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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **Date of Decision: 08.10.2021**

% **MAT.APP.(F.C.) 100/2021**

MRS. NAYANIKA THAKUR MEHTA Appellant

Through: Mr. Jawahar Raja, Advocate.

versus

MR. MOHIT MEHTA Respondent

Through:

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE JASMEET SINGH

VIPIN SANGHI, J. (ORAL)

C.M. Nos.35874/2021 & 35876/2021

1. Exemptions allowed, subject to all just exceptions.

2. The applications stand disposed of.

MAT.APP.(F.C.) 100/2021 and C.M. Nos.35873 & 35875/2021

3. The appellant has assailed the order dated 22.03.2021 passed by the learned Judge, Family Courts, New Delhi District, Patiala House Courts, New Delhi in HMA No.315/2018. By the impugned order, the Family Court has dismissed the application filed by the appellant wife under Order VII

Rule 11 CPC seeking rejection of the aforesaid divorce petition preferred by the respondent under Section 13(1)(ib) of the Hindu Marriage Act, 1956 ('the Act') to seek dissolution of marriage on the ground of desertion.

4. The appellant sought rejection of the petition by placing reliance upon Order II Rule 2 CPC. The submission of the appellant – in support of the said application, was that the respondent/ husband had earlier instituted two cases, namely, HMA No.471/2014 for judicial separation under Section 10 of the Act, and HMA No.637/2014 for divorce on the ground of cruelty under Section 13(1)(ia) of the Act, but had failed to include the ground of divorce premised upon the alleged desertion, even though, the said ground was available to the respondent/ husband when the earlier petitions were preferred. The respondent did not include the whole of the claim – which he was entitled to make, in respect of the cause of action and, since he omitted to sue on the ground of desertion – though available to him when he preferred the aforesaid two petitions, he was precluded from, later on, suing in respect of the said ground. The appellant/ wife contended that though the respondent was entitled to grant of both the reliefs in respect of the same cause of action, namely, to seek divorce on the ground of cruelty under Section 13(1)(ia), and on the ground of desertion under Section 13(1)(ib) of the Act, he did not seek the relief of divorce on grounds of desertion, and omitted to do so. While omitting to claim divorce on the ground of desertion in his earlier petitions – particularly HMA No.637/2014, he did not obtain leave of the Court to sue for such relief later on. Thus, he was precluded from preferring the second divorce petition premised upon the ground of desertion under Section 13(1)(ib) of the Act.

5. At the outset, we may observe that so far as the first petition preferred by the respondent/ husband under Section 10 of the Act – to seek judicial separation is concerned, the filing of same, in any event, cannot be relied upon by the appellant for the simple reason, that when the said petition was preferred, the respondent was not interested in seeking a decree of divorce under Section 13 of the Act. Consequently, even if the ground of constructive desertion was available to the respondent – as claimed by the appellant, when he preferred his petition under Section 10 of the Act (HMA No. 471/2014), he was not bound to claim the relief of divorce as he had the option to only claim judicial separation, and not divorce. In any event, this petition was withdrawn by the respondent when he preferred his petition for divorce on the ground of cruelty under Section 13(1)(ia) of the Act, being HMA No.637/2014.

6. The discussion found in the impugned order passed by the Family Court reads as follows:

”6. *The provision of Order 2 Rule 2 CPC reads as under:-*

“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) Relinquishment of part of claim.–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.

Explanation.—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action”.

7. The principle behind Order 2 Rule 2 CPC has been that there cannot be two suits, if causes of action are identical in substance. The object is to prevent multiplicity of suits as it is directed against two evils; i) the splitting up of claims; and ii) the splitting up of remedies. The provisions requires inclusion of whole claim arising in respect of one cause of action in one suit although right to sue for some reliefs may be reserved by leave of the Court, but if no leave is obtained, suit for any relief omitted is barred. It is also important to note that permission to relinquish the relief has to be obtained in the earlier suit and not in the subsequent suit (relief upon *SNP Shipping Services Pvt. Ltd. Vs. World Tanker Carrier Corporation* AIR 2000 Bombay 34).

8. The scheme of Hindu Marriage Act, 1955 provides for various matrimonial reliefs which can be claimed by the parties by filling the relevant petition. The relief of judicial separation is available under Section 10 of Hindu Marriage Act, 1955, but the marriage of the parties cannot be finally dissolved under Section 10 of the Act. The dissolution of marriage can be sought and granted under Section 13 of the Act on various grounds stipulated therein, which includes the grounds of cruelty and desertion.

9. It is an admitted position that petition for judicial

separation earlier filed by the husband has been withdrawn and petitioner is now seeking dissolution of marriage on the ground of cruelty and desertion. For the ground of desertion, the separation of two years is essential which was not there at the time petitioner filed the petition seeking divorce on the ground of cruelty. Therefore, the ground of desertion was not available to the petitioner/husband on the date when petition for divorce on the ground of cruelty was filed. The present petition for divorce in desertion contains different cause of actions and different reliefs, hence Order 2 Rule 2 CPC has no application in such circumstances."

