



2024:CGHC:45948-DB

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

REVP No. 50 of 2024

Order Reserved On : 14/11/2024

Order Passed On : 25/11/2024

Rahul Agrawal Son Of Shri Rajkumar Agrawal Aged About 41 Years Religion Hindu, Working As Army Medical Corps, Permanent R/o P-37, Cit Road, Entally Kolkata (Wb) 700014

... Petitioner

versus

Smt. Priyanka Agrawal D/o Shri Badri Prasad Budhiya, Wife Of Shri Rahul Agrawal Aged About 39 Years At Present Residing At Nehru Nagar, Behind Gurughasi Das School, Bilaspur, C.G.

... Respondent

For Petitioner : Shri BP Sharma with Shri Vivek Kumar Shrivastava, Advocates.

For Respondent : Shri Shubham Bajpai on behalf of Shri Sudhir Kumar Bajpai, Advocate.

**Hon'ble Shri Parth Prateem Sahu &
Hon'ble Shri Deepak Kumar Tiwari, JJ**

CAV ORDER

The following order of the Court was passed by **Deepak Kumar Tiwari,**

J.

1. The instant Review Petition has been filed under Order 47 Rule 1 read with Section 151 of the CPC and Rule 90 (1) of the High Court of Chhattisgarh Rules, 2007 seeking review of the judgment passed by this Court in FA(MAT) No.53/2020 on 21.9.2023 whereby the appeal preferred by the respondent herein was allowed and the impugned judgment passed by the learned family Court was set aside. By the judgment and decree dated 25.1.2020 passed by the Family Court, Bilaspur in Civil Suit No.79-A/2015 the suit filed by the husband for grant of decree of divorce under Section 13 (1) (i-a) of the Hindu Marriage Act, 1955 (henceforth 'the Act, 1955') was allowed.
2. Facts of the case are that the parties got married on 6.6.2010 at Kolkata (South). The petitioner/husband had filed a suit under section 13 (1) of the Act, 1955 for dissolution of marriage which was allowed by the family Court. The present petition has been filed mainly on the ground that this Court has not considered the ground of desertion pleaded in the application filed under Section 13 (1) of the Act, 1955. This aspect has not been considered while passing the impugned judgment although in this regard pleading has been made by the parties and also went on trial keeping in mind the said issue of desertion. No opportunity of hearing was granted on the issue of maintenance. Hence this petition.
3. Learned counsel for the petitioner would submit that the issue with regard to desertion has not been considered though the same has been proved on the basis of pleading made by the parties and evidence was also led in this regard. The decree was sought not only on the ground of cruelty but also on the ground of desertion. He further submits that in

Special Leave to Appeal (C) No.26440/2023, which was preferred against the impugned final judgment, vide order dated 12.1.2024, liberty was reserved in favour of the petitioner/husband to apply for review of the judgment before the High Court, as the ground of desertion and maintenance were urged for dissolution of the marriage of the petitioner with the respondent, but the same was not considered. With the aforesaid liberty, the said petition was dismissed.

4. Learned counsel for the petitioner fairly admits that under Section 13(1) (i-b) of the Act, 1955, to establish the ground of desertion, the Act stipulates that the party has deserted for a continuous period of not less than two years immediately preceding the presentation of the petition. He further submits that the petition/suit was filed by the husband in the month of January, 2013 before the District Judge at Sealdah (West Bengal) bearing matrimonial suit No.40/2013. However, he submits that such suit is not to be necessarily dismissed for having been filed prematurely for the said ground. The question of suit being premature does not go to the root of jurisdiction of the Court, but it is in the judicial discretion of the Court to grant the decree or not. For such proposition, learned counsel for the petitioner would place reliance on the judgment of the Hon'ble Supreme Court in the matter of **Vithalbhai (P) Ltd. Vs. Union Bank of India**¹, and would refer para-22 which reads thus:-

“22. We may now briefly sum up the correct position of law which is as follows :

A suit of a civil nature disclosing a cause of action even if filed before the date on which the plaintiff became actually entitled to sue and claim the relief founded on such cause of action is not to be necessarily

