

**HIGH COURT OF JAMMU AND KASHMIR
AT JAMMU**

C. Ref. No.1/2004

Date of order: 19.12.2013

Darshana Devi v. Bodh Raj and anr.

Coram:

**Hon'ble Mr. Justice M.M.Kumar, Chief Justice
Hon'ble Mr. Justice Hasnain Massodi, Judge**

Appearing Counsel:

For the petitioner(s): Mr. S.S.Ahmad Advocate
For the respondent(s): None

- | | | |
|---|---|------------|
| 1. Whether to be reported in
Press/Journal/Media | : | Yes |
| 2. Whether to be reported in
Digest/Journal | : | Yes |
-

M.M.Kumar, CJ

1. Civil Reference on hand has emerged out of an application filed under Order IX Rule 13 Civil Procedure Code for setting aside *ex parte* judgment and decree passed under section 13 of J&K Hindu Marriages Act, 1980 (for brevity 'H.M. Act') titled Bodh Raj vs. Mst. Darshana Devi. The application under Order IX Rule 13 was filed after the expiry of the period of limitation prescribed under law. The delay in filing the application was justified on various grounds including the one that the notice of application under section 13 of the Act, was not served on the applicant; that the report of Process

Server indicating applicant's refusal to receive the notice was false and that the applicant acquired knowledge about the *ex parte* judgment and decree dated 27.01.2003 when, counsel for the respondent in a parallel proceedings initiated by the applicant u/s 488 Cr. P.C, produced a copy of the *ex parte* judgment and decree in question before the Trial Magistrate, to escape the liability to pay maintenance to the applicant. The applicant claimed to have taken immediate steps to obtain certified copy of the judgment and decree and filed application under Order 9 Rule 13 CPC without any delay.

2. The application was resisted by the non applicant / decree holder, inter alia on the ground that the application was filed beyond period of limitation prescribed under law and therefore liable to be dismissed. It was insisted that section 5 J&K Limitation Act, svt. 1995 (1938 AD) would not be applicable as (a) H. M. Act, was a special Act; (b) prescribes its own period of limitation and (c) did not make section 5 of the Limitation Act, applicable to proceedings under the Act.

3. Ld. Trial Judge (Principal District Judge Udhampur) after a detailed survey of law on the subject, opined that law on the subject was the in realm of uncertainty and to dispel confusion it was necessary to make a reference to the High Court in terms of O 46 CPC, Accordingly Ld. Trial Judge formulated following two questions while making the reference:

(i) whether O-9 R-13 Code of Civil Procedure is available to a party seeking setting aside an ex parte decree or order passed under the H. M. Act; if yes :-

a) whether Article 164, first schedule of the Limitation Act would hold good.

b) If so, whether section 5 of Limitation Act, would be applicable to condone the delay, if any, in making such a prayer.

4. The H. M. Act, has been enacted to amend and modify the law relating to marriages amongst hindus. Section 5 of the Act, lays down conditions for hindu marriages, while sections 7 and 8 deal with ceremonies for hindu marriage and registration of a hindu marriage. Section 13 of the Act, lists various grounds on which a marriage could be dissolved by a decree of divorce by filing a petition

by either of the parties before the Court of the District Judge. Section 34 of the Act, provides for appeals from decrees and orders passed under the Act. It provides that a decree passed under the Act is appealable as decrees of the court made in exercise of its original civil jurisdiction to the court to which the appeals ordinarily lie. The orders passed under sections 31 or 32 i.e “permanent alimony and maintenance” and “custody of children” likewise would be appealable provided the orders are not interim in character. Section 34 (3) prescribes 30 days as period of limitation for filing appeal from the date of the decree or order.

5. The Hindu Marriages Act, does not have a provision for setting aside *ex parte* judgment and decree. Section 34 of the Act, dealing with appeals from decrees and orders, obviously would not bring within its fold or govern an application for setting aside *ex parte* judgment and decree. The respondent against whom a judgment and decree has been passed under any of the provisions of the Act, - say Ss 9,10,13 etc cannot go remediless. An *ex parte* judgment and decree is obviously passed without hearing the opposite party. The court proceeds to

hear and decide the matter *ex parte* as in its opinion the opposite party though duly informed of the proceedings and afforded an opportunity to appear and contest the matter, has opted not to oppose the petition implying thereby that he has no interest in controverting, whatever is averred against the party. In such circumstances it would not be a case of denial of opportunity but an opportunity given and not availed. The respondent, however, would always have a right to come before the court to convince it that the party had no knowledge of the proceedings or that even if he was informed about the proceedings, he was prevented by a sufficient cause to appear and contest the petition. To locate such a right, a closure look at the Hindu Marriages Act, would be necessary.

6. The H. M. Act, does not itself lay down the procedure to regulate proceedings under the Act. Section 22 of the Act, deals with contents of a petition under the Act. It however provides that statements contained in every petition would be verified in the manner required by law for the verification of plaints. It does not go beyond and lay down procedure for service of summons, filing of

documents, admission denial of documents, preliminary statements of the parties, framing of issues, summoning of witnesses etc. Such procedure in terms of section 23 of the Act is to be regulated by Code of Civil Procedure svt. 1977. In the circumstances, remedy under O 9 R 13 CPC would be available to a respondent against whom an *ex parte* judgment and decree has been passed. The respondent can always make an application under order 9 Rule 13 to convince the court that he was not duly served and did not have notice of the date of hearing or that he was prevented by a sufficient cause from appearing when the petition was called on for hearing. The question arise as to within what time such an application can be made and whether delay, if any, in filing the application can be justified on the ground of “sufficient cause” within meaning of section 5 of the Limitation Act.

