

IN THE HIGH COURT OF DELHI AT NEW DELHI

Judgment reserved on: 01.12.2011

Judgment delivered on: 23.12.2011

+ **CM(M) 1469/2009**

Rahul Dubey Petitioner
Through: Mr. Jagjit Singh, Advocate.

Vs.

Vibha Dubey Respondent
Through: Ms. Jyoti Taneja, Advocate

CM(M) No.633/2010

Rahul Dubey Petitioner
Through: Mr. Jagjit Singh, Advocate.

Vs.

Vibha Dubey Respondent
Through: Ms. Jyoti Taneja, Advocate

CORAM:

HON'BLE MR. JUSTICE KAILASH GAMBHIR

KAILASH GAMBHIR, J.

1. This common order shall dispose of two petitions C.M.(M) No. 1469/2009 and CM No. 633/2010 filed by the petitioner husband under Article 227 of the Constitution of India.

2. By way of CM(M) No. 1469/2009, the petitioner has challenged the order dated 4.11.2009 whereby the learned Trial Court had set aside the ex parte judgment and decree dated 8th December, 2005 while deciding the application moved by the respondent under Order IX Rule 13 read with Section 151 CPC while in CM(M) No. 633/2010, the petitioner has challenged the order dated 12th March, 2010 passed by the learned Trial Court thereby recalling the order dated 6.4.2005 whereby the Court had closed the right of the respondent to cross-examine the three witnesses examined by the petitioner in support of his case filed under Section 13(1)(ia) of the Hindu Marriage Act.

3. To appreciate the controversy involved in both these petitions, it would be necessary to give the background of the facts of the case. The petitioner husband had filed a petition for divorce under Section 13(1)(ia) of the Hindu Marriage Act against the respondent wife which was pending before the learned Civil Judge (Sr. Division) at Ghaziabad, U.P. being registered as O.S. 532/03. In the said divorce petition, the respondent had appeared and filed a written statement and

based on the pleadings of the parties, the learned Civil Judge (Sr. Division) Ghaziabad had framed issues and the case was fixed for the evidence of the petitioner. In the evidence, the petitioner had filed affidavits of three witnesses, but these three witnesses were not cross-examined by the respondent despite grant of opportunities with the result that the said Court vide order dated 6.4.2005 closed the evidence of the petitioner by closing the opportunity of the respondent for cross-examination and the case was accordingly adjourned for the evidence of the respondent. It is during this period the Civil Appeal No.2579/2005 filed by the respondent challenging the order of the Allahabad High Court came up for consideration and vide order dated 7.4.2005 the Hon'ble Supreme Court directed stay of further proceedings before the Ghaziabad Court and vide orders dated 11.4.2005, the Hon'ble Supreme Court directed transfer of the said divorce petition from Ghaziabad Court to Matrimonial Court at Delhi. Acting on the said direction given by the Hon'ble Supreme Court, the Ghaziabad Court transferred the case file of the said divorce case to the learned District

Judge, Delhi and on the order passed by the learned District Judge, Delhi the matter was assigned to the Court of Shri K.S. Pal, Additional District Judge, Central Delhi. On 10.5.2005 counsel representing the petitioner had appeared before the transferee Court but none appeared on behalf of the respondent and due to the non-appearance of the respondent, the transferee Court directed notice to the respondent, returnable on 1.6.2005. On 1.6.2005 the petitioner again appeared with his counsel but nobody had appeared from the side of the respondent, but since the Presiding Officer was on leave on that date, therefore, the matter was directed to be put up for 5.7.2005 for further proceedings. On 5.7.2005, the counsel for the petitioner had again appeared at the first call while nobody was present from the side of the respondent and the Court accordingly directed the matter to be put up at 12.00 noon. The matter was again taken up by the Court at 1.00 p.m. when again the same was directed to be put up at 2.30 p.m. The matter was taken up yet again at 3.00 p.m. when also only the counsel for the petitioner had appeared, and none appeared from the side of the

