

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

Date of Decision:-10.12.2021
FAO-2681-2014 (O&M)

1.

Nakul Saxena

....Appellant

Vs.

Shivani Saxena

....Respondent

2.

FAO-968-2013 (O&M)

Nakul Saxena

....Appellant

Vs.

Shivani Saxena

....Respondent

**CORAM: HON'BLE MS. JUSTICE RITU BAHRI
HON'BLE MR. JUSTICE KARAMJIT SINGH**

(Through Video Conferencing)

Present:- Mr. Divay Sarup, Advocate
for the appellant (in both cases).

Mr. Ajay Jain, Advocate
for the respondent (in both cases).

KARAMJIT SINGH, J.

This order will dispose of the above titled appeals filed by the appellant-husband against the judgment and decree dated 24.12.2013 whereby the divorce petition filed by the appellant under Section 13 of Hindu Marriage Act (in short 'HMA') against his wife-respondent on the ground of cruelty and desertion was dismissed; and judgment and decree

dated 10.12.2012 whereby the petition filed by the respondent-wife under Section 9 of HMA was decreed against the appellant-husband by the Court of District Judge, Family Court, Hisar.

The facts of the case in nut-shell are that the appellant filed divorce petition under Section 13 HMA in which he *inter alia* pleaded that the parties got married on 19.5.2005, as per hindu rites and ceremonies, at Lucknow. Out of this wedlock one male child was born on 7.11.2007 and now the parties are living separately since 28.11.2009.

As per the appellant, after marriage, the parties started living in Delhi, where the appellant was working. Then they shifted to Ghaziabad, where father and sister of the appellant were also living with them. Sister of the appellant got married in December, 2006. The respondent got her Doctorate degree in 2007 and prior to that she went to Hisar to pursue the said degree, where her parents were residing. The entire educational expenses of the respondent to pursue Ph.D. were borne by the appellant.

In the divorce petition, the appellant further pleaded as follows:-

The respondent was not ready and willing to keep father and sister of the appellant, in her matrimonial home. She used to abuse and insult father of the appellant and due to her cruel behaviour, the father of the appellant finally started living in Lucknow. The respondent used to allege that the appellant was having illicit relations with his younger sister, who got married in December, 2006. After the marriage of sister of the appellant, when the parties were coming back from Lucknow to Delhi along with their

servant Pappu, on the way the respondent started abusing the appellant and other members of his family without any reason and she got down from the car and thereafter the respondent sat in the car only after great persuasion. It was further pleaded that the respondent was temperamental, adamant, unfriendly and having suspicious nature. Earlier, she used to allege that the appellant was not desirous of having child. They were blessed with one son in November, 2007, but even thereafter there was no change in the behaviour of the respondent. She used to ill-treat and insult the appellant and other members of his family in presence of his relatives, friends and colleagues. Due to such an obnoxious behaviour of the respondent, relatives, friends and colleagues of the appellant stopped coming to his house. In 2008, when the appellant was transferred to Mumbai, both husband and wife shifted to that place. The appellant at that time was deputed in sales department and was having late working hours. Whenever the appellant got late, the respondent refused to open the door and as such he was to stay outside the house for the whole night. Once in November, 2008, when he got late, the appellant was forced to sleep in his car throughout the night. In March, 2009 the respondent left the matrimonial home without informing the appellant and she came back on the next day along with her mother, brother, uncle and aunt, all of whom apologized to the appellant, on behalf of the respondent. The appellant used to provide all the finances to the respondent to run the household and also for her personal needs. Even ATM card was also provided to her. Despite this the respondent used to ask the appellant to handover his entire salary to her. She used to do shopping for her own

relatives by using aforesaid ATM card. The respondent also treated her son with cruelty. She used to beat him. The respondent always tried to malign the character and image of the appellant by spreading rumours amid the relatives, family, friends and colleagues that the appellant was having affair with his female colleagues. Further, the respondent refused to cook food for the appellant and she did not like him. On 23.11.2009, there was some minor dispute between the parties, on which the respondent manhandled the appellant and finally she left the matrimonial house on 28.11.2009 and while leaving she also took her child along with her and thereafter the respondent never came back.

