

Punjab-Haryana High Court

Bhavenesh Kumar vs Shushma Sharma on 12 January, 1998

Equivalent citations: (1998) 118 PLR 412

Author: S Saksena

Bench: S Saksena

JUDGMENT Sarojnei Saksena, J.

1. This is husband's appeal against the dismissal of his divorce petition.

2. Admittedly, the appellant-husband was married to respondent-wife on 30.10.1983. After marriage for some time, they lived together in Sector 23, Chandigarh. At the time of marriage, the appellant-husband was working in Forensic Science Laboratory, Punjab, Chandigarh, while respondent-wife was working as Lower Division Clerk with M/s Salal Hydro Project at Jyoti Puram in Jammu and Kashmir. In 1985 the appellant-husband filed an application Under Section 9 of the Hindu Marriage Act, 1955 (in short the 'Act') for restitution of conjugal rights which was decided ex parte on 29.4.1986 in his favour. Thereafter for some time they lived together, but since 8.8.1988 they are living separately. The appellant-husband filed a divorce petition Under Section 13 of the Act on 18.1.1989 on the ground of cruelty and desertion. This petition was contested by the respondent-wife. On the basis of evidence adduced by the parties therein, the Additional District Judge, Chandigarh, dismissed the divorce petition on 2.2.1991.

3. On 10.10.1991 the appellant-husband filed another divorce petition Under Section 13 of the Act on the ground of desertion. In this petition, he alleged that after marriage for 20 days respondent-wife lived with him in his house at Chandigarh. As before marriage she was working as Lower Division Clerk in Jyoti Puram, she went back to Jammu and Kashmir and did not return to the matrimonial home. Despite decree passed Under Section 9 of the Act in his favour, the wife did not join him in nuptial home. He also alleged that he has come to know that the respondent is staying with one Surjit Singh Rana, who claims to be a 'Dharambhai' of her father, but wife of Surjit Singh Rana asserts that the respondent and her husband, Shri Surjit Singh Rana, are having illicit relations with each other. He also avers that he asked the respondent to leave her job and start living with him, but she has wilfully chosen to live separately from him. Thus, she has deserted him for a continuous period of more than two years without any just cause.

4. The respondent raised a preliminary objection that as his previous petition filed Under Section 13 of the Act was dismissed on 2.2.1991 this petition is not maintainable. She also inter alia pleaded that the petition filed Under Section 9 of the Act was decided ex parte, but thereafter she and her husband have been meeting with each other. She also pleaded that at the time of marriage, the husband indicated that he is in need of financial help to lead the matrimonial life comfortably and therefore, he was in search of a working woman. She denied that she had illicit relations with Shri Surjit Singh Rana. She also pleaded that in November, 1991, she came to Chandigarh with Mrs. Chander Kanta along with her brother Rajesh. They went to her husband's house No. 337 Sector 23, Chandigarh, but she came to know that he has shifted to Sector 30, Chandigarh. She went to his office to meet him, but he made vulgar allegations about the alleged illicit relationship with Shri Surjit Singh Rana, whom she treats as her father, Dharam Bhai of her father. On these counts, the

appellant refused to allow the respondent to stay with him. Therefore, now he cannot take advantage of his own wrong. By levelling false allegations of illicit relations with Shri Surjit Singh Rana, he has treated her with cruelty. He is not entitled to a decree of divorce on the ground of desertion.

5. Husband filed replication denying the averments made in the written statement and reiterating the averments made in his petition.

6. During the pendency of this divorce petition, husband filed an application Under Order 6 Rule 17, Civil Procedure Code for amending his divorce petition which was allowed vide order dated 4.12.1995. Thus, he deleted the averments made earlier in his divorce petition about his wife having illicit relations with Shri Surjit Singh Rana.

7. Issue were framed. Both the parties examined themselves and closed their evidence. On appraisal of the evidence adduced by the parties oral as well as documentary, the learned District Judge, Chandigarh, came to the conclusion that the husband has failed to prove the ground of desertion as its necessary ingredient, i.e. animus deserendi is not proved by him. The wife is not staying at the place of her posting with a desire to bring her cohabitation permanently to an end, rather, the husband wants to get rid of her. He also observed that the wife is not teaming her job probably because of insecurity which she feels at this hands and thus, his divorce petition was dismissed.

