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(2007) 10 AP CK 0003

Andhra Pradesh High Court

Case No: C.R.P. No. 2844 of 2007

N. Hemamalini		APPELLANT
	Vs	
N.A. Raghu		RESPONDENT

Date of Decision: Oct. 30, 2007

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Order 9 Rule 13
- Hindu Marriage Act, 1955 - Section 13, 13B, 15
- Limitation Act, 1963 - Section 5

Citation: (2008) 2 ALD 171 : (2008) 1 ALT 458

Hon'ble Judges: L. Narasimha Reddy, J

Bench: Single Bench

Advocate: M. Venkataswari, for the Appellant; G. Rama Sharma, for the Respondent

Final Decision: Allowed

Judgement

@JUDGMENTTAG-ORDER

L. Narasimha Reddy, J.
The petitioner and the respondent were married in the year 1994 and they had two children. Respondent filed F.C.O.P. No.626 of 2005 in the Family Court, Hyderabad, u/s 13 of the Hindu Marriage Act, 1955 (for short "the Act"), for dissolution of the marriage and for a direction to the petitioner to continue with the custody and care of the children. The O.P. was decreed ex parte on 11.11.2005. The petitioner filed an application under Order IX Rule 13 of the Code of Civil Procedure, 1908, with a prayer to set aside the ex parte decree. Since there was delay of 183 days, in presenting the application, she filed I.A.No.550 of 2006, u/s 5 of the Limitation Act, 1963.

2. The petitioner pleaded that she was staying with her mother at Kadapa, on being sent away by the respondent, whereas the summons were sent to the residence of

her brother. She further pleaded that she came to know about the filing of the O.P., in the month of October, and soon thereafter, she asked her brother to take necessary steps. It was alleged that by the time she has taken necessary steps, the O.P., was decreed ex parte.

3. The respondent opposed the application by filing a counter-affidavit. It is stated that despite receiving notice in the O.P., and having knowledge about the pendency of the same, the petitioner remained silent and that the enormous delay of 103 days was not at all explained.

4. Through its order, dated 16.04.2007, the learned Family Judge, dismissed the I.A. Hence, this revision.

5. Smt. Venkateswari, Learned Counsel for the petitioner, submits that her client was put to serious harassment, for the last several years, by the respondent, after developing illicit relations with some other woman. She further contends that the trial Court ought to have taken note of the plight of the petitioner in the matter of examining the application for condonation of delay, particularly when the O.P., came to be decreed hardly within few months from the date of filing. She contends that the notice was sent to a wrong address deliberately with a view to obtain ex parte decree, so that the respondent can marry another woman, which he did on 15.02.2006.

6. Sri G. Rama Sharma, learned Counsel for the respondent, on the other hand, submits that the O.P., was presented by pleading necessary facts, u/s 13 of the Act. He contends that even after receiving notice, in the O.P., the petitioner did not turn up and the Family Judge was left with no alternative, except to decree the O.P., ex parte. Learned Counsel submits that no explanation, worth its name was offered for the enormous delay of more than 6 months, in filing the application to set aside the ex parte decree.

7. The controversy in this C.R.P., is only about the condonation of delay of 183 days in presenting the application to set aside the ex parte decree for divorce.

8. There does not exist any hard and fast rule in the matter of examining the applications filed u/s 5 of the Limitation Act or exercising the discretion therein. The remedies provided for under various statutes are required to be availed, within the time stipulated therefor. With the expiry of the prescribed time, valuable rights accrue to the opposite parties. Howsoever desirable it may be, to insist that petition, or applications or appeals must be filed within the period of limitation, several factors that disable the parties cannot be ignored. It is in recognition of this, that provisions like Section 5 of the Limitation Act are incorporated, empowering the Courts or Tribunals, to condone the delay, if satisfactory explanation is offered. Much would depend upon the facts and circumstances of the case.

9. Though the relevant provisions of law do not make any distinction, the factors such as the stage of proceedings, the consequences that ensue on account of the delay being not condoned would have their own bearing in the exercise of discretion by the Court or refusal thereof. For instance, the approach while considering application to condone the delay in filing an application to set aside an ex parte decree would be different from the one filing the appeal. The reason is that in the latter, the parties had the benefit of adjudication by a Court, on merits, whereas in the former, the verdict of the Court does almost reflect the version of only one party. Similarly, an ex parte decree in a suit filed for enforcing a contractual obligation, stands on a different footing, compared to the one which results in attaching a stigma or ignomy, to an individual or denies him the livelihood.

