

Rajasthan High Court

Reema Bajaj vs Sachin Bajaj on 13 July, 2011

IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT
JAIPUR BENCH JAIPUR

ORDER

S.B.CIVIL WRIT PETITION NO.5569/2011

Reema Bajaj

Versus

Sachin Bajaj

DATE OF ORDER --- July 13,2011

PRESENT

HONBLE MR.JUSTICE PREM SHANKER ASOPA

Mr.Suresh Sahni with Mr.R.M.Sharma, for the petitioner

Mr.Poonam Bhandari with Ms.Neetu Dave,

for the respondent

REPORTABLE BY THE COURT

(1) This writ petition has been transferred from the High Court of Calcutta by the order of the Supreme Court dated 03.1.2011. Before the Calcutta High Court, the petitioner (hereinafter referred to as 'the Wife') had challenged the order dated 03.11.2009 passed by the 14th Additional Court of District Judge at Alipore, South 24-Parganas in Matrimonial Suit No.123/2009 whereby in a proceeding u/s 9 of the Hindu Marriage Act, 1955 (in short 'the Act of 1955'), for restitution of conjugal rights, the application for amendment filed under Sec.13A, 21 of the Act of 1955 read with Order VI Rule 17 CPC for conversion of the proceedings into the proceedings for divorce by way of amendment, has been allowed.

(2) Briefly stated, the facts of this case are that the husband (hereinafter referred to as 'Husband') filed an application u/s 9 of the Act of 1955 for restitution of conjugal rights in the month of April,2007 stating therein that his marriage was solemnised on 29.6.2005 at Calcutta. Thereafter,the wife went to her parental house in the month of February, 2006 and started residing there without caring and taking any information about the husband. Thereafter again, the Wife returned to her matrimonial home in Calcutta and resumed conjugal relationship with the husband in March, 2006 for some days. Finally, the wife left her matrimonial home on 10.8.2006 without any justification, therefore, the relief of restitution of conjugal rights was claimed. The said proceedings were registered as Matrimonial Suit No.772/2007 before the Distt. Judge, Alipore and the said suit was transferred to two different courts and thereafter, the same was pending before the 14th Addl. Distt. Judge, at Alipore and was registered as Matrimonial Suit No.123 of 2009, at the

time of filing application for amendment.

(3) The Husband filed an application for amendment u/s 13A and 21 of the Act of 1955 read with Order VI Rule 17 CPC on 7.5.2009 seeking conversion of the proceedings u/s 9 of the Act of 1955 for restitution of conjugal rights into divorce u/s 13 of the Act of 1955. In the amended plaint, divorce has been sought on the ground of desertion and cruelty. The trial court at Alipore on 03.11.2009 allowed the application for amendment and converted the Matrimonial Suit No.123/2009 for restitution of conjugal rights into divorce by considering the fact that it is worth remembering that the rule that no amendment altering the character of a suit can be allowed, is not however, in inflexible and in exceptional cases, it has been granted to avoid multiplicity of proceedings of suits for the purpose of determining the real question in controversy and further, an amendment in the pleadings adding a new cause of action, or a new defence should be allowed, if it can be made without injustice to the other side. Against the aforesaid order, the Wife filed Writ Petition No.4093/2009 before the Calcutta High Court and as stated above, the same was transferred to this Court vide order dated 3.1.2011 by the Supreme Court. It is also relevant to mention here that the proceeding pending before the Additional District Judge No.14, Alipore, South 24 Parganas, Calcutta was already transferred to the Family Court at Jaipur vide order of the Supreme Court dated 1.9.2010 with a direction to the Family Court to dispose of the matter, as expeditiously as possible, in any event within one year from the date of communication of that order. The present writ petition on transfer has been received in this Court on 2.4.2011 and registered as SB Civil Writ Petition No.5569/2011.

(4) Submission of Mr.Suresh Sahni, counsel for the Wife is that the trial court has committed serious error in converting the relief of restitution of conjugal rights into the relief of divorce by way of amendment, which has virtually changed the very nature of the suit / application and further caused serious prejudice to the Wife, which leads to injustice, whose acts / omissions referred with regard to the cruel behaviour had been condoned by the Husband by filing an application under Sec. 9 of the Act of 1955 and now the Husband has taken the grounds of desertion and cruelty and further, on the date of presentation of the petition under section 9 of the Act of 1955, i.e. April, 2007 immediately preceding the continuous period of two years from the date of desertion i.e. 10.8.2006, as required under Sec.13(ib) of the Act of 1955, was not complete.

