

MANU/RH/0502/2006



Equivalent Citation: RLW2007(1)Raj389

IN THE HIGH COURT OF RAJASTHAN

Decided On: 09.11.2006

Appellants: **Sarla (Smt.)**
Vs.Respondent: **Narendra Kumar****Judges/Coram:***P.C. Tatia, J.***Subject: Family****Acts/Rules/Orders:**

- Code of Civil Procedure, 1908 (CPC) - Section 10;
- HINDU MARRIAGE ACT, 1955 - Section 9,
- HINDU MARRIAGE ACT, 1955 - Section 10,
- HINDU MARRIAGE ACT, 1955 - Section 13,
- HINDU MARRIAGE ACT, 1955 - Section 21A

Disposition:

Appeal Allowed

CaseNote:

Civil - Res Judicata - Sections 9 and 13 of Hindu Marriage Act, 1955 - Whether divorce petition filed by Respondent was barred by principles of res judicata - Held, Appellant/wife submitted certified copy of judgment obtained by her in her petition under Section 9 of Act - For reason best known to Appellant appearing in trial Court did not submit any application for amendment of written statement nor submitted any application for framing issue on question of res judicata - After going through judgment passed by District Judge, in petition filed by wife under Section 9 of Act and reasons given in impugned judgment passed by Addl. District Judge, on Respondent's petition filed under Section 13 of Act, that core question involved in appeal was that whether finding recorded by Court of District Judge, in case filed by Appellant against her husband in its judgment creates bar of res judicata for retrial of issues raised by Respondent in his divorce petition which were decided by Court below vide judgment and decree - It was true that decree of District Judge on record appears that that document was presented in Court after evidence of Respondent and at time of evidence of Appellant /non-applicant in divorce petition - Respondent could not get opportunity to contest question of res judicata - Present Court cannot presume what Respondent might have against judgment and decree of District Judge, passed in petition under Section 9 of Act - Issue of res judicata was core question and goes to root of matter and may have material bearing on decision of issues framed by trial Court in divorce petition - Both parties may lead evidence with respect to issue of res judicata only and not any other issue - Appeal allowed and decree passed by Court below set aside

JUDGMENT

P.C. Tatia, J.

1. Heard learned Counsel for the parties.
2. This appeal is against the judgment dated 13.9.2002 passed by the learned Addl. District Judge, Sojat Camp Jaitaran District Pali in Divorce Case No. 30/99. The trial Court passed the divorce decree in favour of the respondent-husband. Hence, this appeal has been preferred by the wife-non-applicant-appellant.
3. It will be worthwhile to mention that the present divorce petition was filed by the respondent-husband in the Court of Addl. District Judge, Sojat camp Jaitaran on 24.11.1999 with the allegation of cruelty against the appellant-wife. It appears from the facts of the case that marriage of the appellant and respondent solemnized on 31.1.1990. The respondent-husband's contention is that wife treated him with cruelty and ultimately after more than nine years, the appellant-wife created dispute on 9.11.1999 in front of house of the appellant and insisted for going to her father's house. Number of persons gathered there and the non-applicant-wife threatened that in case she will not be sent to her father's house forthwith, she will commit suicide. In view of the said threat, husband's family members with other persons, took the wife to the wife's parents' house and since then that is from 9.11.1999, the wife is residing in the parents' house.
4. During the pendency of the said divorce petition, the wife submitted a petition under Section 9 of the Hindu Marriage Act for restitution of conjugal rights in the Court of District Judge, Merta. Though the wife submitted the petition under Section 9 of the Hindu Marriage Act subsequent to the filing of the divorce petition, the said petition under Section 9 of the Hindu Marriage Act filed by the wife, was decided by the learned District Judge, Merta vide judgment and decree dated 17.7.2002. While deciding the petition of the wife moved under Section 9 of the Hindu Marriage act, the learned District Judge, Merta decided issue in favour of the