7. Section 5, Limitation Act, does not apply to a proceedings on its own. It would be available only if it is “made applicable” by or under an enactment for the time being in force. The Hindu Marriages Act, is a special enactment, it does not make section 5 applicable to the proceedings under the Act. Section

5 Limitation Act, therefore cannot be available to respondent against whom an *ex parte* judgement and decree has been passed, to seek setting aside of such judgment and decree beyond the period prescribed under the law. Section 29 of the Limitation Act, is another provision that needs to be noticed. It reads:

“29. Savings

(1)

(2) *Where any special or local law prescribes for any suit, appeal or application a period of limitation different from the period prescribed therefor by the first Schedule, the provisions of section 3 shall apply, as if such period were prescribed therefor in that Schedule, and for the purpose of determining any period of limitation prescribed for any suit, appeal or application by any special or local law-*

(a) *the provisions contained in section 4, 9 to 18 and section 22 shall apply only in so far as, and to the extent to which , they are not expressly excluded by such special or local law; and*

(b) *the remaining provisions of this Act shall not apply.”*

When Ss. 3 and 29 of the Limitation Act are read together, one reaches the conclusion that a suit, appeal or application filed beyond the period prescribed under the special law, would be dismissed notwithstanding the period prescribed under first schedule to the Limitation Act. In other words in case period of limitation prescribed by the

first Schedule to the Limitation Act, is more than the period prescribed under the Special law, the latter shall prevail. However, the extensions in period of limitation available under Ss 4, 9 to 18 and 22 of the Limitation Act, could be applicable even in case of period of limitation prescribed under special law unless expressly excluded.

8. Section 34 Hindu Marriages Act does not prescribe period of limitation for an application for setting aside *ex parte* judgment and decree. Section 29, Limitation Act, therefore would not be attracted. Otherwise also Section 5 does not find place in section 29 sub section 2 and would find no application even in absence of a provision expressly excluding application of section 5 to the proceedings under the H.M. Act. Section 29 of the Limitation Act, may be relevant in case of an appeal under the Act, as section 34 (4) prescribes a period of limitation for filing an appeal different from one prescribed by the first schedule to the Limitation Act.
9. Against the above backdrop, to find out the period prescribed under law to file an application under O 9 R 13 CPC, we have to turn to the Limitation Act. The Third Division of First Schedule to the

Limitation Act, deals with Applications. Article 164 is relevant to the present controversy and reads as under:-

164	By a defendant, for an order to set aside a decree passed ex-parte	Thirty days	The date of decree or, where the summons was not duly served, when applicant has knowledge of the decree.
-----	--	-------------	--

The respondent / judgment debtor against whom an *ex parte* judgment and decree has been passed under section 13 or any other provisions of the H. M. Act, would have a right to file an application for setting aside such judgment and decree within 30 days from the date of decree or, where the summons was not duly served, when the respondent/judgment debtor has knowledge of the decree. Article 164 has a remedy for a person who files application for setting *ex parte* judgment decree beyond 30 days because he was not made aware of the proceedings and gained knowledge about the judgment and decree much after the judgment was rendered. The period of limitation in such case would run from the date of acquiring knowledge about the *ex parte* judgement decree

10. Having regard to the discussion made above, the questions framed by Ld. Principal District Judge Udhampur while making the reference are answered as under:

i) Respondent/judgment debtor against whom an *ex parte* judgment and decree has been passed under any of the provisions of Hindu Marriages Act, would have a right to file an application under O 9 R 13 CPC for setting aside *ex parte* judgment and decree

a) The period within which such an application may be filed, would be one governed by Article 164 Schedule 1 Limitation Act.

b) Section 5, Limitation Act, would not be of any help to the applicant, for the reason that the Hindu Marriages Act does not make the provision applicable to the proceedings under the Act.

11. We, before parting with the matter, find it necessary to observe that the law on the subject was well settled even on the date Civil Reference on hand was made. Ld. Counsel for the respondent / judgment debtor appears to have been well aware of law while filing the application for setting aside the *ex parte* judgment and decree and avoided to file an application for condonation of delay under section 5 of the Limitation Act. His only case was that the

respondent/judgment debtor was not duly served and that she had made an application for setting aside *ex parte* judgment and decree within 30 days from the date of acquiring knowledge about the judgment and decree. It was therefore nobody's case before Ld. Trial Judge that section 5 Limitation Act was applicable to the proceedings. Otherwise also the principle of law was reflected with sufficient clarity in ***Manjit Singh vs. Manjit Kour, 2001 SLJ 439.*** The Civil Reference, therefore, was unwarranted. Ld. Trial Judge ought to have decided the application for setting aside *ex parte* judgment decree on the touchstone of law laid down in aforementioned case and other reported cases noticed while dealing with the matter, and avoided to push the parties to further uncertainty.

12. The Civil Reference is answered accordingly

(Hasnain Massodi)
Judge

(M.M.Kumar)
Chief Justice

Jammu
19.12.2013
G. Nabi P/S