

(19) As regards the additional evidence being allowed at this stage, it is well-settled that it should not be permitted merely to enable one of the parties to remove a lacuna in presenting its case at the proper stage or to fill up gaps in its evidence. This is not a case where the appellate Court itself requires this evidence to be adduced in order to enable it to do justice between the parties. In this view of the matter, the application for permission to adduce additional evidence too cannot be allowed. Both the applications are accordingly hereby dismissed.

(20) In the result, the appeals are hereby accepted with costs. Counsel's fee Rs. 500 (one set only).

N.K.S.

Before : S. S. Kang, J.

JAGDISH RAI,—Petitioner.

versus

PARVEEN BALA,—Respondent.

Civil Revision No. 2425 of 1985.

December 4, 1985.

Hindu Marriage Act (XXV of 1955)—Sections 9, 21 and 28—Code of Civil Procedure (V of 1908)—Order 9 Rule 13—Ex-parte order passed in a matrimonial cause under the Act—Application under order 9 rule 13 for setting aside that order—Whether competent.

Held, that it is manifest from a reading of Sections 21 and 28 of the Hindu Marriage Act, 1955, that decree passed in the proceedings under the Act shall be appealable. It is also clear that the proceedings under the Act are governed and regulated by the Code of Civil Procedure only. This is, however, subject to other provisions contained in the Act which may have bearing on the issue in question. From a conjoint reading of sections 21 and 28 of the Act, it becomes apparent that the decrees passed by the Matrimonial Courts are appealable, but the proceedings in the Matrimonial causes are to be carried out in accordance with the provisions of the Code. However, these two provisions do not lead to the inference that an *ex-parte* decree passed in a Matrimonial cause under the Act cannot be set aside by the trial court on the application made under rule 13

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of order 9 of the Act. Section 28 of the Act does not deal with the subject of setting aside *ex-parte* decrees. For that purpose, recourse has to be taken, by virtue of the provisions of section 21, to the procedure prescribed by the Code. The language employed in section 28 of the Act is similar to the one used in section 96 of the Code. Therein also it has been enacted that 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. It is well settled that a defendant against whom an *ex-parte* decree is passed has the following courses open to him. He can apply for review; he can appeal from the decree; he can file a revision in cases of Small Cause Court; he can institute a suit on the ground of fraud; he can move an application under rule 13 of order 9. The provisions of section 28 of the Act do not exclude expressly or by implication the application of rule 13 of order 9 of the Code to the *ex-parte* decrees passed in pursuance of the Act. Thus, an application under rule 13 of order 9 of the Act is competent and maintainable for the setting aside of an *ex-parte* decree and Section 28 does not in any way prohibit this course.

(Para 8)

Anjan Kumar Kataki vs. Smt. Minakshi Sarma, A.I.R. 1985 Gauhati, 44.

(DISSENTED FROM).

Petition under Section 115 CPC for revision of the Order of the Court of Shri N. C. Prashar, PCS, Sub Judge Ist Class, Muktsar dated 22nd July, 1985 allowing the application under Order 9 rule 13 CPC with no order as to costs and setting aside the ex-parte decree dated 5th November, 1983, obtained by Jagdish Rai decree holders respondent.

Ashok Bhan, Senior Advocate (A. K. Mittal, Advocate, with him) for the Petitioner.

V. K. Jhanji, Advocate, for the Respondent.

JUDGMENT

S. S. Kang, J.

(1) Whether an application under Rule 13 of Order 9 of the Code of Civil Procedure for setting aside an *ex parte* order passed by the Matrimonial Court accepting a petition under section 9 of the Hindu Marriage Act (for short 'the Act') is competent, is the solitary question canvassed in this revision petition. A broad brush factual backdrop shall illumine the contours of forensic controversy.

(2) Jagdish Rai, the petitioner-husband, filed a petition under section 9 of the Act for restitution of conjugal rights against his wife Smt. Parveen Bala. Notices were sent to her by the Court to appear on 2nd September, 1983. On that day Smt. Parveen Bala did not appear and *ex parte* proceedings were taken against her. The learned trial Judge recorded the evidence of the petitioner and accepted the petition under section 9,—*vide* order dated 5th November, 1983. On coming to know about the *ex parte* order, Smt. Parveen Bala filed an application under Rule 13 of Order 9 of the Code of Civil Procedure for setting aside the *ex parte* order of 24th November 1983. In that application she *inter alia* pleaded that her husband had obtained an *ex parte* order dated 5th November, 1983 by obtaining a false report from the postman that she had refused to accept the notices sent to her by the Matrimonial Court. In fact she had not refused to take delivery of any registered or other letter from any postman. The *ex parte* decree had been obtained by playing a fraud on the Court and she had come to know about the same on 16th November, 1983 and filed the application on 24th November, 1983.

(3) Jagdish Rai petitioner contested the application. He raised many objections that the application had not been filed within time. It was not competent. Only an appeal could be filed against the *ex parte* decree. On merits, it was averred that Smt. Parveen Bala had been actually served. She had refused to accept notices sent by the Court. The learned trial Judge framed two issues. (1) Whether the application is within time? (2) Whether there are sufficient grounds to set aside the *ex parte* decree?

