

**IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIONAL JURISDICTION
APPELLATE SIDE**

PRESENT:

THE HON'BLE JUSTICE AJOY KUMAR MUKHERJEE

**SAT 433 of 2004
Anima Singha @ Sati Singha
Vs.
Archana Sur (Singha) & Ors.**

For the Appellant	:	Mr. Anirban Bose
	:	Mr. Satyajit Senapati
	:	Mr. Rahul Nag

For the Respondent	:	Mr. Samiran Giri
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Heard on	:	31.08.2023
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Judgment on	:	22.09.2023
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Ajoy Kumar Mukherjee, J.

1. The instant second appeal has been assailed against judgement and decree passed in other Appeal No 100 of 2002 by the 3rd Court of Additional District Judge Medinipur, which was preferred against the judgment and decree passed by Civil Judge, (Junior Division) 2nd Court Medinipur in other Suit No. 6 of 2002.

2. Appellant herein as plaintiff instituted aforesaid suit for declaration and injunction. In the said suit plaintiff/appellant contended that plaintiff was married with one Harekrishna Singh on 22nd Magh 1385 B.S. as per Hindu rites and customs. Thereafter plaintiff delivered a still born child. Subsequently they developed bitter relationship and her husband

Harekrishna (since deceased) took her to her father's house and thereafter did not bring her back to his house, rather he was passing his time with defendant No.1/Respondent no. 1 herein by living together. Said Harekrishna Singh subsequently filed a matrimonial suit being Mat Suit no. 85 of 1981 against present plaintiff in the court of District Judge, Medinipur. Plaintiff being the wife of Harekrishna contested the said matrimonial suit and said suit being MAT suit no. 85 of 1981 was subsequently dismissed on contest. Plaintiff/ wife/appellant also initiated maintenance proceeding under section 125 of the code of criminal procedure against Harekrishna. After contested hearing, said M.R. case was also disposed of, directing her husband Harekrishna to pay Rs. 125/- per month and thereafter for a long period he paid monthly maintenance to plaintiff.

3. Harekrishna was an employee of Public Health Engineering department, namely defendant No.3. After the death of said Harekrishna, the appellant herein demanded pensionary and other benefits, claiming herself to be the only legal heir of deceased Harekrishna. But the office of the defendant No.3 replied that the respondent No.1 herein already demanded all such benefits claiming herself to be the wife of Harekrishna and as such plaintiff filed the aforesaid suit being OS. No. 61 of 2000 for declaration that plaintiff is the only legally married wife of Harekrishna and entitled to get all benefits including pensionary benefits and also for injunction restraining defendant no. 1 for claiming herself as wife of Harekrishna and also from claiming pensionary and other benefits of the deceased. In the said suit defendant no. 1 filed written statement contending that Harekrishna obtained a decree of divorce in MAT Suit No. 13 of 1985

against plaintiff/Appellant herein on 28.04.1985 and after obtaining decree of divorce, Harekrishna married the defendant no. 1/Respondent no. 1 herein who is legally married wife of Harekrishna and entitled to get all sorts of benefit, being legal heir of the deceased.

4. After coming to know such fact from the written statement filed by defendant no. 1, plaintiff had filed an application under Order XI Rule 14 of C.P.C. on 02.03.2000 for production of said judgment and on 08.03.2000 through searching was conducted by lawyer of the plaintiff and she became aware about the exparte decree obtained by defendant no. 1. Subsequently on the basis of plaintiff's prayer, the plaint was amended, where plaintiff incorporated by way of amendment a prayer that the exparte judgment and decree passed in MAT suit No. 13 of 1985 be declared as null and void, as the same was obtained by practicing fraud upon the plaintiff.

5. However, learned Trial Court disposed of said OS 06 of 2002 after contested hearing and was pleased to dismiss the said suit on the ground that under section 41 (h) of Specific Relief Act plaintiff is not entitled to get relief as he has equal efficacious relief elsewhere. Moreover there is no perfect disclosure of cause of action in the plaint and that Trial Court has got no jurisdiction to entertain the prayer made in the plaint and since the plaintiff/appellant has equal efficacious relief before different forum, the trial court also refused to grant any injunction.

6. Being aggrieved by the judgment and decree passed in aforesaid OS No. 6 of 2002, the plaintiff/appellant preferred First appeal before the District Judge, Medinipur which was subsequently transferred to learned 3rd Court on Additional District Judge, Medinipur. The First Appellate Court i.e.

the court below after contested hearing was pleased to dismiss the Appeal on contest being aforesaid O.A 100 of 2002 and affirmed the judgment and decree passed by the Trial Court.

7. The Divisions Bench of this Court while admitting the appeal was pleased to frame the following substantial question of law:-

“whether the learned Judge of the First Appellate court erred in law by holding that for deciding the dispute raised in the suit, the Administrative Tribunal should be approached, when admittedly the point at issue was the marital status of the parties which has nothing to do with the service condition between the employee and the Government?”

In the said order dated 17.12.2004, the Division Bench had also given liberty to the appellant to urge other grounds if necessary and if so advised, at the time of hearing of the appeal.

