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Court : Delhi

Decided On : Nov-05-1986

Reported in : 1987(12)DRJ222

Judge : S.S. Chadha, J.

Acts : [Limitation Act, 1963](#) - Article 123; [Code of Civil Procedure \(CPC\), 1908](#) - Order 9, Rule 13

Appeal No. : Civil Revision Appeal No. 561 of 1977

Appellant : Kailash Devi

Respondent : Priti Mandal @ Priti Aggarwal and anr.

Advocate for Pet/Ap. : J.S. Vohra and; R.K. Saini, Advs

Judgement :

S.S. Chadha, J.

(1) A petition under Section 24 of the Special Marriage Act, 1954 (hereinafter referred to as the Act) was presented by Smt. Kailash Devi (for short 'K') on 21/12/1973 for declaring the marriage of 224 Shri Om Parkash Aggarwal (for short 'O') and Smt. Priti Aggarwal (for short 'P') as null and void on the ground that 'K' was the legally wedded wife of 'O' and that subsequent marriage of 'O' with 'P' was in violation of Section 4(a) of the Act and could not take place. 'O' admitted the

allegation of 'K' but 'P' did not appear and was proceeded ex parte. An ex parte decree declaring the marriage of 'O' with 'P' as null and void was passed on 26/8/1974. 'P' who was ex parte then brought an application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure for setting aside the ex parte decree of nullity against her. That application was once dismissed in default but restored on payment of Rs. 10.00 as costs. It was again dismissed in default on 27/5/1975. Thereafter another application for restoration of the original application under Order IX Rule 13 of the Code of Civil Procedure was brought on 6/2/1976. One of the preliminary objections raised was that the application was barred by time. The trial Court came to the conclusion that the application made on 6/2/1976 is governed by the residuary Article 137 of the Schedule to the [Limitation Act, 1963](#) and held the application within time. As issue was framed whether there was sufficient cause for restoration of the application for setting aside the ex-parte decree. 'K' is aggrieved of that decision on the question of applicability of Article 137 and has brought the present revision petition under Section 115 of the Code of Civil Procedure.

(2) Section 40 of the Act provides that subject to the other provisions contained in the Act, and to such rules as the High Court may make in this behalf, all proceedings under the act shall be regulated, as far as may be, by the Code of Civil Procedure 1908. Any marriage solemnized under the Act could be declared null and void on a petition presented by either party..... thereto against the other party by a decree of nullity if the conditions specified in Clauses (a), (b), (c) and (d) of Section 4 have not been fulfilled or the respondent was impotent at the time of the marriage and at the time of the institution of the suit. The ex parte decree of nullity declaring the marriage of 'O' and 'P' as null and void was passed. An application under order IX Rule 13 and Section 151 of the Code of Civil Procedure for setting aside the ex parte decree was filed and dismissed in default. Another application for restoration of the application under Order IX Rule 13 and Section 151 of the Code of Civil Procedure dismissed in default has been made. The consensus of judicial opinion including the view of this Court is that if an application under Rule 4, 9 or 13 of Order IX is itself dismissed for non-appearance of the applicant, a fresh application to restore that application can be filed. The reason for this is that the proceedings contemplated under Order IX are in the

nature of a original suit and that by virtue of Section 141, Order IX applies to them. Some other High Courts have taken the view that Section 151 of the Code of Civil Procedure is wide enough to clothe the Court with power to restore an application for rehearing of the suit made under Order IX Rule 13 of the Code of Civil Procedure which had been dismissed for default. There is no objection to the maintainability of the application. The short question is as to period of limitation during which such an application can be made.

(3) Article 123 of the Schedule to the [Limitation Act, 1963](#) provides the period of limitation of thirty days for applications to set aside a decree passed ex parte or to re-hear an appeal or application ex parte. The starting point is the date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. The submission of the counsel for the petitioner is that although the application is called an application to restore the application is set aside the ex parte decree, which application itself has been dismissed for default, it really is an application to set aside the ex parte decree, and it may be treated as such. Reliance is placed on 'Pitamber Lal v. Dodee Singh' A.I.R. 1924 Al, where this view has been taken.

