

THE HON' BLE SRI JUSTICE M. SEETHARAMA MURTI

Civil Revision Petition No.316 of 2016

ORDER:

This revision petition by the respondent-husband under Article 227 of the Constitution of India is filed assailing the order dated 31.12.2015 of the learned Judge, Family Court-cum-III Additional District Judge, Warangal, passed in IA.No.171 of 2014 in FCOP.No.177 of 2013 filed under Order IX Rule 13 of the Code of Civil Procedure, 1908, by the petitioner-wife requesting to set aside the *ex parte* decree dated 09.08.2014 passed in the said OP.

I have heard the submissions of Sri Venkat Reddy Thipparthi, learned counsel appearing for the revision petitioner-husband, and of Sri A. Prabhakar Rao, learned counsel appearing for the respondent-wife. I have perused the material record.

The parties shall hereinafter be referred as the husband and the wife for convenience and clarity.

The introductory facts, in brief, are as follows:

The husband filed the OP for declaring the marriage between the parties as voidable in view of the provision of Section 12(1)(a)(d) of the Hindu Marriage Act, 1955, *inter alia*, alleging that the marriage took place between the parties on 14.02.2013 and that from the beginning the wife expressed inability to have the conjugal life and that when she was taken to a Doctor, pregnancy was confirmed and that subsequently she gave birth to a female child on 28.09.2013 and that the husband has not fathered the child and that there was no consummation of marriage between the parties and that the wife gave birth to the female child on account of an affair she had with one L. Naresh.

The wife filed a counter denying all the allegations in the petition and *inter alia* stating that after the marriage was arranged, the parties developed

physical contact with each other and that subsequently the marriage took place and that later she gave birth to the female child under lawful wedlock and that the husband fathered the child. She also raised other contentions in her counter.

However, the matter was posted for conciliation before the Family Court. After noticing that the wife failed to attend for conciliation proceedings despite granting a number of adjournments successively, the Court below set the wife *ex parte* on 09.08.2014 and on the same day taken on record the evidence of the husband and decreed the OP *ex parte*.

In this setting of facts, the wife filed the subject application to set aside the *ex parte* decree. Her case in support of the said request, in brief, is this: - 'She appeared before the Family Court by engaging a counsel and filed her counter on 26.02.2014. Later, the case was posted to 21.03.2014 for filing the affidavit of the husband in lieu of examination in chief, but, he did not file his affidavit and sought time and the matter was adjourned from time to time. On 09.08.2014, she could not attend before the Family Court as she suffered from Fever. On that day as her counsel was also not present in the Court she was set *ex parte*. On receiving the affidavit of the husband in lieu of examination in chief the OP was decreed in his favour. Her absence before the Family Court on 09.08.2014 is neither intentional nor for wanton reasons and the counsel for the wife also could not attend before the Family Court for the reason it is coming for filing the chief affidavit of the husband. Her matrimonial rights are involved in the matter. On coming to know of the *ex parte* decree she approached her counsel and filed the subject application.'

The case of the husband in his counter, in brief, is this: - 'The wife having appeared through her counsel on 31.07.2013 failed to attend before the Family Court thereafter for 16 continuous adjournments. The Family Court posted the matter specifically for reconciliation. However, neither the wife nor

her counsel attended before the Family Court. The trial Court was pleased to go through the proceedings recorded in the docket and set the wife *ex parte*. The petition is filed without any basis. The wife was observing the proceedings without appearing before the Court even though her presence is essential in the proceeding before the Family Court. The petition is intended to drag on the proceedings on one pretext or the other. There is no merit in the petition. The petition may be dismissed.'

At the time of enquiry, no oral and documentary evidence was adduced before the trial Court. On merits and by the order impugned in this revision, the learned Judge, Family Court allowed the petition of the wife subject to the condition of payment of costs of Rs.200/- . Aggrieved thereof, the husband filed the present revision petition.

