

(1987) 08 MP CK 0015
In the Madhya Pradesh High Court
Case No : L.P.A. No. 8 of 1985

Anand Prakash Dixit, Jabalpur

APPELLANT

Vs

Smt. Malti Dixit, Narsinghpur

RESPONDENT

Date of Decision : 18-08-1987

Acts Referred:

Hindu Marriage Act, 1955 — Section 13, 13(1)(ib)

Citation : (1988) JLJ 184 : (1987) MPLJ 704

Hon'ble Judges : N.D. Ojha, C.J.; K.K. Adhikari, J

Bench : Division Bench

Advocate : P.N. Patel, for the Appellant; H.S. Dube, for the Respondent

Final Decision : Dismissed

Judgement

N.D. Ojha, C.J.

This Patent Appeal has been preferred against the judgment of a learned Single Judge dated 14-2-1983 whereby First Appeal No. 68 of 1983 preferred by the respondent against a judgment and decree dated 29-1-1983 passed by IV Additional District Judge, Jabalpur, was allowed. The parties who are Hindus were married according to Hindu rites on 4-3-1978. A petition was subsequently instituted on 16-8-1979 by the appellant against the respondent for dissolution of marriage u/s 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act) on two grounds (1) cruelty and (2) desertion. The petition was dismissed by the trial Court. The said Court held that the appellant had failed to prove the plea of desertion. It also recorded a finding that since the cause of action for the petition based on desertion was said to have arisen near about Diwali of the year 1978 and the petition had been instituted on 16-2-1979, it was liable to be dismissed inasmuch as the desertion had not been for a continuous period of not less than two years immediately preceding the presentation of the petition as contemplated by clause (ib) of sub-section (1) of Section 13 of the Act.

Aggrieved by the judgment and decree of the trial Court, the appellant preferred an appeal in this Court. The appeal was dismissed on the ground that the petition in so far as it was based on the plea of desertion could not be decreed as it had been filed before the prescribed period. Soon thereafter the appellant filed another petition on 6-5-1981 for dissolution of the marriage u/s 13 of the Act again on the ground of desertion. The trial Court accepted the plea raised by the appellant and allowed the petition on 29-1-1983. As noted above, this judgment was set aside by a learned Single Judge of this Court by the Judgment appealed against.

The first submission which was made by the learned counsel for the appellant is that the first appeal preferred by the appellant in this Court against the decree of the trial Court dated 29-1-1983 was barred by time and consequently it should have been dismissed. In support of this submission reliance has been placed by the learned counsel for the appellant on sub-section (4) of Section 28 of the Act which contemplates that every appeal u/s 28 of the Act shall be preferred within a period of thirty days from the date of the decree or order. Reliance has further been placed by him on subsection (4) of Section 23 of the Act, which provides that in every case where a marriage is dissolved by a decree of divorce the court passing the decree shall give a copy thereof free of cost to each of the parties. It was urged that since the respondent was entitled to a copy of the decree free of cost as contemplated by sub-section (4) of Section 23 of the Act on which the judgment had been delivered by the trial Court, namely, 29-1-1983, she should have preferred the appeal before this Court within thirty days of 29-1-1983 as contemplated by sub-section (4) of Section 28 of the Act. This having been actually preferred in this Court on 7-4-1983, it was obviously barred by time. We find it difficult to agree with this submission. Section 21 of the Act contemplates that 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. In the exercise of powers conferred by Section 21 of the Act, this Court has framed rules. Rule 7 provides that unless otherwise directed by the Court, the costs of the petition under the Act shall be costs as taxed in a suit. On the other hand, Rule 9 provides that every appeal to the High Court from the decree and orders of the District Court shall be governed by the rules of the High Court as far as may be applicable. Sub-rule (2) of Rule 4 of Chapter IV of the rules of the High Court provides that every memorandum of appeal shall be accompanied by a certified copy of the decree appealed from. In this view of the matter, it is apparent that a first appeal could have been filed by the respondent before this Court against the decree of the trial Court dated 29-1-1983 only if it was accompanied by a certified copy of the decree.

