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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Judgment reserved on: 02.02.2023*
Judgment delivered on: 21.04.2023

\+ **MAT.APP.(F.C.) 189/2022**

SEEMA DEVI ..... Appellant

Versus

SHREE RANJIT KUMAR BHAGAT ..... Respondent

Advocates who appeared in this case:

For the Appellant: Appellant in person.

For the Respondent: Mr Neeraj Shekhar, Dr. Sumit Kumar and Mr Keshav Bharti, Advocates along with respondent in person.

CORAM:
HON'BLE MR. JUSTICE SANJEEV SACHDEVA
HON'BLE MR. JUSTICE VIKAS MAHAJAN

JUDGMENT

VIKAS MAHAJAN, J.

1. The present appeal has been filed assailing the order dated 03.02.2006 vide which the Additional District Judge, Delhi has dismissed the application filed by the appellant under Order IX Rule 13 of the Code of Civil Procedure, 1908, seeking setting aside of the *ex parte* judgment and decree of divorce passed between the parties on 14.05.2003 in HMA No.849/2001.

2. The marriage between the parties was solemnized on 04.05.1998 at Village Maliganj, District Madhepura, Bihar and a girl child was born from the

said wedlock on 23.07.1999, who is presently 23 years of age.

3. Disputes and differences arose between the parties which led the respondent-husband to file a divorce petition against the appellant on 27.07.2001 in the Court of District Judge, Saharsa, Bihar.

4. Subsequently, on an application of withdrawal being filed by the respondent husband, the Court at Saharsa returned the Divorce Petition for being filed in the Court of proper jurisdiction.

5. Thereafter, the respondent filed a Divorce Petition in the District Court, Delhi on 15.10.2001 under Section 13(1)(i-a) and (i-b) of the Hindu Marriage Act, 1955 [in short 'the Act'] premised on the ground of cruelty and desertion. The summons was issued to the appellant-wife but she refused to accept the same. Based on the report of the process server to the effect that the appellant refused to accept the summons, the appellant-wife was proceeded *ex parte* in the divorce proceedings on 08.04.2003. Eventually, the divorce petition was allowed and an *ex parte* decree of divorce on the ground of "desertion" was passed in favour of the respondent-husband and against the appellant-wife, on 14.05.2003 by the Additional District Judge, Delhi.

6. After about 18 months, on 25.11.2004 the appellant-wife filed an application under Order IX Rule 13 CPC alleging that the summons issued by the court in the divorce petition was neither tendered to her nor she refused to accept the same. It was pleaded by her that she acquired the knowledge of the *ex parte* divorce decree dated 14.05.2003 only on 30.08.2004, when the copy of said *ex parte* divorce decree was filed by the respondent-husband in her maintenance proceedings pending in the Court at Madhepura, Bihar. Additionally, it was pleaded by the appellant-wife that the respondent-husband

had earlier filed a divorce case in the Court at Saharsa, which was withdrawn by him for being filed in the Court at Madhepura in Bihar, therefore, the divorce petition could not have been filed before the District Judge, New Delhi.

7. The respondent filed his reply, pleading that the appellant was having knowledge of the Divorce Petition filed by him in Delhi and that he has already re-married to Smt. Sanju Devi, D/o of Sh. Ramji Prasad Bhagat on 24.11.2004 as per Hindu rites and customs.

8. Learned Additional District Judge, Delhi vide impugned order dismissed the application of the appellant-wife under Order IX Rule 13 CPC on the ground that the appellant-wife was aware of the divorce petition pending in the Court at Delhi and that the contention that she had not been duly served and had not refused to accept the notice of the petition, cannot be accepted. To return this finding, the learned Additional District Judge has relied upon the pleadings and the orders passed in other litigations between the parties wherein there is a specific reference to the divorce petition having been filed by the respondent-husband in the Court at Delhi. The learned Additional District Judge also relied upon the cross-examination of the appellant-wife and her father in a petition filed by the appellant-wife seeking maintenance [Misc. Case No.27 /2001] wherein they had admitted about the pendency of the divorce proceedings pending between the parties. The material part of the impugned order reads as under: -