respondent. On considering the absence of the respondent as intentional, the learned transferee Court after having gone through the direction given by the Hon'ble High Court of Allahabad, directing to hold day to day proceedings of the said case and also considering the fact that the respondent was well aware of the fact of transfer of the said case from Ghaziabad to Delhi Courts, held that there was no need to issue any Court notice to the respondent as the respondent was held to have deemed knowledge of the pendency of the said case before the transferee Court. The learned transferee Court after taking into consideration the directions given by the Apex court vide orders dated 11.4.2005 directing the transferee Court to proceed further from the stage at which the case was before the Civil Judge at Ghaziabad, adjourned the matter for 3.8.2005 for the evidence of the respondent. On 3.8.2005, the Presiding Officer was on leave and the matter was adjourned to 12.8.2005 but again on 12.8.2005 the Presiding Officer was on leave and the matter was adjourned to 16.8.2005. On 16.8.2005, none was present for the respondent and the matter was again adjourned

to 3.9.2005 for the evidence of the respondent giving the respondent last opportunity, but on 3.9.2005, since nobody had appeared on behalf of the respondent, therefore, the learned Court had closed the evidence of the respondent and fixed the matter for 30.9.2005 for final arguments. On 30.9.2005, ex parte arguments were heard by the learned ADJ and the matter was fixed for orders for 13.10.2005 and finally on 8.12.2005 the learned ADJ allowed the said divorce petition filed by the petitioner whereby the marriage between the parties was dissolved on the ground of cruelty under Section 13(1)(ia) of the Hindu Marriage Act.

4. The said ex parte decree dated 8.12.2005 was sought to be set aside by the respondent by moving an application under Order IX Rule 13 read with Section 151 CPC along with Section 5 of the Limitation Act wherein she pleaded ignorance about the passing of the said ex parte decree as no Court notice was received by her from the transferee Court. The respondent claimed her knowledge about the said ex parte decree in the last week of February, 2007, which fact she came to know from her

counsel Mr. Suman Pal, who was earlier representing her at Ghaziabad Courts. Vide order dated 4.11.2009 the learned ADJ set aside the said ex parte judgment and decree dated 8.12.2005 and feeling aggrieved by the same, the petitioner has preferred the present CM(M) No. 1469/2009.

5. After the setting aside of the ex parte decree, the respondent had moved an application under Section 151 CPC thereby seeking recalling of the order dated 6.4.2005 whereby the transferor Court had closed the right of the respondent to cross-examine three witnesses adduced by the petitioner in support of his divorce case. Vide orders dated 12th March, 2010 the learned ADJ recalled the said order dated 6.4.2005 as the Court felt that it will result in grave miscarriage of justice if the respondent is deprived of her valuable right to cross-examine the said three witnesses adduced by the petitioner. Feeling aggrieved by the said order dated 12th March, 2010 the petitioner has preferred the present CM(M) No. 633/2010.

6. Assailing both the said orders, Mr. Jagjit Singh, learned counsel representing the petitioner submitted that the

respondent was not entitled to any fresh notice from the transferee Court as the said case was transferred from Ghaziabad Court to Delhi Court on the transfer petition filed by the respondent herself. Counsel further submitted that when the petitioner could cause appearance before the transferor Court, then what could have prevented the respondent to appear before the transferee Court. Counsel further submitted that the absence of the respondent before the transferee Court is willful and the petitioner cannot be made to suffer because of negligent conduct of the respondent. Counsel further submitted that the petitioner got remarried after waiting for the statutory period of limitation of filing the appeal to expire and this fact of remarriage alone should have weighed upon the learned Trial Court to reject the application moved by the respondent under Order IX Rule 13 CPC. Counsel further submitted that after the order dated 11.4.2005 was passed by the Hon'ble Apex Court, the matter was taken up by the Ghaziabad Court on 19.4.2005 and the said Court after having gone through the order passed by the Hon'ble Supreme Court directed the transfer of the

