

IN THE HIGH COURT AT CALCUTTA
CIVIL REVISIOAL JURISDICTION

Present:-

Hon'ble Justice Shampa Sarkar

CO 2112 of 2022

Mahadeb Kundu
Vs.
Nandita Kundu

For the petitioner : Ms. Shohini Chakrabarty
Ms. Prajaaini Das

For the opposite party : Mr. Rwitendra Banerjee
Mr. Aritra Roychowdhury

Hearing concluded on : 04.04.2024

Judgment on : 12.04.2024

Shampa Sarkar, J.:-

1. The revisional application arises out of an order dated June 20, 2022 passed by the learned Additional District Judge, Fast Track 1st Court, Lalbagh, Murshidabad in Misc. Case No.01 of 2021. The Misc. case arose out of Matrimonial Suit No.133 of 2014. By the order impugned, the learned Court allowed the Misc. Case and set aside the ex parte decree. The Matrimonial Suit No. 133 of 2014 was restored to its original file and number. The learned Court allowed an application under Section 5 of the Limitation Act for condonation of delay in filing the Misc. Case as also the Misc. Case, by the same order, which has been impugned before this Court.

2. The petitioner is the husband. The petitioner has challenged the said order on the following grounds:-

- a) The learned Court failed to assign the reason for setting aside the ex parte decree and in allowing the Misc. case.
- b) The learned Court did not consider the fact that the summons of the matrimonial suit were duly served, but the wife failed to contest the suit.
- c) The basic grounds on which an application under Order 9 Rule 13 of the Code of Civil Procedure could be allowed, were, non-service of summons and/or sufficient cause owing to which the party was prevented from contesting the suit.
- d) The wife had failed to satisfy the existence of the above factors with cogent evidence before the learned Court, which was overlooked by the Court. The summons were sent to the parents' house of the opposite party where she was residing with her minor child. The service return before the learned Court reflected that the AD card was duly signed.

3. Ms. Shohini Chakrabarty, learned Advocate appearing on behalf of the petitioner drew the attention of the Court to the order passed by the learned Judge. According to Ms. Chakrabarty, the factors which persuaded the learned Judge to condone the delay and allow the Misc. Case were mainly the Judge's social perception of a middle class Bengali family. The learned Judge proceeded with an erroneous presumption that in a situation like the present one, not only the wife should have been informed about the husband's inclination to separate from her and obtain divorce, but the family of the wife and other relatives should have also been made aware before a drastic step like divorce was taken by the husband. Ms. Chakrabarty further submitted that the application for condonation of delay

and the Misc. Case could not have been disposed of at the same time, by a single order.

4. Moreover, the Court also erred in presuming that if the wife received summons of a suit for divorce filed by husband, it was impossible for her to ignore such an aggressive step taken by the husband. She was bound to contest the proceeding, especially when the fate of a minor girl child was also involved.

5. Ms. Chakrabarty further contended that after the decree was passed and the period for filing the appeal was over, the petitioner had remarried and a child has been born from the said marriage.

6. Under such circumstances, setting aside the ex parte decree and restoration of the matrimonial suit to its original file and number was unjust, unfair and had caused irreparable loss and injury to the petitioner.

7. According to Ms. Chakrabarty, the opposite party was all along aware of the proceeding. She kept quiet and waited for the decision of the Court. Upon expiry of the period for preferring the appeal, she filed the application for setting aside the decree, only to harass the petitioner and to extract money from him. She had abandoned the petitioner with her child long time ago and did not have the intention to reside with the petitioner. Her sole purpose was to disturb his marital peace and also create a situation of unpleasantness. The averments in the application for setting aside the ex parte decree would indicate that the reasons assigned by her for not attending the Court when the decree was passed, were not convincing. It was unbelievable that two days after the opposite party left her matrimonial home, she was informed that her husband had filed an application for

divorce and had obtained the decree. The source of her information was not disclosed.

8. Thus, the decision of the Court suffered from perversity. The same was based on surmise, conjecture and human emotion. The order impugned was devoid of any legal basis.

9. Mr. Banerjee, learned Advocate appearing on behalf of the opposite party submits that the suit was filed at a time when the wife was living with her husband in the matrimonial home. Referring to the petition for divorce, Mr. Banerjee submitted that a few cryptic statements with regard to alleged cruelty had been made in the divorce petition. The birth and the existence of a minor daughter had been suppressed. Such an incomplete petition for divorce raises a doubt with regard to the bona fide of the petitioner. Secondly, the judgment and decree indicated that the Court had taken into account the false and connected story that the wife had tortured the husband at the matrimonial home and around March 25, 2011 she had left her matrimonial home and did not ever return. As the parties were apart for a long time, the learned court deemed it fit to grant an ex-parte divorce.

