

# RAJASTHAN HIGH COURT

Basant Kumar Jha

Vs.

Mithlesh Jha

Civil Misc. Appln. No. 58 of 2007, Civil Misc. Appeal No. 790 of 2005.  
(Shiv Kumar Sharma and Guman Singh, JJ.)

02.08.2007

## ORDER

**Shiv Kumar Sharma and Guman Singh, JJ. –**

1. Family Court, Ajmer vide judgment and decree dated January 29, 2005 dismissed the petition moved by Basant Kumar Jha (hereinafter referred to as 'husband') against Smt. Mithlesh Jha (hereinafter referred to as 'wife') under section 13 of the Hindu Marriage Act, 1955. Being aggrieved by the said judgment and decree the husband preferred Civil Misc. Appeal. When the appeal was called for hearing the wife and her counsel did not appear and this Court vide judgment dated May 30, 2007 allowed the appeal. Now the wife has filed application under Order 41 Rule 21 of the Civil Procedure Code seeking rehearing of appeal.
2. We have heard learned counsel for the parties and carefully weighed the material on record.
3. A look at the order sheets dated May 14, 2007 and May 28, 2007 demonstrates that neither the wife nor her counsel appeared before this Court and the Court proceeded to hear and decide the appeal *ex parte* in view of sub-rule (2) of Rule 17 of Order 41, C. P. C.
4. Order 41, Rule 21, C. P. C. however provides that a respondent against whom an appeal is heard and decided *ex parte* is entitled to a re-hearing of the appeal provided he proves either that he had not been duly served, or that he was prevented by sufficient cause from appearing when the appeal was called for hearing.
5. The wife stated in the application that she did not have the knowledge that May 28, 2007 was fixed and when the matter had been taken up for hearing her counsel could

not appear in the Court since he was engaged in another Court. The application was supported by the affidavit of the wife.

6. The husband, in the reply, raised preliminary objections in regard to the maintainability of the application. It was stated that absence of wife and her counsel was not bona fide. This Court called the counsel for the wife many a times but he deliberately did not choose to appear in the Court. The wife also had knowledge of the date of hearing but she took the direction of the Court casually. On the date of hearing the wife was not involved in any training programmed. Since wife was not prevented by sufficient cause from appearing in the Court on the date of hearing, the application deserves to be dismissed.

7. Non-appearance of the Advocate at the time of hearing of revision was treated sufficient ground by the Apex Court in *Savithri Amma Seethamma v. Aratha Karthy* <sup>1</sup> In para 2 of the Judgment, Their Lordships observed as under :-

"Now it is obvious that the appellant could not appear at the hearing of the revision application preferred by the first respondent because the Advocate engaged by him was occupied in another Court and this fact was stated by the learned Advocate in the affidavit made by him in support of the application for rehearing. We are, therefore, of the view that on the facts and circumstances of the present case, the appellant had sufficient cause for not being present at the hearing of the revision application and the learned Single Judge of the High Court ought, in the circumstances, to have allowed the application and re-heard the civil revision petition applying the principle underlying Order 41 Rule 21 of the Civil Procedure Code."

8. In *Abdul Wajid v. Visvanathan* <sup>2</sup> Full Bench of Mysore High Court however held that where the counsel appeared but refused to take part in hearing and arguments were heard and decree was passed, the application for re-hearing of appeal under Order 41 Rule 21 read with Section 151, C. P. C. was not maintainable.

9. In *Roop Kanwar v. Deputy Commissioner, Kheri* <sup>3</sup> the Division Bench of Oudh High Court indicated that the advocate for the appellant, despite awareness, did not appear in Court, mere fact that he lived in another place was not a ground for not appearing on the date of hearing, in absence of an affidavit of the advocate to show what prevented him from appearing.

10. In the case on hand as already noticed, learned counsel for the wife acted casually and did not take proper steps to assist this Court on her behalf when the case was

called for hearing. We in such a situation, if penalise the wife, it would be against principles of substantive justice. In *Prem Lata Nahata v. Chandi Prasad Sikaria* <sup>4</sup> the Supreme Court propounded that the procedure is the handmaid of justice and not its mistress.

11. In the family matters the Court is required to evolve its own procedure in bringing about settlement between the parties. The Family Courts are free from the shackles of the rigid rules of procedure by which ordinary Courts are bound.

12. Learned counsel for the husband then made attempt to narrowly interpret Order 41 Rule 21, C. P. C., but we find ourselves unable to agree with the submission.

13. Upshot of above discussion is that since the wife, in whose favor learned Family Court passed the decree, has shown sufficient ground for her absence on the date of hearing, she is entitled to re-hearing in view of Order 41 Rule 21, C. P. C.

14. Resultantly, we allow the application and recall the ex-parte judgment and decree dated May 30, 2007.

15. The matter shall now be placed for re-hearing before the Regular Bench.

Application allowed.

Cases Referred.

1. (AIR 1983 SC 318)
2. (AIR 1950 Mysore 55)
3. (AIR 1945 Oudh 303)
4. (2007) 2 SCC 551: (AIR 2007 SC 1247)