

\$~19

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

%

Judgment delivered on: 14.03.2023

+ **MAT.APP.(F.C.) 60/2023, CM APPL. 9693/2023 & CM APPL. 9694/2023**

VIMMI SUD

..... APPELLANT

versus

SHALIN KUMAR SUD

..... RESPONDENT

Advocates who appeared in this case:

For the Appellant: Ms Payal Budhiraja and Ms Jyoti Nambiar, Advocates.

For the Respondent: None.

CORAM:-

HON'BLE MR JUSTICE SANJEEV SACHDEVA

HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

SANJEEV SACHDEVA, J. (ORAL)

1. Pursuant to the liberty granted on 28.02.2023, appellant has filed the amended appeal. The amended appeal is taken on record.
2. Appellant impugns order dated 02.11.2022 whereby the petition filed by the appellant seeking divorce under Section 13(1)(a) of the Hindu Marriage Act, 1955 (hereinafter referred to the 'Act') has been dismissed in default. Appellant further impugns order dated 02.11.2022 whereby the application of the appellant under Order IX Rule 4 CPC has been dismissed holding that incorrect averments have

been made in the application for restoration.

3. Learned counsel for the appellant submits that averments in the application were not incorrect, however, there were some misunderstanding inasmuch as though the process fee, for service of the respondent, was filed returnable for 08.03.2022, but on the file cover of the file maintained in the office of the counsel next date was mentioned as 18.04.2022. Copy of the file cover has also been annexed with the appeal paper book.

4. Subject application under Order IX Rule 4 CPC was filed on 23.04.2022. When the petition was dismissed in default, it was only at the stage of service of the respondent and the service has not been affected.

5. In terms of Order IX Rule 4 CPC, if a suit is dismissed under Rule 2 or Rule 3 of Order IX, plaintiff, subject to law of limitation, can bring a fresh suit or file an application seeking setting aside of the Order of dismissal.

6. In the present proceedings, the respondent is yet to be served and the appellant was entitled to file a fresh suit as the petition was for obtaining divorce and so long as the parties remain married, the cause of action to seek divorce continues to survive and as such a petition seeking divorce would even today be within limitation.

7. On perusal of the record of the case, we find that there is sufficient explanation given by the appellant in her application under

Order IX Rule 4 CPC explaining the circumstances under which the counsel failed to appear on 08.03.2022. The explanation in our view amounts to sufficient cause for non- appearance on the said date.

8. The Family Court has clearly erred in holding that there was no sufficient cause in view of the discrepancies noticed by the Family Court.

9. In view of the discrepancies having been sufficiently explained, the impugned order dated 08.03.2022 dismissing the petition in default and the order dated 02.11.2022 dismissing the application under Order IX Rule 4 CPC are set aside. The petition is restored in its original number on the record of the Family Court.

10. As the service of respondent had not taken place in the original petition and further as none had appeared on behalf of the respondent on 08.03.2023, the application under Order IX Rule 4 CPC was liable to be allowed without notice, consequently, we have taken up and disposed of the appeal without notice to the respondent.

11. Appellant shall appear before the Family Court for appropriate direction and further proceedings on 10.04.2023.

SANJEEV SACHDEVA, J

MARCH 14, 2023/ tp

VIKAS MAHAJAN, J