

aside the ex-parte divorce decree obtained by the appellant-husband against the respondent dated 30.10.2021.

2) The parties were married on 19.10.1996. They were living as husband and wife under the same roof in Village Maanpur, Patti Sukhrow, Tehsil Kotdwar, District Pauri Garhwal. While so living together as husband and wife, the appellant filed the divorce petition under Section 13(1)(ia) of the Hindu Marriage Act on the ground of cruelty against the respondent vide Matrimonial Case No. 05 of 2013, in the Court of the Family Judge, Kotdwar, Pauri Garhwal. The memo of parties / cause title of the said divorce petition disclosed the address of both the parties as aforesaid, namely, Village Maanpur, Patti Sukhrow, Tehsil Kotdwar, District Pauri Garhwal. The parties were blessed with three sons, namely, Deepak, Kulbhushan and Paras, who were 16 years, 14 years and 10 years old, when the divorce petition was preferred in the year 2013. In the divorce proceedings, the respondent-wife was treated as served with the summons on the basis of the Process Server's report which showed acknowledgement of the summons by her, in her own hand. Since she did not appear to contest the divorce proceedings, she was proceeded ex-

parte on 12.08.2013. The ex-parte divorce decree came to be passed by the Family Court on 30.10.2021.

3) During the course of the pendency of the divorce proceedings, the appellant did not inform the Court of any alleged change of address of the respondent to claim that she had moved out of her matrimonial home. Thus, as per the record, she continued to reside with the appellant even during the pendency of the divorce proceedings under the same roof.

4) Pertinently, even in the present appeal, the address of both the parties is shown to be the same, which shows that the respondent continues to reside in her matrimonial home even now.

5) After the appellant had obtained the ex-parte decree of divorce on 30.10.2021, the respondent-wife moved the aforesaid two applications on 23.05.2022 - one under Section 5 of the Limitation Act to seek condonation of delay in moving the second application under Order 9 Rule 13 CPC, and the other, to seek the setting aside of the ex-parte decree of divorce. The respondent claimed that the conduct of the appellant in relation to other woman gave rise to a controversy

between the parties and, at that stage, the appellant disclosed to the respondent that he had already obtained a decree of divorce against her. It is only thereafter, that she moved the aforesaid two applications on 23.05.2022. In the application, the respondent stated in paragraph 8, as follows:

" कि पत्रावली पर जो समन की प्रति प्रार्थिनी/प्रतिवादिनी को प्राप्त होना दर्शाया है वह प्रार्थिनी/प्रतिवादिनी द्वारा प्राप्त नहीं है बल्कि विपक्षी/वादी ने ही प्रार्थिनी/प्रतिवादिनी के हस्ताक्षर बनाकर प्राप्त की है क्योंकि विपक्षी/वादी व प्रार्थिनी/प्रतिवादिनी एक ही घर में रहते हैं तथा पत्रावली पर जो पो0ओ0 की रसीद संलग्न है वह भी विपक्षी/वादी द्वारा ही प्राप्त किया गया होगा इस तरह विपक्षी/वादी ने प्रार्थिनी/प्रतिवादिनी को अन्धकार में रखकर माननीय न्यायालय को गुमराह कर एक पक्षीय तलाक की डिक्री प्राप्त की है जो खारिज होने योग्य है।"

6) The application was contested by the appellant by filing his reply / objection, wherein he stated in paragraph 5, as follows:

" यह कि माननीय न्यायालय द्वारा प्रार्थिनी को बजरिये विपक्षी/वादी नोटिस/समन पैरवी की गयी थी जोकि कागज संख्या 9क है जिस पर प्रार्थिनी लज्जी देवी के हस्ताक्षर बने हैं तथा लज्जी देवी पर तामीला पर्याप्त है तथा माननीय न्यायालय के तामीली वाहक की आख्या परिलक्षित है। इस प्रकार प्रार्थिनी को माननीय न्यायालय के तामीली वाहक द्वारा दिनांक 11.05.2013 को वाद की पूर्ण जानकारी प्राप्त हो गयी थी प्रार्थिनी को वाद में उपस्थित होकर अपना उत्तर/जवाब देने का पर्याप्त समय था किन्तु प्रार्थिनी ने जानबुजकर बावजूद जानकारी माननीय न्यायालय में उपस्थित नहीं हुई और ना ही वादी के वाद का कोई खण्डन किया जिस कारण माननीय न्यायालय द्वारा दिनांक 12.08.2013 को मूल वाद में एक पक्षीय सुनवाई के आदेश पारित किये गये।"

7) In the impugned order, in paragraph 7, the Family Court observed as follows:

