

GAHC010131342023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/3635/2023

MANIKA BHUYAN
W/O- LATE PRAVEEN BHUYAN, D/O- SRI KANDARPA CHANDRA DAS, R/O-
VILL.- SITARA, P.O. AND P.S. RANGIA, DIST. KAMRUP(R), ASSAM, PIN-
781365.

VERSUS

THE UNION OF INDIA AND 2 ORS
THROUGH THE MINISTRY OF DEFENCE, REPRESENTED BY THE
COMMISSIONER AND SECRETARY TO THE GOVERNMENT OF INDIA.

2:MILITARY ENGINEER SERVICES GE (AF) TEZPUR
P.O. SALONIBARI
DIST. SONITPUR
PIN- 784104.

3:SMTI. SUCHITRA KUMARI
D/O- BISWANATH MAHATO
R/O- VILL.- SOLAGAON
P.O. BOKAJAN
DIST. SONITPUR
ASSA

Advocate for the Petitioner : MR. U SAIKIA, MS K DEKA,MR. S D ROY,B DAS

Advocate for the Respondent : DY.S.G.I., MS. D DEKA,MR. M NATH,MR. S SAHU (r-3),MS A
ROY (r-3)

**BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR**

Date of hearing : 30.07.2024

Date of Judgment : 30.07.2024

Judgment & order(Oral)

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Heard Mr. S. D. Roy, learned counsel, appearing on behalf of the petitioner. Also heard Mr. S. K. Medhi, learned CGC, appearing on behalf of respondents No. 1 & 2; Ms. A. Roy, learned counsel, appearing on behalf of respondent No. 3; and Mr. M. Nath, learned senior counsel, assisted by Ms. D. L. Deka, learned counsel, appearing in the matter as an amicus curiae.

2. The petitioner by way of instituting the present proceeding, has prayed for the following reliefs:

“i. To issue a writ in the nature of mandamus and/or any other writ, order or direction of like nature directing the MES, Salonibari, Tezpur to release the pensionary benefit of the Petitioner's deceased husband namely late Prabin Bhuyan in her name;

ii. To issue a writ in the nature of mandamus and/or any other writ, order or direction of like nature directing the Ministry of Defence MES, GE (AF) Tezpur at Sonitpur not to release the pensionary benefit to the Respondent No.3 i.e. Smti Suchitra Kumari.

iii. To call for entire record and proceeding culminating into the ex-parte decree of divorce dated 21/02/2014 passed by the additional District & Sessions Judge No.2, Sonitpur at Tezpur, Assam in T.S. (D) No.100/2013 and after going into the validity of the same, be pleased to set aside the said exparte decree of divorce dated 21/02/2014 passed by the additional District & Sessions Judge No.2, Sonitpur at Tezpur, Assam in T.S. (D) No.100/2013.”

3. The, facts in brief, required to be noticed for adjudication of the issues arising in the present proceeding, is noted as under:

The petitioner, herein, had married Prabin Bhuyan by executing a deed of agreement, dated 07.08,2002, and by way of a social marriage on 14.08.2002. At the relevant point of time, Prabin Bhuyan i.e. the husband of the petitioner was working as an employee in the establishment of Military Engineering Services, GE(AF), Tezpur. Out of their wedlock, a daughter was born to the petitioner on 07.07.2024. It is contended that in the year 2012, on account of certain marital discord between the petitioner and her husband; the petitioner, herein, along with her daughter, was required to live with her parents.

The husband of the petitioner not providing any maintenance to the petitioner as well as their daughter; the petitioner approached the Tezpur Mahila Samiti and on a discussion held between the petitioner, her husband and the said Samiti; the husband of the petitioner was required to pay maintenance to the petitioner and her daughter at the rate of 10,000/- p.m.. Although, the said amount was initially paid by Prabin Bhuyan to the petitioner, herein, however, subsequently, he did not deposit the maintenance amount, in question, in the account of the petitioner leading her to institute a proceeding being MR Case No. 60/2014 before the Court of learned Judicial Magistrate, First Class, Rangia, on 28.11.2014. The learned trial Court vide order, dated 20.01.2017, directed the husband of the petitioner to pay an amount of Rs. 6,000/- p.m. to the petitioner, herein, as maintenance amount. Due to inflation and increase in the expenses required to be met in case of her daughter; the petitioner instituted a proceeding being Misc.Case No. 13/2018 in MR Case No. 60/2014, seeking enhancement of the maintenance amount so paid to her by Prabin Bhuyan at the rate of Rs. 6,000/- p.m.. Accordingly, the learned trial Court on consideration of the matter, vide order, dated 18.07.2018, enhanced the maintenance amount to Rs. 7,000/- p.m. from Rs. 6,000/- p.m..

