

KARUNA KANSAL

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v

HEMANT KANSAL & ANR.

(Civil Appeal Nos. 4847–4848 of 2019)

MAY 09, 2019

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**[ABHAY MANOHAR SAPRE AND  
DINESH MAHESHWARI, JJ.]**

*Code of Civil Procedure, 1908: Or. 43, r. 1(d) – Appeal from orders – Appeal u/Or. 43 r. 1(d) by first wife-respondent no.2 against the husband-respondent no.1, against the order passed by the trial court refusing to condone the delay in filing application by first wife and rejection to set aside the exparte decree for dissolution of marriage of respondent no. 1 and 2 – High Court set aside the exparte decree and issued directions that the respondent no. 1 and 2 to live together as husband and wife – Review by appellant-second wife – Dismissed by the Division Bench – On appeal held: High Court, even after taking note of the factum of the marriage of the appellant with respondent No.1, did not advert to the consequences thereof and gave directions, which may not be capable of due performance – High Court passed the order without hearing the appellant and did not issue any notice of the appeal to her – Thus, the impugned order wholly without jurisdiction and legally unsustainable – Matter remanded to the High Court for deciding the appeal afresh after impleading the appellant as a party respondent in the appeal before the High Court – Party/Parties – Necessary parties – Impleadment.*

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#### **Allowing the appeal, the Court**

**HELD : 1.1** On perusal of the impugned order, it is found that the High Court, even after taking note of the factum of the marriage of the appellant with respondent No.1, has not adverted to the consequences thereof and has given such directions, which may not be capable of due performance. In such a situation, where the impugned order was passed without hearing the appellant and not issuing any notice of the appeal to her and yet giving such directions, which may not be capable of being carried out,

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- A the impugned order is wholly without jurisdiction and legally unsustainable. [Para 11, 12] [480-C-D]
  - 1.2 It is apart from the fact as to whether such directions could at all be issued; and secondly, whether such directions were necessary in an appeal between the respondents *inter se* for its
- B disposal wherein the only question involved was as to whether the Family Court (ADJ) was justified in declining to condone the delay in filing the application filed by respondent No.1 under Order 9 Rule 13 CPC and, if so, on what grounds. The impugned orders are set aside. The case is remanded to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law after impleading the appellant as a party respondent in the appeal before the High Court and persuade the parties to settle the issues. [Paras 13, 14, 16] [480-E-F; H; 481-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 4847-4848 of 2019.

- D From the Judgment and Order dated 17.10.2014 of the High Court of Madhya Pradesh, Bench at Indore in Review Petition No. 48 of 2014 and order dated 09.08.2011 in M.A. No. 709 of 2005.

- E A. K. Chitale, Sr. Adv., Sumit Kumar Sharma, Neeraj Srivastava, Rahul Tripathi, Kartik Chitale, Niraj Sharma, Advs. for the Appellant.

Ms. Pankhuri, Tushar Singh, S. K. Verma, Advs. for the Respondents.

The Judgment of the Court was delivered by

- F ABHAY MANOHAR SAPRE, J. 1. Leave granted.

- G 2. These appeals are filed against the final judgment and order dated 17.10.2014 passed by the Division Bench of the High Court of Madhya Pradesh at Indore in Review Petition No.48 of 2014 whereby the Division Bench of the High Court dismissed the said Review Petition filed by the appellant herein and upheld the order dated 09.08.2011 passed by the Single Judge of the High Court in Miscellaneous Appeal No.709 of 2005.

3. A few facts need mention hereinbelow for the disposal of these appeals, which involve a short point.

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4. The dispute, which is the subject matter of these appeals, is between the husband (respondent No.1) and his two wives (appellant and respondent No.2). It arises out of the matrimonial suit decided by the Family Court between respondent Nos. 1 and 2.