(4) Smt. Parveen Bala stepped into the witness-box and supported the averments made in her application. She stated in categorical terms that she had not received any summons or notices from the Court. She had not refused to accept any letter from any postman. She had no knowledge about the proceedings. She came to know about the *ex parte* decree on 16th November, 1983 and filed the application for setting aside the same on 24th November, 1983. In reply, Jagdish Rai petitioner made his own statement. He stated that Smt. Parveen Bala had been served in the case by registered post because she had refused to accept the registered letter tendered before her by the postman.

(5) The learned trial Judge rightly concluded issue No. 1 against the petitioner. The application had been filed within 30 days of the *ex parte* decree. So, it was clearly within time.

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(6) On merits, the learned Judge held that Smt. Parveen Bala had not been served. The postman had not been produced and the record in the original proceedings under section 9 of the Act had been destroyed in a fire which broke out in the record-room. Consequently, he set aside the *ex parte* order. Aggrieved, Jagdish Rai has filed the present revision petition.

(7) It has been contended by Shri Ashok Bhan, Senior Advocate, learned counsel for the petitioner, that the Hindu Marriage Act specifically provides for an appeal against the orders passed in proceedings taken out under the Act. The provisions of Civil Procedure Code are applicable only to those matters regarding which there is no provision in the Act itself. Since the Act provides for setting aside orders passed thereunder by an appeal under section 28 of the Act, an application under Rule 13 Order 9, C.P.C. is not competent. For this submission, he seeks sustenance from a recent decision of a learned Single Judge of Gauhati High Court in *Anjan Kumar Kataki v. Smt. Minakshi Sarma* (1).

(8) This argument of the learned counsel has not commended itself to me. Section 21 of the Act provides that subject to other provisions contained in the Act and to such Rules as the High Court may make in this behalf, all proceedings under the Act shall be regulated, as far as may be, by the Code of Civil Procedure. Section 28 of the Act reads as under:—

“(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 decisions 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.

(1) A.I.R. 1985 Gauhati 44.

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- (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 thirty days from the date of the decree or order."

It is manifest from a reading of the two statutory provisions mentioned above that decrees passed in the proceedings under the Act shall be appealable. It is also clear that the proceedings under the Act are governed and regulated by the Civil Procedure Code only. This is, however, subject to other provisions contained in the Act which may have bearing on the issue in question. From a conjoint reading of sections 21 and 28 of the Act, it becomes apparent that the decrees passed by the Matrimonial Courts are appealable, but the proceedings in the Matrimonial causes are to be carried out in accordance with the provisions of the Code of Civil Procedure. However, these two provisions do not lead to the inference that an *ex parte* decree passed in a Matrimonial cause under the Act cannot be set aside by the trial Court on an application made under Rule 13 of Order 9 of the Code of Civil Procedure. Section 28 of the Act does not deal with the subject of setting aside the *ex parte* decrees. For that purpose, recourse has to be taken, by virtue of the provisions of section 21, to the procedure prescribed by the Code of Civil Procedure. The language employed in Section 28 of the Act is similar to the one used in section 96 of the Code of Civil Procedure. Therein also it has been enacted that 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. It was not contended, and could not indeed be done so plausibly by the learned counsel for the petitioner that in general law an *ex parte* decree could not be set aside by the trial Court on an application under Rule 13 of Order 9. It is well settled that a defendant against whom an *ex parte* decree is passed has the following courses open to him. He can apply for review; he can appeal from that decree; he can file a revision in cases of small cause Court; he can institute a suit on the ground of fraud; he can move an application under Rule 13 of Order 9. The provisions of Section 28 of the Act do not exclude expressly or by implication the application of Rule 13 of Order 9 of the Code of Civil Procedure, to the *ex parte* decrees passed under the provisions of the Act. The Punjab High Court in *Firm Seth Khuda Bakshi and Sons v. Firm Shri Ghulam*

Bal Kishan Khanna and others v. State of Punjab and others
(M. M. Punchhi, J.)

Qadir and Sons (2) went to the extent of laying down that an application for setting aside an *ex parte* decree can be filed in the trial Court under Rule 13 of Order 9 even in those cases where an appeal had been filed from the impugned *ex parte* decree. It seems, that aspect of the matter had not been highlighted in *Anjan Kumar Katakji's case* (supra). With greatest respect to the learned Judge I have not been able to persuade myself to concur with the ratio of that decision. I am of the considered view that the application under Rule 13 of Order 9 of the Code of Civil Procedure is competent and maintainable to set aside an *ex parte* decree and Section 28 does not in any way prohibit this course. The question raised is answered in the affirmative.

(9) On merits, the conclusion reached by the learned trial Judge are based on correct facts and do not call for any interference. The revision petition has no merit and is dismissed with costs. Counsel fee Rs. 200.

N.K.S.

Before : M. M. Punchhi, J.

BAL KISHAN KHANNA AND OTHERS,—Petitioners

versus

STATE OF PUNJAB AND OTHERS,—Respondents.

Civil Writ Petition No. 4572 of 1985

December 9, 1985.

Punjab Municipal Act (III of 1911)—Sections 154 and 168—Disposal of dead animals—Public auction—Such auction including those animals whose bodies were disposed of by their owners at places one mile beyond limits of Municipal Committee—Ownership of animals so disposed of—Whether vests in the Municipal Committee—Auction in regard to such animals—Whether valid.

Held, that owners of cattle who disposed of dead bodies of the animals at a place one mile beyond the limits of municipality, by

(2) 1924 Lahore 224.