

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

FAO No.5479 of 2018

Date of decision :-30.08.2022

Kiranjit Kaur

.....Appellant

Versus

Baljit Singh

.....Respondent

CORAM :- **HON'BLE JUSTICE MS. RITU BAHRI**
HON'BLE JUSTICE MS. NIDHI GUPTA

Present :- Ms. Rita Kohli, Sr. Advocate with
Mr. Kirat Pal Dhaliwal, Advocate
for the appellant.

Respondent ex-parte (vide order dated 20.03.2019).

NIDHI GUPTA, J.

The appellant-wife has come up in appeal before this Court seeking setting aside of judgment dated 19.3.2018 passed by the District Judge, Family Court, Barnala, whereby petition filed by her under Section 13 of the Hindu Marriage Act, 1955 (hereinafter 'the Act'), for dissolution of her marriage with the respondent herein by a decree of divorce, has been dismissed. The appellant sought divorce primarily on grounds of cruelty and desertion on part of the respondent.

Briefly stated the facts are that the marriage between the appellant-wife and the respondent-husband was solemnized on 18.11.1998 in the area of Barnala as per Sikh rites and rituals. After their marriage, the parties lived together as husband and wife and cohabited in district Ludhiana in their matrimonial home. Out of this

wedlock, the appellant-wife gave birth to two sons, namely, Akash Deep Singh on 15.1.2002 and Harjot Singh on 30.05.2005, both of whom are residing with the respondent-husband. It is claimed that at the time of marriage, the appellant spent Rs.10,00,000/- (rupees ten lacs) on the marriage and sufficient dowry and gifts were given to the respondent and his parents. It is the case of the appellant-wife that initially the respondent was a good husband but after some years of marriage he fell into bad company and became winebibber and used to beat the appellant without any rhyme and reason and also did not provide any maintenance and basic amenities of life to her. As a result, the appellant had no alternative but to go to her parental house; and as she had no source of income, she eventually left for Cyprus in the year 2011 to make her living. It is further pleaded that in the year 2013 the appellant visited India and also sent a message to the respondent to meet, but the respondent refused to visit the appellant and rather threatened that his relations with the appellant were at an end and if she tried to enter the matrimonial home, then she will be done to death. It is accordingly, pleaded that the respondent willfully and without reasonable cause withdrew himself from the society of the appellant and she was left with no choice but to file the petition under Section 13 of the Act before the Family Court concerned in the year 2017.

Upon notice, the respondent appeared and filed written statement by taking legal objection that the appellant's petition under Section 13 of the Act was not maintainable as it was filed through her mother who is her power of attorney holder.

It was also pleaded by the respondent that the Court at Barnala had no territorial jurisdiction to entertain, try or decide the petition under Section 13 of the Act as the appellant/petitioner was now residing in Cyprus, and prior to that had left for Cyprus from the village Hans Kaur, Tehsil Jagraon and both the places are not falling within the territorial jurisdiction of the Court at Barnala.

On merits, the respondent contested the petition by stating that the appellant had not approached the Family Court with clean hands and had concealed material and true facts. It was the respondent's case that it was he only who had sent the appellant to Cyprus by bearing all the expenses of visa etc. on the understanding between the parties that upon reaching Cyprus, the appellant would arrange visa for the respondent also and would sponsor him. However, contrary to this settlement, the appellant after reaching Cyprus never arranged any visa for the respondent. In fact, after earning money there she purchased one big bungalow in the area of Barnala and was now living a luxurious life, but had never sent any money to the respondent or their children. It was further pleaded that the appellant has been sending all her money to her parents and therefore the parents of the appellant-wife had now turned greedy and instigated the appellant-wife to file the petition for dissolution of marriage under Section 13 against the respondent-husband.

The respondent stated that initially after the marriage the appellant had no complaint against the respondent and that she had only now concocted false story and levelled false allegations against the respondent. It is also stated that when the appellant had visited

India in the year 2013, she had actually stayed with the respondent and the children.

No rejoinder was filed by the appellant. On the basis of the above averments, the Family Court at Barnala vide order dated 02.08.2017 framed the following issues for consideration :-

1. Whether the petitioner is entitled for the dissolution of her marriage with the respondent as prayed for ? OPP
2. Whether the petitioner has no locus standi and cause of action to file the present petition against the respondent? OPR
3. Whether the petitioner has not come with clean hands for the purpose of filing the petition against the respondent ? OPR
4. Whether the petitioner is stopped by her own act and conduct to file the petition against the respondent ? OPR
5. Whether this Court has no any territorial jurisdiction to entertain, try and decide the present petition ? OPR
6. Relief.

