

10 19.9.2022

Ct-08

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FMAT 326 of 2022

with

I.A No. CAN 1 of 2022

Smt. Mampi Das

Vs.

Sri Sukhen Das

Mrs. Sohini Chakroborty

Mr. Ariit Sarkar

Ms. Prajaaini DAs

... For the Appellant

Mr. Asok Kumar Ganguly

... For the Respondent

Affidavit of service filed in court be kept with the record.

Mr. Asok Kumar Ganguly, learned advocate for the respondent, filed Vakalatnama in the department being filing no. A-19310 dated 7th September, 2022.

The matter is appearing in today's list under the heading "Application". Accordingly, the appeal is treated as on day's list and is taken up along with CAN 1 of 2022 and disposed of by this common order without calling for lower court record.

The appeal is arising out of an order where the learned Trial Judge dismissing the application under Section 5 of the Limitation Act in connection with a Matrimonial Suit.

The appellant alleged that she was not aware of the ex parte decree passed on 26th March, 2013 in the matrimonial suit instituted by the husband being MAT Suit No. 103 of 2012. She came to know during the consideration of bail application filed by the husband against her complaint. She finally came to know on 16th July, 2017 after about four years and two

months about the ex parte decree.

Initially, the appellant filed an application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the said ex parte decree registered as Misc. Case No. 01 of 2017. The said Misc. Case was filed out of time. As such the appellant filed an application under Section 5 of the Limitation Act. The learned Trial Judge allowed the same by the order dated 17th August, 2017 without putting the respondent/husband on notice.

The respondent/husband subsequently filed an application for recalling the order dated 17th August, 2017 as the Section 5 application was not served upon him and accordingly he did not have the opportunity to make appropriate statement on the said application.

It appears from the submission made before the learned Single Judge of this Court that the application under Section 5 of the Limitation Act was not necessary as the application under Order IX Rule 13 of the Code of Civil Procedure was filed within time. Learned Single Judge while disposing of the revisional application set aside the impugned order dated August 17, 2017 and directed the learned Trial Judge to dispose of the said application for condonation of delay afresh. This time the learned Trial Court had taken a contrary view and dismissed the application under Section 5 of the Limitation Act resulting dismissal of Order IX Rule 13 of the Code of Civil Procedure.

Learned counsel for the appellant has submitted that on 30th August, 2012 on behalf of her learned advocates appeared by filing Vakalatnama along with one adjournment

petition for filing written statement bearing the signature of the appellant, although the said signatures were not put by the appellant at any point of time and the same were totally beyond the knowledge of the appellant/petitioner. Moreover, the spelling of the appellant's name in Bengali was totally wrong. The appellant never appointed any advocate on her behalf. The respondent/husband somehow managed to do the same by practising fraud upon the wife.

In view of the above, we feel that an opportunity should be given to the wife/appellant to contest the suit on merit.

We set aside the impugned order. We direct the Trial Court to hear the suit afresh. The appellant/wife is permitted to file written statement on or before 11th November, 2022.

Learned Trial Judge is requested to hear the suit and dispose of the same on merits preferably within a period of one year from the date of commencement of the trial without granting any unnecessary adjournment to either of the parties, unless it is unavoidable.

Liberty to apply for alimony before the learned Trial Court.

On such consideration, the appeal and the application being CAN 1 of 2022 are disposed of.

(Uday Kumar ,J.)

(Soumen Sen, J.)

