

Ct. 26.02
No. 652
13
akb
2024

C.O. 1978 of 2021

**Swapan Kumar Mallick
-Versus-
Bhabani Mallick**

**Mr. Dhananjay Banerjee
Ms. Oindrilla Ghosh ...For the Petitioner**

Mr. Rwitendra Banerjee ...For the Opposite Party

Affidavit-of-service filed on behalf of the petitioner is taken on record.

The petitioner herein challenged the impugned order by which Court below condoned the delay in filing the application for setting aside ex parte decree in one hand and by the same order vacated ex parte decree on the other hand.

In the said applications opposite party herein contended that the petitioner was married with the opposite party herein on 12th February, 1996 according to Hindu Rites and Customs and as a result of which a female child was born on 21st November, 1996. A series of litigation has been initiated by and between the parties. Ultimately, the petitioner herein filed a case for dissolution of marriage under Section 13 of the Hindu Marriage Act, which was registered as Mat. Suit No. 06 of 2011.

The petitioner further submits that on 5th January, 2011 summons of the suit was issued by the Court below fixing 5th March, 2011 as the next date for service return

through both ways. From the order dated 5th March, 2011, it appears from the record that the opposite party refused to accept the notice and as such Court below fixed 12th May, 2011 for ex parte hearing of the suit. On 8th July, 2011 petitioner filed affidavit-in-chief in support of his application and on 21st February, 2012 the Trial Court concluded the trial and the Court below was pleased to pass ex parte judgment and decree of dissolution of the marriage in favour of the petitioner

The petitioner submits after expiry of appeal period and after about one year of passing that ex parte judgment and decree he got married for the second time with one Tapati Mallick on 4th June, 2013 and out of the said wedlock one male child and one female child were born.

On 22nd September, 2017 all on a sudden the opposite party herein lodged a complain under Section 156(3) of the Code of Criminal Procedure, alleging that the petitioner herein has contracted for second marriage. Thereafter on 21st August, 2018, the opposite party filed an application under Order IX, Rule 13 of the Code of Civil Procedure, 1908 along with an application under Section 5 of the Limitation Act before the Court below and it was registered as Misc. Case No. 11 of 2018.

Learned Court below by the order impugned was

pleased to allow both the applications filed under Section 5 of the Limitation Act as well as the application filed under Order IX, Rule 13 of the Code.

Being aggrieved by that order petitioner herein submits that the Court below has failed to take into consideration that the notice to suit was served properly upon the wife/opposite party, which had returned with postal endorsement 'refused'. Accordingly, Court below ought to have decided that it was a good service and that the opposite party herein in her application has failed to justify day to day delay. He further submits that the Court below came to an erroneous findings that the delay was for 554 days, but in fact the delay was for about six years. In fact the Court below erred in law in considering the bar of Limitation raised by the petitioner to be ignoble. Opposite party herein has failed to explain that sufficient cause has prevented her from appearing before the Court when the suit was called for hearing. Accordingly, he has prayed for setting aside the order impugned.

Mr. Rwitendra Banerjee, learned Counsel appearing on behalf of the opposite party submits that the service was not proper as per process server's report and in fact in her application filed under Section 5 of the Limitation Act as well as application under Order IX, Rule 13 of the

Code, she has sufficiently explained the delay in filing the application. Furthermore, she is a rustic villager and was totally ignorant about the decree passed by the Court below. As soon as she came to know about the decree she at once preferred the application. Accordingly, the Court below was justified in giving opportunity to the opposite party herein to contest the suit so that the matter can be adjudicated on merits after contested hearing. Accordingly he submits that the order impugned does not call for any interference.

I have considered the submissions made by both the parties. It appears from the rerecord that the Court below by a cryptic order has disposed of both the applications. Since there was considerable period of delay in filing the Misc. Case, the Court below ought to have disposed of the application for condonation of delay filed under Section 5 of the Limitation Act first. If the Court below would have found himself satisfied about the “sufficient cause” shown by the petitioner/wife then only he ought to have proceeded for disposal of the Misc. Case filed under Order XVII, Rule 13 of the Code. This is because in the application for condonation of delay as well as in the application under Order IX, Rule 13 it has been specifically averred by the opposite party/wife that the petitioner in collusion with the postal authority has procured endorsement on the envelope,

which however has been denied by the petitioner herein.

In the back ground of such allegation and counter allegation, the Misc. Case which has been filed for setting aside ex parte decree ought not to have disposed of without taking evidence specially in connection with the issue of service of summon. Furthermore, Section 141 of the Code, makes it clear that the procedure in regard to suits will be applied “as far as it can be made applicable” to a proceeding initiated under Order IX, Rule 13 of the Code of Civil Procedure.

In such view of the matter, I find that the order impugned is perverse and liable to be set aside. In view of above the order impugned No. 15 dated 19th March, 2021 is hereby set aside.

The Court below is directed to dispose of the wife/opposite party’s application under Section 5 of the Limitation Act seeking condonation of delay first and in the event the Court below finds that the cause shown is sufficient to condone the delay, then and then only he will proceed with the Misc. Case, being Misc. Case No. 11 of 2018 filed under Order IX, Rule 13 following the procedure laid down in Section 141 of the Code of Civil Procedure.

However, I made it clear that I have not gone into the merits of the allegation and the Court below will dispose

of the applications without being influenced by any observation made herein preferably within a period of twelve weeks from the date of Communication of this order.

The revisional application, being C.O. 1978 of 2021 is accordingly disposed of.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, on priority basis on compliance of all usual formalities.

(Ajoy Kumar Mukherjee, J.)