
(1996) 07 P&H CK 0057
In the Punjab And Haryana At Chandigarh
Case No : Civil Revision No. 2172 of 1995

Rajinder Kaur

APPELLANT

Vs

Bakhshish Singh

RESPONDENT

Date of Decision : 12-07-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 9 Rule 13
Hindu Marriage Act, 1955 — Section 13

Citation : (1996) 114 PLR 335 : (1996) 3 RCR(Civil) 450

Hon'ble Judges : Sarojnei Saksena, J

Bench : Single Bench

Advocate : Arun Palli, for the Appellant; R.K. Battas, for the Respondent

Judgement

Sarojnei Saksena, J.—Rajinder Kaur petitioner has filed this revision against trial Court's order whereby her petition for staying the operation of the divorce decree is dismissed.

2. Brief facts of the case are that the petitioner was married to Bakhshish Singh on June 26, 1990. On August 18, 1994, Bakhshish Singh obtained a divorce decree against her. On September 15, 1994, Bakhshish Singh died. On October 24, 1994, when the petitioner approached her husband's department for release of retiral benefits to her. She was apprised of this fact that her husband has already obtained a divorce decree against her on August 18, 1994. Thereafter within three days i.e. on October 27, 1994, she filed a petition under Order 9 Rule 13 CPC for setting aside that ex-parte decree. She also filed a petition under Order 39 Rules 1 and 2 CPC stating that mother of Bakhshish Singh is also trying that these retiral benefits be released in her favour, and therefore, the department be restrained from releasing these retiral benefits to Bakhshish Singh's mother.

3. The petitioner's learned counsel contended that the trial Court has dismissed her petition for staying the operation of the divorce decree relying on *Saraswathi Ammal v. Lakshmi* AIR 1989 Mad 216, wherein it is held that after the death of

the husband if the wife filed a petition under Order 9 Rule 13 CPC, such a petition is not maintainable and abates and that the wife cannot prosecute such a petition against legal representatives of the husband. He also fervently argued that in *Iravva Vs. Shivappa Shiddalingappa Angadi*, , Karnataka High Court has held that if the wife files a petition under Order 9 Rule 13 CPC to set aside an ex parte decree of dissolution of marriage obtained by the husband, it is maintainable even if the husband dies. Relying on *Vadalasetti Samrajamma Vs. Vadalasetti Nagamma*, , he contends that in this case it is held that when the husband obtained an ex-parte decree of divorce against the wife and the wife filed a petition under Order 9 Rule 13 CPC to set aside that decree, consequent upon the death of the husband, proceedings would not abate and the wife is entitled to bring on record legal representatives of deceased husband under Order 22 Rule 4 CPC. In this judgment, the decisions *Saraswathi Ammal's* and *Iravva's* cases (*supra*) are also referred to and after considering various other authorities a Single Bench of Andhra Pradesh High Court has held that such a petition filed by the wife is maintainable.

4. The respondent's learned counsel vehemently argued that the petition is rightly dismissed by the trial Court because it suffers from suppression of material facts also. The petitioner has not approached the Court with clean hands. Earlier on June 15, 1993, the petitioner as well as Bakhshish Singh filed a petition for divorce on mutual consent. They also filed their affidavits in support of the said petition, but later on the petitioner-wife contended that first of all her dowry articles be returned by the husband, then only she will get divorce by mutual consent. On September 27, 1993, as the dowry articles were not returned to her, she made such a declaration and the petition was dismissed on that very day. On December 1, 1993, Bakhshish Singh filed divorce petition on the grounds of cruelty, vulnerable disease with which she is suffering and desertion. According to him, the wife never cohabited with Bakhshish Singh and deserted him. She has taken a job and is serving as a teacher. The husband died on September 15, 1994. Cremation was held on September 16, 1994, and Bhog ceremony was performed on September 25, 1994. Though the petitioner has alleged that she attended these ceremonies but had it been true then she would have come to know about the death of Bakhshish Singh much earlier than October 24, 1994, when according to her, she came to know about the death of her husband from the department where she had gone to get the retiral benefits released in her favour. Relying on *Kamla Kumar Thapar Vs. Vinod Kumar Thapar*, he fervently argued that power of the appellate Court to interfere with an order passed by the trial Court under Order 39 Rules 1 and 2 CPC is not unlimited. The appellate Court cannot upset an order passed by the trial Court without holding that the trial Court has erred in recording findings on the issues of *prima facie* case, balance of convenience and irreparable loss or without holding that the conclusions recorded by the trial Court on these issues are perverse or against the settled principles of law.