Thereafter, the parties led evidence. The appellant herself stepped into the witness box as PW1, and examined her mother Mrs. Sukhdev Kaur as PW2, and led other documentary evidence. The respondent stepped into the witness box as RW1 and after recording his testimony, closed his evidence.

After taking into consideration the abovesaid facts, pleadings and evidence, the Family Court came to the conclusion that the appellant was not able to prove cruelty and desertion by the

respondent. In reaching the above conclusion, the Family Court at Barnala relied upon several decisions of this Court, as well as that of the Hon'ble Supreme Court, and dismissed the petition holding that the appellant:

“could not prove her stand as per evidence led against her by the respondent and resulting of which, is concluded from the rival evidence on the record that the respondent has established that the petition is not maintainable and the petitioner is estopped by her own act and conduct from filing the present petition against him because the petitioner had created such circumstances which had constrained the respondent to live in his house separately from her and had subjected cruelty to the respondent by doing so and therefore has failed to prove the grounds of cruelty because mere simpliciter leaving the society of the petitioner by the respondent is not desertion unless and until, the intention of deserting the petitioner on the part of the respondent is proved on record and the petitioner has failed to prove the other ground of desertion. The petitioner has also failed to prove as to how this Court has no any jurisdiction to entertain, try and decide the petition and resulting of which, the contention of learned counsel for the petitioner raised in rhyme of the stand of the petitioner, is not found to be sustainable as per stand of the respondent from any angle and resulting of which, all the said issues are therefore, decided against the petitioner.”

Accordingly, vide order dated 19.03.2018 the District Judge, Family Court, Barnala, dismissed the appellant's petition under Section 13 of the Hindu Marriage Act.

It is to challenge this order that the appellant has approached this Court by way of the present appeal on account of inter alia, the grounds that the Family Court has failed to appreciate the documentary and other evidence and has wrongly held that the appellant was not subjected to mental and/or physical cruelty. It has also been pleaded before this Court that the lower Court had erred in not appreciating that the respondent had become winebibber and used to beat the appellant without any rhyme or reason, thus, causing her great mental disturbances and agony. It was further averred that the respondent had neglected his matrimonial obligations towards the appellant because of which the appellant was left with no alternative but to go to Cyprus to make her living as the respondent failed to maintain her or provide any basic amenities of life to her. It was also stated that in fact, it was the respondent who had refused the appellant's offer to come to Cyprus and therefore, it was in these circumstances that the appellant was constrained to file the petition under Section 13 of the Hindu Marriage Act.

Notice of this appeal was issued to the respondent-husband on 30.08.2018. Thereafter the matter was adjourned to 30.11.2018, and then to 20.03.2019 to enable him to put in appearance. As the respondent failed to put in appearance, this Court on 20.03.2019, directed proceeding ex-parte against the respondent by passing the following order :-

“As per the office report, notice issued to the respondent has been received back with the report that he has refused to receive the same and thereafter the same was affixed on the door of his house.

In this view of the matter, the service is assumed to have been effected on the respondent.

Since no one has put in appearance on behalf of the respondent, therefore, he is proceeded against ex-parte.

To come up for arguments on 24.07.2019.”

Subsequently, this case was adjourned on 24.7.2019, 19.11.2019, 20.1.2020, 07.5.2020, 08.7.2022 and 30.08.2022. Yet, no one appeared on behalf of the respondent on any of these dates.

We have heard learned counsel for the appellant and perused the record.

First and foremost, the reasoning of the Id. Family Court to the effect that “*The petitioner has also failed to prove as to how this Court has no any jurisdiction to entertain, try and decide the petition...*”, belies explanation, as this plea questioning jurisdiction had been raised on behalf of the respondent, and not the petitioner/appellant herein.