¹ (2005) 4 SCC 315

dismissed for such reason. The question of suit being premature does not go to the root of jurisdiction of the Court; the Court entertaining such a suit and passing decree therein is not acting without jurisdiction but it is in the judicial discretion of the Court to grant decree or not. The Court would examine whether any irreparable prejudice was caused to the defendant on account of the suit having been filed a little before the date on which the plaintiff's entitlement to relief became due and whether by granting the relief in such suit a manifest injustice would be caused to the defendant. Taking into consideration the explanation offered by the plaintiff for filing the suit before the date of maturity of cause of action, the Court may deny the plaintiff his costs or may make such other order adjusting equities and satisfying the ends of justice as it may deem fit in its discretion. The conduct of the parties and unmerited advantage to the plaintiff or disadvantage amounting to prejudice to the defendant, if any, would be relevant factors. A plea as to non-maintainability of the suit on the ground of its being premature should be promptly raised by the defendant and pressed for decision. It will equally be the responsibility of the Court to examine and promptly dispose of such a plea. The plea may not be permitted to be raised at a belated stage of the suit. However, the Court shall not exercise its discretion in favour of decreeing a premature suit in the following cases : (i) When there is a mandatory bar created by a statute which disables the plaintiff from filing the suit on or before a particular date or the occurrence of a particular event; (ii) when the institution of the suit before the lapse of a particular time or occurrence of a particular event would have the effect of defeating a public policy or public purpose; (iii) if such premature institution renders the presentation itself patently void and the invalidity is incurable such as when it goes to the root of the Court's jurisdiction; and (iv) where the lis is not confined to parties alone and affects and involves persons other than those arrayed as parties, such as in an election petition which affects and involves the entire constituency. (See : Samar Singh v. Kedar Nath and Ors. 1987 Supp. SCC 663). One more category of suits which may be added to the above, is: where leave of the Court or some authority is mandatorily required to be obtained before the institution of the suit and was not so obtained.”

5. Learned counsel for the petitioner has also invited our attention to the pleadings made and evidence led by the parties. He would submit that the ground of desertion has been well established. Considering the conduct of the wife, an inference can be drawn that there was animus deserendi on her part to permanently end the matrimonial life. To establish desertion, learned counsel for the petitioner would place reliance on the judgments of the Hon'ble Supreme Court in the matters of **Smt. Rohini Kumari Vs. Narendra Singh**² and **Debananda Tamuli Vs. Kakumoni Katakya**³. He further submits that even if the suit has been filed on the ground of desertion prematurely, the same does not affect the jurisdiction of the Court and the said ground can be entertained even after maturity particularly if it does not prejudice the other side. For the said submission, he has referred to the observations made by the Hon'ble Supreme Court in the matter of **Ravi Khandelwal Vs. Taluka Stores**⁴ at para-10, which reads thus:-

“10. The appellant contended that ‘shall lie’, which is the expression used in Section 14(3) of the said Act, implies that the suit would lie defective for five years and thereafter stand cured. In this regard, the appellant relied on *Martin & Harris Ltd. v. ADJ* {(1998) 1 SCC 732}, where it was noticed in the context of the U.P. Urban Buildings (Regulation of Letting, Rent and Eviction) Act, 1972, that the bar was only on deciding the suit and not filing it. A suit could thus be entertained after expiry of three years. In *Vithalbai (P) Ltd. v. Union Bank of India*, (supra) it was opined that a premature suit does not affect the jurisdiction of the Court, and the suit can be entertained after maturity, particularly if it does not prejudice the other side.”

2 1972 (1) SCC 1

3 (2022) 5 SCC 459

4 (2023) 7 SCC 720

6. Learned counsel for the petitioner further submits that while allowing the Appeal, maintenance amount has also been enhanced though there was no pleading or any opportunity was granted to the petitioner to address on such issue. For all the aforesaid reasons, learned counsel for the petitioner prays to allow the Review Petition.
7. On the contrary, Shri Bajpai, learned counsel for the respondent would submit that the petitioner/husband has pleaded that the wife has deserted in the month of January, 2012 whereas the suit seeking divorce was filed on 29.1.2013 i.e. one year after the alleged desertion and, therefore, the ground of desertion cannot be sustained, inasmuch as the petitioner/husband did not object for the said ground before the family Court and neither any issue was framed by the family Court nor any application has been filed under Order 14 Rule 5 of the CPC to amend the issue. The learned family Court has granted decree of divorce on the ground of cruelty and not on the ground of desertion. The wife has challenged the said finding in Appeal and the petitioner/husband did not challenge the judgment and decree granting divorce. Therefore, principle of res judicata is attracted even in different stage of proceeding in the same suit.
8. Learned counsel for the respondent further submits that the petitioner has withdrawn his Appeal filed before the Hon'ble Supreme Court with liberty to file Review Application and agitate the whole issue, which has already attained finality in the eye of law. The power of review is not to be confused with the appellate power which enables the superior Court to correct errors committed by the subordinate Court. It is not rehearing

of an original matter. Reliance is placed in the matters of **S. Madhusudhan Reddy Vs. V. Narayana Reddy and Others**⁵ and **Arun Dev Upadhyaya Vs. Integrated Sales Service Ltd.**⁶.

