

Civil Revision

Present: **The Hon'ble Justice Jyotirmay Bhattacharya**

C.O. No.1123 of 2009

Judgment On: 07-04-2010.

Sujit Paul

-Vs-

Mousomi Paul (Poddar)

POINTS:

SETTING ASIDE EXPARTE DECREE:-Matrimonial suit under the Hindu Marriage Act decreed Ex parte-Application under O 9 R 13 C. P. Code whether maintainable-Hindu Marriage Act, 1856 Ss. 21, 28(1), -Code of Civil Procedure, 1908 O 9 R 13.

FACTS:

The petitioner filed a suit for divorce against his wife in the Court of the learned District Judge at Uttar Dinajpur. The said suit which was subsequently transferred to the Court of the learned Additional District Judge was ultimately decreed ex parte. The opposite party filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the said ex parte decree. The reasons for her non-appearance before the Court on the date which was fixed for the ex parte hearing of the said suit was explained as default committed due to the laches on the part of her Advocate's clerk who failed to update his diary by not recording the last two dates which were fixed for ex parte hearing of the said suit. Accordingly, she prayed for setting aside of the said decree. The learned Trial Judge was pleased to set aside the said ex parte decree and restored the suit to its original file. The propriety of the said order is under challenge under Article 227 of the Constitution of India at the instance of the petitioner.

HELD:

Section 21 of the Hindu Marriage Act makes it clear that the entire Code of Civil Procedure including the provision of Order IX of the Code of Civil Procedure is applicable to a Matrimonial Suit under Hindu Marriage Act. It is no doubt true that a decree, be it a contested one or ex parte, is appealable under Section 28(1) of the said Act, but the said provision does not provide that in case of an ex parte decree, a party aggrieved by the said decree cannot opt for setting aside the said decree under Order 9 Rule 13 of the Code of Civil Procedure. Though remedy for challenging such ex parte decree is available under the said Act by way of appeal, but such remedy by way of appeal is illusory, as the Appellate Court would have to go by records and to determine whether the appellant was prevented by sufficient cause from appearing before the Trial Court. Since the Appeal Court would have no material on record to render a decision on the sufficiency of the cause, the Appeal Court can give no relief to the appellant. On the contrary, if the reasons for such non-appearance can be explained before the Trial Court, the Trial Court can set aside the said decree under Order 9 Rule 13 of the Code of Civil Procedure to mitigate justice to a party who is affected by a decree due to no fault on his part. Para-17

Relying upon the said Full Bench decision of this Hon'ble Court, this Court has no hesitation to hold that Order 9 Rule 13 of the Code of Civil Procedure can be resorted to for setting aside the ex parte divorce decree even though such decree is appealable under Section 28(1) of the Hindu Marriage Act, as the said provision regarding appeal does not even by necessary implication exclude the application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree which is also a remedy available to the defendant for avoiding such decree. Para-18

CASES CITED:

1. Tejbai Tejshi & Ors. –Vs- Smt. Gangubai Dinanath Ulvekar 2002 Vol.104(1) Bombay L.R. 137.
2. Anjan Kr. Kataki –Vs- Smt. Minakshi Sarma AIR 1985 Guahati 44.
3. Smt. Bimala Debi –Vs- Aghore Chandra Mallick & Ors. AIR 1975 Cal.80

For the Petitioner : Mr. Bidyut Kr. Banerjee,
Mr. G.K. Thakur.

For the Opposite Parties : Mr. Ayan Banerjee,
Mr. Raja Guin.

THE COURT:

1) The petitioner/husband filed a suit for divorce against his wife viz. the opposite party herein in the Court of the learned District Judge at Uttar Dinajpur. The said suit which was subsequently transferred to the Court of the learned Additional District Judge, Fast Track Court, 2nd Court at Raiganj, was ultimately decreed ex parte on 10th January, 2006 vide order no.16.

2) The opposite party filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the said ex parte decree passed in Matrimonial Suit No.53 of 2004. The said proceeding was registered as Misc. Case No.1 of 2006. The reasons for her non-appearance before the Court on the date which was fixed for the ex parte hearing of the said suit was explained by the opposite party in her said application. It was alleged by her that such default was committed due to the laches on the part of her Advocate's clerk who failed to update his diary by not recording the last two dates which were fixed for ex parte hearing of the said suit by the Court where the suit was subsequently transferred for disposal. The opposite party, thus, claimed that the reasons which

prevented her from appearing before the Court were absolutely beyond her control as she was never informed about the dates which were fixed for ex parte hearing of the suit, by her learned Advocate. Accordingly, she prayed for setting aside of the said decree.

