

(2016) 05 SHI CK 0128

High Court of Himachal Pradesh

Case No: FAO(HMA) No. 306 of 2006

Kamal Sharma

APPELLANT

Vs

Minakshi Sharma

RESPONDENT

Date of Decision: May 16, 2016**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 32 Rule 15
- Hindu Marriage Act, 1955 - Section 13

Citation: (2016) AIRCC 2812 : (2016) 4 CivCC 853 : (2016) 3 HLR 621 : (2016) ILRHP 1373**Hon'ble Judges:** Mr. Dharam Chand Chaudhary, J.**Bench:** Single Bench**Advocate:** Mr. Suneet Goel, Advocate,, for the Appellant; Mr. J.R. Poswal, Advocate, for the Respondent**Final Decision:** Disposed Off

Judgement

Mr. Dharam Chand Chaudhary, J.(Oral)—Aggrieved by the judgment dated 8.8.2006 passed by learned District Judge, Shimla in a petition Under Section 13 of Hindu Marriage Act registered as Petition No. 46-S/3 of 2004, the petitioner-husband has approached this Court by filing the present appeal with a prayer to quash and set aside the same.

2. The petitioner has solemnized marriage with the respondent on 1.8.1991 as per Hindu rites and rituals. They lived together as husband and wife and there are three children, two females and one male, born to them out of this wedlock. The petitioner-husband was deaf and dumb by birth. The complaint is that after marriage the respondent has started treating him with cruelty. The instances of cruelty as highlighted in the petition were that the respondent not accompanying him to attend social gathering, not prepared to live with him in the same bedroom, do not look after the children, neglects his old ailing father, finds excuses not to have sexual relation with him, lodged false complaint against him in the police station, went to her mother"s place during children"s holidays and on return

after three months, refused to share bedroom with him and that her relations visits her off and on and she do not inform either the petitioner or his father nor disclose their identity to them. The petitioner, therefore, have filed the petition in the trial Court for dissolution of his marriage with respondent by a decree of divorce on the grounds as aforementioned.

3. In reply, the respondent-wife has raised objections qua maintainability of the petition and that the same does not disclose an enforceable cause of action and also that the same suffers from delay and latches. On merits, while denying the instances of cruelty the petitioner referred to in the petition, it is submitted that she never neglected him nor any question of her refusal to accompany him in social gathering arise. The children are living with her and also the petitioner. There is no question of not attending to the children. She submits that her relations with the petitioner are very cordial and she never harassed him mentally or physically. Also that, their relations as husband and wife still exists. The complaint she lodged was against the petitioner as he being persuaded by his father and sister Nain Tara used to treat her with cruelty. Also that, the petitioner usually comes to house late in the night and addicted to drinks. It is also submitted that she is in talking terms with the petitioner and residing in the matrimonial home. It is denied that she is not cohabiting with the petitioner. The petitioner has allegedly concocted a story just to get rid of his liabilities which he otherwise is duty bound to discharge.

4. The petitioner has also filed the rejoinder. On the pleadings of the parties, the trial Court has framed the following issues:-

1. Whether the respondent has treated the petitioner with cruelty? ... OPP

2. Whether the petition is not maintainable? ... OPR

3. Whether the petitioner has no cause of action? ... OPR

4. Whether the petition suffers from delay and latches? ... OPR

5. Relief.

5. Parties were put to trial on all the issues. The petitioner in turn has produced his own affidavit in evidence and also examined their domestic help Smt. Indira PW2, T.K. Sharma, his Uncle PW3, V.K. Sharma his father PW4 and their tenants S/Shri M.J. Amla and Naresh Thakur, PWs 5 and 6, respectively. On the other hand, the respondent has herself stepped into the witness box as RW1 and examined her mother Smt. Sudeva Devi RW2.

6. Learned trial Court has answered the question of maintainability of the petition in affirmative, while answering issue No. 2. However, while arriving at a conclusion that the instances quoted in the petition do not constitute the cruelty within the meaning of Section 13 of the Hindu Marriage Act has arrived at a conclusion that the petitioner failed to make out a case for dissolution of his marriage with respondent by a decree of divorce, the

petition, as such, was dismissed.

