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out from the reading of the orders which admittedly do not exist in the present case.”

I am in respectful agreement with the view expressed in *Ram Dass's* case. In the case in hand the impugned order is as follows:—

- “Reference your explanation, dated the 30th June, 1964, in reply to Punjab Government Memorandum No. 7759-B-(ASO-2) 6315713, dated the 4th December, 1963, on the subject noted above.
2. Your explanation has been carefully considered and the same has been found to be unsatisfactory. The Governor of Punjab is accordingly pleased to impose on you the penalty of stoppage of your next one increment without cumulative effect.
 3. A copy of this communication is being placed on your personal confidential record”.

It does not show if the representation was taken into consideration as the principles of natural justice require. In view of what has been stated above, the writing of the words, “carefully considered and the same has been found to be unsatisfactory” does not satisfy the requirements. The judgment under appeal correctly decided the point in issue and we do not find any ground to interfere in it.

(10) The net result of the above discussion is that the appeal is dismissed and the parties are left to bear their own costs.

Prem Chand Jain, J.—I agree.

K. T. S.

REVISIONAL CIVIL

Before R. S. Narula, C.J.

MANJIT KAUR,—Petitioner.

versus

GURDIAL SINGH GANGAWALA,—Respondent.

Civil Revision No. 287 of 1977

August 8, 1977.

Code of Civil Procedure (V of 1908)—Order 9 Rule 9—Hindu Marriage Act (XXV of 1955) as amended by Marriage Laws (Amendment) Act (LXVIII of 1976)—Sections 10, 13 and 21—Petition for

judicial separation dismissed in default—Application for restoration not filed—Subsequent petition for divorce on the same cause of action—Order 9 Rule 9—Whether applicable so as to bar the subsequent petition.

Held, that section 21 of the Hindu Marriage Act 1955 states that subject to the other provisions contained in the Act and to such rules as the High Court may make in that behalf all proceedings under the Act “shall be regulated, as far as may be, by the Code of Civil Procedure 1908”. No other provision in the Act deals with dismissals of proceedings in default or their restoration or the effect of non-restoration thereof. Nor does any rule contained in the Hindu Marriage (Punjab) Rules, 1956, framed by the High Court deal with this matter. There is therefore no escape from applying the provisions of Order 9 Rule 9 of the Code by operation of section 21. The expression “as far as may be” in the context in which it is used in section 21 excludes the applicability of only those provisions of the Code which cannot in the nature of things apply to proceedings under the Act. This expression has a reference to different provisions of the Code and merely means that all those provisions of the Code shall apply to the proceedings under the Act which are neither inconsistent with any provisions of the Act, nor contrary to its scheme or purpose. It does not and cannot mean that a particular Rule of procedure contained in the Code may be applied to one case but not to the other or that in one case it may be applied with full force and in the other not with its full rigour. Thus, there is no hurdle in proceedings under the Act being regulated by Order 9 Rule 9 of the Code. The rule is based on sound policy. It is based on the well established juristic principle that no defendant would be allowed by law to be vexed twice on the same cause of action. (Para 4).

Petition under Section 115 C.P.C. for revision of the order of the court of Shri Charan Singh Tiwana, District Judge, Chandigarh, dated 14th January, 1977, deciding the issue against the Respondent-Petitioner and holding that the case shall now proceed on its own merits.

Vijay Jhanji, Advocate, for the Petitioner.

O. P. Ahluwalia, Advocate, for the Respondent.

JUDGMENT

R. S. Narula, C. J.

(1) The only question which calls for decision in this petition for revision of the order of the Court of Shri Charan Singh Tiwana, District Judge, Chandigarh, dated January 14, 1977, is whether or

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not the provisions of Rule 9 of order 9 of the Code of Civil Procedure are applicable to applications for judicial separation or divorce, etc., filed under the Hindu Marriage Act (25 of 1955) (hereinafter called the Act).

