

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

219

FAO-7535 of 2016

Date of Decision:- 22.2.2018

Sheetal

... Appellant

Versus

Parveen Kumar

... Respondent

**CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI
HON'BLE MR. JUSTICE GURVINDER SINGH GILL**

Present:- Mr. Shvetanshu Goel, Advocate for
Mr. Shrey Goel, Advocate, for the appellant.

Mr. Raminder Singh Dhaliwal, Advocate for
Mr. Mohan Singh Chauhan, Advocate, for the respondent.

M.M.S. BEDI, J.

The short question, required to be determined in this appeal, is whether the ex parte decree of divorce granted in favour of the respondent dated 8.11.2012 could be set aside under Order 9 Rule 13 CPC. Vide impugned order dated 8.4.2016 the said application filed by the wife-appellant had been dismissed on the ground that the application was barred by time and was also devoid of merits.

Respondent seems to have re-married. In view of the said circumstance we propose to dispose of the appeal against order dated 8.4.2016 on merits today as record has already been received.

This is an appeal against order dated 8.4.2016, dismissing her application under Order 9 Rule 13 CPC for setting aside the ex parte decree

of divorce dated 8.11.2012. While deciding the application under Order 9 Rule 13 CPC, the same has been dismissed on the ground that it is barred by time and the period of limitation would start not from the date of knowledge of the applicant rather it would start from passing of the ex parte decree. The observations of the District Judge, Family Court, Ambala reads as follows:

- “9. Although, counsel for the applicant-wife has contended that the present application has been within 30 days from the knowledge of passing of ex-parte decree, but his contention does not hold water because period of limitation starts not from the date of knowledge of the applicant, rather it starts from the date of passing of the ex-parte decree. It is also worthwhile to mention here that the applicant filed the instant application only for setting aside ex-parte judgment and decree dated 08.11.2012, but no such application has been filed by her for setting aside ex parte order dated 07.05.2012, whereby ex-parte proceedings were initiated against her. Moreover, the applicant has intentionally avoided to disclose specific date as to on which date, she came to know about the passing of ex-parte decree against her. Therefore, it appears to me that she has concealed some true and material facts from the Court, disentitling herself from seeking the discretionary relief.
10. Hence, as a sequel to my aforesaid discussion and observation, I am of the view that the application of the applicant being time barred and devoid of merits deserves to be dismissed with no order as to costs. It is ordered accordingly. Memo of costs be prepared accordingly. File be consigned to the record-room after due compliance.”

In the present case, the learned trial Court appears to have not

applied judicious mind on the relevant provisions of the Limitation Act specially. The relevant provision of Article 123 of the Schedule appended to the Limitation Act regarding period of limitation in context to Section 2(g) and Section 3 of the Limitation Act is reproduced below:

	Description of application	Period of limitation	Time from which period begins to run
123	To set aside a decree passed ex parte or to re-hear an appeal decreed or heard ex parte. Explanation.— For the purpose of this article, substituted service under Rule 20 of Order V of the Code of Civil Procedure, 1908 (5 of 1908) shall not be deemed to be due service.	Thirty days	The date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

Perusal of the above said provision indicates that the time for computing the period of limitation would start from the date of decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree.

The next question arises to be determined in the present case is whether the appellant-wife had been “duly served”. The word “duly served” in our opinion would mean service in accordance with provision of law I.e. Order 5 Rule 17 CPC which would be applicable in the present case. The appellant had been proceeded against ex parte on the basis of the report of Process Server which on translation reads as follows:

“Sir,

It is submitted that I had gone to House No.3232, Sector 47, Chandigarh where presence of Sheetal was inquired. Smt. Sheetal present on the spot after reading the summons refused to sign the same. No statement of

any witness was recorded. Report is submitted.

Sd/-
Raminder Singh, P.S.
21.12.2011”

We have seen the copy of the report which does not bear even the name of person in whose presence an attempt had been made to serve the appellant-wife. Even if it is presumed that the appellant had refused to accept the service, in said eventuality, the provisions of Order 5 Rule 17 CPC will come into operation. Order 5 Rule 17 CPC reads as follows:

“17. Procedure when defendant refuses to accept service, or cannot be found.—

Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and ‘whose presence the copy was affixed.’”

The above said provision deals with situation when defendant refuses to accept service or is not found at the address. It becomes mandatory for the Process Server to affix copy of the summons on the outer

door or some conspicuous part of the house in which the defendant ordinary resides. He is also required to furnish a report stating that he had affixed the copy in the above said manner. The Process Server is required to make an endorsement specifically mentioning that he had affixed the copy in the above said manner and mentioning the circumstances under which he did so. He is also required to mention the name and address of the person who had either identified the house and in whose presence the copy was affixed. The absence of any witness regarding refusal and non-compliance of requirement of law as mentioned hereinabove is sufficient enough to arrive at a conclusion that the appellant had not been duly served. When a party is not duly served, in those circumstances, the period of limitation would start from the date of the knowledge of the decree and not from the date of ex-parte decree as per the requirement of Article 123 of the Schedule appended to the Limitation Act, 1963.

A perusal of the application filed by the appellant for setting aside the ex parte decree indicates that the date of knowledge has been mentioned to be the 3rd week of April, 2013 when the husband disclosed about ex parte decree before the police in an FIR wherein he was arrested by police under Section 498-A IPC which was registered against him by the appellant. The inquiry was made by the appellant about the said judgment and decree as such the application for setting aside the impugned judgment and decree dated 8.11.2012 was filed within a period of 30 days i.e. on 24.4.2013.

In view of the said circumstances, the order of proceeding ex parte against the appellant which ultimately culminated into decree for ex parte divorce is patently illegal. Order dated 8.4.2016 dismissing the

application of the appellant being barred by time is thus set aside. It is held that order dated 7.5.2012 proceeding ex-parte against the appellant and the subsequent order of ex-parte decree dated 8.11.2012 passed by District Judge, Family Court, Ambala are illegal, having been passed without giving a fair opportunity to the appellant. The matrimonial fate of the appellant-wife has been prejudiced without taking into consideration the fact that she has got a daughter born out of the marriage and she had gone to her parent's house for the purpose of delivery but for the reasons which we have not taken into consideration at this stage, was not permitted to join the matrimonial home. The order of divorce is apparently a fraud having been played on the Court as well as on the appellant-wife. The appeal is allowed in above said terms.

The parties are directed to appear before the district Judge, Family Court, Ambala on 31.3.2018 and the appellant will be permitted to file written statement in accordance with law. The Family Court is directed to take up the proceedings in accordance with law.

Since the order has been passed in presence of the counsel for the respondent, it will be deemed that the respondent has got notice of the date for which the parties have been directed to appear before the lower Court.

It has been informed at this stage that the respondent is in custody having been convicted in a criminal case. It will be open to him to be represented through an authorized agent i.e. counsel before the lower Court.

We have gone through the observations in the impugned judgment wherein the lower Court appears to have formed an opinion of re-

marriage of the respondent for terming the application for setting aside the ex parte order infructuous. The said observation is based upon misconceived notion about the law of restitution. Any order obtained by playing fraud will vitiate all the steps taken pursuant to the order obtained by fraud.

(M.M.S. BEDI)
JUDGE

February 22, 2018
mohan

(GURVINDER SINGH GILL)
JUDGE

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