

33. So far as submission of learned Standing Counsel that respondent No. 3 acted in compliance of order passed by Additional Commissioner and Additional Commissioner has not been made party in the present petition, the petitioner is directed to implead the Additional Commissioner (Administration) Azamgarh Mandal, Azamgarh, who has passed the order dated 01.04.2021 and Additional Commissioner (Judicial) who has passed the order dated 03.02.2022 as party respondent.

34. The newly impleaded respondent Nos. 7 and 8 shall also file their personal affidavit explaining how such orders were passed by them by the next date fixed.

35. Since the petitioner has been illegally dispossessed, the respondents are directed to restore the possession of the petitioner over the shop/ house in dispute within a period of ten days from today.

36. Learned Standing Counsel is directed to communicate this order to respondent No. 3 as well as respondent Nos. 7 and 8 for necessary compliance.

37. Office to supply a copy of this order free of cost to learned Standing Counsel for necessary compliance.

38. List this case as fresh on 26.11.2024 at Serial No.1.

(2024) 11 ILRA 508
APPELLATE JURISDICTION
CIVIL SIDE
DATED: LUCKNOW 14.11.2024

BEFORE

THE HON'BLE RAJAN ROY, J.
THE HON'BLE OM PRAKASH SHUKLA, J.

First Appeal No. 122 of 2023

Dinesh Verma @ Dinesh **...Appellant**
Versus
Smt. Malti Verma @ Malti Devi
...Respondent

Counsel for the Appellant:
Mohd. Yasin

Counsel for the Respondent:
Rakesh Kumar, Arun Kumar

(A) Family Law - Divorce proceedings - Hindu Marriage Act, 1955 - Sections 13 - grounds for divorce, Section 19 (1) - Appeals, Section 28 - Code of Civil Procedure, 1908 - Section 11 - Res Judicata, Order II Rule 2 - Suit to include the whole claim, Domestic Violence Act, 2005 - Section 12 - relief sought by the aggrieved woman - Principle of res judicata - A fresh and subsequent cause of action permits filing a second matrimonial case even when an earlier case was dismissed on similar grounds - Second matrimonial case is not barred if it is based on a new cause of action.(Para - 16,17)

(B) Word or Phrases - Cause of action - a bundle of facts constituting the right of a party which he or she has to establish in order to obtain a relief from a Court - same has to be tested on the anvil of evidence led by the parties.(Para 16)

First matrimonial suit was by appellant - for dissolution of marriage with respondent - dissolved on the ground of desertion - Appellant filed second divorce petition - after first petition was dismissed - second case alleged subsequent acts of cruelty by respondent - based on a subsequent and fresh cause of action - issue - maintainability of second divorce petition - applicability of principle of res judicata. (Paras 3, 9, 10,16)

HELD: - Second matrimonial case for divorce on ground of cruelty and desertion not hit by principle of *res judicata* as it is based on new and subsequent cause of action. Second divorce petition was maintainable. Impugned judgment was set aside. Matter was remitted to the Family Court for fresh consideration. (Para - 17, 18)

Appeal allowed. (E-7)

List of Cases cited:

St. of Maha. & anr. Vs M/s National Construction Comp., Bom. & anr., AIR 1996 SC 2367

(Delivered by Hon'ble Om Prakash Shukla, J.)

(1) Heard Shri Mohd. Yasin, learned Counsel representing the appellant-husband and Shri Rakesh Kumar, learned Counsel representing the respondent-wife.

(2) This appeal under Section 19 (1) of the Family Court Act, 1984 read with Section 28 of the Hindu Marriage Act, 1955 has been filed by the appellant against the judgment and decree dated 07.04.2023 passed by the Principal Judge, Family Court, Ambedkar Nagar in Matrimonial Case No. 287 of 2021 : *Dinesh Vs. Malti Devi*, whereby the learned Family Court has dismissed the matrimonial case filed by the appellant for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955 on the ground of being barred by the principle of *res judicata*.

(3) The factual matrix of the case, along with the record of multiple legal proceedings between the parties, is summarised as under :-

A) The appellant is the husband and the respondent is the wife. Their marriage was solemnized on 07.06.1993 in accordance with Hindu Rites and Customs. But it appears that there were problems from

the very inception for which appellant blames not only the respondent but her family members too.

B) It is on 26.04.2005 that the appellant filed a Matrimonial Case No. 93 of 2005 : *Dinesh Vs. Malti Devi*, under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as '**First Matrimonial Case**') for dissolution of marriage against the respondent mainly on the ground of desertion. This matrimonial case was, however, dismissed by the Family Court, Ambedkar Nagar vide order dated 28.02.2013 predicated on a reasoning that desertion on the part of the respondent was not proved by the appellant.