8. On perusal of the Cause Title of the plaint of OS 6 of 2000 it is quite clear that dispute pertains to marital status of defendant no. 1, who claims herself to be the wife of deceased Harekrishna and rest of the defendants namely defendant no. 2 to 4 are the State of West Bengal and its Assistant Engineer, Executive Engineer, who are to act on the basis of final determination of marital status of the parties. In order to adjudicate the aforesaid dispute between the plaintiff and defendant no.1, the question of approaching before Administrative Tribunal does not arise, because the real controversy between the parties is over determination of marital status of the parties, which has nothing to do with the service condition of deceased Harekrishna.

9. Now coming to the facts and circumstances of the present case it appears that said Harekrishna earlier filed Mat Suit No. 85 of 1981 claiming dissolution of marriage against present Appellant/Plaintiff, where

present appellant contested and said suit was ultimately dismissed on contest. The plaintiff appellant's specific case is that though said matrimonial suit was dismissed on contest but the proceeding initiated by the Appellant herein under section 125 of the Code of Criminal Procedure, claiming maintenance, was allowed and deceased Harekrishna was directed to pay maintenance by the Court. Showing me Trial Court record as well as searching slip, learned counsel for the appellant contended that for non-payment of maintenance amount, said Harekrishna was arrested on 21.02.1986 and on deposit of arrear maintenance amount of Rs. 1500/- he was released by court. He further drawn my attention showing a letter dated 06.10.1989 wherein the lawyer of the Appellant herein describing present Appellant as the wife of Harekrishna sent a letter to Harekrishna claiming eight months arrear maintenance amount. Harekrishna thereafter through his advocate had given reply to that letter on 09.11.1989 denying allegation about default of payment of maintenance. Learned counsel for the Appellant contended that nowhere in the said letter, written in 1989, Harekrishna claimed that the appellant is not his wife, though the divorce decree was allegedly passed on 25.04.1985. Accordingly plaintiff/Appellant contended that the husband of the appellant, Harekrishna kept out of sight of the Appellant the fact of passing the exparte decree and paid maintenance to the appellant at regular interval till his death and never denied that appellant is not his lawfully married wife nor he ever disclosed anything about the said exparte decree to the Appellant.

10. In the plaint appellant/plaintiff by way of amendment incorporated in paragraph 5(A) of the plaint that the aforesaid fact of arrest of Harekrishna

never disclosed the fact of Matrimonial Suit No. 13 of 1985 on the fear that if the plaintiff can know the fact, she may file a petition for setting aside the exparte decree and may pray for contesting the suit. It is further allged in the said paragraph of amended plaint that Harekrishna, since deceased in collusion with process server and postal peon got exparte decree, which is evident from the fact that process server named two persons in whose presence, he reached plaintiffs residence but summon does not bear signature of those two persons.

11. Be that as it may in the prayer portion of the amended plaint paragraph 9(a) has been incorporated which runs as follows:-

“the Exparte judgment and decree in Mat Suit No. 13 of 1985 in the court of District Judge, Medinipur dated 25.04.1985 given in the second schedule below be declared null and void as the same was obtained by practising fraud upon the plaintiff.”

12. It is curious enough, when the plaintiff specifically pleaded by way of amendment that he came to know about exparte decree passed in matrimonial suit No. 13 of 1985 from the written statement filed by the defendant no. 1 and when it is her (plaintiff) specific case in the plaint that no summon of said Mat Suit 13 of 1985 was ever served upon plaintiff and process server or postal peon never went to the house of plaintiff nor they have ever tendered any summon or notices to the plaintiff and that deceased Harekrishna in collusion with process server and postal peon fraudulently suppressed the summon and obtained exparte decree, the Trial Court did not feel it necessary to frame an issue over that controversy.

13. Now an exparte decree of divorce can be set aside either by

(i) Making an application under order IX rule 13 of the Code of Civil Procedure.

(ii) Making an application for review

(iii) By filing an appeal against the exparte order under section 96(3) of the Code.

(iv) By filing separate independent suit on the ground of fraud.

14. There is no dispute about the proposition of law that an independent suit is maintainable to set aside exparte decree on the ground of fraud even after rejection of application under order IX, Rule 13. When a suit will lie to set aside a decree on the ground of fraudulent suppression of summon and when the plaintiff/appellant has amended the plaint and has incorporated a prayer stating that the exparte decree was obtained by practising fraud in suppression of summon, the trial court was duty bound to frame an issue and to adjudicate the issue as to whether the service of summon in matrimonial suit no. 13 of 1985 upon the plaintiff/ appellant was a fraudulent service or not.

15. Learned District Judge in matrimonial suit No. 13 of 1985 passed following order on 05.03.1985:-

“Petitioner filed Hazira, Summon was upon the respondent issued in the ordinary way, through the agency of the process server, served by affixture and that issued under registered cover returned on refusal to accept as per endorsement of the postal peon. No appearance made. Fix 25.04.1985 for exparte hearing.”