Learned counsel for the revision petitioner-husband while reiterating the case in the counter of the husband, which is stated supra, contended that the orders in the proceedings sheet, a copy of which is produced before this Court, reflect that the wife never attended before the Family Court for conciliation despite granting sufficient adjournments and that the Court below having taken her conduct into account set her *ex parte* on 09.08.2014 and that on the same day the affidavit in lieu of examination in chief of the husband was filed and that the OP was decreed in favour of the husband and that the wife, who was watching the proceedings, later filed the subject application by simply stating that she suffered from Fever without producing any medical record in support of the said contention and that the trial Court was in error in accepting the unsubstantiated allegation of the wife and that the trial Court ought to have seen that the husband has already married one Sandela Mounika and that if the *ex parte* order is set aside it will have adverse impact on the relationship of the husband with the said Mounika and that in view of the legal position in the decision of the Supreme Court reported in Parimal v. Veena @Bharti [2011(2)

ALT 33], the wife is not entitled to the relief claimed in the petition filed to set aside the *ex parte* decree and therefore the order is liable to be set aside.

Per contra, learned counsel appearing for the wife while supporting the orders of the trial Court and while reiterating her defence would submit that if the *ex parte* decree is set aside and the parties are directed to undergo DNA test the truth will surface and that not only the rights of the wife but also of the female child are involved in the matter and that when the matter is posted for reconciliation and when the wife could not attend on the day of adjournment the Family Court ought to have posted the matter for trial instead of setting her *ex parte* and granting an *ex parte* decree to the husband and that in matter of this nature the application for setting aside the *ex parte* decree shall be liberally considered and that the trial Court was correct in the facts and circumstances of the case in allowing the wife's application on payment of costs.

I have given detailed and thoughtful consideration to the facts and submissions.

The wife pleads that on the date of adjournment she was unwell and therefore she could not attend before the Court and that her counsel also did not appear before the Court below as the matter was coming for reconciliation and filing the affidavit in lieu of examination in chief of the husband and that her absence before the Family Court is neither wilful nor wanton and that she has got a strong case in the OP and that if the *ex parte* decree is not set aside she suffers and irreparable loss.

The first contention of the husband is that the wife was continuously absent before the Family Court as is borne out by the recordings in the proceeding sheet, a copy of which is produced before this Court, and that the wife did not appear on any date of adjournment before the Family Court though the matter was posted for reconciliation from time to time and that the trial

Court having observed her conduct set her *ex parte* and that her previous conduct is by itself enough to show that she is not diligent in prosecuting her defence. He would also submit that the wife who was watching the proceedings got filed the subject petition to drag the proceedings and harass the husband.

I have perused the decision of the Supreme Court referred to supra. In the cited decision, the Supreme Court observed that while considering the application for setting aside the *ex parte* order, the approach should be liberal and elastic rather than narrow and pedantic. As per the law well settled, while considering the merits of the application filed for setting aside the *ex parte* decree, the Court has to only consider the valid reason, if any, for non appearance of the wife on the day she was set *ex parte* and the OP was decreed *ex parte*, but the Court cannot take into consideration the aspect of her non appearance on previous dates of adjournments and cannot stretch the matter to cover circumstances which had occurred prior to the date of *ex parte* order and decree as the said conduct prior to the said date stands over looked and condoned. Therefore, in the considered view of this Court, on the basis of her previous conduct and her earlier absence on the dates of adjournments prior to the *ex parte* order and decree, her request for setting aside the *ex parte* decree in the OP cannot be refused. As rightly pointed out by the learned counsel for the wife, when one of the contentions of the husband is that he did not father the child and when he attributed infidelity and unfaithfulness to the wife, the interests not only of the wife but also of the child are involved in the matter and, hence, in a matter of this nature, a fair and reasonable opportunity shall be given to the wife to contest the matter on merits, as such a course subserves the ends of justice, in the well thought of view of this Court.

Viewed thus, this Court finds that the trial Court is justified in passing the order which is impugned in the revision and that the said order does not brook interference.

In the result, the Civil Revision Petition is dismissed confirming the order of the trial Court.

Pending miscellaneous petitions, if any, shall stand closed. There shall be no order as to costs.

M. SEETHARAMA MURTI, J

14th December, 2016
Vjl