> *"The entire record thus speaks unequivocally to the effect that the applicant was aware of the divorce petition pending in the Delhi Courts through the anticipatory bail proceedings dated 25.02.2002 in the Court of the Ld. Sessions Judge at Madhepura in Anticipatory Bail Petition No.10/2002, that the applicant was aware of the divorce petition being pending at the Delhi Courts, in view of averments made*

in the Anticipatory Bail Petition No.27/2002 filed by the non-applicant in the court of Ld. Sessions Judge at Madhepura, that the applicant was aware of the divorce petition having been filed by the non-applicant at Delhi Courts through the show cause petition filed by the non-applicant dated 22.07.2002 filed by the non-applicant in Misc. Case No.27/2001 in the Court of the Judicial Magistrate, First Class, Madhepura. The applicant was also aware of the pendency of the divorce petition at Delhi, in view of order dated 16.09.2002 of the Hon'ble High Court of Patna in Criminal Misc. No.12273/2002, the anticipatory bail application filed by the non-applicant, the applicant was aware of the pendency of a divorce petition other than the divorce petition filed by the non-applicant, which was returned on 21.08.2001 by the Ld. District Judge at Saharsha as being pending on the date 31.11.2002, as per her statement dated 30.11.2002 in Misc. Case No.27/2001, as per her cross-examination before the Court of the Judicial Magistrate, First Class, Madhepura, that the father of the applicant Sh. Vijay Kumar Bhagat was also aware of the pendency of a divorce petition other than the divorce petition already withdrawn, as per cross-examination dated 02.12.2002 before the Court of the Judicial Magistrate, First Class, Madhepura in Case No.27/2001 and the copy of that divorce petition was with the lawyer of the father of the applicant, as per the cross-examination of Sh. Vijay Kumar Bhagat.

It is thus apparent that the contention of the applicant that she was not aware of the pendency of the divorce proceedings in the Court at Delhi and had not been duly served with the notice of the petition and had not refused to accept the same cannot be accepted."

9. The appellant who appeared in-person has submitted that the respondent-husband has not only played a fraud upon the appellant but has also played fraud upon the Hon'ble Court. She submits that the earlier divorce petition was filed by the respondent before the District Judge, Saharsa but the said petition was withdrawn by the respondent stating that the Saharsa District court has no jurisdiction and only the Madhepura District Court had jurisdiction and accordingly, such withdrawal was allowed by the District Judge, Saharsha on

21.08.2001. She contends that the appellant always had an impression that the divorce petition will be filed only in Madhepura Court, Bihar but the respondent committed fraud by filing the divorce petition in the Court at Delhi. She further submits that she had no knowledge about the divorce petition pending before the Additional District Judge, Delhi. It is further contended that the appellant was not a party to the anticipatory bail applications filed by the respondent and his family members in Complaint Case No.577/2001, therefore, knowledge cannot be attributed based on the averments made in the said applications or orders passed therein. She, thus, prayed for setting aside of the impugned order as well as the judgment and decree of divorce dated 14.05.2003.

10. *Per contra*, Mr Neeraj Shekhar, learned counsel appearing on behalf of the respondent, contends that the service of summons was earlier refused by the appellant and such refusal has been recorded by the postal authorities on the registered cover. Subsequently, the summons was directed to be served through the District Judge, Madhepura but the appellant again refused to accept the same, therefore, a copy of the same was affixed by the process server on a conspicuous part of the appellant's residence. He thus, urged that the appellant was duly served. He further contends that in any case, the defendant had notice of the date of hearing in the divorce petition, therefore, the learned Additional District Judge has rightly refused to set aside the *ex parte* decree. To add emphasis to his argument, he invited attention of the court to - (i) order dated 25.02.2002, whereby the anticipatory bail application of the family members of the respondent-husband was dismissed; (ii) anticipatory bail application no.27/2002 filed by the respondent in Complaint Case No.577/2001 under Section 498A/504/406 IPC; (iii) reply filed by the respondent in maintenance

Case No.27/2001 before the Chief Judicial Magistrate, Madhepura; and (iv) an order dated 16.09.2002 passed by High Court of Patna in Crl.Misc.No.12273/2002 on an application for grant of anticipatory bail in complaint case under Section 498A/504/406 IPC, which contains reference to the proceedings of divorce pending at Delhi. He further refers to the statement of the appellant dated 30.11.2002 recorded in the Court of Judicial Magistrate, First Class, Madhepura in Misc. Case No.27/2001 seeking maintenance, wherein she has admitted that the respondent has filed a case of divorce against her. He also draws the attention of the court to the statement dated 02.12.2002 of Shri Vijay Kumar Bhagat, father of the appellant, in the same case wherein the appellant's father has admitted about the divorce case having been filed by the respondent and a copy of the divorce case being in possession of their advocate. The learned counsel further contends that not only the respondent has remarried but he has two children from the said wedlock, therefore, the present appeal is infructuous.

