

(2013) 01 GAU CK 0001

Gauhati High Court

Case No: Matrimonial Appeal No"s. 2 and 3 of 2009

Ranjit Das

APPELLANT

Vs

Rani Das

RESPONDENT

Date of Decision: Jan. 30, 2013**Citation:** (2014) 1 DMC 407 : (2013) 4 GLT 411**Hon'ble Judges:** Iqbal Ahmed Ansari, J; Indira Shah, J**Bench:** Division Bench**Advocate:** S. Ali, Mr. M. Alam and Ms. J. Begum, for the Appellant; J.A. Hassan, S. Dasgupta and Mr. D. Nandi, for the Respondent

Judgement

Iqbal Ahmed Ansari, J.

By this common judgement and order, we propose to dispose of both the appeals, which have been preferred by the appellant against the judgement and decree, dated 06.06.2008, passed, in FC (Civil) 117/1998, by the learned Principal Judge, Family Court, Kamrup, whereby the learned trial Court, while granting relief to the plaintiff (i.e., the respondent herein under Sub-Section (2) of Section 18, read with Sub-Section (3) of Section 18 of the Hindu Adoption and Maintenance Act, 1956, has disallowed the counter-claim, made by the appellant, praying for declaration of his marriage with the plaintiff (i.e., respondent herein) a nullity u/s 12(1)(c) of the Hindu Marriage Act, 1955. We have heard Mr. S. Ali, learned counsel for the appellant in both the appeals. We have also heard Mr. S. Dasgupta, learned counsel for the plaintiff-respondent in the two appeals.

2. Before we enter into the merit of the present two appeals, it needs to be noted that the plaintiff-respondent herein instituted a suit, namely, FC (Civil) 117/98, seeking, in terms of the provisions of Sub-Section (2) and (3) of Section 18 of the Hindu Adoption and Maintenance Act, 1956, maintenance @ Rs. 3,500/- per month and a separate residence, the case of the plaintiff-respondent herein being, in brief, thus:

(i) The plaintiff-respondent herein is legally married wife of the defendant No. 1 (i.e., the present appellant), her marriage having been solemnized with the defendant No. 1, on 19.1.84, as per the Hindu rites and customs. Since her marriage, the plaintiff-respondent herein started living with her husband, at Bhaskar Nagar, Guwahati, along with the family members of the defendant No. 1 and, apart from doing all the household chores, she had to take care of her ailing father-in-law. The defendant No. 1, who was in government service, took voluntary retirement from service, joined the Bar at the Gauhati High Court and started practicing as a lawyer and built up a very good practice. The plaintiff-respondent herein, however, could not give birth to any child and although, in the year 1985, she had experienced the initial stage of pregnancy, miscarriage occurred to her, because she had to do all the household chores from cooking to washing of clothes without any rest. After the said miscarriage, the plaintiff-respondent was taken by the defendant No. 1 (i.e., appellant herein), to Vellore, and she was subjected to a major operation without her consent, though no such operation was necessary as per the doctors at Guwahati, whom she had consulted before and during her said pregnancy, and, as a result of the said operation, performed at Vellore, she lost her child bearing capacity for good. Soon thereafter, defendant No. 1 started torturing her, both physically and mentally, with the intention to elicit her consent for divorce and when she protested thereto, she was subjected to cruelty.

(ii) Thereafter, in the year 1991, defendant No. 1 instituted a suit, u/s 12(1)(c) of the Hindu Marriage Act, 1955, in the court of the District Judge, Kamrup, seeking annulment of their marriage by a decree of divorce. The said suit was subsequently transferred to the Family Court, Guwahati; but the suit was withdrawn by defendant No. 1, on 14.07.1993, without reserving any right to institute a suit on the same cause of action. The defendant No. 1 cut off all his conjugal relation with the plaintiff-respondent herein and compelled her to stay confined to a room in his house. Thereafter, defendant No. 1 went to Karimganj and, when he came back on 07.10.93, a woman, namely, Smti. Tinku Das, accompanied him and defendant No. 1 declared the woman to be his second wife. When the plaintiff-respondent herein tried to resist the woman from entering into the house, defendant No. 1 assaulted the plaintiff-respondent and tried to strangle her to death. The plaintiff-respondent herein, somehow, succeeded in saving herself and left her matrimonial house to save her life and took shelter at the residence of one of her relative in the neighbouring locality. Although the plaintiff-respondent herein lodged an FIR, in this regard, at the All Women Police Station, Guwahati, u/s 498A IPC, read with Section 494 IPC, and charge-sheet was submitted against defendant No. 1, the said defendant was acquitted by the Court, because since the charge, framed against the defendant No. 1, could not be proved.

