

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

**FAO-M-105-M of 2007
Date of Decision-22.04.2016**

Smt. Asha Gambhir ... Appellant

Versus

Ghanshyam Dass Gambhir ... Respondent

CORAM:- HON'BLE MR. JUSTICE M. JEYAPPAUL

HON'BLE MR. JUSTICE RAJ MOHAN SINGH

Present: Mr. Amit Jain, Advocate, Advocate
for the appellant.

Mr. Ashwani Gaur, Advocate
for the respondent.

RAJ MOHAN SINGH, J.

[1]. Appellant has assailed judgment dated 17.11.2006 passed by Additional District Judge (I), Faridabad vide which application for setting aside the order dated 04.01.1991 and consequent dissolution of marriage by a decree of divorce dated 09.01.1991 passed by the then Additional District Judge, Faridabad was dismissed.

[2]. Before embarking upon the merits of the case, some facts are required to be noted.

[3]. Respondent Ghanshyam Dass Gambhir filed a petition under Section 13 of Hindu Marriage Act for dissolution of

marriage by decree of divorce between the parties. The said petition was filed on 23.11.1990 in the Court of District Judge, Faridabad. The notice of that petition was directed to be served upon the present appellant being respondent therein for 21.12.1990. As per report of Process Server, service was effected on the appellant on 28.11.1990 by him in person. On service, Sh. Suresh Sharma, Advocate appeared on behalf of the respondent on 21.12.1990 and sought time to file reply. The case was adjourned for 04.01.1991. On 04.01.1991, Sh. Suresh Sharma, Advocate pleaded no instructions and withdrew from the case. Present appellant was proceeded against ex parte and case was adjourned to 09.01.1991 for ex parte evidence of the husband-petitioner.

[4]. On 09.01.1991, statements of two witnesses were recorded in the ex parte evidence of the husband. Ghanshyam Dass Gambhir himself appeared as PW-1 and also got examined one Rakesh Kaushik as PW-2. In his statement, Ghanshyam Dass Gambhir-husband submitted that his marriage was solemnized in the year 1970 at Gwalior according to Hindu rites and ceremonies. The couple started living at Gwalior and stayed there till the year 1974. Thereafter, they started living at Ballabgarh, District Faridabad. A son named Ashu and a daughter named Sonia took birth from this wedlock. The wife-appellant had lived in the company of Ghanshyam Dass Gambhir at Ballabgarh till the year 1985, thereafter she deserted him along

with the children without the knowledge of the husband. The divorce was sought on the ground of desertion. PW.2 Rakesh Kaushik also supported the version of the husband-Ghanshyam Dass Gambhir (PW-1). On the basis of ex parte evidence, learned District Judge vide order dated 09.01.1991 accepted the petition and the marriage of the parties was ordered to be dissolved by an ex parte judgment and decree of divorce under Section 13 of Hindu Marriage Act.

[5]. Thereafter, appellant filed an application for setting aside the order dated 04.01.1991 and decree dated 09.01.1991 passed by the Additional District Judge on 25.09.2004/28.09.2004 on the ground that Sh. Suresh Sharma, Advocate appeared on behalf of the respondent on 21.12.1990. He did not appear on 04.01.1991 and the applicant was proceeded against ex parte. Ex parte evidence was taken on 09.01.1991.

[6]. Applicant-appellant pleaded that judgment and decree dated 09.01.1991 was obtained by way of playing fraud upon the Court as well as upon the applicant. She claimed that she was never married to Ghanshyam Dass Gambhir in the year 1970. Neither she resided with him at Gwalior upto 1974, nor she resided with him at Faridabad. There was no relationship of husband and wife between them, rather she was married to one Satyavir Vashisht on 17.04.1988. In the year 1970, she was only

14 years of age, therefore, being minor she was not supposed to be married.

