

Maninder Singh Vs. Neelam

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Court : Delhi

Decided On : Apr-24-2007

Reported in : II(2007)DMC436; (2008)149PLR9

Judge : S. Muralidhar, J.

Acts : [Hindu Marriage Act, 1955](#) - Sections 9, 13(1) and 23A; [Code of Civil Procedure \(CPC\) , 1908](#) - Sections 151 - Order 9, Rule 13

Appeal No. : FAO 158 of 2004

Appellant : Maninder Singh

Respondent : Neelam

Advocate for Def. : Kamlesh Sabharwal, Adv.

Advocate for Pet/Ap. : D.P. Sharma and; Rajendera Yadav, Advs

Disposition : Appeal allowed

Judgement :

ORDER

S. Muralidhar, J.

1. The challenge in this appeal is to an order dated 11.2.2004 passed by the Additional District Judge, Delhi dismissing the Misc. Case No. 35 of 2002 in HMA

No 427 of 2000 declining to set aside the ex parte decree dated 12.10.2001 granting divorce to the respondent on the ground of cruelty under Sections 13(1)(ia) and 13(1)(ib) of the [Hindu Marriage Act, 1955](#) ('Act').

2. The brief facts are that the appellant filed a petition under Section 9 of the Act against the respondent for restitution of conjugal rights. In that very petition, a counter-claim was filed by the respondent seeking divorce from the appellant on the ground of cruelty under Sections 13(1)(ia) and 13(1)(ib) of the Act read with Section 23A thereof. When the Section 9 petition was listed on 12.4.2001, the appellant did not appear and accordingly, it was dismissed in default.

3. The respondent realized that with the dismissal of the petition in default, the counter-claim was inadvertently dismissed, since there was no separate number assigned to the counter-claim. Accordingly, she filed an application under Section 151, CPC before the learned ADJ for reviving the counter-claim and for setting the appellant ex parte in the counter claim. On 5.5.2001 that application was straightaway allowed without notice to the appellant and the following order was passed:

5.5.2001 Pr. None for the parties.

I have considered the submissions made by learned Counsel for the applicant on her application under Section 151, CPC, On going through the record, it has come to my notice that the applicant/ respondent had filed her counter claim under Section 23(A) of the Hindu Marriage Act for a decree of divorce under Sections 13(1)(ia) and 13(1)(ib) of the Act. Shri Maninder Singh had even filed his written statement to the said counter-claim. On 12.4.2001 the petitioner did not put in appearance and inadvertently the petition itself was dismissed in default. I, therefore, deem it expedient to allow the application.

Put on 19.7.2001 for ex parte evidence of the applicant Smt. Neelam.

4. Thereafter on 12.10.2001 by ex parte judgment, divorce was granted to the respondent and an ex parte decree was drawn on that basis.

5. The appellant claims that he learnt of the ex parte divorce decree on 1.5.2002 when the respondent came to the house of the appellant with a warrant of attachment pursuant to certain orders made in the proceedings filed by the respondent for grant of maintenance. The appellant states that soon thereafter he filed an application under Order 9 Rule 13, CPC for setting aside the ex parte judgment.

6. By the impugned order dated 11.2.2004 the learned Additional District Judge held that no notice of the application filed by the respondent under Section 151, CPC was required to be served on the appellant as he remained absent on 12.4.2001 when his application under Section 9 of the Act was listed. Despite being aware of the dismissal of the Section 9 petition, the appellant made no efforts to have the said application restored. The learned ADJ held that the appellant was obviously aware of the consequence of his non-appearance on 12.4.2001 and his contention that he became aware of it and the subsequent ex parte decree dated 12.10.2001 only on 1.5.2002 was not bonafide.

7. In regard to the plea of the appellant that he had left Delhi and, therefore, he was not present on 12.10.2001, the Trial Court observed that even though the appellant and his Counsel had filed affidavits, that did not help the case of the appellant since the Counsel ought to have checked the next date and known about the fate of the petition.