(5) In support of his aforesaid submissions, Mr.Sahni placed reliance on the latest judgment of the Supreme Court in *Revajeetu Builders and Developers V. Narayanswamy and Sons and others* (2009) 10 SCC 84 (paras 58, 59, 63 and 64) wherein the Supreme Court after discussing the entire case law on amendment, upheld the judgment of the High Court of Karnataka whereby the amendment sought by the plaintiff of possession in a suit for recovery allowed by the trial court has been reversed and laid down certain important factors which may be kept in mind while dealing with application under Order VI Rule 17 CPC, with the further observation that the said factors are only illustrative and not exhaustive.

(6) Mr.Sahni further placed reliance on *Bibhas Chandra Bose V. Sm.Dolly Bose nee Dutta* (AIR 1989 Calcutta 190), *Nirmala Devi V.Ved Prakash* (AIR 1993 Himachal Pradesh 1), *Smt. Sakuntala Chakraborty V. Shiba Prosad Roy and another* (AIR 1998 Calcutta 29), *Vaidhya Shyam Sunder Joshi*

V. Jain Vishwa Bharti Ladnu and others (AIR 1998 Rajasthan 227) and Baldev Raj V. Smt. Bimla Sharma (AIR 2006 Himachal Pradesh 33).

(7) Submission of Mr.Poonam Bhandari, appearing for the Husband is that when alternate relief can be claimed under Order VII Rule 7 CPC and u/s 13A of the Hindu Marriage Act for judicial separation, in divorce petition considering the aforesaid position of law, the trial court has allowed the conversion of the proceeding of restitution of conjugal rights u/s 9 of the Act of 1955 into divorce u/s 13 of the Act of 1955. The trial court has also considered that one of the objects under Order VI Rule 17 CPC is to avoid multiplicity of the proceedings, therefore, the trial court has not committed any error of law while allowing the amendment and converting the petition of restitution of conjugal rights u/s 9 of the Act of 1955 into divorce u/s 13 of the Act of 1955. In view of the aforesaid provisions of law, the impugned order dated 3.11.2009 does not warrant any interference by this Court under Article 227 of the Constitution of India. Mr.Bhandari further submits that the said application was filed when the Husband lost all hopes of grant of decree of restitution of conjugal rights by the conduct of the Wife.

(8) In support of his submissions, Mr.Poonam Bhandari placed reliance on Smt.Bhavna Adwani V. Manohar Adwani (AIR 1992 MP 105),Smt.Krishna Devi V. Additional Civil Judge, Bijnor and another (AIR 1985 All 131), Srinivas Ram Kumar V. Mahabir Prasad and others (AIR 1951 177), Ardeshir H.Mama V. Flora Sassoon (Vol.XXXII The Calcutta Weekly Notes 953) and Hakim Chand and others V. Raj Mal (2001 A I H C 4808) and Pravin Kumar Gupta V. Smt.Vineeta alias Geeta Rani (1996 AIHC 3275).

(9) On consideration of the pleadings of the parties and submissions of counsel for the parties, the core question, which is involved in this case, is as under:

Question Whether an application filed u/s 9 of the Hindu Marriage Act, 1955 can be allowed to be converted into an application u/s 13 of the Hindu Marriage Act, 1955 ?

(10) Before proceeding further, it would be appropriate to quote Sections 9 and 13(ia) and (ib) with Explanation relating to desertion, of the Hindu Marriage Act, 1955. The same are as under:

Sec.9

9.Restitution of conjugal rights. When either the husband or the wife has, without reasonable excuse, withdrawn from the society of the other, the aggrieved party may apply, by petition to the district court, for restitution of conjugal rights and the court, on being satisfied of the truth of the statements made in such petition and that there is no legal ground why the application should not be granted, may decree restitution of conjugal rights accordingly.

Explanation Where a question arises whether there has been reasonable excuse for withdrawal from the society, the court shall have regard to all the circumstances of the case, including the conduct of the parties before and after the institution of the proceedings.
Sec.13(ia)and (ib)

(ia) has, after the solemnization of the marriage, treated the petitioner with cruelty;

(ib) has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition.

