



2024:DHC:7339-DB



\$~3

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Date of Decision: 29.08.2024

+

MAT.APP.(F.C.) 176/2024 & CM APPL. 30812/2024**VIJAY SINGH**

.....Appellant

Through: Md. Azam Ansari and Md Maroof,
Adv.

versus

SMT. JYOTI YADAV

.....Respondent

Through: Ms Shreya Gulati, Adv.

CORAM:**HON'BLE MR. JUSTICE RAJIV SHAKDHER****HON'BLE MR. JUSTICE AMIT BANSAL****[Physical Hearing/Hybrid Hearing (as per request)]**

1. This appeal is directed against the impugned judgment and order dated 30.03.2024, passed by the family court.
2. Via the impugned judgment, the family court has rendered its decision on an application preferred by the appellant/petitioner to withdraw the divorce action instituted by him.
- 2.1 The trial court while permitting the appellant/petitioner to withdraw the divorce petition, refused to grant permission to file a fresh action in respect of the same subject matter.

Signature Not Verified

Digitally Signed By: TARUN
RANASigning Date: 23.09.2024
15:48:10

MAT.APP.(F.C.) 176/2024

Page 1 of 7



2.2 Furthermore, the family court imposed costs of Rs.51,000/- towards expenses incurred by the respondent in defending the divorce action, and incidental expenses. Although the respondent had sought costs amounting to Rs.2.50 lakhs, the family court concluded that Rs.51,000/- towards costs would suffice.

3. Mr Azam Ansari, learned counsel, who appears on behalf of the appellant/petitioner, submits that the family court has erred on both counts.

3.1 Mr Ansari submits that the family court could not have allowed simpliciter the withdrawal of the divorce action, while emasculating the right of the appellant to file a fresh divorce action.

3.2 As regards the costs, Mr Ansari submits that the family court could not have imposed costs in excess of Rs.3000/-.

4. In support of his submission, Mr Ansari has drawn our attention to Section 35A of the Code of Civil Procedure, 1908 [in short, “CPC”]. Furthermore, Mr Ansari has also drawn our attention to the judgment rendered by the learned Single Judge of this Court in ***Jasveer Lal Gour vs. M/s Delcap Financial Services Pvt. Ltd.***, 2023:DHC:2531.

5. Before we proceed further, we would like to record certain uncontested facts that are relevant for the purpose of taking a view one way or the other *qua* the impugned judgement and order.

6. Concededly, the appellant/petitioner had filed the divorce action on or about 11.07.2022 in the concerned court in Firozabad, Uttar Pradesh.

7. The respondent, on the other hand, had moved the Supreme Court by way of a transfer petition, which was lodged on 17.10.2022. The Supreme



Court transferred the divorce action preferred by the appellant to the concerned family court in Saket, New Delhi *via* the order dated 06.12.2022.

8. In addition to the divorce action, the appellant lodged a petition under Section 9 of the Hindu Marriage Act, 1955 [in short “1955 Act”] on 09.11.2022. *Via* the subject petition, the appellant sought restoration of conjugal rights.

8.1 This petition as well, stood transferred to the concerned family court in Saket, New Delhi, based on the transfer petition preferred by the respondent. The order concerning transfer of the Section 9 petition was passed by the Supreme Court on 16.04.2024.

9. The application filed for withdrawing the divorce action, which was preferred pursuant to the order of the Supreme Court for transfer of the divorce petition to the concerned family court in Saket, New Delhi, simply sought withdrawal of the divorce action.

9.1 The appellant, concededly, did not seek permission to file a fresh divorce action.

10 However, our attention has been drawn to the written submissions filed on behalf of the appellant before the family court, wherein there is a broad submission made on behalf of the appellant that in case he does not succeed in the Section 9 petition or is unable to have the respondent comply with a judgement and decree passed in his favour on the Section 9 petition, he may, at that juncture, wish to file a fresh divorce action.

11. Given the backdrop set forth above, we are of the view that the family court erred in concluding that the appellant ought not to be given



leave/permission to file a divorce action if a fresh cause of action arises to trigger the same. Undoubtedly, withdrawal of a divorce action and instituting a fresh action on the same cause of action would not be permissible; however, if a fresh cause of action arises, certainly the litigant would have the right to institute a petition in that behalf. Such possibility cannot be ruled out. Matrimonial relationships carve out no such exception.

