

(1986) 01 CAL CK 0019**Calcutta High Court****Case No:** C. O. No. 3136 of 1986

Tarakeswar Saha

APPELLANT

Vs

Sm. Binapani Saha

RESPONDENT

Date of Decision: Jan. 31, 1986**Acts Referred:**

- Hindu Marriage Act, 1955 - Section 13, 19, 21, 28

Citation: 91 CWN 152**Hon'ble Judges:** Mookerjee, J; Mitra, J**Bench:** Division Bench**Advocate:** S. Dasgupta and D.S. Mallick, for the Appellant; Prafulla Kr. Kundu, Supriya Chatterjee and Ishani Ghosh, for the Respondent**Final Decision:** Dismissed

Judgement

Mookherjee, J.

In our view, the learned Additional District Judge did not commit any error of jurisdiction by allowing the application under Order 9 Rule 13 of the CPC filed by the opposite party wife for setting aside the ex parte decree passed in a matrimonial suit instituted by the husband petitioner. Proceedings under the Hindu Marriage Act, 1955 are before established civil courts. The Hindu Marriage Act having provided for adjudication of the proceedings under the said Act before established Civil Court, the court is imparted with the ordinary incidents of the procedure including power under Order 9 Rule 13 of the Code. We are fortified in our said view by the Division Bench decision of this Court in the case of Ajit Kumar Bhunia Vs. Sm. Kanan Bala Deyi, which inter alia held that in the light of the provisions of Sections 13, 19 and 21 of the Hindu Marriage Act, the learned District Judge before whom a matrimonial proceeding is instituted has power u/s 8(2) of the Bengal, Agra and Assam Civil Courts Act to transfer the same to an Additional District Judge.

2. Section 21 of the Hindu Marriage Act, 1955 expressly provides that subject to the other provisions contained in the said Act and such Rules as the High Court may make in this behalf, proceedings under the Act shall be regulated so far as may be by the Civil Procedure Code, 1908. Thus the aforesaid provision expressly makes CPC applicable to proceedings under the Hindu Marriage Act. We are unable to read, as suggested by Mr. Dasgupta, learned advocate for the petitioner, a limitation in Section 21 of the Act to the effect that once proceedings under the Hindu marriage Act terminate by passing of decree, the provisions of the CPC would be no longer applicable. Even after passing an exparte decree the Civil Court has jurisdiction under the CPC to entertain an application under Order 9 Rule 13 of the Code for setting aside an exparte decree passed for default of the appearance by the defendant. The matrimonial proceedings under the Hindu Marriage Act are regulated by the CPC and therefore, even after passing an exparte decree under Order 9 Rule 6 of the Code, the court retains its jurisdiction to entertain an application under Order 9 Rule 13 of the Code for setting aside the said exparte decree passed by it. Kotwal, J. in the case of Sunanda Gundopant Ashtekar Vs. Gundopant Bandopant Ashtekar, has inter alia, held that by virtue of Section 21 of the Hindu Marriage Act provisions of CPC including Order 9 Rule 13 would apply to proceedings under the Hindu Marriage Act. We respectfully agree with the said view. There is no contrary intention expressed either in Section 21 or in any other provision of the Hindu Marriage Act depriving the defendant in a matrimonial proceeding of his or her right to apply for setting aside an exparte decree passed against him or her for default of appearance.

3. For the foregoing reasons, we are unable to agree with the view expressed by the learned Single Judge of the Gauhati High Court in the case of Anjan Kumar Kataki Vs. Smt. Minakshi Sarma, that appeal would lie against an exparte decree passed in a proceeding under the Hindu Marriage Act and application under Order 9 Rule 13 of the Code for setting aside the said exparte decree would not therefore be maintainable. Section 28 of the Hindu Marriage Act has provided that all decrees made by the court in any proceeding under the said Act shall be appealable decrees of the Court made in the exercise of its original jurisdiction. But the said provision does not expressly or by necessary implication exclude application of Order 9 Rule 13 to exparte decrees passed for default of appearance in matrimonial proceedings. It is settled law that a defendant against whom an exparte decree has been passed under Rule 6 Order 9 of the Code for default of appearance, has following three courses open:

1. he may appeal from the exparte decree,
2. he may apply under Order 9 Rule 6 for setting aside the exparte decree,
3. he may apply for a review of judgment under Order 47 Rule 1 of the Code.

Remedies by way of appeal and by application under Order 9 Rule 13 of the Code are concurrent. Therefore, one could simultaneously prosecute both the said remedies. But once the appeal is disposed of, other considerations would arise. If the decree is confirmed or modified in appeal, the decree of the lower court would be merged in that of the appellate court. Therefore, the trial court which passed the original decree would cease to have jurisdiction to proceed with the application under Order 9 Rule 13 of the Code (vide discussion in Mulla's Civil Procedure Code, 14th Edn. under Order 9 Rule 13 with the heading "Remedies in Case of Ex parte Decree").

4. Exercising revisional jurisdiction, we are not prepared to appraise the evidence about the sufficiency of the cause shown by the opposite party wife about her non-appearance on 6th November, 1984. Therefore, we need not discuss the evidence recorded by the court below.

5. For the foregoing reasons, we dismiss the application. There will be no order as to costs. We also dispose of the application for maintenance filed by the opposite party without prejudice to the rights and contentions of the parties in any other proceedings according to law. We express no opinion on the merits of the matrimonial proceeding now pending between the parties in the court below. The matter is an old one. Therefore, the trial court will dispose of the same as early as possible, preferably within six months from this date in accordance with law. In the event either of the parties adopts dilatory tactics, the court below would be at liberty to take strict view in the matter.

Let a copy of this order be communicated to the court below at the cost of the petitioner by special messenger.

Mitra, J.

6. I agree.