appellant and held that the non-applicant husband left the wife without any reasonable cause and, therefore, the wife is entitled to decree for restitution of conjugal rights. While deciding the said petition under Section 9 of the Hindu Marriage act, the learned District Judge, Merta rejected the husband's plea that wife has committed cruelty upon the husband, in view of the facts mentioned above, it is clear that the crucial questions for decision before both the Courts below were whether the wife was turned out by the husband in the month of November, 1999 without any reasonable cause and whether the wife has committed any cruelty towards the husband before November, 1999. As stated above, though the divorce petition was filed earlier in time but it appears from the record that no application under Section 10 CPC was submitted by any of the parties for staying the proceedings in subsequently filed petition under Section 9 of the Hindu Marriage Act. Not only this, the wife-appellant, in the present appeal, merely submitted certified copy of the judgment and decree dated 17.7.2002 in the trial Court i.e. before the Court of Addl. District Judge, Sojat camp Jaitaran and when the said certified copy of the judgment and decree dated 17.7.2002 was tendered in evidence, an objection was raised from the side of the husband about the admissibility of the document but that was rejected by the trial Court and the certified copy of the judgment passed in petitioner under Section 9 of the Hindu Marriage act, dated 17.7.2002 was exhibited as Ex.NA-3. Though certified copy of the judgment was produced by the appellant-wife in defence to the divorce petition but she did not amend the written statement nor prayed for framing any issue on the basis of the plea of res judicata as both the issues involved in the present divorce petition were also involved in the petition filed by the wife under Section 9 of the Hindu Marriage Act.

5. The learned Counsel for the appellant vehemently submitted that the trial Court committed serious error of law in recording finding just contrary to the finding which has been recorded by the competent Court

of law in appellant's petition under Section 9 of the Hindu Marriage Act in its judgment dated 17.7.2002. Not only this, but the trial Court even did not look into the said judgment dated 17.7.2002. According to the learned Counsel for the appellant, the judgment of the Court below vitiates because of non-consideration of material piece of evidence, i.e. the judgment dated 17.7.2002 (Ex. NA-3) passed by the court of the District Judge, Merta in petition under Section 9 of the Hindu Marriage Act. It is also submitted that in view of the finding recorded in the judgment dated 17.7.2002 and which has attained the finality, as no appeal has been preferred by the husband against the judgment dated 17.7.2002, the trial Court should have dismissed the divorce petition filed by the respondent-husband.

6. The learned Counsel for the respondent submitted that the plea of res judicata is required to be raised by the defendant in pleading and the Court can decide the issue of res judicata in case the plea is raised by the defendant. Admittedly, the defendant-appellant in the divorce petition, did not raise the plea of res judicata, despite the fact that the learned District Judge, Merta decided the appellant's non-applicant's petition under Section 9 of the Hindu Marriage Act, before decision of the respondent's divorce petition. According to the learned Counsel for the respondent, if the plea is not raised then the judgment recording finding can be considered as opinion of the Court at the most. However, according to the learned Counsel for the respondent, the respondent proved in case by positive evidence in his case and, therefore, the Court below has not committed any error of law.

7. The learned Counsel for the respondent also submitted that the Court can look into the evidence which has been recorded in the case itself and not the evidence recorded in any other case. It is also submitted that the reasons given on the issues are also not relevant for the purpose of deciding the issues raised in the respondent's divorce petition. The only finding may be binding but in this case the plea of res judicata has not been raised by the appellant-non-applicant, therefore, that judgment itself could not have been considered by the Court below.

8. The learned Counsel for the respondent further submitted that all the evidence produced by the respondent totally proved the case of cruelty committed by the appellant against the respondent and his family members.

