

* **HIGH COURT OF DELHI : NEW DELHI**

MAT APP.No.3 of 2008

% Judgment reserved on: 4th August, 2008

Judgment delivered on: 14th August, 2008

Mr. Vijay Shah,
Son of Shri Vikram Shah,
R/o. F-79/5A, Sainik Farms
New Delhi.

..... Appellant

Through: Ms.Malavika Rajkotia with
Ms.Jyoti Sharma, Adv.

Versus

Mrs. Padmini Shah
W/o Sh.Vijay Shah,
R/o 66, Allerton Road,
Parsippany,
New Jersey-07054
U.S.A.

Also at:

Ms.Kiran/Hardeep Advani
Power of Attorney holder for
Ms. Padmini Shah
R/o B-26, First Floor,
Chanakya Puri,
New Delhi-110021.

....Respondent

Through: Mr. Aman Hingorani, Adv.

Coram:

HON'BLE MR. JUSTICE V.B. GUPTA

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| 1. Whether the Reporters of local papers may
be allowed to see the judgment? | Yes |
| 2. To be referred to Reporter or not? | Yes |

3. Whether the judgment should be reported
in the Digest?

Yes

V.B.Gupta, J.

The present appeal under section 28 of the Hindu Marriage Act, 1955 (for short as the “Act”) has been filed by the Appellant/Husband against the judgment/order dated 03.12.07 passed by Gurdeep Saini, ADJ, Delhi praying for setting aside the impugned order.

2. The question that arises in the present appeal for consideration is as to whether a subsequent divorce petition, when earlier petition for divorce has been dismissed in default, is barred under Order IX Rule 9 of the Code of Civil Procedure, 1908 (for short as the “Code”)?

3. Appellant had filed a divorce petition at Family Court, in Jaipur on 25.07.94 on the grounds of cruelty.

The said petition was dismissed in default in the presence of Respondent on 21.07.95.

4. It is alleged by the Appellant that no application was made for restoration as the Respondent had promised for reconciliation. She, however, subsequently refused to do so. Thereupon the Appellant filed a fresh petition for divorce in Delhi on 22.01.96 on the additional ground of desertion besides cruelty.

5. The matter was fixed for evidence and during the cross examination, an application was moved for framing of the additional issues regarding bar of petition under Order IX Rule 9 of the Code and thereafter vide order dated 06.03.07, the additional issue was framed by the Trial Court which reads as under;

“(iii)a, Whether the present petition is barred under Order IX Rule 9 of the Code on account of dismissal of previous petition at the Family Court at Jaipur?” OPR

6. The Respondent preferred revision and this Court *vide* order dated 11.10.07 directed that this issue be decided as preliminary issue.

7. The Trial Court *vide* impugned judgment dismissed the divorce petition by holding that the petition is barred under Order IX Rule 9 of the Code.

8. It has been contended by the Ld. Counsel for the Appellant that the Trial Court after holding that para18 and 19 of the petition have raised additional grounds that requires trial to prove the same has yet failed to apply its mind and illegally dismissed the petition whereas, the Appellant had raised additional cause of action of desertion which alone would have entitled him the relief of divorce. Although certain facts pleaded in both the petitions are same, yet the additional cause of action with respect to desertion was not available to the Appellant when the earlier petition for divorce was filed and could not have been

filed earlier and this cause of action had materially altered this petition from the earlier petition.

9. It is also contended that the Trial Court has failed to appreciate that the previous petition filed in the Family Court of Jaipur was dismissed in default and the same could not be restored as the Respondent prolonged the compromise talks and the Appellant's right to restore his petition lapsed and now after 11 years of the present litigation and after 14 years of previous litigation, the present petition has been dismissed on a technical issue.

10. It is further argued that the Respondent kept the Appellant engaged in negotiation talks for settling the issue of divorce for a sufficient long time until his right to move appropriate application for restoration lapsed and this cause of action amounted to an act of cruelty.

11. The Trial Court was wrong in holding that "compromise talks" is not an independent cause of action and has not destroyed the earlier causes of

action whereas, holding of such talks between the parties in general only shows that the parties are willing to resolve their disputes inter-se rather than by mechanism of courts for which previous pleadings are not relevant and is an independent cause of action.

12. On the other hand, it is contended by the Ld. Counsel for the Respondent that the present petition filed before this Court on 22.2.96 shows in its title as petition u/s 13(1)(i-a) and (i-b) of the Act and paras number 1 to 15 are that same, as that filed in the petition before the Family Court at Jaipur. Para No.16 and 17 are the facts regarding the filing of the divorce petition and its dismissal. Para No.18 and 19 are the only additional paras and lastly, the prayer clause shows that the present petition is for decree of divorce and continuous desertion and these are the only additional facts pleaded in the petition.

