

Item Nos.- 6-7
19.05.2025
Rohan
Court No. 4

**In the High Court at Calcutta
Civil Appellate Jurisdiction
Appellate Side**

FA 127 of 2023

**Sandip Kumar Kundu
Versus
Anupa Kundu**

with

CO 3629 of 2023

**Sandip Kumar Kundu
Versus
Anupa Kundu
(ASSIGNED)**

Mr. Probal Kr. Mukherjee, Sr. Adv,
Mr. Avirup Mondal,
Mrs. Ahana Ghosh Mondal,
Mr. Debdipta Sen.

... for the appellant

Mr. Saumyen Datta,
Mr. Subrata Bhattacharya,
Ms. Rusha Mukherjee.

... for the respondent

1. The present appeal has been initiated assailing the order and judgment dated 29th May, 2023 passed by the learned Additional District Judge, 12th Court, Alipore, whereby, the learned Judge has been pleased to dismiss the suit on contest without cost.
2. The present lis involves matrimonial dispute.
3. The husband had earlier initiated a Matrimonial Suit being No. 1162 of 2011 before the Ld. District Judge at Alipore which was eventually dismissed.
4. Thereafter the husband once again filed a fresh matrimonial suit which has also been dismissed

through the impugned judgment which is the bone of contention in this present appeal.

5. The learned counsel representing the appellant/husband submits that the dismissal of the earlier matrimonial suit being Mat Suit No. 1162 of 2011 was under Order IX Rule 3 of the Code of Civil Procedure, 1908 and being dismissed under Order IX Rule 3, the appellant/ husband had the choice to apply for restoration subject to limitation or had the liberty to file a fresh suit. Taking the second option, the appellant/husband preferred to file a fresh suit, as, there is no bar to prefer a fresh suit under Order IX Rule 4 of the said Code. As such the impugned judgment is not in accordance with law.
6. He further submits that in the earlier matrimonial suit the respondent/wife had not appeared and the petitioner husband was initially directed to show cause as none had represented him and eventually on the very next date as neither anybody had represented the husband nor any cause was shown and filed so the Ld. Court has eventually dismissed the suit for non-appearance. This being the scenario that ultimately the suit was dismissed and that being for non-appearance and there being non-representation of either of the parties so the earlier suit had been dismissed under Order IX Rule 3 of the said Code.
7. In support of his contention, the learned counsel has referred a judgment of the Hon'ble Apex Court passed in the case of ***Amiruddin Ansari (Dead) Through Lrs and others vs. Afajal Ali and others*** reported in ***2025 SCC OnLine SC 912*** and has relied upon paragraph 21 of the said judgment.

8. Per contra the learned counsel representing the respondent has placed that the appellant was barred from initiating a fresh suit seeking dissolution of the marriage when the earlier application seeking dissolution of marriage was dismissed and in addition to that, the appellant/husband had not revealed before the Trial Court as regards to the dismissal of the earlier matrimonial suit. Thus, the learned counsel representing the respondent/wife raised the issue that the appellant/husband was barred from initiating a fresh application seeking dissolution of the marriage under Order IX Rule 9 of the Code of Civil Procedure, 1908 as because the earlier matrimonial suit has been dismissed under Order IX Rule 8 of the said Code.
9. In support of his contention, the learned counsel has mentioned that non-revealing of the earlier suit being dismissed by the Trial Court in the later suit estops the said husband from filing the second suit seeking divorce. He further submits that filing of the second suit in the circumstances would invite fatal consequence.
10. On perusal of the impugned judgment, it transpires that the learned Trial Court has relied upon a judgment published in **1969 AIR SC 971** and has stated that the dismissal of the earlier application seeking dissolution of the marriage was under Order IX Rule 8 of the Code of Civil Procedure, 1908 and as such, Order IX Rule 9 comes into effect which precludes the appellant/husband from filing a fresh suit on the same cause of action.
11. From the ordersheet of the matrimonial suit being Mat Suit No. 1162 of 2011, it transpires that the earlier suit was dismissed as because no steps were taken on behalf of the petitioner/husband and at that relevant

point of time, there was no question of representation of the respondent/wife as because summon was not served upon her till that point of time. A copy of the order-sheet has been placed on behalf of the appellant/husband, which has not been disputed by the learned counsel representing the respondent/wife. From the order No. 14 dated 4th December, 2013 in respect of Mat Suit No. 1162 of 2011, it transpires that the petitioner was directed to show-cause as because no step was taken on behalf of the petitioner/husband and subsequently, vide order No. 15 dated 19th March, 2014, the said matrimonial suit was dismissed for default as because no step was taken on behalf of the petitioner/husband. This being the position, it is clear that the earlier suit being Mat Suit No. 1162 of 2011 was dismissed as because of absence of both the parties.

12. In this context Order IX Rule 3 with Order IX Rule 4 and Order IX Rule 8 with Order IX Rule 9 of the Code of Civil Procedure, 1908 are laid:

“Order IX Rule 3-

3. Where neither party appears, suit to be dismissed.- Where neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed.

Order IX Rule 4-

4. Plaintiff may bring fresh suit or Court may restore suit to file.- Where a suit is dismissed under rule 2 or rule 3, the plaintiff may (subject to the law of limitation) bring a fresh suit; or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for [such failure as is referred to in rule 2], or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

Order IX Rule 8-

8. Procedure where defendant only appears.-

Where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall dismiss the suit so far as it relates to the remainder.

Order IX Rule 9-

9. Decree against plaintiff by default bars fresh suit.

-(1) Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.

(2) No order shall be made under this rule unless notice of the application has been served on the opposite party."

13. On perusal of Order IX Rule 3 of the Code of Civil Procedure, it transpires that when neither of the parties appear when the suit is called on for hearing, the Court may make an order that the suit be dismissed, which has taken place in the Matrimonial Suit No.1162 of 2011 filed earlier. In consequent to which, the appellant/husband had the alternative either to seek for restoration of the suit seeking dissolution of marriage or to initiate a fresh suit and in this instant appeal, the husband took the later step, i.e., initiated a fresh suit, which is not barred under the said Code.

14. Having come to such conclusion, the impugned judgment and order deserves to be interfered with.
15. The judgment and order dated 29th May, 2023 is set aside and the matter is remanded back to the said Trial Court to deal afresh as regards to the *lis*.
16. With the above observation, **FA 127 of 2023** is **disposed of**.
17. **CO 3629 of 2023** is **dismissed as not pressed**.
18. On behalf of the respondent/wife, it has been mentioned that written statement has already been filed and the respondent is at liberty to take further steps in accordance with law.
19. A prayer has been made that the suit may be disposed of expeditiously since the issue has now been pending for some time.
20. The learned counsel for the respondent submits that there are issues regarding huge amount being pending as alimony.
21. Without going into the merits of the submission advanced by the learned counsel for the respondent and in view of the admitted position that the parties will not take any unnecessary adjournments, we would only observe that the Court may proceed expeditiously and without any unnecessary delay.

(Madhuresh Prasad, J.)

(Supratim Bhattacharya, J.)