5. No doubt, in this petition or in the grounds of revision, the petitioner has not

alleged that earlier she and her husband filed a petition for obtaining divorce by mutual consent on June 15, 1993, but, in my considered view, that fact was not relevant in this case. That petition was not supported by the petitioner because dowry articles were not returned to her, and consequently the said petition was dismissed by the Court on September 27, 1993.

6. No doubt, Bakhshish Singh filed divorce petition against the petitioner on December 1, 1993, on the grounds of cruelty, vulnerable disease and desertion as well. This petition was proceeded ex parte and on August 18, 1994, an ex parte divorce decree was granted in favour of the husband. Thus, the petitioner had no opportunity to deny/rebut the said allegations made against her. Therefore, much cannot be made out from the said mere allegations made in the divorce petition. If she would have contested the case, she might have proved by adducing her evidence and might have been in a position to rebut all these allegations.

7. Admittedly, after the death of Bakhshish Singh, the mother and widow-petitioner are trying to get the retiral benefits of Bakhshish Singh from husband's department. In her petition filed under Order 9 Rule 13 CPC, she filed a petition under Order 39 Rules 1 and 2 CPC that till her petition is decided, these retiral benefits be not released by the department in favour of Smt. Mukand Kaur, husband's mother.

8. No doubt, Madras High Court in the above-mentioned case has held that such a petition filed by the wife is not maintainable after the death of the husband and such proceedings abate, but Karnataka High Court and Andhra Pradesh High Court have taken a different view so far as that legal position is concerned. This Court in Smt. Suresh Bala v. Rajbir Singh (1996) 114 PLR 286 had the occasion to consider all these authorities along with catena of other authorities also on this point whether after the death of the husband, such a petition/appeal filed by the wife is maintainable or not. This Court has held:

"If the appeal is allowed to abate on this ground alone, that the husband has died, it will seriously affect the status of the appellant as well as her property rights, which she may be entitled to, in case the appeal is decided on merits. If she succeeds in having the decree set aside, she will be entitled to inherit the property left by her deceased husband under the Hindu Succession Act. Admittedly, this is a judgment in rem. Her status is at stake. Hence, in my considered view, only on the ground that the husband has died, appeal does not abate."

9. The petitioner's petition filed under Order 9 Rule 13 CPC is still pending in the trial Court. If in that petition she succeeds and the ex parte decree of divorce is set aside, she will not be termed as divorcee, but will become widow of deceased Bakhshish Singh. In that situation she will be entitled to succeed to the property of Bakhshish Singh as Class-I heir under the Hindu Succession Act.

10. So far as Kamla Kumar Thapar's case (supra) is concerned, in that case the

trial Court has discussed the three cardinal principles on which injunction petition is considered and decided. So far as this case is concerned the trial Court relying on Saraswathi Ammal's case (supra) has come to the conclusion that prima facie her main petition cannot be held to be maintainable. Therefore, other two points were also decided against her.

11. Since the very basis of the order is challenged and, in my considered view, the decision in Saraswathi Ammal's case (supra) does not come in the way of the petitioner, as the ex parte divorce decree is not a judgment in personam but is a judgment in rem, which is affecting her status as well as her property rights and, therefore, she has a right to get her petition filed under Order 9 Rule 13 CPC decided on merits, her main petition cannot be said to be not maintainable. The impugned order is challenged on a legal issue. Hence Kamla Kumar Thapar's case (supra) is not applicable in this case.

12. During arguments, respondent's leaned counsel contended that the respondent is an old lady and if these retiral benefits of her deceased son Bakhshish Singh are not released in her favour, she will suffer an irreparable loss and she will not be in a position to maintain herself. The petitioner's counsel candidly admitted that the respondent, the mother, is also a Class-I heir of deceased Bakhshish Singh and even if her petition filed under Order 9 Rule 13 CPC is allowed and she is held to be entitled to succeed to the property of Bakhshish Singh, she will only get half share and the other half will go to the respondent. This legal position cannot be disputed.

13. Accordingly, the revision is partly allowed. The impugned order is set aside, but it is ordered that half of the retiral benefits of deceased Bakhshish Singh be released in favour of the respondent as Bakhshish Singh has died issueless and except the parties there is no other heir of Bakhshish Singh.