

01 **06.03.
2024**

Ct. No. 04

ab

FAT 468 of 2017

**Smt. Usha Devi
Vs.**

Sheetansu Kumar Yadav and others.

**Mr. Sharanya Chatterjee,
Mr. Zahaib Rauf,
Mr. Siddharth Gupta,
Mr. Indrajit Ghosh.**

... for the appellant.

Mr. Subhas Chandra Saha.

... for the respondents.

Assailing the ex parte judgment and decree dated 28th April 2016 passed by the learned District Judge, Purulia, in Matrimonial Suit No. 159 of 2012, the present appeal is filed by the wife/appellant.

For the purpose of record it is pertinent to say that after passing of the decree of dissolution of marriage before the instant appeal is filed, the husband of the appellant died. The instant appeal was taken out together with an application for condonation of delay impleading the children as respondents for the obvious reason that by virtue of the said decree of dissolution of marriage the legal status of the appellant gets affected and, therefore, there is no impediment on the part of the Court to bring the heirs on record.

The aforesaid proposition of law where the substitution may be allowed in a matrimonial proceeding is fortified by a judgment of the Apex Court in case of **Yallawwa (Smt.) vs. Shantavva (Smt.)**, reported in **(1997) 11 SCC 159** in the following:

“.....

It is of course true that pending such trial if either of the spouses expires then, as seen earlier, the personal cause of action against the husband or the wife, as the case may be, dies with the departing spouse. As no rights are still crystallized by then against or in favour of either spouse, no

proprietary effect or any adverse effect on the status of the parties would get generated by mere filing of such petition and the status quo ante would continue to operate during the trial of such petition, However the situation gets changed once a decree of divorce follows in favour of either of the spouses whether such decree is bipartite or ex parte. Thereafter, as noted earlier, direct legal consequences affecting the status of parties as well as proprietary rights of either of them, as noted earlier, would flow from such a decree. Under these circumstances, if the aggrieved spouse who suffers from such legal efforts of the adverse decree against him or her is told off the gates of the appellant proceedings for setting aside such ex parte decree, the spouse concerned would suffer serious legal damage and injury without getting any opportunity to get such a decree set aside on legally permissible grounds. Consequently, it may be held that once the petition under Section 13 of the Hindu Marriage Act results into any decree of divorce either ex parte or bipartite then the aggrieved spouse concerned who suffers from such pernicious legal efforts can legitimately try to get them reversed through the assistance of the Court. In such an exercise, all other legal heirs of the deceased spouse who are interested in getting such a decree maintained can be joined as necessary parties. Section 13(1) of the Hindu Marriage Act can obviously come in the way of such proceedings being maintained against the legal heirs of the decree-holder-spouse.

.....”

After the service of notice of appeal, the respondents have appeared and the Counsel for the respondents submits that his clients have instructed not to appear and contest the said proceeding. The reason is laudable because from the pleadings it appears that children were all along living with the appellant and still living with her and, therefore, they may not be interested in contesting the said proceeding.

Be that as it may, the moment a decree for dissolution of marriage is passed and the challenge is made by way of a statutory appeal before this Court, it is an ardent duty of the Court to hear out the matter on merit in order to ascertain whether the findings made by the Trial Court can be sustained.

As indicated above, the appeal is filed against an ex parte decree and it is axiomatic to record the findings returned by the Trial Court while passing an ex parte decree against the defendants in the following:

“The petitioner through his affidavit-in-chief has corroborated his case as made out in the petition under sections 13(i) (ii) (ia) (ib) of Hindu Marriage Act and on the basis of his unchallenged testimony, the suit deserved to be allowed ex-parte.”

After perusing the aforesaid findings, as quoted above, we are unable to persuade ourselves to concur to it, as a Court deciding a judicial proceeding is required to return a finding on each and every issues or the questions involved in the said proceeding, more particularly, the Court should be more cautious in deciding the case ex parte.

