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Ct-08

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FA 137 of 2006
with
I.A No. CAN 7 of 2022

Swati Malakar @ Ghosh
Vs.
Subrata Ghosh

with

FA 169 of 2009
with
I.A No. CAN 3 of 2013(Old No. CAN 8701 of 2013)
CAN 5 of 2022

Swati Malakar @ Ghosh
Vs.
Subrata Ghosh

Mr. Rwitendra Banerjee
... For the Appellant in
both the appeals

Mr. Debductta Basu
Ms. Pampa Dey (Dhabal)
... For the Respondent in
both the appeals

By consent of the parties both the appeal are taken up for hearing along with the connected applications.

The appeal and the applications are taken up together and disposed of by a common judgment.

The appeal is arising out of a suit filed by the appellant for divorce in which an application has been filed by the respondent/husband under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights. The decree for divorce was dismissed.

The application filed by the husband for restitution of conjugal rights was allowed.

The parties have stayed together as husband and wife in the matrimonial house for 30 days.

The suit was dismissed on 31st January, 2006. During the pendency of the appeal the appellant/wife has filed an application for additional evidence. In the said application the applicant wife/husband has disclosed three documents, which, in our view, if proved would constitute mental cruelty and can result in a reversal of the findings against the wife appellant.

Mr. Rwitendra Banerjee, learned counsel appearing for the appellant/wife, submits that these documents could not have been produced during evidence as these letters are all issued subsequent to the suit being dismissed by the trial court. The purport and content of the said letters would clearly establish mental cruelty and furnish a ground for divorce.

The said application is opposed by the husband. Learned counsel representing the respondent/husband, submits that if this application for additional evidence is allowed it would give undue advantage to the appellant to fill up the lacuna. The court in deciding the application should take into consideration whether after a long lapse of time these letters are at all to be allowed to be relied upon as evidence for establishing the ground of cruelty.

It is submitted by the respondent that the appellant has failed to establish that in spite of due diligence these documents could not have been produced. The requirements of Order 41 Rule 27 are not fulfilled. In this regard, learned counsel for the respondent has relied upon the decision of the Hon'ble

Supreme Court in ***State of Gujarat and Anr. Vs. Mahendrakumar Parshottambhai Desai, reported in (2006)9 SCC 772, (paragraph 10).***

We are unable to accept such submission in opposing the application for additional evidence.

Firstly, these documents are all subsequent to the trial and if the authenticity, genuineness and contents of the documents are proved, this would undoubtedly constitute mental cruelty. In *State of Gujarat & Anr. (supra)*, the documents sought to be brought on record are government record which could have been produced in the suit and were not such which were discovered later and came into existence after filing of the suit. Hence, the said decision has no application in the facts of the case. Moreover, Order 41 Rule 27 of the Code of Civil Procedure is an exception to the rule that the court cannot travel outside the record of the lower court and take additional evidence in the appeal as the said Section enables the appellate court to take additional evidence in exceptional circumstances and one such exceptional circumstances would be where the documents discovered after the trial of the suit had a direct bearing on the decision of the suit on merit. In other words, these documents if were in existence and available during the trial of the suit and produced what would have been the outcome of the trial. It is true that the appellate court may permit the additional evidence the conditions laid down in Order 41 Rule 27 are found to exist and the parties are not entitled, as of right, to the admission of

such evidence, however, at the same time where the additional evidence sought to be adduced removes the cloud of the doubt over the case and the evidence has direct and important bearing on the main issue in the suit and interest of justice clearly renders imperative that it may be allowed [See. ***Sanjay Kumar Singh v State of Jharkhand*** reported in **2022(7) SCC 247** at paragraph 7) to be permitted on record such application may be allowed. In the instant case, we are of the opinion that these documents, if proved at the trial, may lead to a different conclusion.

In view thereof, the judgment of the trial court is set aside and the trial court is directed to permit the appellant/wife to adduce fresh evidence on three documents, namely, Annexure-A and Annexure-B (appearing in CAN 7 of 2022) and the order passed in M Case no. 288 of 2004 on 12th December, 2015.

The suit shall be disposed of preferably within six months from the date of communication of this order without granting any adjournment to either of the parties unless it is unavoidable.

The parties shall be present on the date fixed for evidence. The husband is presently paying maintenance Rs.3,000/- per month. Considering that the wife has no independent source of income and the husband is duty bound to maintain his wife, who is unemployed, we direct the husband to pay alimony pendente lite @Rs.10,000/- per month on and from December, 2022 till the disposal of the suit.

In determining the said amount we have taken note of the earlier orders and the rise in

living cost and inflation. The appellant is expected to live a decent life. In our view, the said amount is reasonable for leading a decent and dignified life. We also record that the respondent/husband in spite of liberty being given did not file any affidavit of assets and liabilities. A document alleged to have been signed by his employer produced before us in support of his present income is not accepted as the authenticity of the said document is in doubt. In any event, irrespective of the income earned by the husband it is the duty of the husband to ensure a decent and dignified life of his wife.

The trial court is directed to decide the permanent alimony in the event the suit is decreed in favour of the wife.

The maintenance amount, as determined, shall be paid by 10th of each month.

The application for additional evidence is allowed.

In view of the above both the appeals being FA 137 of 2006 and FA 169 of 2009 are allowed CAN 8701 of 2013, CAN 5 of 2022 and CAN 7 of 2022 are accordingly disposed of in terms of the order passed today. The impugned decrees are set aside

The Chairman, DLSA, Howrah, is directed to appoint a competent advocate to represent the appellant/wife in the pending proceeding.

Registrar Administration (L & OM) is directed to communicate this order to the Secretary, DLSA, Howrah as well as the District Judge, Howrah at the earliest for doing the needful.

The learned District Judge is requested to ensure early disposal of the suit.

(Uday Kumar , J.)

(Soumen Sen, J.)