As seen above, Section 21 of the Act has made the provisions of the CPC applicable to the proceedings under the Act subject to the other provisions contained in the Act or the Rules that may be framed by the High Court. Order XX Rule 6 of the CPC provides that the decree shall also state the amount of

costs incurred in the suit and by whom or out of what property and in what proportions such costs are to be paid. Rule 7 of Order XX on the other hand contemplates that the decree shall bear the date on which the judgment was pronounced, and; when the Judge has satisfied himself that the decree has been drawn up in accordance with the judgment, he shall sign the decree. In exercise of the powers conferred by Section 122 of the Code of Civil Procedure, this Court has framed rules regulating the procedure of the Courts subordinate to it known as M. P. Civil Courts Rules, 1961. Rule 173 of these Rules contemplates that decree shall ordinarily be prepared within three days of the judgment or order. Rule 176 reads as hereunder :

(i) As soon as a decree has been drawn up the Court shall cause a notice to parties and their pleaders of decrees being drawn up (in Form No. 21 on Schedule II) to be exhibited on the notice-board stating that such decree has been drawn up and that it may be perused by the parties or their pleaders within three days from the date of posting of the notice.

(ii) When such notice has been posted any party or his pleader may before the expiry of the time prescribed in the last preceding rule peruse the decree and if it is incorrectly prepared bring the matter to the notice of the court.

(iii) If no such objection is made on or before the date specified in the notice the Judge shall sign the decree giving the date of his signature.

(iv) If any objection is raised to the correctness of the decree it shall be heard and disposed of by the Judge by an order to be recorded in the order-sheet and the correction or alteration, if any, as directed by him shall be made in the decree and initialled by the Judge. When the above preliminaries have been concluded, the presiding Judge, having satisfied himself as to the correctness of the decree and the Schedule of costs, shall sign it and endorse the date of his signature.

Rules 173 and 176 read together make it clear that even if the provisions contained therein were strictly complied with, it could not have taken less than about seven days in preparing the original decree. Consequently, even if the respondent wanted to have a copy of the decree as contemplated by sub-section (4) of Section 23 of the Act, on the date on which the judgment was pronounced i.e. on 29-1-1983, it was not possible for her to have obtained such a copy. The respondent, therefore, had to wait for a certified copy of the decree before filing the appeal.

The question then arises is whether the respondent would in the circumstances be entitled to exclude the time spent in obtaining a copy of the decree or not for purposes of computation of the period of limitation for filing an appeal. In this connection, reference may be made to sub-section (2) of Section 29 of the Limitation Act. The said sub-section provides that where any special or local law prescribes for any suit, appeal or application, a period of limitation different from the period prescribed by the Schedule, the provisions of Section 3 shall apply as

if such period were the period prescribed by the Schedule and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law, the provisions contained in Sections 4 to 24 (inclusive) shall apply only in so far as and to the extent to which they are not expressly excluded by such special or local law. In view of subsection (2) of Section 29 of the Limitation Act, Section 12 of the said Act would apply even to an appeal preferred u/s 28 of the Hindu Marriage Act, the same not having been excluded by the said Act. Thirty days" limitation prescribed in subsection (4) of Section 28 of the Act shall, therefore, be computed after excluding the time required for obtaining a copy of the decree as contemplated by sub-section (2) of Section 12, of the Limitation Act. In the instant case, if the period contemplated by subsection (2) of Section 12 was excluded, the first appeal preferred by the respondent on 7-4-1983 was within limitation. The mere fact that in place of applying for and obtaining a copy of decree free of cost as contemplated by Section 23(4) of the Act the respondent applied for and obtained such copy on payment of cost would not, in our opinion, make any difference in so far as applicability of Section 12 of the Limitation Act is concerned. We are accordingly unable to agree with the submission made by the learned counsel for the appellant that the first appeal preferred by the respondent before this Court was barred by time.

The second submission made by the learned counsel for the appellant was that the learned Single Judge has committed an error in making the observation that the appellant shall be liable to consequences contemplated by Section 15 of the Act, since he had remarried on 6-6-1983 during the pendency of the first appeal in this Court Suffice it to say so far as this submission is concerned that it was the appellant himself who brought it to the notice of this Court that he had remarried on 6-6-1983. The first appeal preferred in this Court on 7-4-1983 by the respondent, which had been filed within limitation was thus apparently pending on 6-6-1983. The observation which has been made by the learned Single Judge in this behalf is based on the aforesaid facts and it is not a case where the learned Judge can be said to have recorded any independent finding of his own in regard to the validity of this remarriage.

