Neutral Citation Number 2023:DHC:5211-DB

* IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 08.05.2023
Judgment delivered on: 27.07.2023

\+ MAT.APP.(F.C.) 127/2022 & CM APPL. 38047/2022

NIDHI JAIN ..... Appellant

versus

ANKIT JAIN ..... Respondent

Advocates who appeared in this case:
For the Appellant: Appellant in person.
For the Respondents: Mr. Arush Bhandari, Advocate with respondent in person.

CORAM:-
HON'BLE MR. JUSTICE SANJEEV SACHDEVA
HON'BLE MR. JUSTICE MANOJ JAIN

JUDGMENT

MANOJ JAIN, J.

1. Appellant has challenged order dated 25.07.2022 whereby her application under Section 151 CPC filed in HMA petition No.1367/2019 titled as *Ankit Jain vs. Nidhi Jain* has been dismissed by learned Judge, Family Court, North District, Rohini, Delhi.

2. Appellant got married to respondent on 16.02.2012 as per Hindu rites and customs. However, their marriage was in turmoil and the matrimonial discord between the two resulted in filing of various cases by them, against each other.

3. Presently, we are concerned with HMA petition No.1367/2019 filed by the respondent whereby he has sought dissolution of marriage

on account of cruelty. Said petition is pending adjudication and the trial is yet to begin.

4. It needs to be highlighted that the respondent had earlier also filed two petitions seeking dissolution of marriage. One such petition was filed on 15.12.2012 which was registered as HMA 594/2012. By virtue of said petition also, he had sought divorce but it was dismissed at the very threshold, being barred under Section 14(1) of Hindu Marriage Act, 1955(in short HMA) as it had been filed within one year of the marriage and no instance of any exceptional hardship to him or exceptional depravity on the part of his wife could be brought on record.

5. Thereafter, respondent filed one more petition seeking divorce on the ground of cruelty on 23.03.2013. Said petition was registered as HMA No.219/2013. For the sake of convenience, said petition would be hereinafter referred to as "*the previous petition*." He sought divorce citing several grounds of cruelty allegedly attributable to his wife. The previous petition was contested by the Appellant/wife. Issues were framed and the case was put to trial but before the conclusion of the trial, respondent withdrew the same on 07.04.2016. Respondent personally appeared before the concerned court of learned Principal Judge, South West District, Dwarka, New Delhi and withdrew the same.

6. After the withdrawal of the previous petition on 07.04.2016, respondent again filed a petition seeking divorce on the same ground

of cruelty under Section 13 (1) (ia) of HMA. In his such petition (hereinafter referred to as *the new petition*), he did divulge that he had previously filed a divorce petition, which was withdrawn by him. He, however, claimed that the petition was withdrawn by him as he was fed up of legal battles between him and his wife. In the new petition, he, *inter alia*, also claimed he had not condoned any act of cruelty.

7. Appellant contested the new petition also and filed written submission-cum-reply refuting the averments made in the petition as well taking certain objections.

8. During the pendency of the new petition, appellant filed an application under Section 151 CPC seeking dismissal of the petition on the ground that the new petition was based on the same cause of action which had been averred by the respondent when he had filed the previous petition seeking divorce in the year 2013. She claimed that since the previous petition was withdrawn by him unconditionally and without assigning any reason whatsoever, he was barred by law from filing a fresh petition on the same cause of action. It was also contended that when the previous petition was withdrawn by him, he had neither sought nor was granted any liberty to file a fresh petition on the same cause of action and, therefore, his act of filing the new petition was a clear abuse of process of law and thus, the new petition was liable to be dismissed.

9. Learned Trial Court noticed that the previous petition had also been filed on the similar grounds but observed that in the new

petition, respondent had come up with new set of allegations as there was mention of one incident dated 14.12.2016. Holding that such incident dated 14.12.2016 was not then available to the petitioner, as the previous petition had been withdrawn on 07.04.2016 and also after making reference to other facts of the case, the learned Trial Court did not find any merit in the aforesaid application moved under Section 151 CPC.