It is also contended that another petition being Misc.Case No. 09/2019 in MR Case No. 60/2014, was also instituted by the petitioner, seeking further enhancement of the maintenance amount, in question. In the year 2021, her husband having stopped the payment of maintenance amount; the petitioner visited the office of the Unit of Military Engineering Services, wherein the husband of the petitioner was so posted and she could come to learn for the first time that the name of the private respondent No. 3, herein, was entered as the nominee of the husband of the petitioner and such entry was revealed to have been so made in the year 2016.

At this stage, the petitioner also could come to learn that the husband of the petitioner had obtained an ex-parte decree of divorce against her. Accordingly, on coming to learn about the ex-parte decree of divorce, the petitioner proceeded to apply for the certified copies of the ex-parte decree of divorce and other connected documents and on receipt of the same; it was revealed that an ex-parte decree of divorce was passed by the learned Additional District Judge No.2, Sonitpur at Tezpur, Assam, vide order, dated 21.02.2014, in Title Suit(Divorce) No. 100/2013, as instituted by the husband of the petitioner.

After obtaining the said ex-parte decree of divorce against the petitioner, herein; the husband of the petitioner had married the respondent No. 3 viz. Smti Suchitra Kumari.

Being aggrieved, the petitioner filed a petition under Order 9 Rule 13 of the Civil Procedure Code, 1908, which was registered as Miscellaneous (J) Case No. 14/2022. The husband of the petitioner entered appearance in the above-noted case as instituted by the petitioner, herein, for vacation of the ex-

parte decree of divorce, dated 21.02.2014, and filed his objections therein. Pending consideration of the issue arising in the said Miscellaneous (J) Case No. 14/2022; the husband of the petitioner expired on 09.11.2022.

The petitioner, thereafter, submitted application before the respondent authorities praying for release to her, the family pension and other pensionary benefits on account of the services rendered by her deceased husband. However, the same not having been so considered and there being no progress made in Miscellaneous (J) Case No. 14/2022; the petitioner has initiated the present proceeding with the reliefs as noticed hereinabove.

4. Mr. Roy, learned counsel for the petitioner, submits that this Court by appreciating the fact that the ex-parte decree of divorce was so obtained by the husband of the petitioner by resorting to falsehood in the matter by not providing the correct address of the petitioner; the ex-parte decree of divorce, dated 21.02.2014, as obtained by him, must be declared to be non-est in the eye of law.

5. Mr. Roy, learned counsel, further submits that the petitioner, herein, being the first wife of late Prabin Bhuyan; it is, she, and her daughter who would have a claim to the pension and pensionary benefits as would be available on account of the services rendered by the husband of the petitioner.

6. Mr. Medhi, learned CGC, and Ms. Roy, learned counsel for respondent No. 3, submits that although the petitioner, herein, had instituted an application under Order 9 Rule 13 of the Civil Procedure Code, 1908, for vacation of the ex-parte decree of divorce, as passed in the matter by the concerned Court;

the same would not be maintainable in-as-much as the husband of the petitioner having expired during the pendency of the proceeding, the issue involved being of a private right between the petitioner and her deceased husband; after the death of the husband of the petitioner, no further proceedings would be maintainable and the proceedings in Miscellaneous (J) Case No. 14/2022, must be declared to have been abated.

7. Mr. Nath, learned senior counsel, appearing in the matter as an amicus curiae, at the outset, submits that a petition for divorce can be moved, either, by a husband, or, by a wife as the case may be and to that extent, it is certainly a personal cause of action based on one or more matrimonial misconduct alleged in the petition against the erring spouse.

8. Mr. Nath, learned senior counsel, submits that after institution of such proceedings, before any decree comes to be passed therein; if either of the spouse expires pending the trial, then the personal cause of action would have to be construed to have died with the death of that person. Accordingly, the right to sue would not survive.