C) Feeling aggrieved by the said judgment and decree dated 28.02.2013, the husband/appellant preferred First Appeal No. 42 of 2013 : *Dinesh Vs. Smt. Malti Devi* before this Court. A learned Single Judge of this Court, after appraising the judgment and decree dated 28.02.2013 and the evidence on record, returned a finding that though the suit filed by the appellant itself was not maintainable as per the averment made therein inasmuch as the appellant himself has averred in the said suit that the respondent/wife had refused to live with the appellant on 25.04.2005 and admittedly the said suit was presented on 26.04.2005, meaning thereby that the suit was presented within two years, which is not as per the provision of Section 13 of the Hindu Marriage Act, 1955, although the Family Court had not dismissed the suit on the aforesaid ground but on another ground that desertion on the part of the respondent was not proved by the appellant, the learned Single Judge of this Court dismissed the aforesaid first appeal vide judgment and order dated 11.10.2017 on the said ground of non-maintainability of the suit.

D) The appellant, almost after two and half years from the date of the

aforesaid judgment and order dated 11.10.2017, again filed a Matrimonial Case No. 287 of 2021 for dissolution of marriage under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as ‘**Second Matrimonial Case**’). The appellant, besides levelling almost identical allegations as were made in the earlier case, also alleged in this case that the wife/respondent had filed a case under Section 12 of the Domestic Violence Act, in which Judicial Magistrate, vide order dated 13.06.2012, gave a slew of directions, including payment of lump sum amount of Rs.20,000/- as litigation cost, Rs.2000/- per month towards maintenance and a right to be provided accommodation in favour of the respondent-wife. According to the appellant, he had complied with the aforesaid order dated 13.06.2012 and in compliance therewith had also provided to the respondent a room in his house, wherein, while living in the said room, cruelty has been inflicted by the respondent on 04.09.2020, at about 12:00 noon. It was stated by the appellant that on the said fateful day and time, when mother of the appellant was alone, the respondent and her brother-in-law Narendra Verma and his brother Phool Chanda came and without any rhyme or reason, hurled abuses against appellant’s mother and sister and also beat them up with kicks and fists and also broke various household items. According to the appellant, when alarm was raised by his mother and sister, villagers rushed to the place of occurrence, whereupon, all the assailants, including the respondent ran away using Vehicle No. U.P. 45-W-5556. This incident was reported by the appellant’s mother at police station Aliganj, upon which N.C.R. No. 20 of 2020, under Sections 323, 427 and 504 I.P.C. was lodged on 08.09.2020 at Police Station Aliganj. Thus, it has been alleged

by the appellant that cause of instituting the second suit arose subsequent to the dismissal of the earlier suit/appeal. It has also been stated that appellant and respondent are residing separately in the same premises in village Hithuri, Daudpur, district Ambedkar Nagar.

E) In the second matrimonial case, notice was issued to the wife/respondent. In response thereof, the wife/respondent appeared before the Family Court and filed written statement, wherein while reiterating the factum of first matrimonial case of divorce filed by the appellant, has denied the allegations made in the second matrimonial case regarding cruelty, however, it has been admitted by the respondent/wife that in pursuance to the order dated 13.06.2012 passed under Section 19 of the Domestic Violence Act, she is residing in a two room set accommodation in her matrimonial house. It was also stated that since the first matrimonial case filed by her husband/appellant for dissolution of marriage was dismissed by the Family Court and the same was affirmed by the appellate Court, therefore, the second case filed by the appellant for dissolution of marriage was liable to be dismissed.

F) The record reveals that in the second matrimonial case filed by the appellant, wife/respondent filed an application under Section 24 of the Hindu Marriage Act, 1955, which was allowed by the Family Court vide order dated 17.12.2021 and the husband/appellant has been directed to pay Rs.500/- per appearance to his wife/respondent towards litigation expenditure, transportation and other expenditure. Thereafter, on 12.07.2022, following four issues were framed by the Family Court in the suit :-

1. Whether respondent is legally wedded to petitioner ?

2. Whether respondent has deserted the petitioner for more than last two years ?

3. Whether respondent has continuously treated the petitioner with cruelty ?

4. Whether petitioner is entitled to any relief ?”

G) Parties led evidence before the trial Court on the issues framed. In support of his case, appellant/husband examined himself as P.W.1 and his mother, namely, Smt. Prema, as P.W.2, whereas respondent/wife got her statement recorded as D.W.1 and her brother, namely, Phoolchand Verma as D.W.2.