Explanation relating to desertion

Explanation In this sub-section, the expression desertion means the desertion of the petitioner by the other party to the marriage without reasonable cause and without the consent or against the wish of such party, and includes the wilful neglect of the petitioner by the other party to the marriage, and its grammatical variations and cognate expressions shall be construed accordingly.

(1A)

(i)

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties.

(2)(i) to (iv).....

(emphasis supplied) (11) When attention of counsel for both the parties was drawn towards Mulla Principles of Hindu Law, Vol.II, Twentieth Edition, regarding commentary on Sec.9 at page 63-64, Mr.Sahni candidly accepted the fact that keeping in view the judgments referred in the said paragraph (Krishna Devi V. Addl. Civil Judge AIR 1985 All 131 and Bhavana Advani V.Manohar Advani AIR 1992 MP 105) as well as consideration of Order 7 Rule 7 CPC, alternate relief of divorce can be claimed in a petition for restitution of conjugal rights but the Court has to grant only either one of the reliefs and the present case is not of alternate relief claimed at the initial stage or subsequently but the same is conversion of the proceedings of restitution of conjugal rights into divorce and the Court/Family Court will not be in a position to consider the petition for restitution of conjugal rights, therefore, the provision of Order VII Rule 7 CPC is not applicable and further, Sec.13A of the Act of 1955 cannot be considered.

(12) I have gone through record of the writ petition and further considered the rival submissions of counsel for the parties.

(13) Before proceeding further, it would be appropriate to consider the relevant paragraphs of the judgments cited by the parties.

(14) First, I will consider the judgments cited by Mr.Sahni, counsel for the Wife, on the submissions referred hereinabove.

(15) It would also be relevant to quote paras 58, 59, 63 and 64 of Revajeetu Builders and Developers V. Narayanswamy and Sons and others (2009) 10 SCC 84, Para 1 of Bibhas Chandra Bose V. Sm.Dolly Bose nee Dutta (AIR 1989 Calcutta 190 (DB), Nirmala Devi V.Ved Prakash (AIR 1993 Himachal Pradesh 1), Smt. Sakuntala Chakraborty V. Shiba Prosad Roy and another (AIR 1998 Calcutta 29),Vaidhya Shyam Sunder Joshi V. Jain Vishwa Bharti Ladnu and others (AIR 1998 Rajasthan 227) and Baldev Raj V. Smt. Bimla Sharma (AIR 2006 Himachal Pradesh 33). The same

are as under:

Relevant paras of the Judgemnts cited by Mr.Suresh Sahni, counsel for the petitioner Wife.

Paras 58, 59, 63 and 64 Revajeetu Builders and Developers V. Narayanswamy and Sons and others (2009) 10 SCC 84 Whether amendment is necessary to decide real controversy

58. The first condition which must be satisfied before the amendment can be allowed by the court is whether such amendment is necessary for the determination of the ral question in controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the courts' discretion in grant or refusal of the amendment.

No prejudice or injustice to other party

59. The other important condition which should govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side. Ordinarily, if the other side is compensated by costs, then there is no injustice but in practice hardly any court grants actual costs to the opposite side. The courts have very wide discretion in the matter of amendment of pleadings but court's powers must be exercised judiciously and with great care.

Factors to be taken into consideration while dealing with applications for amendments

63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

- (1)whether the amendment sought is imperative for proper and effective adjudication of the case;
- (2)Whether the application for amendment is bona fide or mala fide;
- (3)the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
- (4)refusing amendment would in fact lead to injustice or lead to multiple litigation.
- (5)Whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case; and (6)as a general rule, the court shoud decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.

These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive.

(64) The decision on an application made under Order 6 Rule 17 is a very serious judicial exercise and the said exercise should never be undertaken in a casual manner. We can conclude our discussion by observing that while deciding applications for amendments the courts must not refuse

bona fide, legitimate, honest and necessary amendments and should never permit mala fide, worthless and / or dishonest amendments.