9. Mr. Nath, learned senior counsel, submits that if after the decree of divorce is passed, ex-parte, or, bipartite, against the other spouse, the spouse so initiating such proceedings, dies, the question as to whether the right to sue would survive for the spouse against whom such decree has been passed by the Court and whether such decree can be set aside at the instance of the surviving spouse, either, by filing an appeal, or, by moving an application under Order 9 Rule 13 of the Civil Procedure Code, 1908, for getting it set aside if it is an ex-parte decree of divorce; was considered by the Hon'ble Supreme Court in the case of **Smt. Yallawwa v. Smt. Shantavva**, reported in

(1997) 11 SCC 159; wherein, the Hon'ble Supreme Court had held that such right would survive. Accordingly, he submits that given the legal effects flowing from a divorce decree; an application for setting aside such ex-parte decree and/or an appeal from such decree, cannot be held to have abated and a right to sue for getting the divorce decree set aside by the aggrieved party whose status and proprietary rights gets adversely affected by such decree; would survive to such an aggrieved spouse.

10. Mr. Nath, learned senior counsel, further submits that in the event, an application under Order 9 Rule 13 of the Civil Procedure Code, 1908, is so filed by the adversely affected spouse for setting aside an ex-parte decree of divorce and during the pendency of such proceeding; the spouse obtaining the decree of divorce, dies, such proceeding given the legal consequences flowing from the ex-parte decree of divorce, cannot be said to have abated. The cause of action would survive qua the estate of the deceased spouse. However, he further submits that other persons interested in maintenance of such decree of divorce and/or having interest in the estate of the deceased husband; could be joined as opposite parties in the matter.

11. I have heard the learned counsels appearing for the parties and also perused the materials available on record.

12. The facts as noticed hereinabove, is not disputed. The marriage of the petitioner, herein, with late Prabin Bhuyan, is also not disputed.

13. As noticed hereinabove; the petitioner, herein, had preferred an application before the Court of competent jurisdiction, seeking maintenance

from her deceased husband i.e. Prabin Bhuyan and in terms of the directions so passed, providing for maintenance to the petitioner and her daughter; the husband of the petitioner viz. late Prabin Bhuyan was remitting such amount to the petitioner. It is seen that the petitioner had preferred applications, praying for enhancement of the maintenance amount so provided to her by late Prabin Bhuyan which on consideration by the competent Court, was so allowed.

14. The last of such orders enhancing the maintenance amount was so passed by the Court considering the matter on 18.07.2018, and thereafter, it is seen that the petitioner, herein, had filed further application for enhancement of the maintenance amount provided to her in the year 2019. The husband of the petitioner was continuously paying the maintenance amount to the petitioner as directed by the learned trial Court without any objection and such payment were continued to be so made till the year 2021.

15. At this stage, it is seen that the husband of the petitioner had instituted a proceeding seeking divorce from the petitioner, herein, before the Court of learned Additional District Judge No.2, Sonitpur at Tezpur, Assam, which was registered as Title Suit(Divorce) No. 100/2013. It is also seen that vide order, dated 21.02.2014, as passed by the learned trial Court in the Title Suit(Divorce) No. 100/2013, an ex-parte decree of divorce was so granted in favour of the husband of the petitioner and against the petitioner, herein. The materials including the pleadings filed in the maintenance case so preferred by the petitioner and also the objections filed against the enhancement petitions filed by the petitioner, herein, it is not seen that the husband of the petitioner in the pleadings so filed after 21.02.2014, had brought on record, the fact that the marriage between him and the petitioner, herein, stood dissolved vide

order, dated 21.02.2014, passed in Title Suit(Divorce) No. 100/2013. It is not discernible from the records, the reasons as to why such disclosure was not made by late Prabin Bhuyan. The husband of the petitioner having stopped the maintenance amount in the year 2021; the petitioner, herein, had approached the employers of her husband to understand the reasons for such stoppage and therein, she came to learn the fact that the husband of the petitioner had obtained an ex-parte decree of divorce against her and also of the fact that subsequent to obtaining such ex-parte decree of divorce; the husband of the petitioner had married one Smti Suchitra Kumari, respondent No. 3, herein. Armed with the said information and after receiving the certified copies of the ex-parte decree of divorce along with the connected documents; the petitioner preferred an application under Order 9 Rule 13 of the Civil Procedure Code, 1908, to vacate the ex-parte decree of divorce, dated 21.02.2014, passed by the Court of learned Additional District Judge No.2, Sonitpur at Tezpur, Assam, in Title Suit(Divorce) No. 100/2013. The said application came to be registered as Miscellaneous (J) Case No. 14/2022, and on receipt of the notice of the said application; the husband of the petitioner entered appearance therein and filed his written objection to the above-noted application so filed by the petitioner, herein, on 14.06.2022.

