



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

% **Reserved on: 13th October, 2023**
Pronounced on: 31st October, 2023

+ **MAT.APP. (F.C.) 164/2023 & CM APPL. 29884/2023, 29886/2023,**
33507/2023 & 36933/2023

RICHA SUREKA Appellant
Through: Ms.Vandana Kejriwal, Advocate.

versus

AKHIL KUMAR SUREKHA Respondent
Through: Mr.N.P.Singh, Mr.Amrit Singh and
Mr.Vinay Kaushik, Advocates.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT
HON'BLE MS. JUSTICE NEENA BANSAL KRISHNA

J U D G M E N T

NEENA BANSAL KRISHNA, J.

1. **An appeal under Section 19 of the Family Courts Act, 1984** has been filed against the Order dated 02.02.2023 dismissing the application under Order VII Rule 11 of the Code of Civil Procedure, 1908 (*hereinafter referred to as "CPC"*) of the appellant/ wife.
2. The respondent/ husband had filed a petition for Divorce on the ground of cruelty and desertion under Section 13 (1) (ia) and (ib) of Hindu Marriage Act, 1955 (*hereinafter referred to as "Act"*). The appellant/ wife moved an application under Order VII Rule 11 CPC claiming that the divorce was sought essentially on the ground of adultery which cannot be adjudicated in the absence of alleged adulterer being made a party to the



petition. Rejection of the petition was sought on the ground of non-impleadment of the alleged adulterer.

3. The learned Judge, Family Court observed that the present petition was on the ground of Cruelty and Desertion and not on the ground of adultery, therefore, the contention raised by the appellant was primarily not maintainable and was without merit. Furthermore, whether the allegations of adulterous relationship would be viewed as a ground of cruelty is an aspect which is dependent on factual settings of a given case and cannot be determined forthwith. Therefore, the application was rejected.

4. **Aggrieved, the present appeal has been preferred.**

5. The **learned Counsel on behalf of the appellant/ wife** (who is the respondent in the Divorce Petition) has asserted that the respondent herein had filed a Divorce petition bearing No.00514/2016 in the Family Court at Faridabad, Haryana, on the ground of Adultery under Section 13 (1)(i) and (ia) of the Act. The Additional Principal Judge, Family Court, Faridabad relied upon the judgments in R.K. Raja vs. U.S. Rayudu & Anr. (2016) 14 SCC 275, Ram Kumar @ Ramender Kumar vs. Smt. Raksha @ Gulabo AIR 2003 Punjab & Haryana 334, Dhruv Galgotia vs. S.E Investment Ltd. CR No.117 of 2017 (Punjab & Haryana) and observed that non-impleadment of an adulterer in a petition seeking divorce on the ground of adultery was not maintainable. Consequently, the divorce petition was rejected under Order VII Rule 11 CPC. An appeal was preferred before the Punjab & Haryana High Court, which was withdrawn by the respondent/ husband.

6. However, the present Divorce petition has been filed afresh before the Principal Judge, Family Court, Delhi, wherein the paragraphs from 1 to 20 are identical to those of the previous divorce petition, while the other



paragraphs relate to the subsequent events. It is argued that once the first Divorce petition had already been rejected for non-impleadment of the adulterer, the present divorce petition which also is essentially on the same grounds, is not maintainable since the adulterer has again not been impleaded. Reliance has been placed on the judgment of Khawar Butt vs. Asif Nasir Mir 203 SCC OnLine Del 4474 wherein it was observed “*it is well settled that in a suit wherein plaintiff alleges adulterous relationship against the defendant, both the parties allegedly involved in such adulterous relationship, of necessity, must be parties. The plaintiff cannot choose to implead only one of the two parties involved in the alleged adulterous relationship as a party defendant, while not proceeding against the other.*” Reliance has also been placed on Philips James Coates vs. Agnes Fernandes AIR 1994 Mad. 1, Rakhee Sharma vs. Amit Sharma, 2022 SCC OnLine J&K 692, Maliga vs. P. Ganeshan 2020 SCC OnLine Mad. 116, Ram Kumar vs. Raksha AIR 2003 P&H 334 and M.K. Kunhiraman vs. Santha AIR 1998 Ker. 189 in support of the above.

7. It is further argued that once the grounds as pleaded in the first divorce petition have already been rejected, the same cannot be agitated afresh by way of the second divorce petition. It is asserted that the present suit is also barred by the principles of *res judicata*, estoppel and also does not disclose any cause of action and is thus, not maintainable. Reliance has been placed on the judgments of Canara Bank vs. N.G. Subbaraya Shetty (2018) 16 SCC 228 and K.S.P. Ali vs. State of Andhra Pradesh 2017 SCC OnLine SC 1238.