11. We have considered the rival submissions made by the appellant appearing in-person, as well as, by the learned counsel for the respondent and have examined the record.

12. The mode of delivery of summons through registered/speed post and the effect of refusal by the defendant to take delivery of the postal article containing summons, has been provided in Rule 9 of Order V of the Code, which after the amendment of 2002, reads as under:-

> *"9. Delivery of summons by Court.—(1) Where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper*

officer to be served by him or one of his subordinates or to such courier services as are approved by the Court.

(2) The proper officer may be an officer of a Court other than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him in such manner as the Court may direct.

(3) The services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court or by the Court referred to in sub-rule (1) or by any other means of transmission of documents (including fax message or electronic mail service) provided by the rules made by the High Court:

Provided that the service of summons under this sub-rule shall be made at the expenses of the plaintiff.

(4) Notwithstanding anything contained in sub-rule (1), where a defendant resides outside the jurisdiction of the Court in which the suit is instituted, and the Court directs that the service of summons on that defendant may be made by such mode of service of summons as is referred to in sub-rule (3) (except by registered post acknowledgment due), the provisions of Rule 21 shall not apply.

(5) When an acknowledgment or any other receipt purporting to be signed by the defendant or his agent is received by the Court or postal article containing the summons is received back by the Court with an endorsement purporting to have been made by a postal employee or by any person authorised by the courier service to the effect that the defendant or his agent had refused to take delivery of the postal article containing the summons or had refused to accept the summons by any other means specified in sub-rule (3) when tendered or transmitted to him, the Court issuing the summons shall declare that the summons had been duly served on the defendant:

Provided that where the summons was properly addressed, pre-paid and duly sent by registered post acknowledgment due, the declaration referred to in this sub-rule shall be made notwithstanding the fact that the acknowledgment having been lost or mislaid, or for any other reason, has not been received by the Court within thirty days from the date of issue of summons.

(6) The High Court or the District Judge, as the case may be, shall prepare a panel of courier agencies for the purposes of sub-rule (1).”

13. It is clear from the perusal of above provision that one of the modes of delivering of summons as prescribed under Order 5 Rule 9(3) includes service through registered post acknowledgement due or by speed post. Order 5 Rule 9(5) specifically provides that if there is a refusal by the defendant to take delivery of the postal article containing summons and the same is received back by the Court with an endorsement made by a postal employee to that effect, the court issuing summons is obliged to declare that the summons had been duly served on the defendant.

14. Order V Rule 17 of the Code deals with a somewhat similar situation where the serving officer tries to serve the summons and the defendant refuses to accept or sign the acknowledgement. Order V Rule 17 reads as under:

“17. Procedure when defendant refuses to accept service, or cannot be found*.—Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant , [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be made, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the Court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”*

15. The above provision makes it evident that that when the defendant refuses to sign the acknowledgement, the serving officer is obliged to affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides and is obliged to return the original summons to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

16. Initially summons in the divorce petition was issued to the appellant on 16.10.2001 for 20.12.2001 but the postal authorities reported that on repeated visits the addressee could not be found. Again, fresh summons was issued on 20.12.2001 for 07.03.2002 but after repeated visits, the postal authorities gave the report on 17.01.2002 that the addressee had *refused* to accept the registered post. In view of the endorsement of refusal, the service stood effected on the appellant but at that juncture the Court did not make a declaration that the summons had been duly served on the appellant, in terms of Order V Rule 9(5) CPC.

17. Summons was then issued on 16.05.2002 but the process issued was not received back. *Vide* order dated 28.11.2002, learned Additional District Judge, Delhi issued fresh summons for service through registered post, as well as, through the concerned District Judge, but the same were received back unexecuted.

18. Again on 23.01.2003, summons was issued for 08.04.2003 through

registered post, as well as, through the concerned District Judge. The summons sent through registered post were received back unexecuted with the report that "*lene se inkaar karne par chipka diya*". The process server also tried to serve the appellant but as the appellant had refused to accept the same, therefore, a copy of the summons and the petition, were affixed by him on a conspicuous part of the appellant's residence in the presence of two witnesses, namely, Sh. Sanjeev Kumar and *Chowkidar* Sh. Paswan. The report of the process server, duly affirmed before the *Nazir* of the Court at Madhepura, is part of the lower court record. The service was thus, effected on the appellant as per the procedure laid down in Rule 17 of Order V CPC.