16. It is seen that during the pendency of the proceedings in Miscellaneous (J) Case No. 14/2022; the husband of the petitioner unfortunately expired on 09.11.2022.

17. The learned counsels for the respondents have submitted that the husband of the petitioner having expired on 09.11.2022; the divorce as effected being a personal right of the spouses involved; the husband of the petitioner having expired during the pendency of the proceeding instituted by

the petitioner, herein, for setting aside the ex-parte decree of divorce i.e. Miscellaneous (J) Case No. 14/2022; the said proceeding have to be construed to be abated.

18. On a consideration of the contentions as made by the learned counsels for the respondents, an issue would arise in the present proceeding as to whether the application as preferred by the petitioner under Order 9 Rule 13 of the Civil Procedure Code, 1908, for setting aside of the ex-parte decree of divorce, dated 21.02.2014, as obtained by her husband during his lifetime, would be maintainable after the death of the husband of the petitioner, herein.

19. The contentions of Mr. Nath, learned senior counsel appearing in the matter on the request of this Court; is required to be noted for the purpose.

20. Mr. Nath, learned senior counsel, has categorically submitted that the decree of divorce both, ex-parte, and/or bipartite; while causing a cessation of a marriage, has the effect of dissolving the marriage between the spouses and also the changes of the status of the spouse concerned. The cessation of the marriage would also have an effect on the proprietary rights of both the spouses involved. Accordingly, by placing reliance on the decision of the Hon'ble Supreme Court in the case of **Smt. Yallawwa**(supra), he submits that given the legal effect which flow from a decree of divorce, it cannot be said that proceeding for setting aside such a decree, either, by way of of an appeal, or, if it is an ex-parte decree of divorce, by way of an application under Order 9 Rule 13 of the Civil Procedure Code, 1908, would also abate and further contends that such a right to sue for getting the decree of divorce set aside by the spouse whose status and proprietary rights gets adversely affected by such a decree; would survive to such an aggrieved spouse.

21. Having noticed the said submissions of Mr. Nath, learned senior counsel, this Court would be now required to examine as to whether the decision rendered by the Hon'ble Supreme Court in the case of **Smt. Yallawwa**(supra) has an application to the facts involved in the present proceeding.

22. The Hon'ble Supreme Court in the above-referred case, was considering an issue which is similar to the one arising in the present proceeding. The Hon'ble Supreme Court by considering the provisions of Hindu Marriage Act and other connected Acts having a bearing on the marriage as well as the proprietary rights of spouses; proceeded to draw the following conclusions:

“6. That takes us to the consideration of the alternative contention canvassed by the learned counsel for the appellant. It is, true that this contention was not canvassed either before the Trial Court or before the High Court. However, as this contention touches the maintainability of the application, we have thought it fit to hear the learned counsel on this point. So far as the contention of maintainability of the application of the respondent-wife is concerned, it must be kept in view that petition of divorce was moved by the husband for getting his marriage with the respondent dissolved by a decree of divorce on the ground that the respondent deserted him for a continuous period of not less than two years immediately preceding the presentation of the petition. It is also to be kept in view that such petition for divorce can be moved either by the husband or the wife, as the case may be. To that extent it is certainly a personal cause of action based on one or more matrimonial misconduct alleged in the petition against the erring spouse. Consequently, in such proceedings before any decree comes to be passed if either of the spouse expires pending the trial then the personal cause of action would die with the person. Such civil proceedings would not abate only if right to sue survives after the death of one or more of the parties to the proceedings as laid down by Order 22, Rule 1 C.P.C. However, if during the pendency of the petition for divorce either of the spouses expires, the cause of action being personal to both of them, the right to sue would not survive. The next question is whether after the decree of divorce is passed ex parte or bipartite against the other spouse whether the right to sue would survive for the spouse against whom such decree has been passed by the Court and whether such a decree can be got set aside by the surviving spouse either by filing an appeal or by moving an application under Order 9, Rule 13 C.P.C. for getting it set aside if it is an ex parte decree. The answer to the question will depend upon the legal effects of such a decree of divorce passed by the Trial Court under Section 13(1) of the Hindu Marriage Act. It is obvious that so long as the decree is not passed and the proceedings are at any stage prior to the decree, no rights or obligations of either spouse get crystallised. The marital status of both the spouses remains intact as it was prior to the filing of the suit. But once a decree gets passed in such proceedings the rights and obligations of the respective spouses who are parties to such proceedings get crystallised under the orders of the Court. The marriage gets dissolved; the status of the spouses gets changed and they become ex-husband and ex-wife. As a result of such a decree of divorce the marriage

