

Before Ajay Kumar Mittal & Jaspal Singh, JJ

RAM KALAN—*Appellant*

versus

PURSHOTAM ALIAS MINTU—*Respondent*

FAO No.6898 of 2010

July 5, 2013

Family Courts Act, 1984 - Ss.19&21 - Hindu Marriage Act, 1955 - Ss. 13(1)(ia)(ib) & 2(iv) - Code of Civil Procedure, 1908 - O.9 RL9 - Marriage of appellant solemnized with respondent as per Hindu rites and ceremonies - Parties mutually agreed to separate by an agreement - Appellant filed petition for divorce - Dismissed in default - Appellant filed another petition for divorce - Dismissed by Family Court on ground that it was barred under O.9 RL9 CPC - FAO filed under S. 19 of Family Courts, Act, 1984 - Dismissed - Held, as per S.21 of the Family Courts Act, proceedings are regulated by Code of Civil Procedure, 1908 - Petition disclosed no new fact - O.9 RL9 regulates dismissal in default of petition under the Act.

AJAY KUMAR MITTAL, J

Held, that Section 21 of the Act provides that all proceedings there under shall be regulated as far as may be by the Code which is subject to any other provision contained in the Act and to any rules made by the High Court in that behalf. There is no other provision in the Act which deals with dismissals of proceedings in default or their restoration or the effect of non-restoration thereof. No rule contained in the Hindu Marriage (Punjab) Rules, 1956 framed by the High Court under the Act had been shown to be governing such a situation. In such an eventuality Order 9 Rule 9 of the Code regulates the effect of dismissal in default of a petition filed under the Act.

(Para 7)

Further held, that learned counsel for the appellant was unable to show that on the basis of the averments made in the petition filed on 8.9.2009, it disclosed any new fact after the dismissal of the earlier petition

on 6.6.2009 which gave fresh cause of action to the appellant to file the present petition for divorce.

(Para 15)

Sumit Sangwan, Advocate *for the appellant.*

V.D. Sharma, Advocate *for the respondent.*

AJAY KUMAR MITTAL, J.

(1) The appellant-wife has approached this Court by way of instant appeal filed under Section 19 of the Family Courts Act, 1984 against the judgment and decree dated 10.9.2010 passed by the learned District Judge (Family Court), Bhiwani whereby the petition filed under Section 13(1)(ia)(ib) and 2(iv) of the Hindu Marriage Act, 1955 (in short "the Act") by the wife for dissolution of marriage by a decree of divorce, was dismissed.

(2) Briefly stated, the facts necessary for adjudication of the present appeal as narrated therein are that the marriage between the parties was solemnized on 15.6.1994 at village Rambas, Tehsil Charkhi Dadri, District Bhiwani as per Hindu rites and ceremonies. Both the parties mutually agreed to separate each other by an agreement dated 15.5.2008 and thus, their relationship as husband and wife came to an end. Thereafter, the appellant filed a petition for divorce. During the pendency of the divorce petition, the father of the appellant died and due to non-appearance, the divorce petition was dismissed in default on 6.6.2009. The appellant filed another petition for divorce on 8.9.2009. The Family Court vide order dated 10.9.2010 dismissed the petition holding the same to be barred under Order 9 Rule 9 of the Code of Civil Procedure (hereinafter referred to as "the Code"). Hence, the present appeal.

(3) Learned counsel for the appellant submitted that the earlier petition seeking divorce was filed on 22.7.2008 and the same was dismissed in default. Since the earlier petition was not decided on merits and the present petition was filed on the continuous cause of action and, therefore, the fresh petition filed on 8.9.2009 was maintainable. It was also urged that a written agreement dated 15.5.2008 was executed between the parties whereby socially the marriage stood dissolved. According to the learned counsel, the trial court was in error in dismissing the petition on the ground that the same was not maintainable.

(4) Learned counsel for the respondent, on the other hand submitted that since the earlier petition was dismissed in default, therefore, the second petition was barred in view of provisions of Order 9 Rule 9 of the Code.

(5) After hearing learned counsel for the parties, we do not find any merit in the submission of the learned counsel for the appellant. Under Section 21 of the Act, the provisions of the Code as far as may be would be applicable to all proceedings under the Act. It is reproduced as under:-

“21. Application of Act 5 of 1908.- Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.”

(6) It would also be apposite to refer to Order 9 Rule 9 of the Code which bars filing of a fresh petition where the earlier petition had been dismissed in default. It reads thus:-

“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.”