The third submission made by the learned counsel for the appellant is that the learned Single Judge committed an error of law in holding that the finding recorded in the earlier petition that the appellant had failed to establish desertion operates as res judicata. According to the learned counsel for the appellant since the earlier petition was premature in the sense that it had been filed at a point of time when the desertion had not continued for the requisite period of not less than two years, it was not necessary for the trial Court to record any finding on the plea of desertion. Indeed, the learned counsel for the appellant has gone to extent of arguing that not even an issue was framed in the earlier petition about desertion and the finding that the appellant had failed to establish desertion was consequently a finding which could not operate as res Judicata. We find it difficult to agree with this submission either. The appellant was himself the petitioner in

the earlier petition. It is not his case that his petition was not based on the ground of desertion also apart from cruelty. From the statement of facts appearing in the opening part of the judgment of this Court in the appeal which had been preferred by the appellant himself against the decree of the trial Court in the earlier petition, it is clear that it was admitted that the petition for divorce was filed on the ground of desertion.

As regards the submission about absence of an issue about desertion, it is true that the issues framed in the earlier petition were not very happily worded, but on a perusal of issues Nos. 1 to 3 particularly issue No. 3 which were decided by the trial Court together, there seems to be no doubt that the parties were very much at issue on the point as to whether the respondent had deserted the appellant as asserted by him. Moreover, on the facts of the instant case it is also apparent that both the parties were fully aware that desertion was one of the pleas on which a decree for divorce was claimed by the appellant and it was to be decided by the trial Court. The case of the appellant was that the respondent had deserted her, whereas the case of the respondent was that she did not desert the appellant. Both the parties produced evidence on this point of desertion in support of their respective cases and it is not the case of either of the parties that they were precluded from producing evidence on the issue of desertion. In *Nagubai Ammal and Others Vs. B. Shama Rao and Others*, , it was held by the Supreme Court that the rule that evidence let in on issues on which the parties actually went to trial should not be made the foundation for decision of another and different issue which was not present to the minds of the parties and on which they had no opportunity of adducing evidence has no application to a case where parties go to trial with knowledge that a particular question is in issue, though no specific issue has been framed thereon, and adduce evidence relating thereto.

In support of his submission that the finding in the earlier petition on the plea of desertion would not operate as *res judicata*, learned counsel for the appellant placed reliance on the observations of the Supreme Court in *Mathura Prasad Bajoo Jaiswal and Others Vs. Dossibai N.B. Jeejeebhoy*, , to the effect that where the question is one purely of law and it relates to the jurisdiction of the Court a party affected by the decision will not be preclude from challenging the validity of the order under the rule of *res judicata* In our opinion, there is nothing in the case of *Mathura Prasad* (*supra*) which supports the contention of the learned counsel for the appellant. The question about desertion is neither purely of law nor does it relate to the jurisdiction of the Court.

Reliance was then placed by the learned counsel for appellant on another decision of the Supreme Court in *Sheodan Singh Vs. Smt. Daryao Kunwar*, . In paragraph 13 of the report it was held that -

Reliance in this connection is placed on the well settled principle that in order that the matter may be said to have been heard and finally decided, the decision in the former suit must have been on the merits. Where, for example, the former

suit was dismissed by the trial Court for want of jurisdiction or for default of plaintiff's appearance or on the ground of non-joinder of parties or misjoinder of parties or multifariousness or on the ground that the suit was badly framed, or on the ground of a technical mistake, or for failure on the part of the plaintiff to produce probate or letters of administration or succession certificate when the same is required by law to entitle the plaintiff to a decree, or for failure to furnish security for costs, or on the ground of improper valuation or for failure to pay additional court fee on a plaint which was undervalued or for want of cause of action or on the ground that it is premature and the dismissal is confirmed in appeal (if any) the decision not being on the merits would not be res judicata in a subsequent suit.

In our opinion, the observations made above in the case of Sheodan Singh (supra) also are of no assistance to the appellant in the instant case. Here it is not the case of the appellant that the trial Court did not have the jurisdiction to record a finding on the plea of desertion so that the said finding could be treated as a nullity. Indeed the said finding was recorded in a petition filed by the appellant himself u/s 13 of the Act which was cognizable by the Court which recorded the said finding. The petition aforesaid was not dismissed by the trial Court on any preliminary issue to the effect that the petition was premature, without recording any finding on the merits of the plea of desertion. On the other hand, on the basis of the evidence produced by the parties a finding of fact was recorded by the trial Court on merits on the said plea of desertion.