matter before the District Judge at Delhi. Counsel further submitted that while passing the said order, the Ghaziabad Court also directed both the parties to appear before the matrimonial Court at Delhi on 12.5.2005. Counsel further submitted that in the order passed by the Hon'ble Supreme Court no such direction was given for directing fresh notice on the parties. Counsel also submitted that by addition of proviso to Order IX Rule 13 CPC after amendment of 1976, the decree cannot be set aside by the Court merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim. The contention raised by the counsel for the petitioner was that the respondent had complete knowledge about the transfer of the said case from Ghaziabad to Delhi Courts and once she had not chosen to appear before the Delhi Court, passing of the ex parte decree by the Delhi Court was an inevitable consequence as the Delhi Court was not required to direct fresh notice on the respondent. Counsel also submitted that no sufficient cause was

shown by the respondent for condonation of delay or for seeking the setting aside of the ex parte decree and the respondent was not entitled for exercise of any discretion by the Court in her favour as her negligence and callous conduct was writ large to disentitle her to reopen the decree of divorce.

7. Arguing in CM(M) No.633/2010, counsel submitted that the learned Trial Court had also passed another illegal direction vide order dated 12.3.2010 recalling the order dated 6.4.2005 by which order the right of the respondent to cross-examine the three witnesses adduced by the petitioner was closed. The contention raised by the counsel for the petitioner was that the Hon'ble Supreme Court while transferring the petition had given clear direction that the proceedings of the case shall start from the stage at which it was pending on the date of the order i.e. 11.4.2005. The contention raised by the counsel for the petitioner was that the order dated 12.3.2010 passed by the learned Trial Court is in violation of directions given by the Apex Court and, therefore, the said order deserves

to be set aside. In support of his arguments, counsel placed reliance on the following judgments:-

1. Sunil Poddar and ors -vs- Union Bank of India; (2008) 2 SCC 326
2. Parimal -vs- Veena alias Bharti; (2011) 3 SCC 545
3. Balwant Singh -vs- Jagdish Singh & Ors.; V(2010) SLT 790
4. Sujata Udai Patil -vs- Udai Madhukar Patil; 2007(1) RCR Civil 404

8. Refuting the contentions of the counsel for the petitioner, counsel for the respondent submitted that neither the respondent nor her counsel was present before the Ghaziabad Court on 19.4.2005 and the Ghaziabad Court had given the directions for the transfer of the said case before Courts at Delhi in compliance of the direction given by the Apex Court. Counsel further submitted that when the said matter was taken up by learned ADJ, Delhi Courts on 10.5.2005, the court directed notice on the respondent, returnable on 1.6.2005. Counsel further submitted that the learned Trial Court ignoring its own direction, all of a sudden changed its mind and felt that there was no need to serve Court notice on the respondent as the respondent was deemed to have knowledge of the case and

accordingly vide order dated 5.7.2005 proceeded ex parte against the respondent. Counsel further submitted that the counsel for the respondent who was handling her case had no knowledge of the said case being transferred to the Delhi Court, therefore, she could not have caused her appearance before the said transferee Court and, hence the grant of ex parte judgment and decree by the transferee Court was per-se illegal. Counsel further submitted that in the event of transfer of the case from one Court to another, it is imperative on the part of the transferee Court to issue notice and it is through such a notice only the respondent could gain knowledge about the transfer of the said case to a particular Court at Delhi. Counsel further submitted that Chapter 13 Rule 4 of Delhi High Court Rules also provides for issuance of such notice to both the parties in case of transfer. Based on these submissions, counsel for the respondent submitted that the learned Trial Court has rightly set aside the ex parte decree vide order dated 4.11.2009.

