

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.70 of 2016**

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Sweta Singh, W/o Sri Birendra Kumar, D/o Sri Arun Kumar Thakur, At present Residing at Village- Dohan Patahi (Jagarnath Patahi), P.S.- Sadar, District- Muzaffarpur.

... .. Appellant/s

Versus

Sri Birendra Kumar, S/o Late Suryadeo Singh @ Babu Saheb, R/o Mohalla-Brahmpura, Behind Sanjay Cinema, P.O.- M.I.T., P.S.- Brahmapura, District-Muzaffarpur.

... .. Respondent/s

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**Appearance :**

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| For the Appellant/s  | : | M/s. Rajendra Kumar Jain, Advocate<br>Pradeep Kumar Sinha,<br>Punam Srivastava, Advocates |
| For the Respondent/s | : | Mr. Abhay Kumar, Advocate                                                                 |

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**CORAM: HONOURABLE DR. JUSTICE RAVI RANJAN**

**and**

**HONOURABLE MR. JUSTICE S. KUMAR**

**ORAL JUDGMENT**

**(Per: HONOURABLE DR. JUSTICE RAVI RANJAN)**

**Date : 06-10-2017**

We have heard the parties and perused the records of this case.

This appeal has been preferred against the judgment dated 22.09.2015, passed by the Principal Judge, Family Court, Muzaffarpur in Matrimonial Case No.26 of 2012 by which the aforesaid matrimonial case for grant of decree of divorce under Section 13 of the Hindu Marriage Act, 1955 was dismissed.

It appears from the order-sheet of the case that the petitioner-appellant had led her evidence in support of her claim and the evidence of the respondent-husband was initially closed as he was not appearing on the date fixed. However, the said order



was recalled subsequently on 22.05.2015 upon payment of a cost of Rs.200/-. The matter was again fixed on 16.07.2015. On that day, the opposite party-respondent was present along with his witness. However, on behalf of the petitioner-appellant attendance was filed by her Pairwikar upon which she was directed to remain present on 20.08.2015. On 20.08.2015, the petitioner-appellant did not appear in person and the matter was again posted on 22.09.2015. Thereafter, on the aforesaid date, the case was dismissed for default considering that the appellant did not appear on last several dates. It is recorded that though the opposite party appeared physically, the appellant was absent on three consecutive dates. However, the petitioner-appellant was granted liberty to file miscellaneous case for restoration of maintenance case.

The appellant did not avail that opportunity and has filed appeal against the aforesaid order.

It is contended on behalf of the appellant that in view of the provision contained in Section 19 (1) and (2) of the Family Courts Act, 1984 (hereinafter referred to as “the Act”), the miscellaneous case would not be maintainable as there is a provision of appeal under Section 19(1) of the Act.

Learned counsel appearing for the respondent, *per contra*, has submitted that though there is a provision of appeal, however, the inherent power of the Court under Section 151 CPC



as well as its power under Order 9 Rules 13 and 8 does not stand wiped out as they are not in conflict with Section 19 of the Act. For better appreciation, the relevant provision of Section 19(1) and (5) are quoted as under:-

“19. Appeal.(1) Save as provided in sub-section (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in the Code of Criminal Procedure, 1973 (2 of 1974) or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law.

(5) Except as aforesaid, no appeal or revision shall lie to any court from any judgment, order or decree of a Family Court.”

From perusal of the aforesaid provision, it appears that Section 19 has overriding effect upon any other law and an appeal would lie from every judgment or order.

Now, it has to be seen as to whether the provision under Order 9 or Section 151 CPC are in conflict with the aforesaid provision of the Act or not?

On anxious consideration of all the relevant provisions, we are of the opinion that the same is not in conflict with each other. Under the Code of Civil Procedure every order is not appealable as the appeal lies from decree which includes an order setting aside the plaint under Order 7 Rule 11 CPC and there are certain orders which have been specified under Order 43 Rule 1 which are considered to be appealable orders and appeal is also available against such orders. However, there are many orders which are not appealable. For example, If a petition is filed under



Order 7 Rule 11 for rejection of plaint and the same is dismissed then no appeal would be available against such order, thus, only revision would lie under Section 115 CPC.

Considering these aspects of the matter, in our view, the Legislature in its wisdom has come up with Section 19(1) of the Act to provide one forum for several matters and it is stated specifically that notwithstanding anything contained in the Code of Civil Procedure or any other law, an appeal shall lie from every judgment or order. There is another aspect of the matter also. Under Section 28 of the Hindu Marriage Act, 1955, appeal has been provided against all the decrees and orders made by the Court. However, after enforcement of the Family Courts Act, 1984, it would be in conflict with Section 19 of the Act and, as such, Section 19(1) of the Act would have an overriding effect. Thus, appeal would now be available under Section 19 of the Act only and not under Section 28 of the Hindu Marriage Act.