We may in this connection point out that in a petition u/s 13 of the Act for dissolution of marriage on the ground of desertion, the petitioner has to establish two facts (1) that the respondent was guilty of desertion and (2) that the respondent had deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. A petition for dissolution of marriage, therefore, could be dismissed on any of the two findings, namely (1) that the petitioner has failed to prove his plea of desertion or (2) even if he has succeeded in proving the plea of desertion, he has failed to prove that the respondent has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition. In the normal course it would be necessary for the trial Court to record finding on both these points and this is what precisely had been done by the trial Court. It recorded the finding that the appellant had failed to establish that the respondent had deserted him. It also recorded a further finding that the desertion asserted by the appellant had not been for a continuous period of not less than two years as contemplated by Section 13 of the Act. In this connection it may be pointed out that sub-rule (1) of Rule 2 of Order XIV of the CPC after its amendment by Amendment Act of 1976 contemplates that notwithstanding that a case may be disposed of on a preliminary issue, the Court shall subject to the provisions of sub-rule (2) pronounce judgement on all issues. Accordingly, subject to the provisions of sub-rule (2), the trial Court in the earlier petition which was decided after the Amendment Act of 1976 was under an obligation to decide all

the issues arising therein. As regards sub-rule (2) of Rule 2 of Order XIV, suffice it to say that neither of the parties in the earlier petition made any application for the petition to be decided on any preliminary issue nor was it decided on any preliminary issue as contemplated by sub-rule (2) of Rule 2 aforesaid. It is well settled as has been held by the Supreme Court in the case of *Vithal Yeshwant Jathar Vs. Shikandarkhan Makhtumkhan Sardesai*, , that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point-each of which by itself would be sufficient for the ultimate decision - the decision on each of these points operates as *resjudcata* between the parties. In the case of *Sheodan Singh (supra)* it was also held that where a decision is given on the merits by the trial Court and the matter is taken in appeal and the appeal is dismissed on some preliminary ground without going into the merits it must be held that such dismissal when it confirms the decision of the trial Court on the mertis itself amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal and the bar of *res judicata* will apply.

Learned counsel for the appellant lastly relied on the decision of a learned Single Judge of this Court in *Saraswatibai Vs. Durga Sahai and Others*, , wherein it was held that in order that the doctrine of *res judicata* may come into play, one of the legal requirements is that there must be a suit which has been decided prior to the suit in question. If there is no decision in former suit as envisaged by Explanation 1 to Section 11, Civil Procedure Code, the doctrine of *res judicata* cannot come into play. In our opinion. this case is obviously of no assistance to the appellant inasmuch as here an earlier petition was there which had been filed by the appellant himself and in the said petition the issue of desertion had been decided prior to the petition in question.

We may point out that a similar question arose for consideration in *Maharama and another vs. Ram Bux* AIR 1978 Raj. 206. In that case in an earlier suit the finding had been recorded on merits and also on the issue that the suit was premature. It was held that the finding in the previous suit that it was premature could not be considered to be a decision on a preliminary issue so as to render the finding on the other issues merely obit, therefore, could be dismissed on any of the two findings, namely (1) that the petitioner has failed to prove his plea of desern that case it would not have given finding on merit on all other issues. Therefore, fresh suit was not maintainable being barred by *res judicata*

In this view of the matter no exception can be taken to the finding of the learned Single Judge in the jdugment appealed against, that the finding in the earlier petition operated as *res judicata* That being so, the present petition obviously was not maintainable inasmuch as the earlier petition was instituted on 16-8-1979 and the present one was instituted on 6-5-1981. The effect of the finding on the plea of *res judicata* was that the appellant had failed to establish that the respondent was guilty of desertion till 16-8-1979 i.e. the date when the earlier petition was instituted. As such, even if for the sake of argument it may

be accepted that there was desertion after 16-8-1979, it could not be said that the respondent had deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the present petition on 6-5-1981 as contemplated by clause (ib) of sub-section (1) of Section 13 of the Act, the period in between being less than two years.

No other point has been pressed.

In the result, we find no merit in this appeal. It is accordingly dismissed. There shall, however, be no order as to costs.