

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.426 of 1998

Date:12.06.2015

Between:

Salesha Sulthana

...Appellant.

AND

Ahmed Shaji Akbar

...Respondent.

The Court made the following:

THE HON'BLE SRI JUSTICE S. RAVI KUMAR

SECOND APPEAL No.426 of 1998

JUDGMENT:

This appeal is preferred against judgment dated 26-03-1998 in A.S.No.76/1995 on the file of First Additional District Judge, Warangal whereunder judgment dated 11-09-1995 in O.S.No.303/1990 on the file of II Additional Munsiff Magistrate (presently Second Additional Junior Civil Judge), Warangal is confirmed.

2. Appellant herein is defendant and respondent herein is

plaintiff in the above referred O.S.No.303/1990 and they are hereinafter referred to as plaintiff and defendant as arrayed in the suit.

3. Plaintiff who is the husband filed suit for restitution of conjugal rights and defendant resisted the claim of plaintiff on the ground that plaintiff already pronounced talak and that the plaintiff is not entitled for the relief of restitution of conjugal rights. According to plaintiff, his marriage with defendant was performed on 16-10-1981 and since the time of marriage, for every trivial issue, the defendant used to bombard without any reason and the plaintiff tolerated every situation with fond hope that the defendant would realise her fault. Defendant, during the absence of plaintiff, left the marital home on 30-01-1986 without any reasons and thereafter, she filed O.S.No.97/1986 for damages and O.P.No.7/1989 for custody of the children and plaintiff in spite of threatening her with pronouncement of talak, did not realise her fault and did not join him. Hence he filed the suit.

4. Defendant resisted the claim of plaintiff contending that she was asked to contribute her salary, plaintiff's father demanded a sum of Rs.60,000/- and that she was not allowed to visit her parents house. She contended that plaintiff was not tolerant and not humble, character of the plaintiff and other compelling circumstances made her to leave the house on 30-01-1986 and that she filed one suit

for maintenance, one suit for injunction restraining the plaintiff from publishing any defamatory matters and one suit for damages and one suit for custody of the children and the plaintiff has already married another lady and therefore, he is not entitled for relief of restitution of conjugal rights. In support of case of plaintiff, one witness is examined and 31 documents are marked and on behalf of defendant, two witnesses are examined and five documents are marked and on a over all consideration of oral and documentary evidence, trial Court decreed the suit and aggrieved by the same, defendant preferred appeal to the District Court and First Additional District & Sessions Judge, on a reappraisal of entire evidence, confirmed the findings of the trial Court. Now aggrieved by the same, present appeal is preferred.

5. The following are the substantial questions of law raised in the grounds of appeal:-

“1. Is not the suit filed by the plaintiff/respondent herein for restitution of conjugal rights against the divorced woman (Defendant/Appellant herein) void ab initio, illegal, ineffective, unenforceable, frivolous and fictitious?

2. Did not the plaintiff/respondent pronounce “TALAQ” of the Defendant/appellant herein in an irrevocable form, by sending continuously registered letters on 14.2.1988, 15th Feb 1998, 30th March ‘88 and 31st March ‘88? If so, did not “Talaq’ become complete after the expiration of the period of ‘IDDAT’ on 10th August 1988, that is, during the long duration of four months and ten days, in between the pronouncement of ‘Talaq’ and ‘Iddat’? (The letters herein above mentioned were not produced in the lower Courts. The appellant is seeking leave of the Hon’ble Court to produce them as Additional documentary

evidence in the above Appeal).

3. Does not the written statement setting up a divorce (Talq) filed by the Defendant/appellant herein, in O.S.No.303 of 990, on the file of the II Additional District Munisf, Warangal, is enough to reject the plaint dated 28.03.1990 under Order VII Rule 11 C.P.C holding that a suit wherein the relief of Restitution of Conjugal Rights, is sought against the divorcee (Defendant/appellant) two years after she had been finally divorced on 31.3.1988 in writing in an irrevocable form 'Maintainable'?

4. Both the Courts below should have concurrently held and dismissed the suit with exemplary costs awarding heavy damages to the appellant herein by holding that the plaint does not disclose a cause of action as contemplated by Order VII Rule 11 C.P.C and thus saved the turbulent turmoil of facing unnecessary litigation frivolously and fictitiously engineered by the Respondent herein by dragging a respectable, decent and highly educated lady to court and pained her there for a continuous period between 23.3.1990 and 26.3.1998.

5. Does not the confession on the part of the Plaintiff/Respondent made in the plaint as well as in his deposition as P.W-1 that, he had pronounced Talaq of the Defendant/appellant tantamount to admission of pronouncement of Talaq of her in an irrevocable form, cutting off the marital-tie between them for ever?

6. Does not the admission, acknowledging the fact by way of legal plea taken by the Defendant/appellant that she had been divorced by the Plaintiff/Respondent, in the written statement filed by her in the suit as well as in her deposition as D.W.1 is enough at that stage for the trial court to reject the plaint applying the test adumbrated by the Legislature in Order VII, Rule 11 C.P.C?

