

Balwinder Kaur

Vs

Hardeep Singh

(Sujata V. Manohar, D. P. Wadhwa JJ)

18.11.1997

JUDGMENT

D.P.WADHWA, J.

1. Leave granted.

2. Appellant-wife is in appeal against the judgment dated September 27, 1996 of the Division Bench of Punjab and Haryana High Court summarily dismissing her appeal filed under Section 28 of the Hindu Marriage Act, 1955 (for short 'the Act'). Appellant had filed this appeal against the judgment and decree dated December 4, 1995 passed by the District Judge, Patiala in her own petition under Section 13 of the Act seeking divorce from her husband the respondent herein, on the ground of cruelty and desertion. Appellant had alleged that fraud was perpetrated upon her by her husband in filing the petition for divorce which she said she never intended to file and never sought divorce from her husband. In the proceeding before the District Judge appellant appeared to have examined herself and also one Dalip Singh who claimed to be her maternal uncle which the appellant has denied. An ex-parte decree of divorce was granted by the District Judge, Patiala on the petition of the appellant. Appellant says when she became aware of the decree of divorce she moved the High Court in appeal which appeal, as noted above, was dismissed by the following order:

"Neither any ground for condoning the delay of 263 days is made out nor there is any merit in the appeal. It is the applicant-appellant who filed a petition for divorce under Section 13 of the Hindu Marriage Act. If any fraud has been practised on the applicant, the present appeal is not the appropriate remedy. The remedy lies with the Civil Court. The application as well as the appeal is dismissed."

3. The marriage between the parties was solemnised according to Sikh rites on February 18, 1991 at Sangrur, tehsil and district Patiala in the State of Punjab. After sometime it appears differences arose between the parties. Appellant on May, 22 1995 lodged a complaint with the Senior Superintendent of Police complaining harassment by the respondent in connivance with his parents. She said her husband was having illicit relations with the wife of his elder brother and that her parents-in-law and brother-in-law were hatching a conspiracy to kill her in order to get her husband married for a second time. She complained that for the last six months she was living with her parents because of the ill-treatment meted out to her and that all the persons named in the complaint were not permitting her to live in peace. There is an entry in the Police Station City Rajpura, District Patiala dated July 10, 1995 where compromise between the parties has been recorded. Reporting of the compromise was made by the respondent himself who was accompanied with various respectable persons whose names are recorded as under:

"Sh. Diwan Singh S/o Daudagar Singh R/o H.No.920 Gurbax Colony, Patiala, Shri

Mohinder Singh, Sarpanch village Pillap Maghali, Sh.Sukhdev Singh Sarpanch Mondo P.S Ghanour, Sharan Singh member Panchayat village, Alipur Raian, Jarnail Singh S/o Sh. Arjan Singh R/o Rampur, Bagh Singh Nambardar Village Ghaggar Sarai, Baldev Singh Nambardar Village: Chamaru."

4.The report further records that the compromise has been accorded between the parties with the help of the aforesaid persons after lodging of the complaint by the appellant against her husband when she felt annoyed. It was also reported that from that day onwards both parties will live separately from other members of the family and that respondent would not unduly cause hardship to the appellant. Since the complaint by the appellant had been addressed to the Senior Superintendent of Police her statement was separately recorded on July 21, 1995 withdrawing the complaint when she made the following statement :

"Statement of Smt. Balwinder Kaur w/o Shri Hardeep Singh D/o Shri Tirath Singh r/o Kasturba Road, Rajpura State that I am the resident of the address given above. I got married to Hardeep Singh on 18.2.91.I had a family problem with my husband Hardeep Singh and my in-laws family and because of this problem I had gone to the house of my mother and father at Samour because of which I gave this application. Both the parties with the aid and help of the respectable persons and the Panchayat have arrived at a settlement. I have agreed to this settlement without any fear or pressure from any quarter. I agree to the settlement got done by the Panchayat. Now I do not want any action on the complaints given by me. Now I live separately from my in-laws house.

Sd/-

(BALWINDER KAUR)

W/o Hardeep Singh d/o

Tirath Singh

R/o Kasturba Road,

Rajpura

21.7.95"

5.On July 4, 1995 respondent had filed a petition against the appellant, his wife, under Section 9 of the Act for restitution of conjugal rights in the court of the Additional Senior Sub Judge, Rajpura. This petition was withdrawn on February 14, 1996.The following is the record of proceeding on that day:

"14.2.1996-Present:-Counsel for the plaintiff. Counsel for the plaintiff has made statement that he does not want to proceed with this case. So in view of the statement of counsel for the plaintiff the suit of the plaintiff is dismissed as withdrawn. File be consigned to the Record Room. Announced Sd/-Dt.14.2.96 Civil Judge Junior Division, Rajpura."

