A.F.R.

Judgement reserved on 24 August 2017

Judgement delivered on 6 September 2017

Court No. - 39

Case :- FIRST APPEAL No. - 605 of 2017
Appellant :- Smt. Preeti
Respondent :- Sandeep Asthana
Counsel for Appellant :- Alok Kumar Srivastava,Dharam Pal Singh,Hemant Kumar Srivastava

Hon'ble Dilip Gupta,J.
Hon'ble Dinesh Kumar Singh-I,J.

(Delivered by Hon'ble Dinesh Kumar Singh-I, J.)

The judgment and order dated 2 August 2017 passed by the Principal Judge, Family Court, Allahabad in Matrimonial Case No. 812 of 2013, (Sandeep Asthana vs Smt. Preeti), under Section 9 of the Hindu Marriage Act 1956[1] has been assailed in this First Appeal, whereby an amendment application moved under Order 6 rule 17 read-with section 151 of the Code of Civil Procedure 1908[2] has been allowed permitting the case to be treated to have been filed under section 13 of the Act.

The short point that has arisen for consideration in this appeal is whether a case filed under section 9 of the Act for restitution of conjugal rights by a party can be permitted to be converted to one having been filed under section 13 of the Act by allowing the amendment application moved under Order 6 Rule 17 CPC.

1 The Act
2 CPC

For adjudicating on the aforesaid point, it would be germane to refer to the facts of the case in brief which are as follows.

The respondent–plaintiff filed Matrimonial Case No. 812 of 2013 (Sandeep Asthana vs Smt. Preeti) under section 9 of the Act, for restitution of conjugal rights, alleging that he had married the appellant–defendant on 25 April 2012 according to Hindu rites at Allahabad. Soon after the dinner ceremony organised on 27 April 2012, a misunderstanding developed between the two resulting in tense relations between them which were sought to be removed by him, but it did not happen and petty arguments between them would result in altercations. This situation became worse when the respondent started using derogatory language for his family members and started taunting him and boasted that she was earning a handsome amount. The respondent continued to endure all this only to ensure that family life proceeded happily and smoothly. She started making undue demands, which though were sought to be fulfilled, but not to her satisfaction. She even expressed her repugnance to the visit of his parents at the Noida house where they were staying after marriage, so much so that he had to send back his parents to Allahabad. Gradually her brother-in-law, in whose company, the respondent was employed started interfering in their life. Her demands increased and she wanted a car and a flat. To appease her, he even called her mother to look after her when she was pregnant and she delivered a male child on 13

February 2013. Her mother used to instigate her which made her allege that she had married a beggar and would not permit him to even touch the child. In the second week of the month of March 2013 she fought with him, abused him and threatened to implicate him in a false case of dowry. Even his parents were threatened on phone but all this was tolerated to secure the future of the child. She left for her parent's house with bag and baggage on 1 June 2013 taking with her the entire jewellery without even informing him and also threatened that she would implicate him and his family members in a dowry demand case.

The petition under section 9 of the Act was filed by the husband on 8 July 2013. On 3 March 2017, the husband moved an application under Order 6 Rule 17 readwith section 151 of CPC seeking amendment in the plaint with consequential relief to the effect that the relief for divorce under section 13 of the Act be permitted to be substituted in place of the relief for restitution of conjugal rights under section 9 of the Act, because she had lodged a false report under section 498 A, 323, 504, 506 of the Indian Penal Code and ¾ of Dowry Prohibition Act at Police Station, Mahila in District Gautam Buddha Nagar against his parents (his ailing father being 75 years old), his cousin who resided in Allahabad, which made him believe that now it was impossible for him to live with her and that it was appropriate to seek a dissolution of marriage on the ground of cruelty.