7. In so far as HMA No. 637/2014 is concerned, the submission of learned counsel for the appellant is that a perusal of the averments made by the respondent in the said petition would show that it was open to the respondent to seek divorce on ground of desertion, since he alleged that for over four years prior to filing of the said divorce petition, the parties had not been cohabiting – though living under the same roof, and had not been on talking terms. In this regard, learned counsel for the appellant has drawn our attention to the averments contained in paragraphs 5 & 37 of the petition, which read as follows:

"5. That the parties to this petition are finally living separately since 14/06/2014 and have since not been living together. However, the parties have not been cohabiting since past over four, and have not been on talking terms. The parties to this petition have been communicating through sms only, if at all, and always quarreling.

x x x x x x x x x

37. That the parties to the petition are finally living separately without cohabitation and not speaking to each other except quarrelling for over four years."

8. Thus, the submission of learned counsel for the appellant is that the respondent was bound to sue for divorce on the ground of constructive desertion, at least, when he preferred the first divorce petition under Section 13(1)(ia) of the Act, being HMA No.637/2014, since the said ground was available to him.

9. Learned counsel for the appellant also draws our attention to the way in which the respondent pleaded the cause of action in the divorce petition in question filed under Section 13(1)(ib) of the Act, to submit that the respondent/ husband had pleaded that the cause of action for filing the divorce petition on the ground of desertion arose on account of constructive desertion by the appellant/ wife. The relevant paragraph pleaded by the respondent in the said divorce petition reads as follows:

*“159. The cause of action arose when in 2002 just after marriage the respondent insisted on continuing to meet Mr. Arvind and even brought him to B-9/2 Vasant Vihar which was strongly objected by grandfather Shri P.C. Mehta also and meeting took place between parties with parents to dissolve the marriage by mutual divorce, and again in 2007 when similar meeting took place to dissolve the marriage. That the cause of action for physical desertion arose on 19/06/2014 when the respondent wife on returning pre-maturely from Mumbai tried to enter the flat MA-1/1,2D, Garden Estate, Grugaon(Haryana), having failed left for her Bhua's place at Faridabad without intimation/ contact or communication to her husband or in laws and is residing separately since 19/06/2014 and refuses to join the petitioner husband. **The cause of action for constructive desertion had arisen on 13.06.2011 and continued till 19.06.2011** when the respondent wife left for Hyderabad despite the petitioner husband objecting to her trip to Hyderabad on 13/06/2011 immediately after her return from*

holiday at Ooty and Conoor on 11.06.2011 with Shri Gaurav Kapahi and his family and having already spent about 10 days with them. Very relevant is the cause that respondent's ticket by flight was financed and booked by Shri Gaurav Kapahi without intimating or permission of the petitioner husband for Respondent to visit Gaurav Kapahi's place at Hyderabad again, despite having already spent about ten days with Shri Gaurav Kapahi and his family at Ooty/Conoor and respondent again stayed at Shri Gaurav Kapahi's place at Hyderabad from 13 June 2011 to 19 June 2011. **The cause of action again arose in June-July 2011 and kept arising and continues to arise as parties after June-July 2011 never co-habited.** The respondent wife did not allow the husband to enter the room when she was dressing, much less touch her, and thereafter shifted into separate bed room/daughter's room and would scream and shout at him even if he accidentally opened to toilet door. The cause of action again arose in June 2012 at Goa when the respondent wife admitted that she had been misbehaving wanting the husband to initiate divorce proceedings since the marriage wasn't working. However since the same were not initiated she was coming clean that she wanted out of the marriage as she was not satisfied mentally, physically, emotionally and financially. She repeated this resolve to get rid of the dead marriage to Ms. Geeta Dudeja also at Goa.

The cause of action further arose when the respondent wife refused to accompany the husband for family holiday planned with her consent for the last week of December 2012 to Ranikhet. The cause of action further arose when the respondent emptied the locker No. 171 ICICI Bank on 24/12/2012 without intimation to her husband and in laws and left for Hyderabad to her brother in law Mr. Gaurav Kapahi's place also without intimation to her husband (permission is too far for her ever to be taken). That the report of the Local Commissioner confirms that she has made good with jewellery and valuables worth over Rs.80,00,000/- (Rs. Eighty lacs apprx) on 24/12/12 and made false complaints on 6/7/14 and