6.Appellant submitted that service on her in this petition filed by her husband under Section 9 of the

Act was wrongly got obtained. However, it is not necessary for us to go into all the details at this stage.

7. The petition for divorce filed by the appellant out of which this proceeding has arisen was instituted on September 4, 1995. We have gone through the petition for divorce. Apart from the date of the marriage between the parties the petition singularly lacks in better particulars though the petition is based on the alleged acts of cruelty and desertion. Respondent did not appear and the proceeding was ex-parte against him. Statement of the appellant was recorded on November 22, 1995 and that of her solitary witness also on the same day. The judgment of the learned District Judge allowing the petition is dated December 4, 1995. The Judgment merely reproduces what the appellant had stated in the petition for divorce in general terms and the fact that she was an illiterate person and it proceeds as under:

"Respondent Hardeep Singh did not turn up to contest the petition in spite of his service and therefore, he was proceeded ex-parte. I have recorded ex-parte proof of the petitioner Balwinder Kaur petitioner appeared as AW1 and she examined Dalip Singh her maternal uncle. Petitioner while appearing as AW 1 supported her allegations made in the petition while Dalip Singh AW 2 her maternal uncle corroborated her. Both of them have stated that the respondent used to treat her with cruelty during her stay with him and deserted her for a continuous period of more than two years. In view of the ex-parte proof of the petitioner, I am satisfied that the respondent treated the petitioner with cruelty and deserted her for a continuous period of more than two years before the filing of the petition. Resultantly, I accept this petition and pass an ex-parte decree of divorce in favour of the petitioner and against the respondent dissolving their marriage with immediate effect. No order as to costs. Pronounced. 4.12.1995 Sd/ District Judge Patiala.

8. Appellant has alleged fraud by her husband in getting her signatures on the petition for divorce and then bringing her to court to record her statement. Her case is she was unaware of what was happening and she in fact was duped in signing the petition and then appearing in the court as a witness. She said she never wanted divorce. During the course of hearing in this appeal, we enquired from learned counsel for the respondent if the respondent himself at any time wanted divorce and the reply was in the negative. The question then arises as to why the respondent allowed the proceeding to go ex-parte. There is no mention of the complaint filed by the appellant before the Senior Superintendent of Police and recording of the compromise between the parties and her own statement in the police on July 21, 1995. If the matter had been settled between the parties in July 1995 one may ask a question as to what was the reason for the appellant to file a petition for divorce within six weeks of the compromise. The conduct of the respondent in proceeding with the petition filed by him for restitution of conjugal rights is also not understandable.

9. A petition for divorce is not like any other commercial suit. A divorce not only affects the parties, their children, if any, and their families but the society also feels its reverberations. Stress should always be on preserving the institution of marriage. That is the requirement of law one may refer to the Objects and Reasons which led to setting up of Family Courts under the Family Courts Act, 1984. For the purpose of settlement of family disputes emphasis is "laid on conciliation and achieving socially desirable results" and eliminating adherence to rigid rules of procedure and evidence. These further note: "The Law Commission in its 59th report (1974) had also stressed that in dealing with disputes concerning the family the court ought to adopt an approach radically different from that adopted in ordinary civil proceedings and that it should make reasonable efforts

at settlement before the commencement of the trial. The Code of Civil Procedure was amended in 1976 to provide for a special procedure to be adopted in suits or proceedings relating to matters concerning the family. However, not much use has been made by the courts in adopting this conciliatory procedure and the courts continue to deal with family disputes in the same manner as other civil matters and the same advisory approach prevails."10. It is now obligatory on the part of the Family Court to endeavour, in the first instance to effect a reconciliation or settlement between the parties to a Family dispute. It will be useful to note the qualifications and the method of selection of a Family Court Judge. That will be sub-sections (3) and (4) of Section 4 of the Family Courts Act:(3) A person shall not be qualified for appointment as a Judge unless he(a) has for at least seven years held a judicial office in India or the office of a member of a Tribunal or any post under the Union or a State requiring special knowledge of law; or (b) has for at least seven years been an advocate of a High Court or of two or more such courts in succession; (c) possesses such other qualifications as the Central Government may, with the concurrence of the Chief Justice of India, prescribe.(4) In selecting persons for appointment as Judge, -(a) every endeavour shall be made to ensure that persons committed to need to protect and preserve the institution of marriage and to promote the welfare of children and qualified by reason of their experience and expertise to promote the settlement of disputes by conciliation and counseling are selected; and (b) preference shall be given to women".

