

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.256 of 2015

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Abhishek Verma, S/o Shri Gopal Jee Gupta, resident of Mohalla- Tari
Mohalla, Bichli Road, P.S. & P.O.- Ara Town, District- Bhojpur.

.... Appellant

Versus

1. Khusbu Kumari @ Khusbu Devi, W/o Abhishek Verma, D/o Ashok
Kumar Saumyari, resident of Mohalla- Abarpul, P.S.- Arrah Nagar,
District- Bhojpur.

2. Anand Kumar, S/o Jwahar Prasad, resident of Mohalla- Tari
Mohalla, P.S.- Arrah Nagar, District- Bhojpur. Respondents

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Appearance :

For the Appellant : Mr. Binod Kumar Singh, Advocate
Ms. Vagisha Pragya Vacaknavi, Advocate
For the Respondents : Mr. Subodh Prasad, Advocate

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CORAM: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH

And

HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE NAVANITI PRASAD SINGH)

Date: 17-01-2017

Interlocutory Application No. 6530 of 2015 has
been filed for condonation of delay.

The delay in filing the memo of appeal is
condoned.

Accordingly, I.A. No. 6530/2015 stands allowed.

Heard learned counsel for the appellant and
learned counsel for the respondent no. 1. The said parties are
husband and wife respectively.



This appeal is directed against order dated 11.06.2015, passed by learned Principal Judge, Family Court, Ara at Bhojpur, in Matrimonial Case No. 45 of 2013, whereby the learned court has dismissed the matrimonial case on the ground of *res judicata* and constructive *res judicata*. Let it be noted that it has not adjudicated upon merits.

The appellant had filed the present suit for dissolution of marriage on two grounds. First, on the ground of desertion, and then, on the ground of adultery. It is for the latter reason that opposite party no. 2 was also impleaded in the suit. While the trial proceeded and evidence was recorded, it appears that it was brought to the notice of the Principal Judge, Family Court, that the appellant had earlier filed a case for dissolution of marriage being case no. 208/2008, on the ground of desertion and cruelty. So far as desertion is concerned, the court held that the same was not available to the appellant inasmuch as the marriage had taken place less than two years prior to the date of presentation of the application, and as such, it was not maintainable on that ground. So far as cruelty is concerned, the court held it against the appellant. The appellant appealed to the High



Court unsuccessfully, then, the appellant filed another suit, which was dismissed for non-prosecution, and then, the present suit was filed in the year 2013. The trial court has held that as the claim for dissolution of marriage on the ground of desertion had already been adjudicated in the suit, which was filed in the year 2008, the present proceeding or the suit are barred by *res judicata* and/or constructive *res judicata*.

We have considered the same and heard the parties. We are indeed surprised at the finding of the learned Principal Judge, Family Court. *Res judicata*, as envisaged under Section 11 of the Code of Civil Procedure, contemplates a prior adjudication of the *lis* as between the parties by court of competent jurisdiction.

In the present case, nothing was decided in the earlier suit of the year 2008, except that so far as desertion is concerned, suit itself was not maintainable having been filed before time, it was, thus, premature. It suffered from fundamental legal flaw. There was no adjudication on merits. That being so, the question of *res judicata* does not apply. The trial court was, thus, clearly in error in dismissing the appeal.



We, therefore, have no option but to set aside the judgment and order under appeal and remit the case back for trial in accordance with law.

The learned Principal Judge, Family Court, Ara at Bhojpur, is requested to take up this matter at an early date as it is a matter which has been pending since four years.

This appeal is, accordingly, allowed.

(Navaniti Prasad Singh, J.)

(Vikash Jain, J.)

Rajeev/-

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