(iii) The further case of the plaintiff-respondent herein was that her marriage with the defendant No. 1 had not been legally dissolved and, hence, during the subsistence of her marriage, the defendant No. 1 could not have entered into

another marriage with the said Tinku Das (i.e., defendant No. 2 in the suit) and, since the defendant No. 1 and defendant No. 2 had been staying together in her matrimonial house, it was not possible, on her part, to live in the said house with defendant No. 1. The plaintiff-respondent herein, therefore, instituted the suit, u/s 18(2) and 18(3) of the Hindu Adoption and Maintenance Act, 1956, against, primarily, the defendant Nos. 1 seeking from him maintenance @ Rs. 3,500/- per month and a separate residential accommodation.

3. The defendant No. 1 (i.e., the appellant herein) contested the suit by filed filing his written statement wherein, while admitting that the plaintiff-respondent herein was his legally married wife, their marriage having been solemnized, on 09.11.84, as per Hindu rites and customs and that after their marriage, the plaintiff lived with him at her matrimonial house, he denied that the plaintiff was entitled to the relief of maintenance and residential accommodation, as had been sought for by her, the case of the defendant No. 1 being, briefly stated, thus:

(i) The marriage of the defendant No. 1 with the plaintiff-respondent herein was an arranged one and that from the very beginning of heir marital life, he noticed the plaintiff-respondent herein having some gynecological disorders with menstruation problems and he even noticed milk secretion from the breasts of his wife, though she never became pregnant. The defendant No. 1 denied that the plaintiff-respondent herein was forced to look after his ailing father and that she had to do all the household chores without rest, for, defendant No. 1 had, according to the defendant No. 1 (i.e., the appellant herein) had engaged one maid for doing the cooking and washing for the entire family. The defendant No. 1 stated, in his written statement, that the plaintiff had been taken to Vellore for treatment on the advice of a renowned gynecologist, at Guwahati, who had been treating her for a long time and that the operation, at Vellore, had been performed as per the advice of the doctor, at Vellore, and with her full consent as both of them were very much keen to have a child. The defendant No. 1 denied that he compelled the plaintiff to live in a separate room without keeping any conjugal relation with her. The defendant No. 1 also denied that he had introduced defendant No. 2 to the plaintiff as his second wife and that he had assaulted the plaintiff-respondent herein for not allowing defendant No. 2 to enter into the house. The defendant No. 1's further case was that he went to Karimganj to look after his ancestral property and, on 07.10.1993, while he came back, he was informed by his brother that the plaintiff-respondent herein had left the house with all her belongings and stridhan properties, although he never married defendant No. 2.

(ii) In her written statement, the defendant No. 1 accused the plaintiff-respondent herein of living in adultery with one Atul Chandra Paul and it was for this reason that he had filed the petition before the Court seeking annulment of their marriage by a decree of divorce.

(iii) The defendant No. 1 also expressed his inability to pay the amount of Rs. 3,500/-, which the plaintiff had claimed as maintenance, stating that his total income was less than Rs. 4,000/- per month. The defendant No. 1 prayed for dismissal of the suit on the ground that the plaintiff had been staying in a rented house at Mathgharia, Guwahati, which had been rented by the said Atul Chandra Paul, who used to frequently visit the plaintiff at the said rented house.

4. The present appellant, as defendant No. 1 in the said suit, made counter-claim, seeking, u/s 12(1)(c) of the Hindu Marriage Act, 1955, a decree of nullity of his marriage with the plaintiff-respondent herein, his case being, in short, thus:

(i) The marriage between defendant No. 1 and the opposite party (i.e., the plaintiff-respondent herein) was solemnized, on 19.11.84, as per Hindu rites and customs and they started conjugal life in his house, at Bhaskar Nagar, Guwahati, but from the very beginning of their conjugal life, he found the opposite party having gynecological disorders, such as, menstruation problem, pain and discomfort during cohabitation, etc., that as per advice of the doctor, he took her to Vellore for treatment and, after various medical tests having been performed, the doctor advised her to undergo operation and, accordingly, the opposite party (i.e., the plaintiff-respondent herein) was operated upon, that he spent huge amount for her treatment, but, ultimately, the doctor gave up hope as there was no further treatment for her gynecological problem.

