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CR-475-2025

IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR

BEFORE

HON'BLE SHRI JUSTICE ASHISH SHROTI

ON THE 1st OF MAY, 2025CIVIL REVISION No. 475 of 2025*SONAL SAXENA W/O SHRI RITESH SAXNEA**Versus**RITESH SAXNEA*

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Appearance:

Shri Amit Lahoti - Advocate for the applicant.

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ORDER

Applicant has filed this Civil Revision challenging the order dated 7/4/2025 passed by Second District Judge, Karera, District Shivpuri in Case No. 14/2018 (MJC).

2. Facts relevant for decision of this case are that non-applicant (hereinafter referred as 'husband') has suffered an *ex-parte* judgment and decree of divorce, dated 9/10/2018, passed in favour of the applicant (hereinafter referred as 'wife'). He has filed an application under Order 9 Rule 13 CPC for setting aside of the said *ex-parte* judgment and decree, which is pending consideration before the Court below.

3. The applicant herein filed an application under Section 151 CPC praying for dismissal of the application under Order 9 Rule 13 CPC as not maintainable. The grounds on which the application is stated to be not maintainable is that by virtue of second proviso to Order 9 Rule 13 CPC, an application can be entertained only when the husband satisfies that there was



no service of summons of suit on him. The wife's case is admittedly, the husband was served with the summons of suit and he had entered appearance therein, therefore, his application under Order 9 Rule 13 is not maintainable. The second ground on which the application of husband is stated to be not maintainable is that *ex-parte* decree can be challenged only in appeal under Section 28 of the Hindu Marriage Act, 1955. It is the wife's submission that the mandatory language used under Section 28 of Hindu Marriage Act, 1955, (in short 'HM Act') excludes applicability of provisions of Order 9 Rule 13 CPC in respect of *ex-parte* decree passed under HM Act.

4. The learned Trial Court has rejected the application filed by the wife holding the application under Order 9 Rule 13 CPC to be maintainable.

5. The learned counsel for the wife submitted that since husband was admittedly served with the notice of the suit and he entered his appearance in the suit but later on was proceeded *ex-parte*, his application under Order 9 Rule 13 CPC is not maintainable. He also submits that in view of the provisions of Section 28 of the HM Act, only an appeal would lie against the *ex-parte* judgment and decree and the application under Order 9 Rule 13 CPC would not be maintainable. In support of his submissions, he relied upon the judgment rendered in the case of **Anjan Kumar Kataki Vs. Smt. Minakshi Sarma**, AIR 1985 Gauhati 44.

6. Considered the arguments and perused the record.

7. The provisions of Order 9 Rule 13 CPC are clear and unambiguous. It reads as under:-

" Order IX: Appearance of parties and consequence of non-appearance.



Rule 1 to 12 xxx xxx xxx

Rule 13: Setting aside decree ex parte against defendants.- In any case in which a decree is passed ex parte against a defendant, he may apply to the Court by which the decree was passed for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall make an order setting aside the decree as against him upon such terms as to costs, payment into Court or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit;

Provided that where the decree is of such a nature that it cannot be set aside as against such defendant only it may be set aside as against all or any of the other defendants also:

Provided further that no Court shall set aside a decree passed ex parte merely on the ground that there has been an irregularity in the service of summons, if it is satisfied that the defendant had notice of the date of hearing and had sufficient time to appear and answer the plaintiff's claim.

Explanation-Where there has been an appeal against a decree passed ex parte under this rule, and the appeal has been disposed of on any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside the ex parte decree."

8. Thus, an application under Order 9 Rule 13 CPC can be filed in following two eventuality:

- i. firstly, when the summons of suit is not served upon the defendant; and
- ii. secondly, he was prevented by sufficient cause from appearing when the suit was called on for hearing.

The second proviso, relied upon by the learned wife's counsel, relates to first eventuality when the summon is not served to the defendant and has no applicability so far as second eventuality is concerned. For attracting second eventuality viz. when the defendant was prevented by sufficient



cause from appearing when the suit was called on for hearing, the defendant is only required to show sufficient cause of his non-appearance when the suit was called for hearing.

9. In the facts of present case, the husband has not filed the application under Order 9 Rule 13 CPC on the ground of non-service of summons on him. Therefore, the second proviso is not attracted in the facts of this facts. The reliance on second proviso by wife is thus found to be misconceived. The application filed by non-applicant therefore, could not have been dismissed on this ground.

10. The second argument raised by wife's counsel is based upon the provisions of Section 28 of HM Act which provides for filing of an appeal against a decree under the HM Act. Section 28 of the said Act is reproduced hereunder for ready reference:

"28. **Appeals from decrees and orders.**—(1) All decrees made by the court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the court made in the exercise of its original civil jurisdiction, and every such appeal shall lie to the court to which appeals ordinarily lie from the decision of the court given in the exercise of its original civil jurisdiction.

(2) Orders made by the court in any proceeding under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders and every such appeal shall lie to the court to which appeals ordinarily lie from the decisions of the court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on the subject of costs only.

(4) Every appeal under this section shall be preferred within a period of ninety days from the date of the decree or order."

11. The objection raised by wife regarding maintainability of application filed by husband finds its genesis from language of sub-section 1



of Section 28 which opens with the words "All decrees made by the court in any proceeding under this Act...". The applicant submits that the use of the word "All decrees" makes it mandatory and all decrees, including *ex-parte* decree passed in proceedings under the HM Act can be challenged under Section 28 of the Act only and nowhere else.

12. For deciding this issue, the provisions Section 21 of HM Act are significant and needs to be considered. Section 21 of HM Act reads as under:

"21. Application of Act 5 of 1908.- Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated, as far as may be, by the Code of Civil; Procedure, 1908."

13. Thus, Section 21 of HM Act makes all provisions of CPC applicable in proceedings under the HM Act unless applicability of any provision is otherwise restricted. All provisions of CPC would include Order 9 Rule 13 also. The use of phrase "as far as may be" in Section 21 only means and is intended to exclude only such provisions of the Code as are or may be inconsistent with any of the provisions of the Act. The use of words "All decrees made by the court in any proceeding under this Act..." in Section 28 cannot be read as restricting applicability of Order 9 Rule 13 CPC in the proceedings under HM Act. Therefore, in view of provisions of Section 21 of the HM Act, the applicability of provisions of Order 9 Rule 13 CPC cannot be ousted.

14. The argument of applicant's counsel is unacceptable for yet another reason. Section 96 of CPC which provides for an appeal against the decree passed by any court exercising original jurisdiction. The language



used in Section 96 CPC is same as used in Section 28 of HM Act. Section 96

CPC is reproduced hereunder for ready reference:

"96. **Appeal from original decrees**—(1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie from **every decree** passed by any Court exercising original jurisdiction to the Court authorised to hear appeals from the decisions of such Court."

15. Thus, under Section 96 CPC also an appeal lies against every decree passed by any court exercising original jurisdiction. If the interpretation being given by wife's counsel is accepted, then in every decree passed *ex-parte* (even other than HM Act), only an appeal would lie under Section 96 CPC and in no case application under Order 9 Rule 13 CPC would be maintainable. For the reasons stated above, the application filed by husband could not have been dismissed on this ground also.

16. In view of the aforesaid discussion, this Court respectfully disagree with the view taken by the Gauhati High Court in the case of **Anjan Kumar Kataki (supra)**.

17. In view of the discussion made above, the order passed by the learned Trial Court cannot be said to be illegal. The same is accordingly upheld. The Civil Revision is dismissed in *limine*.

(ASHISH SHROTI)
JUDGE