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IN THE HIGH COURT OF DELHI AT NEW DELHI

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MAT.APP.(F.C.) 59/2013

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Date of Judgment : 15.12.2015

JAG PERVERSH SINGH

..... Appellant

Through : Mr. Pushkar Raj Khatana, Advocate.

versus

MANJEET KAUR

..... Respondent

Through : None.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MS. JUSTICE SANGITA DHINGRA SEHGAL

SANGITA DHINGRA SEHGAL, J.

1. Present appeal has been preferred by the appellant under Section 19 of the Family Court Act, 1955 against the impugned Ex-parte Judgment/Decree dated 16.07.2013 passed by the Family Court in HMA Case No. 788/2010 thereby dismissing the petition of the appellant.
2. The facts in brief leading to the present appeal are that the marriage between the appellant and the respondent was solemnised on 16.05.2004 as per Hindu (Sikh) rites and ceremonies at Haryana. No issue was born out of the said wedlock. After marriage, respondent joined her matrimonial home at Rampura, Delhi. As per the appellant, due to their temperamental differences and consequent estrangement, they started living separately in a rented accommodation at Jail Road, New Delhi with effect from 21.04.2007 and stayed there for about three years. As per appellant, due to the quarrelsome and rude behaviour of the respondent, they had to shift to a new rented accommodation at

Dwarka, New Delhi on 26.01.2010. On 02.02.2010, when respondent started bullying the appellant and turned him out of the rented accommodation, he lodged a complaint vide DD No. 72B dated 02.02.2010 and took refuge in his parental home at Rampura, Delhi. On interventions of the elders of the family to reconcile the affairs, a separate rented accommodation was arranged at Lajwanti Garden, Delhi but all in vain. Thereafter, appellant preferred a petition under Section 13 (1) (i-a) of the Hindu Marriage Act on the ground of cruelty and same was registered as HMA Case No. 37/2010. Since, appellant failed to trace the fresh address of the respondent, he sought withdrawal of the petition and vide order dated 10.05.2010, the first petition was dismissed as withdrawn. Soon after the withdrawal of the petition, the respondent joined the company of the appellant for a couple of days at her matrimonial home i.e. Rampura, Delhi and told him about her future plans for leading an independent and free life of her own and also that she is residing at the same tenanted premises at Dwarka, Delhi.

3. Thereafter, appellant filed another petition under Section 13 (i-a) of the Hindu Marriage Act being HMA Case No. 788/2010 on the same grounds asserting the allegations in para 21 and 22. Notice was issued to the respondent but she could not be served and as per the service report “She has shifted her residence”. Thereafter, respondent was duly served upon by way of affixation and publication in the newspaper ‘Rashtriya Sahara’ dated 12.02.2012, but she failed to put her appearance before the Court and was proceeded ex-parte vide order dated 26.03.2012. Ex-parte

evidence was recorded. The Family Court vide its order dated 16.07.2013, dismissed the petition on the ground that “no further discussion on the merits of the case is merited, since the petition itself is not maintainable, in view of the earlier petition bearing HMA No. 37/10, having been withdrawn, the said petition being on the same cause of action and on the same allegations on the respondent.”

4. Mr. Khatana, learned counsel for the petitioner submits that the learned Trial Court has failed to appreciate the factual matrix of the case and impugned ex-parte judgment and decree is arbitrary and not based upon law. Learned counsel further submits that the fresh allegations against the respondent were made in paras 21 and 22 of the second petition, which arises out of ensued subsequent to the withdrawal of the first petition. However, without deciding the case on merit, the petition was erroneously dismissed on the ground of resjudicata. The act of respondent joining the company of appellant for a couple of days gives rise to fresh cause of action which has been incorporated in paras 21-22 of the second petition. Hence, the concept of res judicata is inapplicable when there is a fresh cause of action based on fresh facts and circumstances. The second petition was not rejected on merit, but on the technical ground of res judicata. Learned counsel contends that the second petition of the appellant was squarely covered by the judgment *Seema (Dr.) Vs. Alkesh Chaudhary (Dr.) : 177 (2011) LDT 537*, which was brushed aside by the learned Judge by holding that the same is not applicable to the case in hand.

5. In support of his contention, learned counsel has placed reliance on ***Sushil Kumar Sen Vs. State of Bihar : AIR 1975 SC 1185***, wherein it has been observed by the Apex Court that :

“The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in Judges to act ex debito justitiae where the tragic sequel otherwise would be wholly inequitable.

