

IN THE COURT OF JUDGE, FAMILY COURT, BHUBANESWAR.

Present: Shri Pravakar Mishra, OSJS (S.B),  
Judge, Family Court, Bhubaneswar.

C.M.A No. 109(A) of 2013

Preeti Trama @ Mishra, aged about 30 years,  
D/o- Ramesh Chandra Trama,  
At-401, Ashirbad Apartment,  
Bomikhal, P.S.- Saheednagar,  
P.O.- Bhubaneswar, Dist.- Khurda.

..... Petitioner

Versus

Ashish Misra, aged about 27 years,  
S/o- Debabrata Mishra, resident of  
Qr. No. Block-2/29, OCL Colony,  
Rajgangpur, P.O./P.S.- Rajgangpur,  
Dist. Sundargarh.

..... Opp. Party

Date of argument : 21.08.2014

Date of order : 04.09.2014

O R D E R

This order arises on an application filed by the petitioner-wife U/o-9, Rule-13 of the C.P.C praying to set aside the ex parte order dated 11.07.2013 passed by this court by dissolving the marriage between the Opp. Party-husband and petitioner-wife by passing a decree of divorce on the petition of the Opp. Party-husband.

2. The Opp. Party – husband filed petition on 06.04.2011 for dissolution of marriage by a decree of divorce alleging cruelty and mental illness of petitioner-wife. Wife appeared in the proceeding on 18.07.2011 through Mr. S.M. Dwivedi, the learned Advocate and prayed time to file written statement. The wife filed the TRP(C) No. 84/2011 before the Hon'ble Court for transfer of C.P. No.545/2011 to Rajgangpur as she is residing there but the application was rejected by the Hon'ble Court and accordingly, fresh notice was served on the wife for her appearance in the court fixing the date 14.03.2012 and from 14.03.2012 to 08.05.2012. On 08.05.2012 there was cease work and accordingly the case was adjourned to 20.06.2012 for appearance of both the parties as both of them were absent from the court on the aforesaid date. There was no mention in the order sheet whether notice was served on the wife in any of dates but on 20.06.2012 the wife was set ex-parte and the case was adjourned to 11.07.2012 for ex parte hearing. On 12.07.2012 both the parties were absent and the case was adjourned to 16.07.2012 for ex parte hearing. On 13.07.2012, on application of the wife the ex parte order was set aside on 17.09.2012 and the proceeding was adjourned to 17.09.2012 for filing W.S. and as W.S. could not be filed till 13.12.2012, she was again set ex parte but the said ex parte was set aside on 16.01.2013 and the proceeding was adjourned to 06.02.2013 for filing the W.S. on which date the wife filed the W.S. and the proceeding was adjourned to 07.03.2012 for service of copy of W.S. to the petitioner-husband. On 07.03.2013 when both the parties present the matter was referred to counseling centre for conciliation and adjourned to 10.04.2013 awaiting report of conciliator. On 10.04.2013, the wife changed the previous learned counsel and engaged Mr. J.S. Acharya and his Associates to conduct case on her behest and on a petition for time, the proceeding was adjourned to 04.05.2013 for conciliation and awaiting report of conciliator and on 04.05.2013, the proceeding was adjourned to 01.07.2013 for the aforesaid purpose as the wife did not appear on the aforesaid date. On

01.07.2013, as the wife was absent, she was set ex parte and the case was adjourned to 08.07.2013 for ex parte hearing on which date the evidence of the husband was recorded and the case was adjourned to 11.07.2013 for order and on that date the impugned order was passed.

3. The case of the wife is that her withdrawal from the court was neither intentional nor deliberate but purely due to the fact of wrong noting of dates by her and also by her counsel in as much as missing of diary of the learned counsel and therefore, she should not be allowed to suffer for the lapses of her lawyer and unless the ex parte order be set aside it would cause irreparable loss and damage to her as her personal right has been taken away and hence, submitted to set aside ex parte order dated 11.07.2013.

4. The husband though appeared yet chose not to file any show cause.

5. The wife in order to prove her case, she herself has been examined as P.W.1. P.W.1 during her examination in chief has supported her case. She was cross-examination at length but she did not break down under the pressure of such lengthy cross-examination. Since no rebuttal evidence has been adduced by the husband, and also the evidence of P.W.1 has not been demolished, the irresistible conclusion would be that the wife was set ex parte due to lapses on the part of her counsel.