9. Advancing arguments in opposition to CM(M) No. 633/2010, counsel submitted that no fault can be found by this

Court in the order dated 12.3.2010 passed by the learned ADJ thereby recalling order dated 6.4.2005 as the direction given by the Hon'ble Supreme Court vide order dated 11.4.2005 that the petition shall be proceeded with from stage at which it was before the transferor Court could not have come in her way to seek recalling of the order dated 6.4.2005. The contention raised by the counsel for the respondent was that the said order of the Hon'ble Supreme Court could not have forestalled the remedy of the respondent to seek recalling of the order dated 6.4.2005 and it was for the learned Trial Court to have satisfied itself that sufficient reasons were disclosed by the respondent to seek recalling of the order dated 6.4.2005. Counsel thus submitted that the counsel for the petitioner has misconstrued the direction given by the Apex Court vide order dated 11.4.2005 as if the said order had closed all the legal doors of the respondent to seek recalling of the order dated 6.4.2005 to cross examine three witnesses adduced by the petitioner. Counsel also submitted that the respondent was pursuing her remedy for the transfer of the said case first by filing necessary

transfer petition before the Allahabad High Court and then by challenging the order of the Allahabad High Court before the Supreme Court and, therefore, the learned Ghaziabad Court should have awaited the outcome of the decision of the Apex Court in the transfer case instead of proceeding in the matter to record the evidence of the petitioner. Counsel also submitted that principles of natural justice also warranted recalling of the said order dated 6.4.2005 otherwise the respondent would not have got fair opportunity to present her case. Based on these submissions, counsel submitted that the order dated 12.3.2010 passed by the learned Trial Court is well reasoned order and the same does not in any manner violate the directions given by the Apex Court. In support of his arguments, counsel for the respondent has placed reliance on the following judgments:

1. Sushil Kumar Sabharwal –vs- Gurpreet Singh & Ors; (2002) 5 SCC 377
2. Prakash Chander Manchanda –vs- Janki Machanda; (1986) 4 SCC 699
3. Bhanu Kumar Jain –vs- Archana Kumar & Anr. (2005) 1 SCC 787

10. I have heard learned counsel for the parties at considerable length and given my thoughtful consideration to

the pleas raised by them. The Court has also carefully gone through the Trial Court records produced before the Court.

11. Indisputably, the divorce proceedings from Ghaziabad Court to Matrimonial Court at Delhi were transferred pursuant to the direction given by the Hon'ble Apex Court vide order dated 11.4.2005 while disposing of Civil Appeal No. 2579/2005 filed by the respondent. After the said order passed by the Hon'ble Supreme Court, the matter was also fixed before the Ghaziabad Court, which was taken up by the Court on 19.4.2005 when the Ghaziabad Court after having gone through the direction given by the Apex Court for the transfer of the said case to the Delhi Court gave direction for placing the said case before the Delhi Court in compliance of the direction given by the Apex Court. The matter was thereafter received by the District Judge, Delhi and the same was assigned by the District Judge to the Court of Shri K.S. Pal, Additional District Judge, Delhi, which was taken up by the Court of Shri K.S. Pal, Additional District Judge, Delhi on 10th May, 2005. On 10th May, 2005 Mr. Rakesh Upadhyay, counsel representing the petitioner

had appeared, but nobody appeared from the side of the respondent and considering the fact that the said case was received by transfer by the Delhi Court from the Family Court Ghaziabad, the Court directed Court notice to be issued to the respondent, returnable for 1.6.2005. On 1.6.2005 the learned Presiding Officer was on leave and the case was adjourned for further proceedings on 5.7.2005. On 5.7.2005 the matter was passed over by the Court thrice and finally it was taken up at 3.00 p.m. The Court then recalled its own order dated 10.5.2005 and took a view that since the respondent was well aware about the transfer of the case to the Matrimonial Court in Delhi therefore her non-appearance before the Delhi Court was intentional and the Court held that there was no need to issue any Court notice to the respondent as she was deemed to have knowledge about the pendency of the said matter before the Delhi Court. The Court then adjourned the matter for the evidence of the respondent after having gone through the order dated 11.4.2005 passed by the Hon'ble Supreme Court giving direction to the Matrimonial Court to proceed with the matter

from the stage it was before the Ghaziabad Court. On account of the failure of the respondent to appear in the said case and to lead her evidence the learned ADJ Delhi finally passed a decree of divorce under Section 13(1)(ia) of the Hindu Marriage Act vide order dated 8.12.2005.

