

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

Sr. No.260

CR-2964-2017

Date of decision: 25.07.2019

Kulwinder Singh

....Petitioner

versus

Manmohan Kaur

....Respondent

CORAM: HON'BLE MR. JUSTICE DEEPAK SIBAL

Present: Mr. Manish Kumar Singla, Advocate
for the petitioner.

Mr. Karan Bhardwaj, Advocate
for the respondent.

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DEEPAK SIBAL, J. (Oral)

The present petition is directed against the order dated 20.03.2017 passed by the Additional District Judge, Fatehgarh Sahib (for short – the Trial Court) through which an application filed by the petitioner seeking withdrawal of his divorce petition with permission to file a fresh one on the same cause has been dismissed.

The facts, in brief, which are required to be noticed for adjudicating upon the present petition are that the petitioner filed a petition under Section 13 of the Hindu Marriage Act, 1955 (for short – the Act) for dissolution of the marriage between the parties. Divorce was sought on the ground of cruelty. It was further mentioned in the divorce petition that on 23.05.2013, the respondent-wife had refused to join the company of the petitioner occasioning the filing of the divorce petition on the very next day

i.e. 24.05.2013. Thereafter, issues were framed by the Trial Court including the issue as to whether the respondent had treated the petitioner with cruelty. No other issue pertaining to any other ground for divorce as available under Section 13 of the Act was framed. It is the admitted position that neither party challenged or objected to the issues framed. Thereafter, the parties led their respective evidence. When final arguments were being addressed, the petitioner filed an application under Order 23 Rule 1 CPC seeking withdrawal of his divorce petition with permission to file a fresh petition on the same cause which through the order impugned in the present proceedings has been dismissed.

Learned counsel for the petitioner submits that the petitioner seeks to withdraw his petition with permission to file a fresh one on the same cause as his petition contained a formal defect. According to him, though averments had been made in the petition with regard to the respondent-wife having deserted the petitioner but since between the alleged date when the respondent-wife had deserted him and the filing of his petition the statutory period of 02 years had not elapsed, the petitioner's petition being premature was defective and therefore, the Trial Court erred in not permitting the petitioner to withdraw his divorce petition with permission to file a fresh one on the same cause.

Learned counsel for the respondent-wife submits that with regard to the issue of desertion, there was no formal defect in the petitioner's petition and therefore, the petitioner cannot be allowed to withdraw his petition with permission to file fresh one on the same cause.

Order 23 Rule (1)(3) CPC reads as under:-

ORDER XXIII

1. Withdrawal of suit or abandonment of part of claim-

- (3) Where the Court is satisfied, -
- (a) that a suit must fail by reason of some formal defect, or
 - (b) that there are sufficient ground for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,
- it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim.”

As per the afore-quoted provision where the Court is satisfied that there is some formal defect in the suit on account of which it would fail or that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject matter of a suit or part of a claim, it may, on such terms as it deems fit, permit a plaintiff to withdraw his suit with permission to institute a fresh suit on the same cause.

A perusal of the petitioner's divorce petition shows that through the same he had preferred to seek divorce from the respondent only on the ground of cruelty. Accordingly, the only issue framed by the Trial Court was whether the respondent had treated the petitioner with cruelty. Framing of issues was not challenged by the petitioner. Rather, the petitioner proceeded with the matter and led evidence only on the ground of cruelty.

Mere reference to a fact in the divorce petition filed on 24.05.2013 that a day before i.e. on 23.05.2013, the respondent-wife had refused to join the company of the petitioner would not give a cause to the petitioner to seek divorce on the ground of desertion. In the facts of the present case, qua the ground of desertion, the petitioner's petition could also

not be considered to be premature. In any case, this would not constitute a formal defect in the petitioner's petition.

At the time of filing of the divorce petition, the ground of desertion was neither available to the petitioner nor taken by him. During the pendency of the petition, even if such ground has become available, the same would not make the petitioner's petition as defective.

In view of the above, no error is found in the order impugned in the present petition.

Dismissed.

(DEEPAK SIBAL)
JUDGE

July 25, 2019
Jyoti 1

Whether speaking/reasoned
Whether reportable

Yes/No
Yes/No