(emphasis supplied) Para 1 of Bibhas Chandra Bose V. Sm.Dolly Bose nee Dutta (AIR 1989 Calcutta 190) (DB)

1. The first part of O.6 R.17 of the Civil P.C. Providing that the Court may allow either party to amend his pleading, has given rise to a general impression that amendments of pleading always rest in the discretion of a Court. The impression, however deep-rooted, is not well-founded, for it ignores the second part of R. 17 providing that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. The user of the two words May and shall in such close proximity in the same sentence would at once demonstrate that one cannot mean the other, unless we choose to, which we should not, think that the Legislature had no sense of words. The conclusion, therefore, must be that while the first part of R. 17 dealing with amendments in general vests the Court with discretion, the later part, dealing with such amendments as are necessary for the purpose of determining the real controversy between the parties, imposes an obligation on the Court, and not merely a discretion, to allow such amendments. The observation of the Privy Council in Shamu Patter V. Abdul Kadir (1912) ILR 35 Mad 607 at p.612 must be taken to be a clear authority on the point, where analogous provisions of S. 149 of the preceding Code of Civil Procedure of 1882, corresponding to O. 14 R. 5 of the present Code, were being considered. ...

(emphasis supplied) Nirmala Devi V.Ved Prakash (AIR 1993 HP 1) Para 12 and relevant extract of para 13

12. In case reference is made to the pleadings, it can be seen that wife in her reply has in clear terms pleaded that the husband is not entitled to any relief from the Court since he had not come to the Court with clean hands and was breathing hot and cold in the same breath. The husband filed a petition under Section 9 of the Act, which was withdrawn and now he has claimed a decree for dissolution of marriage. To the specific averments made in para 8 of the petition that the husband had not condoned the acts of cruelty of the wife, the reply denied the said averments. This in our opinion amounts to taking up a plea that even if the allegation of cruelty, if proved, amounts to husband's condoning the said acts by having filed a petition under Section 9 of the Act. Even if it be assumed that condonation is not pleaded as a defence by respondent in a petition seeking a decree for divorce, as held in Dr.N.G.Dastane V. Mrs. S.Dastane, AIR 1975 SC 1534, it is the duty of the Court in view of the provisions of Section 23(1)(b) to find whether the cruelty was condoned. The learned Judges in their report in para 54 said that:

....Even though condonation was not pleaded as a defence by the respondent it is our duty, in view of the provisions of S.23(1)(b), to find whether the cruelty was condoned by the appellant. That section casts an obligation on the court to consider the question of condonation, an obligation which has to be discharged even in undefended cases. The relief prayed for can be decreed only if we are satisfied 'but not otherwise' , that the petitioner has not in any manner condoned the cruelty ...

(emphasis supplied)

13. In viewsuch allegation. Having waited for four years during which period the wife continued to remain residing at the house of her parents and thereafter, as admitted by the husband in his statement, his act of continuing making efforts to bring the wife to his house and then filing a petition for restitution of conjugal rights amounts to an act which can be termed as an act of forgiveness which conduct of the petitioner will amount to condonation depending upon the facts and circumstances of each case. Condonation has not been defined anywhere. 'Condonation' is a word of technical import, which means and implies wiping of all rights of injured spouse to take matrimonial proceedings. In a sense condonation is reconciliation, namely, the intention to remit the wrong and restore the offending spouse to the original status which in every case deserves to be gathered from the attending circumstances. The forgiveness in order to constitute condonation need not be express. It may be implied by the husband of the wife's conduct and vice versa. Ordinarily, as a general rule, condonation of matrimonial offence deprives the condoning spouse of the right of seeking relief on the offending conduct. When a petition is filed claiming a decree for restitution of conjugal rights, it clearly stipulates that the person seeking relief has no grouse or cause of complaint against the other spouse and even if there was any cause or complaint, the same has either been condoned or forgiven. The intention being to resume normal cohabitation. As held in Dastane's case (AIR 1975 SC 1534)(supra), matrimonial offence is erased by condonation. In view of clear provisions contained in clause (b) of sub-section (1) of Section 23 of the Act, it is always for the person who has approached the Court to satisfy that the act of cruelty has not been condoned. When such allegations were made by the wife in her reply that the husband petitioner had filed earlier a petition under Section 9 of the Act, it was incumbent for the husband to have led evidence that after the wife left in the year 1981, she never returned and stayed with him as his wife. His statement is quite vague. According to him, after she had left his house, he made all efforts to bring her back. She used to come back from her parental house and stay with him for 7/8 days and then used to leave his house. This part of the statement when read with the remaining part of the statement would show that even after the Panchayat had decreed her claim she had been visiting the husband's house. The conduct, in this case, of the husband in having moved the petition thereafter under Section 9 of the Act would amount to his intention to forgive the offending spouse in having made the statement before the Panchayat which alone was the ground made out which according to the husband was cruelty on the part of the wife. Admittedly, the allegation was made once and was not repeated thereafter. Due to the parties having lived together even for a short duration of 7/8 days on couple of occasions, as admitted by the husband, after the wife made the allegation amounts to the restoring of the offending spouse to the original status. By this act and conduct on the part of the husband it can reasonably be inferred that the act stood condoned and as such husband was not entitled to the relief claimed.