12. This Court is totally baffled and flabbergasted to find that the learned ADJ reversed its own decision dated 10th May, 2005, when the Court notice was directed on the respondent by taking a view that there was no need to direct Court notice as the respondent can be taken to have deemed knowledge of the said transfer of the case. This order dated 5.7.2005 was ex facie illegal order not only because it had recalled its earlier order dated 10th May, 2005 for no reasons but also because the Court did not appreciate the fact that the said case was transferred from one State to another State and, therefore, in the absence of appearance of anyone of the parties the Court notice for the absentee party was imperative. The rules of natural justice mandate that the party should be put to notice after the case has been transferred from one court to the other. What could have

been more fatal to the respondent wife to seek transfer of the case at Delhi Court and then not be able to appear due to the injudicious approach of the learned trial court. Once the Supreme court has allowed the transfer petition, the transferee court should have put the parties to notice as the rules of fair play and natural justice demand. (*Payal Ashok Kumar Jindal vs. Ashok Kumar Jindal*(1992)3SCC116). It also cannot be lost sight of the fact that earlier the Ghaziabad Court vide orders dated 19th April, 2005 had given the directions for placing the said matter before the Delhi Court on 12.5.2005 and then on the application moved by the petitioner, fresh direction vide orders dated 26.4.2005 was given by the Civil Judge, Ghaziabad for placing the matter before the Delhi Court in terms of the directions given by the said Civil Judge on 19.4.2005. Surprisingly the said matter was not placed before the Delhi Court on 12.5.2005 but was taken by the concerned matrimonial Court in Delhi on 10.5.2005. The Trial Court in the impugned order dated 4.11.2009 has rightly observed that it was mandatory on the part of the matrimonial Court at Delhi to issue

Court notice to the applicant/respondent informing her the actual date of hearing. Learned Trial Court had also drawn an analogy from Chapter 13 Volume 1 of the Delhi High Court Rules which deals with the rules governing transfer of suits and appeals. Learned Trial Court further placed reliance on other judgments of the Apex Court on the proposition of law applicable to the facts of the case involved and this Court does not find any perversity or illegality in the reasoning given by the learned Trial Court to set aside the ex parte judgment and decree of divorce passed by the predecessor Judge of the same Court. In the absence of service of any Court notice, there was no fault on the part of the respondent to assume that she would receive a Court notice from the transferee Court, more particularly when the respondent herself was residing at a far off place at Varanasi (U.P.) and was, therefore, not expected to have chased the said case from one Court to another after its transfer to Delhi Court as it cannot be overlooked that in Delhi itself at a given point of time at least 6 to 8 Additional District Judges deal with the jurisdiction in matrimonial cases. The learned Trial Court also

did not appreciate that the said matter was being contested by the respondent before the Ghaziabad Court and there could not have been any perceptible reason because of which the respondent would have avoided to contest the said divorce case filed by her husband, more particularly when the respondent herself sought transfer of the case from the Ghaziabad Court to Delhi Courts. It has been a consistent view of the Supreme Court and various High Courts that matrimonial disputes should be decided by the Courts on merits and due care is required to be taken by the Courts that one of the interested parties may not walk away with the ex parte decree to the detriment and prejudice of the other party, which has exactly happened in the present case.

13. To deal with the next contention of the counsel for the appellant it would be relevant to reproduce Order IX rule 13 as under:

"13. Setting aside decree ex parte against defendant.-

In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that there was sufficient cause for his failure to appear when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to

costs payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit:

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only, it may be set aside as against all or any of the other defendants also:

Provided also that no such decree shall be set aside merely on the ground of irregularity of service of summons, if the Court is satisfied that the defendant knew, or but for his wilful conduct would have known, of the date of hearing in sufficient time to enable him to appear and answer the plaintiff's claim.