Parliament, I hope, will consider the wisdom of making the Judge the ultimate guardian of justice by a comprehensive, though guardedly worded, provision where the hindrance to rightful relief relates to infirmities, even serious, sounding in procedural law. Justice is the goal of jurisprudence--processual. as much as substantive. While this appeal has to be allowed, for reasons set out impeccably by my learned brother, I must sound a pessimistic note that it is too puritanical for a legal system to sacrifice the end product of equity and good conscience at the, altar of processual punctiliousness and it is not too radical to avert a breakdown of obvious justice by bending sharply, if need be, the prescriptions of procedure. The wages of procedural sin should never be the death of rights.”

6. We have heard the learned Counsel and have perused the impugned Order.

7. Notice was issued to the respondent but returned unexecuted with the report that no such person is residing at the given address. Respondent was served by way of publication in the newspaper 'Statesman' Delhi Edition dated 18.08.2014 and in the English newspapers 'The Tribune' and 'The Times of India', Hindi newspaper 'Punjab Kesari' and Punjabi newspaper 'Jag Bani', but respondent failed to appear before this Court.
8. In the instant case, appellant married the respondent on 16.05.2004 according to Hindu (Sikh) rites and ceremonies at Haryana and respondent joined her matrimonial home at Rampura, Delhi. Due to ill behaviour and regular bullying by the respondent, the couple kept on shifting to rented accommodations. When the appellant expressed his inability to purchase a house in the name of the respondent, she turned the appellant out from the house. Even, on the intervention of elders of the family, when the attitude of the respondent towards the appellant did not change, appellant filed the petition seeking divorce. The same was withdrawn by the appellant for want of correct address. Appellant filed another petition seeking divorce. In spite of service, wife of the appellant failed to put her appearance before the Trial Court and she was ordered to be proceeded ex-parte on 26.03.2012. Ex-parte evidence was adduced on behalf of the husband and his mother on 02.06.2012. The husband himself entered into the witness box as PW1 and his mother as PW2 in support of his allegations and their statements were recorded in form of affidavit, which remained unchallenged, uncontroverted and unrebutted. Before the Trial Court, appellant by way of his affidavit deposed

on the lines of plaint that he got married respondent on 16.05.2004 according to Hindu (Sikh) rites and ceremonies. Despite all his love, affection and care, respondent never reciprocated and on the contrary her behaviour towards the appellant and his mother had been cruel, ruthless and uncompassionate and moreover with each passing day her behaviour grew more violent and erratic with the appellant. He further deposed that respondent always bullied him to arrange for a separate accommodation and under constraint, he arranged a separate rental accommodation but her behaviour/attitude remained unchanged. He further deposed that that due quarrelsome behaviour of the respondent, he had to shift his rented accommodation from one place to another. He further deposed that in October, 2009 brother of the respondent sought a friendly loan of Rs.25000/- from the appellant and on refusal respondent and her brother gave him merciless beating and turned him out of his home. For the sake of household peace and tranquillity, he arranged the said amount and handed over the same to the respondent and her brother only thereafter he was allowed to enter his home. He further deposed that 02.02.2010, respondent again started bullying the petitioner to buy a new house in her name and that too within a period of three months and when appellant expressed his inability to accept her said demand, she started giving physical beatings to him and turned him out of the house and threatened that he would be accepted by her only if he purchases a new house in her name and in case her demand was not fulfilled, he along with his mother would face spate of litigations for dowry harassment. Ultimately, he lodged a complaint DD No.

72-B at Police Station Dwarka. He further deposed that on intervention of elders, the petitioner tried to reconcile the affairs and again arranged a separate rented accommodation but all in vain. He further deposed that respondent told him that she wants to lead an independent and free life of her own and she further told that she is still in occupation of the tenanted premises at Dwarka and she left for her rented house at Dwarka and since then she did not turned back and living separately from him. While passing the ex-parte judgment/decreed, the Family Court dismissed the petition and following order was passed :

“20. I have gone through the cited authority, but I am constrained to add that the same is not applicable to the facts of the case as firstly condonation of cruelty by the petitioner, is not an issue in this case, in my opinion.

The issue involved, is whether the instant petition is maintainable or not, under the wake of the earlier petition being withdrawn by the petitioner. Even otherwise in para 21 and 22 of the present petition, there is no fresh cruelty alleged but rather the assertions made in para 21 and 22 are more of an extension of the allegations made in the preceding paras, which were already contained in the previous petition.

21. This being the case, the withdrawal of the earlier petition and not seeking any liberty to file a fresh one on the same cause of action does not act as a legal impediment to the entertainment of the present petition. more so, when the petition has been filed against the respondent on the same address of the respondent, which was mentioned in the earlier petition. Rules of procedure are though hands maids of justice, but the said procedure cannot be brutally sacrificed on the whims and fancies of luxury litigants, who are in the habit of filing and withdrawing petitions, and are out only to make a mockery of the process of law.