10. Feeling aggrieved, the appellant has filed the present appeal under Section 19 of the Family Courts Act, 1984.

11. According to the appellant, in view of the unconditional withdrawal of previous petition, the respondent had no reason or occasion to have filed a new petition on same ground. According to her, there is nothing fresh in the new petition. She has contended that no new instance of any cruelty on her part has been mentioned in the petition and the learned trial court got unnecessarily swayed away by the fact that there was a reference of one incident, post withdrawal of the previous petition. According to her, she had merely taken recourse to law for redressal of her grievances and that any such step cannot be dubbed as an act of cruelty.

12. According to respondent herein, there was never any application moved by him under Order XXIII Rule 1 CPC and moreover the cause of action mentioned in the previous petition and the cause of action averred in the new petition are not absolutely the same and mere identity of some of the issues would not mean that the

new suit is not maintainable or that it is barred by *issue estoppel* or *res judicata*. Reliance has also been placed upon ***Vallabh Das vs. Madan Lal & Ors.:*** (1970) 1 SCC 761 and ***Infonox Software Pvt. Ltd. Vs. R.K. Dubey:*** 2017 SCC Online Delhi 7194. Thus, according to him, the filing of the new petition is unmistakably permissible in law and that there was no legal impediment and, therefore, the learned trial court was fully justified in dismissing the application. It has also been contended that the present appeal is not maintainable.

13. Order XXIII Rule 1 CPC reads as under: -

> *"Withdrawal of suit or abandonment of part of claim- (1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:*
>
> *Provided that where the plaintiff is a minor or other person to whom the provisions contained in Rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.*
>
> *(2)…….*
>
> *(3) Where the Court is satisfied,—*
>
> *(a) that a suit must fail by reason of some formal defect, or*
>
> *(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a*

fresh suit in respect of the subject-matter of such suit or such part of the claim.

(4) Where the plaintiff—

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3), he shall be liable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim."

14. The record of the previous petition shows that the previous petition was also filed on the ground of cruelty i.e. under Section 13 (1)(ia) of HMA. When the case was at the stage of petitioner's evidence, a statement was made by the petitioner seeking to withdraw the petition. In view of the statement, the petition was dismissed as withdrawn. It will be worthwhile to extract the statement made by him in this regard on 07.04.2016 which reads as under:-

"Statement of petitioner Sh. Ankit Jain S/o Sh. Narender Kumar Jain aged about 31 years R/o 136D, Kamla Nagar, Delhi-110007.

On SA

I am making this statement voluntarily without any force, coercion or undue influence. Without prejudice to my rights, I may be permitted to withdraw the present petition which is u/s 13(1)(ia) of HMA. The petition be dismissed as withdrawn. I undertake to remain bound by my statement."

15. Interestingly, in the present petition, the petitioner has though made a reference about such withdrawal of his previous petition but he has contended that he had to withdraw the same as he was fed up of legal battles. This averment is not substantiated by his above statement, whereby he had withdrawn the previous petition.

16. It is quite manifest from the trial court record of the previously instituted petition that the respondent herein had not sought withdrawal on account of any formal or technical defect. He also did not seek any permission from the Court to institute a fresh petition on the same cause of action. There was not even any application filed seeking leave to institute a fresh Petition. Thus, noticeably it is a case where the respondent had voluntarily abandoned the previous suit altogether and in such a situation, he is automatically precluded from instituting any fresh petition in respect of the same cause of action.

17. The principle of *beneficium non datur* i.e. 'law confers upon a man no rights or benefits which he does not desire' would squarely apply. Said principle is primarily based on public policy though it may not be, strictly speaking, akin to principle of *res judicata,* simply for the reason that the issues in the previously instituted suit were never heard and finally decided by any Court. Nonetheless, the spirit and objective can be derived therefrom.

18. Distinction between "issue estoppel" and "res judicata" has been highlighted by Supreme Court in ***Bhanu Kumar Jain v. Archana Kumar***: (2005) 1 SCC 787 by observing that *res judicata*

debars a court from exercising its jurisdiction to determine the lis if it has attained finality between the parties whereas the doctrine *issue estoppel* is invoked against the party. If such an issue is decided against him, he would be estopped from raising the same in the latter proceeding. The doctrine of *res judicata* creates a different kind of estoppel viz. estoppel by accord. It also elaborated about doctrine of *"cause of action estoppel"* by holding that *'cause of action estoppel'* arises where in two different proceedings identical issues are raised, in which event, the latter proceedings between the same parties shall be dealt with similarly as was done in the previous proceedings. In such an event, the bar is absolute in relation to all points decided save and except allegation of fraud and collusion.