11. Even where the Family Courts are not functioning, the objects and principles underlying the constitution of these courts can be kept in view by the civil courts trying matrimonial causes.

12. Under Section 21 of Hindu Marriage Act provisions of Code of Civil Procedure 1908, as far as may be, are applicable but that is subject to other provisions contained in the Act and to such rules as the High Court may make in this behalf. Under Section 28 of Hindu Marriage Act decree of divorce is appealable. Section 28 of the Act is as under:

"28. Appeals from decrees and order.-

(1) All decrees made by the court in any proceeding under this Act shall, subject appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeal ordinarily lie from the decision of the court given in the exercise of its original civil jurisdiction.(2) Orders made by the court in any proceeding under this Act section 25 or section 26 shall, subject to the provisions of sub-section

(3), be appealable if they are not interim orders, and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order."13. This Section 28 may be contrasted with Section 96 of the Code which provides for appeal from original decree, which, in relevant part, is as under:"96. Appeal from original decree-(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from every decree passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court.(2) An appeal may lie from an original decree passed ex parte.(3) No appeal

shall lie from a decree passed by the Court with the consent of parties."

14. Rules of procedures are meant to subserve the cause of justice and not to frustrate it. In the present case when fraud has been alleged by the wife in getting the petition for divorce filed through her when she never wanted a divorce and circumstances showed that what she said was prima facie probable and further from circumstance of the case hereinafter pointed out, the High Court in our opinion was not justified in rejecting the appeal without satisfying itself that the requirements of law had been satisfied. 15. Section 23 of the Hindu Marriage Act mandates the court before granting decree for divorce, whether defended or not to satisfy itself (1) if the grounds for claiming relief exist and the petitioner is not taking advantage of his or her own wrong or disability for the purpose of such relief and (2) the petitioner has not in any manner been accessory to or connived at or condoned the act or acts complained of, or where the ground of the petition is cruelty the petitioner has not in any manner condoned the cruelty. A duty is also cast on the court in the first instance, in every case where it is possible so to do consistently with the nature and circumstances of the case, to make every endeavour to bring about a reconciliation between the parties. Under sub-section (3) of Section 23 of the Act, the court can even refer the matter to any person named by the parties for the purpose of reconciliation and to adjourn the matter for that purpose. These objectives and principles govern all courts trying matrimonial matters. The judgment of the District Judge is silent if the learned Judge took into consideration all what is mentioned in Section 23 of the Act. A question also arises can be a party defeat the provisions of sub-section (2) and sub-section (3) of Section 23 of the Act by remaining ex-parte and the court is helpless in requiring the presence of that party even if in the circumstances of the case so required. We are of the opinion that court can in such a situation require the personal presence of the parties. Though the proceedings were ex-parte in the case like this the court cannot be a silent spectator and it should itself endeavour to find out the truth by putting questions to the witnesses and eliciting answering from them. 16. In the circumstances aforesaid, the High Court should not have summarily dismissed the appeal. By doing so it has also failed to exercise its power of superintendence under Article 227 of the Constitution. The High Court should have seen if the proceedings before the District Judge were in accordance with the procedure prescribed and as per the law applicable. To direct the appellant to file a separate suit for setting aside the decree of divorce on the ground of fraud otherwise is hardly a solution to the case. 17. As to the correctness otherwise of the allegations made by the appellant or the stand taken by the respondent, we do not wish to comment as it might prejudice the case of either of the parties as we are considering of remanding matter back to the District Judge for trial of the case afresh. 18. Accordingly, the appeal is allowed, the impugned judgment dated September 27, 1996 of the High Court and as well as that of District Judge dated December 4, 1995 are set aside. The matter will go back to the learned District Judge to try and proceed with the petition in accordance with law. 19. A copy of this judgment shall be sent of the District Judge, Patiala immediately and the parties are directed to appear in that court on December 17, 1997.

20. The appellant is entitled to costs which we quantify as Rs.2,000/-.