9. I considered the submissions of the learned Counsel for the parties and perused the facts of the case.

10. It will be worthwhile to mention here that there is specific provision in the Hindu Marriage Act, 1955 providing for joint trial of two counter petitions filed under certain provisions of Hindu Marriage act. As per Section 21A, in the case where a petition for judicial separation under the Hindu Marriage Act, 1955 is presented to a District Court under Section 10 or for a decree of divorce under Section 13 and another petition under the Hindu Marriage act is presented thereafter praying for judicial separation under Section 10 or for a decree of divorce under Section 13 on any ground, whether in the same district Court or in a different district Court, in the same State or in a different State, the petitions are required to be dealt with as specified in Sub-section (2) of the Act of 1955. Sub-section of Section 21A of the Hindu Marriage Act, 1955 provides that in such situation where Sub-section (1) applies and if the petitions are presented to the same district Court, both the petitions shall be tried and heard together by that district Court. Not only this but as per Sub-clause (b) of Sub-section (2) of Section 21A, if the petitions are presented to different district Courts, the petition presented later shall be transferred to the district Court in which the earlier petition was presented and both the petitions shall be heard and disposed of together by the district Court in which the earlier petition was presented. It appears from Section 21A of the Hindu Marriage Act, 1955 that no such provision has been made for the eventually when one files the petition under Section 13 of the Hindu Marriage Act on the ground of desertion or cruelty or both and other party submits the petition for restitution of conjugal rights involving the same issues based on same facts. It is true that there is no such specific provision under Section 21A of the Hindu Marriage Act, 1955 providing for joint trial of divorce petition on the ground of desertion and

counter petition for restitution of conjugal rights but the help of the provision of Code of Civil Procedure can be taken by the parties and the parties should move appropriate application for staying the proceedings under Section 10, CPC in subsequently filed petition or the parties should take steps for consolidation of the two petitions.

11. Be it as it may be, in the present case, the appellant-wife, under the advise of her counsel, submitted certified copy of the judgment obtained by her in her petition under Section 9 of the Hindu Marriage Act. For the reason best known to the learned Counsel for the appellant appearing in the trial Court, he did not submit any application for amendment of the written statement nor submitted any application for framing an issue on the question of res judicata. After going through the judgment dated 17.7.2002 passed by the learned District Judge, Merta in the petition filed by the wife under Section 9 of the Hindu Marriage Act, 1955 and the reasons given in the impugned judgment passed by the learned Addl. District Judge, Merta on respondent's petition filed under Section 13 of the Hindu Marriage Act, this Court is of the view that the core question involved in the appeal is that whether the finding recorded by the Court of the District Judge, Merta in Case No. 6/2000 filed by the appellant Smt. Sarla against her husband Narendra Kumar in its judgment dated 17.7.2002 creates a bar of res judicata for retrial of the issues raised by the respondent in his divorce petition which were decided by the Court below vide judgment and decree dated 13.9.2002.

12. It is true that the decree of the learned District Judge, Merta dated 17.7.2002 is on record but it appears that that document was presented in Court after the evidence of the respondent applicant-husband and at the time of evidence of the appellant non-applicant in divorce petition. The respondent could not get the opportunity to contest the question of res judicata. This Court cannot presume what defence the respondent may have against the judgment and decree of the learned District Judge, Merta passed in the petition under Section 9 of the Hindu Marriage Act dated 17.7.2002. The said issue of res judicata is the core question and goes to

the root of the matter and may have material bearing on the decision of the issues framed by the trial Court in divorce petition No. 30/99. Therefore, the judgment and decree dated 13.9.2002 deserves to be set aside, so that the trial Court may frame proper issue and decide whether the divorce petition Filed by the respondent is barred by principles of res judicata in view of the finding recorded by the Court of District Judge, Merta in Case No. 6/2000 filed by the appellant and decided by the learned District Judge, Merta vide judgment and decree dated 17.7.2002.

13. Both the parties may lead evidence with respect to issue of res judicata only and not any other issue.

14. In view of the above, the appeal of the appellant is allowed. The judgment and decree passed by the Court below dated 13.9.2002 is set aside. The matter is remanded to the trial Court for deciding the suit afresh after framing proper issue about plea of res judicata and decide the suit afresh. Both the parties are directed to appear before the Court below on 27.11.2006.

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