19. Supreme Court in, ***Hope Plantations Ltd. v. Taluk Land Board*****:** (1999) 5 SCC 590, also observed as under:-

> *"26. It is settled law that the principles of estoppel and res judicata are based on public policy and justice. Doctrine of res judicata is often treated as a branch of the law of estoppel though these two doctrines differ in some essential particulars. Rule of res judicata prevents the parties to a judicial determination from litigating the same question over again even though the determination may even be demonstratedly wrong. When the proceedings have attained finality, parties are bound by the judgment and are estopped from questioning it. They cannot litigate again on the same cause of action nor can they litigate any issue which was necessary for decision in the earlier litigation. These two aspects are "cause of action estoppel" and "issue estoppel". These two terms are of common law origin. Again, once an issue has been*

> *finally determined, parties cannot subsequently in the same suit advance arguments or adduce further evidence directed to showing that the issue was wrongly determined. Their only remedy is to approach the higher forum if available. The determination of the issue between the parties gives rise to, as noted above, an issue estoppel. It operates in any subsequent proceedings in the same suit in which the issue had been determined. It also operates in subsequent suits between the same parties in which the same issue arises. Section 11 of the Code of Civil Procedure contains provisions of res judicata but these are not exhaustive of the general doctrine of res judicata. Legal principles of estoppel and res judicata are equally applicable in proceedings before administrative authorities as they are based on public policy and justice."*

20. Taking note of the above and provision contained under Order XXIX Rule 1(4), in case of abandonment of any claim or withdrawal without permission to file afresh, the concerned party is altogether estopped from instituting any fresh suit in respect of same subject matter.

21. We may also add here that cause of action means a cause which gives occasion for and forms the foundation of the suit. If that cause of action enables a person to ask for 'a larger and wider relief" than that to which he limits his claim, he cannot afterwards seek to recover even the balance by independent proceedings in view of Order 2 Rule 2 CPC.

22. Comparison of the instances of cruelty which had been alleged by the respondent in his previous petition as well as in his new

petition clearly shows that the instances of the cruelty remain virtually the same and similar in both the petitions, albeit the manner of expression and choice of words seem little different. Reference be made to para 5(ii) to 5(xii) of old petition and para 6(a) to 6(m) of new petition. The following instances of cruelty, attributed to appellant herein, are found to be there in both these petitions:-

(a) improper behaviour;

(b) sense of dissatisfaction;

(c) frivolous demand of separate accommodation;

(d) showing least interest in doing household work;

(e) making regular monetary demands

(f) making mockery of financial status of her in-laws

(g) having a spendthrift nature;

(h) leaving the matrimonial house, uninformed;

(i) use of offensive language by her father;

(j) threat of false implication in criminal matters by her.

23. In the previous petition, respondent had also made reference to a meeting between the parties which took place on 17.11.2012 and continued till wee hours of morning of 18.11.2012. It was also mentioned that the petitioner and his family members were in shock as when they were away from their house, the respondent (appellant herein) along with her parents and several other persons took possession of their flat situated at Sector 18-B, New Delhi 78. It was also mentioned that the police was also informed about the aforesaid incident of criminal trespass. However, the local police, instead of

taking any action against them for the aforesaid act of criminal house trespass, rather started threatening respondent herein and his family members and, therefore it was averred in the previous petition that his aforesaid property was required to be saved by granting an injunction in their favour.

24. Be that as it may, a careful perusal of the averments made in the new petition would clearly indicate that all the aforesaid incidents of cruelty have been mentioned by the respondent in para 6(a) to 6(m) and, therefore, as regards the above instances of cruelty, which are common in both the matters, he stands precluded from seeking divorce on the same cause of action as by legal implication and his own statement, he had voluntarily and consciously foregone and abandoned those.

25. The precedents cited by respondent are clearly distinguishable. In ***Vallabh Das vs. Madan Lal & Ors***.(supra), the situation was altogether different as the first suit was seeking to enforce his right to partition and separate possession whereas the subsequent suit was for possession of the suit property from a trespasser on the basis of title. In both the suits, the factum and validity of adoption of one Dr. Madan Lal had also come for decision but it was observed that such adoption was not the cause of action. It was thus held that mere identity of some issues in the two suits did not bring about an identity of the subject matter in the two suits.