8. The appellant's learned attorney vehemently argued that after the marriage respondent-wife was morally and legally bound to discharge her matrimonial duties. As the husband is posted at Chandigarh, matrimonial home is at Chandigarh. Wife should have left her job and should have started living with the husband in the matrimonial home, but after marriage she lived with the husband only for 20 days and thereafter for few months she was coming to the appellant for some time but she declined to leave her job. He stressed strongly that since 8.8.1988, she has not come to reside with the appellant, thus, it is obvious that she has permanently brought cohabitation to an end. According to him, from the proved facts of the case, it is evident that the marriage is irretrievably broken. In these circumstances, the matrimonial Court should have allowed the divorce petition.

9. He also pointed out that the respondent-wife cannot now alleg the ground of cruelty on the count that the husband failed to prove that she has illicit relations with Shri Surjit Singh Rana, as by moving an amendment application, the husband has already withdrawn that allegation from the divorce petition and his prayer was allowed by the matrimonial Court vide order dated 4.12.1995. He also submitted that there is no question of financial insecurity with the wife as the husband is getting handsome salary and can run the household with his own earning; he does not want any financial help from his wife. He also contended that the respondent has deposed that she came to the appellant in November, 1991 along with her brother Rajesh and Smt. Chader Kanta, but she has utterly failed to prove this allegation. She has not examined Rajesh or Smt. Chander Kanta to corroborate her testimony. If she would have tried to contact him and would have shown her inclination to live with him in the matrimonial home, there was no occasion for the husband to decline as he very much wanted to have her company under nuptial roof. To support his

contentions, he has placed reliance on Smt. Tirath Kaur v. Kripal Singh, A.I.R. 1964 Punjab 28; Smt. Saroj Rani v. Sudershan Kumar Chadha, AIR 1984 Supreme Court 1562; Gaya Parsad v. Mst. Bhagwati, A.I.R. 1966 Madhya Pradesh 212; Rajwati v. Inder Raj 1989(1) H.L.R. 261 and Sundri Devi v. Ram Lal, 1994(2) H.L.R. 84. Thus, he prayed that the judgment and decree under appeal be reversed and a decree of divorce be granted in appellant's favour.

10. Appellant's attorney also pointed out that When this appeal was pending before the Division Bench for admission, the appellant was made to pay Rs. 5,000/- to the wife as litigation expenses, but wife is also an earning hand is getting hand some salary of more than Rs. 5,000/-. Therefore, the Division Bench fell into an error in awarding Rs. 5,000/- to her as litigation expenses. Respondent-wife never filed an application Under Section 24 of the Act seeking such a relief. She has not proved that she does not have sufficient means to contest the case. Husband filed S.L.P. (Civil) No. 729 of 1997, which was decided by the Apex Court on 27.1.1997. The Apex Court has observed that in case the High Court finds that the wife who is employed as a Head Clerk in Government of India Undertaking is not entitled to obtain maintenance pendente lite and litigation expenses from the appellant in view of the financial status of the parties then the High Court may pass such an order as it may think fit towards the refund of the said sum wholly or partially. Hence, he submitted that in view of this order, this amount of Rs. 5,000/- be refunded to the appellant.

11. Respondent's learned counsel valiantly argued that Under Section 13 of the Act, there is no ground to grant a decree of divorce on the basis that the marriage has irretrievably broken. Under Section 13 of the Act, irretrievably breakdown of marriage is no ground to dissolve the marriage. He stated that the respondent-wife was all through willing and ready to join the appellant in matrimonial home, but he treated her with cruelty. He made reckless, baseless and false allegations against her that she is having illicit relations with Shri Surjit Singh Rana. In the earlier divorce petition, Judgment, Exhibit R-1, he made such an allegation but failed to prove it; therefore, his earlier divorce petition was dismissed. In this divorce petition also initially he pleaded that she is having illicit relations with Shri Surjit Singh Rana, but later on by amending the divorce petition, he deleted that allegation, but the trial Court in its order dated 4.12.1994 has clearly observed that these assertions made afford the respondent a ground for proceeding against the petitioner on account of his having made false allegation of adultery. He also pointed out that despite deleting that allegation from the divorce petition, while entering the witness-box the appellant re-asserted the same allegation and again failed to prove it, thereby he has caused her mental agony and cruelty to her.

