

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

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FAO-M-76-2017 (O&M)

Date of decision: October 23, 2017

Banita @ Mona

.....APPELLANT

Versus

Amit Sareen

.....RESPONDENT

CORAM: HON'BLE MR. JUSTICE M.M.S.BEDI
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH

Present: Mr. Rajeev Sharma, Advocate,
for Mr. Kamaldeep Singh Sodhi, Advocate,
for the appellant.

None for the respondent.

M.M.S.BEDI, J.(ORAL)

As per the report of the process serving agency, the respondent had obtained the summons and disappeared on 18.05.2017. Report of the process server to that effect has been submitted.

In view of the said circumstances, we are of the considered opinion that the respondent-husband, who has obtained an ex-parte decree under Section 11 of the Hindu Marriage Act, is intentionally adopting evasive approach to appear and contest the appeal.

Case has been called twice. No one has put in appearance on behalf of the respondent-Amit Sareen. The respondent is proceeded against ex-parte and the appeal has been considered after going through the records of the lower Court.

This appeal has been preferred by the appellant-wife against the ex-parte judgment and decree dated 07.01.2017 passed by the Additional District Judge, Jalandhar, allowing the application under Section 11 of the Hindu Marriage Act declaring the marriage of the parties as null and void being violative of clause (i) of Section 5 of the Hindu Marriage Act.

The respondent-husband sought a declaration of the marriage between the parties as nullity on the averments that his marriage with the appellant was solemnized on 28.06.2010 at Jalandhar. Both the parties were divorcee and their marriage was performed by way of garlanding ceremony. The respondent claimed that his first marriage was dissolved on 02.03.2009 by a decree of divorce passed by the Court of Sh. Tarsem Mangla, the then Additional District Judge, Jalandhar. He had given a matrimonial advertisement in a newspaper for 2nd marriage and came in contact with the parents of the appellant who disclosed that the appellant was also a divorcee as she was previously married to one Munish Khanna of Lucknow and had obtained the divorce through the Court. In view of the said circumstances, the marriage was performed. As the appellant was not having any legal decree of divorce from her previous husband, the respondent was not able to persuade the appellant to join his society. As such, he filed a petition for annulment of the matrimonial ties. Said application filed under Section 11 of the Hindu Marriage Act by the respondent was, however, withdrawn by him on the basis of alleged assurance given by the family members of the appellant but later on the family members of the appellant allegedly wriggled out of the

settlement and implicated the respondent in various false cases. The respondent also took up the plea of cruelty for declaring the marriage as nullity.

A perusal of the impugned judgment dated 07.01.2017 indicates that the appellant had put in appearance through her counsel but on account of non-appearance on behalf of the appellant only on one date of hearing i.e. 08.08.2016, she was proceeded against ex-parte.

We have gone through the lower Court record and perused the interim orders. The interim orders indicate that on 08.08.2016, the appellant was proceeded against ex-parte at 2.40 P.M. and case was adjourned to 05.09.2016 for ex-parte evidence. On 05.09.2016, ex-parte evidence of PW-1 Amit Sareen, PW-2 Surinder Kumar Sareen and PW-3 Satnam Singh was recorded and the evidence was closed but no final order was passed on 05.09.2016. The order dated 05.09.2016 reads as follows:-

“ PW-1 Amit Sareen, PW2 Surinder Kumar Sareen and PW-3 Satnam Singh have come present and examined. Petitioner closed his ex-parte evidence by making separate statement. Arguments partly heard. Case is adjourned to 27.09.2016 for remaining arguments.”

After the above-said order, the case was adjourned to 27.09.2016, on which date the appellant moved an application for setting aside ex-parte order dated 08.08.2016. The interim order dated 27.09.2016 reads as follows:-

“ Counsel for respondent moved an application for set aside exparte order dated 08.08.2016. Copy of the same

supplied to counsel for petitioner, who seeks time to file reply of the said application.

On request, case is adjourned to 04.10.2016 for reply and arguments on above application.”