12. As regards the objection taken by Mr Ansari with regard to the imposition of costs of Rs.51,000/-, we are unable to persuade ourselves that the order requires any interference. The family court has correctly distinguished the judgment of the learned Single Judge in *Jasveer Lal Gour* and the judgment of Supreme Court in *Ashok Kumar Mittal vs Ram Kumar Gupta & Anr* (2009) 2 SCC 656.

13. The judgment rendered in *Jasbir Lal Gour* relies upon the judgment of the Supreme Court in *Ashok Kumar Mittal*. The learned Single Judge, having regard to the ratio of the judgment in *Ashok Kumar Mittal*, restricted the imposition of costs to Rs.3,000/- as against Rs.1 lakh imposed by the trial court.

14. There is no discussion in the judgment rendered by the learned Single Judge in *Jasveer Lal Gour* as to whether the costs were imposed because, according to the trial court, the claims lodged were found to be false and/or vexatious which is the remit of Section 35A of the CPC.

15. Notwithstanding the limitation imposed *qua* false and vexatious claims [as prescribed in Sub-section (2) of Section 35A of the CPC], no upper limit for imposition of costs is found either under Sections 35 or 35B of the CPC.



Notably, under Section 35B of the CPC, the court is empowered to impose costs which are reasonable so as to reimburse a party concerning expenses incurred in attending the court. On the other hand, Section 35 of the CPC empowers the Court to impose costs in circumstances which do not fall within the scope of Sections 35A or 35B.

16. It appears that the legislature deemed it fit to limit the burden of costs concerning false or vexatious claim under the provisions of sub section (2) of Section 35A as an aggrieved party has been given the liberty to file a subsequent suit for damages or compensation in respect of such claim or defense. This is evident upon a perusal of sub-Section (4) of Section 35A.

16.1 Thus, if such an action is filed by the aggrieved party, the costs awarded under Section 35A are to be adjusted against such claim made in a suit for damages or compensation. The limitation prescribed under Section 35A would necessarily not apply to costs imposed under Sections 35 or 35B.

17. Section 35 of the CPC vests discretion in the Court to impose costs, subject to such conditions and limitations as prescribed and imposed by law for the time being in force. Therefore, for instance, if costs imposed concerns false or vexatious claim(s) or defense, then the limit prescribed under sub-Section (2) of Section 35A would kick in. Likewise, if any other law limits the extent of costs that can be imposed, the court's discretion would be circumscribed to that extent.

17.1 Although Section 35B of the CPC does not prescribe any limit on the costs that can be imposed, it does prescribe circumstances in which costs can be



imposed. Broadly, the circumstances prescribed relate to delay being caused in prosecuting the suit action on account of either a party failing to take steps which are required to be taken by or under the provisions of CPC or when an adjournment is sought to take such steps or there is a delay in production of evidence or any other such step. The only aspect that has to be borne in mind is that the court should record reasons and the cost imposed should be such, that it is reasonably sufficient to reimburse the aggrieved party with regard to the expenses incurred in attending the Court on the date when the opposite party had to take steps in the suit action. The provision also provides explicitly that payment of costs imposed by the Court for the reasons set out in Clause (a) or (b) of sub-Section 1 of Section 35B of the CPC would be a condition precedent for further prosecution of the suit action, if the plaintiff has been ordered to pay such costs or where costs have been imposed on the defendant.

17.2 Therefore, argument advanced by Mr Ansari that imposition of costs could not have exceeded Rs.3000/- overlooks the fact that cap on cost is provided only in Section 35B concerning false and vexatious claims.

17.3 The family court has, however, justified imposition of costs under Order XXIII Rule 1(3) of the CPC. This is a provision which empowers a court to grant liberty, on terms deemed fit, to file a fresh suit *qua* the subject matter of the suit or part of the claim where the court is satisfied that the suit must fail by reason of some formal defect or any other sufficient ground.

17.4 The family court while permitting withdrawal of divorce petition has not granted leave to file a fresh petition. While doing so, the family court has,



as it appears, foreclosed the possibility of filing a divorce action in future upon eruption of a fresh cause of action. We have held hereinabove that the impugned judgment and order is erroneous to that extent.

17.5 Given the discussion above, although the costs imposed cannot be justified under Order XXIII Rule 1(3), it can be sustained under Section 35 of the CPC.

18. Thus, for the foregoing reasons, the appeal is partly allowed.

19. The appellant would have leave to file, if advised and found necessary, a divorce action, *albeit* based on a fresh cause of action.

20. As regards imposition of costs of Rs.51,000/-, the impugned judgment of the family court is sustained.

RAJIV SHAKDHER, J

AMIT BANSAL, J

AUGUST 29, 2024

pmc