“Learned counsel for the applicant argued that the applicant had not received the summons sent by registered post and the summons paper number 9A which the opposition is asking to be served on the petitioner, was also got signed by the applicant saying that in any case he has to testify and kept the paper with him and the applicant never got to know about the pending divorce case against her. In the light of the above discussion in this application, it has been found that the opposition is also residing with the applicant, therefore, in view of the relationship and mutual trust between the husband and wife, the opposition cannot ask any of his/her wife/appellant. The fact of getting the paper signed also cannot be denied. Therefore, the petitioner not having the information of suit 05/2013 in advance also appears to be justified by the statement made by the applicant. In addition to the applicant, if the summons has been sent by post, it is also shown from the postal receipt paper number 12A, to be sent to the joint residence of the applicant and the opposition, in such a situation, in view of the conduct of the opposition, there is a strong possibility that the said post was sent by the opposition himself and has been received by him, and the applicant does not have any information regarding the said registered post, because no copy of the acceptance of the said registered post has been received on record, which should show that the said registered post has been received by the applicant.”

8) We may observe that the aforesaid quotation is from a translation of the impugned order produced by the appellant, and is not the original text from the impugned order itself.

9) Paragraph 7 from the impugned order, which is in Hindi language, reads as follows:

"प्रार्थिनी के विद्वान अधिवक्ता ने तर्क दिया कि प्रार्थिनी को पंजीकृत डाक से प्रेषित समन प्राप्त नहीं हुआ और जो समन कागज संख्या क9 विपक्षी, प्रार्थिनी पर तामील होना कह रहा है उस पर भी विपक्षी ने प्रार्थिनी से यह कहकर हस्ताक्षर करवाये की किसी मामले में गवाही देनी है और उस कागज को अपने पास रख लिया और प्रार्थिनी को उसके विरुद्ध लम्बित तलाक के मुकदमें की कभी जानकारी नहीं हो पायी। इस प्रार्थना पत्र में उपर की गयी परिचर्चा के प्रकाश में यह तथ्य पाया जा चुका है कि विपक्षी भी प्रार्थिनी के साथ निवास कर रहा है, अतः ऐसे में पति-पत्नि के रिश्ते एवं आपसी विश्वास को देखते हुए विपक्षी द्वारा अपनी पत्नि/ प्रार्थिनी से किसी कागज पर हस्ताक्षर कराने के तथ्य से भी इन्कार नहीं किया जा सकता है। अतः प्रार्थिनी को वैवाहिक वाद संख्या 05/2013 की जानकारी पूर्व में नहीं होना भी प्रार्थिनी द्वारा प्रकट किये गये कथन से न्यायोचित प्रतीत होता है। इसके अतिरिक्त प्रार्थिनी को जो समन डाक द्वारा प्रेषित किया गया है वह भी प्रार्थिनी व विपक्षी के संयुक्त निवास करने वाले पते पर प्रेषित करना डाक रसीद कागज संख्या 12क से दर्शित है, ऐसे में विपक्षी के आचरण को देखते हुए इस तथ्य की प्रबल संभावना है कि उक्त डाक विपक्षी द्वारा स्वयं प्राप्त कर ली गयी हो और प्रार्थिनी को उक्त पंजीकृत डाक के संबंध में कोई जानकारी न हो, क्योंकि उक्त पंजीकृत डाक की कोई प्राप्ति स्वीकृति की प्रति अभिलेख पर प्राप्त नहीं है, जिससे प्रकट हो कि उक्त पंजीकृत डाक प्रार्थिनी द्वारा प्राप्त की गयी हो।"

10) The submission of learned counsel for the appellant is that the Family Court has, while passing the impugned order under Order 9 Rule 13 CPC, gone beyond the pleadings of the parties. It was the case of

the respondent-wife that she had not signed the summons, and that her signatures on the summons had been forged by the appellant. However, in paragraph 7 of the impugned order, the Family Court has proceeded on the basis that the signature of the respondent-wife had been obtained by the appellant by misrepresenting to her that her signatures are required in relation to some case without disclosing anything further. Therefore, it is argued, that the impugned order suffers from a patent illegality and deserves to be recalled. He further submits that since the respondent had been proceeded ex-parte way back on 12.08.2013, after due notice of summons upon her, her applications under Section 5 of the Limitation Act and under Order 9 Rule 13 CPC should have been dismissed.

11) We have heard learned counsel for the appellant and perused the record.

12) We may observe that when the appeal was taken up by us for hearing on 23.09.2022, after hearing counsel for the appellant, we had expressed the, *prima facie*, view that the appellant appears to have played fraud upon the respondent, and we also informed learned counsel that we would be inclined to dismiss the

appeal - in case, we do not agree with the submissions advanced by the counsel for the appellant, with exemplary costs in the light of the appellant's conduct. Counsel for the appellant had taken an adjournment to take instructions, and the matter was posted for today. Today, the appellant is also present in Court, and in our presence, counsel for the appellant has again taken instructions, and the appellant insists that the present appeal be decided on merits. Accordingly, we proceed to decide the present appeal.