The application for setting aside ex-parte order dated 08.08.2016 was adjourned from 04.10.2016 till 02.12.2016 by Sh. Vinod Kumar Goyal, Additional District Judge, Jalandhar without assigning any special reason for adjournment. The interim orders from 04.10.2016 till 02.12.2016 read as follows:-

Order dated 04.10.2016

“ Reply to the application for set aside ex-parte order dated 08.08.2016, has been filed. Copy of the same supplied to counsel for respondent, who seeks adjournment to address arguments on said application.

On request, case is adjourned to 18.10.2016 for arguments on above application.”

Order dated 18.10.2016

“ Received by way of transfer. It be registered. Case is fixed consideration on application for setting aside ex-parte. The learned counsel for the petitioner is stated to be sick. At request of the proxy counsel for consideration on aforesaid application, case is to come up on 4.11.2016.”

Order dated 04.11.2016

“ Case is fixed consideration on application for setting aside ex-parte. At request, for consideration on aforesaid application case is to come up on 21.11.2016.”

Order dated 21.11.2016

“ Case is fixed consideration on application for setting aside ex-parte. At request, for consideration on aforesaid application case is to come up on 28.11.2016.”

Order dated 28.11.2016

“ Case is fixed for consideration on application for setting aside ex-parte. At request, for consideration on aforesaid application, case is to come up on 02.12.2016.”

Order dated 02.12.2016

“ Case is fixed for consideration on application for setting aside the ex-parte. At request, case is to come up on 08.12.2016. for consideration.”

On 08.12.2016, when no one was present on behalf of the appellant, who had been proceeded against ex-parte on 08.08.2016, Sh. Vinod Kumar Goyal, Additional District Judge, Jalandhar opted to dismiss the application for setting aside ex-parte proceedings by passing the following order:-

Order dated 08.12.2016

“ The case is fixed for consideration on application of the respondent for setting aside ex-parte proceeding order dated 8.8.2016. Despite calling the case a number of times, neither the respondent herself nor anybody else has appeared on her behalf. Hence, the application for the respondent for setting aside ex-parte proceeding order is dismissed. For arguments, the case is to come up on 13.12.2016.”

Thereafter, the case was adjourned for 13.12.2016, 21.12.2016, 4.1.2017 and 7.1.2017 by considering the appellant ex-parte and finally, the application under Section 11 of the Hindu Marriage Act filed by the respondent was allowed on 07.01.2017. The interim orders after 08.12.2016 read as follows:-

Order dated 13.12.2016

“ Case is fixed for arguments. The counsel for the petitioner is not available. At request of the petitioner, for arguments, the case is to come up on 21.12.2016.”

Order dated 21.12.2016

“ Case is fixed for arguments. The learned counsel for the petitioner is not available. At request for ex-parte arguments, the case is to come up on 4.1.2017.”

Order dated 04.01.2017

“ Arguments not addressed. At request of the learned counsel for the petitioner, for arguments, the case is to come up on 7.1.2017.”

Order dated 07.01.2017

“ Arguments heard. Vide my separate judgment of today, present petition has been allowed ex-parte by leaving the petitioner to bear his own costs of these proceedings. Decree sheet be drawn and file be consigned to the Record Room.”

We have considered the above-said interim orders and are of the opinion that the circumstances of the present case warrant interference in the illegal interim order passed on 08.12.2016 dismissing

the application for setting aside ex-parte order after unnecessarily adjourning the application for six dates of hearing. It appears that there was no reason for the learned trial Court to adjourn the application for setting aside the ex-parte order dated 08.08.2016 for so many dates and all of a sudden, dismissing the same on one particular date on 08.12.2016 when the counsel for the appellant was not present. The entire approach of the trial Court in considering the application for setting aside ex-parte proceedings is illegal and arbitrary.