26. Similarly, in ***Infonox Software Pvt. Ltd. Vs. R.K. Dubey*** (supra), the subject matters of the two suits were different. The first suit was filed seeking decree of declaration regarding one resolution dated 18.10.2009 and also mandatory injunction restraining the opposite side from holding extraordinary general meeting proposed to be held on 27.10.2009. In the second suit, relief was sought that the resolution passed in extraordinary general meeting be declared null and void. Besides the above, damages and compensation were also sought. It was in that peculiar factual matrix that it was observed that the two suits were different and, therefore, Order XXIII Rule 1(4) CPC was held inapplicable.

27. We may also note that after the withdrawal of the earlier petition, parties did not live together or resume their matrimonial relationship. They continued to remain separate. In that light we may examine the alleged fresh instances of cruelty referred by him in para 6(n) which read as under:-

> *"(n) That the act of cruelty by the Respondent does not consist of a single isolated act but a series of acts since their time of marriage till present day in the following manner:-*
>
> *i On 08.02.2013 the Respondent has lodged a frivolous complaint under Section 498-A IPC in the CAW Cell against the Petitioner and his family members to abuse the process of law. Irresponsible insinuations and allegations were made in the said complaint which led to further strains that developed in the marital relationship of the Petitioner and the Respondent. The family of the petitioner was harassed time to time by the Police*

regarding the said false complaint causing trouble in living a normal and respectful life in civil society.

ii That the Respondent also filed a frivolous and vexatious complaint under Domestic Violence Act against the Petitioner and his family. The act of Respondent to irresponsibly level false allegations against the Petitioner and his family members amounts to cruelty.

iii The Respondent also filed a frivolous and vexatious complaint under Section 125 of Cr.P.C. merely to harass the Petitioner. The Petitioner has always provided the Respondent a comfortable life. It is only to inflict hostility on the Petitioner that the Respondent has dragged him into court for unnecessary litigation and this amounts to cruelty.

iv. The Respondent has been filing one application after another in the abovementioned cases only to harass the Petitioner.

a. The Dwarka flat is mortgaged with the LIC Housing Finance and there is outstanding of Rs. 32 Lakhs for which the Petitioner, his mother and his brother are paying EMI. The Petitioner applied for refinancing of home loan from ICICI Bank in the 2nd week of December. The Petitioner opted for refinance as the rate of interest of the loan of ICICI bank was lower than LIC Housing Finance. The Respondent filed a frivolous application in the court of MM, Dwarka where the Domestic Violence case is pending and obtained stay order from the court vide order 24.12.2014 restraining the Petitioner and the family members from transferring/alienating or creating any 3rd party interest regarding the Dwarka flat and as such the refinancing could not be processed, creating financial problems for the Petitioner. This act of the Respondent to move a frivolous complaint

to intentionally cause difficulties in the life of the Petitioner also amounts of cruelty.

b. *On 14.12.2016, the mother, sister in law and one-year old nephew of the Petitioner went to the Dwarka flat where the Respondent is solely residing. They were not allowed to enter the house and the Respondent hurled abuses at them. In order to play the victim, the Respondent moved a frivolous and vexatious application in the court of MM, Delhi where the Domestic Violence case is pending and levelled false allegations against the old mother and the sister-in-law of the Petitioner that they threatened the Respondent and obtained a stay order from the court dated 17.12.2016 restraining the Petitioner from entering the house. This act of the Respondent to level false allegations against the family members of the Petitioner amounts to cruelty.*

c. *The Petitioner has become unemployed since 7.12.2018 as the company in which he was previously employed in (Punj Lloyd) is undergoing bankruptcy proceedings. Therefore, the Petitioner resigned from the company. Nevertheless, to cause the Petitioner difficulties even financially, the Respondent had moved an application in the court of MM, Delhi where the Domestic Violence case is pending, to enhance the maintenance order. The application of the Respondent was dismissed on the ground that the Petitioner is unemployed and cannot provide an unexceptionally high maintenance to the Respondent. However, the Respondent still preferred an appeal to drag the Petitioner into vexatious litigation. This act of the Respondent to compel the Petitioner to provide a high sum of maintenance while he is unemployed also amounts to cruelty.*