From the side of wife, though no written statement had been filed but an objection was filed against the amendment application denying all the allegations made against her and in addition she stated that she was residing with her small child aged 4 years, named Priyansh, in Gautam Buddha Nagar because the respondent was a scheming person who had tortured her for dowry but posing as a victim had filed the petition under section 9 of the Act. She did admit that she had lodged a Criminal Case being crime number no. 102/2013 under sections 498 A, 323, 504, 506 IPC and ¾ Dowry Prohibition Act. She further alleged that the respondent was exerting undue pressure on her as a result of which she had filed **Writ Petition No.9711 of 2016** (Sandeep Asthana vs Smt. Preeti), wherein a direction was issued to the Court below to decide case No.812 of 2013 with expedition. It is alleged by the appellant that Order 6 Rule 17 does not permit an amendment to be allowed which would change the nature of the case. It was further alleged by her that as per law laid down by Rajasthan High Court in **Civil Writ Petition number 5569 /2011 (Rima Bajaj vs Sachin Bajaj), 2011 Lawsuit (Rajasthan) 1224**[3] and in **Civil Writ Petition No. 4599/2015 (Lakshmana vs Ramamani), 2015 Lawsuit (Karnataka) 3242**[4] an amendment cannot be permitted which would change the nature of the case.

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3 Rima Bajaj
4 Lakshmana

Overruling the objection of the appellant, the learned Court below expressed its opinion that the said amendment application deserved to be allowed because the Supreme Court had in various cases held that amendments should be allowed which would help the Court in finally deciding the case. In the case at hand it was found that the mediation between the parties had failed and a direction had also been issued by the High Court for expeditious disposal. In this view of the matter, in case the said amendment was disallowed, it would require the respondent to institute a fresh case for divorce under section 13 of the Act, which would delay the disposal of the dispute between the parties. It has also been mentioned in the order that the wife had not even presented the written statement. The amendment was accordingly allowed on cost of Rs. 500/– to be paid to the wife within 3 days.

Learned counsel for the appellant Shri Alok Kumar Shrivastava has submitted that the impugned order deserves to be set aside because under Order 6 Rule 17 CPC, such kind of amendment is not permissible as it would change the nature of the case. It was emphasised by him that initially the respondent had filed a petition under section 9 of the Act seeking restitution of conjugal rights condoning all the alleged lapses on the part of the respondent wife and thereafter the relief was sought to be amended by seeking divorce. Both these pleas were diametrically opposed to each other and if the

said amendment was permitted, the mandatory separation of 2 years prior to filing the case of divorce would remain unsatisfied as the amendment would relate back to the date of filing of the petition under section 9, which had been filed less than 2 years from the date of separation. Learned counsel has mainly relied upon the judgment delivered by Rajasthan High Court in **Rima Bajaj** and the decision of the Karnataka High Court in **Lakshaman**,

It transpires from the record that the petition under section 9 of the Act was filed by the husband on 8 July 2013 for restitution of conjugal rights mentioning therein that marriage took place on 25 April 2012 and on 1 June 2013 the wife left the matrimonial house. Thereafter, an amendment application was moved on 3 March 2017 with a prayer that instead of section 9, section 13 should be permitted to be substituted converting the petition of restitution of conjugal rights into that of divorce under the changed circumstances because a criminal case, being crime No. 102 of 2013 under sections 498 A , 323 , 504 , 506 IPC and ¾ Dowry Prohibition Act was lodged on 4 October 2013 by the wife against the husband and his family members, including his ailing old father which amounted to cruelty and consequential amendments were also prayed to be permitted to be incorporated. The said amendment application has been allowed.

It would be pertinent to reproduce the relevant portions of sections 9, 13, 13A and 14 of the Act which are as follows: –

"**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, 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 burden of proving reasonable excuse shall be on the person who has withdrawn from the society."

"13. Divorce – (1) Any marriage solemnised whether before or after the commencement of this Act, may, on petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party –

i) has, after the solemnisation of the marriage, had voluntarily sexual intercourse with any person other than his or her spouse: or

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

(ib) has deserted the petitioner for a continuous period of not less than 2 years immediately preceding the presentation of the petition; or
(ii).....
.....
Explanation – In this subsection, 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 it's grammatical variations and cognate expressions shall be construed accordingly.

(1A) Either party to a marriage, whether solemnised before or after the commencement of this Act, may also present a petition for dissolution of the marriage by a decree of divorce on the ground –

i) that there has been no resumption of cohabitation as between the parties to the marriage for a period of one year

or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(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.
.....

13A. Alternate relief in divorce proceedings – in any proceeding under this Act, on a petition for dissolution of marriage by a decree of divorce, except in so far as the petition is founded on the grounds mentioned in clauses (ii), (vi) and (vii) of subsection (1) of section 13, the court may, if it considers it just so to do having regard to the circumstances of the case, pass instead a decree for judicial separation.