10. For the most part of it, the guiding factor in such cases would be, to give opportunity to the parties, to seek adjudication of the dispute on the merits, except where one of them have remained indifferent, for a prolonged period of unexplained delay. An ex parte decree for divorce against a woman, warrants slightly liberal approach. The reason is that, in the Indian context the legal termination of the marriage, contrary to the will of a woman, would bring about almost a catastrophe, in her social and personal life. It is only through a proper adjudication, that such a situation can be brought about.

11. The allegation made by the respondent against the petitioner is that the various acts and omissions on her part, spread over for a period of 11 years, amounting to cruelty. The O.P., is silent as to when the petitioner started living separately, and changed her abode. This fact assumes significance in the context of furnishing the address of the petitioner herein, in the OP. At one place in the O.P., it was mentioned that the petitioner started living with her parents. Nowhere it was stated that the petitioner started living in the house of her brother. However, the address of the petitioner was furnished, as though she is residing in the house of his brother at Kadapa.

12. If a notice is ordered to a particular address, many a time, it would certainly be served, but it can be treated as an effective service, if only it reaches the person, who is required to answer it. Mere service of a notice at the address furnished in the petition, cannot be treated as effective, unless it was at least pleaded and asserted that the petitioner is residing at that place. Viewed in this context, the service of notice at the address furnished in the O.P., cannot be treated as perfect, or effective, upon the petitioner.

13. As contended by the learned Counsel for the respondent, this may not be so vital, once the petitioner became aware of the pendency of the O.P., before it came to be decreed ex parte. All the same, the misery of the petitioner, when she came to know about the pendency of the O.P., otherwise than through service of notice, directly upon her, cannot be ignored.

14. In Kanchan Sharma Vs. Uma Shanker Sharma, this Court dealt with the manner in which an application filed u/s 5 of the Limitation Act to set aside an ex parte decree of divorce, needs to be considered. It was pointed that relatively liberal approach must be adopted in the matters of this nature.

15. An important fact that needs to be taken into account in this C.R.P., is that the O.P., was presented on 26.07.2005. It is not known as to on what date the Court set the petitioner herein ex parte. The O.P., was decreed ex parte on 11.11.2005 i.e. within 3 1/2 months. Even where an application is filed u/s 13B of the Act, the Court is required to wait for a minimum period of six months, before it grants decree of divorce. A contested matter cannot be in a worse position. The learned Family Judge ought to have waited at least for six months. Otherwise, the device of ex parte decree is prone to be misused, as a substitute for a petition u/s 13B of the Act.

16. Another aspect of the matter is that the trial Court recorded several findings touching upon the mental status of the petitioner, without there being any evidence. Even where the defendant in a suit remains ex parte, findings on issues, like mental status etc., cannot be recorded, on the strength of an affidavit filed by the plaintiff in lieu of chief-examination. The findings must be based upon independent evidence. Though this is not the occasion to deal with the merits of the order passed by the trial Court, the observations are made in the context of the social stigma, which the petitioner is made to suffer on the basis of an ex parte decree and in the process of examining the application to condone the delay in filing the application to set aside the ex parte decree.

17. It is strongly urged on behalf of the respondent that the respondent had already married, after the ex parte decree and that the same is valid as per Section 15 of the Act. He contends that the setting aside of the ex parte decree has its own impact on the said marriage. The rights that accrue to an individual on the basis of an ex parte decree always depend upon the same being set aside or set aside depending upon the satisfaction of the Court. For the sake of convenience, or the pleasure of the respondent, the life of the petitioner cannot be staked. This Court is satisfied that there exist valid grounds to condone the delay. The allegation of the petitioner that she was made to live at different place on account of the treatment accorded to her by the respondent cannot be brushed aside. The maximum that can happen in the event of the delay being condoned is that way would be paved for the parties to substantiate their contentions.

For the foregoing reasons, the C.R.P., is allowed and the order under revision is set aside. Consequently, I.A. No.550 of 2006 shall stand allowed. There shall be no order as to costs.