

Krishna Mukherjee Vs. Narayan Mukherjee and ors.

Krishna Mukherjee Vs. Narayan Mukherjee and ors.

SooperKanoon Citation : sooperkanoon.com/880346

Court : Kolkata

Decided On : Sep-01-2005

Reported in : 2006(1)CHN6,2006CriLJ180

Judge : Bhaskar Bhattacharya and ;Sadhan Kumar Gupta, JJ.

Acts : [Hindu Marriage Act, 1955](#); ;[Code of Criminal Procedure \(CrPC\) , 1973](#) - Sections 195, 195(4), 340, 340(1), 340(2) and 341; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 120B, 193, 419, 464 and 471; ;[Code of Civil Procedure \(CPC\) , 1908](#) - Order 9, Rule 13; ;[Code of Criminal Procedure \(CrPC\) , 1898](#)

Appeal No. : F.M.A. No. 1420 of 1997

Appellant : Krishna Mukherjee

Respondent : Narayan Mukherjee and ors.

Advocate for Def. : Probal Kumar Mukherjee and ;Rajat Dutta, Advs.

Advocate for Pet/Ap. : Haradhan Banerjee and ;Subhas Chandra Karar, Advs.

Disposition : Appeal dismissed

Judgement :

Bhaskar Bhattacharya, J.

1. This first miscellaneous appeal is at the instance of a wife in a proceeding for divorce and is directed against the Order No. 45 dated 21st July, 1995 passed by the Additional District Judge, 4th Court, Alipore in Matrimonial Suit No. 7 of 1993 thereby rejecting an application filed by the present appellant for lodging complaint against the husband in terms of Section 340 of the Code of Criminal Procedure.

2. The husbands-respondent filed a matrimonial suit for divorce and the said suit was decreed ex parte. Subsequently, the wife filed an application under Order 9 Rule 13 of the Code of Civil Procedure for setting aside the said ex parte decree on the ground that no summons was served upon her and that the husband by suppressing the summons obtained the said ex parte decree on frivolous grounds.

3. The said application under Order 9 Rule 13 of the Code of Civil Procedure was ultimately allowed by the learned Trial Judge and the ex parte decree, earlier passed, was set aside.

4. It appears from record that in the proceedings under Order 9 Rule 13 of the Code of Civil Procedure, the wife took specific plea that the signatures appearing on the AD Card and service return of the process-server relating to the service of summons were not her signatures. In course of hearing, during cross-examination, on the request of the learned advocate of the husband, the signatures of the wife were taken both in English and Bengali in the open Court and the learned Trial Judge on comparing those signatures with the ones appearing on the AD Card and service return, came to the conclusion that those were not identical with the admitted signatures of the wife taken in open Court. The learned Trial Judge, thus, set aside the ex parte decree and allowed the application under Order 9 Rule 13 of the Code of Civil Procedure.

5. Subsequently, the wife came up with an application before the learned Trial Judge for lodging complaint against the husband under Sections 193/464/471/120B/419 of the Indian Penal Code on the ground that the husband practised fraud upon the Court by furnishing false return of summons and procured the ex parte decree.

6. The aforesaid application was contested by the husband contending that the allegation of the wife was incorrect and that he neither practised any fraud nor did he suppress the summons.

7. The learned Trial Judge on consideration of the materials on record came to the conclusion that it was not a lit case where Court should make complaint as prayed for by the wife. The learned Trial Judge further noticed that the process-server of the Judgeship gave evidence and asserted that the summons was tendered to the wife who received the same by putting her signature. The learned Trial Judge further observed that the wife did not take any steps to examine the postal peon and in such circumstances, it was difficult to believe that the husband managed the postal peon and obtained a false return regarding service of summons. The learned Trial Judge further pointed out that the Court set aside the ex parte decree without obtaining assistance of any handwriting expert.

8. Being dissatisfied, the wife has come up with the present appeal.

9. At the every outset, a question arose as to whether this Bench, being authorised by the Hon'ble Chief Justice to hear civil appeals, has the determination to take up this appeal filed in terms of Section 341 of the Code of Criminal Procedure.