19. On the basis of the report of the process server, and regard being had to the previous refusal, the learned Additional District Judge, Delhi vide order dated 08.04.2003 proceeded *ex-parte* against the appellant. We are also of the view that the procedure adopted for effecting the service on appellant was proper and the service was complete. There is no irregularity in the service of summons and the learned Additional District Judge has rightly held that the appellant had been duly served with the summons in the divorce petition.

20. There is another aspect of the matter. Even if there is any irregularity in the service of summons, still in view of the second proviso to Rule 13 of Order IX an *ex-parte* decree cannot be set aside on the ground of irregularity in service of summons, if the Court is satisfied that appellant had notice of the date of hearing and had sufficient time to appear in the Court. At this juncture, it is apposite to reproduce the provisions of Order IX Rule 13 CPC, which reads as under:

> ***"13. Setting aside decree ex parte against defendant.***—*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 than no Court shall set aside a hdecree 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 an any ground other than the ground that the appellant has withdrawn the appeal, no application shall lie under this rule for setting aside that ex parte decree."

21. The Supreme Court in ***Parimal Vs. Veena @ Bharti***, *(2011) 3 SCC 345*, while noting the mandatory nature of the second proviso to Rule 13 of Order IX CPC, observed that the Court shall not set aside the *ex parte* decree on mere irregularity in the service of summons in a case where the defendant otherwise, had notice of the date of hearing and sufficient time to appear in the court. The relevant para 12 of the judgment reads as under :-

"12. It is evident from the above that an ex parte decree against a defendant has to be set aside if the party satisfies the court that summons had not been duly served or he was prevented by sufficient cause from appearing when the suit was called on for hearing. However, the court shall not set aside the said decree on mere irregularity in the service of summons or in a case where the

> *defendant had notice of the date and sufficient time to appear in the court. The legislature in its wisdom, made the second proviso mandatory in nature. Thus, it is not permissible for the court to allow the application in utter disregard of the terms and conditions incorporated in the second proviso herein."*
>
> *(emphasis supplied)*

22. Now, reverting to the facts of the case at hand; no doubt the factum of divorce petition having been filed by the respondent in the Court at Delhi, has been mentioned in the - (i) application for anticipatory bail filed by the respondent husband in Case No.577/2001 initiated by the appellant under Sections 498A/504/406 IPC; (ii) order dated 25.02.2002 of Ld. Session Judge, Madhepura rejecting the bail application filed by the family members of the respondent/husband in the aforesaid case; (iii) reply to show cause notice submitted by the respondent in the Misc. No.27/2001 filed by the appellant in the court of CJM, First Class, Madhepura claiming maintenance from the respondent; and (iv) order dated 16.09.2002 passed by the High Court of Patna in Crl.Misc.No.12273/2002 granting anticipatory bail to the respondent; but these documents do not indicate other details *apropos* the divorce petition *viz.*, the number of the divorce petition, the Court before which it is pending and the next date of hearing. Therefore, on the basis these documents at the best, knowledge of the divorce petition pending in the Court at Delhi could be attributed to the appellant but it cannot be said with certainty that she had notice of the "date of hearing", which is a requirement under the second proviso to Rule 13 of Order IX CPC for not setting aside an *ex parte* decree on the ground of irregularity in the service of summons.

23. However, the following admissions made by the appellant and her father in their cross-examination in maintenance proceedings pending in the Court of

Judicial Magistrate, First Class Madhepura, cannot be ignored.

(i) The relevant part of the appellant's statement dated 30.11.1992 reads as under:

> *"12. My husband has filed the case of divorce against me. I don't know that when the case of divorce was filed."*
>
> *(emphasis supplied)*

(ii) The relevant part of the statement dated 02.12.2022 of the appellant's father, Shri Vijay Kumar Bhagat, reads as under:

> *"19. My daughter Seema used to go to Bakhtiyarpur. I have not attended the Court case of divorce filed by my son-in-law. I have learnt about divorce case recently. Advocate sahib has taken the copies etc. of divorce case. It is not correct that divorce case was filed at first."*
>
> *(emphasis supplied)*

Conjoint reading of the statements of the appellant and her father makes it evident that the appellant has been served with summons and she had handed over the copy of the divorce petition to her Advocate, which leads to the conclusion that the appellant had the notice of the "date of hearing" in the divorce petition and had sufficient time to appear in the Court and answer respondent's claim.

