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

% ***Date of decision: 10th October, 2023***

+ **MAT.APP.(F.C.) 25/2023, CM APPLs. 3710/2023, 3711/2023**

MR. MANISH KUMAR CHOUDHARY Appellant

Through: Mr. Saurabh Chauhan, Mr. Varun Jain and Ms. Reny chauhan, Advocates.

versus

MRS. PALLAVI GARG Respondent

Through: Mr. Pankaj Yadav and Mr. Vivek Kumar, Advocate with respondent in person.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

JUDGMENT (oral)

1. The present appeal has been filed by the appellant under Section 19 of the Family Court Act read with Section 96(1) of the Code of Civil Procedure, 1908 read with section 28 of the Hindu Marriage Act, 1955 against the Order dated 13.09.2022 passed by learned Judge, Family Court, New Delhi District, Patiala House Court, with the following prayer :

*“a) allow the present appeal and impugned order dated 13.09.2022 passed by the Sh. Rajesh Kumar Singh, Judge, Family Court (New Distt.), Patiala House Court, New 314/2020 titled "Mr. Manish Kumar Pallavi Garg";
b) Pass such other or further Order(s)/Direction(s), which may be deemed fit and proper by this Hon'ble Court of the facts and circumstances of the present case to meet the ends of justice.”*



2. The learned Judge, Family Court passed the Order dated 13.09.2022 by observing as under :

“7. Now the question arises whether the court should reject the plaint under Order VII Rule II (d) CPC or should allow the petitioner to withdraw the petition with liberty to file a fresh petition as prayed. Under Order XXIII Rule I (3) CPC, petitioner may be allowed to withdraw the petition if it is apparent that the petition would fail due to some formal defect and he can also be allowed to withdraw the petition for any other sufficient reason. Most of the grounds provided under Order VII Rule 11 CPC also qualify as formal defect for which petitioner may be allowed to withdraw the petition with liberty to file a fresh petition. At first glance, it appears that in the present case allowing the petitioner to withdraw the petition with liberty to file a fresh petition will not be any different from rejecting the petition under Order VII Rule 11 CPC as in both cases he can file a fresh petition. However, deeper analysis of the facts of the case will show that the effect of rejection of plaint under Order VII Rule 11 (d) CPC in the present case will not be same as withdrawal of the petition under Order XXIII Rule 1 (3) CPC with liberty to file a fresh petition.

8. In the application, the petitioner has not disclosed what kind of petition he is going to file after withdrawing the present petition. Ld. Counsel for the petitioner submitted that the petitioner will file a civil suit for declaration of the marriage as non est and he will also file a divorce petition u/s 12 (1) (a) & 13 (I) (ia) HMA. An order under Order VII Rule 11 CPC does not by itself bar a fresh suit as provided under Order VII Rule 13 CPC Therefore, question arises as to why the petitioner should not be allowed to withdraw the petition instead of rejecting the petition under Order VII Rule 11



CPC.

9. *This court has held that the provisions of HMA cannot be invoked once the petitioner claims that the respondent was not a Hindu at the time of marriage. If he is allowed to withdraw the petition with liberty to file a fresh petition, he will file a petition under Section 12 (I) (a) & 13 (1) (ia) HMA which will be against the decision of this court that he cannot invoke HMA. It is pertinent to note that my Ld. Predecessor also observed in para 12 of the order dated 17.09.2021 that the mutually destructive plea cannot be taken. The petitioner was allowed only to bring on record subsequent events about alleged conversion of the respondent to Muslim religion.*

10. *After arguments on the application under Order VII Rule 11 CPC, respondent has become entitled to a finding from this court whether the petitioner can invoke HMA. If the petitioner is allowed to withdraw the petition, he will circumvent this finding of this court. Ld. Counsel for petitioner has relied upon judgment by Hon'ble Madars High Court dated 22.10.2019 in CRP (NPD) No .33 titled K.P Selvah @ Panner Selvam Vs. Atlee & Ors. Ld . Counsel has placed on record a print out of the judgment. Facts of the said case are entirely different.*

11. *In view of above discussion, the application of the petitioner under Order XXIII Rule 1 (1) & (3) CPC is dismissed. The application of the respondent under Order VII Rule II CPC is allowed and the petition is rejected under Order VII Rule 11 (d) CPC with a cost of Rs. 10,000/- to be paid by the petitioner to the respondent. File be consigned to Record Room."*

3. It is not in dispute that as per Order XXIII Rule 3 CPC the petitioner can at any time seek permission to withdraw the petition with liberty to file afresh on the same cause of action.



4. The learned Judge, Family court has erred in not granting the liberty, instead allowed the application under Order VII Rule 11 CPC rejecting the petition with cost of Rs.10,000/- to be paid in favour of the respondent herein.
5. The appellant has submitted that the petition suffered from technical defects as relief was claimed under Section 11, 12 and 13 of Hindu Marriage Act in the alternative. Moreover, the respondent was not forthcoming to disclose whether she is a Hindu or Muslim.
6. During the hearing we have specifically asked from the respondent who is present in the Court that whether she is Hindu or a Muslim. She replied that she is a Hindu and she never converted to Muslim.
7. Accordingly, we set aside the Order dated 13.09.2022 and permit withdrawal of petition with liberty to file afresh as per the law.
8. The appellant has undertaken and seek time and is granted two week's time to pay cost of Rs.10,000/- in favour of the respondent.
9. The appeal is accordingly disposed of along with its pending applications.

(SURESH KUMAR KAIT)
JUDGE

(NEENA BANSAL KRISHNA)
JUDGE

OCTOBER 10, 2023/va