

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CM(M) No.1108 /2009 & CM No.14330/2009**

Reserved on: March 09, 2010
Date of Decision : July 02, 2010

SONU SETH Petitioner
Through: Mr.Parinay D. Shah and
Ms.Akanksha Munjhal,
Advocates.

versus

SURESH SETH Respondent
Through: Mr.P. Norula, Advocate.

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CORAM:

HON'BLE MS. JUSTICE ARUNA SURESH

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| (1) | Whether reporters of local paper may be allowed to see the judgment? | |
| (2) | To be referred to the reporter or not? | Yes |
| (3) | Whether the judgment should be reported in the Digest ? | Yes |

J U D G M E N T

ARUNA SURESH, J.

1. In this petition, petitioner has challenged the order of the learned Additional District Judge dated 13th July, 2009 rejecting her application filed under Order 7 Rule 11 CPC seeking rejection of the petition.

2. Mr.Parinay D.Shah, counsel for the petitioner has

argued that Trial Court went wrong in dismissing the application observing that in para-12 of the petition, petitioner has pleaded subsequent events which arose after dismissal of the first petition filed under Section 13 (1) (i-a) of the Hindu Marriage Act (hereinafter referred to as 'the Act') and that the subsequent events as detailed in para-12 were not covered under Section 11 of the Code of Civil Procedure (hereinafter referred to as 'CPC').

3. Mr.P.Norula, counsel appearing for the respondent has submitted that his second petition seeking divorce is maintainable as in para-12 he has narrated subsequent events which arose after dismissal of the first petition. He has emphasized on sub-para (iv), grounds 'f' and 'h' of para-12 of the petition that certain acts of cruelty were committed by the respondent even after dismissal of the first petition and therefore, this petition is maintainable. He has referred to '*Malti Vs. Ramesh Kumar*', I (2006) DMC 878.

4. Order 7 Rule 11 CPC empowers the Court to reject a plaint on any of the grounds narrated therein. Some of the grounds are that, where plaint does not disclose a cause of action or, where the suit appears from the statement in the plaint to be barred by any law. Though a plea of *res judicata* under Section 11 CPC has been raised by the petitioner, however, principles of *res judicata* contained

therein are not applicable to the facts and circumstances of this case.

5. Respondent had filed a petition for decree for divorce under Section 13(1)(i-a) of the Act. In the said petition, petitioner had moved an application under Section 24 of the Act seeking interim maintenance. Trial Court vide its order dated 24th August, 2002 awarded maintenance of Rs.20,000/- per month to the petitioner and her two children along with litigation expenses of Rs.20,000/-. Subsequently, this order was modified on 29th January, 2003 reducing the quantum of maintenance to Rs.13,000/- per month and the arrears of maintenance payable were also reduced from 50% to 25%. Despite this order, respondent failed to pay the maintenance as awarded and also did not clear the arrears of maintenance. Thereafter, he did not appear in the court to contest the petition and it was dismissed in default on 7th July, 2003.

6. Subsequently, on 21st July 2003, respondent filed an application under Order 9 Rule 9 CPC seeking restoration of the petition. The said application was allowed by the Trial Court subject to the condition that respondent would comply with the order of payment of maintenance. Since respondent failed to comply with the condition imposed upon him while allowing his application under Order 9 Rule 9 CPC, Trial Court, vide its order dated 31st January

2004, dismissed the application observing:-

“Petitioner has failed to comply with the conditions subject to which petitioner’s application u/o 9 r 9 CPC was allowed despite last opportunity being granted on the last date of hearing.

In view of the above, petitioner’s application is dismissed.”

7. This order was never challenged by the respondent and it attained finality.

8. After about four years of dismissal of the first petition, respondent filed another petition under Section 13(1)(i-a) of the Act in December, 2007 averring same grounds of cruelty which were alleged by him in his first petition filed on 27th May, 1998. In view of dismissal of the first petition, petitioner filed an application under Order 7 Rule 11 CPC seeking rejection/dismissal of the petition as barred by *res judicata*.

9. As discussed above, principles of *res judicata* do not strictly apply to the facts and circumstances of this case. Since petition was not dismissed by the court on merits, therefore, rights of the parties were not finally adjudicated upon to have any binding force on the parties.

10. Order 9 Rule 9 CPC bars fresh suits where plaintiff’s

earlier suit is dismissed in default under Order 9 Rule 8. The only remedy available with such party is to file an application for setting aside dismissal order on showing sufficient cause for his non-appearance on the date when the suit was dismissed in default.

11. Respondent-husband did file an application under Order 9 Rule 9 CPC, which was allowed. However, Trial Court had to dismiss the application as respondent failed to fulfill the conditions imposed upon him by the court for restoration of the suit. Resultantly, the petition remained dismissed in default. Order of dismissal of the first petition on the ground of default cannot 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. Divorce proceedings based upon the cause of action on which first proceeding was filed is barred and not maintainable. However, respondent is entitled to file and institute fresh proceedings for divorce on the basis of continuation of cause of action, provided the said cause of action had continued after the dismissal of the petition in default. Reference is made to *Malti's* case (*supra*).

12. Counsel for the respondent has submitted that para-12 of the petition contains cause of action which continued after the

dismissal of the first petition and also a fresh cause of action which entitled the respondent to file fresh petition under Section 13 (1)(i-a) of the Act. His emphasis is only on para-12 sub-para (iv) grounds ‘f’ and ‘h’ of the petition. It is pertinent that in sub-para (iv) of para-12, respondent has reproduced the averments made by him in the suit for partition filed by the petitioner, which is pending adjudication in this Court. Averments of the petitioner in the suit for partition, in no manner, can be considered as subsequent cause of action or continuation of cause of action for filing the present petition for divorce. It is also noted that a half-hearted attempt has been made by the respondent to make out a ground of cruelty, when he averred in the petition that petitioner was influencing the mind of children, who are now major, against the respondent. Son is already studying abroad for which respondent is bearing the expenses, as claimed by him. None of the averments contained in para-12 of the present petition, in any manner, indicate any fresh cause of action or continuing cause of action to entitle the petitioner to file this petition seeking divorce on the grounds of cruelty.

13. While dismissing the application, Trial Court did not take into consideration the averments made in para-12 of the petition but, simply observed that para-12 of the petition dealt with

subsequent events and therefore, the petition could not be dismissed under Order 7 Rule 11 CPC. Trial Court could have been more elaborate in its order while deciding the application of the petitioner under Order 7 Rule 11 CPC. Be that as it may, as discussed above, para-12 of the present petition does not disclose any continuing cause of action or any fresh cause of action which entitled him to file this petition. It is noted that the parties did not start living together after the dismissal of the first petition and therefore, there could not have been any occasion for the respondent to commit acts of cruelty within the provisions of Section 13(1)(i-a) of the Act. This petition, therefore, is barred by law.

14. Consequently, the petition is allowed. Impugned order of the Trial Court dated 13th July, 2009 is set aside. Main petition is dismissed as not maintainable. Under the circumstances, there are no orders as to costs.

CM No.14330/2009 (for stay)

15. With dismissal of the petition, this application has become infructuous and is accordingly dismissed.

**ARUNA SURESH
(JUDGE)**

**JULY 02, 2010
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