tie is snapped. Both of them become free to marry again as laid down by Section 15 of the Hindu Marriage Act. Not only that after such a decree when the spouses have ceased to be husband and wife and become ex-husband and ex-wife, proprietary rights of both the spouses also got affected. As per Section 8 of the Hindu Succession Act, if a male Hindu dies instate, his widow would be entitled to inherit his property being a relative specified in Class 1 of the Schedule. Similarly, if the wife dies leaving behind her any property, as per Section 15 of the Hindu Succession Act, the property of the female Hindu shall devolve according to the rules set out in Section 16 firstly, upon the sons and daughters (including the children of any predeceased son or daughter) and the husband. Thus if a female Hindu dies leaving behind her children and husband, the husband also becomes entitled to inherit her property as first class heir. Consequently, because of a divorce decree when the spouses do not remain husband and wife, the mutual rights of inheritance in each other's property on the death of either of them get extinguished. Therefore, apart from the divorce decree destroying the erstwhile status of husband and wife, it has a direct impact on the property rights of the concerned spouses.

Even that apart, as per Section 9 of the Hindu Adoption and Maintenance Act, 1956, a Hindu widow is entitled to be maintained out of her deceased husband's estate and failing which by her father-in-law under circumstances laid down by the said section. Even this right will vanish after the decree of divorce, when her husband dies after obtaining the said decree against her. It has also to be kept in view that when a decree of divorce gets passed against a spouse on the grounds of matrimonial misconduct mentioned in Section 13(1) of the Hindu Marriage Act it attaches a social stigma on the concerned spouse. Such a spouse cannot be said to be left without any remedy to get such finding vacated by filing an appeal or if it is an ex parte decree to get it set aside by filing an application under Order 9, Rule 13, C.P.C. Cause of action for getting such an adverse finding stigmatising the concerned spouse, cannot be said to be purely a personal cause of action against the departed spouse who was armed with a decree in his or her favour based on such a finding. When such legal effects flow from divorce decree, it cannot be said with any emphasis that proceedings for setting aside such a decree either by way of appeal or if it is an ex parte decree by way of application under Order 9, Rule 13, C. P. C. would also abate and such a right to sue for getting the divorce decree set aside by the aggrieved party whose status and proprietary rights get adversely affected by such decree would not survive to such an aggrieved spouse. It is also pertinent to note that as per Section 305 of the Indian Succession Act, 1925 an executor or administrator has the same power to sue in respect of all causes of action that survive the deceased and may exercise the same power for recovery of debts as the deceased had when living. Save and except the personal cause of action which dies with the deceased on the principle of "actio personalis moritur cum persona" i.e. a personal cause of action dies with the person, all the rest of causes of action which have impact on proprietary rights and socio legal status of the parties cannot be said to have died with such a person.

7. Learned counsel for the appellant submitted one objection in connection with such proceedings. He submitted that if such an action survives and the challenge to a decree ex parte or bipartite for divorce is found to be maintainable at the instance of the aggrieved spouse against whom the decree has been passed then persons who are non-spouses will have to be joined in the litigation and this would go counter to Section 13 of the Hindu Marriage Act. This difficulty is more imaginary than real. Once a divorce decree is passed, the stage of launching any petition under Section 13(1) does not survive. It is true that Section 13 of the Hindu Marriage Act lays down that marriage whether solemnised before or after the commencement of the Act may be dissolved by a decree of divorce on the grounds mentioned therein on a petition