7. How did both the Courts below miss to take stock of the corroborative evidence tendered by the independent witness D.W.2 who certified the fact of divorce of the Defendant/appellant and fail to dismiss the suit, holding that a suit for restitution of conjugal rights, against a

divorced woman is misconceived?

8. *How funny it is that both the Courts below miserably failed to frame at least one additional issue relating to 'Talaq' that had taken place having had not only the admissible pleadings on record before them but also the confessional statements of both the parties leading to the pronouncement of "Talaq" by the plaintiff/respondent herein of Defendant/appellant?*

9. *The erroneous assumption or exercise of excess of jurisdiction by the Courts below in a case like this, where error of law in adjudication of a suit, where it does not disclose a cause of action, ended in flagrant error in procedure which is apparent on the face of the record, leading to manifest injustice.*

10. *Are not the concurrent decrees passed by the Courts below ordering restitution of conjugal rights against a woman, admittedly divorced by the plaintiff two years prior to the institution of suit for conjugal rights, perverse, arbitrary, capricious and unforceable?"*

6. While admitting the appeal, this Court formulated the following as substantial question of law:-

"Having regard to the facts and circumstances of this case that the relationship between the husband and wife were somuch strained for the last ten years. Is it feasible to grant a decree for conjugal rights and consequently the judgments and decrees of the courts below call for any interference."

7. Heard arguments.

8. Advocate for appellant submitted that the respondent herein i.e., plaintiff gave divorce to the appellant in the year 1988 and the same is taken effect from 14-03-1988 and that the appellant is no more his wife and therefore, suit for

restitution of conjugal rights is not maintainable.

He further submitted that both the children became majors and they are also now married and the suit was decreed taking the welfare of the children into consideration, but as of now, children became majors and married therefore, that ground is no more available. He further submitted that from 1986, both husband and wife are living separately and there is no justification in granting restitution of conjugal rights.

9. Now the point that would arise for my consideration in this appeal is whether the contention of the appellant that the plaintiff divorced her in the year 1988 is correct and if so whether a suit can be maintained against the divorced wife for restitution of conjugal rights.

10. **Point:-** Both plaintiff and defendant are highly educated persons and working as lecturers at the time of filing of the suit. As seen from the material, there is no plea in the written statement alleging that plaintiff divorced the defendant in the year 1988 and that divorce came into effect from 14-03-1988. Law is well settled that any amount of evidence and arguments without a pleading is of no use. Further, there is absolutely no material to show that plaintiff divorced defendant in the year 1988. On the other hand, there is a specific plea in the plaint that plaintiff threatened the defendant of giving divorce to her only to make her realise the mistake and come back to the matrimonial home. When such a specific plea was taken with regard to talak

mentioned in one of the notices, there was no plea in the written statement as to the pronouncement of talak three times. When there is no plea and evidence to show that there was a divorce between the parties by the date of filing of the suit, the entire argument of the Advocate for appellant on the point that the suit for restitution of conjugal rights cannot be maintained against a divorced wife is not at all acceptable. Even the substantial question of law raised in the grounds is with the presumption that there was a plea of divorce and evidence to that effect and both the Courts have not considered the same. But as seen from the material, there is no such plea, therefore, the Courts below cannot be found fault and the grounds pleaded as substantial questions of law are not at all tenable.

11. The appellant herein filed one petition in SAMP.No.10734/1998 at the stage of second appeal to amend the written statement and to allow her to take the plea of divorce and another petition in SAMP No.10733/1998 to receive certain documents as additional evidence to support her plea of divorce. The very filing of all these petitions would clearly indicate that the appellant is conscious of the fact that she has not taken the plea of divorce and therefore, the objections raised in the grounds of appeal with reference to divorce aspect are absolutely not tenable. As per the amended CPC, amendment of pleadings are not permissible after the trial has commenced subject to the proviso that the

party is able to show strong grounds that the party in spite of due diligence could not have taken such step before commencement of trial. But here, such step is not taken during trial or during the pendency of the first appeal and only at the second appeal stage, such a petition is filed contending that amendment can be pleaded at any stage. No reasons about the diligence are given in the affidavit filed in support of petitions. So in view of the amended CPC, the application for amendment is not at all maintainable. Petition for additional evidence is only to show the plea of divorce which is sought to be urged by way of amendment. When amendment is not permissible petition for additional evidence in support of the plea raised by way of amendment cannot be entertained. Therefore, both the petitioners are liable to be dismissed.

12. Appellant anticipated that she would be permitted to amend her pleadings and she would be allowed to place additional evidence on record and on that assumption she raised the ground that there was a divorce and the suit against divorced wife is not maintainable as substantial question of law. As already referred above, both the Courts have not committed any error in appreciating the material on record and no substantial question of law is involved. Therefore, I am of the view that second appeal is devoid of merits.

13. For these reasons, second appeal is dismissed without costs.

14. As a sequel, miscellaneous petitions, if any, pending in this appeal, shall stand dismissed.

JUSTICE S. RAVI KUMAR

Date:12.06.2015

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