RAJSTHAN HIGH COURT

Shyam Lal

Vs.

Smt. Leelawati

D.B. Civil Misc. Appeal No. 442 of 2001.
(S.K. Sharma & R.S. Chauhan, JJ.)

05.02.2007

JUDGMENT

R.S. Chauhan, J.

1. Thrice the appellant husband has tried to seek divorce from the respondent wife; thrice he has failed. The appellant is challenging the Order dated 06.02.2001, passed by the Family Court, Ajmer whereby the divorce petition filed by him under Section 13 of the Hindu Marriage Act, 1955 (henceforth to be referred to as 'the Act', for short) has been dismissed. (The appellant shall be referred to as 'the husband', the respondent as 'the wife', for short).

2. In a nutshell the facts of the case are that the appellant and the respondent were married on 14.04.1982 according to the Hindu rites and customs. Since differences arose between the parties, on 20.12.1989, the wife left the matrimonial home. In 1990, the husband filed his first divorce petition against the wife. However, as the statutory period of two years from the date of separation had not taken place, the husband did not plead the ground of desertion on the part of the wife. The petition was filed only on the ground of "cruelty". The said petition was, however, dismissed vide Order dated 22.11.1991. The husband again filed a second divorce petition in 1992; this time the petition was filed on the ground of cruelty and desertion. However, vide Order dated 12.07.1995, the second petition was dismissed on the ground of *res judicata*. The learned Court was of the opinion that since the earlier divorce petition was dismissed on the ground of cruelty, the second petition for divorce was hit by *res judicata*. After the rejection of the petition, the husband tried his best to convince the wife to return to the matrimonial home, but to no effect. Again the husband filed a third petition for divorce on the ground of cruelty and desertion. During the pendency

of the proceedings, the wife moved an application under Section 11 of the Civil Procedure Code (henceforth to be referred to as 'the Code', for short). Vide order dated 06.02.2001, the learned Family Court has accepted the application and rejected the petition on the ground of *res judicata*. Hence, this appeal before this court.

3. Mr. Resham Bhargav, the learned counsel for the husband, has vehemently argued that the learned Judge has failed to appreciate the factual matrix of the case. In this first divorce petition in 1990, the ground of desertion was neither pleaded, nor proved. The first divorce petition was based solely on the ground of cruelty. It was the second petition where desertion was taken as a ground for seeking divorce. However, without deciding the case on merit, the petition was erroneously dismissed on the ground of *res judicata*. The learned Judge has failed to notice that the ground of desertion was neither directly, nor substantially in issue in the first divorce petition. Moreover, the second petition was not rejected on merit, but on the technical ground of *res judicata*. Therefore, no judicial finding was given about desertion by the wife. Hence, the third divorce petition could not be dismissed on the ground of *res judicata*. Secondly, cruelty and desertion are continuing "wrongs". Therefore, these two grounds give rise to fresh cause of action every time. Hence, the concept of *res judicata* is inapplicable when there is a fresh cause of action based on fresh facts and circumstances.

4. Mr. Rajesh Kapoor, the learned counsel for the wife, has strenuously argued that the husband cannot be permitted to repeatedly file divorce petition. It tantamount to abuse of the process of the court. He has, thus, supported the impugned order.

5. We have heard the learned counsels and have perused the impugned Order.

6. While interpreting Section 11 of the Code in the case of *Sajjadanashin Sayed MD B.E.EDR. v. Musa Dadabhai Ummer and Others,* [1] the Hon'ble Supreme Court held as under :

> Thus words used in Section 11 Civil Procedure Code are "directly and substantially in issue". If the matter was in issue directly and substantially in a prior litigation and decided against a party then the decision would be *res judicata* in a subsequent proceeding. Judicial decisions have however held that if a matter was only "collaterally or incidentally" in issue and decided in an earlier proceeding, the finding therein would not ordinarily be *res judicata* in a latter proceeding where the matter is directly and substantially in issue. The fundamental rule is that a judgment is not conclusive if any matter came collaterally in question. A collateral or incidental issue is one that is ancillary to

> a direct and substantive issue'; the former is an auxiliary issue and the latter the principal issue. The expression "collaterally or incidentally" in issue implies that there is another matter which is "directly and substantially" in issue.

7. In order to decide whether the issue is "directly and substantially" in issue or it is "collaterally or incidentally" in issue, "one test is to see if the issue was "necessary" to be decided for adjudicating on the principal issue and was decided, it would have to be treated as "directly and substantially" in issue and if it is clear that the judgment was in fact based upon the decision, then it would be *res judicata* in a latter case," (Ref. to Mulla's Civil Procedure Code, 15th Ed. P. 104).

8. In the present case, the first divorce petition was based solely on the ground of "cruelty". Therefore, the issue of desertion was not even pleaded. It was neither directly, nor substantially in question. In the second divorce petition, although the ground of desertion was pleaded, but no judicial finding was given about the said plea. Hence, although "desertion" was "directly and substantially" raised, but the court did not decide the said issue. Therefore, the learned Judge has erred in treating the third divorce petition as being hit by *res judicata* on the basis of decision of the second divorce petition.

9. Moreover, desertion and cruelty are continuous wrongs. What could begin is a disagreement, may turn into friction, only to transform itself into conflict. Therefore, each day would give a fresh cause of action to the wronged spouse. Hence, the learned Judge has misapplied the concept of *res judicata* in the present case.

10. A matrimonial dispute is not just a legal dispute, but more importantly it is a family problem and a social concern. Hence, matrimonial disputes should not be viewed from the glasses of legal technicalities. It should be appreciated at the human level of being a conflict between a husband and wife. Such issues should be dealt with sensitively rather than mechanically, as has been done in the present case

11. Moreover, the husband and the wife in the present case are living separately since 1989, i.e. for the last eight years. In the case of *Naveen Kohli v. Neelu Kohli,*[2] the Hon'ble Supreme Court has observed as under :

> Once the parties have separated and the separation has continued for a sufficient length of time and one of them has presented a petition for divorce, it can well be presumed that the marriage has broken down. Once the marriage has broken down beyond repair, it would be unrealistic of the law not to take notice of that fact, and it would be harmful to society and injurious to the interests of the

parties.

The court, no doubt, should seriously make an Endeavour to reconcile the parties; yet, if it is found that the breakdown is irreparable, then divorce should not be withheld. The consequences of preservation in law of the unworkable marriage which has long ceased to be effective are bound to be a source of greater misery for the parties. By refusing to sever that tie the law in such cases does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. Public interest demands not only that the married status should, as far as possible, as long as possible, and whenever possible, be maintained, but where a marriage has been wrecked beyond the hope of salvage, public interest lies in the recognition of that fact. Since there is no acceptable way in which a spouse can be compelled to resume life with the consort, nothing is gained by trying to keep the parties tied forever to a marriage that in fact has ceased to exist.

12. Thus, a pragmatic approach and not a pedantic one is required while dealing with matrimonial issues.

13. In the result, this appeal is allowed and the case is remanded back to the learned Family Court for fresh decision. The parties are directed to appear before the learned court on February 26th, 2007. The learned Family Court is directed to decide the case after taking the evidence of both the parties. The court is further directed to decide the case within a period of six months from the date of first appearance of the parties before it. There shall be no order as to cost.

Appeal allowed.

Cases Referred.

1. (2000)3 SCC 350)
2. 2006(2) RCR(Civil) 290 : ((2006)4 SCC 558