

2020 C L C 320

[Balochistan]

Before Muhammad Hashim Khan Kakar and Rozi Khan Barrech, JJ

ABDUL KHALIQ----Petitioner

Versus

ADDITIONAL DISTRICT JUDGE-V, QUETTA and another----Respondents

Constitutional Petition No.361 of 2019, decided on 29th October, 2019.

(a) Family Courts Act (XXXV of 1964)---

---Ss. 5, Sched. & 17 ---Civil Procedure Code (V of 1908), S. 11---Suit for "enhancement" of maintenance allowance---Second suit---Res judicata---Principle of---Applicability---Scope---Respondent filed suit for enhancement of maintenance allowance which was earlier fixed through a decree---Trial Court dismissed the suit whereas appellate court allowed the appeal and remanded the suit for adjudication on merits---Validity---Family Courts Act, 1964 had not barred the filing of a second suit for "enhancement" of maintenance allowance--Second suit was only barred in cases where the matter was directly or substantially in issue in a former suit between the parties---Earlier suit was for recovery of maintenance allowance but issue regarding its "enhancement" was neither raised nor was considered in that suit and thus was not in issue---Section 11, C.P.C. did not bar any subsequent suit, which was filed only for "enhancement" of maintenance allowance---Appellate court had rightly remanded the case to the Trial Court---Constitutional petition was dismissed.

Ejaz Ahmed v. Judge Family Court and others 2005 C L C 1913 ref.

(b) Family Courts Act (XXXV of 1964)---

---Ss. 17 & 5 Sched.---Civil Procedure Code (V of 1908), S. 11---Suit for "enhancement" of maintenance allowance---Second suit---Res judicata, principle of---Applicability---Scope---Section 11, C.P.C. in relation to the cause of action of suit codifies the doctrine of res-judicata which operates when there is a judgment between the same parties and it prevents a fresh suit between them regarding the same matter---In a suit for enhancement of maintenance, the growth of the children, the cost of living, change in the status of parties, change in the expenditures incurred based on the needs of the children are some of the factors which either bring about a change of the cause of action or may make out even fresh cause of action for the children to demand enhanced maintenance allowance---Fresh proceedings for maintenance allowance are maintainable before the Family Court, in circumstances.

Petitioner in person.

Muhammad Ali Rakhshani for Respondent No.2.

Date of hearing: 14th October, 2019.

JUDGMENT

ROZI KHAN BARRECH, J.----Succinctly, relevant facts are that respondent No.2 married the petitioner according to Muslim rites. This wedlock gave birth to a one daughter. Relations between the spouses did not remain cordial and ultimately ended in divorce. The minor daughter was living with respondent No.2, who filed a suit for recovery of minor's maintenance allowance, recovery of dowry articles and medical expenses, which was decreed by learned Family Judge-I, Quetta (trial court) vide judgment and decree dated 20.04.2015, whereby the trial court approved the maintenance allowance of Rs.5000/- per month with enhancement of 5% per annum for minor daughter namely Amber. Thereafter the respondent filed a suit for enhancement of the maintenance allowance in the year 2018. The trial court after hearing arguments for the parties dismissed the suit filed by respondent No.2 on 26.12.2018 on the ground of res-judicata under section 11, C.P.C. Being aggrieved from the said judgment, respondent No.2 filed an appeal under Section 14 of the Family Courts Act, 1964 before the learned Additional District Judge-V, Quetta (appellate court), which was accepted vide judgment and decree dated 6th April 2019, whereby the case was remanded to trial court with direction to dispose of the suit on merits. Hence, this petition.

2. We have considered the arguments advanced by learned counsel for the parties and have also perused the available record with their valuable assistance.

3. There is no bar in the Family Courts Act, 1964 for filing second suit - for enhancement of maintenance allowance except the one under section 11 of the C.P.C., which was made applicable to these proceedings by virtue of section 17 of the Act of 1964. Under this provision, second suit will only be barred in case the matter has been directly or substantially in issue in a former suit between the parties. No doubt the earlier suit was for recovery of maintenance but issue regarding its enhancement was neither raised nor was considered in that suit and thus was not in issue then. In view of this position, section 11, C.P.C. would not bar any subsequent suit, which was filed only for enhancement of maintenance allowance. Reliance is placed on Ejaz Ahmed v. Judge Family Court and others (2005 CLC 1913).

4. Section 11 of the C.P.C. in relation to the cause of action of suit codifies the doctrine of res-judicata which operates when there is a judgment between the same parties and it prevents a fresh suit between them regarding the same matter. In a suit for enhanced maintenance, the, growth of the children, the cost of living, change in the status of the parties, change in the expenditures incurred based on the needs of the children are some of the factors which either bring about a change of the cause of action or may make out even a fresh cause of action for the children to demand enhanced maintenance allowance. Thus fresh proceedings for maintenance allowance are maintainable before the Family Court. Since enhanced maintenance was not a matter in issue between the parties, hence, the principle of res judicata will not apply.

In view of above, we are of the firm view that appellate court has rightly remanded the case to the trial court. Consequently, having found the petition without any force, same is hereby dismissed with no order as to costs.

SA/151/Bal.

Petition dismissed.