6. The Opp. Party contended that previous adjournment date of hearing/conduct of the wife indicated her prepense conduct to protract the trial. Expatriating the point he would contend that wife filed C.P. No.125/2012 against the husband for a decree of restitution of conjugal right before Family Judge, Rourkela and she takes interest in that case but does not co-operate in the smooth proceeding and early disposal of C.P. 545/2011 which is indicative and suggestive that she has ill motive to try for restitution of conjugal rights and therefore adopted a tactics of delay to trash the Opp. Party. He would further contend that misplacement of advocate's diary is not a good or sufficient ground for setting aside the ex parte decree. He would

further contend that the wife having since been failed to satisfy the court that she was prevented by any sufficient cause from appearing from the court when the proceeding was called for hearing, ex parte decree should not be set aside and such discretionary relief should not be granted to a party who habitually, purposefully and intentionally avoided to appear and participate in the proceeding. In support of his contention he relied upon *Tejashwari Lal Vrs. Pancham Lal* reported in AIR 2009 Patna 31; *Madan Lal (since deceased) and others Vrs. Prabhu Dayal & others* reported in AIR 2009 Rajasthan P 57; *Smt. Indira Kashyap Vrs. K.N. Kashyap* reported in AIR 1984 SC P 1045 and *Parimil Vrs. Venna @ Bharati* reported in 2011 (99) AIC 9 (SC).

7. Per contra, the petitioner has submitted that she has been residing at Rajgangpur in the district of Sundergarh, a far away place from Bhubaneswar and therefore she had engaged Mr. J.S.Acharya the learned Advocate to look after her case and therefore she was under impression that her counsel would supply information from time to time but to her dismay, the learned counsel could not supply such information for which she could not attend the conciliation on 01.07.2013 on which date she was ex parte and therefore for the mistake of the counsel which according to her a good ground muchless a sufficient cause to set aside the ex parte order. In support of her contention she relied upon *UCO Bank Vrs. Iyengar Consultancy Services Pvt. Ltd.* reported in 1994 supp (2) SCC 399; *Secretary to Govt. of Orissa Urban Development Department & others Vrs. Sachidananda Mohanty* reported in 103(2007) CLT 300 and *State of Bihar and others Kamaleswar Prasad Singh with State of Bihar & others Vrs. Brij Bihari Prasad Singh and Indra Nand Mishra & others Vrs. State of Bihar and others* reported in AIR 2000 SC 2306.

8. Before delving deep into the main issue, I halted pro temp as I thought to first clear the legal deck.

9. In AIR 2009 Patna 39, on wife's prayer case was adjourned on several dates for filing written statement but she did not chose to file the same within

time granted. She filed written statement when evidence on behalf of husband was almost complete and under the circumstances her prayer to accept written statement and set aside the ex parte order was rejected observing that the wife intended to delay disposal of the matter but the fact and circumstance of the present case stands in a different footing. The petitioner wife had already filed written statement before she was set ex-parte on the date when the case was posted for conciliation but not for hearing. If on the appointed date conciliation failed due to non-appearance of the wife, the conciliator could have simply submitted a failure report and submitted the case record to the court and on receipt of the record the court ought have fixed a date of hearing instead of setting the wife ex-parte on that very date. Participation of a party to a conciliation process is obligatory. Be that as it may it may also be appreciated the petitioner wife does not gain by remaining absence where her interest is likely to be affected by ex parte adjudication. The petitioner claim is that in absence of any intimation from the counsel she remained in dark about the development of the case for which she could not attend the court on the date fixed. Therefore, the aforesaid ration cited (supra) by the Opp. Party has no application to the facts and circumstances of the case.

10. In AIR 2009 Raj 57, an order for proceeding ex parte was passed on 17.1.2005 and thereafter the ex parte decree was passed on 15.9.2005. The notices of the execution application were served upon the defendant on 16.02.2006 and despite service the defendant did not appear before the court nor any steps were taken by the defendant. Delivery of possession was who given and at that stage the defendant filed the application under order 9 rule 13 to set aside the ex parte decree on the ground that on 15.1.2005 the defendant No.1 had to proceed to Delhi to attend marriage and therefore he could not present himself before the court on 17.01.2005 and he returned from Delhi on 20.01.2005. The entire application does not disclose as to what

the defendant did after having returned from Delhi on 20.01.2005 till the application was filed on 02.06.2006 i.e. for a period of nearly one year and four months. For the aforesaid period there was no mention by the defendant in his application regarding any steps he took to find out from his counsel as to what transpired from 17.09.2005. The only explanation which has been sought to be given is that the counsel had assured him that he would inform him about the proceedings and if the defendant was required to appear he could send the necessary information. Since the defendant had not found out from his counsel as to what transpired in the court on 17.01.2005 after he came back from Delhi on 21.01.2005 it was held that his failure to have done so amounting to the negligence on the part of the defendant and once negligence is established then bonafide end and therefore there lacks sufficient cause from appearing the court besides, the application having moved not within reasonable period the application U/o-9, Rule-13 was rejected.