(emphasis supplied) Smt. Sakuntala Chakraborty V. Shiba Prosad Roy and another (AIR 1998 Calcutta 29) Para 8

8. Regarding the other point i.e. The amendment of pleading under Order 6 Rule 17 of the CPC, I cannot share the views of the ld. Senior Advocate, Mr. S.P. Roy Chowdhury; because, the amendment petition can be moved at any stage and if there was no merit in the petition itself, the Court has got

the liberty to reject that petition at any stage before hearing of the Appeal. In other words, if the Court considers that the proposed amendment will simply introduce a new case and in effect virtually change the nature and character of the case, definitely, the Court can reject such prayer for amendment; but such consideration should be done at the time of hearing the amendment petition and such consideration cannot be a ground to defer the hearing of the amendment petition. (emphasis supplied) *Vaidhya Shyam Sunder Joshi V. Jain Vishwa Bharti Ladnu and others* (AIR 1998 Rajasthan 227) Para 9

9. In view of the ratio propounded in *Modi Spinning and Weaving Mills Co. Ltd. V. Ladha Ram and Co.* (AIR 1977 SC 680) (supra) by their Lordships of the Supreme Court, I am of the view that the plaintiff cannot be allowed to amend his plaint by withdrawing the admissions made in the plaint so as to displace the defendants completely from the admissions made in the plaint. As the case of *Akshaya Restaurant V. P. Anjanappa* (AIR 1995 SC 1498) (supra) cited by Mr. K. N. Joshi, learned counsel appearing for the plaintiff has been declared per incuriam by their Lordships of the Supreme Court in *Heeralal V. Kalyan Mal* (1998 AIR SCW 219) (supra), it will be of no help to the plaintiff.

(emphasis supplied) *Baldev Raj V. Smt. Bimla Sharma* (AIR 2006 HP 33) Paras 11, 12 and 13

11. To my mind, the two prayers for restitution of conjugal rights and for a decree of divorce are two diametrically opposite prayers, and, therefore, cannot be made together. These prayers are mutually destructive of each other. The purpose of restitution of conjugal rights is that the Court should intervene in a matter and because one party may have deserted the other, direct it to join the company of the spouse. It is obvious that such an order is to be passed so that the matrimonial home is saved and the married couple can live together. It is no doubt true that in case after decree for restitution of conjugal rights is passed and is not complied with by the spouse for a period of one year or more after the passing of decree it gives a right to the other spouse to claim divorce. However, in the same petition it does not appear reasonable that both the prayers for restitution of conjugal rights and decree for divorce can be made.

12. To be fair to Mr. Maniktala, he has brought to the notice of this Court a judgment of the Madhya Pradesh High Court reported in *Smt. Bhavna Advani V. Manohar Advani*, AIR 1992 MP 105. In this case the same question was considered and the Court held as follows:

I do not (sic) find any legal prohibition under the provisions of the Act for filing a petition by a spouse for restitution or in the alternative, for a decree of divorce on the ground of desertion..

13. I am in respectful disagreement with the observations of the Madhya Pradesh High Court. The ground for obtaining decree for restitution of conjugal rights is that once the spouse has without reasonable cause withdrawn from the society of the other and on this being proved the aggrieved spouse can be granted a decree for restitution of conjugal rights. The grounds for divorce are many and also include desertion for a continuous period of not less than two years immediately preceding the presentation of the petition. Whereas in the case of restitution of conjugal rights no period of desertion is required to be proved, in the case where decree for divorce is claimed, it has to be

proved that the other spouse has deserted the aggrieved spouse for a period of not less than two years. In the present case admitting the alleged desertion took place on 19.2.1993, the petition was filed on 31.3.1993. Therefore, no petition for divorce on the ground of desertion could have been entertained on the ground of desertion since the desertion was admittedly less than two years.

(emphasis supplied) (16) Now, I will consider the judgments cited by Mr.Poonam Bhandari, counsel for the Husband, on the submissions referred hereinabove.