In the aforesaid order, learned District Judge nowhere observed that he was satisfied that the summon has been duly served upon the defendant, however he had fixed the next date for exparte hearing and accordingly on the next date, the exparte decree was passed.

16. In the plaint as well as in the evidence of PW-1, Plaintiff has categorically stated that her husband Harekrishna died in November, 1999

and she had received maintenance till his death and that she is legally entitled to get all the death benefits of Harekrishna from the office of defendant no.3, being only heir of Harekrishna. She further stated that she has not received any notice of matrimonial suit No. 13 of 1985 and no process server reached to her home to serve notice/summon of Mat Suit No. 13 of 1985. She further denied that any postal peon had served any notice of Mat Suit No. 13 of 1985 to her. In the cross examination she also denied that she refused to receive summon which has been sent by post or by court baliff. Defendant no. 1 as DW-1 denied that notice of Mat suit no. 13 of 1985 was not served upon appellant in either way or Plaintiff/Appellant was never aware of institution of the Matrimonial Suit No. 13 of 1985. Accordingly it is undisputed from the evidence of parties that a serious issue was raised before the court as to whether the service of summon in Mat suit 13 of 1985 was a fraudulent service or not but the Trial Court neither framed any issue nor has dealt with such issue in her judgment and on the contrary she dismissed the suit on the ground that she has no power under section 41(h) of the specific Relief Act, as appellant/plaintiff has equal efficacious relief before some other forum.

17. Learned counsel appearing on behalf of the respondent argued that the appellant herein also filed an application under order IX rule 13 of the Code of Civil Procedure for setting aside the decree passed in said matrimonial Suit No. 13 of 1985, which was again dismissed. Accordingly the defendant's contention that summon of the Mat suit was not served upon the appellant herein, has already been dealt with and decided by the court below and as such, said issue attains its finality with the dismissal of

the appellants/plaintiffs application under Order IX rule 13 and appellant has no scope to reopen the same in the second appeal.

18. I have gone through the order passed while disposing the said Misc. Case under order IX rule 13 by the concerned District Judge. In fact said J. Misc. Case No. 168 of 2003 under order IX rule 13 was filed along with an application under section 5 of the Limitation Act seeking condonation of delay in filing application under order IX, Rule 13. While disposing the said Misc. Case the concerned Trial Judge refused to condone delay in filing the application under Order IX rule 13 and as such the ground taken in the application under Order IX rule 13, that sufficient cause has prevented plaintiff/Appellant from appearing before the court when the matrimonial suit No. 13 of 1985 was called on for hearing, has not been adjudicated on merit and as such the allegation of the appellant that the service of summon of the said suit upon the appellant was a fraudulent service, still remains undecided.

19. It is also worthy to be mentioned that the first Appellate Court *inspite* of appellant's submission that an issue ought to have been framed by the Trial Court regarding service of summon, did not ponder over the issue though he noted in the Judgement that "learned lawyer for the appellant submitted before the court that deceased Harekrishna had exercised fraud upon the appellant in collaboration with his employee and brother" but the First Appellate Court referring one decision reported in ***AIR 1987 Bom 87*** observed that independent suit like OS 6 of 2000 to set aside ex parte decree on the ground of fraud or collusion is maintainable despite rejection of an application under Order IX rule 13, but the plaintiff/appellant has to prove

the allegation like fraud or collusion and mere shouting cannot establish fraud. Fraud should be established by circumstantial evidence or cogent evidence.

20. Such observation of the First Appellate Court is baseless as inspite of specific pleading, no such issue was framed by the Trial Court and as such question of adducing evidence or advancing argument that service of summon was fraudulent, could not be made. Learned First Appellate Court without going to that aspect of the matter and without remanding the case before the Trial Court for adjudication on that issue whether fraud was practised upon Plaintiff/Appellant, or not, had affirmed the judgment of the Trial Court. Such observation of the first Appellate Court, in my view, is an outcome of non-application of judicial mind since that issue was the principal issue of the suit being O.S 6 of 2002 .

21. When the statute has given power to challenge an exparte decree by filing a separate and independent suit on the ground of fraudulent service of summon, then both the courts below were not at all justified in ignoring the said issue and to dispose of the case on some irrelevant considerations.

22. In such view of the matter the judgment and decree passed in other Suit No. 6 of 2002 by learned Civil Judge (Junior Division) 2nd Court Medinipur and also the judgment and decree passed in other appeal being No. 100 of 2002 by Additional District Judge, 3rd Court Medinipur on 03.11.2003 are hereby set aside. The present case remanded to the Trial Court for adjudication for limited purpose namely to decide the following

issue:-

“Whether the service of summon of matrimonial suit no. 13 of 1985 upon the plaintiff /appellant herein was a fraudulent service of summon or not?”

23. Such issue shall be adjudicated after giving both the parties an opportunity to contest, without being influenced by any observation made herein or by the earlier Judgments and to write a judgment afresh preferably within a period of twelve weeks from the date of communication of the order.

24. SAT 433 of 2004 is accordingly allowed and disposed of.

25. There will be no order as to the costs.

26. Urgent Photostat certified copy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(AJAY KUMAR MUKHERJEE, J.)