

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.778 of 2016

Vinod Kumar Sah, Son of Baidhnath Sah, Resident of Village – Malinagar,
Police Station – Chakmehsi and District – Samastipur and at present posted as
Civil Guard at Danapur Military Hospital, Danapur.

... .. Appellant/s

Versus

Gayatri Devi, Wife of Vinod Kumar Sah, Daughter of Akloo Sah, Resident of
Village – Birsinghpur, Police Station Kalyanpur and District Samastipur and
at present residing at appellant's house at village Malinagar, Police Station –
Chakmehsi and District – Samastipur.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Mrigendra Kumar, Advocate Mr. Utsav Kumar, Advocate
For the Respondent/s	:	Mr. Anshudhar Sharma, Advocate

CORAM: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH
and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE DINESH KUMAR SINGH)

Date : 25-09-2020

I.A. No. 2052 of 2017 was filed for condonation of
delay of 13 day in preferring the appeal. The delay has been
condoned vide order dated 16.2.2018.

M.A. No. 778 of 2016

The present Miscellaneous Appeal has been
preferred against the judgment and decree dated 16.5.2016 and
27.5.2016, respectively, passed in Divorce Case No. 75 of 2009
by the learned Principal Judge, Family Court, Samastipur,
whereby the divorce case preferred by the appellant husband for
dissolution of marriage between the appellant and the



respondent wife on the ground of cruelty, desertion and adultery has been dismissed with cost of Rs.10000/-.

The factual matrix of the case is that the appellant being a Civil guard at Danapur Military Hospital, was married with the respondent wife according to Hindu rites and rituals on 4.3.1990 at Birsinghpur under Kalyanpur Police Station in the district of Samastipur and the couple were blessed with a male child namely, Brajesh Kumar. Subsequently, the appellant filed Divorce Case No. 17 of 1998 for a decree of dissolution of marriage on the ground of cruelty, adultery and desertion. The said suit was dismissed vide judgment and decree dated 17.4.2003 passed by the learned Ist Additinal Distric Judge , Samastipur. In the said divorce case, the appellant did not examine himself as a witness. Thereafter, the appellant again filed Divorce case no. 75 of 2009, six years after the dismissal of the earlier divorce case on the ground of cruelty and desertion claiming that the appellant was having no physical relationship with the respondent wife since last seven years and several criminal cases were lodged by the respondent wife but in spite of that, the appellant has allowed the respondent to reside at his village home at Mali Nagar since 1996. The respondent wife never allowed the parents of the appellant husband to reside in



the said house, where she resides with her paramour. Thereafter, a dacoity was committed in the house on 13.2.2001 leading to registration of Chakmahesi P.S. Case No. 14 of 2001 against unknown wherein the uncle and relatives of the respondent wife were chargesheeted. Hence, the respondent wife is guilty of inflicting cruelty and deliberately deserting the appellant.

In the said matrimonial case, the respondent appeared and filed written statement claiming to be legally wedded wife of the appellant. Earlier Divorce Case no. 17 of 1998 was dismissed on merits, hence the present matrimonial case on the same grounds is not maintainable. The respondent is living at her parents house and not at the native village of her in-laws. There is no evidence that she used to live with paramour whose name has deliberately not been mentioned. The appellant is not providing maintenance to her and the child. The respondent wife tried her best to resume the conjugal life but it could not be resumed due to adamant attitude of the appellant. The maintenance was awarded vide order dated 20.12.2007 passed in Maintenance case no. 37 of 1999 by the learned Principal Judge, Family Court, Samastipur but the same was not paid resulting into filing of Execution Case no. 37 of 2009 by the respondent wife. The respondent wife is still ready to lead



conjugal life with the appellant. The appellant husband has performed second marriage and the family of the appellant husband are selling properties in order to deprive the respondent of the same. On the basis of the pleadings, following seven issues were framed by the learned Court below which read as follows:

“1. Whether the case/suit as filed is maintainable or not?

2. Whether the applicant has got valid cause of action to file this case?

3. Whether the O.P. has refused to cohabit with the applicant and thereby not fulfilling the basic requirement of marital life?

4. Whether the O.P. deserted the applicant and thereby caused mental cruelty to him?

5. Whether the divorce case No. 17/98 was lodged earlier by the applicant which was dismissed and so this case is maintainable or not?