12. Respondent's learned counsel also argued with all vehemence that even before the marriage respondent wife was in service. At the time of marriage, there was no such agreement and not even talk that she will leave the job after marriage. Rather the husband in order to get financial assistance from the wife, wanted to marry a working woman. After marriage, the wife off and on went to her matrimonial home and lived with the appellant. Despite that the husband insisted that she should leave her job; she was always ready and willing to live with him but despite that he filed a petition for restitution of conjugal rights which was decided ex-parte against her. Thereafter, she again came to live with him at Chandigarh, but the husband filed a divorce petition on the ground of cruelty and desertion wherein he alleged that she is having illicit relations with Shri Surjit Singh Rana. Since

then he is making that allegation against her which is totally false and baseless. He has utterly failed to prove this allegation. Thereby the appellant has treated her with cruelty. She is still ready and willing to leave the job and to start residing with the appellant but because of these allegations, she has developed a feeling of insecurity. She apprehends that if she leaves the job and starts living in matrimonial home, after some time he may not raise such reckless allegations against her to turn her out of the matrimonial home; therefore, she insists that if the husband assures her financial security, she is willing to come to the matrimonial roof. To support her contention, he has relied on *Tapan Kumar Chakraborty v. Smt. Jyotsna Chakraborty*, A1.R. 1997 Calcutta 134, *Rupinder Kaur. Gurjit Singh Sandhu*, (1997-3)117 P.L.R 553 *Laxman Rao v. Vidya Chauhan*, II (1996) DMC 521, *Soda Nanda v. Indra Devi*, 11(1995) D.M.C. 575 and *Dr. Arvind Kundan Singh v. Smt. Avtar Kaut*, (1996) D.M.C. 557.

13. Lastly, he pointed out that the respondent-wife never filed an application Under Section 24 of the Act claiming pendente lite maintenance or litigation expenses but the Division Bench while issuing Notice of Motion on 4.11.1996 directed the appellant to deposit a sum of Rs. 5,000/- to be sent to the wife-respondent along with summons with further direction that she is required to appear in person on the adjourned date, i.e., 15.1.1997. No doubt, she could not appear on 17.1.1997 when the case was taken up by the Division Bench, but she appeared in person on 11.2.1997, The husband filed an application Under Section 151, Civil Procedure Code (Cri. Misc. No. 13277 C II of 1997) praying that the said amount of Rs. 5,000/- be returned to him, but this application was dismissed by the Division Bench vide order dated 13.12.1996 holding that the husband is bound to pay litigation expenses. He also pointed out that the husband and wife both are earning but because of this appeal being filed by the husband, the respondent-wife was ordered to remain present in person by the High Court for reconciliation purposes. Under these circumstances the Division Bench in its own wisdom directed the husband to pay Rs. 5000/- to the wife as litigation expenses. Under these circumstances, the husband is not entitled to get refund of the said amount.

14. After hearing the rival contentions, in my considered view, there is no merit in this appeal.

15. No doubt, the parties were married on 30.10.1983 and admittedly since August, 1988 they are living separately but from the pleadings of the parties as well as the evidence on record, it is evident that even before the marriage, wife was in service. Initially, she was posted at Jammu and Kashmir and now she is at Chamba in Himachal Pradesh. Under Section 20(2) of the Act, the statement contained in every petition under the Act may, at the hearing, be referred to as evidence. In this case, respondent-wife has pleaded specifically that at the time of marriage the husband was keen to have a working partner of life so that she may be of financial assistance to him in running the matrimonial household. No such pre-condition was put by the husband that she would leave her service. She has also stated so on oath but this statement is not assailed in cross-examination. Husband has not denied the said assertion on oath.

16. From the documentary evidence adduced by the parties, it is evident that in 1985 husband filed the petition for restitution of conjugal rights, which was decided ex parte in his favour on 29.4.1986. He filed a divorce petition against the wife under Section 13 of the Act on the ground of cruelty and desertion. This petition was dismissed on the ground that he has failed to prove both the grounds. It

was held therein that the husband admitted that in December, 1987 respondent-wife stayed with him for two days. The wife also proved that in December, 1988 husband came to Sunder Nagar at the time of marriage of her brother and stayed for five days and during that period they have cohabited. Thus, the Court held that the intention to desert is missing. The Court also held that the respondent-Wife tried for her transfer to Chandigarh but her prayer was declined by the department. Simply on the ground that she is living away from her husband because of her job; it cannot be said to be an act of cruelty on her part entitling the husband to seek divorce.