(ii) The defendant No. 1 claimed that one day, the opposite party (i.e., plaintiff-respondent herein) became sentimental and disclosed to the defendant No. 1 that she could not give birth to a child due to the sins and misdeeds committed by her in the past, that she also disclosed before him that she had illicit relation with one Sri Atul Chandra Paul, that she had become pregnant thrice and terminated her pregnancy twice by medical practitioner and once by an unqualified midwife, which resulted in profused bleeding for several days leading to various gynecological problems and that she came to know that she would not be able to bear child due to the injuries caused to her internal organs. The defendant No. 1 became shocked at the voluntarily made disclosure by the opposite party (i.e., the plaintiff-respondent herein) and, as he could not pardon the opposite party for the fraud committed on him, he severed his conjugal relationship with her and, therefore, prayed for, with the help of his counterclaim, annulment of his marriage with the opposite party (i.e., the plaintiff) by a decree of nullity.

5. The plaintiff, as opposite party in the counter-claim of the defendant No. 1, filed a written statement, wherein she challenged, inter alia, the maintainability of the counterclaim by pointing out that the counter-claim is barred by the provisions of limitation as embodied in the Hindu Marriage Act, 1955, and that the suit was also barred in terms of Order 23 Rule 2 of the CPC inasmuch as the defendant No. 1-appellant herein had approached the Court with the same cause of action, by way of a suit, which had given rise to Title Suit (Divorce) 88/91, in the Court of the District

Judge, Kamrup, and that the said suit, having been transferred to the Family Court, Kamrup, came to be registered as FC (Civil) No. 96/92, which was withdrawn by the defendant No. 1 himself, on 31.07.1993, without obtaining any liberty to institute any fresh suit or application or without reserving any liberty or right in this regard. This apart, the plaintiff-respondent herein also contended that the counter-claim was barred in terms of the provisions of Section 12(2)(a)(i) inasmuch as according to the plaintiff-respondent herein, no petition for annulling a marriage shall be entertained, in the light of the provisions of Section 12(2)(a)(i), if the petition is presented more than one year after the fraud had been discovered and, since, according to the defendant, the fraud had been committed on him, on 19.11.1984, when his marriage had been solemnized with the plaintiff-respondent by suppressing the fact of her earlier pregnancy, abortion and about her illicit relationship with the said Atul Chandra Paul, the counter-claim was not maintainable.

6. The learned Family Court, having considered the pleadings of the parties, framed the following issues for determination:

(i) Whether the suit was barred u/s 11 of the Code of Civil Procedure?

(ii) Whether the suit was barred by law of limitation?

(iii) Whether the counter-claim-raised by the defendant No. 1 was maintainable under the provision of law in force and the counter-claim was barred under the provision of Order 23 Rule 2 of the Code of Civil Procedure?

(iv) Whether the plaintiff was entitled to be maintained by the defendant as her husband u/s 18(e) of the Hindu Adoption and Maintenance Act, 1956, and, if so, what would be the amount of maintenance per month and from which date the plaintiff would be entitled to maintenance?

(v) Whether the plaintiff is entitled to any other relief or reliefs?

(vi) Whether the defendant was entitled to a decree of nullity of marriage under the provisions of Hindu Marriage Act, 1956, in the present suit?

(vii) Whether the plaintiff was married to the defendant No. 1 and, if so, whether fraud had been committed upon the defendant No. 1 by suppressing the material facts of in-chastity of the plaintiff at the time of settlement of marriage?

(viii) Whether plaintiff had committed fraud and, if so, whether the plaintiff was entitled to any maintenance from the defendant No. 1?

(ix) Whether the plaintiff had sufficient independent source of income to maintain herself so as to disentitle her from claiming maintenance from her husband?

7. In support of their respective cases, both the parties adduced evidence. The learned trial Court decided the issues, as reproduced above, in favour of the plaintiff

and, while holding her entitled to claim maintenance and suitable accommodation, directed the defendant No. 1 (i.e., appellant herein) to pay a sum of Rs. 2,000/-, per month, as maintenance from the date of institution of the proceeding and also to arrange a suitable accommodation for her or pay a sum of Rs. 1,500/-, per month, as house rent, from the date of the disposal of the suit. Consequent thereto, the learned trial Court rejected the counter-claim of the defendant No. 1 (i.e., the appellant herein) by holding that his counter-claim was barred by the period of limitation, as contained u/s 12(2)(a)(i) of the Hindu Marriage Act, 1955, and that his counter-claim was also barred by the provisions of Order 23 Rule 2 of the Code of Civil Procedure. A decree accordingly followed.