6. Whether the applicant is entitled to the decree for divorce?

7. Whether the applicant is entitled to any other relief except as prayed for?”

The appellant examined four witnesses – P.W. 1



Vinod Kumar Sah, the appellant himself, P.W. 2 Savitri Devi, mother of the appellant, P.W. 3 the brother in law of the appellant and P.W. 4 Singheshwar Ram, a villager of the appellant.

The respondent wife also examined three witnesses – O.W. 1 Raju Paswan, O.W. 2 Jagdish Sah, brother of the respondent wife, O.W.3 Gayatri Devi, respondent herself.

The learned trial Court came to a conclusion that the appellant has not been able to prove the grounds taken for divorce and has not made out any valid cause of action to file the suit and hence the suit is not maintainable. It was further contended that the previous suit was dismissed on contest but without cost and that the present suit, i.e., Matrimonial Case No. 75 of 2009 was filed by the appellant again on similar ground with same variations and hence the matrimonial suit was dismissed on contest with a cost of Rs.10000/-, which is under challenge in the present Miscellaneous Appeal.

Learned counsel for the appellant submits that the appellant had made out a case for divorce but mechanically the same has been dismissed. The learned Court below has not appreciated the evidence in its true perspective. The dismissal of the earlier divorce case should not have been the ground for



dismissal of the present divorce case. The appellant did not examine himself in the earlier divorce case under misconception created by the respondent wife that the matter would end into compromise. The respondent has definitely deserted the appellant husband since last several years and by filing of the criminal cases, she inflicted cruelty upon the appellant.

Learned counsel for the respondent wife, however, submits that since the earlier matrimonial suit was preferred on the ground of cruelty, desertion and adultery and the same was dismissed on contest, hence the second suit was not maintainable. The appellant has not produced any cogent evidence to prove the ground of cruelty and desertion. The respondent is still ready to resume the conjugal life.

The only question which arises for consideration is whether the second matrimonial suit on the ground of cruelty, adultery and desertion between the same parties, when the earlier suit being filed on the same grounds of cruelty, adultery and desertion, on contest, was dismissed, is hit by the principle of *res judicata*.

The principle of *re judicata* has been codified under Section 11 of the Code of Civil Procedure, which reads as follows:



“11. *Res judicata*.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

The above quoted provision amply reflects that the principle of *re judicata* is required in judicial system to give finality to the decision on the dispute between the parties and secondly it prevents the multiplicity of the proceeding between the same party on the same subject matter of the lis.

For application of the principle of *res judicata*, it requires four conditions – (i) the matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in the issue in the former suit; (ii) the former suit must have been a suit between the same parties or between the parties under whom they or any of them claim; (iii) the parties must have litigated under the same title in the former suit and (iv) the court which decided the former suit must be a court competent to try the



same.

The Supreme Court in the case of Daryao and Ors. Vs. State of U.P. and Ors., reported in AIR 1961 SC 1457, by a Constitution bench, held that the principle of *res judicata* is also applicable even where the issue of fundamental rights have been decided. Paragraph 9 of the judgment reads as follows:

“9. But, is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of *res judicata* as indicated in Section 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with



fundamental rights in petitions filed under Article 32.”

It serves twin purpose – one, that public policy which makes it to the interest of the State and secondly it saves the individual from the hardship that he should be vexed twice for the same cause. The principle has been enumerated by the Constitution bench. Paragraph 10 of the judgment reads as follows:

“10. In considering the essential elements of res judicata one inevitably harks back to the judgment of Sir William B. Hale in the leading *Duchess of Kingston case* [2 Smith Lead Cas 13 Ed. pp. 644, 645] . Said Sir William B. Hale “from the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: First, that the judgment of a court of concurrent jurisdiction, directly upon the point, is as a plea, a bar, or as evidence, conclusive between the same parties, upon the same matter, directly in question in another court; Secondly, that the judgment of a court of exclusive jurisdiction, directly upon the point, is in like manner conclusive upon the same matter, between the same parties, coming incidentally in question in another court for a different purpose”. As has been observed by Halsbury, “the doctrine of res judicata is not a



