



\$~42

\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

*Date of decision: 16.07.2024*

+ **MAT.APP.(F.C.) 219/2024 & CM 39354/2024, CM 39355/2024**

.....Appellant

Through: Mr Prateek Goswami, Mr Dhiraj Goswami and Mr Shashank Goswami, Advocates.

versus

.....Respondent

Through: None.

**CORAM:**

**HON'BLE MR. JUSTICE RAJIV SHAKDHER**

**HON'BLE MR. JUSTICE AMIT BANSAL**

**[Physical Hearing/Hybrid Hearing (as per request)]**

**RAJIV SHAKDHER, J. (ORAL)**

1. This appeal is directed against the judgment and order dated 03.06.2024 passed by Mr Manish Khurana, learned Judge, Family Court, East District, Karkardooma Courts, Delhi.
2. The appellant/wife is aggrieved by the fact that the application moved by her under Order VII Rule 11 of the Code of Civil Procedure, 1908 [in short, "CPC"] was dismissed.
3. Counsel for the appellant/wife submits that the divorce action instituted by the respondent/husband against the appellant/wife was pivoted on three grounds, i.e., cruelty, adultery, and desertion.
4. It is the submission of the counsel for the appellant/wife that in so far



as the desertion is concerned, the pre-requisites of Section 13(1)(ib) of the Hindu Marriage Act, 1955 [in short, “HMA”] were not fulfilled. In other words, it is emphasized that divorce on the ground of desertion is available only if the appellant/wife would have deserted the respondent/husband for not less than two (2) years immediately preceding the presentation of the petition.

5. It is, thus, asserted by the counsel for the appellant/wife that since the appellant/wife had lived and cohabited with the respondent/husband till July 2022 and the petition was filed in and about 25.05.2023, the ground under Section 13(1)(ib) of the HMA was not available to the respondent/husband to seek a divorce.

6. In this context, we may note that in so far as the respondent/husband is concerned, he alleges that the appellant/wife had deserted him since November 2021.

7. As far as adultery is concerned, counsel for the appellant/wife says that there is a contradiction in the stand taken by the respondent/husband and therefore, even this ground is not available for grant of divorce.

8. Besides this, it is submitted that since the person with whom the appellant/wife, allegedly, had an adulterous relationship was not arrayed as a party, the plaint was, any which way, liable to be rejected.

9. Notably, *qua* desertion, the learned Family Court Judge has held that the respondent/husband would need to prove the factum of alleged desertion from the date the respondent/husband claims the appellant/wife, purportedly, deserted him.

9.1 Although, *prima facie*, the learned counsel for the appellant/wife is right in contending that even if November 2021 is taken as the date of



desertion, the ground will still not be available to the respondent/husband as the divorce petition was filed only in May 2023, it cannot lead to rejection of the divorce petition as the ground concerning cruelty, at this stage, seems viable.

10. As regards the non-joinder of the alleged adulterer (third party), the learned Family Court Judge has concluded that the divorce petition cannot be rejected only for the reason that the person with whom the appellant/wife was, allegedly, having an adulterous relationship was not impleaded as a party as the divorce petition.

10.1 In arriving at his conclusion that the application preferred under Order VII Rule 11 of the CPC was not sustainable, the learned Family Court Judge reasoned that the divorce petition could not be rejected merely because a part of the cause of action was not viable in law if the Court otherwise had jurisdiction to entertain the action.

11. In our view, even though the conclusion reached by the Family Court Judge on this score is correct, i.e., that the divorce petition cannot be rejected in part, arraying a third party to a divorce petition is neither proper nor necessary. A necessary party is one in whose absence no effective decree can be passed, whereas, a proper party enables complete and final adjudication of issues involved in a given *lis*.

11.1 The alleged adulterer is, to our minds, not a necessary party as a decree can be passed in his/her absence. Likewise, the adulterer is not a proper party since the issue concerning adultery can be adjudicated without making the adulterer a party to the cause. Proof of adultery need not be conflated with who should be arrayed as a party to a divorce action.

11.2 A divorce action is a *lis* centered around the couple who have entered



into matrimony. A third party [who does not claim the status of a spouse] has no locus to intervene or seek impleadment in such a cause. [Also see *Manjul Joshi v. Bhavna Khurana*, 2024: DHC:4170-DB].