24. Notably, the divorce suit filed in the court at Saharsa was withdrawn by the respondent on 21.08.2001, while the divorce petition was filed by him in the District Court, Delhi on 15.10.2001, therefore, the admission of appellant and her father made subsequently in their statements on 30.11.2002 and 02.12.2002, respectively, as regard the divorce case having been filed by the respondent, undoubtedly alludes to the divorce petition filed in Delhi.

25. In the circumstances, the contention of the appellant that she was not duly served and that she had no knowledge of the divorce petition filed by the respondent before the Court in Delhi is bereft of any merit.

26. The contention of the appellant that the respondent withdrew the divorce petition filed before the District Judge, Saharsa for filing it before the District Court, Madhepura but the respondent committed fraud upon the appellant by filing it before the District Court in Delhi instead of Madhepura, is also without substance. The order dated 21.08.2001 of District Judge, Saharsa vide which Divorce Petition no.12/2001 was withdrawn from Court at Saharsa does not record that the divorce petition is being withdrawn for being filed at Madhepura. Rather the order mentions that the divorce petition is being withdrawn for being filed before the Court of proper jurisdiction. The material part of the said order reads as under :

> *"A petition has been filed on behalf of plaintiff/petitioner praying there in that to return the plaint in order to get it filed in a Court of proper jurisdiction as there appears no jurisdiction of this case in the instant case. Heard arguments for the Plaintiff/Petitioner.*
>
> *Since the plaintiff/Petitioner himself wants to withdraw the suit, let the plaint of this suit be returned to him accordingly. Accordingly this suit stands disposed of."*

The appellant, in any case, could have objected to the territorial jurisdiction of the Court at Delhi to entertain the divorce petition filed by the respondent after entering her appearance in the divorce petition, but she chose not to appear despite service and adequate notice of the date of hearing.

27. Another submission of the learned counsel for the respondent is that after seventeen months of the *ex-parte* decree, the respondent has remarried and now has two children from the second marriage – one son aged about 16

years and a daughter aged about 15 years. During the course of arguments, we have specifically put to the appellant whether she admits second marriage of the respondent, to which her reply is evasive. She states that the second marriage of the respondent is not a subject matter of the present appeal and it is for the court to decide about the legal status of the second marriage. The appellant did not, however, deny or dispute the factum of the respondent's second marriage. On the contrary, the respondent through an affidavit dated 08.08.2007 has placed on record the fact that he has remarried on 24.11.2004.

28. The legal status of the respondent's second marriage and its bearing on the present appeal, however, has to be tested on the anvil of Section 15 of the Act, which reads thus:

> *"**15. Divorced persons when may marry again.**—When a marriage has been dissolved by a decree of divorce and either there is no right of appeal against the decree or, if there is such a right of appeal, the time for appealing has expired without an appeal having been presented, or an appeal has been presented but has been dismissed, it shall be lawful for either party to the marriage to marry again."*

29. In terms of Section 15 of the Act, either party to the marriage is well within his or her right to marry when the time for filing an appeal has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed. The bar or impediment to contract a second marriage operates during the pendency of appeal only if an appeal is preferred within the period of limitation. In other words, the provision enables parties to marry again only after the decree of divorce has become final.

30. The provision of Section 15 of the Act has been subject matter of a recent decision of the Supreme Court in ***Krishnaveni Rai v. Pankaj Rai and***

***Anr.*, (2020) 11 SCC 253.** In that case the ex-husband of appellant wife remarried as no appeal was filed within period of limitation. The appeal was preferred by the appellant wife almost one year after the expiry of period of limitation. In this factual backdrop, the Supreme Court held that bar of Section 15 was not attracted, it was lawful for the ex-husband to remarry and the appeal was infructous from the inception. The relevant extract of the judgment reads as under:

> *"28. Section 15 clarifies that when a marriage has been dissolved by a decree of divorce, and there is no right of appeal against the decree, or if there is such a right of appeal, the time for appealing has expired without an appeal having been preferred, or an appeal has been presented but the same has been dismissed, it shall be lawful for either party to the marriage to marry again. Had it been the legislative intent that a marriage during the pendency of an appeal should be declared void, Section 11 would expressly have provided so.*
>
> *29. As held by this Court in Anurag Mittal v. Shaily Mishra Mittal [Anurag Mittal v. Shaily Mishra Mittal, (2018) 9 SCC 691 : (2018) 4 SCC (Civ) 550] , the object of Section 15 is to provide protection to the person who had filed an appeal against the decree of dissolution of marriage and to ensure that such appeal was not frustrated. The protection afforded by Section 15 is primarily to a person contesting the decree of divorce. As observed by Bobde, J. in his concurring judgment in Anurag Mittal [Anurag Mittal v. Shaily Mishra Mittal, (2018) 9 SCC 691 : (2018) 4 SCC (Civ) 550] : (SCC pp. 702-703, paras 31 & 33)*
>
> *"I am in agreement with the view taken by Nageswara Rao, J. but it is necessary to state how the question before us has already been settled by the decision in Lila Gupta v. Laxmi Narain [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . Even when the words of the proviso were found to be prohibitory in clear negative terms — "it shall not be lawful", etc., this Court held that the incapacity to marry imposed by the proviso did not lead to an inference of nullity, vide para 9 of Lila Gupta [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . It is all the*