technical doctrine applicable only to records; it is a fundamental doctrine of all courts that there must be an end of litigation [*Halsbury's Laws of England*, 3rd Edn., Vol. 15, paragraph 357, p. 185]”. Halsbury also adds that the doctrine applies equally in all courts, and it is immaterial in what court the former proceeding was taken, provided only that it was a Court of competent jurisdiction, or what form the proceeding took, provided it was really for the same cause (p. 187, paragraph 362). “Res judicata”, it is observed in *Corpus Juris*, “is a rule of universal law pervading every well regulated system of jurisprudence, and is put upon two grounds, embodied in various maxims of the common law; the one, public policy and necessity, which makes it to the interest of the State that there should be an end to litigation — *interest republicae ut sit finis litium*; the other, the hardship on the individual that he should be vexed twice for the same cause — *nemo debet bis vexari pro eadem causa*” [*Corpus Juris*, Vol. 34, p. 743] . In this sense the recognised basis of the rule of *res judicata* is different from that of technical estoppel. “Estoppel rests on equitable principles and *res judicata* rests on maxims which are taken from the Roman Law” [*Ibid* p. 745] . Therefore, the argument that *res judicata* is a technical rule and as such is irrelevant in dealing with petitions under Article 32 cannot be accepted.”



The only thing is that an issue which was directly and substantially involved in a former suit between the same parties and has been decided and has attained finality, cannot be brought before the court again to be decided.

In the present case, there is no doubt that earlier Divorce Suit No. 17 of 1998 was by the appellant for dissolution of marriage with the respondent. The marriage was sought to be dissolved on the ground of cruelty, desertion and adultery in the earlier suit, while in the second suit i.e., Divorce Case no. 75 of 2009 also the marriage is sought to be dissolved between the same appellant and the respondent on the grounds of adultery, cruelty and desertion.

Order II Rule 2 of the Code of Civil Procedure contemplates and predicates that all rights emanated from the single cause of action should be settled by a single suit and not that all different cause of action should be put in one suit. Order II Rule 2 of the Code of Civil Procedure reads as follows:

“2. Suit to include the whole claim. - (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim in order to bring the suit within the



jurisdiction of any Court.

(2) Where defendant added, plaint to be amended.-Where a plaintiff omits to sue in respect of, or intentionally relinquishes, any portion of his claim he shall not afterwards sue in respect of the portion so omitted or relinquished.

(3) Omission to sue for one of several reliefs.-A person entitled to more than one relief in respect of the same cause of action may sue for all or any of such reliefs; but if he omits, except with the leave of the Court, to sue for all such reliefs, he shall not afterwards sue for any relief so omitted.”

From the bare reading of the above provision, it appears that, both, the principles of *re judicata* under Section 11 of the Code of Civil Procedure and Order II Rule 2 thereof are based on the rule of law that a ground shall not be fixed for one and the same cause. The only thing the Court has to see is that new suit is in fact founded upon the cause of action distinct from the foundation for the former suit.

Even if the present suit under consideration would have been filed on some other ground, which was not a ground in the earlier suit for dissolution of marriage, yet, by virtue of application of Order II Rule 2 of the Code of Civil Procedure, he could not have succeeded because the new suit is in fact



founded upon the same cause of action, as has been held by the Supreme Court in the case of State of Maharashtra and Anr. Vs. M/s National Construction Company, Bombay and Anr., reported in AIR 1996 SC 2367. Part of paragraph 9 of the judgment reads as follows:

“.....Both the principle of re judicata and Rule 2 of Order 2 are based on the rule of law that a man shall not be twice vexed for one and the same cause. In the case of Mohd. Khalil Khan v. Mahbub Ali Khan, AIR 1949 PC at p.86, the Privy Council laid down the tests for determining whether Order 2 Rule 2 of the Code would apply in a particular situation. The first of these is, “whether the claim in the new suit is in the fact founded upon a cause of action distinct from that which was the foundation for the former suit.” If the answer is in the affirmative, the rule will not apply. This decision has been subsequently affirmed by two decisions of this Court in Kewal Singh v. Lajwanti, AIR 1980 SC 161 at p.163: (1980) 1 SCC 290 and in Inacio Martins’s case (1993) AIR SCW 2163) (supra).”

In view of the discussions made above, we do not find any perversity that the divorce case has been dismissed on the ground that the same is hit by the principle of res judicata.



Hence, the cost of Rs.10000/- has rightly been awarded. More over, on merits also, the appellant has failed to prove the grounds of cruelty, adultery and desertion.

In the result, this Miscellaneous Appeal is dismissed.

(Dinesh Kumar Singh, J)

(Arvind Srivastava, J)

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