

**Durga Devi Vs. Rajendra Singh**

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**SooperKanoon Citation :** [sooperkanoon.com/503094](http://sooperkanoon.com/503094)

**Court :** Madhya Pradesh

**Decided On :** Nov-25-1993

**Reported in :** II(1994)DMC428

**Judge :** A.R. Tiwari, J.

**Acts :** [Code of Civil Procedure \(CPC\) , 1908](#) - Order 43; [Hindu Marriage Act, 1955](#)  
- Sections 13

**Appeal No. :** Miscellaneous Appeal No. 94 of 1991

**Appellant :** Durga Devi

**Respondent :** Rajendra Singh

**Advocate for Def. :** V.K. Pathan, Adv.

**Advocate for Pet/Ap. :** P. Shastri, Adv.

**Disposition :** Appeal allowed

**Judgement :**

**A.R. Tiwari, J.**

1. This miscellaneous appeal presented under Order 43 Rule (d) of the Code of Civil Procedure (for short, 'the Code') is directed against the order dated 10-8-90 rendered by I Additional Judge to the Court of District Judge, Indore in Civil Misc.

Case No. 10/86 thereby dismissing the application of the applicant under Order 9 Rule 13 and Section 15 of the Code.

2. Briefly stated, the facts of the case are that NA/husband instituted the petition under Section 13 of the Hindu Marriage Act for dissolution of marriage by decree of divorce. This case was registered as Hindu Marriage Case No. 223/84. On 1-5-85, the case was listed for making an endeavour to bring about re-conciliation between the parties. It appears that the applicant did not remain present on 1-5-85 and as such the case was postponed to 2-5-85 for the purpose of presentation of the written statement as was the date fixed earlier. On 2-5-1985, the applicant remained absent as a result of which the order was passed that the case shall be heard ex-parte against the applicant. On 3-5-1985 an ex-parte decree dissolving the marriage was passed. The applicant contended that she was prevented by sufficient cause from appearing in the case on 2-5-85 when it was called on for hearing.

3. The grounds asserted were that she was ill and she had no knowledge of the date of 2-5-1985. On knowing from her Counsel that an ex-parte decree has been passed, the applicant presented the aforesaid application for setting aside the ex-parte decree alongwith the application under Section 5 of the Limitation Act seeking condonation of delay in initiating such proceedings. This application was opposed by the other side The Trial Court concluded that the application was within time but dismissed the same on the ground that no sufficient cause for non-appearance was made out. Aggrieved by this order, the applicant has preferred this appeal.

4. I have heard Shri Shastri learned Counsel for the appellant and Shri V.K. Pathan learned Counsel for respondent. I have perused the record.

5. The application, as noted, was moved under Order 9 Rule 13 and Section 151 of the Code, contending that the applicant was prevented by sufficient cause from appearing on 2-5-85 when the suit was called on for hearing and praying that the order setting aside the ex-parte decree be passed.

6 An ex-parte decree of divorce was passed under Section 13 of the Hindu Marriage Act in HM Case No. 223/84 on 3-5-85. The course of this litigation was that it was slated for reconciliation on 1-5 85 and on failure of endeavour towards reconciliation, for reply on 2-5-85. There seemed to be some error in writing about date. On 2-5-85, the order was passed that the case will be heard ex-parte. On acquisition of knowledge of ex-parte order, the applicant filed the application on 1-8-85 for setting aside the same. The other side resisted the application. The Court framed two issues--

(a) Whether the application was within time ?

(b) Whether there was sufficient cause for setting aside the decree ?

7. The Court below answered the issue (a) in the affirmative and held the application within time. The issue (b) was, however decided against the applicant resulting in dismissal of the application. Aggrieved by this order, this appeal was filed and aggrieved by the finding on issue (a) the respondent submitted cross-objection.

8. The Court below considered the facts in great detail and held the application as within time. I find that the facts have been correctly appreciated and law has been properly applied. This conclusion is no firm foundation and is not liable to be dislodged or demolished. This is a finding of fact. AIR 1986 SC 509--Dudh Nath Pandey v. Suresh Chandra Bhatta Sali, is pertinent. Accordingly the finding is upheld and the cross-objection is dismissed.

9. As regards finding on issue No. (b), it is noticed that the decree was passed just on the next day. The applicant was represented by the Counsels. The serious endeavour to bring about reconciliation between the parties does not seem to have been made in terms of Section 23(2) of the Hindu Marriage Act before proceeding to grant relief of divorce.

10. The proceedings are pointed to hot-haste :

1.5.85 -- For reconciliation proceeding

2.5.85 -- For W.S..., order passed to hear the case exparte.

3.5.85 -- Marriage dissolved by the decree of divorce.

11. It was contended that appellant had attended the Court on 1.5.85 but was not informed about the date of 2.5.85 by her Counsel. In enquiry, appellant examined herself as witness No. 1 AW2 is Rajendra Singh Chouhan, AW 3 is Ramchandra Pandey (Advocate) and AW 4 is Rajendra Singh. In rebuttal, the respondent examined himself and led no other evidence.

12. There seemed to be no cogent reason as to why sworn testimony of the appellant was held to be un-acceptable. It is also not clear as to why the Court proceeded to hear the matter without serious 'endeavour to bring about reconciliation.' It is again not clear as to why non-pleading by Counsel, engaged for pleading, was accepted lightly to the disadvantage of the appellant.

13. The provisions under Order 9 Rule 13 of the Code are required to be construed liberally. After all, why the wife, confronted with divorce proceedings, would opt to remain absent and choose to suffer decree of divorce on default The provisions of Order 9 of the Code are not penal in nature. Normally, the parties should be deprived of the opportunity of hearing only in case of gross negligence and mis-conduct. Both the parties should be given full opportunity to place their respective case and evidence before the Court. The rule of procedure should not be too strictly applied to deny justice to the party, more so, in matrimonial matters, which involve the question of dissolution of marriage by decree of divorce, unless the Court was satisfied that the party-had motive for non-appearance and that the absence was deliberate to achieve that object. The decision reported in 1980 MPWN(2) 68-(Kusum Vaishya v. Ravindra Vaishya) is pertinent.

14. Considering the application and evidential material, I am inclined to hold that the decree, without serious efforts towards reconciliation, is unsustainable in law and that the appellant-in the absence of knowledge of date of 2-5-85, was prevented by sufficient cause from appearing in the Court when the case was called on for hearing. In these circumstances, the case for setting aside the exparte decree is thus clearly made out.

15. Ex consequenti, I allow this appeal, set aside the order impugned in this appeal, allow the application moved under Order 9 Rule 13 and Section 151 of the Code and accordingly vacate the exparte judgment and decree of divorce passed in H.M. Case No. 223/84 on 3.5.85.

16. The Trial Court is now directed to readmit and restore the petition, under Section 13 of the Hindu Marriage Act, registered as HM Case No. 223/84 (Rajendra Singh v. Smt. Durgadevi) under its original number and to proceed to determine it afresh, after giving reasonable opportunity of hearing i.e. evidence etc. to both the sides, in conformity with law.

17. There shall be no order asto costs.

18. Parties through their Counsel are directed to appear in the Trial Court on 17-12-93 to take further orders in the matter. As the matter is quite old, the parties are also directed to cooperate in speedy trial and the Trial Court is ordered to endeavour to decide the main petition within a period of six months from 17-12-1993.