

AD 41
Ct No.16
30.04.2025
(SSS)

FMA 234 of 2025
With
CAN 2 of 2024

Shrimati Sathi Ghosh Bhunya
Vs.
Rishi Arotrik Bhunya

Mr. Rabindranath Mahato,
Mr. Aritra Shankar Ray
....For the Appellant.

Mr. Partha Pratim Roy,
Mr. Soumyajit Das Mahapatra,
Ms. Madhurai Sinha,
Mr. Ranabeer Halder
....For the Respondent.

1. Heard learned Counsel for the appellant.
2. The present appeal has been preferred against an order whereby an application for condonation of delay filed by the appellant/wife in connection with an application under Order IX Rule 13 of the Code of Civil Procedure, for restoration of a divorce suit filed by the respondent/husband, was refused and consequentially the Order IX Rule 13 application was also dismissed.
3. The respondent/husband obtained an *ex parte* divorce decree against the appellant/wife. Subsequently, the appellant took out an application under Order IX Rule 13 of the Code, accompanied by an application for condonation of delay in filing the

same, pleading that the appellant/wife was all along unaware of the pendency of the suit and first came to know of the same in connection with the proceeding under Section 498A of the Indian Penal Code which was levied by the wife, from the defence taken by the respondent/husband therein.

4. The learned Trial Judge, as we find from the impugned order, disbelieved the plea of the appellant/wife on the ground that the appellant/wife had appeared on several occasions during the pendency of the matrimonial suit and had sought time to file written objection.

5. The learned Trial Judge observed accordingly that the appellant/wife had not come with clean hands. Accordingly, the application for condonation of delay and consequentially, the application under Order IX Rule 13 of the Code of Civil Procedure were dismissed.

6. Learned Counsel for the appellant argues that the appellant/wife ought not to be made to suffer for no fault of her own, since she was all along unaware of the pendency of the suit.

7. It is insisted that the appellant/wife never authorized any learned Advocate to appear on her behalf in the court in connection with the matrimonial suit and as such, the very premise of the impugned order is bad in law and on facts.

8. However, we are unable to agree with learned Counsel for the appellant. The law casts the burden of proving an act of fraud or misrepresentation on the person who alleges such act. In the present case, even if we construe that the appellant/wife had a case that she did not authorise any advocate to appear on her behalf in the matrimonial suit, we cannot deny the fact that there are materials on record in connection with the matrimonial suit which indicate that the appellant executed a Vakalatnama for authorizing some learned advocate to appear on her behalf. The learned Trial Judge relied on the materials on record and the successive orders passed in the matrimonial suit to come to the conclusion that the appellant/wife had entered appearance in the suit and appeared therein several times.

9. The appellant/wife did not take out any application for examination of her signature in the Vakalatnama filed on her behalf in the matrimonial suit and/or on any pleading filed by her in the court below in connection with the matrimonial suit. She did not even seek any opportunity to adduce evidence in connection with the proceedings under Order IX Rule 13 of the Code of Civil Procedure or the connected condonation application to substantiate her contention that the appearance recorded on her behalf in several orders of the matrimonial suit were products of fraud.

10. As such, in the absence of any effort on the part of the wife to disprove the fact of her appearance in the divorce suit, we are unable to accept her contention that the learned Trial Judge erred in law in going by the materials on record in respect of the matrimonial suit and holding that the appellant had not come with clean hands in pleading that she was all along unaware of the pendency of the suit.

11. At this juncture, learned Counsel for the respondent/husband, who otherwise does not have any right of audience at the stage of hearing of an appeal under Order XLI Rule 11 of the Code of Civil Procedure, is given an opportunity to address us for the limited purpose of ascertaining as to whether the respondent/husband has remarried in the meantime.

12. It is informed to us that the respondent/husband, on the strength of the decree of divorce obtained by him, has since remarried and has a child of the said subsequent marriage.

13. Thus, we are of the opinion that considerations of equity are also not available to the appellant/wife, since more wrong would be done in admitting or allowing the appeal than in dismissing the same even on equitable considerations, particularly since valuable rights have accrued in favour of the respondent/husband by virtue of the divorce decree, which has culminated in his remarriage and having a child from the said second marriage.

14. In the event equitable considerations are to be balanced, we find that the allowing of the appeal would ruin several lives and as such, we are also not with the appellant/wife on such count.

15. In view of the above observations, FMA 234 of 2025 is dismissed under Order XLI Rule 11 of the Code of Civil Procedure.

16. CAN 2 of 2024 is also disposed of consequentially.

17. There will be no order as to costs.

(Sabyasachi Bhattacharyya, J.)

(Uday Kumar, J.)