13. Ld. Counsel for the Respondent has relied upon ***Suraj Ratan Thirani & Ors. v. The Azambad Tea***

Co. & Ors.,(1964) 6 SCR 192; Manjit Kaur v. Gurdial singh, AIR 1978 P&H 150; C.Sarla v. K. Nalinakshan, AIR 1991 Ker. 362; Gurcharan Singh v. Mukhtiar Kayr, I (2002) DMC 747; Shree Bhagwan & Ors. v. Suraj Bhan & Ors., 2006 VIII AD (DELHI) 380 in support of its contentions.

14. Order IX Rule 8 & 9 of the Code reads as under;

“8. Procedure where defendant only appears.---

Where the defendant appears and the plaintiff does not appear when the suit is called on hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit as far as it relates to the remainder.

9. Decree against plaintiff by default bars fresh suit. ---

(1) Where a suit is wholly or partly dismissed under Rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an

order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party.”

15. Section 21 of the Act is also relevant for the purpose of deciding the issue. The said section reads as under;

“21. Application of Act 5 of 1908.-- Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.”

16. In ***C. Sarla (supra) and Gurcharan Singh (supra)*** cited by the Respondent, it has been opined that the provisions of Order IX Rule 9 of the Code are

applicable to the subsequent proceedings under the Act.

17. A similar view has also been taken by this Court in ***Smt. Malti v. Ramesh Kumar, 2006 VI AD (DELHI) 1.***

18. Thus, section 21 of the Act makes the procedure prescribed under the Code, including its sections and orders applicable to the proceedings under the Act, unless there is provision in the said Act or under the Rules framed to the contrary.

19. In ***Manjit Kaur (supra)***, cited by the Respondent, the Punjab and Haryana High Court while referring the decision of Privy Council in ***Mohammad Khalil Khan v. Mahbub Ali Mian, AIR 1949 P. C. 78*** has observed as under;

“The question of the meaning of the expression "same cause of action" in O. 2 R. 2 of the Code arose before the Privy Council. It was observed that the cause of action means every fact which will be necessary for the

plaintiff to prove if traversed in order to support his right to the judgment. Their Lordships held that if the evidence to support the two claims is the same then the cause of action is the same, but if the evidence to be led in the two cases is different, the causes of action are also different. On the facts of that case it was decided that where the facts which would entitle the plaintiffs in their new suit to recover property 'Y', to establish their title are substantially the same as those alleged in their former suit to recover property 'X', the causes of action in the two suits are identical."

20. As regards to the independent cause of action, the Trial Court held as under;

"Now the question arises whether the facts pleaded by the petitioner are independent cause of action, independent from the previous petition or are in substance the same. The cause of action are facts which the petitioner must necessary prove in order to have judgment in his favour. If these two paras i.e. para 18 and 19 are divorced from the total petition it cannot be said that the facts pleaded can constitute independent cause of action. In sum and substance the cause of action are the same and facts pleaded in earlier petition are integral to the facts in present petition. Therefore it cannot be said that these

are independent cause of action. As regards the relief, it is settled principle of law that the cause of action are distinct from the relief claimed. The cause of action, therefore cannot take its sustenance from the relief rather it should be other way round. In order to support the ground of the relief, the facts mentioned as cause of action must be sufficient to support the same.”

The Trial Court further held as under;

“I am of the opinion that these two additional paragraphs containing the subsequent allegations did not destroy the earlier cause of action as the allegations regarding the compromise is based on the previous pleadings and unless the same is proved one cannot come to the allegations of compromise. The allegations contained in other para is also dependent on the previous pleadings alone.”

The Trial Court further held as under;

“I have also perused the affidavit of evidence filed by the petitioner, except para 24, the remaining facts are the same which are pleaded and even the documents in support are the same, except PW 1/N1 to N3 and PW 1/O. I am of the opinion that the facts are in sum and substance the same as in the previous petition and only these two new facts have been mentioned to create a further cause of action. These two additional para do not in any

manner destroy the earlier cause of action.”

21. In the present case, para no. 1 to 15 are the same as that filed in the previous petition before the Family Court at Jaipur. Para no. 16 & 17 are the facts regarding the filing of the divorce petition and its dismissal. Para no. 18 and 19 are the only additional paras than the previous petition and lastly, the prayer clause shows that the present petition is for decree of divorce and continuous desertion for more than 2 years. Thus these 2 paras along with the grounds of desertion are only additional pleaded facts in the petition.

22. There is also no dispute that the previous petition was dismissed in default and no application has been moved for restoration of the same petition. It is also not disputed that some proceedings were pending even at the time of filing of the present petition before the Jaipur High Court arising out of the said petition.

23. In sum and substances, the cause of action of both the petitions is same and the facts pleaded in the earlier petition are integral to the facts mentioned in the present petition. So, it cannot be said that these are independent cause of action.

24. The additional paras containing the subsequent allegations did not destroy the earlier cause of action and these allegations are dependent on previous pleading alone.

25. In view of the above discussion, I am fully in agreement with the finding of Trial Court and no infirmity can be found with the impugned judgment and thus, there is no merit in this appeal and the same is dismissed.

26. No order as to costs.

27. Trial Court record be sent back forthwith.

August 14, 2008
Bisht

V.B.GUPTA, J.