

Meena

IN THE HIGH COURT OF BOMBAY AT GOA

**APPEAL FROM ORDER NO.12 OF 2021
WITH
CIVIL APPLICATION NO.223 OF 2019
IN
APPEAL FROM ORDER NO.12 OF 2021**

1 Mr Rohidas Tukaram Mayekar, ...Appellant
son of late Tukaram Mauekar, (original
aged 44 years, consultant, resident of petitioner)
H.No.142, Vancio Wado, Guirim, Bardez Goa,

Versus

1 Mrs Rupali Rohidas Mayekar,
daughter of Bachubhai Jamnadas Abhani,
aged 43 years, Practicing Chartered Accountant
resident of Vancio Vaddo, Guirim Bardez, Goa,
Indian National, Presently residing at Flat
No.002, Kadambari Apartments, Plot No.46,
Sector 19, Kharghar, Navi Mumbai -410 210.

... Respondent
(original respondent)

Party in person present.

Mr Clayton Anthony Fonseca, Advocate for the respondent.

CORAM:	BHARAT P. DESHPANDE,J.
RESERVED ON:	27th July, 2023.
PRONOUNCED ON:	3rd August, 2023

JUDGMENT:

1. Heard the applicant in person and Mr Clayton Fonseca, learned Counsel for the respondent.

2. Though earlier present matter was registered as Second Appeal, it was converted into Appeal from Order vide order dated 07/02/2021, therefore, the provisions of Order 43 Rule 1(u) of the CPC stands attracted which deals with an appeal against an order under Rule 23 of Order 41 remanding a case, where an appeal would lie from the decree of the Appellate Court.

3. Since while dealing with such appeal, the provision of Section 100 of CPC stands attracted, though notices were issued and records and proceedings were called vide order dated 02/03/2023 it was made clear that since the matter is arising out of matrimonial discord and original proceedings are of the year 2016, the matter would be taken up for final disposal on 30/03/2023.

4. The matter was then adjourned since the records and proceedings were not arisen and later on with the consent of the parties. The appellant who is appearing in person filed a written synopsis of arguments.

5. Learned Counsel for the respondent pointed out that since a present appeal is under Order 43 Rule 1(u), the same will have to be considered and heard only on the grounds enumerated under Section 100 of the Code. In other words, the constraint of Section 100 continues to attract an appeal under Order 43 Rule 1(u). In this respect, he placed reliance in the case of **Jagannathan v/s. Raju Sigamani and Anr** [2012 AIR SC 3788] and **Narayanan v/s Kumaran** [2004 (4) SCC 26.]

6. On perusing the observations of the Apex Court in the above two decisions and more specifically paragraph 17 in the case of **Jagannathan** (supra), it is clear that present appeal will have to be considered on the ground of Section 100 CPC i.e. only on the question of law involved in it.

7. The facts in the above matter would show that the appellant is the husband whereas the respondent is the wife. Their marriage was solemnized on 28/05/2010 under the regime of Communion of assets and registered with the Sub-Registrar of Bardez at Mapusa. Out of the wedlock, a son was born and thereafter the matrimonial discord commenced. It is the contention of the husband that the wife abandoned the conjugal domicile and left along with the child and she started residing at Navi Mumbai. In spite of efforts of the husband the wife failed to join the matrimonial home and therefore he filed suit for divorce under Article 4(5) to the Portuguese Civil Code in the Court of Senior Division at Mapusa along with the prayer for custody of child. The grounds taken in the divorce petition was of complete abandonment of conjugal domicile by the wife.

8. The wife while staying at Navi Mumbai filed some proceedings against the husband for domestic violence. However, she appeared before the Senior Division at Mapusa and initially contested the petition through her Advocate. However, an ex-parte decree was passed against the wife when she along with her Advocate failed to appear and contest the matter. Such an ex-parte decree of divorce was then challenged by the wife by

filing Regular Civil Appeal No.3 of 2019 before the District Court at Panaji. By the impugned judgment dated 29/06/2019, the learned Adhoc District Judge-1, FTC, Panaji observed that there was a fault of the Advocate of the wife who failed to appear and conduct the proceedings and for that purpose the wife should not be punished. Accordingly, by the impugned order, the judgment and decree of the Trial Court was quashed and set aside and the matter has been remanded to the Trial Court to adjudicate the matrimonial petition after giving reasonable opportunity to the wife to cross-examine the husband and lead evidence in defence. Against this order the appellant is before this Court.

9. While arguing the matter, the only ground which was raised by the appellant is that ex-parte orders were passed on two occasions against the wife it become final and without setting aside such ex-parte orders, it was not permissible for the First Appellate Court to quash and set aside the entire judgment and remand the matter back to the Trial Court.