7. The legality and validity of the judgment under challenge has been questioned on the grounds, inter-alia, that issue No. 2 could have not been answered in-affirmative for the reasons that the petitioner though is deaf and dumb by birth, however, besides getting educated in a special school meant for the students like the petitioner he also did diploma in photography from All India Federation of the Deaf multipurpose training Centre for the deaf, New Delhi. He is running a STD booth and Photostat machine. He is deaf and dumb but not of unsound mind. The findings on issue No. 2 rather are stated to be not legally sustainable.

8. As regard the findings on merit, the same are stated to be contrary to the evidence available on record. The evidence as has come on record by way of testimonies of PW2, PW3, PW5 and Pw6 is stated to be misinterpreted and misconstrued. The marriage of the parties is stated to be irretrievably broken down. As such, the impugned judgment has resulted in miscarriage of justice to the petitioner.

9. On hearing learned Counsel representing the parties at length and on appreciation of the pleadings of the parties as well as the evidence available on record, in the considered opinion of this Court findings on issue No. 2 are neither legally nor factually sustainable.

10. In order to substantiate the view of the matter so taken by this Court, reference can be made to the reply filed by respondent to the petition in the trial Court. Only an objection qua maintainability of the petition has been raised without specifying as to how the petition is not maintainable. Even issue No. 2 as framed is also simpliciter that the petition is not maintainable. Now if looking to the statement of respondent-wife while in the witness box as RW1 she has not even uttered a single word that on account of the petitioner a deaf and dumb person is not of sound mind and as such, the petition should have been filed by him through his next friend. Nothing to this effect is there in the statement of her mother RW2 also.

11. The findings recorded on issue No. 2 reveal that learned Counsel representing the respondent-wife has raised the question of maintainability of the petition on the ground that the petitioner being a deaf and dumb person should have filed the petition through his next friend or guardian for the first time during the course of arguments. Learned trial Judge while accepting the submission, so made, has concluded that the provision contained in Rule 15 Order 32 and Rules 1 to 14 applies to a person of unsound mind which includes deaf and dumb person also. It has, therefore, been held that the petitioner who is deaf and dumb person could have not represent his own case and rather represented by his next friend or guardian. The petition, therefore, was held to be not maintainable.

12. It is surprising to note that without any pleading qua this aspect of the matter nor there being anything in the evidence, the trial Court by recording such findings has taken the

petitioner-husband in surprise. True it is, that the mental infirmity within the meaning of Order 32, Rule 15 is not mental disorder, insanity or mental illness but infirmity caused by physical defects like deafness or dumbness also constitute weakness of mind and renders a person incapable of protecting his interests. In such a case where the person having such infirmity is not represented through the next friend or a guardian and an objection that such person is not of sound mind is raised, the enquiry as envisaged under Order 32, Rule 15 is required to be conducted. Support in this regard can be drawn from the judgment of a Division Bench of the High Court of Kerala in **AIR 2008 Kerala 145, Raveendran v. Sobhana & anr.** The relevant text of this judgment reads as follows:

"11. Thus, the legal position is that mental infirmity in the context of Order 32, Rule 15 is not mental disorder, insanity or mental illness. Weakness of mind due to any reason, making a person incapable of protecting his interests, is sufficient to unfold the protective umbrella under Order 32, Rule 15 . Such infirmity can also be caused by physical defects like deafness or dumbness, whereby a person is made incapable of communicating his wishes, views or thoughts to others who are not acquainted with him. If such a person is before the Court in a suit or proceedings either as plaintiff or defendant, the Court has a jurisdictional obligation to conduct an enquiry as to whether the person is capable of protecting his own interests. If in the judicial enquiry, if necessary and if required, conducted with the assistance of an expert, it is found that such person is incapable of protecting his interests in the suit or proceedings before the Court, the Court has an obligation to appoint a next friend for such person, and if the Court on the other hand finds that the person is otherwise capable of protecting his interests without a next friend, the Court shall remove the next friend if already available and permit the person, who is alleged to be of unsound mind or suffering from mental infirmity to conduct the litigation himself."