8. By preferring these two appeals, the appellant, who was defendant No. 1 in the suit, in the learned trial Court, has challenged the decree, whereby he has been directed to pay maintenance and also either to provide a suitable accommodation for the plaintiff or to pay house rent as indicated hereinbefore. The appellant herein has also sought for a decree declaring his marriage with the plaintiff-respondent as nullity in terms of the provisions of Section 12(1)(c) of the Hindu Marriage Act, 1955, on the ground that fraud had been committed on him, when his marriage had been solemnized with the plaintiff-respondent by suppressing the facts as mentioned above.

9. Let us, first, consider if the counterclaim, which the appellant had filed, was maintainable at all, for, the question of entering into the merit of the counter-claim does not arise if the counter-claim is, otherwise, found barred in law.

10. While considering the above aspect of the matter, it may be pointed out that, as per Clause (c) of Sub-Section (1) of Section 12 of the Hindu Marriage Act, 1955, a marriage shall be void and may be annulled by a decree of nullity if the consent of the petitioner was obtained by fraud as to the nature of the ceremony or as to any material fact or circumstances concerning the respondent.

11. There can be no doubt that if what the appellant has alleged, in his counter-claim? as regard the facts that the plaintiff-respondent had illicit relation with the said Atul Chandra Paul and she repeatedly became pregnant and her pregnancy was terminated in the manner as he has alleged and that all these facts were suppressed and the plaintiff respondent had been hurriedly married to him (appellant herein) -- were true, then, a case of fraud, having been committed on the appellant herein, would have been accepted inasmuch the alleged fraud related to the circumstances concerning the respondent and fell within the ambit of Clause (c) of Sub-Section (i) of Section 12 of the Hindu Marriage Act, 1955.

12. What is, however, of immense importance to note, now, is that Sub-Clause (i) of Clause (a) of Sub-Section (2) of Section 12 provides that a petition, seeking decree of nullity on the ground of fraud, shall not be entertained if the application is made more than one year after the discovery of the fraud. To make the position of law

clear, the relevant provisions of Sub-Section (2) of Section 12 of the Hindu Marriage Act, 1955, are reproduced below:

12. Voidable marriages.- *** **

(a) *** **

(b) *** **

(c) *** **

(d) *** **

(2) Notwithstanding anything contained in sub-section (1), no petition for annulling a marriage-

(a) on the ground specified in clause (c) of sub-section (1), shall be entertained if-

(i) the petition presented more than one year after the force had ceased to operate or, as the case may be, the fraud had been discovered; or

(ii) *** **

(b) *** **

13. In the case at hand, it is the admitted case of the appellant that he came to know about the fraud, on 19.11.1990, when his wife (i.e., respondent herein) confessed before him that she had illicit relation with the said Atul Chandra Paul. The application, therefore, seeking decree of nullity, by virtue of the provisions of Section 12 of the Hindu Marriage Act, 1955, ought to have been filed within one year, i.e., on or before 18.11.1991. There was, indisputably, a suit instituted by the appellant, on 14.07.1991, alleging infidelity of his wife (i.e., respondent herein) as indicated above. This suit, which had, initially, given rise to Title Suit No. DTS 88/1991, was transferred to the Family Court, Kamrup, at Guwahati, and registered as FC (Civil) 96/1992. The said suit was, however, withdrawn by the petitioner (i.e., the appellant herein) without reserving any right or liberty to institute a fresh suit on the same cause of action.

14. Situated thus, it becomes clear that the counter-claim, which had been filed by the appellant herein, in the suit, which the respondent herein had instituted, was beyond the period of limitation prescribed by Sub-Section (2) of Section 12 of the Hindu Marriage Act, 1955, and learned trial Court committed no illegality in holding that the counter-claim of the defendant No. 1 (i.e., the present appellant) was plainly beyond the prescribed period of limitation and not maintainable in law. The conclusion, so reached by the learned trial Court, cannot be faulted at.

15. Coupled with the above, Sub-Rule (4) of Rule 6A of Order VIII provides that a counter-claim shall be treated as a "plaint" and be governed by the rules applicable to plaints. From the provisions embodied in Sub-Rule (4) of Rule 6A of Order VIII, it

becomes abundantly clear that the provisions of limitation would apply as much to a counterclaim as the same are applicable to a "plaint". When, therefore, a "plaint" is barred by the prescribed period of limitation, a counterclaim cannot be instituted on such a cause of action, which is, otherwise, barred by the period of limitation.