10. The written submissions filed by the appellant show that the learned Trial Court considered and decided the issue regarding complete abandonment by the wife, which could not have been ignored or set aside by the First Appellate Court without giving any reasons.

11. The appellant submits that the question of law involved in the present appeal is that the First Appellate Court completely erred in setting aside ex-parte decree wherein there was no challenge raised to the ex-parte

order dated 23/11/2018. He then submitted that without challenging such ex-parte order, the wife is not entitled to challenge the ex-parte decree and order, which operates as res-judicata or the principles of constructive res-judicata. He then submitted that the impugned judgment is considered as an abuse to the provisions of Order 9 of CPC as it defeats the very importance of the said provisions and contrary to Article 20(2) of the Constitution of India. He then submitted that granting remand, the learned First Appellate Court forced the appellant to go into relitigation which amounts to double jeopardy. He then claimed that by remanding the matter to the Trial Court, the fundamental rights of the appellant to get speedy justice stands violated.

12. The learned Counsel for the respondent strongly contended that there is no question of law involved in the present appeal and therefore there is no merit in the matter to be either admitted or to be considered in favour of the appellant.

13. First of all the contention of the appellant that without setting aside ex-parte order, the Appellate Court erred in setting aside ex-parte decree is concerned, required to be rejected for the simple reason that ex-parte orders are passed during the proceedings which are pending before the Trial Court and that too in view of the provisions of Order 9 which deals with appearance of the parties and consequences of non-appearance. These provisions give power to the Court while deciding the suit or the proceedings either to dismiss the proceedings for non-appearance of the

plaintiff/applicant or to proceed ex-parte when the defendant in spite of service of summons fails to appear and contest the proceedings.

14. Order 9 Rule 6 CPC deals with the situation when only plaintiff appears and defendant in spite of service failed to appear and contest the matter, in that context, the power is given to the Court to make an order that the suit be heard ex-parte. If such order is passed and the proceedings are adjourned, it is open for the defendant under Order 9 Rule 7 to appear on the adjourned date and after assigning good cause for the previous nonappearance, request the Court to set aside the order of ex-parte.

15. However, even if an ex-parte decree is passed, the defendant against whom such decree is passed is entitled to apply to the same Court by which a decree is passed in Order 9 Rule 13 of the CPC to set aside the ex-parte decree by showing sufficient cause. These provisions though available to affected parties are not debarring such parties from filing an appeal from the original decree under Section 96 of the CPC wherein sub Section 2 provides that an appeal may lie from an original decree passed ex parte.

16. Thus, the first contention of the appellant has no merit. The options available to the defendant are as provided under Order 9 Rule 7, Order 9 Rule 13 of CPC and also an appeal from original decree under Section 96 of CPC. Therefore, the contention of the appellant that unless

the ex-parte order is set aside, the Appellate Court had no power to set aside ex-parte decree is misconceived. It is well settled that these three options operate in different situations and are available to the aggrieved party.

17. The second contention of the appellant is with regard to the Order 9 of CPC being contrary to Article 20(2) of the Constitution of India. First of all such an aspect is required to be outrightly rejected for the simple reason that Article 20(2) deals with the aspect of double jeopardy which is basically applied to the offences which are tried by the Courts wherein penalty of imprisonment or otherwise is inflicted. It deals with the aspect that no person shall be prosecuted and punished for the same offence more than once. The matter in hand is a civil proceedings and therefore the judgment and decree passed by the matrimonial Court even if remanded back for deciding afresh cannot be considered as attracting the Article 20(2) of the Constitution.

18. The third submission of the appellant is that the fundamental right of the appellant of speedy justice stands violated. In this respect the question of speed justice is also equated with the rights of the wife to get justice and for that purpose she is entitled to be defended in the Court of law by an Advocate. Therefore, the question of violation of the fundamental right under Article 21 qua the appellant will not arise in the present matter as the learned First Appellate Court observed that though the respondent engaged Advocate, her Advocate failed to appear and

contest the matter. It is a well settled proposition of law that for the default conducted by the Advocate, the party should not be blamed or punished.

19. After considering the grounds raised in the present memo of appeal and the one which are argued, it is clear that there is no substantial question of law involved in the present matter so as to admit the appeal and decide it accordingly. Hence, the appeal fails and stands dismissed.

BHARAT P. DESHPANDE, J.

MEENA
VISHAL
BHOIR



Digitally signed
by MEENA
VISHAL BHOIR
Date: 2023.08.03
18:28:01 +05'30'