13. In the case in hand the trial Court has not conducted any enquiry and rightly so as no specific objection to this effect was raised by the respondent in reply to the petition. Otherwise also, without holding any enquiry into the question of soundness/unsoundness of mind of the petitioner, no findings that he was of unsound mind and he has not filed the petition through his next friend or guardian, the same is not maintainable, should have not been recorded. Therefore, the findings on Issue No. 2 being legally and factually unsustainable are ordered to be reversed.

14. Now if coming to the findings recorded on issue No. 1, while concurring with the same in the considered opinion of this Court the instances of cruelty as highlighted in the divorce petition not constitute the cruelty within the meaning of Section 13 of the Hindu Marriage Act and at the most amount to bear and tears of normal married life. Learned trial Judge has not committed any illegality and irregularity while holding that the degree of cruelty for seeking the decree of divorce should be over and above the mere bear and tears of routine married life. This Court in **Kamaljit Bhullar v. Nimrat Preet Singh Bhullar, 1991 (1) Sim. L.C. 156** though has held that it is difficult to define the exact legal meaning of the expression "cruelty", however, as per the ratio of this judgment, it is

conduct of such character so as to have caused danger to life, limb or health or as to give rise to a reasonable apprehension of such danger constitute cruelty in a matter of this nature. Similar is the ratio of the judgment in **P.K. Vijayappan Nair v. J. Ammini Amma, AIR 1997 Kerala 170**. The High Court of Punjab and Haryana in **Harjit Kaur v. Jaswant Singh, 1996(1) H.L.R. 217** has held that behaviour of one of spouse if so cruel that it becomes impossible for the other spouse to live harmoniously with the first spouse in the matrimonial home, it is only then it can be said that the first spouse has acted with cruelty and on that ground the spouse is entitled to the decree of divorce. It is also held in this judgment that the bear and tears of married life do not constitute cruelty.

15. If the evidence is scrutinised in the light of the legal background, admittedly the respondent is residing in the matrimonial home. No doubt, as per her own admission she is residing in a room in the third floor of the house, whereas the petitioner-husband resides in the forth floor of the house with his father and children. She also admit that the food for the petitioner and the children is being cooked some time by her father-in-law and some time by the maid PW2. She prepares food for herself. Not only this, but she is residing alone in the room. However, she is looking after the children. The close scrutiny of the evidence produced by the petitioner reveals that the children takes their breakfast with her. She had been accompanying them to school. She was also bringing them back to the home. The petitioner has admitted while in the witness box that on one occasion she decided not to attend the marriage of her brother as the children were undergoing their annual exams. She is very categoric and specific while stating in her examination-in-chief that except for the petitioner there is no one upon whom she can depend and that she is living in the matrimonial home and also intend to reside in the matrimonial home. She admit that the complaint was lodged by her against the petitioner in the police station when she was not allowed to visit her parents" house and it is after that complaint she is now being allowed to go there.

16. The evidence as discussed herein above lead to the only conclusion that the present is not a case where it can be said that the marriage of the petitioner with respondent irretrievably broken down. There may be some other and further reason of her not sharing bedroom with the petitioner or preparing food for herself separately. May be the petitioner or his father PW4 and for that matter his sister Nain Tara are not allowing her to cook food for the family and the petitioner-husband himself has withdrawn from her company in order to get rid of her cannot be ruled out.

17. Otherwise also, the instances that the respondent is not accompanying him to attend social gathering/functions, not sharing bedroom with him, not preparing food for the family or finding excuses not to maintain sexual relations with him are not the instances of cruelty in legal parlance and rather the bear and tears of normal married life. The instances such as visiting the parent"s house with children during their vacation or her relations visiting her in the matrimonial home are not at all the instances of cruelty towards the petitioner and rather it is the petitioner who seems to be treating her with cruelty by not allowing her to visit her parents" house and even objecting to the visits of

her relations to the matrimonial home.

18. The appraisal of the facts of this case and also the evidence available on record, therefore, amply demonstrate that the Court below has not committed any illegality or irregularity while answering issue No. 1 against the petitioner. Therefore, though this Court has quashed and set aside the findings on issue No. 2, however, maintained the findings on issue No. 1. The result, therefore, would be the same i.e. dismissal of the petition.

19. In view of the above, the impugned judgment though is modified and appeal partly allowed, however, the petitioner is not entitled to the decree of divorce. No order as to costs.

20. The appeal is accordingly disposed of.