8. Learned Counsel for the appellant submits that the learned ADJ ought not have proceeded to straightaway set the appellant ex parte on 5.5.2001 on an application moved by the respondent under Section 151, CPC. Notice ought to have been issued to the appellant to inform him that the counter claim was being revived even after the dismissal of the application under Section 9 of the Act on 12.4.2001. He further submits that the reasons for the appellant not being present in Court on the date subsequent to 12.4.2001 were bonafide. Since there was no occasion for the appellant to know that the proceedings were continuing and that he was proceeded ex parte, he could not move the Court earlier.

9. On the other hand, learned Counsel for the respondent submits that the conduct of the appellant in the past should disentitle him to relief in this appeal. In the

criminal proceedings against him, the appellant made a statement that he was going to seek divorce by mutual-consent. However, the appellant did not present himself at the second motion in those proceedings thereby leading to the frustration of those proceedings. Instead he filed a petition under Section 9 of the Act for restitution of conjugal rights when the respondents filed a counter-claim in those proceedings, he allowed the petition to get dismissed for default and made no effort to revive it. This showed that the appellant kept changing his stand to harass the respondent. Further it is submitted that the appellant has also not been honouring the orders for payment of maintenance and, therefore, the present proceedings would result in further harassment to the respondent.

10. The issue in the present appeal is whether the learned ADJ was justified in declining the request of the petitioner for setting aside the ex parte judgment. It is not in dispute that the petition under Section 9 was dismissed for default. In the absence of a separate number for it, the counter-claim also stood dismissed. That is what prompted the respondent to file an application under Section 151, CPC to have the counter claim revived and simultaneously have the appellant set ex parte. The order dated 5.5.2001 on the face of it shows that it was passed in the absence of the parties before the Court. The Court had no occasion to inform itself whether, despite not pursuing the Section 9 application, the appellant was still willing to contest the counter-claim filed by the respondent. In fact, as it has been observed by the learned ADJ, the appellant had filed a written statement to the counter claim and was in fact contesting it. It also not in dispute that the appellant had no notice that the application of the respondent was being listed on 5.5.2001 and was going to be allowed on that date. It was incumbent on the Court to have directed notice to issue on that application to the appellant here and if he did not appear despite such notice, to proceed to set him ex parte. In not following such a procedure, the learned ADJ was not justified in straightway setting the appellant ex parte and proceeding to grant divorce to the respondent on the ground of cruelty.

11. Considering the nature of the issue in the present case, the fact that in criminal proceedings, the appellant may have undertaken to file an application for divorce by way of mutual consent should not make a difference to the question whether the appellant should be proceeded ex parte, in the counter-claim filed by the

respondent. At the time when the mutual consent application was filed, the decision of this Court in *Rachna Jain v. Neeraj Jain* : 120(2005)DLT365 , was not available. It is not possible to say at this stage whether the appellant committed any infraction of the law by declining to present himself at the second motion in the application for divorce by mutual consent. The issue of non-payment of maintenance, is admittedly being pursued by the respondent in a separate execution proceedings which are pending before the Trial Court. In that view of the matter, these factors cannot come in the way of the appellant claiming to be heard in the divorce proceedings in the form of the counter-claim filed by the respondent.

12. For the above reasons, this Court is of the view that the impugned order cannot be sustained and is hereby set aside. The counter claim shall now stand restored to the file of the learned Additional District Judge. The parties are directed to appear before the District Judge, Delhi in the first instance on 21.5.2007 and continue to appear thereafter before the Court to which the matter is assigned by the learned District Judge. Considering the disputes has been pending for some time between the parties, the learned ADJ is requested to try and dispose of the counter claim of the respondent within a period of six months from the date the parties or either of them present themselves before him.

13. The Trial Court record be sent back by the Registry within a period of one week from today.

14. This appeal is allowed with no orders as to costs.