8. Learned Counsel for the appellant has further argued that the present petition is nothing but forum shopping for which reliance has been placed on



the judgment of Vijay Kumar Ghai & Ors. vs. State of West Bengal & Ors. 2022 SCC OnLine 344. Learned counsel has argued that when the petition does not disclose any cause of action, then it is an exercise in futility to proceed with the trial and make the parties suffer. The petition has to disclose a definite cause of action and in case the same is not disclosed, the litigation should be nipped in the first instance. Reliance has been placed on the judgment of Prem Kishore & Ors. vs. Brahm Prakash Civil Appeal No.1948 of 2013 decided on 29.03.2023 by Supreme Court of India.

9. **Learned counsel on behalf of respondent** has submitted his written submissions and has argued that while withdrawing the Appeal before the High Court of Punjab & Haryana bearing No.164/2023, liberty had been granted to the respondent to file a fresh petition under the Act to which the respondent (appellant herein) had raised no objection and no appeal was preferred. Therefore, the present divorce petition is not barred by the principles of estoppel or *res judicata* for which reliance has been placed on Shri Hari Hanuman Das Totala vs. Hemant Vithal Kamat (2021) 9 SCC 99. The withdrawal of the earlier petition with liberty to file a fresh does not invoke the principle of *res judicata* or estoppel and the present petition is maintainable. It is further argued that there is no final decision on the merits of the case and the principles of *res judicata* are not applicable. The present appeal is therefore, without merit.

10. **Submissions heard and the record perused.**

11. At the outset, it may be observed that Order VII Rule 11 CPC provides that the petition/ suit must be rejected at the threshold itself if they do not disclose any cause of action or is barred under any law. The salutary objective of this provision is to nip the frivolous litigation in bud and not to



permit protracted litigation which is non-viable from its inception itself. Learned counsel on behalf of the appellant has rightly argued that Order VII Rule 11 CPC must be invoked in the cases where the cause of action is not disclosed in the petition or is barred by law.

12. Having said that, it is pertinent to consider whether the second Divorce petition which is pending trial, is barred by law. The main ground on which rejection is sought is that the earlier Divorce petition which was filed on identical facts, has already been rejected and the second Petition on the same cause of action is barred by the principle of estoppel and is liable to be rejected.

13. Pertinently, the first divorce petition was filed on the ground of adultery and cruelty. Undeniably, the first 20 paragraphs of both the petitions are identical. However, in the first petition the divorce was sought on the ground of adultery and since the alleged adulterer had been initially impleaded but was subsequently deleted, the petition under Section 13 (1)(i) of the Act on the ground of adultery, was held to be not maintainable and the first divorce petition was rejected. An Appeal that was preferred against the rejection order was withdrawn with the liberty to file a fresh petition. Once, the liberty had been granted, the bar of Order VII Rule 11 CPC is not attracted. In fact, Order XXIII Rule 3 CPC clearly provides that a fresh suit may be filed if the permission has been taken while withdrawing the previous suit. In the present case, since the permission had been granted leave to file the petition afresh, by the Court while permitting the withdrawal of the Appeal, the fresh petition on the same facts is maintainable. Therefore, even if the present divorce petition contains identical 20 paragraphs as contained in earlier petition, it would not bar the present



petition.

14. It is also significant to observe that the parameter for adjudging adultery are significantly different from adjudging cruelty on the ground of illicit relationship.

15. In the case of Harjit Kaur vs. Surinder Singh 2016 SCC Online Del 6063, it has been observed that having an affair during the subsistence of marriage by either of the spouse amounts to cruelty to the other. Where the petition is able to prove that the wife had extra marital relationship, this in itself is an act of cruelty entitling the husband to divorce on the ground of cruelty.

16. The law on adjudging cruelty is well settled and illicit relationship is one of the factors relevant for determining if the spouse has been subjected to cruelty entitling him divorce. The present petition is not on the ground of adultery and, therefore, non-impleadment of alleged adulterer is not fatal. The petition in question is on the ground of cruelty and desertion, which is a matter to be adjudicated on facts and merits between the spouses.

17. Learned counsel on behalf of the appellant had also contended that the subsequent events have been added and the alleged desertion is essentially on the same grounds of illicit relationship. This contention also does not enure to the benefit of the appellant since there was no bar from impleading subsequent events including the ground of Desertion in the subsequent petition. The reasons for claiming Desertion may again be adulterous relationship, but it is a matter of evidence whether the conduct of the respondent including his alleged adulterous behaviour, would amount to Desertion. The question whether the appellant has been treated with cruelty or that she has allegedly deserted the respondent, are all matter of evidence.



The averments in the petition, which alone are significant for the purpose of Order VII Rule 11 CPC, discloses a cause of action which has to be tested on the anvil of evidence to determine whether the respondent is entitled to the relief, as claimed by him. The divorce petition is not bereft of any cause of action and is also not barred by the principle of *res judicata* in view of Order XXIII Rule 3 CPC, since the liberty was granted to file the petition afresh, while permitting the withdrawal of first Divorce petition in Appeal, by the Punjab and Haryana High Court.

18. We find that the present Appeal is without merit and is hereby dismissed.

19. The pending applications also stand disposed of.

(NEENA BANSAL KRISHNA)
JUDGE

(SURESH KUMAR KAIT)
JUDGE

OCTOBER 31, 2023
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