We have considered the legality and propriety of the order dated 08.12.2016 in view of the jurisdiction vested in the Appellate Court under Order 43 Rule 1-A CPC, which enables a party to challenge a non-appealable order in appeal against decree. Order 43 Rule 1-A (1) CPC reads as follows:-

“ 1-A. Right to challenge non-appealable orders in appeal against decrees.-(1) Where any order is made under this Code against a party and thereupon any judgment is pronounced against such party and a decree is drawn up, such party may, in an appeal against the decree, contend that such order should not have been made and the judgment should not have been pronounced.”

A perusal of the order dated 08.12.2016 dismissing the application for setting aside ex-parte proceedings dated 08.08.2016 indicates that neither the reasons for dismissal of the application have been mentioned nor the averments made in the application have been considered. The order dated 08.12.2016 is apparently an order passed without applying a judicious mind on the application for setting aside

ex-parte order. The lower Court has failed to appreciate that the appellant was proceeded against ex-parte on 08.08.2016 and the applicant had filed an application for setting aside the ex-parte proceedings dated 08.08.2016 on 27.09.2016.

The provisions of order 9 Rule 7 CPC reads as follows:-

“ 7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.-Where the Court has adjourned the hearing of the suit ex-parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.”

A perusal of the above-said provisions clearly indicates that when a Court adjourns the hearing of the suit ex-parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon any terms and conditions imposed by the Court, be heard in answer to the suit as if he had appeared on the day fixed for his appearance.

The appellant had appeared on 27.09.2016 and moved an application for setting aside ex-parte proceedings prior to the ex-parte proceedings culminating into ex-parte decree. In the above-said eventuality, the rules of justice required that the appellant should have been given permission to appear on the subsequent dates and contest the petition subject to imposition of some costs or penalty upon the

appellant. Instead of permitting the appellant to participate in further proceedings and giving an opportunity to her to cross-examine the witnesses, who had been examined on 05.09.2016, the then Additional District Judge Sh. Tarntaran Singh Bindra adjourned the application for 04.10.2016. Thereafter, the case was transferred to the Court of Sh. Vinod Kumar Goyal, Additional District Judge, Jalandhar, who casually adjourned the case for five dates instead of permitting the appellant to participate in further proceedings and contest the matter. The appellant has been deprived of a fair opportunity to contest the claim of the respondent without any reasonable cause. The application of the appellant could have been allowed on the very day when the application under Order 9 Rule 7 CPC was filed. The casual approach of the Court also has caused serious prejudice to the matrimonial life of the appellant.

In the interest of justice, we set aside the interim order dated 08.12.2016 dismissing the application of the appellant for setting aside ex-parte proceedings dated 08.08.2016. The application dated 27.09.2016 for setting aside ex-parte proceedings dated 08.08.2016 is allowed subject to payment of costs. Since the respondent is ex-parte, the cost cannot be granted.

The order dated 08.12.2016 is hereby set aside. The consequential relief pursuant to the setting aside of order dated 08.12.2016 would entail the setting aside of subsequent orders and proceedings, which culminated in the ex-parte judgment and decree dated 07.01.2017 passed by Sh. Vinod Kumar Goyal, Additional District Judge, Jalandhar. The arms of the clock will be reverted back to the

stage as it was on 27.09.2016. The appellant would be entitled to participate in the further proceedings w.e.f. 27.09.2016.

In view of the application for setting aside ex-parte proceedings dated 08.08.2016 having been allowed by this Court, the appellant-wife will get an opportunity to file written statement and contest the claim of the respondent in the petition under Section 11 of the Hindu Marriage Act subject to payment of cost of Rs. 1,000/-. The parties are directed to appear before the trial Court on 02.12.2017. The appellant shall be permitted to file written statement on that date. The cost will be offered on the next date of hearing to be fixed before the trial Court.

It is observed that since the respondent has opted to evade appearance before this Court, in the interest of justice, in the eventuality of respondent not appearing before the lower Court, the lower Court can issue notice to the respondent through his counsel for appearance on the date of hearing fixed by the Court.

The appeal is allowed in the above terms.

Decree sheet be prepared.

(M.M.S.BEDI)
JUDGE

(AUGUSTINE GEORGE MAISH)
JUDGE

October 23, 2017

pj

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No