(4) The application made on 6/2/1976, in my view, is not an application to set aside a decree passed ex parte. It is only an application for restoration of the application dated October 21/10/1974 dismissed in default. It would be unfair and inequitable to treat this application as one for setting aside the ex parte decree when it is not so. I have already noticed the consensus of judicial opinion that a fresh application to restore the application under Order IX Rule 13 dismissed in default can be legally entertained. If it was regarded as one for setting aside the ex parte decree, it would be barred by limitation. Article 137 provides the period of limitation in case of any other application for which no other period of limitation is provided elsewhere in the third Division of Schedule 1. The period of limitation is three years when the right to apply accrues. There has been an alteration in the language employed in Article 137 of the [Limitation Act, 1963](#) as compared with Article 181 of the Limitation Act of 1908. Article 137 is not now confined to the applications under the Code of Civil Procedure. It provides for any other application for which no period of limitation is provided elsewhere in the third

Division of Schedule 1. Any other application under Article 137 would be an application or petition under any Act or even under the Code of Civil Procedure if not elsewhere provided. There is no dispute that the application for restoration was being filed in the Court and the provisions of the Limitation Act are applicable to it. As the application is not governed by any other Article in the third Division of the Schedule, Article 137 will apply. I am fortified for this view by a decision of Lahore High Court in 'Maula Bakshv. Ram Das', A.I.R. 1920 Lah. 199.

(5) Both the Law of Limitation and the Civil Procedure Code are primarily laws relating to procedure and the Courts should give the same meaning to the expression used therein. Article 123 covers the application to set aside a decree passed ex parte. Courts have taken the view that application to set aside an ex parte order under Section 25 of the Guardian and Wards Act or under the Workmen's Compensation Act or under the Companies Act or order which does not have the force of the decree will not be governed by the said Article as these are not construed as applications to set aside any ex parte decree. Whether the application in this case is an application under Order IX Rule 13 of the Code of Civil Procedure or Section 151 C.P.C., it is merely an application to restore the original application under Order IX Rule 13 of the Code of Civil Procedure for setting aside the ex parte decree. There is no warrant to extent its substance to one for setting aside- the ex-parte decree.

(6) A question arose before the Bombay High Court in 'P.N. Films' Ltd. v. Overseas Film Corporation', : AIR1958 Bom10 about the period of limitation where an application to set aside a decree in summary suit under Order xxxvii when leave to defend was not given, was filed. It was held. that Article 164 of the Act of 1908 (Now Article 123) does not apply as an application to set aside a decree in a summary suit is not regulated by Order IX Rule 13 but by Order xxxvii Rule 4 of the Code of Civil Procedure. It is true that in one sense the decree was passed against the defendant in his absence, but that absence was an enforced absence as leave to defend was not granted and it was enforced by law. The Court did not extend or stretch the meaning of 'ex-prate decree' as understood in the Code of Civil Procedure for the purpose of the Limitation Act. It was held :--

".....if the Civil Procedure Code has understood an ex parte decree in one particular definite sense, there is no reason why we should take the view that the Limitation Act has understood it in a different sense. Apart from that, the Limitation Act must always be construed strictly against the party who sets up the plea of limitation. The Limitation Act deprives a party of a valuable right and unless the provision in the Limitation Act was clear and beyond doubt, a benevolent construction, a construction favorable to the party whose valuable right is being taken away, must always be given and therefore in our opinion Article 164 does not apply to an application made by a defendant against whom a decree has been passed in a summary suit when he was precluded from appearing by reason of the fact that leave to defend was not given. In our opinion, such an application falls under Order 37, Rule 4 and the Limitation Act has not dealt with any such application. therefore, the Article that would apply would be the residuary Article 188.'

(7) For the above reasons, the petition fails and is dismissed with no order as to costs.

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