

(2014) 06 JH CK 0010

Jharkhand High Court

Case No: F.A. No. 92 of 2011

Mala Kumari

APPELLANT

Vs

Vijay Kumar

RESPONDENT

Date of Decision: June 24, 2014

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13, 96
- Family Courts Act, 1984 - Section 19
- Hindu Marriage Act, 1955 - Section 13, 14

Citation: AIR 2015 Jhar 31 : (2014) 3 JLJR 307

Hon'ble Judges: R. Banumathi, C.J; P.P. Bhatt, J

Bench: Division Bench

Advocate: Arbind Kumar Choudhary, Advocate for the Appellant; Shekhar Prit Jha and A.K. Jha, Advocate for the Respondent

Judgement

1. This first appeal arises out of the judgment passed by the Principal Judge, Family Court, Deoghar in Matrimonial Suit No. 64 of 2010 in and by which the learned Principal Judge, Family Court dissolved the marriage of the appellant-wife and the respondent-husband solemnized on 11.07.2009.

2. The case of the respondent-husband was that he married with the appellant-Mala Kumari on 11.07.2009 according to Hindu rites and customs. After marriage, the respondent-husband and appellant-wife came to Deoghar to live together in a rented house of Smt. Rina Devi and they lived together till 28.09.2009. Thereafter differences arose between the parties and the relation between the spouses became strained. Alleging that the appellant-wife namely Mala Kumari is mentally sick and that she was having abnormal behavior and also is of unsound mind and suffering continuously from the alleged mental disorder and that she had been threatening to commit suicide, the respondent-husband filed the Matrimonial Suit No. 64 of 2010 seeking dissolution of their marriage.

3. A Divorce Petition, under Section 13 of the Hindu Marriage Act, 1955, was filed on 03.04.2010 in the Family Court but the appellant did not appear in the Court and, therefore, the Family Court ordered paper publication in the local daily newspaper and the matter was decided ex-parte.

4. To substantiate the allegations, the respondent-husband examined himself as P.W. - 5 and also examined four other witnesses namely Rina Devi, P.W. - 1, Hari Kishore Singh, P.W. - 2, Anjani Devi, P.W. - 3 and Dr. Sudhir Kumar, P.W. - 4.

5. Pointing out that inspite of several efforts being made, the appellant-wife did not appear in the Court and that the respondent-husband had proved the allegations by examining the witnesses, the Family Court allowed the petition and passed a decree of divorce dissolving the marriage of appellant and respondent.

6. Being aggrieved by the ex-parte decree passed by the Family Court in Matrimonial Suit No. 64 of 2010, the appellant-wife has preferred the present First Appeal.

7. The learned counsel for the appellant-wife has submitted that as per the order sheet, the Matrimonial Suit No. 64 of 2010 was admitted and notice was issued to the present appellant for which, requisite was filed on 13.04.2010 and thereafter a Nazarath notice through the Civil Court, Bhagalpur was ordered to be sent to the appellant and thereafter paper publication was made and finally the court accepted the same as valid service of notice on the appellant-wife and fixed the case for ex-parte hearing on 13.09.2010 and the matter was decided ex-parte. It was further submitted that Nazarath notice was not sent as directed by the Family Court to Civil Court, Bhagalpur where the appellant was residing. The learned counsel for the appellant-wife further submitted that the publication was effected in the daily newspaper published from Patna and Deoghar and no publication was effected in the local newspaper published from Bhagalpur. It is submitted that the paper publication was effected in daily newspaper namely "Prabhat Khabar" and "Aaj" only in Patna and Deoghar Edition even though those newspapers are having Bhagalpur Edition and the respondent-husband knowingly published the notice only in the newspaper of Patna and Deoghar Edition despite the order of the Court to get it published in the Bhagalpur Edition and since the publication was not effected in the Bhagalpur Edition of newspapers, the family Court ought not to held that there was a valid service of notice.

8. The learned counsel further submitted that the marriage was solemnized on 11.07.2009 and in violation of Section 14 of the Hindu Marriage Act, the divorce case was filed on 03.04.2010 even before expiry of one year from the date of solemnization of marriage and in view of violation of mandatory provisions, an opportunity should be given to the appellant to contest the matter. It was also submitted that the respondent-husband made serious allegations of abnormal behavior and mental disorder against the appellant-wife and, therefore, the appellant ought to be given an opportunity of contesting the suit by setting aside

the ex-parte decree.

