

Item- ML-4.	01-05-2023	FA 192 of 2022 CAN 1 of 2022
sg	Ct. 8	Subhra Ganguly Versus Uttam Ganguly

Mr. Rajdeep Bhattacharya, Adv.
Mr. Neil Basu, Adv.
...for the appellant

Mr. Dulal Sarkar, Adv.
Mr. Kajal Mukherjee, Adv.
Mr. Bikash Chakraborty, Adv.
...for the respondent

The short question arises in this appeal is whether the subsequent suit for divorce on the ground of cruelty would be maintainable when the earlier suit was dismissed in which divorce was prayed for on similar grounds.

In the instant case, the appellant filed the first matrimonial suit on 20th March, 2016 being MAT Suit No. 113 of 2016 on the ground of desertion and cruelty. The said suit was dismissed for default on 13th February, 2017 when the learned Advocate for the respondent was present. Instead of filing of an application for recalling the said order, a fresh suit was filed on the ground of cruelty within one month from the date of dismissal of the earlier suit for default. Admittedly, in the earlier proceeding, no adjudication took place. The only bar was to filing of the fresh suit in view of Order 9 Rule 9 of the Code of Civil Procedure. The said provision is quite clear as it clearly states that if a suit is dismissed for default in presence of the defendant, then the remedy lies in recalling the order upon the said proceeding was dismissed and a fresh proceeding would be barred.

The learned Trial Judge, apart from relying upon the said provision, had also relied upon the decision of the Hon'ble Supreme Court in the case of *Mayandi vs. Pandarachamy & Anr.* reported in **2019 (3) HLR 776**. The issue on cruelty as such, was not gone into. However, the act of cruelty may be independent of desertion and on that score, it may be available to its spouse to refer to the acts of cruelty subsequent to the dismissal of the earlier suit but obviously, it cannot be relied upon the acts on which cruelty was alleged at the time of dismissal of the earlier proceeding. It appears that under wrong advice the fresh suit was filed within one month although, the remedy available to the wife was to file an application for recalling of the earlier order which, if were filed, would have been within the period of limitation. The suit was dismissed after the filing of the written statement. The wrong legal advice has prevented the wife to seek an adjudication of the matrimonial disputes. In an adversarial proceeding a litigant has to depend upon her advocate. We feel that the wife is entitled to have her earlier suit heard on merits.

Although, we do not find any reason to interfere with the order passed by the learned Trial Court in dismissing the subsequent suit. However, this order shall not prevent the appellant to file an application for recalling of the order dated 13th February, 2017 and restoration of the earlier suit.

The entire proceeding starting from filing of the fresh suit till the disposal of the appeal may be excluded under Section 14(2) of the Limitation Act, 1963.

In the event of revival of the earlier suit, we would request the learned Trial Judge to dispose of the MAT Suit No. 113 of

2016 as expeditiously as possible, preferably within a period of one year from the date of settlement of the issue.

Since the respondent is working abroad, his suitability has also been taken into consideration during the course of trial and if required, the evidence of the husband may be recorded through video conferencing.

In view of the aforesaid order, the application for maintenance is not decided here and the appellant may seek self-same remedy in the proceeding after being revived. We are presently not deciding the said application for maintenance.

The appeal and the application are, accordingly, disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties upon compliance of all requisite formalities.

(Uday Kumar, J.)

(Soumen Sen, J.)