14. No petition for divorce to be presented within one year of marriage – (1) Notwithstanding anything contained in this Act, it shall not be competent for any court to entertain any petition for dissolution of marriage by a decree of divorce, unless at the date of presentation of the petition one year has elapsed since the date of the marriage.

Provided that the court may, upon application made to it in accordance with such rules as may be made by the High Court in that behalf, allow a petition to be presented before one year has elapsed since the date of the marriage on the ground that the case is one of exceptional hardship to the petitioner or of exceptional depravity on the part of the respondent, but if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree, do so subject to the condition that the decree shall not have effect until after the expiry of one year from the date of marriage or may dismiss the petition without prejudice to any petition may be brought after the expiration of the said of one year upon the same or substantially the same facts as those alleged in support of the petition so dismissed.

(2) In disposing of any application under this section for leave to present a petition for divorce before the expiration of one year from the date of the marriage the court shall

> have regard to the interest of any children of the marriage and to the question whether there is a reasonable probability of a reconciliation between the parties before the expiration of the said one year."

In **Rima Bajaj's** case relied up by learned Counsel for the appellant, the petitioner had challenged the order allowing the amendment application to convert the proceedings instituted under section 9 of the Act for restitution of conjugal rights to divorce. The husband had moved an application under section 9 of the Act for restitution of conjugal rights in the month of April 2007 stating that his marriage was solemnised on 29 June 2005, where-after the wife left her matrimonial home on 10 August 2006 without any justification. The relief for restitution of conjugal rights was claimed. Subsequently, the husband filed the amendment application seeking divorce on the ground of desertion and cruelty. The Trial Court allowed the said amendment holding that though an amendment altering the character of the suit cannot be allowed, but in exceptional cases, to avoid multiplicity of proceedings and for determining the real question in controversy, it can be allowed. The Rajasthan High Court took the view that the parties were not staying together for a minimum 2 years period, immediately preceding the presentation of the petition and, therefore, the amendment could not be allowed.

In **Lakshmana's** case the facts were as follows:

A petition was filed under Section 9 of the Act seeking restitution of conjugal rights. At the stage of evidence, an application

was filed seeking amendment to convert the said petition under section 13 (1) (ib) of the Act for dissolution o marriage. The Court below after taking into consideration the rival contentions, dismissed the application on 3 January 2015. Against the said order, Writ Petition No.4599 of 2015 was preferred in Karnataka High Court. The Court held that it was unable to accept the contention of the petitioner, for the reason that the aspect relating to the birth of the child and the allegations which had been made to seek dissolution of marriage, would not be the same, as had been pleaded in the said case when the petition was filed under section 9 of the Act and consequently the order of the Court below was found justified. The view taken by the Karnataka High Court was in the peculiar facts and circumstances of that case and would not benefit the appellant.

The other case law relied upon by the learned counsel for the appellant is **Revajeetu Builders and Developers vs Narayanswamy and Sons and others**[5]**.** It was held in the said case that the courts have a very wide discretion in the matter of amendment of pleadings but the power must be exercised judiciously and with great care. While deciding an application for amendment, the Courts must not refuse bona fide, legitimate, honest and necessary amendments and should never permit malafide, worthless or dishonest amendments. The first condition which must be satisfied before an amendment can be allowed is whether such an amendment is necessary for the

5 (2009) 10 SCC 84

determination of the real controversy. If that condition is not satisfied, the amendment cannot be allowed. This is the basic test which should govern the discretion in grant or refusal of the amendment. The other important condition which ought to govern the discretion of the court is the potentiality of prejudice or injustice which is likely to be caused to the other side.

Section 21 of the Act provides that subject to the other provisions contained in this Act and such rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure, 1908.

It was because of changed circumstances that the respondent-husband had to seek an amendment in the petition for restitution of conjugal rights because at the time of filing the petition no criminal case had been filed against the husband and his family members but subsequently the wife filed a criminal case against the husband and his family members which according to the husband, resulted in cruelty and necessitated seeking additional relief of divorce.

It has, therefore, to be seen whether such an amendment can be permitted under Order 6 Rule 17 CPC as the same is diametrically opposite to the restoration of conjugal rights.