3) The petitioner/husband contested the said proceeding by filing objection denying the averments made out by the opposite party in her said application. The husband stated therein that the wife is not at all interested in reconciliation and this application, according to him, was filed mala fide only to prolong the litigation. Thus, he prayed for the rejection of the said application.

4) The parties adduced evidence in support of their respective claims in the said proceeding. The lawyers' diary was proved in evidence which shows that the said suit was not entered in the lawyer's diary on last two occasions when the said suit was fixed for ex parte hearing. The lawyer's clerk was examined in the said proceeding. He stated in his evidence that he was not aware that the said suit was transferred to the Fast Track Court and as such, he could not update his diary by making entry of the dates fixed by the learned Transferee Court in respect of the said matrimonial suit. He further stated that for the aforesaid reason he could not take effective steps in the suit on last two dates.

5) Considering the facts and circumstances as aforesaid and the evidence of the parties, the learned Trial Judge held that the opposite party was prevented by sufficient reason from appearing before the Court on the date when the said suit was fixed for ex parte hearing. The learned Trial Judge observed that the lawyer's clerk was responsible for this unfortunate situation under which the said

suit was decreed ex parte. The learned Trial Judge, thus, was pleased to set aside the said ex parte decree and restored the suit to its original file.

6) The propriety of the said order is under challenge under Article 227 of the Constitution of India at the instance of the petitioner/husband.

7) Heard Mr. Bidyut Kr. Banerjee, learned Senior Counsel appearing for the petitioner and Mr. Ayan Banerjee, learned Advocate appearing for the opposite party. Considered the materials on record including the impugned order.

8) Let me now consider as to how far the learned Trial Judge was justified in passing the impugned order in the facts of the instant case.

9) On perusal of the materials on record including the pleadings and evidence of the parties, this Court does not find any perversity in the impugned order. The defendant engaged the lawyer to contest the said suit on her behalf. But if the suit is decreed ex parte due to negligence on the part of his lawyer and his clerk, she cannot be penalized for the default of her lawyer on whom she reposed full confidence for defending her said suit. Thus, when the learned Trial Judge set aside the ex parte decree under such circumstances, this Court sitting in this jurisdiction under Article 227 of the Constitution of India does not think it proper to interfere with the impugned order.

10) Of course, Mr. Bidyut Kr. Banerjee, learned Senior Counsel did not invite this Court to interfere with the impugned order on the ground of perversity therein. He challenged the impugned

order on the ground of maintainability of the opposite party's application under Order 9 Rule 13 of the Code of Civil Procedure in the facts of the instant case. According to him a decree passed in a matrimonial suit under the Hindu Marriage Act, be it contested or ex parte, is appealable under Section 28(1) of the said Act and as such, the learned Trial Judge ought to have rejected the opposite party's said application for setting aside the said decree on the ground of its maintainability alone. In support of such submission he relied upon the following two decisions of different High Courts :-

4. In the case of Tejbai Tejshi & Ors. –Vs- Smt. Gangubai Dinanath Ulvekar reported in 2002 Vol.104(1) Bombay L.R. 137.
5. In the case of Anjan Kr. Kataki –Vs- Smt. Minakshi Sarma reported in AIR 1985 Guahati 44.

11) On careful consideration of those two decisions, this Court finds that both the Hon'ble Bombay High Court and the Hon'ble Guahati High Court held that Order 9 Rule 13 cannot be applied for setting aside the ex parte decree under certain circumstances.

12) On perusal of the Bombay High Court's decision, this Court finds that Hon'ble Bombay High Court held that if a decree is passed by the learned Trial Judge by following the provision contained in Order 8 Rule 5 of the Code of Civil Procedure, provision contained in Order 9 Rule 13 cannot be invoked, for setting aside such decree as, according to the Bombay High Court, such decree passed under Order 8 Rule 5 of the Code of Civil Procedure cannot be regarded as an ex parte decree and as such, the said decree can be set aside under Order 9 Rule 13 of the Code of Civil Procedure.