(2) The relevant facts giving rise to this petition are not in dispute. The petitioner was married to the respondent. On March 4, 1976, the respondent filed an application against the petitioner for judicial separation under section 10 of the Act on the ground that she had deserted the respondent on November 11, 1973, that is for a continuous period of not less than two years preceding the presentation of the petition. That application was dismissed by the Court in default of appearance of the respondent on June 3, 1976. The petitioner was present on that day and the dismissal was ordered under Rule 8 of Order 9 of the Code. Soon thereafter the respondent filed his present application against the petitioner for divorce under section 13 of the Act. The petition for divorce is practically a verbatim copy of the earlier petition for judicial separation. The solitary ground on which divorce has been claimed is again the same allegation of desertion. While contesting the respondent's claim for divorce, the petitioner took up a preliminary objection to the effect that the petition for divorce is liable to be dismissed under Order 9 Rule 9 of the Code as the respondent did not get his original application for judicial separation restored which he could have amended after the coming into force of the Marriage Laws (Amendment) Act (68 of 1976) so as to claim therein a decree for divorce which could be claimed in a pending case after the coming into force of the amending Act. This plea of the petitioner was put by the learned District Judge into the following preliminary issue:—

“Whether the petition is barred under Order 9, Rule 9 C.P.C. ?

(3) By this order under revision the learned District Judge has held that the present case is not such in which the provisions of Order 9, Rule 9 can be applied as it would cause real hardship to the respondent if the rigour of that rule is made applicable to the case.

(4) I am unable to conceive of a situation in which a particular rule of procedure may be applied to one case and not to another case at the discretion of the Court depending on the circumstances of a given case. If Rule 9 of Order 9 applies to proceedings under

the Act it must apply to all cases and *vice versa*. Section 21 of the Act states that subject to the other provisions contained in the Act and to such rules as the High Court may make in that behalf all proceedings under the Act "shall be regulated, as far as may be, by the Code of Civil Procedure, 1908". No other provision in the Act deals with dismissals of proceedings in default or their restoration or the effect of non-restoration thereof. Nor does any rule contained in the Hindu Marriage (Punjab) Rules, 1956, framed by the High Court deal with this matter. According to the petitioner there is no escape from applying the provisions of Order 9, Rule 9 of the Code by operation of section 21. Mr O. P. Ahluwalia, learned counsel for the respondent (the husband) has contended on the other hand that discretion is given to the Court to apply or not to apply any particular provision of the Code to proceedings under the Act by the words "as far as may be" occurring in section 21. I am unable to agree with him in this respect. The expression "as far as may be" in the context in which it is used in section 21 excludes the applicability of only those provisions of the Code which cannot in the nature of things apply to proceedings under the Act. This expression (as far as may be) has reference to different provisions of the Code and merely means that all those provisions of the Code shall apply to the proceedings under the Act which are neither inconsistent with any provisions of the Act nor contrary to its scheme or purpose. It does not and cannot mean that a particular Rule or procedure contained in the Code may be applied to one case, but not to the other, or that in one case it may be applied with full force and in the other not with its full rigour. I am unable to find any such hurdle in proceedings under the Act being regulated by Order 9, Rule 9 of the Code. The rule is based on sound public policy. It is based on the well-established juristic principles that no defendant would be allowed by law to be vexed twice on the same cause of action.

(5) In *Tirukappa v. Kamalamma* (1), it was held by a Division Bench of the Mysore High Court that the provisions of rules 8 and 9 of Order 9 of the Code have application to proceedings under section 10 of the Act, and, therefore, an order dismissing a petition for the petitioner's default to appear has to be read as an order made under rule 8 of Order 9 of the Code, and the only remedy available to the petitioner is one provided under rule 9 of Order 9. The learned Judges observed that the provisions of rules 8 and 9 of Order 9

(1) A.I.R. 1966 Mysore 1.

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being quite in accord with the general principles followed for generations by Courts exercising civil jurisdiction, and there being nothing in them which is to any extent repugnant to any of the provisions or the policy of the Hindu Marriage Act, they should be applied to proceedings under the Act by virtue of section 21 thereof. It was added that the provisions are quite just and proper from the point of view of the parties and are quite essential from the point of view of due despatch of work of civil Courts. I am in respectful agreement with every word of the judgment of the Division Bench of the Mysore High Court in the above respect. No judgment of any Indian High Court to the contrary has been cited by the respondent.

(6) It was not disputed before me that both the actions brought by the respondent were based on the same cause of action. In case of doubt, however, reference can with advantage be made to the authoritative pronouncement of their Lordships of the Privy Council in *Mohammad Khalil Khan and others v. Mahbub Ali Mian and others* (2). The question of the meaning of the expression "same cause of action" in Order 2, Rule 2 of the Code arose before the Privy Council. It was observed that the cause of action means every fact which will be necessary for the plaintiff to prove if traversed in order to support his right to the judgment. Their Lordships held that if the evidence to support the two claims is the same then the cause of action is the same, but if the evidence to be led in the two cases is different, the causes of action are also different. On the facts of that case it was decided that where the facts which would entitle the plaintiffs in their new suit to recover property 'Y', to establish their title are substantially the same as those alleged in their former suit to recover property 'X', the causes of action in the two suits are identical.