Explanation I.-Where a summons has been served under Order V, rule 15, 01, adult male member having an interest adverse to that of the defendant in the subject, matter of the suit, it shall not be deemed to have been duly served within the meaning of this rule.

Explanation II.-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree." (w.e.f. 1-10-1983)

14. The contention of the counsel for the appellant that the proviso of Order IX rule 13 envisages that a decree cannot be set aside if the court is satisfied that the defendant had the notice of the date of hearing is without any force as what is contemplated by this proviso is that the defendant has the knowledge of the *date of hearing* that too where the applicant complains about the irregularities in the service of summons which is not the situation in the case at hand to bar the remedy

available to the respondent under order IX rule 13. The judgments relied upon by the counsel for the appellant canvass the legal proposition that there is a bar to entertain the application under the said proviso where the Court is satisfied that the defendant knew or but for his willful conduct would have known the date of hearing in sufficient time to enable him to appear in the case. There can be no dispute with the above said legal position but the same would be of no help to the facts of the present case. The respondent in the present case has shown sufficient reasons for her non-appearance before the transferee court and thus the case in hand does not fall within the ambit of the proviso, and thus the judgments cited by the appellant would not be applicable to the facts of the case at hand.

15. In the light of the aforesaid discussion, this Court does not find any merit in the petition C.M.(M) No. 1469/2009 and the same is hereby dismissed.

16. Dealing with the other petition filed by the petitioner i.e. CM(M) No. 633/2010, this Court does not subscribe to the

arguments canvassed by the counsel for the petitioner before this Court that the learned Trial Court has reopened the case by giving fresh opportunity to the respondent to cross-examine three witnesses adduced by the petitioner. The Supreme Court vide order dated 11.4.2005 had given direction to the transferee Court to proceed with the matter from the stage at which it was before the earlier Court and by no stretch of imagination this can be construed to mean that the said order passed by the Hon'ble Apex Court foreclosed the right of the respondent to move an application for recalling the order dated 6.4.2005, to cross-examine three witnesses adduced by the petitioner before the transferee Court. The Court cannot be oblivious of the fact that on 6.4.2005, the respondent sought an adjournment before Ghaziabad Court on the ground that she had filed a Special Leave Petition against the order of the Allahabad High Court, but the learned Civil Judge at Ghaziabad without waiting for the orders of the Supreme Court gave the directions to the respondent to cross-examine the witnesses produced by the petitioner at 2.00 p.m. and when at 2.00 p.m. the counsel for

the respondent was not present the learned Judge had closed the right of the respondent to cross-examine the said witnesses. It also cannot be lost sight of the fact that on 7.4.2005, the Hon'ble Supreme Court had stayed further proceedings in the said divorce matter pending before the Ghaziabad Court and finally on 11.4.2005 the Supreme Court directed transfer of the said petition from Ghaziabad Court to Matrimonial Court at Delhi. The learned Trial Court in para 7 of the impugned order has rightly observed that the principles of natural justice require that adequate and fair opportunity is to be granted to all the parties to a litigation for producing whatever documents or evidence which may be in their possession. The learned Trial Court on the application moved by the respondent under Order IX rule 13 CPC had already set aside the ex parte judgment and decree dated 8.12.2005 and, therefore, there was nothing wrong if the Court had given a fresh opportunity to the respondent to cross-examine the three witnesses earlier adduced by the petitioner in support of his case. The absence of opportunity of cross-examination to the respondent would have

certainly caused serious prejudice to the rights of the respondent as without the cross-examination of these three witnesses, their evidence would have been held against the respondent being unchallenged and unrebutted.

17. In the light of the aforesaid position, this Court does not find any infirmity, illegality or perversity in the impugned order dated 12th March, 2010 passed by the learned Trial Court giving opportunity to the respondent to cross-examine the said three witnesses, whose examination-in-chief was completed by the petitioner before the Civil Judge, Ghaziabad.

18. In the light of the aforesaid discussion, there is no merit in the present two petitions and the same are hereby dismissed.

DECEMBER 23,2011
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KAILASH GAMBHIR, J.