Secondly, the learned Family Court has failed to deal with the legal objection raised by the respondent that petition u/s 13 of the Act cannot be filed through Attorney holder. In our view, this issue is covered by a decision of the Division Bench of the Hon’ble High Court of Kerala rendered in ‘**Sethi P.V. v. Nil’ OP (FC).No.146 of 2021. D/d. 26.2.2021**, wherein it has been held thus:

“ ... The power of attorney is an authority whereby "one is set in the turn, stead or place of another" "to act for him". In Black's Law Dictionary, "power of attorney" is described as the instrument by which a person is authorised to act as an agent of the

person granting it. The relation between the donor of the power and the donee of the power is one of principal and agent as recognised under section 182 of the Indian Contract Act. The relation of agency arises whenever one person called the agent has authority to act on behalf of another called the principal and consents so to act. ... Law is well settled that a power of attorney holder can appear, plead and act on behalf of a party in all proceedings in any Court of civil jurisdiction. Relevant statutory provisions are Order VI Rule 14, Order III Rules 1 and 2 of the Code of Civil Procedure, 1908 (for short 'CPC') ... Section 10 of the Family Courts Act, 1984 provides that the provisions of CPC shall apply to all suits or proceedings before the Family Court. It is also stated that Family Court shall be deemed to be a civil Court for the purpose of provisions of the CPC and shall have all the powers of such courts. Section 21 of the HMA also provides that proceedings under the Act shall be regulated by CPC. ...”

Accordingly, this issue regarding maintainability is laid to rest in above terms.

On merits too, the order impugned, suffers from patent flaws. Under Section 28 of the Act, this Court is the first Court of appeal, and is therefore, a Court on both facts and law. Consequently, we have appraised the Lower Court Record in minute detail and find that no evidence whatsoever has been led by the respondent-husband which could have led the learned Family Court to conclude that *“the petitioner had created such circumstances*

which had constrained the respondent to live in his house separately from her". It is not clear as to how the learned Family Court has derived this conclusion.

On the contrary, it is not in dispute that initially it was a happy marriage. Therefore, it is but trite to wonder that any woman would suddenly leave a happy matrimonial home, and especially her children, and move to Cyprus without any reason or strong instigation. A perusal of the record of proceedings evidences that the respondent-husband has not come forward to ebulliently contest the appeal/divorce; nor has he led any evidence before the Family Court save for his affidavit which was also his testimony verbatim. Some may say that there is no consent of the respondent. But at the same time it is also clear, that there is no willingness, in real terms, to live together. If that were so, it was open to the respondent-husband to file a petition for restitution of conjugal rights, but he has not even contested the present appeal. Therefore, for all intents and purposes, the respondent has distanced/divorced himself from the appellant's life, as discernible from his conduct.

This leads to the question, whether this behaviour would satisfy the requirement of cruelty under law? What constitutes 'Cruelty', in a marriage is almost impossible to define. This Court, as also the Hon'ble Supreme Court, have in a number of decisions acknowledged this fact and have thus, held that 'cruelty' in a marriage is to be determined in the facts and circumstances of each case. In this regard, the observations of the Hon'ble Supreme Court in '**Ravi Kumar v. Julmidevi**' (2010) 4 SCC 476, are relevant:

- “19. *It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it may be just an attitude or an approach. Silence in some situations may amount to cruelty.*
20. *Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial cases can be of infinite variety-it may be subtle or even brutal and may be by gestures and words. That possibly explains why Lord Denning in **Sheldon v. Sheldon**, [1966] 2 WLR 993 held that categories of cruelty in matrimonial cases are never closed.” (Emphasis supplied)*

In our view, the conduct of the parties in the present case evidences that there are irreconcilable differences between the parties, rendering the marriage, as of today, a mere legal fiction. It is not in dispute that the parties are residing separately since

2011/2013. Even mediation attempts between the parties have remained unsuccessful. Though irretrievable breakdown of marriage is not available as a ground under the statute, yet, the reality of it has been recognised by the Supreme Court in a catena of decisions. Reference in this regard may be made to some:

Hon'ble Supreme Court in '**N. Rajendran v. S. Valli**',
(2022) SCC OnLine SC 157 has observed as follows:

"In this regard, learned counsel for respondent pointed out that this is not a case for exercising power under Article 142. He addressed this submission, reminding us of the conduct of the appellant throughout. He would submit that the respondent is completely without blame. She was always ready and willing. The findings as found by the High Court being confirmed, no occasion arises for this Court to exercise power under Article 142. We record this submission for as a prefatory remark to indicate that *this is not a case where both parties are agreeable for a dissolution by way of irretrievable breakdown of marriage. But that then leads us to the question as to whether the consent of the parties is necessary to order dissolution of marriage on the ground of irretrievable breakdown.* This again, is not res integra. We may notice that this Court has in a catena of decisions discussed this very aspect. The judgment reported in **R. Srinivas Kumar v. R. Shametha** reads as under:

"7. Now so far as submission on behalf of the respondent wife that unless there is a consent by both the parties, even in exercise of powers under Article 142 of the Constitution of India the marriage cannot be dissolved on the

ground of irretrievable breakdown of marriage is concerned, the aforesaid has no substance. If both the parties to the marriage agree for separation permanently and/or consent for divorce, in that case, certainly both the parties can move the competent court for a decree of divorce by mutual consent. Only in a case where one of the parties do not agree and give consent, only then the powers under Article 142 of the Constitution of India are required to be invoked to do substantial justice between the parties, considering the facts and circumstances of the case. However, at the same time, the interest of the wife is also required to be protected financially so that she may not have to suffer financially in future and she may not have to depend upon others.”