presented by either the husband or the wife. Thus, initially when such petition is to be presented, the person who presents such petition must be either wife or husband and the other party would be the other spouse. But once these proceedings are initiated by the concerned aggrieved spouse, the trial then proceeds further. It is of course true that pending such trial if either of the spouses expires then, as seen earlier, the personal cause of action against the husband or the wife, as the case may be, dies with the departing spouse. As no rights are still crystallised by then against or in favour of either spouse, no proprietary effect or any adverse effect on the status of the parties would get generated by mere filing of such petition and the status quo ante would continue to operate during the trial of such petition. However the situation gets changed once a decree of divorce follows in favour of either of the spouses whether such decree is bipartite or ex parte. Thereafter, as noted earlier direct legal consequences affecting the status of parties as well as proprietary rights of either of them, as noted earlier, would flow from such a decree. Under these circumstances, if the aggrieved spouse who suffers from such legal effects of the adverse decree against him or her is told off the gates of the appellate proceedings or proceedings for setting aside such ex parte decree, the concerned spouse would suffer serious legal damage and injury without getting any opportunity to get such a decree set aside on legally permissible grounds. Consequently, it may be held that once the petition under Section 13 of the Hindu Marriage Act results into any decree of divorce either ex parte or bipartite then the concerned aggrieved spouse who suffers from such pernicious legal effects can legitimately try to get them reversed through the assistance of the Court. In such an exercise, all other legal heirs of deceased spouse who are interested in getting such a decree maintained can be joined as necessary parties. Section 13(1) of the Hindu Marriage Act can obviously come in the way of such proceedings being maintained against the legal heirs of the decree-holder spouse. A mere look at the ground of Section 13(1) will show that a Hindu marriage can be dissolved on the proof of matrimonial misconduct of very serious nature as mentioned in the concerned grounds, namely, that the offending spouse, after the solemnization of the marriage, has voluntary sexual intercourse with any person other than his or her spouse or has treated the petitioner with cruelty; or has deserted the petitioner for a continuous period of not less than two years immediately preceding the presentation of the petition; or has ceased to be a Hindu by conversion to another religion; or has been incurably of unsound mind, or has been suffering continuously or intermittently from mental disorder or has been suffering from a virulent and incurable form of leprosy, or has been suffering from venereal disease in a communicable form; or has renounced the world by entering any religious order or has not been heard of as being alive for a period of seven years or more. These grounds to say the least, if found established, against the offending spouse would be serious matrimonial misconduct or incapacities and such a spouse will go with a stigma for the rest of his or her life which will have serious pernicious consequences not only social but also legal, as we have noted earlier. If a decree of divorce on these grounds whether ex parte or bipartite is not permitted to be challenged by the aggrieved spouse, it would deprive the aggrieved spouse of an opportunity of getting such grounds re-examined by the competent Court. It cannot, therefore be said that after a decree of divorce is passed against a spouse whether ex parte or bipartite such aggrieved spouse cannot prefer an appeal against such a decree or cannot move for getting ex parte divorce decree set aside under Order 9, Rule 13, C.P.C. Such proceedings would not abate only because the petitioner who has obtained such decree dies after obtaining such a decree. The cause of action in such a case would survive qua the estate of the deceased spouse in the hands of his or her heirs or legal representatives. Consequently in such appellate proceedings or proceedings under Order 9, Rule 13, C.P.C., other heirs of the deceased spouse could be joined as opposite parties as they would be interested in urging that the surviving spouse against whom such decree is passed remains a divorcee and is not treated to be a widow or widower of the deceased original petitioner so that she or he may not share with other heirs the property of deceased spouse. So far as the other

heirs of the deceased spouse are concerned, they would certainly be interested in getting the decree of divorce confirmed by the appellate Court or by the Trial Court by opposing application under Order 9, Rule 13, C.P.C. if it is an ex parte decree against the concerned spouse. It must, therefore, be held that when a divorce decree is challenged by the aggrieved spouse in proceedings whether by way of appeal or by way of application under Order 9, Rule 13, C.P.C, for setting aside the ex parte decree of divorce, right to sue survives to the aggrieved surviving spouse if the other spouse having obtained such decree dies after the decree and before appeal is filed against the same by the aggrieved spouse or application is made under Order 9, Rule 13 by the aggrieved spouse for getting such an ex parte decree of divorce set aside. Similarly, the right to sue would also survive even if the other spouse dies pending such appeal or application under Order 9, Rule 13, C.P.C. In either case proceedings can be continued against the legal heirs of the deceased spouse who may be interested in supporting the decree of divorce passed against the aggrieved spouse.”