H) The Family Court, instead of dealing with each issue referred hereinabove, considered the issue whether the second matrimonial case is barred by principles of *res judicata* or not ?.

I) On considering this issue, the learned Family Court has returned a finding that the plaintiff/appellant filed first matrimonial case against the defendant/respondent under Section 13 of the Hindu Marriage Act, 1955 for dissolution of marriage, which was dismissed by the Family Court and affirmed by the First Appellate Court and further the plaintiff has filed the second matrimonial case again against his wife, complaining about the selfsame facts ever since their marriage except that of a single incident which allegedly took place on 04.09.2020, which appears to be part of the same sequence of events which were involved in the first suit, hence the learned Family Court has returned a finding that the second matrimonial case was hit by Section 11 of Code of Civil Procedure and is barred by the principle of *res judicata*. Only on this ground, the Family Court has dismissed the second matrimonial case filed by the appellant under Section 13 of

the Hindu Marriage Act, 1955 vide judgment and decree dated 07.04.2023. It is this judgment and decree dated 07.04.2023, which has been challenged by the appellant/husband in the present first appeal.

(4) Shri Mohd. Yasin, learned Counsel representing the appellant has argued on the facts of the present case as narrated herein above and additionally he submitted that after lodging of the complaint at police station, an N.C.R. No. 20 of 2020, under Sections 323, 427, 504 I.P.C. was registered, wherein after due investigation, the police has also submitted a charge-sheet on 05.08.2021. Submission is that there was continuous harassment/cruelty by the wife/respondent and as such the appellant/husband was constrained to file the second matrimonial case for dissolution of marriage on the ground of cruelty and also desertion, hence the findings of the Family Court that the second matrimonial case filed by the appellant for divorce under Section 13 of the Hindu Marriage Act, 1955 is barred by the principle of *res judicata*, is unsustainable.

(5) Per contra, Shri Rakesh Kumar, learned Counsel representing the respondent/wife has argued that the second matrimonial case for divorce is a clear abuse of process of law and the principle of *res judicata* clearly applies to the case at hand since the appellant had filed the first matrimonial case for divorce on the ground of desertion and the same was dismissed and affirmed by this Court. It has also been argued by the learned counsel that the respondent/wife has also filed a case under Section 125 of Code of Criminal Procedure, which got dismissed for want of prosecution. Thereafter, the respondent/wife has filed a case under Domestic

Violence Act against her husband/appellant, which was allowed. The appellant's mother also lodged complaint against the respondent, which was registered as N.C.R. and the same is pending before the trial Court.

(6) The crux of the submission of the learned counsel was that once the grounds as pleaded in the first matrimonial case for divorce had already been rejected and the same was affirmed by the First Appellate Authority, the same could not be agitated afresh by way of the second matrimonial case for divorce. It has been asserted that facts and issues raised in the second matrimonial case were directly and substantially in issue in the earlier case, therefore, the subsequent case is barred by the principle of *res judicata*. It has also been submitted that the present case also does not disclose any cause of action and is, thus, not maintainable. Hence, the Family Court has rightly dismissed the second matrimonial case for divorce on the ground of *res judicata*.

(7) Having regard to the rival contentions of the learned Counsel for the parties and going through the evidence on record available before this Court in the present appeal as well as the impugned judgment and decree passed by the Family Court, this Court finds that the point for determination in this appeal firstly is as to whether the present divorce case i.e. Case No. 287 of 2021 is hit/barred by principle of *res judicata*, since the appellant had earlier filed a divorce petition and the same was dismissed and appeal against it was dismissed and suit was also dismissed albeit on grounds other than given by trial Court and, secondly, whether judgment of the Family Court is sustainable ?. If the answer is in the negative, then, the point for

determination would be as to whether the appellant is entitled to a decree of divorce on the ground of cruelty or desertion, as claimed.

(8) Appellant had filed first matrimonial suit, bearing No. 93 of 2005, seeking grant of a decree of divorce under Section 13 of the Hindu Marriage Act, 1955 on 26.04.2005, stating therein that he was married to the respondent on 07.06.1993 according to Hindu rites and customs. In para-2 of the first matrimonial suit, it was alleged that after marriage, the respondent came to live with the appellant but her behaviour towards the appellant and his family members was cruel and she was not able to perform household work due to some defect on his left hand. In paras 3 and 4, it was alleged that respondent did not co-operate in performing the household work and the respondent wanted to live separately with the appellant and when the appellant did not listen the respondent, then, she threatened to go to her parental house. In para-5 and 6, it was alleged that after great efforts respondent agreed to live with the appellant and in the meantime, he gave loan of Rs.50,000/- to the brother of the respondent, namely, Phool Chandra and after paying this amount, the respondent came to matrimonial house but her behaviour was again cruel. In para-7, it was alleged that after about two months, the respondent again went to parental home. In para 10 and 11, it was alleged that inspite of several efforts made by the appellant, she did not come back and on 25.04.2005, the respondent refused to perform her marital obligation and refused to go for settlement. Thus, the cause of action shown in para-11 of the plaint was dated 25.04.2005 when respondent refused to lived with the appellant, whereas first matrimonial suit was presented on