(7) Section 21 of the Act provides that all proceedings thereunder shall be regulated as far as may be by the Code which is subject to any other provision contained in the Act and to any rules made by the High Court in that behalf. There is no other provision in the Act which deals with dismissals of proceedings in default or their restoration or the effect of non-restoration thereof. No rule contained in the Hindu Marriage (Punjab) Rules, 1956 framed by the High Court under the Act had been shown to be governing such a situation. In such an eventuality Order 9 Rule 9 of the Code regulates the effect of dismissal in default of a petition filed under the Act.

(8) In *Smt. Manjit Kaur versus Gurdial Singh Gangawala (1)*, Single Bench of this Court considering the provisions of Section 21 of the Act with reference to Order 9 Rule 9 of the Code observed as under:-

“....It does not and cannot mean that a particular Rule of procedure contained in the Code may be applied to one case, but not to other, or that in one case it may be applied with full force and in the other not with its full rigour. I am unable to find any such hurdle in proceedings under the Act being regulated by Order 9 Rule 9 of the Code. The rule is based on sound public policy. It is based on the well established juristic principle that no defendant would be allowed by law to be vexed twice on the same cause of action.”

(9) Identical view has been taken by another Single Judge of this Court in *Gurcharan Singh versus Mukhtiar Kaur* reported in (2).

(10) A Division Bench of Mysore High Court in *Tirukappa versus Kamalamma (3)* under similar circumstances recorded as under:-

“It will be noticed that the position is more or less similar to the position under Rules 8 and 9 of Order 9 of the Code of Civil Procedure. The specific provisions of these rules being quite in accord with the general principles followed for generations by courts exercising civil jurisdiction in this country and there being nothing in them which is to any extent repugnant to any of the provisions or the policy of the Hindu Marriage Act they should be applied by virtue of Section 21 thereof. Indeed the provisions appear to us to be quite just and proper from the point of view of the parties and quite essential from the point of view of due despatch of work of civil courts.”

(11) Following *Manjit Kaur's case (supra)*, Kerala High Court in *C. Sarala v. K. Nalinakshan (4)*, has opined in the following terms:-

“10. Where a suit is dismissed, wholly or partly, under Rule 8 of Order 9 of the Code of Civil Procedure, the plaintiff shall be precluded from filing a fresh suit in respect of the same cause of

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- (1) 1977 PLR 574
 - (2) (2002) 1 DMC 747
 - (3) AIR 1966 Mysore 1
 - (4) AIR 1991 Kerala 362

action. The question is whether the provisions of Rules 8 and 9 of Order 9 of the Code of Civil Procedure are applicable to petitions under the Hindu Marriage Act, subject to the other provisions of the Hindu Marriage Act and the rules made by the High Court, "all proceedings" under the Hindu Marriage Act, shall be regulated, "as far as may be", by the Code of Civil Procedure. Order 9 being a part of the Code of Civil Procedure governs the proceedings under the Hindu Marriage Act. The words "as far as may be" no doubt, qualify the application of the Code of Civil Procedure to the proceedings under the Hindu Marriage Act. These words merely mean that the provisions of the Code of Civil Procedure, which, by reason of their nature are incapable of application to the proceedings under the Hindu Marriage Act, may not be applicable. For instance the provisions as to the place of suing the institution of suits by presentation of plaints and such other provisions of the Code of Civil Procedure as are inconsistent with the provisions of the Hindu Marriage Act, may not be applicable to matters in respect of which Hindu Marriage Act has different provisions. However, in the context of this case, there is no provision of the Hindu Marriage Act or Rules made thereunder, which suggests exclusion of the application of Rules 8 and 9 of Order 9 of the Code of Civil Procedure. In Manjit Kaur's case, Smt. Manjit Kaur v. Gurdial Singh, AIR 1978 Punjab and Haryana 150, in identical circumstances, Rule 9 of Order 9 of the Code of Civil Procedure was held applicable to the proceedings under the Hindu Marriage Act."

