

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 222 of 2019**

- Shekhar Chouhan S/o Subhaliya Aged About 60 Years R/o Koriya Colliery, P.S. Chirmir, Tahsil Baikunthpur, District- Koriya, Chhattisgarh

---- Appellant**Versus**

- Geeta Devi W/o Shekhar Chouhan Aged About 55 Years R/o Jhagarakhand, P.S. Jhagarakhand, Tahsil- Manendragarh, District- Koriya, Chhattisgarh, At Present R/o Ward No.09, Anuppur, Police Station, Tahsil And District- Anuppur, Madhya Pradesh

---- Respondent

For Appellant	:	Shri Praveen Dhurandhar, Advocate
For Respondent	:	Shri Sanjay Patel, Advocate

D.B.:- Hon'ble Shri Justice Manindra Mohan Shrivastava
Hon'ble Smt. Justice Vimla Singh Kapoor

Order On Board**28/06/2021**

With the consent of the parties, the matter is heard finally at motion stage itself.

1. This appeal has been filed against order dated 09/05/2009 passed by the learned Family Court, Manendragarh, District – Koriya in Misc. Civil Suit No.03/2019 whereby appellant's application under Order 9 Rule 13 CPC for setting aside ex-parte decree dated 11/07/2018 in Civil Suit No.28-A/2018 passed by the Family Court, Manendragarh, has been dismissed.

2. An application under Section 25 of the Hindu Marriage Act, 1955 was filed by the respondent / wife on 20/03/2018 for enhancement of maintenance amount which was earlier granted to her vide order dated 30/12/2006. In that application, though the appellant initially, upon service of notice appeared, but later on, he did not appear and he was proceeded ex-parte on 16/05/2018 and thereafter, Family Court finally

decided respondent's application for enhancement of maintenance and passed an order of enhancement from Rs.2,000/- to Rs.5,000/-. Aggrieved by the ex-parte decree, the appellant moved an application for setting aside ex-parte decree mainly on the ground that because of acute illness of his mother, who later on died, could not appear on 16/05/2018 and that being the main reason for non-appearance on that day, prayer was made for setting aside ex-parte decree. Learned Family Court, however, did not accept the cause shown and rejected the application giving rise to this appeal.

3. At the outset, objections with regard to maintainability of this appeal has been raised by learned counsel for the respondent by submitting that against an order of refusal to set aside ex-parte decree, remedy of appeal lies under Order 43 CPC and appeal under Section 19 (1) of the Family Courts Act could not be maintainable.

Learned counsel for the appellant would submit that as the order passed by the Family Court is included as an order mentioned in Section 19 of the Family Courts Act, 1984 (for short 'the Act of 1984') which has overriding effect over the general law under the provisions of Civil Procedure Code, the appeal has been filed under Section 19 of the Act of 1984.

4. Considering the overriding effect of principles of Section 19 (1) of the Act of 1984 which starts with *non-obstante* clause to the effect that save as provided in subsection (2) and notwithstanding anything contained in the Code of Civil Procedure, 1908, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law and further taking into consideration the overriding effect of the Act of 1984 as provided under Section 20 thereof, the objection is not maintainable and therefore, it is overruled.

5. The factual premise on the basis of which, prayer for setting aside ex-parte decree was sought to be set aside was that the appellant / husband was appearing before the Family Court after service of summons on him but later on, he could not

appear on 16/05/2018. The cause shown in the application was that because of acute illness of his mother, he could not appear on the stated day. It was also pleaded before the Court that his mother later on, died on 28/07/2018. Further statement was made that on a complaint against the appellant, he was arrested and he remained in jail from 26/10/2018 to 11/01/2019 and only after release, upon obtaining information, he applied for copy of the order on 12/02/2019 which was received on 20/02/2019 and thereafter, the application could be filed.

6. On the other hand, learned counsel for the respondent would submit that though certain causes were shown by the appellant but the ground on which the application was rejected was that it was not supported by reliable documentary evidence with regard to admission, illness etc. of the mother of the appellant. It is next submitted that though the mother stated to have died on 28/07/2018, it has not been clearly stated in the application why the application for setting aside ex-parte order was not filed within a reasonable period. Thus, the appellant remained indolent in promptly approaching the Court.

7. We have heard learned counsel for the parties and perused the order of the Court below and various documents placed on record.

8. After going through the order, we find that the learned Family Court earlier granted adjournment to the appellant / husband on 18/04/2018 and thereafter, again on 02/05/2018 mainly on the ground of illness of the mother of the appellant. Next date was fixed for hearing on 16/05/2018. Learned Court below has disbelieved the statement made before the Court that ultimately, the mother died on 28/07/2018. The factual averment regarding appellant's arrest in a criminal case, he having remained in jail for some time and then filing application after his release, has also been considered as false and fabricated.

9. After going through the causes stated by the appellant for setting aside ex-parte decree, in our considered opinion, learned Court below was required to take

liberal approach particularly taking into consideration that non-appearance was made due to the reason that his mother was ill and it is admitted fact that she died also on 28/07/2018. In our opinion, this was sufficient to consider the cause shown for non-appearance on 16/05/2018 as sufficient. Not only this, the appellant's statement regarding he being arrested in criminal case and later on, released are also not factually disputed. Therefore, in our opinion, learned Court below has taken an unduly restricted approach while considering prayer for setting aside ex-parte decree of enhancement from Rs.2,000/- to Rs.5,000/- as maintenance in the backdrop that there was an order of settlement between the parties prior to respondent / wife moving application for enhancement of maintenance. The ex-parte decree does not refer to any such order. In view of above, in the interest of justice, we consider that present is a case where the Court below ought to have accepted cause shown by the appellant as sufficient for setting side ex-parte decree.

10. In the result, the impugned order passed by the Family Court refusing ex-parte decree is set aside. The application for setting aside ex-parte decree is allowed. The ex-parte decree passed by the Court below on 11/07/2018 in civil suit no.28-A/2018 is set aside. The effect would be that respondent's application / suit before the Family Court concern, shall stand restored. The Family Court shall decide the same in accordance with law after giving both the parties due and proper opportunity of hearing and leading oral and documentary evidence.

Sd/-

(Manindra Mohan Shrivastava)
Judge

Sd/-

(Vimla Singh Kapoor)
Judge