13) It is not in dispute that the parties, who were married way back on 19.10.1996, continued to live as husband and wife even when the divorce petition was preferred by the appellant on 04.01.2013. The appellant, while filing the petition and providing his own address and the address of his wife, i.e., the respondent, did not claim that they are residing separately, in different portions of their house. The address of both the parties was the same as taken note of hereinabove. Thus, it is clear that the divorce petition was preferred by the appellant while living with the respondent as her husband. The conjugal relationship between the parties, therefore, continued to be maintained as before, even after filing of the petition. It would, therefore, naturally follow that there would have been condonation of the alleged matrimonial misconduct of

the respondent, as the parties continued to reside under the same roof as husband and wife, even after the filing of the divorce petition. Not only this, even after obtaining the ex-parte divorce on 30.10.2021, the parties continued to live under the same roof as husband and wife, at least till the respondent learnt of the ex-parte decree against her dated 30.10.2021.

14) The three sons of the parties, who were 16 years, 14 years and 10 years in the year 2013, when the divorce petition was preferred, would have all attained majority when the application of the respondent-wife to seek the setting aside of the ex-parte decree was moved. The Family Court observes in the impugned order, that none of them were produced before the Court by the appellant to establish that the parties were not residing as husband and wife after the filing of the divorce petition. Pertinently, the case of the respondent, in her application was that she was residing with the appellant and her children in the same house as a single family. This fact was not even denied by the appellant in his reply to the respondent's application under Order 9 Rule 13 CPC.

15) So far as the submission of learned counsel for the appellant premised on the averment made in paragraph 8 of her application under Order 9 Rule 13 CPC

is concerned, we do not find any merit in the same. This is for the reason that, in the normal course, while living as husband and wife, there is complete and implicit faith that the two spouses repose in each other, and are expected to repose in each other. Therefore, if the husband were to - casually, ask his wife to sign a particular document, she would unhesitatingly sign the same without even enquiring as to what is the document on which her signatures are being obtained. She would not even care to remember the fact that she has actually signed a document on the instructions of her husband. It is in this context that the averment made in paragraph 8 of her application has to be viewed. When she made the averment, she was certain that she had not signed any summons in a divorce case initiated against her by the husband. The appellant, however, seems to think that he can get away with the aforesaid fraudulent conduct by clutching on to her averment made in paragraph 8 of her application, and by insisting that the summons in the divorce proceedings were actually signed by her. Even if she did actually sign the summons, the same is neither here nor there, as he continued to cohabit with his wife, i.e., the respondent by treating his wife all through - before filing the divorce petition; after filing the divorce petition, and; even after obtaining the ex-parte divorce decree.

16) It appears that the Family Court has taken note of the aforesaid circumstances while passing the impugned order, and the observation made in paragraph 7 of the impugned order, stand from a correct understanding of the factual situation, considering the fact that the parties were residing as husband and wife, and also keeping in view the social context in which Indian family exist - where the spouses, particularly the wives, exhibit implicit faith and trust in their husbands.

17) The appellant, by his aforesaid conduct, has gravely undermined the institution of marriage which is sacrosanct amongst the Hindus - the religion to which the parties belong. If he had to obtain divorce, he should have fairly and squarely separated from his wife before filing the divorce petition, and he should not have been living with her. However, he continued to live with her as her husband even after filing of the divorce petition, and obtained the ex-parte divorce. The only conclusion that we can draw is that the appellant misled his wife into, and contrived to obtain her signatures on the summons and get the Process Server's report to show that she had been served in the divorce proceedings, while she continued to live with the appellant as his wife in complete ignorance of the said developments. If there was any truth in the case of the appellant, he would have produced his children to

support his plea that he was not residing with the respondent as her husband throughout the proceedings, and even after obtaining the ex-parte divorce decree.

18) We, therefore, dismiss this appeal with costs quantified at Rs.1,00,000/- (Rupees one lac only). Out of the said costs, Rs. 50,000/- shall be paid to the respondent-wife, and the remaining Rs.50,000/- shall be deposited with the State Legal Services Authority within four weeks. In case, the appellant does not deposit the said costs, his divorce petition, which has been restored, would be liable to be dismissed for non-prosecution.

Stay Application (IA No. 01 of 2022) also stands disposed of.

VIPIN SANGHI, C.J.

R.C. KHULBE, J.

Dt: 26th SEPTEMBER, 2022
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