Relevant paras of the Judgemnts cited by Mr.Poonam Bhandari, counsel for the respondent-husband.

Ardeshir H.Mama V.Flora Sassoon (XXXII Calcutta Weekly Notes 953 at page 954, decided on 21.5.1928) (Privy Council)at Page 954 Held - (i) That on the plaint as it originally stood, the Judge had no power to grant the Plaintiff any relief at all.

(ii)That the Judge had power to allow the amendment as it was only allowing to be made a claim which might be brought forward in a new suit then commenced. The claim for compensation becomes barred only after a suit for specific performance has been dismissed, but in the present case dismissal had not yet taken place.

(iii) That considering the facts of the case, the amendment was allowed lightly and without proper appreciation of its effect on the position of the parties.

The power of allowing such amendments should be exercised carefully and jealously, on the facts of each case, and with as much care that the Plaintiff may not turn his suit into a gamble at the Defendant's expense as that the Defendant may not starve the Plaintiff into submission.

(iv) That the amendment, as made, could not operate to convert the suit into one for recovery of damages for breach of contract.

(v) That before allowing an amendment in such a case, a wise precaution would be to require the plaint to be remodelled in a form appropriate to an action for damages for breach of contract and nothing else.

(emphasis supplied) Relevant paras of the respective Judgments cited by Mr.Poonam Bhandari, counsel for the Husband, on the issue that the trial court has committed no error of law in allowing the amendment of converting proceedings for restitution of conjugal rights into divorce.

Firm Srinivas Ram Kumar V. Mahabir Prasad and others(AIR 1951 SC 177)(relevant extract of para 9) A plaintiff may rely upon different rights alternatively & there is nothing in the C.P.C. To prevent a party from making two or more inconsistent sets of allegations & claiming relief thereunder in the alternative. Ordinarily, the Ct. cannot grant relief to the pltf. on a case for which there was no foundation in the pleadings & which the other side was not called upon or had an opportunity to meet. But when the alternative case, which the pltf. could have made, was not only admitted by the

deft. in his written statement but was expressly put forward as an answer to the claim which the pltf. made in the suit, there would be nothing improper in giving the pltf. A decree upon the case which the deft. himself makes. A demand of the pltf. based on deft's own plea cannot possibly be regarded with surprise by the latter & no question of adducing evidence on these facts would arise when they were expressly admitted by the deft. in his pleadings. In such circumstances, when no injustice can possibly result to the deft., it may not be proper to drive the pltf. to a separate suit.

Thus, where in a suit for specific performance of a contract, in part performance of which the pltf. alleges to have paid the deft. some money, the deft. denies the contract & pleads that the money was taken by him as a loan, the Ct. can pass a decree for recovery of the loan in favour of the pltf. on his failure to prove the contract even though the pltf. Had failed to plead, & claim relief on, this alternative case. (emphasis supplied) Smt.Bhavna Adwani V.Manohar Adwani (AIR 1992 MP 105)
Para 14

14.The last submission made by the learned counsel for the respondent now needs to be considered that there could be no joint petition for restitution and divorce. I do not find any legal prohibition under the provisions of the Act for filing a petition by a spouse for restitution or in the alternative, for a decree of divorce on the ground of desertion. ..

Paras 2 and 6 of Pravin Kumar Gupta V.Smt. Vineeta alias Geeta Rani (1996 A.I.H.C. (Allahabad) 3721) wherein in paras 3 and 4, AIR 1951 SC 177 and AIR 1992 MP 105 have been followed.

2.The impugned order is by the Family Court Judge rejecting the application for amendment. Initially the suit was filed for restitution of conjugal rights u/s 9 of the Hindu Marriage Act. During the pendency of the suit, the application was moved by the applicant for amendment in the plaint seeking addition of relief of divorce u/s 13 of the Act. The Court below refused to allow the application for amendment on the ground that the husband by the amendment sought has tried to add a fresh cause of action in the suit which is a cause of action which arose later after filing of the suit. The learned Court below was of the view that if S. 13 of the Hindu Marriage Act is added and the relief as claimed is added, the original prayer of restitution of conjugal rights would become redundant and infructuous. For these reasons, the Court declined to allow the amendment application.