[7]. Appellant further asserted that she lived with Satyavir Vashisht happily for 4-5 years, thereafter Satyavir Vashisht intended to marry someone else and wanted to get rid of applicant and got filed the petition in collusion with his counsel by showing fake address. Satyavir Vashisht often used to obtain her signature on blank papers and even at some times on *Vakalatnama* for transfer of ownership of land. Various agreements of lands were executed in her name and she was having faith in him. Collusion was alleged and she denied having received any summons from the Court, nor engaged Sh. Suresh Sharma, Advocate on her behalf in the aforesaid captioned petition. She also pleaded that she had no knowledge or intimation of aforesaid petition of divorce filed by Ghanshyam Dass Gambhir. It was also claimed by the applicant that Sh. Suresh Sharma, Advocate was very close to Satyavir Vashisht and it was very possible that Sh. Suresh Sharma, Advocate must have colluded with Satyavir Vashisht in procuring and obtaining the judgment and decree by practicing fraud. Applicant also pleaded that she came to know the particulars of judgment and decree dated 09.01.1991 for the first time in the proceedings under Section 494 IPC and thereafter, application in question came to be filed.

[8]. Perusal of the pleadings of the application for setting aside the ex parte order and ex parte judgment and decree reveals that the applicant-appellant has denied having received any summons from the Court and never engaged Sh. Suresh Sharma, Advocate as her counsel.

[9]. The respondent contested the application on the ground of delay as well as on merits. Respondent also contested the application on the ground that the same is neither supported by any affidavit, nor the contents thereof have been verified by the applicant. Respondent also contested the claim of the applicant by submitting that a son was born out of the wedlock in the year 1973 and a daughter was born in the year 1976-77 and both the children are living with the respondent. The applicant deserted the respondent in the year 1985. Respondent has denied the marriage of the applicant with Satyavir Vashisht. In the aforesaid application, the applicant appeared as AW-3 and admitted that her two children were born in the year 1975 and 1977 respectively. She did not want to disclose the name of the father of her children. She denied the suggestion that since she did not give any further instructions to Sh. Suresh Sharma, Advocate, so he did not appear in the case. Besides appearing herself, she adduced voter list of the year 1995 as Ex. A-1, Ration Cards Exs. A-2. A-3 and A-4 and other documents i.e. school certificate and receipt of Mandir as Exs.A-6 and A-7. Identity card prepared by Election Commission of India as Ex.A-8

and some photographs as Ex.A-9, documents viz. A4/A and A4/B were also tendered. The applicant got examined Nathu Lal, Election Kanungo as AW-1, Om Kanwar SI, Food and Supplies Department as AW-2 and Head Constable Hari Singh as AW-4. Respondent also adduced evidence by examining Sh. Surajmal as RW1, Sh. Het Ram Sharma, Advocate as RW-2, Sh. S.D. Sharma, Advocate as RW-3 and he himself appeared as RW-4. Respondent also tendered his affidavit dated 27.09.2006 as Ex.R-4, wherein he has disclosed that he was called by CIA staff in 2002 and he produced the copy of order dated 09.01.1991 passed by the Additional District Judge, Faridabad and Smt. Asha Gambhir had came to know about the order in June 2002.

[10]. Trial Court after perusing the record dismissed the application vide the impugned order dated 17.11.2006.

[11]. We have heard learned counsel for both the sides and have also perused the record.

[12]. Learned counsel for the appellant has submitted that when the counsel for the appellant pleaded no instructions before the trial Court, it was obligatory on the part of the Court to issue notice to the appellant. In support of his contention, learned counsel placed reliance upon **Malkiat Singh and another Vs. Joginder Singh and others, (1998) 2 Supreme Court Cases 206** and **Jayalakshmi Vs. Avara, 2003 (3) Civil Court Cases 284 (Kerala).**