(7) The learned counsel for the respondent stated that his client got the earlier petition dismissed in default because of the amendment to section 13 of the principal Act by section 7(a)(ib) of the Marriage Laws (Amendment) Act, 1976 (hereinafter called the Amending Act) whereby the ground of desertion was for the first time added to the grounds on which divorce could be claimed under that section, and that is why he filed the present application for divorce on that ground on which judicial separation alone could be

(2) A.I.R. 1949 Privy Council 78.

claimed prior to the amendment of section 13. Counsel for the petitioner on the other hand invited my attention to section 39(1)(i) of the Amending Act which provides that all petitions and proceedings in causes and matters matrimonial which are pending in any Court at the commencement of the Amending Act shall be dealt with and decided by such Court, if it is a petition or proceeding under the Hindu Marriage Act, then so far as may be as if it had been originally instituted therein under the Hindu Marriage Act as amended by the Amending Act. On the basis of the provisions of section 39 of the Amending Act referred to above, learned counsel argued that it was not necessary for the respondent to have his earlier petition for judicial separation dismissed, he could convert it by amendment into a petition for divorce and continue it under section 39 of the Amending Act, and therein claim the relief which was not available to him under the pre-amended principal Act. Learned counsel for the respondent referred to sub-section (3) of section 29 of the principal Act, which says, *inter alia*, that nothing contained in the Act shall affect any proceeding under any law for the time being in force for judicial separation pending at the commencement of the Act, and any such proceeding may be continued and determined as if the Act had not been passed. That provision has no relevancy at all to the matter before me. Section 29(3) of the principal Act deals with actions for judicial separation, etc. mentioned in that provision which were pending under Acts other than the Hindu Marriage Act, 1955, prior to the coming into force of that Act. Be that as it may, what the respondent could do or could not do or should have done does not make any difference to the answer to the pure jurisdictional question of law on which the fate of this petition depends. It was not questioned for a moment that for purposes of determining whether proceedings under the Act can or cannot be regulated by rules 8 and 9 of Order 9 of the Code, an application for judicial separation and an application for divorce are both treated as suits by operation of section 21 of the Act. It is the common case of both sides that the earlier petition for judicial separation was dismissed in default of appearance of the respondent (petitioner in that case) under rule 8 of Order 9 of the Code. It is also admitted by the respondent that the cause of action for both the petitions was the alleged desertion by the petitioner for a continuous period of more than two years, though the relief claimed in the two petitions was different (judicial separation in the first one and divorce in the second). The facts leading to the filing of the petition and the cause of action for both were, therefore, the same.

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No application for restoration of the first suit was ever filed. On these facts and in the state of law discussed by me above, the respondent appears to me to be precluded from filing the present application for divorce in respect of the same cause of action, that is the same desertion. The order of the learned District Judge to the contrary cannot, therefore, stand.

(8) For the reasons assigned above, I allow this petition, set aside and reverse the order of the Court below, and decide the preliminary issue in favour of the petitioner (the wife). As a result of the decision on the preliminary issue, the respondent's petition for divorce is dismissed as being barred by Order 9, Rule 9 of the Code. The parties are left to bear their own costs throughout.

K. T. S.

LETTERS PATENT APPEAL

Before A. D. Koshal and Surinder Singh, JJ.

MADAN MOHAN GOEL,—Appellant.

versus

STATE OF HARYANA,—Respondent.

Letters Patent Appeal No. 673 of 1974

and Civil Misc. No. 549 of 1977

August 9, 1977.

Punjab Civil Service (Punishment and Appeal) Rules 1952—Rule 9—Person applying for a post in response to advertisement providing for a period of probation—Letter of appointment making no reference to advertisement and prescribing no such period though laying down terms and conditions of service—Such person—Whether governed by the conditions in the appointment letter.

Held, that where the contents of an advertisement providing for a period of probation do not form part of the appointment letter and the terms and conditions of service of an employee are comprehensively laid down in the appointment letter independently of the