> *v. The Respondent had moved several Right To Information (RTI) applications with different departments like MCD to seek various informations about financial status like properties and business of the Petitioner and his family.*
>
> *vi. The Respondent has been disrespectful and abusive behaviour towards the Petitioner and his family and her conduct caused a great mental tension and danger to health, life, body and mental welfare to the Petitioner. In these circumstances the Petitioner is entitled for decree of divorce on the ground of cruelty."*

28. Merely because appellant had taken recourse to law by initiating legal action before a court of law, it would not amount to cruelty. Taking recourse to law, cannot be, by any stretch of imagination, labeled as an instance of cruelty. Moreover there is no finding by any Court which may even remotely indicate that such action was frivolous or vexatious or that it was abuse of process of law. If appellant is to be believed, she did not even pursue her complaint given under section 498A IPC.

29. In so far as the incident dated 14.12.2016 is concerned, it is also of no significance. According to respondent, his family members were not allowed to enter Dwarka flat where the appellant was residing. Appellant had merely filed one application before the concerned Magisterial Court where her complaint under Protection of Woman from Domestic Violence Act, 2005 was pending and obtained a stay order from the Court on 17.12.2016 seeking a restraint on the respondent herein from entering her house. Such act cannot be

labeled as an act of cruelty as she had merely taken recourse to law. Moreover, as per appellant, respondent never ever challenged said order. Further, merely because the respondent had become unemployed after 7th December, 2018 would also not amount to cruelty.

30. Parties are, admittedly, living separately since October 2012.

31. It is manifestly evident that broad instances of cruelty remain the same and since the respondent, of his own volition, chose not to pursue his previous petition, which was already at the stage of trial and since the claim in the aforesaid petition was abandoned by him unconditionally, he cannot now seek divorce on the same grounds.

32. A careful perusal of all the grounds taken in the new petition would, as already noted, clearly suggest that his petition is based on the same cause of action. The only additional ground taken is that Appellant took recourse to law. Appellant had to take recourse to law as the Respondent and his family wanted to enter into the residential house where the Appellant was residing. Mere taking recourse to law by filling petitions/ applications before court of law, by his estranged spouse, would not, in itself, give him any fresh ground to file a new petition.

33. Respondent herein has also challenged the maintainability of the present appeal as well. According to him, as per Section 19(1) of the Family Courts Act, 1984, no appeal is maintainable against an

interlocutory order passed by the Family Court. Section 19 of the Family Court Act reads as under:-

> *"19. Appeal.—(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.*
>
> *(2) No appeal shall lie from a decree or order passed by the Family Court with the consent of the parties [or from an order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974): Provided that nothing in this sub-section shall apply to any appeal pending before a High Court or any order passed under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) before the commencement of the Family Courts (Amendment) Act, 1991.*
>
> *(3) Every appeal under this section shall be preferred within a period of thirty days from the date of the judgment or order of a Family Court.*
>
> *(4) The High Court may, of its own motion or otherwise, call for and examine the record of any proceeding in which the Family Court situate within its jurisdiction passed an order under Chapter IX of the Code of Criminal Procedure, 1973 (2 of 1974) for the purpose of satisfying itself as to the correctness, legality or propriety of the order, not being an interlocutory order, and as to the regularity of such proceeding.*
>
> *(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court."*

34. Respondent has also relied upon ***Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nanda*****:** (2006) 5 SCC 399 and ***Anup Kumar vs. Reena:*** 2019 SCC Online MP 7138. Said Judgments do not further the case of the Respondent. Instead of advancing the case

of the respondent, these rather go on to indicate that in the present context, the impugned order is not an interlocutory order at all.

35. In ***Midnapore Peoples' Coop. Bank Ltd. v. Chunilal Nanda*** (supra), the question was whether a decision given by the High Court, in a contempt proceeding, either by an interlocutory order or final judgment, was appealable under Section 19 of the Contempt of Courts Act, 1971 or not. It was in that context that the Supreme Court had discussed the import of 'interlocutory order.'

36. Referring to ***Shah Babulal Khimji v. Jayaben D. Kania AIR****: 1981 SC 1786*, the Supreme Court considered the scope of clause 15 of the Letters Patent wherein it was observed that there may be interlocutory orders which possess the characteristics and trappings of finality in that, the orders may adversely affect a valuable right of the party or decide an important aspect of the trial in an ancillary proceeding and which affect vital and valuable rights of the parties and which work serious injustice to the party concerned and that the interlocutory order in order to be a judgment must contain the traits and trappings of finality either when the order decides the questions in controversy in an ancillary proceeding or in the suit itself or in a part of the proceedings.

