenance Ex.P2, Ex.P3 the power of attorney exhibited by the appellant, her affidavit Ex.P4, copy of the order dated September 21, 2010 Ex.P6, copy of the orders Ex.P7 and Ex.P8, passed in case Sudesh Versus Mahesh; judgment of divorce Ex.P9 granted to the appellant and judgment of divorce in the case of her sister Sudesh Vs. Mahesh Ex.P10, her application under Section 24 of the Hindu Marriage Act Ex.P11; application under Section 24 of the Hindu Marriage Act filed by Sudesh Ex.P12; and report of the Protection Officer under Protection of Women from Domestic Violence Act in case Sudesh Vs. Mahesh Ex.P-13. The evidence produced by respondent has also been carefully gone through by us which includes the statement of respondent No.1 as RW1, Vikas Kharab was produced as RW2; the application for setting aside the ex-parte order dated September 30, 2010 as Ex.R1; copy of the order for setting aside the judgment and decree Ex.R2, application for setting aside the judgment

and decree Ex.R3, application for withdrawal of application Ex.R4; and application moved by Poonam for engaging counsel Ex.R5.

We are surprised at the manner in which the proceedings had been taken up by the Matrimonial Court while considering the petition under Section 13 of the Hindu Marriage Act. Though it is required of a Court under Section 23 (3) of the Act to make an attempt to mediate and try to bring about some settlement but it appears that no mediation proceedings were ever conducted in the divorce petition probably for the reason that respondent No.1 had opted to remain ex-parte. But defendant- respondent No.1 despite having been served had never made any attempt to get ex-parte proceedings set aside against him and to rebut the allegations of cruelty implying thereby that he was also interested in getting rid of the appellant as both the sisters had strained matrimonial relations. The appellant has made a categorical statement in the Court that she had approached her counsel for instituting proceedings under Section 125 Cr.P.C. whereas her sister had approached the counsel for a decree of divorce. It is a matter of common knowledge that in cases of matrimonial disputes, the nature of allegations regarding act of the other spouse being unreasonable, the allegations of cruelty and the pleas of refusal to maintain are generally common for a petition under Section 125 Cr.P.C. as well as a petition for divorce. Since both the sisters had approached simultaneously the same counsel, there are chances of gap of communication for the purpose for which the defendant-respondent No.2 had been engaged. His collusion may not be there with respondent No.1 but there are chances that there was no free consent from the appellant and the party had not been ad idem while entering into the

agreement which in the present case was a power of attorney. It is settled principle of law that under Section 10 of the Contract Act all agreements are contract if they are made by free consent of the parties competent to contract or a lawful consideration and the lawful object. Section 14 of the Contract Act defines that consent is free when it is not caused by coercion, undue influence, fraud, misrepresentation, mistake subject to the provisions of Sections 20, 21 and 22 of the Contract Act. The appellant has been able to establish by her testimony which is supported by her father and sister that she had not engaged respondent No.2 for getting divorce. In these circumstances, both the parties were under misconception about the object of the power of attorney dated July 17, 2009. An application has been filed under Order 41 Rule 27 CPC to produce the report of Forensic Science expert to the effect that the same does not bear the signatures of appellant-Poonam.

Without entering into the controversy whether the power of attorney of defendant No.2 contained the signatures of Poonam or not, it is sufficient to observe that at the time of entering the agreement by way of power of attorney both the parties were not ad idem regarding the terms of the agreement as such the decree obtained on the basis of said power of attorney cannot be foisted upon the appellant. Even otherwise, there are number of circumstances which are indicative of the fact that an error could have been erupted on account of two simultaneous petitions having been filed. Even if it is not a case of fraud but it is a case where the consent of the appellant to engage respondent No.2 for the purpose of divorce is not established. Ex-parte decree obtained against respondent No.1 was also not

sought to be set aside by him which is indicative of his collusion with his real brother who had also suffered a similar decree of divorce.

In view of the above circumstances, we have no hesitation to arrive at a conclusion that the decree obtained by the appellant was not with her free consent and it suffers from a mistake apparent on the record for the reasons mentioned hereinabove. The finding of the lower Court on issue No.1 is set aside and the judgment and decree dated September 30, 2010 are hereby set aside declaring the same void. The suit of the appellant is decreed for a declaration that she is entitled for declaration of decree dated September 30, 2010 passed in HMA case No. 447/ July 17, 2009. The appeal is allowed. Let the decree sheet be prepared.

It is further observed that anything observed in this order will not have any prejudicial effect on the professional status of respondent No.2 as Advocate and any observation made in this case is meant for the purpose of decision of matrimonial rights of the appellant vis-à-vis respondent No.1.

(M.M.S. BEDI)
JUDGE

May 02, 2018
sanjay

(GURVINDER SINGH GILL)
JUDGE

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