

S/L 1
08.04.2021
Court. No. 19
GB

C.O. 207 of 2021

Shri Yogesh Kamdar
Vs.
Smt. Meena @ Mitay Kamdar

(Through Video Conference)

Mr. Antarikhya Basu,
Mr. Surya Prasad Chattopadhyay,
Mr. Arjun Samanta,
Ms. Madhumita Basak.

...for the Petitioner.

Mr. K.C. Garg,
Mr. Aftab Ahmed,
Ms. Sunita Agarwal.

...for the Opposite Party.

This revisional application arises out of an order dated January 13, 2020 passed by the learned Additional District Judge, 10th Court at Alipore, District 24 Parganas (South) in Misc. Case No.10 of 2015 thereby setting aside the *ex parte* judgment and decree passed on November 29 of 2013 in Mat Suit No.56 of 2010.

It is urged by the learned advocate for the petitioner that while considering the application for condonation of delay the learned court below allowed the application under Order IX, Rule 13 of the Code of Civil Procedure thereby setting aside the *ex parte* decree of dissolution of marriage, which could not be done without allowing the petitioner to adduce evidence and also without the court having satisfied itself on the basis of the evidence and pleadings and that the reasons assigned by the wife for not being able to attend the

court when the suit was decree *ex parte* was satisfactory and was proved.

I agree with the contention of the learned advocate for the petitioner to the extent that while considering the application under Section 5 of the Limitation Act, without dealing with the contention of the parties in the application under Order IX, Rule 13 of the Code of Civil Procedure and without recording evidence in that regard, the application under Order IX, Rule 13 should not have been allowed. However, the learned court below has exercised its discretion in coming to a conclusion that the wife was in a destitute condition and because she could not pay the fees to her learned advocate, the learned advocate failed to take steps before the court. The learned court below accepted the explanation that the wife/opposite party was in contact with her learned advocate but was not aware that the suit has been fixed on several dates and finally decreed *ex parte*. Only when she approached another learned advocate, whose clerk enquired into the matter, took an inspection slip then informed her about the *ex parte* decree, that she was aware of the ex-parte decree. The delay in filing the Order IX, Rule 13 application is about one and half years. In our social system, the estranged wife, who did not have an income of her own, may not have been in a position to pay the fees as required by the learned advocate representing her and the explanation that the learned advocate did not appear because fees were not paid and the wife was not aware of the

ex-parte decree having relied upon her learned advocate, cannot be totally ruled out at the time of deciding the application for condonation of delay. The name of the learned advocate has been specifically mentioned. The name of the learned advocate whose clerk was subsequently asked to enquire into the fate of the suit has also been mentioned. The learned court below did not find any reason to doubt or disbelieve such contention. This is a matrimonial suit and the wife should be allowed to avail of all the remedies under the law. The order condoning the delay in filing the application under Order IX Rule 13 is upheld.

Now the question is whether the application under Order IX, Rule 13 of the Code of Civil Procedure should have been allowed without recording any evidence. In my view, while deciding the application for condonation of delay, the learned court below ought to have allowed the said application for setting aside the *ex parte* decree. An opportunity should have been given to the husband/petitioner to adduce evidence and cross-examine the wife on the reasons assigned by the wife.

Under such circumstances, the order impugned is modified to the extent that the application under Order IX, Rule 13 of the Code of Civil Procedure should be heard afresh. Parties shall be at liberty to adduce both oral and documentary evidence in support of their contentions. It is expected that the said application should be disposed of within a period of three months from the date of

communication of this order, in view of the fact situation as that the husband has already remarried because there was no bar under the law once the suit was decreed and the period of appeal had expired. With regard to the prayer for arrear maintenance made by the wife, the wife is at liberty to approach the learned trial judge for appropriate remedy but this Court shall not decide such issues.

This Court has not gone into the merits of the contentions of the wife with regard to the application under Order IX, Rule 13 of the Code of Civil Procedure and the learned court below shall decide the issue independently and in accordance with law.

The revisional application is disposed of.

There will be, however, no order as to costs.

Urgent Photostat certified copy of this order, if applied for, be given to the parties on priority basis.

(Shampa Sarkar, J.)