The divorce petition was contested by the respondent who filed written statement taking preliminary objections that the petition is not maintainable and that the husband is estopped by way of his own act and conduct to file the present petition. On merits, it was admitted that the parties got married on 19.5.2005. It was also admitted that one male child was born out of the wedlock on 7.11.2007 and now the parties are living separately since 28.11.2009. However, it was denied that the respondent treated the appellant and other members of his family with cruelty. Rather the appellant and other members of his family oftenly complained that the dowry articles brought by her, were not as per the expectations and status of the family. The appellant and other members of his family also used to taunt the respondent by saying that some big car like Toyota was not given in dowry by her parents. It was also alleged that the appellant was a drunkard and used to return at the odd hours and used to give beatings to the

respondent. The appellant and other members of his family also used to say that the respondent was having dark complexion and was not beautiful. In the month of March, 2009, the appellant gave beatings to the respondent as she showed her inability to bring bigger car from her parent's home and she was thrown out of the matrimonial home, on which she went to house of her aunt from where she was taken back by the appellant and his father after seeking apology. In November, 2009, the appellant pressurised the respondent to sign a mutual divorce deed in presence of lawyer and on her refusal to do so she was abused and severely beaten by the appellant. In the last week of November, 2009, the appellant requested her to stay with her parents at Hisar, as he was to go abroad for some official work and as such the respondent came to Hisar on 28.11.2009 and thereafter, the appellant never came to take her back to his house. The other averments of the divorce petition were denied by the respondent.

On the pleadings of the parties following issues were framed by the concerned Court:-

1. Whether the petitioner is entitled for the decree of divorce on the ground of cruelty, as alleged in the petition? OPP
2. Whether the petitioner has been deserted by his respondent-wife, as alleged? OPP
3. Whether the petitioner has no locus standi and cause of action to file the present petition? OPR
4. Whether the petition is not maintainable in the present form? OPR

5. Relief.

Summary of the evidence led by the parties in the divorce petition is as follows:-

PW-1 Arun Gupta, deposed that he is colleague of the appellant. He further narrated about the incident of June, 2008 when he and his wife accompanied the appellant and the respondent to Goa and they stayed in Beach Resort, where on 15.6.2008, when they were enjoying in the swimming pool, the respondent picked up quarrel with her husband in their presence and at that time, she misbehaved with the appellant. That on the next day also while sitting at the breakfast table, the respondent misbehaved with them and in the evening, the respondent again quarreled with the appellant in their presence and at that time she alleged that the appellant was having illicit relations with his younger sister and female colleagues. He also proved confirmation letter Ex.P1, regarding their booking in aforementioned resort.

PW-2 Sandeep Dutta, friend of the appellant, who also remained working with him, deposed that from February, 2007 to July, 2007 he was residing in Ghaziabad and during said period he used to visit the house of the appellant at Ghaziabad and he found that the respondent used to quarrel with the appellant on petty issues. On one occasion when the appellant asked respondent to prepare some snacks, the respondent refused to do so and misbehaved with the appellant in his presence. During another visit, the respondent started saying in his presence that the appellant was having illicit relations with his younger sister. On his next visit, the respondent levelled

allegations that the appellant is having illicit relations with his female colleague and she also asked him to keep an eye on the activities of the appellant.

PW-3 Krishan Kumar Pandey @ Pappu deposed that he remained working as a domestic servant in the house of the appellant at Ghaziabad till July, 2007. That in the month of December, 2006 he was coming back to Delhi from Lucknow along with the appellant and the respondent in a car and on the way the respondent got angry as the appellant turned off FM radio and then she got down from the car and created scene and after great persuasion she again sat in the car. He also deposed that in March, 2009, the respondent left the matrimonial home without informing the appellant and she came back on the next day with her mother, brother, uncle & aunt; all of whom expressed their apologies for the said incident. He further deposed that the respondent was having no respect for the appellant and his father. She never served food to father of the appellant. He further stated that the appellant had never consumed liquor in the house and never misbehaved with the respondent, in his presence.

Appellant-Nakul Saxena while appearing in the witness-box as PW-4 reiterated the averments made in the divorce petition and he narrated all the incidents of cruelty as has been detailed in the divorce petition.

On the other hand, the respondent while appearing in the witness-box as RW-1 refuted all the allegations of cruelty and desertion levelled against her by the appellant. She also tendered certified copy of

judgment dated 10.12.2012 Ex.R1 and copy of execution application under Section 125(3) Cr.P.C. Ex.R2.

After hearing the counsel for the parties, the Family Court decided issues No.1 & 2 against the appellant and consequently the divorce petition was dismissed.