Let us see from the pleadings made in the application filed under Section 13 of the Hindu Marriage Act and the averments made therein in relation to the grounds mentioned therein, being the grounds envisaged under Section 13 of the said Act, to have been pleaded and proved by way of evidence. It appears that the said application for dissolution of marriage was founded upon an allegation that the wife/appellant is leading an adulterous life, guilty of perpetrating cruelty upon the husband, deserting the husband without any reasonable cause and above all has converted her religion from Hindu to other.

So far as the last ground, which is incorporated under Section 13(1)(ii) of the said Act, is concerned, relating to the act of conversion of the religion after the marriage is solemnized, we do not find a whisper in the application seeking dissolution of marriage. While passing a decree for dissolution of marriage, the Court proceeded with the close mind and did not notice that

neither in the application nor in the affidavit as to examination-in-chief there is any iota of piece of pleading or the evidence produced in relation to the aforesaid ground.

It is apparent from the findings made by the Trial Court that it neither perused the pleadings nor the affidavit as to examination-in-chief and proceeded on the ipso dixit of the nomenclature of the said application and, therefore, fails to discharge its onerous duty cast upon it on the principles of the provisions contained in the Code of Civil Procedure.

Order XIV Rule 2 provides that the Court shall pronounce the judgment on all issues except where the preliminary issue if decided against the plaintiff would make him non-suited, even if there is no appearance of the defendant yet the questions or the issues involved in the said proceeding is to be understood by the Judge and to return its independent finding on all of the issues/questions germane from the pleading and the evidence adduced in this regard and should not simplicitor proceed on the basis that the plaintiff is entitled to a decree simplicitor on the basis of the pleading as well as repletion of the same in the form of affidavit as to examination-in-chief.

The Apex Court in case of **Maya Devi vs. Lalta Prasad**, reported in **(2015) 5 SCC 588** was considering a case where the defendant therein failed to file the written statement or the written statement was not taken on record having filed beyond the statutory period of limitation provided therefor and the fallout of the same in relation to the provisions under Order VIII Rule 10 of the Code. Though the language employed in Order VIII Rule 10 of the Code indicates that the Court shall pass a judgment in the event the written statement is not filed within the time provided therefor yet it does not absolve the responsibility and the duty of the Court to meticulously examine the pleadings and the evidence and

to arrive at the conclusion that the same has been proved in the following:

“The absence of the defendant does not absolve the trial court from fully satisfying itself of the factual and legal veracity of the plaintiff’s claim. nay this feature of the litigation casts a greater responsibility and onerous obligation on the trial court as well as the executing court to be fully satisfied that the claim has been proved and substantiated to the hilt by the plaintiff. Reference to *Shantilal Gulabchand Mutha v. TELCO Ltd*, will be sufficient. The failure to file a written statement, thereby bringing Order 8 Rule 10 CPC into operation, or the factum of the defendant having been set ex parte, does not invite a punishment in the form of an automatic decree. Both under Order 8 Rule 10 CPC and on the invocation of Order 9 CPC, the court is nevertheless duty bound to diligently ensure that the plaint stands proved and the prayers therein are worthy of being granted.”

Such being the proposition of law that the Court is not absolved of its duty to return the finding on each of the points involved in the case nor can shy away from weeding out the questions of law as well as the fact and to find out that those have been proved by the plaintiff, who is pursuing an undefeated suit or the proceeding. Even a doctrine of non-traverse cannot be applied in such abstract form and does not takeaway the onerous duty of proving a case made out in the plaint.

In view of the law enunciated by the Apex Court in the above noted decision, we find that the Trial Court has committed error in decreeing the proceeding for dissolution of marriage without recording any independent finding on the issues or the questions involved therein and, therefore, the impugned judgment is liable to be set aside. As a consequence whereof, the Matrimonial Suit being no. 159 of 2012 is dismissed.

The appeal is disposed of.

(Harish Tandon, J.)

(Madhuresh Prasad, J.)