13) This Court is of the view that the principle laid down in the said case has no application in the facts of the instant case as the decree for divorce was not passed under Order 8 Rule 5 of the Code of Civil Procedure in the instant case. Here in the instant case, the suit was fixed for ex parte hearing as the defendant neither filed any written statement in the said suit nor she took any step for participating in the trial of the said suit when the said suit was fixed for ex parte hearing. Under such circumstances, the plaintiff proved his claim in the said suit by ex parte evidence and the learned Trial Judge passed the ex parte decree by recording his satisfaction with regard to the evidence led by the plaintiff in the said suit.

14) Unlike in the Bombay case, it was not recorded in the divorce decree that the said decree was passed under order 8 Rule 5 of the Code of Civil Procedure by the learned Trial Judge in the instant case. Thus, the principle laid down in the Bombay decision, in my view, has no application in the instant case.

15) Let me now consider the other decision cited by Mr. Banerjee, learned Senior Counsel as mentioned above. It is rightly pointed out by Mr. Banerjee that the facts of the case before the Hon'ble Guahati High Court was exactly the same as in the present case before this Court. There also an ex parte decree for divorce was passed on 31st March, 1977 by the learned District Judge at Dibrugarh and an application was filed for setting aside the said ex parte decree under Order 9 Rule 13 of the Code of Civil Procedure. The said application for setting aside the ex parte decree was allowed by the learned Trial Judge by overruling the objection regarding the maintainability of such an application raised by the plaintiff. But the Hon'ble High Court set aside the said decision of the

learned Trial Judge by interpreting the provisions contained in Section 21 read with Section 28(1) of the Hindu Marriage Act. Hon'ble Guahati High Court ultimately came to a conclusion that Section 28(1) of the said Act being a mandatory provision, all decrees, be it contested or ex parte, are required to be challenged in appeal under Section 28(1) of the said Act and such mandatory provision of Section 28(1) of the Hindu Marriage Act cannot be regulated by Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree.

16) With due respect to His Lordship, this Court is unable to concur with the said views of His Lordship for the reasons hereinafter recorded.

17) Section 21 of the Hindu Marriage Act provides that subject to other provisions contained in this Act and to such Rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated as far as may be by the Code of Civil Procedure, 1908. The said provision makes it clear that the entire Code of Civil Procedure including the provision of Order IX of the Code of Civil Procedure is applicable to a Matrimonial Suit under Hindu Marriage Act. It is no doubt true that a decree, be it a contested one or ex parte, is appealable under Section 28(1) of the said Act, but the said provision does not provide that in case of an ex parte decree, a party aggrieved by the said decree cannot opt for setting aside the said decree under Order 9 Rule 13 of the Code of Civil Procedure. Though remedy for challenging such ex parte decree is available under the said Act by way of appeal, but such remedy by way of appeal is illusory, as the Appellate Court would have to go by records and to determine whether the appellant was prevented by sufficient cause from appearing before the Trial Court. Since the Appeal Court would have no material on record to render a decision on the sufficiency of the cause, the Appeal Court can give no relief to the

appellant. On the contrary, if the reasons for such non-appearance can be explained before the Trial Court, the Trial Court can set aside the said decree under Order 9 Rule 13 of the Code of Civil Procedure to mitigate justice to a party who is affected by a decree due to no fault on his part. In this regard reliance can be placed on a Full Bench decision of this Hon'ble Court in the case of Smt. Bimala Debi –Vs- Aghore Chandra Mallick & Ors. reported in AIR 1975 Cal.80 wherein it was held as follows :-

“15. The relevance of the observations of Mukherji, J. quoted above to the application under Order 21, Rule 90 has been dismissed for default and an appeal is preferred from the order of dismissal, the Appellate Court would have to go by the record as it stands and to determine upon the materials that are on record whether the appellant was prevented by sufficient cause from appearing before the Trial Court. It is obvious that the Appellate Court would have no material on record to render a decision on the sufficiency of the cause and can give no relief to the appellant.”

18) Thus, relying upon the said Full Bench decision of this Hon'ble Court, this Court has no hesitation to hold that Order 9 Rule 13 of the Code of Civil Procedure can be resorted to for setting aside the ex parte divorce decree even though such decree is appealable under Section 28(1) of the Hindu Marriage Act, as the said provision regarding appeal does not even by necessary implication excludes the application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree which is also a remedy available to the defendant for avoiding such decree.

19) Thus, this Court does not find any merit in this revisional application. The revisional application, thus, stands rejected.

20) Urgent xerox certified copy of this order, if applied for, be supplied expeditiously after complying with all formalities.

(Jyotirmay Bhattacharya, J.)