[13]. Before advertizing to the aforesaid precedents, it has to be noted that the stand of the appellant in the application for setting aside the ex parte order dated 04.01.1991 and decree dated 09.01.1991 was that she never received summons from the Court, nor engaged Sh. Suresh Sharma, Advocate. The very engagement of the Advocate has been denied. Said Advocate appeared on behalf of the appellant on 21.12.1990 and also filed power of attorney duly signed by the appellant. The appellant never denied her signature on the power of attorney, nor led any evidence to counter and show that her signature did not appear on the power of attorney on record. Sh. Het Ram Sharma, Advocate appeared as RW-2 and Sh. S.D. Sharma, Advocate as RW-3. Sh. S.D. Sharma, Advocate was working with Sh. Suresh Sharma, Advocate from 1983 to 2001. This Advocate has proved the *Vakalatnama* Ex.R-3 on record and has identified the signature of Sh. Suresh Sharma, Advocate on the power of attorney. Once the power of attorney is proved on record, it was legally incumbent upon the applicant-appellant to prove that her signature was not present on the power of attorney. The service of summons is already on record. Sh. Suresh Sharma, Advocate had already appeared on 21.12.1990 and thereafter, on adjourned date, he pleaded no instructions. The case of the applicant-appellant was not that her Advocate pleaded no instructions, rather her case was that she never received any summons from the Court, nor engaged any lawyer on her behalf.

The ex parte order and proceedings were passed on 04.01.1991 and 09.01.1991 respectively. The application for setting aside the same came to be filed only in the year 2004. The delay is sought to be explained on the plea that the applicant-appellant came to know about the judgment and decree only in the proceedings of the case under Section 494 IPC. For that, reliance was placed on the affidavit of the respondent Ex.R-4, wherein the respondent has submitted that she had come to know about the order dated 09.01.1991 in June 2002. Mr. Ghanshyam Dass Gambhir while appearing as RW-4 has also stated that he showed the decree of divorce in the year 2003-04, when the police inquired from him in the investigation.

[14]. In the light of above facts, the judgment relies upon by the applicant-appellant do not apply to the facts and circumstances of the case because the applicant-appellant has denied the very engagement of the lawyer, therefore, question of his pleading no instructions and thereafter, issuing a personal notice to the appellant do not arise in the controversy in hand.

[15]. The scope of the application under Order 9 Rule 13 CPC cannot be extended to decide the factum of marriage or otherwise between the parties in the year 1970. In the present appeal, the scope of appeal is only to see proper service so effected upon the appellant and thereafter, she was proceed against ex parte in a lawful manner. Sh. Suresh Sharma,

Advocate duly appeared on behalf of the applicant-appellant on 21.12.1990 and thereafter, he pleaded no instructions on behalf of the applicant. Since the applicant-appellant has denied the very engagement of Sh. Suresh Sharma, Advocate as her counsel, therefore, the legality of the evidence or otherwise has to be tested on the touchstone of pleadings and evidence on record. The applicant-appellant has failed to adduce evidence of expert to prove that her signature is not present on the power of attorney so filed by Sh. Suresh Sharma, Advocate.

[16]. The filing of application only in the year 2004 further aggravates the claim of the applicant-appellant. Even after alleged information having been conveyed to her or received by her through the respondent in the year 2002, the application came to be filed only in the year 2004. The material on record even if not relevant for decision of present appeal, arising out of the application, still facts are pertinent that two children took birth from the wedlock of the parties in the year 1975 and 1977 respectively. The applicant-appellant very strangely pleaded in her statement that she will not disclose the name of father of the children. In the year 1975-1977, Satyavir Vashisht was never in picture. The alleged marriage between the applicant and Satyavir Vashisht was claimed to be in the year 1988. For more than 13 years, the applicant-appellant kept mum. It can safely be gathered that she was having knowledge of ex parte judgment and decree. Since, she was allegedly living with Satyavir

Vashisht, therefore, she chose not to get the decree set aside. It is only when the Civil Suit for maintenance under Adoption and Maintenance Act was filed on 26.10.2002 and seeing the way in which the proceedings took place, the applicant-appellant thought it appropriate to challenge the ex parte order and decree dated 04.01.1991 and 09.01.1991 respectively by moving a belated application, which has been found to be totally misplaced by the trial Court.

[17]. Having considered the controversy in the light of facts on record, we are of the considered view that there is no worth in the appeal and the same is dismissed as such.

(RAJ MOHAN SINGH)
JUDGE

(M. JEYAPPAUL)
JUDGE

22.04.2016
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