

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

206

FAO-M-215-2014 (O&M)

Date of Decision : 08.02.2019

Mamta

... Appellant

Versus

Manjit

...Respondent

**CORAM:HON'BLE MR. JUSTICE RAKESH KUMAR JAIN
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: Mr. S.P.Chahar, Advocate for the appellant.

Mr. Manoj Kaushik, Advocate for the respondent.

RAKESH KUMAR JAIN, J.(ORAL)

This appeal has arisen from the judgment and decree dated 31.01.2014 passed by the learned Additional District Judge, Jhajjar, vide which the decree for judicial separation under Section 10(1) of the Hindu Marriage Act, 1955 (for short 'the Act') on the ground of cruelty has been passed.

In brief, the marriage of the parties was solemnized on 10.03.2008 at Village Palri, Tehsil Charkhi Dadri, District Bhiwani as per Hindu rites. They do not have any child out of the wedlock. The respondent-husband filed a petition under Section 13(1) (ia) of the Act for seeking a decree of divorce, *inter alia*, on the grounds of cruelty and desertion. On the pleadings of the parties as many as 4 issues were framed by the trial Court on 12.05.2011 in which issue No. 1 pertains to cruelty and issue No.2 to desertion. Both the issues have been decided by the learned trial court against the husband-respondent as he could neither prove the element of cruelty and desertion. However, while deciding issue No.4 pertaining to

relief, the following finding has been recorded:-

“In view of my above discussion concluded in para 31, decree for divorce u/s 13(1)(ia) of HMA is declined, however, decree for Judicial Separation u/s 10(1) of HMA, on ground of cruelty is hereby allowed. Decree-sheet be prepared accordingly and file be consigned to the record room.”

Learned counsel for the appellant has vehemently argued that the issue of relief has wrongly been decided by learned trial court. It is submitted that no petition was filed under Section 10(1) of the Act. Therefore, the decree under Section 10(1) of the Act could not have been passed. It is further submitted that if the Court had the jurisdiction to pass a decree under Section 13-A of the Act for judicial separation but for that also the Court has to come to the conclusion that it is not a fit case for passing a decree of divorce rather it would be expedient to pass a decree for judicial separation. Further he has referred to the provisions of Section 10(1) of the Act, which is reproduced as under:-

***Section 10(1)** of the Act, referred to above provides that either party to a marriage, whether solemnized before or after the commencement of this Act, may present a petition praying for a decree for judicial separation on any of the grounds specified in sub-section (1) of section 13, and in the case of a wife also on any of the grounds specified in sub-section (2) thereof, as grounds on which a petition for divorce might have been presented.”*

Section 13(1) (ia) and (ib) of the Act which has reference in Section 10(1) of the Act are also relevant and is thus reproduced as under:-

Section 13(1) in The Hindu Marriage Act, 1955

(1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented

by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

(i) has, after the solemnisation of the marriage, had voluntary sexual intercourse with any person other than his or her spouse; or

(ia) has, after the solemnisation of the marriage, treated the petitioner with cruelty; or

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or

On the other hand, learned counsel for the respondent has submitted that there is no error in the judgment dated 31.01.2014 insofar as issue of relief is concerned because the Court had the jurisdiction to pass decree of judicial separation as well.

We have heard learned counsel for the parties and perused the available record with their able assistance.

Two issues are involved in this case namely (i) whether the decree of judicial separation under Section 10(1) of the Act can be passed without there being a foundation for the said decree as the petitioner has filed the petition under Section 13(1)(ia) of the Act? and (ii) whether the Court had the jurisdiction to pass decree under Section 10(1) of the Act for judicial separation unless and until the court decides that decree could have been passed in terms of Section 13(1)(ia) of the Act as well?

From the bare reading of Section 10(1) of the Act, it transpires that it can only be invoked for the purpose of seeking decree specifically for judicial separation, in the case of the husband by invoking Section 13(1)(ia) and in the case of wife it can also be on the grounds mentioned in Section 13(2) of the Act. It is also an admitted fact that learned trial Court, while dealing with the issue of cruelty, has come to the conclusion that the said

issue is not proved by leading cogent evidence by the respondent-husband and therefore decree of divorce under Section 13(1)(ia) of the Act was declined. Strangely enough, thereafter, the learned trial court has granted the decree of judicial separation under Section 10(1) of the Act. Thus, the first question raised by the learned counsel for the appellant is hereby decided in affirmative to the effect that the petition under Section 10(1) of the Act has to be specifically filed by referring to the provision of Section 13(1)(ia) of the Act in case petition is filed by the husband for judicial separation and in case it is filed by the wife under Section 13(2) of the Act as well. The decree thus granted, without filing the specific petition, in this regard is not maintainable.

As far as second question is concerned, no doubt the legislation has added Section 13-A in the year 1976 to the Act, enabling the Court to grant alternate relief to the petitioner for decree of judicial separation but it is categorically provided, therein that if any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of sub-Section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation. The word used by the legislature 'instead' has a great significance because it means that while granting the decree of divorce if the Court is of the view that in the facts and circumstances of the case, the decree of divorce can be given but while taking into consideration the fact and circumstances, if the court feels that instead of snapping the ties of the marriage forever, it would be in the interest of justice and parties that they remain separated for some time, then the Court can pass decree of judicial

separation.

In the present case, the trial Court has not made any such observation while deciding the issue of relief that the decree of divorce can be granted but the Court is of the view that instead of granting divorce it would be sufficient to grant the decree of judicial separation so that in the meantime the parties may think again and if good sense prevails upon them.

The findings recorded by the trial Court, declining decree of divorce under Section 13(1)(ia) of the Act cannot be accepted because the ground of cruelty has not been proved. In such circumstances, the emphasis has rightly been laid down by learned counsel for the appellant on the word 'instead'. The finding has to be recorded by the learned trial Court that a decree of divorce on the ground of cruelty is available under Section 13 of the Act but instead of it, the court has passed decree of judicial separation.

No other issue has been raised.

Thus, in view of the aforesaid facts and circumstances, we are of the considered opinion that the finding of the trial court is totally erroneous in regard to the relief granted and therefore, the judgment and decree dated 31.01.2014 passed by learned Additional District Judge, Jhajjar is hereby set aside.

Appeal stands allowed.

(RAKESH KUMAR JAIN)
JUDGE

(HARNARESH SINGH GILL)
JUDGE

08.02.2019

pooja saini

Whether speaking/reasoned?

Yes/No

Whether reportable?

Yes/No