17. On oath, the husband stated that the wife is residing with Shri Surjit Singh Rana, but in the cross-examination, he candidly admitted that the wife of Shri Surjit Singh Rana never told him that respondent Sushma had illicit relations with Shri Surjit Singh Rana, but in his earlier divorce petition, he made such an assertion and again on oath he admitted that he has no personal knowledge about his wife's illicit relations with Shri Surjit Singh Rana.

18. Respondent-wife has testified on oath that both of them are living separately since 1988, but in 1992 she came to Chandigarh with a view to reside with him but she was not permitted by him to live in the matrimonial home. She also stated that she is in service since 1981.

19. Respondent-wife has categorically stated that she is staying separately from her husband because he has made false allegations against her that she is having illicit relations with Shri Surjit Singh Rana. According to her, Shri Surjit Singh Rana is just like her father. Since her childhood she is staying with him. She is categoric that her husband has never made any effort to rehabilitate her nor he wrote any letter to her. She has also stated that she came to Chandigarh around Dussehra of 1992 after taking leave. She has asserted that her job is non-transferable.

20. During arguments, respondent's learned counsel submitted that the wife is still ready and willing to join the husband but she wants some security for her financial stability.

21. To prove the ground of desertion, the petitioner is required to prove not only the factum of desertion but also the element of animus deserendi. The authorities relied on by the appellant's learned attorney are not helpful to advance his cause. In Tirath Kaur's case (supra), the wife refused to resign her job which compels her to live away from her husband though she made promise to visit him and also allowed him to visit her occasionally. On these facts, it was held that the husband is entitled to get the relief of restitution of conjugal rights under Section 9 of the Act. It was also held that under the Hindu Law a wife's duty to her husband is to submit herself obediently to his authority and to remain under his roof and protection. She is, therefore, not entitled to separate residence or maintenance unless' she proves that, by reason of his misconduct or by his refusal to maintain her in his own place of residence or for other justifying cause, she is compelled to live apart from him.

22. Gaya Prasad's case (supra) is distinguishable on facts. In that case also, the husband filed the petition Under Section 9 of the Act. In that case wife accepted service without husband's consent at place different from husband's home to augment husband's family income. Husband asked her to leave service and live with him at his place; wife refused to obey but requested him to come and stay

with her. On these facts, it was held that the wife had withdrawn without reasonable excuse from husband's society. It was also observed that the wife is expected to perform the matrimonial obligation at her husband's residence.-The Division Bench of M.P. High Court also observed that "wife can accept service at a different place but not so as to clash with the husband's marital rights which she is duty-bound to render. They also observed that "it is, therefore, plain that there could only be an arrangement for her staying separately for continuing her service by mutual consent and concurrence of both the parties but she could not impose her unilateral decision on the husband by merely stating that she had no objection to allow the husband to live with her at the place where she has accepted the service."

23. In Saroj Rani's case (supra), wife filed a petition for restitution of conjugal rights wherein consent decree was passed, but for one year there was no cohabitation between the parties. On these facts, it was held that the husband is not disentitled to get a decree of divorce. But in this case, no such fact is either pleaded or proved.

24. In Rajwati's case (supra) wife was held guilty of desertion as the parties were living separately for the last more than 8 years. It was observed that under such circumstances, it is better to close that On these facts divorce decree granted by the Matrimonial Court was affirmed.

25. In Sundri Devi's case (supra) wife was posted at Palwal at a distance of 25 Kilometers from Sohna where, the husband was posted. Because of her service she neglected her husband and refused to join his society. It was held by a Division Bench of this Court that this was not a sufficient ground for the wife to live with her parents out of the society of the husband. It was also held that the wife has wilfully withdrawn from the husband's society and refused to live in matrimonial home only for the reason that she was employed as a teacher at Palwal. On these facts, decree of divorce was upheld.