more difficult to infer nullity when there is no prohibition; where there are no negative words but on the other hand positive words like "it shall be lawful". Assuming that a marriage contracted before it became lawful to do so was unlawful and the words create a disability, it is not possible to infer a nullity or voidness vide paras 9 and 10 of Lila Gupta case [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] . …

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33. What is held in essence is that if a provision of law prescribes an incapacity to marry and yet the person marries while under that incapacity, the marriage would not be void in the absence of an express provision that declares nullity. Quae incapacity imposed by statute, there is no difference between an incapacity imposed by negative language such as "it shall not be lawful" or an incapacity imposed by positive language like "it shall be lawful (in certain conditions, in the absence of which it is impliedly unlawful)". It would thus appear that the law is already settled by this Court that a marriage contracted during a prescribed period will not be void because it was contracted under an incapacity. Obviously, this would have no bearing on the other conditions of a valid marriage. The decision in Lila Gupta case [Lila Gupta v. Laxmi Narain, (1978) 3 SCC 258] thus covers the present case on law."

31. In any case, the bar of Section 15 is not at all attracted in the facts and circumstances of this case, where the appeal from the decree of divorce had been filed almost a year after expiry of the period of limitation for filing an appeal. Section 15 permits a marriage after dissolution of a marriage if there is no right of appeal against the decree, or even if there is such a right to appeal, the time of appealing has expired without an appeal having been presented, or the appeal has been presented but has been dismissed. In this case, no appeal had been presented within the period prescribed by limitation.

32. The bar, if any, under Section 15 of the Hindu Marriage Act applies only if there is an appeal filed within the period of limitation, and not afterwards upon condonation of delay in filing an appeal unless of course, the decree of divorce is stayed or there is an interim order of court, restraining the parties or any of them from remarrying during the pendency of the appeal.

> *33. As observed above, the appeal was infructuous for all practical purposes, from the inception, since the appellant's ex-husband had lawfully remarried after expiry of the period of limitation for filing an appeal, there being no appeal till then."*
>
> *(emphasis supplied)*

31. When confronted with the above decision in **Krishnaveni Rai (supra)**, the appellant submits that it will not apply in case where the husband has obtained *ex parte* decree of divorce and that too by committing fraud.

32. It is trite that the dissolution of marriage is complete once the decree is made. A decree of divorce breaks the marital tie and the parties forfeit the status of husband and wife in relation to each other. Each one becomes competent to contract another marriage as provided by section 15 of the Act[1]. In law the effect of *ex parte* decree of divorce is not different from a contested one. Even Section 15 of the Act does not make any distinction between a contested decree and an *ex parte* decree. Therefore, in case of an *ex parte* decree of divorce also it shall be lawful for either party to the marriage to marry again if no appeal is filed against such decree within the period of limitation.

33. In the present case no appeal was preferred within the period of limitation or even thereafter. The application under Order 9 Rule 13 CPC was also filed after seventeen months from the date of *ex parte* decree as against limitation period of thirty days from the date of decree as provided under Article 123 of the Limitation Act, despite the appellant having been duly served with summons. In the circumstances, it was lawful for the respondent

[1] *Smt. Lila Gupta vs. Laxmi Narain, AIR 1978 SC 1351*

husband to solemnize another marriage. We have already observed that no fraud has been committed by the respondent. Summons was also served on the appellant as per the procedure prescribed in law. This being the position, an application under Order 9 Rule 13 CPC filed by the appellant a day after the second marriage was solemnized by the respondent-husband, was infructuous for all practical purposes, from the very inception. So is the present appeal.

34. In view of the above, there is no merit in the appeal and accordingly, the same is dismissed.

VIKAS MAHAJAN, J.

SANJEEV SACHDEVA, J.

APRIL 21, 2023
MK