The Supreme Court in **Om Prakash Gupta vs Ranbir B Goel**[6] in this regard, made the following observations in paragraph nos. 11 and 12 :

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6 (2002) 2 SCC 256

"11. The ordinary rule of civil law is that the rights of the parties stand crystallised on the date of institution of the suit and, therefore, the decree in a suit should accord with the rights of the parties as they stood at the commencement of the lis. However, the Court has power to take note of subsequent events and mould the relief accordingly subject to the following conditions being satisfied: (i) that the relief, as claimed originally has, by reason of subsequent events, become inappropriate or cannot be granted; (ii) that taking note of such subsequent event or changed circumstances would shorten litigation and enable complete justice being done to the parties; and (iii) that such subsequent event is brought to the notice of the Court promptly and in accordance with the rules of procedural law so that the opposite party is not taken by surprise --------".

"12. Such subsequent event may be one purely of law or founded on facts. In the former case, the Court may take judicial notice of the event and before acting there on put the parties on notice of how the change in law is going to affect the rights and obligations of the parties and modify or mould the course of litigation or the relief so as to bring it in conformity with the law. In the latter case, the party relying on the subsequent event, which consists of facts not beyond pale of controversy either as to their existence or in their impact, is expected to have resort to amendment of pleadings under Order 6 Rule 17 CPC. Such subsequent event, the Court may permit being introduced into the pleadings by way of amendment as it would be necessary to do so for the purpose of determining the real question in controversy between the parties. In **Trojan and Company** vs. **RM. N. N. Nagappa Chettiar** this Court has held that the decision of a case cannot be based on grounds outside the pleadings of the parties and it is the case pleaded that has to be found without the amendment of pleadings the Court would not be entitled to modify or alter the relief. In **Shri Mahant Govind Rao vs Sitaram Kesho**, their Lordships observed that, as a rule, relief not founded on the pleadings should not be granted."

In Sampath Kumar vs Ayyakannu and Another[7] the plaintiff–appellants filed a suit in 1988 for issuance of a permanent prohibitory injunction claiming possession over the suit property, which was an agricultural land. Before the commencement of the trial, in 1999, the plaintiff moved an application under Order 6 Rule 17 CPC for amendment in the plaint alleging that during pendency of the suit, the defendant had in 1989 forcibly dispossessed the plaintiff. The plaintiff therefore sought a relief for declaration of title and consequential relief of delivery of possession. The defendant opposed the prayer for amendment on the ground that the plaintiff was changing the cause of action through amendment which was not permissible and that the defendant had perfected his title also by adverse possession over the property rendering the suit for recovery of possession barred by time. Thus, a valuable rights which had accrued to the defendant was sought to be taken away by the proposed amendment. The Trial Court rejected the amendment application holding that appropriate course for the plaintiff was to bring a new suit. The High Court, in revision, had maintained the said order of the Trial Court. Allowing the appeal, the Supreme Court observed that the plaintiff on the averments made in the application for amendment proposed to introduce a cause of action which had arisen during the pendency of the suit. The basic structure of the suit

7 (2002) 7 SCC 559

was not altered by the proposed amendment. What was sought to be changed was the nature of relief sought for by the plaintiff. The plaintiff was not debarred from instituting a new suit seeking a relief for declaration of title and recovery of possession. The Supreme Court also observed that a**n amendment once incorporated relates back to the date of the suit. However, the doctrine of relation back in the context of amendment of pleadings is not one of universal application and in appropriate cases the Court is competent, while permitting an amendment, to direct that the amendment will not relate back to the date of suit and to the extent permitted by it, shall be deemed to have been brought before the Court on the date on which the application seeking the amendment was filed.**

It would also be pertinent to refer to the views of the celebrated author of the book 'Principles of Hindu Law' Sir Dinshah Fardunji Mulla, who on page 871 of the 21st Edition of this book has opined as follows-

> "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 deserting his 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. 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 Order 7 Rule 7 of CPC, 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 the plaintiff seeking two apparently diagonally opposite reliefs. As held by the Supreme Court 'the 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 reliefs 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."