26. In Sada Nand's case (supra) husband filed the divorce petition on the ground of cruelty and desertion which was declined by the matrimonial Court. Husband filed three divorce petitions and two petitions Under Section 9 of the Hindu Marriage Act, but failed in all such petitions. He levelled allegations against the wife that by filing a petition Under Section 125, Code of Criminal Procedure, as well as complaint under Dowry Prohibition Act and by not permitting him to meet his son, she has caused mental agony and pain to him, but these allegations were not proved by him. On these facts, it was held that the ground of cruelty is not proved against the wife. In that case also, wife demonstrated surge of an urge to live together but the husband was not willing to rehabilitate her. On these facts, it was held that animus deserendi is not proved.

27. The facts of Dr. Arvind Kundan Singh's case (supra) are somewhat similar to the facts of this case. Respondent-wife was in service and was posted at Phagwara. She was not in a position to reside in conjugal home, but she was willing to leave her job and come to her matrimonial home provided she is given financial security. Appellant-husband failed to prove that he ever gave any maintenance amount to his wife or his son. The husband insisted that she should leave her job but she did not want to leave the job as she had no source of income for her and for her son's maintenance. Under these circumstances, it was held that it cannot be said that the wife has

deserted the husband appellant or it is a case of totally broken marital tie.

28. In the case of Bhawna Advani v. Manohar Advani, 1192(2)M.P.L.J. 40, it was held that for proving desertion, wilful negligence on the part of the spouse has to be proved beyond doubt. When the wife has been visiting the place of husband, it could not be said that she had wilfully neglected/deserted the husband. In the case of Vibha v. Dinesh, 1991 M.P.L.J. 975, it was held that cruelty and desertion to the husband by the wife has to be judged in the facts and circumstances of each case. When the wife is in Government employment and has occasionally been visiting the place of husband whenever she gets leave, it could never be said that there was any desertion on the part of the wife. When the wife feels financially insecure, she was not bound under law to leave the service to live with the husband permanently.

29. In Laxman Rao's case (supra) also the wife was in service before marriage. There was no insistence by the husband that the wife will leave the job and will live with the husband. Wife used to visit the husband whenever she gets leave. She made efforts also to get herself transferred to Gwalior, where the husband resided. The Court held as under:-

"In these days, when there are no issues between the parties, the wife/respondent was certainly feeling insecure for leaving the service. In these days, filling of belly is more important than sexual obligations and therefore, it could be said that the husband was unjustified in continuing in service to earn her livelihood, and also ready and willing to live with the appellant whenever she is getting leave giving company to the appellant. The distance of Gwalior from Khandwa is about 1000 Kilometres and the expectation of the husband that the respondent should come to live with him was totally unjustified". Hence, the order of dismissal of husband's divorce petition was sustained."

30. In Rupinder Kaur's case (supra) a Division Bench of this High Court has held that disharmony or incompatibility is not cruelty and will not furnish a cause for dissolution of marriage. Assuming that marriage has broken down irretrievably, but since irretrievably breakdown of marriage is no ground to dissolve the marriage, divorce cannot be granted on this ground.

31. In Tapan Kumar's case (supra) a Division Bench of Calcutta High Court also held that the Court cannot grant divorce on mere ground of irretrievable breakdown of marriage. In that case, wife in her written statement made allegations of illicit connection of her husband with one unmarried girl, but she failed to prove this allegation. The Division Bench of Calcutta High Court held that making such a baseless allegation is cruelty on the part of the wife.

32. In V. Bhagat v. D. Bhagat, (1994)106 P.L.R. 603 (S.C.), the Apex Court has observed as under:-

"Mental cruelty in Section 13(1)(ia) can broadly be defined as that conduct which inflicts upon the other party such mental pain and suffering as would make it not possible for that party to live with the other. In other words, mental cruelty must be of such a nature that the parties cannot reasonably be expected to live together. The situation must be such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with the other party. It is not necessary to prove that the mental cruelty is such-as to cause injury to the health of the petitioner..."

33. In *Shobha Rani v. Madhukar*, A.I.R. 1986 SC 121 the Apex Court has held in the context of mental cruelty that if the conduct complained of itself is bad enough and per se unlawful or illegal then the impact or injurious effect on the other spouse need not be enquired into or considered and in such cases cruelty will be established if the conduct itself is proved or admitted.