The respondent-wife filed petition under Section 9 of HMA, in which she reiterated all the pleas taken by her in the written statement to the aforesaid divorce petition. She prayed for grant of decree for restitution of conjugal rights against the appellant-husband.

Petition was contested by the husband, who filed written statement denying all the allegations. The appellant-husband reiterated the pleas taken by him in the divorce petition and refuted the allegations levelled against him by the respondent-wife.

On the pleadings of the parties following issues were framed by the Court concerned for the disposal of the petition under Section 9 of HMA:-

1. Whether the petitioner is entitled for restitution of conjugal rights on the grounds mentioned in the petition as alleged?
OPP
2. Whether the petition is not maintainable? OPR
3. Whether the petitioner is estopped by her own act and conduct from filing the present petition? OPR

4. Whether the petitioner has not come to the Court with clean hands and suppressed the material facts from the Court? OPR
5. Relief.

In support of her claim, Shivani Saxena appeared in the witness-box as PW-1 and she deposed as per the pleadings made by her in the petition.

On the other hand, the appellant-husband while appearing in the witness-box as RW-1 refuted all the allegations and deposed as per the pleas taken by him in his written statement.

After hearing the counsel for the parties, the petition moved by Shivani Saxena under Section 9 HMA was allowed by the Family Court.

Aggrieved by the aforesaid judgments and decrees dated 24.12.2013 and 10.12.2012 respectively, passed by the Family Court, the present appeals have been filed by the appellant-husband.

We have heard the counsel for parties and gone through the Lower Court Record.

The counsel for the appellant contended that ample evidence is available on the record to establish that the respondent was indulging in character assassination of her husband. She used to level false allegations against the appellant that he was having extra marital relations with his sister and female colleagues. The respondent left no stone unturned to malign the reputation and image of the appellant in the eyes of his relatives, friends and

colleagues. The counsel for the appellant further contended that in the present case the appellant was subjected to mental cruelty by the respondent as is clear from the testimony of PW-1 to PW-4. It is further argued that even while appearing in the witness-box as RW-1, the respondent alleged that the appellant was having illicit relations with his female colleagues. It is further contended that in the divorce petition, she took defence that her husband is drunkard and cruel and at the same time in her petition under Section 9 HMA, she has showed her willingness to live with him. It is further contended that the respondent cannot blow hot and cold at the same time.

The counsel for the appellant submitted that from the perusal of testimony of PW-1, it is evident that in June 2008, the appellant and the respondent along with PW-1 and his wife went to Goa where they stayed in Beach Resort and during that stay, in their presence, the respondent misbehaved with her husband and she also levelled false allegations that he was having illicit relations with his younger sister. The counsel for the appellant while referring to statement of PW-2, submitted that the said witness being colleague of the appellant used to visit their house in 2007 and during the said visits the respondent ill-treated her husband and also falsely alleged that he was having illicit relations with his younger sister and female colleague and the respondent asked the said witness to keep check on the activities of her husband. The respondent also refused to provide tea and snacks to PW-2, on his visit to their house, when her husband asked her to do so. The counsel for the appellant further contended that even from the

perusal of testimony of PW-3, it has emerged that the respondent even ill-treated father of the appellant and was temperamental, as once while coming back from Lucknow to Delhi, she lost temper and got down from the car. The counsel for the appellant also referred to testimony of the appellant (PW-4), to prove the ground of cruelty against the respondent. The counsel for appellant further argued that during his posting in Mumbai, the appellant used to come late to his house as he was in sales department and was having long working hours. The respondent oftenly humiliated the appellant by refusing to open the door of the house late in the night and thus kept him waiting outside, till morning. It is further contended that from the aforesaid evidence, it stands proved that the respondent used to ill-treat and humiliate the appellant and other members of his family in presence of his relatives, friends and colleagues. She oftenly levelled wild allegations against the appellant that he was a womaniser and a drunkard and thus caused mental torture to him. In support of his contentions, the counsel for the appellant referred to **Vishwanath Agarwal vs. Sarla Vishwanath Agarwal, (2012)7 SCC 288** wherein the appeal filed by the husband was allowed and decree of divorce on the ground of cruelty was granted in his favour by the Hon'ble Supreme Court. Reference is also made to **Ranjit Kaur vs. Saranjit, 2020(2) RCR (Civil) 399(Delhi)** wherein the appeal filed by the wife against the decree of divorce passed in favour of husband, was dismissed.