However, so far as restoration of a case or for setting aside the *ex parte* decree under Order 9 Rule 13 or the inherent power of the Court for the purpose of restoration under Section 151 CPC are concerned, unless they are in conflict with Section 19 of the Act, they cannot be held to have been wiped out from scene in view of the provisions under Section 19 of the Act. For that



purpose, one would have to peruse Section 10 of the Act also which reads as under:-

“10. Procedure generally. (1) Subject to the other provisions of this Act and the rules, the provisions of the Code of Civil Procedure, 1908(5 of 1908) and of any other law for the time being in force shall apply to the suits and proceedings (other than proceedings under Chapter IX of the Code of Criminal Procedure, 1973(2 of 1974)] before a Family Court and for the purpose of the said provisions of the Code, a Family Court shall be deemed to be a Civil Court and shall have all the powers of such court.”

The aforesaid provision clearly lays down that provisions of Code of Civil Procedure, 1908 and any other law for the time being in force shall apply to the suits and proceedings save and except the proceedings under Chapter IX of the Code of Criminal Procedure, 1973. Therefore, since there is no provision for restoration of the case under the Act or the relevant rules, v.i.z. Family Courts (Patna High Court) Rules, 2000 and the Bihar Family Court Rules, 2011, which has simply been dismissed for default, in our view, the power of restoration of the case or power of setting aside the *ex parte* decree would always be available to the Family Courts under the provisions contained in C.P.C. as the same would have its root under Section 10 of the Act itself. On consideration of all the aspects of the matter, one would have to come to irresistible conclusion that in the matters regarding



which there is no provision under the Family Courts Act or Rules, the procedure available under the CPC, for example with respect to the present case the provisions under Order 9 Rule 8 or Section 151 of the CPC, would be applicable. A reference in this regard is made to a decision of learned Single Judge of Karnataka High Court in **Eknath Vs. Rupa [C 2015(0) Supreme (KAR) 605]** as well as a decision of the Division Bench in **Smt. Roopa V. Santosh Kumar [AIR 2005 Allahabad 172]**. Both the High Courts have taken an identical view in the matter to the views of this Court expressed above.

Thus, in our view, there is no infirmity in that part of the order by which the appellant/petitioner has been granted liberty to file miscellaneous case for restoration of the matrimonial case which was dismissed for default. However, having said so, even when such power is there, the order impugned is also an order by which the matrimonial case has been dismissed, though not on merit. Thus, in our view, an appeal under Section 19(1) of the Act would also be maintainable as it would also come within the purview of the judgment or order. Another example would be a circumstance when *ex parte* decree is passed. In such a situation, aggrieved person has a remedy to move before the competent court under Order 9 Rule 13 for setting aside the *ex parte* decree. However, it does not mean that such person would have no right



to prefer an appeal against the original decree. However, in such case, law is well settled that appeal would only be heard only on merit but the ground which might have been available to the appellant had an application been filed by him under Order 9 Rule 13 to show that no notice could be served upon him or there was another reason beyond his capacity due to which he/she could not appear in the suit on the given date, would not be available in appeal.

However, in the present case, issue is not as above. The simple issue is that the case has been dismissed for default as the petitioner was directed to remain physically present and she could not appear on three consecutive dates. It is submitted on behalf of the appellant that she was busy with the treatment of her mother and, as such, she could not appear.

In our view, such type of matrimonial matters are ordinarily required to be considered and disposed of on merit and technicality should not come in way of doing full justice. Justice would be served if the petitioner-appellant is granted another opportunity to appear before the Family Court and matrimonial case is decided on its own merit and in accordance with law.

As a result, the judgment dated 22.09.2015 is set aside. The matter is remitted back to the court concerned to decide the matter on its own merit and in accordance with law. The appellant



-petitioner would be required to appear in person before the court concerned along with a copy of this judgment on 22.11.2017 and the opposite party would also be required to remain present in person on that day so that a particular date is fixed by the court below to proceed further in the matter. It is expected that the court concerned will take all the steps so that the case could be decided on its own merit and in accordance with law expeditiously, preferably within a period of three months thereafter as the petitioner-appellant evidence has already been closed. It is further made clear that if any of the parties do not co-operate in the matter and again adopt dilatory tactics then the court below would not grant unnecessary adjournment and if one of the parties remains absent on two – three consecutive dates without any explanation to the satisfaction of the court then the matter should proceed in accordance with law even in the absence of such party.

As a result, this appeal is allowed. The parties would bear their own costs.

**(Dr. Ravi Ranjan, J)**

Sanjay/-

**( S. Kumar, J)**

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