It would also be pertinent to refer to the view taken by the Allahabad High Court in **Smt. Krishna Devi vs Additional Civil Judge Bijnor and another**[8]. In this case, the respondent husband had filed a matrimonial suit before the Trial Court on 28 September 1982 stating therein that his wife had deserted her matrimonial home on 29 July 1977 without any reasonable cause and was residing with her parents and also claimed alternative relief of divorce. It was contended on behalf of the wife that the relief for restitution of

8 AIR 1985 Allahabad 131

conjugal rights as well as for divorce could not be made simultaneously in one petition as they were contradictory to each other. The High Court expressed that alternative relief of restitution of conjugal rights and divorce could be prayed for because the provisions of CPC would govern the procedure to be followed, in which there was no such bar. Relying upon the law laid down by Supreme court in **Ram Kumar vs Mahavir Prasad[9],** it was held that Plaintiff could rely upon different rights alternatively and there was nothing in CPC to prevent the party from making two or more inconsistent sets of allegations and claiming relief thereunder in the alternative. Ordinarily, the Court cannot grant relief to the plaintiff in a case in which there was no foundation in the pleadings and which the other side was not called upon to meet but there was nothing improper in giving the plaintiff a decree upon a case which the defendant himself had stated.

In the backdrop of the above position of law, the order allowing the amendment application by the Court below does not suffer from any infirmity because it has been allowed on 2 August 2017 on an application moved on 3 March 2017, while the marriage was admittedly performed on 25 April 2012. It is apparent that for final adjudication of the disputes between the parties, the same can be allowed by the Court. The wife had left the matrimonial house without any reasonable cause as per version of the husband. Hence the petition

9 AIR 1951 SC 177

for restitution of conjugal rights was initially filed by the husband against the wife on 8 July 2013 with all good intention to bring his wife back home, but during the proceedings, further developments took place which were unpalatable to the respondent. The wife had instituted criminal case, being crime number 102 of 2013, at police station Mahila, District Gautambudh Nagar under sections 498 A, 323, 504, 506 IPC and ¾ Dowry Prohibition Act on 4 October 2013 against the husband and his family members, which made him change his mind to bring an amendment seeking relief of divorce on the ground of cruelty.

It should be remembered that as per section 14 of the Act, no petition for divorce can be filed before the lapse of one year from the date of marriage. Therefore, if such an amendment is allowed, one year time would not be completed from the date of marriage. The answer to this question lies in the law declared by the Supreme Court in **Sampat Kumar** that every amendment may not necessarily be taken to relate back to the date of initial filing of the petition. The Court has the power to make it applicable prospectively **to avoid any legal infirmity. Hence in this case also, the amendment can be made applicable prospectively from the date it is allowed.**

The other issue is as to whether the amendment was necessary for proper adjudication of the dispute between the parties. In this regard it seems that the husband had instituted a case for restitution of

conjugal rights believing that his wife would come back as she had left the matrimonial home without any valid reasons, but when the wife became more aggressive since she filed a criminal case against the husband and his family members, it dawned upon the respondent that his wife probably never wanted to return to her matrimonial home and wanted to torture not only him but his whole family. It is then that the husband thought it proper to get the case of restitution of conjugal rights converted into that of divorce on the ground of cruelty. The divorce on the ground of cruelty does not require separation between spouses for more than 2 years. However, two years separation would be valid only if desertion was the only ground for divorce. In case the divorce on the ground of cruelty is prayed for, only one year period since the date of marriage would make the petition for divorce competent.

From the proposition of law referred to above, there is no ambiguity as regards contradictory pleas being taken because without having the plaint amended for seeking a particular relief, no evidence would be permitted by the Court to be adduced to prove that plea. It is also worth mentioning here that the said amendment does not seem to cause any prejudice to the wife, because firstly she has not filed any written statement till date and she would still have an opportunity to meet the allegations made by the husband in the amended plaint. It may also be mentioned that to avoid multiplicity of suits, the

amendment was required. It may further be mentioned that when alternative reliefs can be prayed for, conversion of one relief into another would not be barred.

In view of the above, the impugned order does not suffer from any infirmity except that the amendment shall be effective from the date of its being allowed by the Court below and it will not relate back to the date of institution of the petition.

This appeal, therefore, deserves to be dismissed at the stage of admission itself with the above observation. It is, accordingly, dismissed. Let a copy of this order be transmitted to the Court below.

Order Date:06.09.2017
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(Dilip Gupta J)

(Dinesh Kumar Singh – I J)