26.4.2005 i.e. immediately after the cause of action accrued to the appellant on the ground of desertion i.e. within prescribed period of two years. Apparently, the suit seeking decree of divorce could have been presented only after expiry of two years from the actual date of desertion, however, the trial Court had not considered the first matrimonial suit for divorce on this ground but had returned a finding that desertion on the part of the respondent was not proved by the appellant. In this backdrop, the first matrimonial suit was dismissed by the Family Court vide judgment and order dated 28.02.2013. However, in First Appeal No. 42 of 2013 filed by the appellant against the judgment and order dated 28.02.2013, the learned Single Judge of this Court had considered the aforesaid ground i.e. the first matrimonial suit was filed by the appellant within the prescribed period of two years, which is contrary to the legal provision of Section 13 of the Act, 1955. Also while considering it, the learned Single Judge had returned a finding that evidence on record did not prove that the respondent had deserted the appellant and further the respondent had made allegation of cruel treatment and also demand of dowry on account of which she lived part. In this backdrop, the learned Single Judge dismissed the aforesaid appeal vide judgment and order dated 11.10.2017.

(9) On 15.07.2021 i.e. after about eight years from the date of dismissal of the first matrimonial suit, the appellant filed second matrimonial suit, bearing No. 287 of 2021, for grant of decree of divorce, reiterating the almost identical pleadings of first matrimonial suit in paras 1 to 10 in the second matrimonial suit, however, in para-11 to 24, different pleadings were made. In para 11, it was alleged that though on 26.04.2005, appellant had filed first

matrimonial case on 26.04.2005 under Section 13 of the Act, 1955 and before filing it, in order to not pay the amount of Rs.50000/- given by the appellant to the respondent's brother, namely, Phool Chandra, the respondent had lodged a F.I.R. on 17.03.2005 with concocted story. In para-15, it was alleged that the respondent had filed a case under Section 12 of the Domestic Violence Act in which Judicial Magistrate, vide order dated 13.06.2012, gave a slew of directions, including payment of lump sum amount of Rs.20,000/- as litigation cost, Rs.2000/- per months towards maintenance and a right to be provided accommodation in favour of the respondent-wife. Appellant had complied the aforesaid order dated 13.06.2012 and in compliance therewith, the appellant had also provided to the respondent a room in his house, wherein respondent is living. In para-16, it was alleged that while living in said accommodation, cruelty has been inflicted by the respondent on 04.09.2020 at about 12:00 noon. On this fateful day and time, when mother of the appellant was alone, the respondent and her brother-in-law Narendra Verma and his brother Phool Chandra came and without any rhyme or reason, hurled abuses against appellant's mother and sister and also beat them up with kicks and fists and also broke various household items. When alarm was raised by his mother and sister, villagers rushed to the place of occurrence, whereupon all the assailants, including the respondent ran away using Vehicle No. U.P. 45-W-5556. This incident was reported by the appellant's mother at police station Aliganj, upon which N.C.R. No. 20 of 2020, under Sections 323, 427 and 504 I.P.C. was lodged on 08.09.2020 at Police Station Aliganj. In para-19, appellant has alleged that since 2005, appellant and respondent

are residing separately and since then there is no cohabitation or relationship between them. In para-21, it was alleged that the cause of action for filing second matrimonial suit for divorce arose on 27.06.2021 when the respondent refused to give consent for divorce on mutual consent.

(10) Having regard to the aforesaid facts and circumstances of the case, what this Court find is that first matrimonial suit i.e. Suit No. 93 of 2005 was by the appellant for dissolution of marriage with the respondent. The marriage was sought to be dissolved on the ground of desertion in the first matrimonial suit, while in the second suit i.e., Divorce Case no. 287 of 2021 the marriage is sought to be dissolved between the same appellant and the respondent on the grounds of continuous cruelty and desertion.