11. Herein in the instant case, P.W. 1 has stated that soon after she received information from her lawyer about the impugned order, she filed the present application for setting aside the ex-parte order. Thus, in this case there was no delay in filing the application for setting aside ex-parte order which prima facie shows her bonafide intention to proceed with the case but for the mistake of her lawyer she could not attend the court on the date of conciliation. It is admitted that she is ordinarily residing at Rajgangpur for which it is not possible for her to attend the court each date and therefore she has engaged a lawyer to conduct her case who betrayed her trust by not giving information about the development of the case. Additionally, the Opp. Party has not filed any objection to restoration application. Therefore, it is open to court to pronounce judgment on the basis of facts contained in the pleadings of the petitioner as per proviso Order 8 Rule 5 C.P.C. what I mean to convey is that, since no objection has been filed to restore the petition the contents of

the application of the petitioner must be accepted as true. Even then, we proceeded to record the evidence of the petitioner who has not resiled from the contents of the application. It was further stressed by the Opp. Party that the petitioner has taken several adjournments and therefore was negligent in proceeding with the case. Suffice it to say, previous adjournments of hearings/conduct of a party is no consideration. Similarly, previous negligence of a party cannot be considered to be a good ground for not setting aside of a ex-parte decision. The petitioner has explained that she was sufficiently prevented from attending the court due to mistake of her counsel. No doubt, for the mistake of a counsel on whom the petitioner imposed trust if he has not acted properly for his lapses the valuable right of the petitioner cannot be snapped out. Therefore, the ratio cited (supra) along with other two Supreme Court decision i.e. Indrakashyap's case and Parimil's case have no application to the fact and circumstances of the case. On the other hand the decisions relied upon by the petitioner reported in 103 (2007) CLT 300 and 1994 supp (2) Supreme Court cases 399 are befitting to the facts and circumstances of the case in hand..

12. An application under Order 9 Rule 13 is a beneficial legislation and to be interpreted liberally in favour of the defendant. Approach of the Court should be to do justice and the valuable rights of the parties should be determined on merit. Further, in cases relating to setting aside of ex-parte decree, the guiding principle would be to give opportunities to the parties to seek adjudication the dispute on merit except where one of them remained in different for a prolonged period of unexplained delay. An ex-parte decree for divorce against woman warrants slightly liberal approach (See N. Hemamalini Vrs. N.A. Raghu) 2008 (I) ALT 458. Here in the instant case, there was no delay. The petitioner soon after knowing that she has been set ex-parte due to in action of her counsel she has taken prompt action in time with a view that her dispute should be adjudicated on merit after giving an opportunity of

hearing. If the ex-parte order would not set-aside her personal right shall be taken away which definitely would cause an irreparable loss which could not be compensated in terms of money. It is pertinent to mention here that although I have mentioned in the earlier part of my order that I would discuss the evidence after clearing up the legal deck yet, I usurped upon the evidence while discussing the ratio cited by the parties, which I now desisted from geminating to avoid the rigmarole of the order. Therefore, I feel it expedient in the interest of justice that one more afforded should be appended to her to defend her case. In other words her application Under 9 Rule 13 deserves merit to be allowed and in fact, I did the same. Hence, ordered;

O R D E R

The petition is allowed on contest subject to payment of cost of Rs. 10,000/-. Put up on 10.09.2014 for payment of cost and further order.

JUDGE, FAMILY COURT,  
BHUBANESWAR.

Dictated, corrected by me and is pronounced on this the 4<sup>th</sup> day of September, 2014.

JUDGE, FAMILY COURT,  
BHUBANESWAR.

Witnesses examined for the petitioner:

P.W.1 Smt. Preeti Trama @ Mishra

Witnesses examined for the respondent:

Nil

List of documents by petitioner:

List of documents by respondent:

Nil.

JUDGE, FAMILY COURT,  
BHUBANESWAR.