

FAO-M-176-2017

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

FAO-M-176-2017 (O&M)
Date of decision: July 26, 2019

Poonam Kesar

.... Appellant

Versus

Sandeep Thamman

.... Respondent

**CORAM: HON'BLE MR. JUSTICE RAJAN GUPTA
HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL**

Argued by: Ms. SAarika Gupta, Advocate
for the appellant.

Mr. Pankaj Bali, Advocate
for the respondent.

Manjari Nehru Kaul, J.

The instant appeal has been preferred by the appellant-wife against the judgment and decree dated 16.05.2017 in a petition filed under Section 9 of the Hindu Marriage Act, 1955 (for short 'the Act'), which was passed by the Court below in favour of the respondent-husband and the appellant-wife was therein directed to join the company of the respondent-husband.

2. Brief facts of the case, which may be noticed herein, are that the marriage between the parties was solemnized on 12.08.2006 as per Hindu rites and customs at Banga. After the marriage, the parties resided and cohabited at Banur. The appellant-wife being a green card holder of Italy had been living in Italy since 2001. After the marriage, respondent-husband too accompanied the appellant-wife to Italy in the year 2008. A son was born out of the said wedlock on 05.11.2008 at Italy.

3. In the petition filed under Section 9 of the Act, the respondent-husband alleged that even though the appellant-wife was treated with love and affection by him and his family yet her behaviour towards them was highly unbecoming as she would often loose temper over trivial issues and used foul language against him and his mother to the extent that she did not even hesitate to humiliate them in front of outsiders. It was also alleged that she had been indulging in such behaviour at the behest of her family. It was further contended in the petition that the respondent-husband along with appellant-wife and their son had to return in 2015 to their village Banur from Italy on account of his ill- health. Thereafter, in the first week of July, 2015, the appellant-wife along with their son left for her parental home at Banga without informing the respondent-husband or any other member of the family. Respondent-husband further averred in the petition that despite his continuous and numerous efforts in making the appellant-wife to return to the conjugal fold, it proved to be a futile exercise.

4. Learned trial Court granted the decree of restitution of conjugal rights in favour of the respondent-husband by directing the appellant-wife to join the company of the respondent-husband as his legally wedded wife.

5. Learned counsel for the appellant-wife by way of present appeal has laid a challenge to the impugned judgment vehemently urging that the Court below had passed the impugned judgment in a totally arbitrary and illegal manner inasmuch as the trial Court failed to appreciate that while filing her written statement through her counsel, the appellant-wife had not admitted the claim of the respondent-husband and hence, it became all the more necessary for the Court to formulate issues, which were given a go by, by the Court below. Learned counsel argued that in this background the Court was duty bound to frame the issues and

fix the case for evidence of the respondent-husband, which was not done by the Court below. Learned counsel further drew the attention of this Court to the fact that the evidence of the respondent-husband was not recorded at any stage of the proceedings. So much so, there was no order on the case file, which could even reflect any date on which the evidence of the appellant-wife (respondent in the petition under Section 9) was recorded and further also the date on which the evidence of the appellant-wife was closed. Learned counsel also drew our attention to as many as 22 interim orders passed by the trial Court wherein the presence of the appellant-wife or her counsel had not been recorded. Hence, it was vehemently argued that a patent illegality had been committed by the Court below in allowing the petition for restitution of conjugal rights of the respondent-husband despite the fact that the appellant-wife had nowhere admitted the case of the respondent-husband and the Court had proceeded without any evidence being led by the respondent-husband.

6. We have heard learned counsel for the parties and perused the evidence and other material available on record.

7. It would be worthwhile to mention that the parties were referred to Mediation and Conciliation Centre of this Court to explore the possibility of amicable settlement but the same failed.

8. We find substance in the submissions put-forth by the counsel for the appellant-wife. A perusal of the impugned judgment reveals that no evidence was led on behalf of the respondent-husband to substantiate the averments made in the petition filed under Section 9 of the Act. It is indeed strange that having noticed the above facts, the learned trial Court yet proceeded to grant a decree for restitution of conjugal rights in favour of the respondent-husband. The trial Court

has made much of the fact that it was the appellant-wife's father, who stepped into the witness box, whereas it was only the wife, who could have in fact narrated the events in their entirety, losing sight of the fact that nobody had stepped into the witness box on behalf of the respondent-husband, who was the petitioner before the trial Court.

9. It is undisputed legal position that the case of the respondent-husband has to stand on its own legs and it is only on the basis of the positive evidence led by the husband that a decree for restitution of conjugal rights could have been passed in his favour. This Court is both astonished and mystified as to how in the absence of any evidence led by the husband, a decree for restitution of conjugal rights could have been passed in his favour. It may be noticed that in the case in hand, even issues were not framed, which assumes significance especially when the appellant-wife had not even admitted the claim of the respondent-husband in her written reply before the Court below. Further, a perusal of the zimni orders reveals that no date was ever fixed for the recording of evidence on behalf of the petitioner-husband (respondent herein). The finding of the trial Court that the averments of the petitioner-husband have gone unrebutted is patently illegal in the eyes of law as no evidence was ever led on behalf of the petitioner-husband (respondent herein). On the other hand, the version of father of the respondent-wife (appellant herein) who had stepped into the witness box as her power of attorney holder, was strangely brushed aside on the ground that he could not have deposed on behalf of his daughter. The aforesaid conclusion drawn by the learned trial Court is facetious when viewed against the fact that no evidence at all was led by the petitioner-husband and yet the trial Court proceeded to grant a decree for restitution of conjugal rights.

10. In view of the above discussion, the present appeal deserves to be allowed and the impugned judgment of the Court below is set aside and the consequentially the respondent-husband’s petition under Section 9 of the Act stands dismissed.

(RAJAN GUPTA)
JUDGE

(MANJARI NEHRU KAUL)
JUDGE

July 26, 2019
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| 1. Whether speaking/non-speaking? | Yes/No |
| 2. Whether reportable? | Yes/No |