23/7/14 and 28/7/14 and 28/10/14 etc. etc. about all jewellery being at home MA-1/1,2D, Garden Estate, Gurgaon(Haryana), and concealing that she had subsequent to misappropriating/stealing all the jewellery on 24/12/12, again after her trip from Shri Gaurav Kapahi's place at Hyderabad without knowledge of the husband. The respondent wife thereafter opened locker no. 86 on 13/9/2013 at Axis Bank, Hauz Khas in her name alone without knowledge of the petitioner husband. The jewellery and valuables misappropriated/removed/ stolen by her included jewellery of his Massi (embedded nath on heir loom from Great great grand mother of his mother borrowed by him at the instance of the respondent wife who took it to show off at his sister's wedding in May 2002 and then kept it make a copy design of it in silver for getting award, and other that pretext she never returned despite being asked by massi and petitioner husband several times. The removal of total jewellery from locker no. 171 ICICI bank clearly showed her intention to walk out of marriage on 24/12/12. The other jewellery which by no imagination could be termed as stridhan were 14 Gold guineas and other gold pieces given to Mohit by his maternal grant mother late Smt. Padmavati Uppal who had special affection and fondness for the petitioner. Diamond karnphools and chain with sovereign of about 5 tolas also belonging to Massi and borrowed by Respondent wife. Diamond necklace and karas of the mother of the petitioner. It is relevant that Petitioner had locker 171 at ICICI bank well before marriage since year 2000 in his name alone. That the name of the respondent wife was added after their marriage and made into operational either or survivor and since then the locker key used to be with the respondent wife alone. This was the reason she refused to go on planned holiday with the husband. That the cause of action again arose in January 2013 when the e-mail/communication were received from Shri Gaurav Kapahi clearly stating that respondent had no trust in the petitioner and their marriage was headed for collapse, and duly replied by the Petitioner. The respondent and her father endorsed the said emails/communications of Shri

Gaurav Kapahi of January 2013. The respondent without permission of the petitioner apologized to Shri Gaurav Kapahi for the replies and communications by the petitioner husband. The cause of action further arose when in February 2013 while living under the same roof in Garden Estate, Gurgaon the respondent wife sent emails to the husband which were duly replied. The cause of action further arose when the respondent wife wrote letter dated 26/2/2014 to bank and Max Insurance and further when she informed about going to Mumbai just half an hour before her departure on 14/6/2014. That the cause of action again arose on 17/6/2014 when the respondent wife on phone from Mumbai threatened the petitioner to see him and his parents behind the bars. It again arose when in reply to the email of the petitioner dated 19/6/2014 the wife chose to reside with Bhua at Faridabad and thereafter continues to stay independently not wanting to stay with the husband. That the cause of action again arose on 6/9-7-2014 when the respondent wife made complaints under Section 498A IPC against the petitioner husband and his parents. That the cause of action again arose when she filed DV complaint and GS 14/14 and claimed inter-alia that the daughter and the respondent were not safe living with the petitioner. That inter-alia the respondent falsely stated that the petitioner used to force respondent to have unnatural sex. That the cause of action arose whenever she filed cases/complaints against the petitioner husband and his parents. That the cause of action is continuing to arise as the respondent wife is not willing to co-habit or live with the husband and making false accusations against the petitioner husband and his parents.”

(emphasis supplied)

10. We heard learned counsel for the appellant at substantial length. Having perused the impugned order, as well as the pleadings of the respondent in HMA No.637/2014 preferred by the respondent under Section 13(1)(ia) of the Act, as well as the averments of the respondent in HMA

No.315/2018, after hearing the submissions of Mr. Raja, we conveyed to him that we do not find any merit in his submissions, and that no ground was made out to seek rejection of HMA No.315/2018 under Order VII Rule 11 CPC. However, learned counsel for the appellant persisted and continued to argue the matter despite our informing him of our view. In fact, we had even made it clear to him – after having heard him at substantial length of time, that his prolonged arguments may come at a cost inasmuch, as, if we do not agree with him even after further arguments, we would impose costs upon the appellant for wasting the precious time of the Court, as that would prevent the Court from taking up other listed matters. In spite of the aforesaid, learned counsel for the appellant persisted with his arguments in the presence of the appellant.

11. The Act in Section 13 provides for several grounds on which one of the spouse may seek divorce from the other. The cause of action in respect of each grounds enumerated in Section 13 of the Act is different. The cause of action in respect of multiple grounds may be available and arise in favour of one, or the other spouse, on the same bundle of facts. For example, the ground contained in Section 13(1)(i) would necessarily require the petitioner to plead and prove that after the solemnization of marriage, the other spouse had voluntary sexual intercourse with any person other than his/ her spouse. The same bundle of facts may also give rise to a cause of action premised on the ground of cruelty under Section 13(1)(ia). Similarly, the same bundle of facts may give rise to cause of action to seek divorce on grounds of cruelty and desertion, which are grounds for divorce under Section 13(1)(ia) and 13(1)(ib) respectively.