12. The alleged adulterer (third party) can either be summoned as a witness or other evidence can be placed before the Family Court to prove adultery. Therefore, on this count, we are not in agreement with the counsel for the appellant/wife.

13. Likewise, contradictory pleadings concerning the accusation of adultery vis-à-vis the appellant/wife, if taken on a standalone basis, cannot lead to the divorce petition being dismissed summarily.

14. Significantly, counsel for the appellant/wife does not dispute, as noticed above, the fact that there are assertions in the divorce petition instituted by the respondent/husband concerning cruelty.

15. Thus, given the fact that allegations concerning cruelty are embedded in the divorce action, the petition cannot be rejected in a piecemeal manner upon an application being moved under Order VII Rule 11 of CPC. This principle has been reiterated by the Supreme Court in *Geetha v. Nanjundaswamy*, 2023 SCC OnLine SC 1407. For convenience, the relevant part of the judgment is extracted hereafter:

*“12. There is yet another reason why the judgment of the High Court is not sustainable. **In an application under Order VII Rule 11, CPC a plaint cannot be rejected in part.** This principle is well established and has been continuously followed since the 1936 decision in *Maqsd Ahmad v. Mathra Datt & Co.* This principle is also explained in a recent decision of this Court in *Sejal Glass Ltd. v. Navilan Merchants (P) Ltd.*, which was again followed in *Madhav Prasad Aggarwal v. Axis Bank Ltd.*<sup>6</sup> The relevant portion of *Madhav Prasad (supra)* is extracted hereinunder:*

*“10. We do not deem it necessary to elaborate on all other arguments as we are inclined to accept the objection of the appellant(s) that the relief of rejection of plaint in exercise of powers under Order 7 Rule 11(d) CPC cannot be pursued only in respect of one of the*



defendant(s). **In other words, the plaint has to be rejected as a whole or not at all, in exercise of power under Order 7 Rule 11(d) CPC.** Indeed, the learned Single Judge rejected this objection raised by the appellant(s) by relying on the decision of the Division Bench of the same High Court. However, we find that the decision of this Court in *Sejal Glass Ltd. [Sejal Glass Ltd. v. Navilan Merchants (P) Ltd., (2018) 11 SCC 780 : (2018) 5 SCC (Civ) 256]* is directly on the point. In that case, an application was filed by the defendant(s) under Order 7 Rule 11(d) CPC stating that the plaint disclosed no cause of action. The civil court held that the plaint is to be bifurcated as it did not disclose any cause of action against the Director's Defendant(s) 2 to 4 therein. On that basis, the High Court had opined that the suit can continue against Defendant 1 company alone. The question considered by this Court was whether such a course is open to the civil court in exercise of powers under Order 7 Rule 11(d) CPC. The Court answered the said question in the negative by adverting to several decisions on the point which had consistently held that the plaint can either be rejected as a whole or not at all. **The Court held that it is not permissible to reject plaint qua any particular portion of a plaint including against some of the defendant(s) and continue the same against the others. In no uncertain terms the Court has held that if the plaint survives against certain defendant(s) and/or properties, Order 7 Rule 11(d) CPC will have no application at all, and the suit as a whole must then proceed to trial.**

...

12. Indubitably, the plaint can and must be rejected in exercise of powers under Order 7 Rule 11(d) CPC on account of non-compliance with mandatory requirements or being replete with any institutional deficiency at the time of presentation of the plaint, ascribable to clauses (a) to (f) of Rule 11 of Order 7 CPC. **In other words, the plaint as presented must proceed as a whole or can be rejected as a whole but not in part...**”  
(emphasis supplied)

13. In view of the above referred principle, we have no hesitation in holding that the High Court committed an error in rejecting the plaint in part with respect to Schedule-A property and permitting the Plaintiffs to prosecute the case only with respect to Schedule-B property. This approach while considering an application under Order VII Rule 11, CPC is impermissible. We, therefore, set aside the judgment and order of the High Court even on this ground.”

16. For the aforesaid reasons, we find no merit in the appeal.
17. The appeal is, accordingly, dismissed.
18. Pending applications shall stand closed.

**RAJIV SHAKDHER, J**

**AMIT BANSAL, J**

**JULY 16, 2024/rt**