37. In ***Anup Kumar vs. Reena*** (supra), it was observed that an order deciding maintenance based on application under section 24 of the Hindu Marriage Act was not an adjudication of any valuable right of the parties in perpetuity for all times to come and, therefore, it

cannot be said that any such order under section 24 of HMA could finally decide any issue which materially and directly affects the final decision in the main case or finally decide a collateral issue which is not the subject matter of the main case, for all times to come leaving the affected party remedy-less in perpetuity.

38. Here, it is obvious that the order in question cannot be labelled as interim or temporary or interlocutory order. The issue raised by the appellant is a legal one, indicating abuse of process of law by her estranged spouse, which goes to the root of the matter. Needless to say, if such issue is eventually decided in favour of the appellant herein, the entire petition as such becomes liable to be dismissed. Viewed thus, the appeal is maintainable as the issue raised by the appellant has the potential to decide the entire controversy and thus possesses the characteristics and trappings of final adjudication, which also affects vital and valuable rights of the parties.

39. Respondent has also asserted that the condonation of the previous acts of cruelty must fall strictly within the framework of Section 23 (1)(b) of HMA. We may reiterate that the condonation in the present situation is by way of legal implication as for the reasons best known to the respondent herein, he had unconditionally abandoned his claim in the previous petition seeking divorce on the ground of cruelty. He did not even seek any liberty to file a petition afresh and in such a situation, it is not legally permissible for him to re-agitate those grounds all over again or file a petition afresh on the

same cause of action. In the present peculiar factual matrix, therefore, unconditional abandonment of the claim in the previous petition would clearly constitute condonation and, therefore, reliance placed on ***N.G. Dastane vs. S. Dastane:*** AIR 1975 SC 1534 is misplaced.

40. Respondent has also relied upon judgment of Supreme Court in ***Rakesh Raman vs. Kavita***: 2023 SCC Online SC 497. It is contended by him that in the said case also, the parties had remained together for only 8 months and there were bitter allegations against each other by them and the legal battle was stretched for a period of more than 11 years and there was no chance of reconciliation of marriage and the Supreme Court went on to hold that in the aforesaid situation, it could be fairly concluded that the matrimonial bond was beyond repair. It was observed that the marriage therein had become a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, did not serve the sanctity of marriage; on the contrary, it showed scant regard for the feelings and emotions of the parties. Holding that, it may, in such like situations, lead to mental cruelty, the divorce was granted. Those observations have come in context of peculiar facts of said case and after full-fledged trial and, therefore, the respondent cannot draw any parallel here.

41. Irretrievable breakdown of marriage is not a ground in the Hindu Marriage Act for grant of divorce. The Supreme Court, in ***Shilpa Sailesh vs. Varun Sreenivasan:*** 2023 SCC OnLine SC 544, has held that in exercise of power under Article 142(1) of

the Constitution of India, it has the discretion to dissolve the marriage on the ground of its irretrievable breakdown, supplementing that such discretionary power is to be exercised to do 'complete justice' to the parties, wherein it is satisfied that the facts established show that the marriage has completely failed and there is no possibility that the parties will cohabit together, and continuation of the formal legal relationship is unjustified. However, such a power akin to Article 142 of the Constitution of India has not been conferred on the High Courts.

42. In view of the above, it is evident that the new petition is based on the same cause of action and, therefore, its institution is barred under Order XXIII Rule 1(4) CPC as also on the principles of issue estoppel and cause of action estoppel. No new instance of cruelty has been cited in the subject petition and as noticed hereinabove, merely because the appellant had knocked the doors of the Court for redressal of her grouse and grievances, it would not imply that she had inflicted any cruelty upon her husband. Resultantly, the application moved by the appellant under section 151 CPC deserves to be allowed.

43. We accordingly allow the appeal and as a necessary corollary, HMA Petition No. 1367/2019 stands dismissed.

44. Copy of the judgment be given *dasti* under the signatures of the Court Master.

MANOJ JAIN, J

SANJEEV SACHDEVA, J

JULY 27, 2023
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