10. Mr. Banerjee referred to the cross-examination of the opposite party wherein she had categorically deposed that she had no knowledge about the suit for divorce. She had been informed by the Jiaganj Police Station about the divorce case filed by the petitioner. Such information was given to her on July 16, 2016. The school certificate of the daughter dated November 26, 2016, issued by the Headmistress Jiaganj S N Girls' High School, was also proved by an employee of the school being authorized by the Headmistress to depose. The petitioner resided within the jurisdiction of Jiaganj Police

Station, but the house of the father of the opposite party was far away. The school's admission register book was also proved by leading evidence. Other witnesses also deposed that the opposite party was residing with the petitioner upto July 2016.

11. In the cross-examination, the petitioner stated that for the first time, dispute between the parties arose on July 11, 2016 and a general diary was lodged at the Jiaganj Police Station. The fact that the daughter was studying at Jiaganj S. N. Girls High School upto 2016 was also admitted by the petitioner in his cross-examination.

12. The learned Court heard the parties on the application for condonation of delay as also for setting aside the ex parte decree. Elaborate evidence was led by the parties and thereafter, by a composite order dated June 20, 2022, the application for condonation of delay and the Misc. Case No.01 of 2021 were allowed. The Court recorded the submissions of the respective parties. The Court recorded the consequence of the marriage of the petitioner. The Court recorded that the delay was not fatal.

13. The case laws were discussed in detail from which the court concluded that remarriage of the husband should not be a ground for rejection of the Misc. Case. It was a matter of public policy that a person who secured an ex parte decree should not be permitted to enjoy the benefit of an ex parte decree, when the court was of the opinion that the circumstances under which the ex parte decree was passed were either incorrect or had caused grave injustice to the judgment debtor.

14. Thus, the court held that only because the petitioner had re-married, the application under Order 9 Rule 13 of the Code of Civil Procedure, could

not be thrown out. The court also discussed the law with reference to an authority, that if the marriage took place before the ex-parte decree was set aside, the petitioner would not be guilty of bigamy.

15. In the facts of the case, the court was of the view that it was unlikely that the opposite party would ignore the summons of a suit for divorce, keep quiet and watch the show, till the decree was passed and again wait for a considerable time before filing the application for setting aside the ex parte decree. Such behaviour from the opposite party was unlikely, unusual and next to impossible, considering her social status, background and humble existence. The court was of the view that in an Indian society, a husband who wanted to divorce his wife, would not keep silent. Usually the family members were aware of the discord and the consequences thereof. Thus, the court was convinced from the facts and circumstances and the evidence, that the ex parte decree should be set aside as the wife had shown sufficient cause which prevented her from contesting the suit. Accordingly, by a composite order, the learned court condoned the delay and set aside the ex parte decree.

16. This court is required to decide the propriety of the order of the learned trial judge. This court agrees with Mr. Banerjee, that the application for divorce was filed in a very slipshod and casual manner. The factum of a child being born to the couple, has been suppressed. The ex parte judgment and decree also does not indicate that the court was in knowledge of the fact that a girl child had been born to the parties. The court proceeded on the basis of the averments that the opposite party had left her matrimonial home sometime in 2011 and as the parties were separated for a long time

and there was no chance for any re-conciliation, the inevitable result of such a marriage was dissolution. Had the existence of a girl child been disclosed, the same could have been an important consideration before the court.

17. The trend of the cross-examination of the opposite party and her witnesses clearly indicate that the opposite party was residing in her matrimonial home till July 2016. The child was also studying at a school at Jiaganj upto 2016, which was within the locality where the petitioner resided. The cross-examination of the petitioner is crucial. He deposed that the dispute arose for the first time in July 2016, when a G.D. entry was lodged in the Jiaganj police station. Such deposition of the petitioner can be co-related with the deposition of the opposite party in the cross-examination. The opposite party stated that she was informed on July 16, 2016, by the Jiaganj police station that her husband had filed the suit for divorce.

18. Considering all such aspects and evidence on record, this was a fit case for setting aside the ex parte decree upon condonation of delay. The opposite party should be allowed to contest the proceeding.

19. In an Indian society, an ex parte decree of divorce obtained by suppression of fact that a girl child had been born to the couple should not be allowed to be sustained, only because the petitioner had re-married. There are evidence which raise a doubt with regard to the knowledge of the wife about the matrimonial suit.

20. The re-marriage cannot by itself determine the fate of the application for setting aside the ex parte decree. The court rightly decided the application on its own merits. There was no irregularity in passing a

composite order. The order was passed to do substantial justice. The Hon'ble Apex Court in the matter of **Parimal Vs. Veena** reported in **AIR 2011 SC 1150** also did not take into account the remarriage of the spouse as a relevant factor in deciding the merits of an application for setting aside an ex-parte decree of divorce.

21. The Hon'ble Apex Court time and again held that an application under Order 9 Rule 13 of the Code of Civil Procedure, should be decided liberally. The reason assigned by the learned Court in this case may be on the emotional and social aspect of the Bengali community, but the ultimate decision of the court that the wife and her family were in the dark, is correct. The reasons have been supplied by this court to justify that the learned judge had proceeded correctly and had rightly set aside the ex parte decree.

22. The revisional application is dismissed.

23. Parties to act on the basis of the server copy of this judgment.

(Shapma Sarkar, J.)