6. In view of the observations, made above, I am of the view that the order refusing to allow the amendment application is erroneous and the court below has not acted in accordance with law, failed to exercise jurisdiction vested in it. The order dated 18.1.95 is hereby quashed. The Court below is directed to permit the applicant to amend the plaint, as claimed, and thereafter proceed to decide the suit expeditiously, if possible, within six months from the date of filing of this order and amendment is made. (emphasis supplied) Hakim Chand and others V. Raj Mal (2001 A.I.H.C. 4808) (in a Rent Control matter for seeking amendment of plaint for addition of subsequent event)

10. It is difficult to agree....

It is the duty of the Court to allow amendment of pleading when it is necessary for the purpose of determining the real questions in controversy in the suit. It is a duty which has been cast upon Courts so that substantial justice may be done for which alone Courts exist. The main considerations to be borne in mind while allowing amendment of pleadings are the advancement of the interest of substantial justice and the avoidance of the multiplicity of litigation. An amendment in the pleadings adding a new cause of action or new defence should be allowed if it can be made without injustice to the other side. Once a lis is instituted on a pre-litum cause of action the Court must take note of all post litum development likely to affect the matters to be determined in the suit. Madras High Court in Velammal V.Chokkiah Gounder (AIR 1971 Madras 469 indicated that an amendment of the plaint based upon a cause of action not subsisting at the time of the suit but arising subsequent thereto which will shorten litigation and sub serve the ends of justice can be allowed.

(emphasis supplied) (17) It would be worthwhile to quote relevant part of the Mulla Principles of Hindu Law, Vol.II, Twentieth Edition, on the issue that in a petition for restitution of conjugal rights, alternate prayer for divorce could be sought. The same is as under:

There is difference of judicial opinion on the question whether, in a petition for restitution of conjugal rights an alternative prayer for divorce could be sought. The High Courts of Allahabad and Madhya Pradesh have held that such proceedings could enure. The High Court of Himachal Pradesh has taken a contrary view. Desertion is the forsaking of all marital obligations by the deserting spouse, without any reasonable cause and without the consent of the deserted spouse. The deserted spouse has a right in law to seek restitution of the marital tie, and all its obligations on part of the respondent. Decisions based on abandonment have held that such conduct by the deserting spouse may entitle the deserted spouse to seek a divorce (Geeta Jagdish Mangtani V. Jagdish Mangtani AIR 2005 SC 3508). In the humble opinion of the author, No plaintiff can be estopped from claiming or seeking alternative reliefs. The seeking of one relief, as opposed to another, would not render the proceedings not maintainable. Reference is invited to the provisions of O VII r 7 of the Code of Civil Procedure, which stipulates that every plaint shall state specifically the relief, which the plaintiff claims, either simply or in the alternative. There is thus, no legal bar against a plaintiff seeking two apparently diagonally opposite reliefs. As held by the Supreme Court, 'a plaintiff may rely upon different rights alternatively and there is nothing in the Civil Procedure Code to prevent a party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative'. It therefore stands to reason, that two different relief which may conflict with each other, could be claimed. The court however, would grant only one of the reliefs, based on the pleadings of the parties. Based upon the above pronouncement, it appears that there could be no embargo on alternative prayers of restitution of conjugal rights or divorce. Such prayers would not be barred.

- In a petition for restitution of conjugal rights, under this section, a petition
- 2.Krishna Devi V. Addl. Civil Judge AIR 1985 All 131. Bhavana Advani V.Manohar Advani AIR 1985 All 131.
 - 3.Baldev Raj. V.Bimla Sharma AIR 2006 HP 33, Nirmala Devi V.Ved Prakash AIR 1993 HP 1.
 4. Firm Srinivas Ram Kumar V.Mahabir Prasad AIR 1951 SC 177.
 5. Krishna Devi V.Addl. Civil Judge AIR 1985 All 131

(18) None of the judgments cited by the parties is squarely on the issue framed hereinabove, which permit or not permit, conversion of the proceedings of restitution of conjugal rights into divorce in respect of which the aforesaid core question has been framed. However, the judgments relate to the making alternate prayer of divorce in an application for restitution of conjugal rights, initially or subsequently by way of amendment, on which there is difference of judicial opinion on the judgment of the High Court of Allahabad, Madhya Pradesh on the side of permission and Himachal Pradesh on other side of non-permission. Allahabad High Court and Madhya Pradesh High Courts have permitted alternate relief whereas Himachal Pradesh High Court has disagreed with the view taken by the Madhya Pradesh High Court. In case of claiming alternate relief or additional relief of divorce in a petition for restitution of conjugal rights, it is always open to the Court to grant either one of the reliefs, but here, in the instant case, after converting proceedings of restitution of conjugal rights u/s 9 of the Act of 1955 into divorce u/s 13 of the Act of 1955, the Family Court is now debarred from considering the relief of restitution of conjugal rights initially claimed by the Husband.

