

HON'BLE SRI JUSTICE M.S. RAMACHANDRA RAO

CIVIL REVISION PETITION No.7203 of 2017

ORDER:

Heard Sri Ravi Shankar Jandhyala, learned counsel for Sri P. Janardhan Reddy and Sri B. Chandrasen Reddy, learned counsel for the respondent.

2. The Respondent herein filed FCOP No.1135 of 2010 before the Judge, Family Court, Hyderabad, seeking divorce against the petitioner and also custody of a child by name Master Vanuk.

3. The petitioner was set *ex parte* and an *ex parte* decree was passed on 06.11.2010.

4. The petitioner then filed I.A. No.138 of 2013 on 01.03.2013 under Section 5 of the Limitation Act, 1963 to condone the delay of 813 days in filing the application to set aside the *ex parte* decree and divorce granted on 06.11.2010 stating that she came to know about the *ex parte* decree of divorce only on 05.01.2013 through the Women police station, CCS, Hyderabad, during counselling in connection with FIR No.9 of 2013 lodged by her under Section 498-A, 406 read with Section 4 and 6 of Dowry Prohibition Act against the respondents. She stated that limitation would actually run from the date of knowledge on 05.01.2013, that she got certified copy of the order in O.P. on 04.02.2013 and she filed this application I.A. No.138

of 2013 to condone the delay in filing the application to set aside the *ex parte* decree.

5. She also filed I.A. No.340 of 2014 on 27.02.2013 to set aside the *ex parte* decree specifically contending that no notice or any intimation regarding the filing and the proceedings of the FCOP No.1135 of 2010 was received by her and that she came to know about the passing of the *ex parte* decree only in the counselling held by the police on 05.01.2013 as mentioned above.

6. In I.A. No.138 of 2013, notice was issued to the respondent by RPAD by the court. It was returned with an endorsement “unclaimed”. Treating the respondent as having been served on 13.06.2014 in I.A. No.138 of 2013, the respondent was set *ex parte* by the court below and the matter was adjourned to 26.06.2014.

7. On 26.06.2014, after hearing the petitioner and perusing the record, the Court below allowed I.A. No.138 of 2013 with a brief order stating “*petitioner present. Heard. Perused the record. In view of the circumstances stated, petition is allowed. No costs*”.

8. It appears that in the meantime on 05.02.2013, the respondent re-married.

9. The respondent then filed I.A. No.894 of 2015 to set aside the order passed on 26.06.2014 in I.A. No.138 of 2013 and I.A. No.340 of 2014 stating that he was not aware about the filing of I.A. No.138 of 2013 and I.A. No.340 of 2014, and in March, 2015 he came to know

that the petitioner had filed a petition to set aside the *ex parte* decree, since he received notice in I.A. No.340 of 2013. He stated that he caused an enquiry to be made and came to know that the petitioner had filed I.A. No.138 of 2013 to condone the delay of 813 days in filing application to set aside the *ex parte* decree in the O.P and that he was not aware about the same being allowed till he received notice in I.A. No.340 of 2014. He denied that notice was served on him in I.A. No.138 of 2013 and pleaded that at that time he was not in Hyderabad, but he was at Bangalore.

10. This application I.A. No.894 of 2015 appears to have been dismissed for default on 08.11.2016.

11. The respondent then filed I.A. No.181 of 2017 on 10.01.2017 to restore I.A. No.894 of 2015 stating that on 08.11.2016, he was unwell and had high fever and so he could not appear before the Court and that his Advocate is not in station.

12. When the matter was called on the bench on 29.06.2017, the Court recorded that parties had no objection for hearing and disposal of the main I.A. No.138 of 2013 and I.A. No.340 of 2014 on merits and so it was allowing I.A. No.181 of 2017.

13. On the very same day, the Court also allowed I.A. No.894 of 2015 filed by the respondent to set aside the order dt.16.06.2014 in I.A. No.138 of 2013 for the same reasons as were contained in the order passed by it in I.A. No.181 of 2017.