34. in *Amarjit v. Darshna*, (1994-2)107 P.L.R. 96 a Division bench of this Court has held that a house is built by hands but home is built by hearts. Mere withdrawal from sex may not constitute withdrawal from home.

35. From the facts and circumstances as they are proved by the parties in this case, it is evident that the wife has not withdrawn from the husband's society without any just and reasonable cause. Even before the marriage she was in service. At the time of marriage, the husband opted for a working woman as he wanted to have financial assistance from his spouse; therefore, at that time no such condition was put by the husband that the wife will leave her job after marriage. Hence, after marriage for at least five years, the parties were going to each others place whenever they had an occasion to go. No such grouse was made by the husband during that period, but in 1985 the husband filed a petition for restitution of conjugal rights which was decided ex parte on 29.4.1986. Thereafter the wife went to reside with the husband at Chandigarh in 1987 for some time and in 1988 the husband came to her place of posting and resided with her for a couple of days. After these facts were proved by the wife, husband's first divorce petition (Application No.7 filed on 18.1.1989) was dismissed by the Additional District Judge, Chandigarh on 2.2.1991 (Judgment Exhibit R-1), but again on 9.10.1991 the appellant-husband filed this divorce petition on the same ground of desertion. In the earlier divorce petition as well as in this petition, he made indecent allegation against his wife that she is having illicit relations with Shri Surjit Singh Rana. In the earlier divorce petition, he utterly failed to prove this allegation and in this divorce petition, he withdrew that allegation by filing an amendment petition, but while allowing his amendment petition, 'the Matrimonial Court observed that these assertions may afford the respondent a ground for proceedings against the petitioner on account of his having made false allegations of adultery against her. In the witness box, the husband candidly admitted that Shri Surjit Singh Rana's wife never told him that Shri Surjit Singh Rana is having illicit relations with Sushma respondent. He has no personal knowledge the his wife is having illicit relations with Shri Surjit Singh Rana, but still in both the divorce petitions he made such reckless and immoral allegation against his wife, thereby he has treated her with cruelty. This false allegation has caused mental agony to her. Her counsel stated at the bar that the respondent-wife is still willing to leave her job and to live with him at Chandigarh but she is having a sense of financial insecurity. She apprehends that in case she leaves her job and start residing with him, after some time he may not again make such an immoral allegation and turn her out of the matrimonial home which may ruin her totally. The husband has not assured financial security to her either in the matrimonial Court or in the High Court; therefore, under these circumstances, it cannot be said that by not leaving her job and not joining the husband at Chandigarh, the wife has deserted the husband without any just and reasonable cause.

36. If the wife would have taken a job after marriage and that too against the wishes of the husband and would have been posted at a different place and would have refused to leave the job and to join the society of the husband, it could have been said that she has deserted the husband. But in this



case, even before marriage, she was in service; husband wanted a working woman he never insisted that she should leave her job; both of them tried for her transfer to Chandigarh, but since her job is non-transferable, it could not be done. At the present moment, she is working as Head Clerk in Central Government Service and is getting around Rs. 5,000/-. Still she is willing to leave the job in case financial security is guaranteed to her. Under these facts and circumstances, in my considered view, the Matrimonial Court has not fallen into any error in dismissing the husband's divorce petition.

37. So far as the refund of Rs. 5,000/- is concerned, in the lower court, both the parties filed certificate showing their pay structure. Even during arguments, both the learned attorney/counsel for the parties admitted that income of both the spouse is more than Rs. 5,000/-. When the husband filed this appeal wife was required to be summoned for reconciliation proceedings. For that purpose, the- Division Bench passed an order that the husband should pay Rs. 5,000/- to her to come to Chandigarh, but later on when he wanted to have refund of this amount, his petition was dismissed holding that he is bound to pay the litigation expenses to his wife. No doubt, in the High court wife has not filed any application Under Section 24 of the Act, but since the husband has dragged her into this litigation, it was thought proper that he should pay at least Rs. 5,000/- to the wife as litigation expenses as this was an additional burden on her income. Under these circumstances, there is no ground to order refund of the said amount of Rs. 5,000/- to the husband.

Resultantly, the appeal, being groundless, is hereby dismissed. Parties are left to bear their own costs.