(11) The principle of *re judicata* has been codified under Section 11 of the Code of Civil Procedure, which reads as follows:

"11. Res judicata.- No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

(12) The principle enunciated in Section 11 of Code of Civil Procedure provides that no Court should try any "suit" or "issue" in which the matter directly and substantially in issue has been directly and substantially decided in a formal suit. The

stress would be on the term "issue" used under Section 13 of the Hindu Marriage Act, 1955.

(13) Section 13 of the Hindu Marriage Act, 1955 provides for grant of divorce in certain cases. It enacts that any marriage solemnized whether before or after the commencement of the Act may be dissolved on a petition presented either by the husband or by the wife on any of the grounds specified therein. Clause (ia) of sub-section (1) of Section 13 of Hindu Marriage Act, 1955 declares that a decree of divorce may be passed by a Court on the ground that after the solemnization of marriage, the opposite party has treated the petitioner with cruelty

(14) From the bare reading of the above provision, it appears that the principles of *re judicata* under Section 11 of the Code of Civil Procedure is based on the rule of law that a ground shall not be fixed for one and the same cause. The only thing the Court has to see is that whether new suit is in fact founded upon a cause of action distinct from the foundation of the former suit.

(15) Even if the second suit under consideration would have been filed on some other ground, which was not a ground in the earlier suit for dissolution of marriage, yet, by virtue of application of Order II Rule 2 of the Code of Civil Procedure, he could not have succeeded because the new suit is in fact founded upon the same cause of action, as has been held by the Supreme Court in the case of **State of Maharashtra and Anr. Vs. M/s National Construction Company, Bombay and Anr.**, reported in AIR 1996 SC 2367. Paragraph 9 of the judgment reads as under :

".....Both the principle of *res judicata* and Rule 2 of Order 2 are based on the rule of law that a man shall not be twice vexed for one and the same cause. In the case of *Mohd. Khalil Khan v. Mahbub Ali Khan*, AIR 1949 PC at p.86, the Privy Council laid down the tests for determining whether Order 2 Rule 2 of the Code would apply in a particular situation. The first of these is, "whether the claim in the new suit is in the fact founded upon a cause of action distinct from that which was the foundation for the former suit." If the answer is in the affirmative, the rule will not apply. This decision has been subsequently affirmed by two decisions of this Court in *Kewal Singh v. Lajwanti*, AIR 1980 SC 161 at p.163: (1980) 1 SCC 290 and in *Inacio Martins's case* (1993) AIR SCW 2163 (*supra*)."

(16) In present case, apparently, the first matrimonial case for dissolution of marriage filed by the appellant under Section 13 of the Hindu Marriage Act, 1955 was filed on the grounds of cruelty and desertion. In para-11 of the first matrimonial suit, the appellant had stated that cause of action in filing first matrimonial suit accrued on 25.04.2005 when the respondent refused to perform her marital obligation and refused to go for settlement. Whereas in the second matrimonial suit i.e. Matrimonial Suit No. 287 of 2021, in para-21, the appellant has asserted that cause of action in filing the second matrimonial case arose on 27.06.2021 when the respondent finally refused for dissolution of marriage before the Court. Moreso, the second matrimonial suit is based on a subsequent and fresh cause of action relating to the infliction of cruelty and desertion on a subsequent date and as such the second divorce petition is very much maintainable and the principle

of *res judicata* does not apply. It has to be reminded that "cause of action" means a bundle of facts constituting the right of a party which he or she has to establish in order to obtain a relief from a Court and the same has to be tested on the anvil of evidence led by the parties. In the present case, there is no adjudication on the fresh/subsequent cause of action, which has been raised by the appellant in the second matrimonial case. No doubt, the appellant raised the ground of cruelty and desertion and filed the present/second case for dissolution of marriage, however, it is apparent from a plain reading of the second matrimonial case for divorce that the cause of action pleaded was different in the earlier suit and as such this Court does not find any legal impediment in maintainability of the second matrimonial case for divorce on the grounds of *res judicata*.

(17) In view of the aforesaid discussion, our decision on the point of determination in this appeal is that the second matrimonial case for divorce on ground of cruelty and desertion is not hit by the principle of *res judicata* as it is based on new and subsequent cause of action.

(18) Accordingly, the present appeal is allowed. The impugned judgment and decree dated 07.04.2023 is hereby set-aside. The matter is remitted to the Family Court, Ambedkar Nagar for deciding it afresh, in accordance with law.

(19) Since the second matrimonial case i.e. case No. 287 of 2021 : *Dinesh Vs. Malti Devi* is of the year 2021, we hope and trust that the Family Court, Ambedkar Nagar shall make an earnest endeavour to consider and decide the same within a period of eight months from the date of

