

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

FA(MAT) No. 60 of 2019

Avinash Kumar Singh S/o Vinod Kumar Singh Aged About 31 Years Caste Kshatriya, Occupation Computer Engineer R/o House No. 1 C-20, R/8 Vishrampur, P.S. Vishrampur District Surajpur Chhattisgarh.....Non-Applicant, District : Surajpur, Chhattisgarh

----Appellant

Versus

Smt. Naina Singh W/o Shri Avinash Singh, Aged About 27 Years Caste Kshatriya R/o Ward No. 34, Krishnanagar Tilda, P.S. Tilda, District Surguja Chhattisgarh.....Applicant, District : Surguja (Ambikapur), Chhattisgarh

---- Respondent

For Appellant : Shri Shakti Raj Sinha, Advocate
For Respondent : Shri Sumit Singh Rathod, Advocate

**D.B. :Hon'ble Mr. Justice Manindra Mohan Shrivastava &
Hon'ble Mrs. Justice Vimla Singh Kapoor**

Judgment On Board

07/08/2020

Per Manindra Mohan Shrivastava, J.

1. This appeal is directed against order dated 24th October 2019 passed by the Family Court, Ambikapur, District- Sarguja in Miscellaneous Case No. 21 of 2018, by which respondent's application for setting aside ex- parte judgment and decree has been allowed and ex-parte judgment and decree dated 21st March 2018, passed in favour of the appellant, has been set aside.
2. Appellant- husband moved an application for grant of decree of divorce before the Family Court. Summons were issued to respondent-wife. She

was served and after service, she appeared and applied for grant of permission to engage Amicus Curiae. Prayer was allowed and respondent was allowed to be represented through Amicus Curiae vide order dated 23.6.2017. Respondent filed objection with regard to territorial jurisdiction. When the case was listed for hearing on that application on 6.1.2018, no representation was made, therefore, the Family Court proceeded ex- parte. On that day itself, an application for setting aside ex- parte order was filed by the respondent through the Amicus Curiae. The application was directed to be listed on 31.1.2018. On that day, no representation was made by the respondent through her counsel nor respondent appeared. The application was rejected and the Family Court proceeded. After recording evidence, ex-parte judgment and decree was passed on 21.3.2018.

Later on, respondent moved an application for setting aside ex-parte judgment and decree stating that she was being represented through her counsel in the proceedings. She had approached the Supreme Court against proceedings drawn by the Family Court in which an interim order was passed on 22.3.2018 staying further proceedings. When she appeared before the Family Court to submit the copy of order passed by the Supreme Court on 24.4.2018, she came to know about the ex-parte judgment and decree, whereafter, she obtained certified copy of the judgment and decree and filed application for setting aside ex-parte judgment and decree. The application was allowed, giving rise to present appeal.

3. Learned counsel for the appellant- husband submits that the learned Court below committed gross illegality in allowing respondent's application for setting aside ex-parte judgment and decree even though no sufficient cause could be established by the respondent. He would submit that even on respondent's own showing, she was served with the summons and was being represented through counsel. After having moved application raising objection to the maintainability of the proceedings, neither respondent appeared nor the counsel engaged by

her regularly appeared. The respondent and her counsel both had full notice and knowledge of order dated 6.1.2018 because on that very day, application for setting aside ex-parte order was moved by respondent counsel. When this application was listed on 31.1.2018, again, no representation was made despite notice and knowledge of the date of hearing. The application was rejected on 31.1.2018 and against the same, no proceedings were taken. Even when, later on, evidence was recorded and the case was listed for final arguments, despite notice and knowledge, no care was taken to appear in the Court and contest the case and in this manner, the respondent and her counsel remained negligent. It is also submitted that the learned Family Court passed ex-parte judgment and decree dated 21.3.2018. As the respondent was duly served and represented through counsel, knowledge is to be attributed to both of them and, therefore, application for setting aside ex-parte judgment and decree was required to be filed within 30 days as per the law of limitation. The application for grant of divorce was filed by the appellant-husband on 11.5.2018. The appellant contacted second marriage on 26.8.2018 which was duly registered on 15.10.2018. Thus, without there being any sufficient cause, learned Court below mechanically allowed the application for setting aside ex-parte judgment and decree resulting in a very complicated state of affairs when the appellant has already contacted second marriage. He would submit that as the second marriage was performed after expiry of period of limitation of filing appeal and application for setting aside ex-parte judgment and decree, it was lawful and thus, only on this ground, the application of the respondent was liable to be rejected. Learned counsel for the appellant argued that as the appellant had contacted second marriage, application for setting aside ex-parte judgment and decree, without impleading second wife, was not maintainable. In support of his submissions, learned counsel for the appellant has relied upon **Anurag Mittal Vs. Shaily Mishra Mittal** (2018) 9 SCC 691 and **Karuna Kansal Vs. Hemant Kansal & Anr.** (2019) 6 SCC 581 and order dated 17.3.2016 passed by the High Court of judicature at Madras in CRP (NPD) No.3237

of 2015 (*A. Raja Sundari Vs. Suresh Kumar*).