16. In the case at hand, when no petition could have been filed, in the light of the provisions of Section 12(2)(a)(i), beyond the prescribed period of one year from the date, when the fraud was discovered, the question of making a counter-claim by the defendant No. 1 (i.e., the appellant herein) and the same being sustainable in law does not arise, when the counter-claim was, it could not be disputed, far beyond the prescribed period of limitation.

17. Further-more, the counter-claim, filed by the respondent herein, was also barred under Order XXIII. For the sake of clarity, Rule 1 of Order XXIII is reproduced below:

1. 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) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(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.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

18. From a careful reading of the scheme of Rule 1 of Order XXIII, it becomes clear that if a suit is withdrawn, or even apart of a claim is withdrawn, without obtaining permission from the Court to institute a fresh suit, in future, on the same ground, no fresh suit can be brought on the same ground/cause of action inasmuch as such a plaintiff shall be precluded, under Sub-Rule (4) of Rule 1 of Order XXIII, from instituting any suit in respect of the same subject-matter or part of the claim made thereunder.

19. In the case at hand, to appellant had instituted earlier a suit, as mentioned above, alleging fraud having been committed on him by his wife and seeking, therefore, a decree of nullity of his marriage with his wife (i.e., respondent herein), but he withdrew the suit, on 31.07.1993, and that too without obtaining liberty from the Court to institute a fresh suit in future. Thus, the petitioner (i.e., the appellant herein) was barred by the provisions made under Sub-Rule (4) of Rule 1 of Order XXIII from instituting a fresh suit.

20. Since a counter-claim stands on no better footing than a suit, it is quite obvious that no counter-claim could have been instituted on the same cause of action, which, according to the appellant, had given him the cause of action for instituting the earlier suit. Considered from this angle, it is clear that the counter-claim of the appellant was not maintainable and has been rightly dismissed by the learned trial Court.

21. Turning to the appeal, which has been preferred against the granting of a decree directing the appellant herein to pay to the respondent a sum of Rs. 2,000/- per month, as maintenance, from the date of institution of the suit and also to provide her a suitable accommodation, or else, pay a sum of Rs. 1,500/- per month, as house rent, from the date of the decree, suffice it to point out that the apple of discord, according to the plaintiff-respondent, was the fact that the present appellant, while having remained wedded to the plaintiff-respondent, had married Smt. Tinku Das, brought her to his house and started living with the said Tinku Das. Though the appellant denied that he had married Tinku Das, what cannot be ignored is that the appellant has admitted, in his cross-examination that Satwaleena Das and Rochoita Das are his children, who are born out of the said Tinku Das and are studying in school. In the face of such an unequivocal admission, one cannot but hold that when the appellant resides with another woman, maintains physical relation with her so much so that he has two daughters born out of his relationship with the said Tinku Das, the respondent herein is wholly justified in living away from him and, at the same time, claim maintenance and also suitable residential accommodation in terms of the provisions of Sub-Section (2) read with Sub-Section

(3) of Section 18 of the Hindu Adoption and Maintenance Act, 1956.

22. With regard to the above, it is imperative to note that the respondent herein was a housewife and there is no worthwhile evidence on record showing that she has any independent source of income. She is bound to be maintained by the appellant, who is her husband. The appellant has admitted, in his cross-examination, that after he had taken voluntary retirement from service, as Superintendent, from the office of the Assam Public Service Commission, he joined the Bar, in the year 1992, as an advocate in this Court. He has also admitted that he has signed the affidavit of his witness as an advocate. There can be, therefore, no escape from the conclusion that the appellant is capable of making payment of the paltry sum of Rs. 2,000/- per month, which has been directed to be paid by him to the plaintiff-respondent, under the impugned decree, as maintenance. This apart, the plaintiff-respondent being entitled to be provided with residential accommodation by the appellant herein, the appellant herein was, in our considered view, rightly directed, under the impugned decree, to either arrange a suitable accommodation for the plaintiff-respondent or pay her a sum of Rs. 1,500/-, per month, as house rent. We do not find that the findings, which have been reached by the learned trial Court, and the reliefs, which have been granted in favour of the respondent herein, suffer from any infirmity, factual or legal. The impugned decree, therefore, does not, in our firm view, call for any interference.

23. Because of what have been discussed and held above, we dismiss these appeals with cost and direct that the appellant shall comply with the decree, in letter and spirit, and all the arrears, which are due and payable to the plaintiff-respondent, shall be made available to her by the appellant within a period of 3 (three) months from today.

24. Let a decree be prepared accordingly. With the above observations and directions, this appeal stands disposed of.