The counsel for the appellant further argued that after the passing of a decree for restitution of conjugal rights in her favour, the respondent never moved any application for its execution. Thus there has

been no restitution of conjugal rights as between the parties for a period of one year or upwards even after the passing of a decree for restitution of conjugal rights, which itself is a ground for divorce under Section 13(1A)(ii) of HMA.

The counsel for the appellant further argued that the parties are living separately for the last about 12 years and there are no chances of reconciliation, so this is a case of irretrievably broken marriage and even on this ground divorce can be granted to the parties. In this context the counsel for the appellant referred to **Ranjit Kaur's** case (supra). The counsel also referred to **Darshana Kaur vs. Labh Singh, 2020(1) RCR(Civil) 286**, wherein also decree of divorce was granted by this Court in favour of husband on the ground that marriage between the parties has broken beyond repair. While summing up his arguments, the counsel for the appellant submitted that the both the appeals be accepted and divorce petition filed by the appellant be allowed and the petition filed by the respondent under Section 9 of HMA deserves to be dismissed.

On the other hand, the counsel for the respondent submitted that the family Court rightly appreciated the entire evidence led by the parties and dismissed the divorce petition of the appellant while holding that he failed to prove the ground of cruelty and desertion. It is further contended that the statements of PW-1 and PW-2 were rightly discarded by the family Court as their testimony was beyond pleadings. It is further contended that even otherwise both PW-1 and PW-2 being colleagues / friends of the appellant were interested witnesses. The counsel for the respondent further

submitted that even PW-3 was interested witness being private servant of the appellant. It is further contended that no member of his family or relative was examined by the appellant to substantiate the allegations of cruelty levelled by him against the respondent. In these circumstances, the Court below rightly ignored the testimony of the appellant (PW-4) in the absence of any independent corroboration.

The counsel for the respondent further argued that the respondent was compelled to leave the matrimonial home in November, 2009 and just within next two months, the appellant filed divorce petition, without making any effort for amicable settlement of the dispute. It is further argued that the appellant never sought custody of his son who is residing with the respondent for the last 12 years. That the aforesaid conduct of the appellant shows that he is interested in getting rid of his wife by levelling false allegations against her.

The counsel for the respondent further argued that immediately after the passing of the decree for restitution of conjugal rights, the appellant filed appeal challenging the same. Under these circumstances, there was no occasion for the respondent to seek execution of the said decree by approaching the family Court, when the matter was already pending in the higher Court. The counsel for the respondent while concluding his arguments urged that both the appeals filed by the appellant deserve to be dismissed.

We have considered the submissions made by counsel for the parties.

Admittedly, the parties got married on 19.5.2005. One son was born out of the wedlock of the parties on 7.11.2007. The parties are living separately since 28.11.2009.

The appellant-husband filed divorce petition under Section 13 of HMA on 2.1.2010, on the grounds of cruelty and desertion. The ground of desertion did not survive as at the time of filing of the divorce petition, continuous period of desertion was less than 2 years. Accordingly, in the divorce petition issue No.2 was rightly decided by the family Court, against the appellant and there is no challenge to the said findings.

The appellant has challenged the findings of the family Court regarding issue No.1 relating to ground of cruelty. In order to establish that he was subjected to cruelty by his wife, the appellant himself appeared in the witness-box as PW-4 and also examined PW-1 to PW-3 in support of his case. PW-1 deposed regarding incident which took place in June 2008, when the parties along with PW-1 and his wife had gone to Goa. The entire incident was described by PW-1 in his testimony which has already been narrated above. The divorce petition is totally silent regarding the aforesaid incident of June 2008, which was witnessed by PW-1. It means that the testimony of PW-1 is beyond pleadings. PW-2 in his deposition described certain incidents of cruelty committed by the respondent during the period from February, 2007 to July, 2007. Even the said incidents of 2007 were not specifically pleaded by the appellant in the divorce petition. Thus making it clear that even testimony of PW-2 is also beyond pleadings. It is well-settled that in the absence of pleadings, evidence if any produced by the

parties cannot be considered. It is also equally settled that no party should be permitted to travel beyond its pleadings and that all necessary and material facts should be pleaded by the party in support of the case set up by it as has been held by the Hon'ble Supreme Court in **Ram Sarup Gupta (dead) by LRs vs. Bishun Narayan Inter College and Others, AIR 1987 SC 1242**. So, we are of the view that the Family Court rightly discarded the statements of PW-1 and PW-2 as the same were beyond pleadings.