9. Learned counsel for the respondent further submits that in violation of Section 15 of the Act, 1955, the petitioner/husband has remarried on 3.3.2020 i.e. within the limitation of challenging the divorce decree. He also submits that the maintenance is not a mere right. It is a part and parcel of basic human right. For grant of permanent alimony in the decree, no specific application is necessary. What is just and reasonable depends on facts and circumstances of each case with reference to Section 25 of the Act, 1955 and the Court, based on the conduct of the parties and other circumstances of the case, without any application, can order maintenance. Reliance is placed in the matter of **T. Mohan Reddy Vs. Potu Krishnaveni**⁷.
10. We have heard learned counsel for the parties at length and perused the documents annexed with the Review Petition.
11. In this Review Petition, one of the grounds raised is that the divorce was also sought on the ground of desertion. Admittedly, according to the averments in the plaint, it was filed before completion of two years. Needless to say that Section 13 (1)(i-b) of the Act, 1955, provides that the other party has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the suit, that is to say, the period of two years must have elapsed after leaving the company in the manner indicated above. Then only, this ground is

5 2022 LiveLaw (SC) 685

6 AIR ONLINE 2023 SC 869

7 AIR 2010 AP 117

available to a party. Even after filing of the divorce petition by the husband in the month of January, 2013, the wife has filed an application under Section 9 for restitution of conjugal rights on 11.6.2013. As per the pleading made in the suit/plaint, the wife has deserted in the month of January, 2012. Therefore, within just one year after the alleged desertion, the suit has been filed. Even before the family Court, no such issue was framed for grant of divorce on the ground of desertion and the family Court has granted divorce only on the ground of cruelty. The petitioner/husband has not filed any such application under Order 14 Rule 5 of the CPC for amendment of the issues. Even after grant of divorce on the ground of cruelty, when the wife has filed an Appeal, the petitioner/husband has not challenged the said finding.

12. Although learned counsel for the petitioner has tried to convince us that even though premature application on such ground can be filed and entertained after its maturity, but when the petitioner/husband has filed the divorce petition before the statutory period prescribed, it cannot be said that no prejudice was caused to the other side, if any such argument is accepted. Therefore, we are constrained to accept the said submission.
13. With regard to grant of permanent alimony/maintenance, it was admitted position that the wife was getting Rs.18,000/- towards maintenance in a proceeding under Section 125 of the CrPC. Considering the entire fact situation of the case, particularly considering the present market rate and inflation and only to avoid multiplicity of the proceeding, this Court had fixed the monthly maintenance to the tune of Rs.30,000/- in favour of the

wife, as the earlier maintenance was fixed by the family Court on 26.1.2020 and the petitioner/husband has remarried on 3.3.2020.

14. Once the husband has already contracted second marriage, the wife is entitled in law to claim separate residence and maintenance.

15. In the matter of **Col. Avatar Singh Sekhon Vs. Union of India**⁸, it was observed that a review of an earlier order cannot be done unless the Court is satisfied that the material error which is manifest on the face of the order, would result in miscarriage of justice or undermine its soundness. The following was observed at para-12:-

“12. A review is not a routine procedure. Here we resolved to hear Shri Kapil at length to remove any feeling that the party has been hurt without being heard. But we cannot review our earlier order unless satisfied that material error, manifest on the face of the order, undermines its soundness or results in miscarriage of justice. In **Sow Chandra Kante Vs. Sheikh Habib**, (1975) 1 SCC 674, this Court observed:

‘A review of a judgment is a serious step and reluctant resort to it is proper only where a glaring omission or patent mistake or like grave error has crept in earlier by judicial fallibility. The present stage is not a virgin ground but review of an earlier order which has the normal feature of finality.’

(emphasis added)”

16. On the basis of aforesaid discussion, we are of the opinion that the petitioner has not been able to make out a case for review of the judgment passed by this Court in FA(MAT) No.53/2020 on 21.9.2023.

17. In the result, the Review Petition fails and is hereby dismissed.

Sd/-
(**Parth Prateem Sahu**)
Judge

Sd/-
(**Deepak Kumar Tiwari**)
Judge

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