23. Applying the said conclusions to the facts of the present case; it is clear that an application preferred under Order 9 Rule 13 of the Civil Procedure Code, 1908, praying for setting aside of the ex-parte decree of divorce, the right to sue survives to surviving spouse even after the other spouse who after having obtained such a decree, dies, even before such application under Order 9 Rule 13, is so filed by the aggrieved spouse for setting aside such ex-parte decree of divorce.

24. Similarly, the Hon'ble Supreme Court had categorically held that the right to sue would also survive even if the other spouse dies pending of such an application preferred under Order 9 Rule 13 of the Civil Procedure Code, 1908. However, it is to be noticed that the Hon'ble Supreme Court, had observed that either, in the case of an appeal against a decree of divorce, or, an application under Order 9 Rule 13 of the Civil Procedure Code, 1908, for setting aside the ex-parte decree of divorce; the proceedings can be continued against such legal heirs of the deceased spouse who may be interested in supporting the decree of divorce so passed against the aggrieved spouse.

25. The above position having been noticed, it is to be held that the decision of the Hon'ble Supreme Court in the case of **Smt. Yallawwa**(supra) squarely

applies to the facts of the present case and accordingly, it is to be held that the proceedings as instituted vide the application as filed by the petitioner, herein, under Order 9 Rule 13 of the Civil Procedure Code, 1908, to set aside the ex-parte decree of divorce, dated 21.02.2014, as passed by the Additional District Judge No.2, Sonitpur at Tezpur, Assam, in Title Suit(Divorce) No. 100/2013, and registered as Miscellaneous (J) Case No. 14/2022; would be maintainable and would now be required to be taken to its logical conclusion.

26. As observed by the Hon'ble Supreme Court in the decision rendered in the case of **Smt. Yallawwa**(supra), in the pending application of the petitioner, herein, as preferred under Order 9 Rule 13 of the Civil Procedure Code, 1908; the legal heirs of her deceased husband who are interested in the matter, is required to be brought on record. Accordingly, the petitioner, herein, would be called upon to implead the respondent No. 3 viz. Smti. Suchitra Kumari, as a party respondent in Miscellaneous (J) Case No. 14/2022.

27. In view of the conclusions reached hereinabove; the prayer of the petitioner for interference by this Court in the present proceeding with the ex-parte decree of divorce, dated 21.02.2014, passed by the learned Additional District Judge No.2, Sonitpur at Tezpur, Assam, in Title Suit(Divorce) No. 100/2013, is not entertained. However, the learned trial Court would now be required to take the proceedings in Miscellaneous (J) Case No. 14/2022 so preferred in Title Suit(Divorce) No. 100/2013, to its logical conclusion after the petitioner, herein, has filed an appropriate application for impleading respondent No. 3, herein, viz. Smti Suchitra Kumari, as a party respondent and also by affording a due opportunity of hearing to said Smti. Suchitra Kumari.

28. The above position having been noted, pertaining to the maintainability of Miscellaneous (J) Case No. 14/2022 after the death of the husband of the petitioner, would bring this Court to consider the prayer of the petitioner, herein, for being authorized the family pension and other pensionary benefits in respect of the services rendered by her deceased husband, namely, Prabin Bhuyan.

29. The proceedings in Miscellaneous (J) Case No. 14/2022, having not been taken to its logical conclusion, the decree of divorce subsists and accordingly, at this stage, it would not be permissible for this Court to direct the respondents No. 1 & 2, herein, to authorize to the petitioner, the family pension and other pensionary benefits flowing from the services rendered by her deceased husband, however, on the proceedings in Miscellaneous (J) Case No. 14/2022, being taken to its logical conclusion and in the event, the ex-parte decree of divorce, dated 21.02.2014, passed by the learned Additional District Judge No.2, Sonitpur at Tezpur, Assam, in Title Suit(Divorce) No. 100/2013, is so set set aside. The proceedings in Title Suit(Divorce) No. 100/2013, would stand automatically restored on the File of the learned trial Court at a stage prior to that, at which, it stood, when the proceedings got intercepted by the ex-parte decree of divorce.