From the perusal of the testimony of PW-3, it could be easily made out that he remained working as domestic servant with the appellant from 1997 to 2007. It being so, it was natural for him to depose in favour of the appellant, who was his pay master. So, he was rightly considered as an interested witness by the Family Court. Further, it is highly improbable as to how PW-3 came to know about incident of March, 2009, when he had already left the said job in July, 2007.

Admittedly in the divorce petition, the appellant failed to examine any other member of his family or relative. So there is no independent corroboration to the testimony of the appellant. Even otherwise there is no dispute regarding the fact that the parties lived together till November, 2009, so it could be easily presumed that all the alleged acts of cruelty committed by the respondent immediately preceding 6 months of their separation, were condoned by the appellant.

At this juncture, it is pertinent to note that term 'cruelty' has not been defined in HMA. However, it is settled that trivial issues cannot be

considered as cruelty. Furthermore instances of cruelty are to be established with reference to date, time, place and manner in which the occurrence took place. In **Samar Ghosh vs. Jaya Ghosh, (2007)4 SCC 511**, the Hon'ble Apex Court summed up the concept of mental cruelty by holding that no uniform criteria can be laid down for guidance but still the instances were enumerated for its application. While allowing the appeal filed by the husband, the Hon'ble Supreme Court observed that the married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty. We are of the view that general allegations of cruelty without specifying any date or month of any such incident are not of any help to the appellant to prove his case. Thus to our mind, mere bald statement of the appellant is not sufficient to prove the ground to cruelty.

That apart, we are of the view that conduct of the appellant, itself speak volumes about his intention. It is a matter of record that the appellant filed divorce petition just after one month of the separation. In his testimony, he admitted that he never filed any petition seeking restitution of conjugal rights between the parties. No efforts were ever made by him to resolve the dispute amicably. Furthermore, he did not made any efforts to get custody of his son. In his testimony, the appellant admitted that he had not paid even a single penny to his son for his better education and future.

The appellant also clarified before the family Court that he does not want to take the respondent to his house. On the contrary, as far as the respondent is concerned, she tried to save the marriage by filing petition under Section 9 of HMA. She never filed any criminal complaint under Sections 406/498-A IPC against the appellant or any other member of his family. Even in her written statement the respondent did not level any wild allegations that her husband was having any extra marital relations. Only in her cross-examination when the opposite counsel put something in her mouth, the respondent stated that she doubted the character of her husband. So, the appellant has failed to demonstrate that the respondent made every endeavour to demean him by levelling false allegations against him. Further, the defence taken by the respondent in the divorce petition stands vindicated as the petition filed by her under Section 9 of HMA was allowed by the family Court vide order dated 10.12.2012.

Further, in the divorce petition, ground as provided under Section 13(1A)(ii) of HMA was not pleaded by the appellant. Even during the pendency of the present appeal, no application was moved seeking amendment of the divorce petition to that effect. Otherwise also the said ground is not available to the appellant reason being immediately after the passing of decree under Section 9 of HMA, the same was challenged by him in 2013 by way of FAO No.968 of 2013. Furthermore the appellant admitted in his testimony that he never complied with the decree passed under Section 9 of HMA. The appellant cannot be allowed to take benefit of his own wrong. So the argument raised by the counsel for the appellant that decree

of divorce can be granted in favour of the appellant under Section 13(1A)(ii) of HMA is also hereby rejected.

As a last resort, the counsel for appellant made prayer that decree of divorce may be granted on the ground that marriage has broken down irretrievably. The Hon'ble Apex Court in **Naveen Kohli vs. Neelu Kohli, (2006) 4 SCC 558**, has observed that irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act. So this plea of the counsel for the appellant being not legally sustainable is hereby rejected.

In the light of the above, the findings of the family Court regarding issue No.1 in the divorce petition are hereby affirmed.

As a sequel of the above, the findings returned by the family Court against the appellant in petition under Section 9 of HMA to the effect that it was the appellant who has withdrawn from the society of his wife without any reasonable excuse do not call for any interference and are hereby affirmed.

In view of the above, both the appeals filed by the appellant are hereby dismissed.

(RITU BAHRI)
JUDGE

(KARAMJIT SINGH)
JUDGE

10.12.2021
Gaurav Sorot

Whether reasoned / speaking?
Whether reportable?

Yes / No
Yes / No