22. In view of my observations above, no further discussions on the merits of the case is merited, since the petition itself is not maintainable, in view of the earlier petition bearing No. 37/10, having been withdrawn, the said petition being on the same cause of action and on the same allegations on the respondent. The petition is therefore dismissed. No orders as to costs. Decree sheet be prepared accordingly. File be consigned to record room.”

9. In *State of Punjab and Anr. v. Shamlal Murari and Anr.* reported in : *AIR 1976 SC 1177*, the Hon'ble Supreme Court held :

“Processual law is not to be tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.”

10. In the case of *Naveen Kohli v. Neelu Kohli : AIR 2006 SC 1675*, the Hon'ble Supreme Court has observed as under:

“Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. Once the marriage has broken down beyond repair, it would be unrealistic of the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the parties.”

11. In *State of Punjab v. Shamlal Murari : (1976) 2 SCR 82*, the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principal that "Processual law is not to be a

tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice". In ***Ghanshyam Dass v. Dominion of India : (1984) 3 SCR 229***, the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to subserve and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.

12. It is well settled that the burden of proving desertion, the factum as well as the animus deserendi is on the Petitioner and he or she has to establish beyond reasonable doubt, to the satisfaction of the Court, the desertion throughout the entire period of two years before the petition as well as the fact that such desertion was without just cause. In other words, even if the deserting spouse does not prove just cause for living apart, the deserted spouse has still to satisfy the Court that the desertion was without cause as held in ***Lachman Utamchand Kirpalani v. Meena alias Mota : AIR 1964 SC 40*** and ***Dr. N.G. Dastane v. S. Dastane: AIR 1975 SC 1534***. In the case of ***Dr. N.G. Dastane (supra)***, it was further laid down that the word "satisfied" in Section 23 of the Act must mean "satisfied on a preponderance of probabilities". Hence, the inference of desertion has to be made on a balance of probabilities. In the present case, on a preponderance of probabilities, the un rebutted evidence of the Appellant clearly leads to the inference of desertion.

13. Divorce :-

- (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented

by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party-

(i) x x x x

(ia) x x x x

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

14. In the present case, the respondent deserted the petitioner in October, 2010 and the present appeal was filed on 19.10.2013. Section 13(1)(ib), reproduced hereinabove, clearly spells out a continuous period of not less than two years immediately preceding the presentation of the petition as the period of desertion required as a sine qua non for presentation of the petition. Thus, by no stretch of imagination, the Appellant could have presented the appeal before October, 2012. Had he done so, the petition would have been liable to be dismissed on the ground of non-fulfilment of the conditions laid down in Section 13(1)(ib). The use of the words not less than two years even otherwise suggest that this is the minimum requirement for presentation of a petition on the ground of desertion but no maximum period has been laid down within which the petition must be presented. This, in our considered opinion, is indicative of the fact that the legislature has vested the deserted spouse with the option of presenting the petition after a lapse of two years from the date of the petition but has not made it incumbent upon the deserted spouse to necessarily present a petition on completion of the aforesaid period of two years of desertion. The reason for this is clear enough. The legislature has kept in mind a contingency where the deserted spouse may still

entertain a hope and expectation that the deserting spouse would ultimately return to the matrimonial home. In a given case this may be after three years or four years or even more. It is for the deserted spouse to determine the period after which she should seek a decree of divorce and the only embargo laid down by the legislature is that the said period should not be less than two years. Section 23(1)(d), in our opinion, must be read down in the context of Section 13(1)(ib). To do otherwise would lead to absurdity and would impliedly lead to the deserted spouse scuttling to file a petition seeking dissolution of marriage after a period of two years even while entertaining the hope that the other spouse would see the light of the day and rejuvenate the matrimonial ties by returning to the shared home and hearth.

15. The Court, no doubt, should seriously make an endeavor to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by

trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

16. Returning to the present case, the appellant has, in our opinion, conclusively established the ground for divorce through his evidence, which is unchallenged, uncontroverted and unrebutted. The same clearly establishes the desertion and cruelty. He has categorically deposed how the respondent was humiliating and insulting him. Even his mother in her evidence by way of affidavit has deposed on the same lines. It has also come in the evidence that cruel treatment of the respondent during the period when the appellant and the respondent had lived as husband and wife. As such, the impugned order dated 16.07.2013 is set aside. The marriage between the appellant and the respondent is liable to be dissolved on the ground of desertion as enunciated in Section 13(1)(ib) of the Hindu Marriage Act. Decree Sheet be drawn up accordingly.

SANGITA DHINGRA SEHGAL, J

G. S. SISTANI, J

DECEMBER 15, 2015

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