(12) The interpretation of the provisions of Order 9 Rule 9 of the Code vis-a-vis Hindu Marriage Act where the first petition had been dismissed in default was considered by Delhi High Court in **Smt. Malti versus Ramesh Kumar (5)**, wherein it was held as under:-

14. I do not think that the decision of the Supreme Court in the case of New India Assurance Company Ltd. v. R. Srinivasan, 2000 II AD (SC) 180: 2000(3) SCC 242 can be applied to

proceedings under the Hindu Marriage Act, 1955. In the said case, Supreme Court was considering whether a fresh complaint under the Consumer Protection Act, 1986 was maintainable when a similar complaint was earlier dismissed in default and an application for restoration of the same had also been dismissed. Reference in this regard was made to Section 13 of the Consumer Protection Act. Under Section 13 of the aforesaid Act only specific provisions of the Code have been made applicable to the proceedings before the forums established under the Consumer Protection Act, 1986. The Supreme Court noticed that Order IX Rule 9 of the Code has not been specifically made applicable to the proceedings under the Consumer Protection Act, 1986 and, therefore, it was held that the bar and prohibition with regard to the maintainability of the second complaint as provided under Order IX Rule 9 of the Code would not apply. It was further held that there was no parallel provision as contained in Order IX Rule 9 of the Code, which could be made applicable to the proceedings under the Consumer Protection Act. However, as already noticed above under Section 21 of the Hindu Marriage Act, 1955, the provisions of the Code have been made applicable to proceedings under the said Act. This is a vital distinction and, therefore, the decision of the Supreme Court in the case of New India Assurance Company Ltd. (supra) is not applicable to the proceedings under the Hindu Marriage Act, 1955.

15. In view of the above, the order passed by the learned trial court dismissing the application under Order IX Rule 9 of the Code on the ground that the said provision was not applicable to proceedings under the Hindu Marriage Act, 1955 cannot be sustained and is liable to be set aside. However I may add a word of caution. The order dated 19.7.2000 dismissing HMA 188/2000 on the ground of non prosecution and default, will not come in the way of the respondent in establishing and proving a ground for divorce on the basis of cause of action that may/might have accrued to him after filing of the first petition for divorce i.e H.M.A.188/00. Divorce proceedings based upon the cause of action on which first proceeding was filed is barred and

not maintainable. Further, the respondent will be also at liberty to file and institute any proceedings for divorce on the basis of continuing cause of action provided the cause of action has continued after 19.7.2000, when the first petition for divorce was dismissed in default and non prosecution. "

(13) Support for the aforesaid view can be drawn from the observations of the Hon'ble Supreme Court in *Guda Vijayalakshmi* versus *Guda Ramachandra Sekhara Sastry* (6), wherein the Hon'ble Apex Court considering the applicability of Section 21 of the Act in respect of transfer of case under Section 25 of the Code had held as under:-

"In the first place it is difficult to accept the contention that the substantive provision contained in Section 25 CPC is excluded by reason of Section 21 of the Hindu Marriage Act, 1955. Section 21 of the Hindu Marriage Act merely provides: "Subject to the other provisions contained in this Act and to such rules as the High Court may make in that behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908". In terms Section 21 does not make any distinction between procedural and substantive provisions of C.P.C. and all that it provides is that the Code as far as may be shall apply to all proceedings under the Act and the phrase "as far as may be" means and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the Act...."

(14) Following the Supreme Court judgment in *Guda Vijayalakshmi's* case (supra), the Madras High Court in *Saraswati Ammal* versus *Lakshmi* (7), had taken a similar view. Furthermore, the Bombay High Court in *Hemraj Shamrao Unredkar* versus *Smt. Leela* (8), had also adopted identical approach.

(15) Learned counsel for the appellant was unable to show that on the basis of the averments made in the petition filed on 8.9.2009, it disclosed any new fact after the dismissal of the earlier petition on 6.6.2009 which

(6) AIR 1981 SC 1143

(7) AIR 1989 Madras 216

(8) AIR 1989 Bombay 146

gave fresh cause of action to the appellant to file the present petition for divorce.

(16) The trial court while rejecting the petition in paras 20 and 21 had recorded as under:-

"20. Now the further question that requires probing is whether present petition has been filed on the same cause of action. Copy of previous divorce petition has been placed on file as Ex.R26. Now a perusal of the allegations contained in the previous petition shows that the allegations as contained in the present petition are the same as well in previous petition. There is no difference in the pleadings in between the previous petition and the present petition. The grounds of divorce are quite same in both the petitions and the allegations are also same. The relief claimed in both the petitions is also similar.

21. Thus the present petition having been filed on the same cause of action as the previous petition was filed which was dismissed in default under Order 9 Rule 8 of CPC to file the fresh petition in respect of the same cause of action."

(17) In view of the above, we do not find any merit in the appeal. Consequently, the same is hereby dismissed. There shall, however, be no order as to costs.

J.S. Mehndiratta