(19) As stated above, Mr.Sahni, counsel for the petitioner Wife, has candidly accepted that an alternate relief of divorce u/s 13 of the Act of 1955 could be claimed in a petition for restitution of conjugal rights u/s 9 of the Act of 1955, either initially or subsequently by way of amendment, therefore, I need not discuss each of the aforesaid judgments of the Allahabad, Madhya Pradesh and Himachal Pradesh High Courts. However, the question involved in this case is of conversion of the proceedings for restitution of conjugal rights into divorce, therefore, whether the provisions of Order VII Rule 7 CPC can be made applicable or Sec.13A of the Act of 1955 can be considered or not, is to be decided.

(20) In the instant case, the impugned order dated 3.11.2009 by which amendment has been allowed, is to be viewed from general law on the issue of amendment which could only be allowed when it is necessary to decide the real controversy between the parties. Here, in the instant case, the real controversy between the parties, initially and till the date of passing of the impugned order, was restitution of conjugal rights and in case after passing of the decree for restitution of conjugal rights in a proceeding, there has been no restitution of conjugal rights as between the parties to the marriage for a period of one year or upwards, then the same would amount to desertion as per Explanation and the same is one of the grounds for divorce. Even otherwise also, the date of filing of the suit / application which was April, 2007, remain the same and on the date of final desertion i.e.10.8.2006, shown in the application u/s 9 of the Act of 1955, the continuous period of not less than two years immediately preceding the presentation of the petition was not completed. Here, in the instant case, filing of the application for restitution of conjugal rights amounts to condonation or forgiveness of the alleged act of cruelty till the date of filing of the amendment application dated 7.5.2009, which is now one of the grounds for divorce. The said condonation amounts to amendment and a party cannot be allowed to back out from the admission. In the present case, the real controversy between the parties was with regard to the relief of restitution of conjugal rights initially and further, in case the amendment is allowed, then the Court/Family Court will be debarred from considering the said real controversy of restitution of conjugal rights, which was initially raised and continued upto the date of filing of the application for amendment, therefore, the amendment of conversion of restitution of conjugal rights into divorce stands on altogether different footing from claiming the same as an alternate or additional relief of divorce in a petition for

restitution of conjugal rights and the provisions of Order VII Rule 7 CPC are not applicable and Sec.13A of the Act of 1955 cannot be taken into consideration. The amendment sought is not imperative or proper for effective adjudication of the case initially filed u/s 9 of the Act of 1955 for restitution of conjugal rights. In case the amendment is allowed, it will cause prejudice or injustice to the petitioner Wife. The prayer for restitution of conjugal rights and divorce are two diametrically opposite prayers and the conversion cannot be allowed by way of amendment as allowing the aforesaid amendment will also result in change of nature of the suit / application.

(21) In view of the above, the present case is to be decided as per the provisions of Order VI Rule 17 CPC and the case of the Husband is covered by the principles No.(1), (3) and (5) laid down in para 63 of *Revajetu Builders and Developers V. Narayanswamy and Sons and others* (2009) 10 SCC 84) and *Vaidhya Shyam Sunder Joshi V. Jain Vishwa Bharti Ladnu and others* (AIR 1998 Rajasthan 227) and the amendment is contrary to the principles laid down in the aforesaid judgments.

Answer to the question Having considered the position of law, as discussed hereinabove, I am of the view that an application filed u/s 9 of the Hindu Marriage Act, 1955 can not be allowed to be converted into an application u/s 13 of the Hindu Marriage Act, 1955 subsequently by way of amendment.

(22) The aforesaid discussion, finding and conclusion shall not come in the way of the Family Court to decide the case on merit.

(23) Accordingly, the writ petition is allowed and the impugned order dated 03.11.2009 is set aside. Now, the Family Court No.1, Jaipur is directed to resume the proceedings immediately.

(24) The Dy.Registrar (Judicial) of this Court is directed to send a copy of this order to the Family Court No.1, Jaipur.

(Prem Shanker Asopa) J.

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All corrections made in the judgment/order have been incorporated in the judgment/order being e-mailed.

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