10. Mr. Banerjee, the learned Advocate appearing on behalf of the appellant contended that the application under Section 340 of the Code of Criminal Procedure filed by his client having been rejected by a Civil Court, this appeal should be treated as a 'civil appeal' though the right to prefer such appeal has been conferred by Section 341 of the Code of Criminal Procedure. According to him, the forum of appeal against such an order is specified by referring to the provision of Section 195(4) of the Code of Criminal Procedure which in clear terms indicates that in case the order impugned is passed by a Civil Court, the appeal should be preferred before a Civil Court. He, in this connection, relies upon an old Division Bench decision of this Court in the case of Nasaruddin Khan v. Emperor reported in ILR 53 Cal 827 based on interpretation of the provisions contained in the earlier Code of Criminal Procedure of 1898.

11. In order to appreciate the aforesaid question, the provisions contained in Sections 341 and 340 of the Code of Criminal Procedure are quoted below:

341. (1) Any person on whose application any Court other than a High Court has refused to make a complaint under Sub-section (1) or Sub-section (2) of Section 340, or against whom such a complaint has been made by such Court, may appeal to the Court to which such former Court is subordinate within the meaning of Sub-section (4) of Section 195 and the Superior Court may thereupon, after notice to the parties concerned, direct the withdrawal of the complaint, or, as the case may be, making of the complaint which such former Court might have made under Section 340 and if it makes such complaint, the provisions of that section shall apply accordingly.

(2) An order under this section and subject to any such order, an order under Section 340, shall be final and shall not be subject to revision.

195.(1)

(a)(i)

(ii)

(iii)

(b)(i)

(ii)

(iii)

(2)

(3)

(4) For the purposes of Clause (b) of Sub-section (1), a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies, to the Principal Court having ordinary

original civil jurisdiction within whose local jurisdiction such Civil Court is situate:

Provided that--

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate;

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

12. A conjoint reading of those provisions makes it abundantly clear that the Court to which an appeal lies is the one to which the Court passing the order impugned is subordinate; in other words, if it is a Civil Court which has passed the order impugned under Section 340, the appeal against such order must be heard by the authority or the Tribunal to which such Civil Court is subordinate. It necessarily follows that the order impugned having been passed by an Additional District Judge sitting in matrimonial proceedings under the Hindu Marriage Act, the appeal against such an order lies before a Bench of this Court taking matrimonial appeals and thus, this Court is entitled to hear this appeal according to the determination conferred upon this Bench by the Hon'ble Chief Justice. The decision of the Division Bench of this Court in the case of Nasaruddin Khan (supra), took a similar view and we respectfully adopt the same.

13. We now propose to enter into the merit of this appeal.

14. After hearing Mr. Banerjee, learned Advocate appearing on behalf of the appellant and after going through the material on record, we are at one with the learned Trial Judge that merely because the ex parte decree was set aside with the findings that the signatures appearing on the service return or the AD Card did not tally with those given by the wife in open Court, there cannot be any ground for invoking Section 340 of the Code of Criminal Procedure.

15. It is rightly pointed out by the learned Trial Judge that postal peon was not even examined and merely because the Court dealing with an application for setting aside ex parte decree had some doubt as regards service of summons resulting in setting aside the said decree for the purpose of giving an opportunity to the wife to contest the proceedings for divorce, such fact by itself cannot be a ground for initiating criminal proceedings against the husband.

16. It is now settled law that before a Court can pass an order under Section 340 of the Code of Criminal Procedure making a complaint, it must be satisfied that the materials before the Court sufficiently manifests that a prima facie case of commission of offences mentioned in Section 195 of the Code of Criminal Procedure has been established and it is expedient in the interest of justice that further enquiry should be made.

17. In this case, as it appears from the record, no such case has been made out. In our view, merely because signatures of the wife taken in Court did not tally with those appearing on the AD Card and the return of the process-server, such fact cannot lead to the inference that the husband committed fraud. As pointed out by P.B. Mukherjee, J., sitting in a Division Bench in the case of Bisseswar Poddar v. Nabadwip Chandra Poddar and Anr., reported in AIR 1961 Cal 300, a test made by comparing a disputed writing with the one written under the direction of the Court would be highly misleading in view of the fact that the party would have motive for disguising his hand.

18. Therefore, it is not such a case where Court is prima facie convicted that any fraud was really practised by the husband in collusion with the process-server or the postal peon justifying lodging of a complaint. As indicated earlier, even the postal peon was not examined in the proceedings for setting aside ex parte decree and the process-server deposed against the wife.

19. We, therefore, find no reason to interfere with the discretion exercised by the learned Trial Judge in this appeal which is quite reasonable. The appeal is, therefore, devoid of any substance and is dismissed. In the facts and circumstances, there will be, however, no order as to costs.

Sadhan Kumar Gupta, J.

20. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com