30. Accordingly, it is required to be examined as to the permissibility of continuation with the proceedings in Title Suit(Divorce) No. 100/2013, after it is restored to file.

31. The said aspect of the matter was also considered by the Hon'ble Supreme Court in the case of **Yallawwa**(supra) and the following conclusions were drawn:

“10. Now remains the question as to whether the proceedings for divorce as restored by the High Court by its impugned order and required to be proceeded further or the curtain must be dropped on the said proceedings. As the ex parte decree is found to be rightly set aside by the High Court, the marriage petition would automatically stand restored on the file of the learned Trial Judge at the stage prior to that at which they stood when the proceedings got intercepted by the ex parte decree. Once that happens it becomes obvious that the original petitioner seeking decree of divorce against the wife being no longer available to pursue the proceedings now, the proceedings will certainly assume the character of a personal cause of action for the deceased-husband and there being no decree culminating into any crystallised rights and obligations of either spouse, the said proceedings would obviously stand abated on the ground that right to sue would not survive for the other heirs of the deceased-husband to get any decree of divorce against the wife as the marriage tie has already stood dissolved by the death of the husband. No action, therefore, survives for the Court to snap such a non-existing tie, otherwise it would be like trying to slay the slain. At this stage there remains no marriage to be dissolved by any decree of divorce. Consequently, now that the ex parte decree is set aside, no useful purpose will be served by directing the Trial Court to proceed with the Hindu marriage petition by restoring it to its file. The Hindu Marriage Petition No. 25 of 1989 moved by Shri Basappa, the husband of the respondent on the file of the Court of Civil Judge, Gadag will be treated to have abated and shall stand disposed of as infructuous. The appeal is disposed of accordingly. In the facts and circumstances of the case, there will be no order as to costs.”

32. In view of the above position, on restoration of Title Suit(Divorce) No. 100/2013, the Hon'ble Supreme Court having already held that on the death of one of the spouses, no marriage remains to be dissolved; no useful purpose will be served in the trial Court proceeding with the said divorce petition and the same, would stand abated and shall have to be disposed of as having become infructuous. In such an eventuality, the status of the petitioner, herein, as the first wife of the deceased husband viz. Prabin Bhuyan, would be so restored; and she would be entitled to have her name re-incorporated in the service records of her deceased husband i.e. Prabin Bhuyan and it would also entitle her to receive the family pension and other pensionary benefits so available on account of the services rendered by her deceased husband.

33. Till the proceedings in Miscellaneous (J) Case No. 14/2022, is taken to its logical conclusion, and the order, dated 21.02.2014, passed in Title Suit(Divorce) No. 100/2013, is set aside by the learned trial Court and the

status of the petitioner, herein, in view of the conclusions reached hereinabove, basing on the decision of the Hon'ble Supreme Court in the case of **Smt. Yallawwa**(supra), is restored; the respondents No. 1 & 2, would be at liberty to continue to authorize the family pension and other pensionary benefits to the legal heirs of late Prabin Bhuyan, which would, however, be subject to the final orders that would be passed by the learned trial Court in Miscellaneous (J) Case No. 14/2022.

34. Considering the fact that the proceedings in Miscellaneous (J) Case No. 14/2022, also involves an issue of proprietorial rights of the petitioner, herein, over the property of late Prabin Bhuyan; it is expected that the learned trial Court shall expeditiously consider the issue arising therein and take the proceeding, in question, to its logical conclusion at the earliest.

35. To facilitate a proper and due conclusion of the issues as arising in the above-noted proceeding; the petitioner, herein, shall, by 10th of September, 2024, file an application for impleading Smti Suchitra Kumari(respondent No. 3,herein) as a party respondent in Miscellaneous (J) Case No. 14/2022 and thereafter, the learned trial Court shall proceed with the matter and conclude the proceeding thereon after hearing the parties to the proceeding, expeditiously, in accordance with law.

36. With the above directions and observations, this writ petition stands disposed of.

37. Before parting with the records of the case; this Court would like to place on record, its appreciation for the valuable assistance rendered in the matter

by Mr. Nath, learned senior counsel appearing as an amicus curiae, which has facilitated for a due resolution of the issues arising in the matter.

JUDGE

Comparing Assistant