36. Having found that consent of the parties is not necessary to declare a marriage dissolved, we cannot be unmindful of the facts as they exist in reality. There has been a marriage which took place on 31.10.2004. There is a child born in the said marriage. No doubt being in contravention of Section 15, it becomes a fait accompli but at the same time we do not reasonably perceive any possibility of the appellant and the respondent cohabiting as husband and wife. Whatever life was there in the marriage has been snuffed out by the passage of time, the appearance of new parties and vanishing of any bond between the parties. Not even the slightest possibility of rapprochement between the appellant and the respondent exists for reasons though which are entirely due to the actions of the appellant and for which the respondent

cannot be blamed. The marriage between the appellant and the respondent has become dead. It can be described as a point of no return. There is no possibility of the appellant and the respondent stitching together any kind of a reasonable relationship as the tie between the parties has broken beyond repair and having regard to the facts of this case, we would think that it would be in the interest of justice and to do complete justice to the parties that we should pass an order dissolving the marriage between the appellant and the respondent.

37. We make it clear that this decision of ours is not based on our approval of the conduct of the appellant nor is it based on sitting in judgment over the conduct of the respondent. In other words, we find that respondent is blameless in the matter but the facts as they have unfolded and the developments which have taken place, render it unavoidable for us to consider dissolution of marriage as the best course open in the interest of justice.” (Emphasis supplied)

In our view, the above said pronouncement of the Hon’ble Supreme Court squarely covers the issue at hand.

Also, as stated above, in the present matter the parties have been living separately for the last almost ten years, since 2011/2013. Reference at this stage can be made to the case of **‘Naveen Kohli v. Neelu Kohli’, (2006) 4 SCC 558** which was also a case of cruelty (mental and physical) where the Hon’ble Supreme Court again considered the concept of irretrievable breakdown of marriage. In that case too the parties had been living separately since ten years and

the wife was not ready to grant divorce to her husband. However, notwithstanding this factual position, Hon'ble Supreme Court was pleased to grant divorce in said matter and has further noticed as follows:

*“32. In ‘**Sandhya Rani v. Kalyanram Narayanan**’, (1994) Supp. 2SCC 588, this Court reiterated and took the view that since the parties are living separately for the last more than three years, we have no doubt in our mind that the marriage between the parties has irretrievably broken down. There is no chance whatsoever of their coming together. Therefore, the Court granted the decree of divorce.*

*33. In the case of ‘**Chandrakala Menon v. Vipin Menon**’, (1993)2 SCC 6, the parties had been living separately for so many years. This Court came to the conclusion that there is no scope of settlement between them because, according to the observation of this Court, the marriage has irretrievably broken down and there is no chance of their coming together. This Court granted decree of divorce.*

*34. In the case of **Kanchan Devi v. Promod Kumar Mittal**, 1996(2) RCR (Criminal) 614 : (1996)8 SCC 90, the parties were living separately for more than 10 years and the Court came to the conclusion that the marriage between the parties had to be irretrievably broken down and there was no possibility of reconciliation and therefore the Court directed that the marriage between the parties stands dissolved by a decree of divorce.”*

Thus, in the conspectus of the peculiar facts and circumstances of the present case, and in consonance with the aforesaid pronouncements of the Hon’ble Supreme Court, with a view to do complete justice, and put an end to the agony of the parties, this Court deems it appropriate to allow the present appeal. Accordingly, for the reasons stated hereinabove, order dated 19.3.2018 is set aside, this appeal is allowed and the appellant-wife is granted divorce under Section 13 of the Hindu Marriage Act, 1955.

Ordered accordingly.

(NIDHI GUPTA)
JUDGE

(RITU BAHRI)
JUDGE

August 30, 2022
Vijay Asija

Whether speaking/reasoned
Whether Reportable

YES/NO
YES/NO