12. In the divorce petition that we are concerned with, the respondent has pleaded actual desertion on and from 14.06.2014. The divorce petition in question has been preferred by pleading that the desertion started with effect from 14.06.2014, continued for the period of over two years continuously as on the date of filing of the divorce petition. Merely because in the earlier divorce petition, being HMA No.637/2014, the respondent pleaded constructive desertion from 2011, that does not preclude the respondent/husband from pursuing his claim for divorce on grounds of actual desertion from 14.06.2014 continuously. At the highest, what the appellant may urge before the Family Court – in defence to the present divorce petition under Section 13(1)(ib), is that the respondent cannot seek to establish constructive desertion - alleged by him from 2011 onwards, since the cause of action for filing petition for divorce on the ground of desertion, premised upon constructive desertion, was available to him when he preferred the first divorce petition being HMA No.637/2014. However, the cause of action which has arisen in favour of the respondent - on his pleading of actual desertion from 14.06.2014 continuously, was not available to him when he preferred HMA No.637/2014, since that petition was preferred in September 2014 itself, i.e. hardly three months after actual desertion allegedly commenced. The cause of action premised on actual desertion, which allegedly started on 14.06.2014, matured only after a period of two years of continuous actual desertion, i.e. in the year 2016. The divorce petition in question being HMA No.980/2016 was preferred on or about 01.12.2016.

13. We cannot accept the submission of learned counsel for the appellant that merely because the ground of constructive desertion was available to the

respondent when he preferred his divorce petition being HMA No.637/2014, he was bound to plead constructive desertion and also seek the relief of divorce on the said ground under Section 13(1)(ib) of the Act. Though the respondent may have pleaded constructive desertion when he preferred HMA No.637/2014, he may have chosen not to press for the relief of divorce on the ground of constructive desertion on account of the inherent challenge in establishing the same. It is not that the appellant is conceding to such alleged constructive desertion. The respondent was, therefore, entitled to await for the cause of action premised on actual desertion to mature and thereafter prefer his second divorce petition under Section 13(1)(ib) of the Act, which he did by preferring HMA No.980/2016.

14. Order II Rule 2 CPC has been culled out in the extract of the impugned order reproduced hereinabove.

15. Sub-Rule (1) of Order II Rule 2 CPC states that though every suit shall include the whole of the claim which the plaintiff is entitled to make “*in respect of the cause of action*”, the plaintiff may relinquish any part of his claim in order to bring the suit within the jurisdiction of any Court.

16. Sub-Rule (2) of Order II Rule 2 CPC states that where the plaintiff omits to sue in respect of, or intentionally relinquishes any part of his claim, he shall not afterwards sue in respect of the portion so omitted, or relinquished. Thus, at the highest, it may be argued that the respondent not having pursued the cause of action premised upon constructive desertion when he preferred HMA under Section 13(1)(ia) of the Act, he would be precluded from doing so subsequently.

17. Sub-Rule (3) of Order II Rule 2 CPC talks about a person being entitled to more than one relief in respect of “*the same cause of action*”. It states that if the plaintiff omits to claim all such reliefs, without the leave of the Court, he shall afterwards be barred from suing for such reliefs premised on the same cause of action.

18. The cause of action in favour of the respondent to seek divorce on account of constructive desertion is not the same as the cause of action premised upon his case of actual desertion. Actual desertion has been pleaded by the respondent from 14.06.2014 onwards and not before that. Constructive desertion on the other hand, was pleaded from the year 2011 till the commencement of the actual desertion, which is 14.06.2014. Both these causes of action are different and distinct and they accrued at different periods of time. Therefore, Order II Rule 2(3) was not attracted in the facts of this case.

19. Learned counsel for the appellant has sought to place reliance on ***Bhushan Dattatraya Kedar Vs. Mrs Dipti Bhushan Kedar***, 2018 SCC OnLine Bom 940; (2018) Mah LJ 842; and ***Vijay Pal Vs. Sunita & Another***, 2014 SCC OnLine Del 1921; (2014) 215 DLT 146. These decisions relied upon by learned counsel for the appellant are not at all attracted in the facts of the present case. Both are cases dealing with *res judicata*, and not Order II Rule 2 CPC, which has been invoked by the appellant.

20. In our view, the application preferred by the appellant under Order VII Rule 11 CPC was completely frivolous, and appears to be an attempt to delay the progress of the two divorce petitions. In our view, the filing of the

application under Order VII Rule 11 CPC was an abuse of the process of the Court.

21. Accordingly, we dismiss the present appeal with costs of Rs.50,000/- to be deposited with the Delhi State Legal Services Authority within three weeks. In case the costs are not deposited, the defence of the appellant before the Family Court shall be liable to be struck off.

VIPIN SANGHI, J.

JASMEET SINGH, J.

OCTOBER 08, 2021

B.S. Rohella