4. On the other hand, learned counsel for the respondent argued that the learned Court below had duly and properly appreciated that the respondent- wife was not informed by her counsel representing her before the Family Court and because of this lack of communication, respondent- wife could not appear and this has been considered to be just and sufficient cause. It is further submitted that merely because the appellant has contacted second marriage, it does not provide any valid defence because before solemnization of second marriage, respondent wife had already moved application for setting aside ex-party judgment and decree. It is also submitted that a serious doubt with regard to jurisdiction was raised and further proceedings were also stayed by the Supreme Court. Learned counsel for the respondent placed reliance upon **Nitin Kanitkar (Retd. Group Captain) Vs. Meenu Nitin Kanitkar** (2014) SCC OnLine Bom 2918.
5. We have heard learned counsel appearing for the parties and perused the records of the case.
6. From orders and proceedings recorded by the Family Court in Civil Suit No.71-A/2017, we find that the respondent-wife was duly served with summons. She moved application before the Family Court for grant of permission to engage a counsel. Permission was duly granted by the Court on 23.6.2017. She was duly represented through a counsel. She moved an application raising objection to the maintainability of the application. That application was listed for argument on 6th January 2018. However, despite service of summons, notice and knowledge of the date of hearing, no one appeared. Neither respondent appeared nor her counsel appeared. Therefore, the Family Court proceeded ex-parte. Immediately after the order, the counsel engaged by respondent appeared before the Court and moved an application for setting aside ex-parte judgment and decree. The case was directed to be listed on 31.1.2018. This date was duly noted by her counsel. However, on 31.1.2018, no appearance was made. The application filed on 6.1.2018

was rejected. The case was thereafter fixed for recording evidence on 15.3.2018. Thus, the counsel for respondent having noted the next date of hearing for consideration of his application, did not appear nor any cause was shown as to why no appearance could be made. Not only this, even though the case was directed to be listed on 15.3.2018, neither respondent nor her counsel took any interest in the proceeding. On 15.3.2018, evidence was recorded and the case was directed to be listed for final arguments on 20th March 2018. On this date also, nobody appeared. Thereafter, on 21.3.2018, learned trial Court delivered ex parte judgment and decree allowing the application for grant of decree of divorce. As the respondent was duly served and she was being represented through her counsel, in the eyes of law, knowledge is attributed to her.

7. As per Article 123 of the Limitation Act, the limitation for filing application for setting aside ex-parte judgment and decree is 30 days to be reckoned from the date of decree. The limitation would begin to run from the date of knowledge only where the summons or notices are not duly served. In the present case, it is an admitted position that summons were duly served and the respondent was being duly represented through her counsel. Therefore, the period of limitation for filing application for setting aside the ex parte judgment and decree was 30 days from the date of ex-parte decree.
8. In the application for setting aside ex-parte judgment and decree, there is no whisper, much less specific pleading of the respondent that there was lack of communication and her counsel had not informed regarding dates of hearing and order dated 6.1.2018. On the contrary, in para-3 of her application, she has clearly averred that when the Court proceeded ex-parte on 6.1.2018, on that day itself, her counsel applied for setting aside ex-parte order which was rejected on 31.1.2018. There is nothing in the application that she was not informed by her counsel. It is relevant to note that no affidavit of the counsel has been filed nor he has been examined to say that there was communication gap. The

respondent did not set up any case that even though she had notice of the dates of hearing, due to unavoidable circumstances beyond her control, she could not appear in the proceeding before the Family Court. The entire case of the respondent is founded on the ground that she intended to prosecute her case and she had raised an objection with regard to territorial jurisdiction. In her application for setting aside ex parte judgment and decree, it has nowhere been stated that she was not served with the summons or that she was not informed by her counsel regarding various dates of hearing. This is a case of sheer negligence on the part of respondent-wife. Despite served with summons and representing through counsel, respondent and her counsel remained negligent and chose not to take part in the proceedings. Respondent's counsel had filed an application for recalling of order dated 6.1.2018 on which hearing was fixed on 31.1.2018, but, despite having full notice and knowledge, none appeared for the respondent on that day. The respondent or her counsel did not even bother to find out as to what order was passed on 31.1.2018 and thereafter.

9. The entire basis for the Court below to allow application for setting aside ex-parte judgment and decree is that there was communication gap between respondent and her counsel but this has not been pleaded in her application for setting aside ex-parte judgment and decree. Any amount of evidence in this regard would, therefore, be inadmissible. In fact, if the application for setting aside ex parte judgment and decree is read as it is, there is hardly any cause shown as to why respondent could not appear on the dates fixed for hearing by the trial Court.
10. It appears that respondent had filed a Transfer Petition before the Supreme Court in which an order of stay was also passed on 22.3.2018. However, the Family Court had already passed ex-pare judgment and decree on 21.3.2018.
11. We also find that neither appeal nor application for setting aside ex-parte judgment and decree was filed within the period of limitation prescribed therefor. As held herein-above, since respondent was duly

served with summons, knowledge is to be attributed to her and in such case, the period of limitation for filing application for setting aside ex-parte judgment and decree would be 30 days from the date of decree and not from the date of knowledge. The appellant contacted second marriage after the period prescribed for filing appeal or application for setting aside ex-parte judgment and decree. This is relevant consideration.

12. In view of the above, we are of the view that respondent- wife failed to satisfy the Court that she was prevented by any sufficient cause from appearing when the suit was called on for hearing. Unless such satisfaction is arrived at, no relief could be granted. We have also noticed that counseling was also held in the trial Court but the Counselor reported that no settlement could be arrived at. The appellant has also contacted the second marriage which is apparently lawful as the second marriage was solemnized after expiry of period of limitation for filing appeal and the application for setting aside ex-parte judgment and decree.

13. In view of the above, impugned order cannot be sustained in law and is therefore set aside. Respondent's application for setting aside ex-parte judgment and decree is rejected.

14. The appeal is accordingly allowed. No order as to costs.

Sd/-
(Manindra Mohan Shrivastava)
Judge

Sd/-
(Vimla Singh Kapoor)
Judge