9. The learned counsel for the respondent-husband submitted that even though it is an ex-parte decree, the respondent-husband has substantiated the allegations by examining the witnesses and the appellant has deliberately not appeared in the Court. It is further submitted that as against the ex-parte decree passed by the Family Court, the appellant-wife ought to have filed an application under Order IX Rule 13 of the C.P.C. to set aside the ex-parte decree or in the alternative, to file review application or an independent suit to set aside the decree of divorce passed in Matrimonial Suit No. 64 of 2010 and appeal is not maintainable.

10. We have considered the submissions and also perused the judgment of the Family Court and the materials available on record.

11. As regards the objection of the respondent-husband regarding maintainability of the appeal, as per Section 96 of the Code of Civil Procedure, an appeal may lie from the original decree passed ex-parte. It is to be pointed out that as per Section 19 of the Family Courts' Act, 1984, "...notwithstanding anything contained in the Code of Civil Procedure, 1908 or in the Code of Criminal Procedure, 1973 or in any other law, an appeal shall lie from every judgment or order, not being an interlocutory order, of a Family Court to the High Court both on facts and on law." Since an ex-parte judgment/decree is an original judgment, the appeal under Section 19 of the Family Courts Act is well maintainable. In any event, Section 19 starts with non obstante clause and, therefore, notwithstanding the right of the appellant to file an application under Order IX Rule 13 of the Code of Civil Procedure, the appeal is maintainable. In such view of the matter, the objection raised by the respondent-husband regarding maintainability of the appeal cannot be acceded to.

12. The Divorce Petition was filed under Section 13 of the Hindu Marriage Act, 1955 on 03.04.2010. By perusal of the order sheet, it is seen that after the suit was admitted, the matter was called before the Family Court for hearing and on 20.07.2010, the Family Court has passed the following order;

"05/20-7-2010 Petitioner is in attendance. O.P. is absent. The case is moved. Heard the learned counsel of the petitioner. Petitioner is directed to file requisites of notice for issuing again against the O.P. through Nazarat, Civil Court, Bhagalpur. Office is directed to issue the same. Petitioner is further directed to take proper step for publication in local newspaper of the O.P. Put up on 30-08-2010 for appearance of the O.P."

13. According to the appellant, even though, the Court has directed the respondent-husband to take steps for notice to the appellant-wife through Nazarath, Civil Court, Bhagalpur and directed office to issue the same but no such notice had been sent. We also do not find any report being filed from Nazarath, Civil Court, Bhagalpur and received by the Family Court. By perusal of the order dated 22.07.2010, it is seen that the respondent-husband had filed notice for publication

through lawyer and office was directed to issue notice through Court. There is no material to indicate that arty requisites were filed for certain notice upon the appellant-wife through Nazarath, Civil Court, Bhagalpur.

14. As contended by the learned counsel for the appellant-wife the paper publication was ordered in local newspaper where the appellant was residing but the paper publication was effected in "Trabhat Khabar" (Deoghar Edition) and "Aaj" (Patna Edition). Admittedly, the appellant-wife is residing in Bhagalpur. It is stated that "Trabhat Khabar" is also published from Bhagalpur but there was no paper publication effected in the Bhagalpur Edition despite specific order of the Family Court dated 20.07.2010 to get it published in a local newspaper where the appellant is residing.

15. In such facts and circumstances, we are of the view that the Family Court was not right in holding that there was valid service of notice upon the appellant-wife and the Family Court was not right in proceeding the matter ex-parte and passing the impugned judgment.

16. The respondent husband has filed divorce petition under Section 13 of the Hindu Marriage Act, 1955 making serious allegations of abnormal behavior and the mental disorder. Having regard to the nature of allegations levelled against the appellant-wife, we are of the view that the Family Court ought to have taken all possible steps in effecting service of notice upon the appellant and so as afford opportunity to the appellant to contest the matter on merits by filing a written statement and by cross-examination.

17. The judgment passed in Matrimonial Suit No. 64 of 2010 dated 21.02.2011 and decree dated 03.03.2011 passed by the Principal Judge, Family Court, Deoghar is set aside and the appeal is allowed accordingly. Both the appellant and the respondent are directed to appear before the Family Court, Deoghar on 15.07.2014 in the Matrimonial Suit No. 64 of 2010 and the Principal Judge, Family Court, Deoghar shall take up the Matrimonial Suit No. 64 of 2010 and opportunity to the appellant to file a written statement, adduce evidence and dispose of the matter in accordance with law as expeditiously as possible preferably within a period of one year from the date of receipt of the copy of this judgment.

18. The office is directed to send back the L.C.R. at once to the concerned Court.