14. Thereafter, it took up I.A. No.138 of 2013 and I.A. No.340 of 2014 and dismissed both applications. It recorded in its order that as per the docket in the O.P. No.1135 of 2010, the petitioner has served with notice by Registered Post on 24.09.2010 and she was set *ex parte*; and thereafter *ex parte* decree was passed on 06.11.2010 after recording the evidence of the respondent as P.W-1. It did not accept the contention of the petitioner that she did not receive notices in the O.P. It observed that the explanation of the petitioner that she was residing at Nellore and not in Hyderabad was not reasonable, justifiable and convincing. It stated that once the petitioner received notice, she was supposed to be present in Court to contest the application, if really she is interested to prosecute case and she slept over the matter for more than 2½ years. It also observed that day today delay was not properly and satisfactorily explained by the petitioner and that the respondent had in the mean time married another person and was living with her. It therefore held that both the applications should be dismissed because the delay was not satisfactorily explained.

15. Challenging the same, this Revision is filed.

16. From the facts narrated above, it is not in dispute that an *ex parte* decree was passed on 06.11.2010 in the FCOP No.1135 of 2010. The order passed in the O.P. merely states that the petitioner remained *ex parte*, without anything further.

17. This Court, on 25.09.2018, had directed the Judge, Family Court, Hyderabad, to submit a report whether notices were served on the petitioner in O.P. No.1135 of 2010 or not along with the relevant docket orders.

18. A report in letter Dis. No.409/Prl.F.C. Hyd/2018 dt.25.10.2018 has been submitted by the Principal Judge, Family Court-cum-Additional Chief Judge, Hyderabad to this Court mentioning that as per docket endorsement dt.24.09.2010 and as per office note of the then Bench Clerk/Section Clerk, notice was served on the petitioner through Registered Post vide B. No.24078 and so the petitioner was set *ex parte* owing to her absence and the case was posted for the *ex parte* evidence of the respondent, but the served postal acknowledgment card is not available in the Court records and it is found to be missing from the file.

19. When the acknowledgment card of the notice sent to the petitioner by RPAD is not available in the court record and is missing, the observation of the Family Court in the impugned order that the petitioner received notice in the O.P., cannot be held to be correct. Under Article 123 of the Limitation Act, the period of limitation to set aside a decree passed *ex parte* is 30 days from the date of the decree or where summons or notices are not duly served, when the applicant had knowledge of the decree.

20. When there is no evidence of service of summons or notice on the petitioner and the petitioner claims to have got notice of the *ex parte* decree only on 05.01.2013 during counselling by the Women Police Station, CCS, Hyderabad in relation to the Section 498A- IPC complaint lodged by her against the respondent, and I.A. No.340 of 2014 was filed by her on 27.02.2013 and I.A. No.138 of 2013 was filed by her on 01.03.2013, it cannot be said that there has been any negligence on the part of the petitioner in approaching the Court to set aside the *ex parte* decree.

21. The petitioner, naturally has to apply and get a certified copy of the order which would have also consumed some time; and if the said period is excluded, it has to be held that there are sufficient grounds to set aside the *ex parte* decree.

22. It is no doubt unfortunate that the respondent had got married in the meantime, but the interest of the respondent and his present wife have to be balanced with the interest of the petitioner and the child born to the petitioner and the respondent as well.

23. In the circumstances I hold that the impugned order dt.28.07.2017 in I.A. No.138 of 2013 and I.A. No.340 of 2014 in O.P. No.1135 of 2010 cannot be sustained; they are both set aside; the CRP is allowed and the O.P. is restored to the file of the Family Court, Hyderabad and the said Court is directed to expeditiously decide the

O.P. preferably within six months from the date of receipt of a copy of this order.

24. The miscellaneous petitions pending, if any, shall stand closed.

M.S. RAMACHANDRA RAO, J

Date: 23.08.2019

MRKR