5. By impugned order dated 09.08.2011, the High Court disposed of the appeal (M.A. No.709/2005) filed by respondent No.2 (first wife) against respondent No.1 (husband) under Order 43 Rule 1 (d) of the Code of Civil Procedure, 1908 (hereinafter referred to as “CPC”) against the order dated 10.12.2004 passed by the Additional District Judge, Kukshi in MJC No. 35 of 2003.

6. By order dated 10.12.2004, the ADJ had declined to condone the delay in filing the application filed by respondent No.2 under Order 9 Rule 13 of the CPC and thereby declined to set aside the *ex parte* decree dated 23.08.2003 passed in C.S. No. 09-A/02 by the said Court.

7. The appellant herein is the second wife of respondent No.1 (husband). It is the case of the appellant that after passing of the *ex parte* decree for dissolution of marriage of respondent No.1 with respondent No.2 and expiry of period of limitation for filing appeal, respondent No.1(husband) entered into matrimony with her (appellant). On the other hand, respondent No.2 (first wife of respondent No.1) filed the aforesaid appeal of which the appellant had no knowledge, but the fact of respondent No.1 having married the appellant was indeed stated before the High Court. However, when respondent No.1 stated that she was having no problem with the appellant, the High Court set aside the *ex parte* decree passed on 23.08.2003 in C.S. No.09-A of 2002 and directed that, “*the parties shall live together as husband and wife.*” The appellant herein (second wife of respondent No.1), on coming to know of the aforesaid order dated 09.08.2011 passed by the Single Judge of the High Court in M.A. No.709/2005, filed review petition (R.P. No.48 of 2014) before the High Court. The Division Bench of the High Court, by order dated 17.10.2014, dismissed the said review petition. Challenging both the orders, the appellant has filed the present appeals by way of special leave in this Court.

8. Heard Mr. A.K. Chitale, learned senior counsel for the appellant and Ms. Pankhuri and Mr. S.K. Verma, learned counsel for the respondents.

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- A        9. Having heard the learned counsel for the parties and on perusal of the record of the case, we are constrained to allow these appeals, set aside the impugned orders and remand the case to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law.
- B        10. The need to remand the case has occasioned because we find that the appellant was not made a party to the appeal and nor she was heard by the High Court.
- C        11. On perusal of the impugned order dated 09.08.2011, we find that the High Court, even after taking note of the factum of the marriage of the appellant with respondent No.1, has not adverted to the consequences thereof and has given such directions, which may not be capable of due performance.
- D        12. In such a situation, where the impugned order was passed without hearing the appellant and not issuing any notice of the appeal to her and yet giving such directions, which may not be capable of being carried out, the impugned order, in our view, is wholly without jurisdiction and legally unsustainable and it has to be set aside on this short ground alone.
- E        13. It is apart from the fact as to whether such directions could at all be issued; and secondly, whether such directions were necessary in an appeal between the respondents *inter se* for its disposal wherein the only question involved was as to whether the Family Court (ADJ) was justified in declining to condone the delay in filing the application filed by respondent No.1 herein under Order 9 Rule 13 of the CPC and, if so, on what grounds.
- F        14. In view of the foregoing discussion, the appeals succeed and are accordingly allowed. The impugned orders are set aside. The case is remanded to the High Court for deciding the miscellaneous appeal afresh on merits in accordance with law after impleading the appellant herein as a party respondent in the appeal before the High Court.
- G        15. We, however, consider it apposite to mention that admittedly during pendency of the litigation, certain events have taken place which have bearing over the rights of the parties.
- H        16. It is for this reason, we request the High Court to implead the appellant herein as a party in the miscellaneous appeal and persuade the

parties to settle the issues, if possible, on some mutually acceptable terms A  
to give quietus to this long pending matrimonial dispute, since it is not in  
the interest of any of the parties to these appeals to continue this litigation.

17. It is only if the High Court eventually finds that the parties are B  
not able to settle amicably for any reason, the miscellaneous appeal be  
decided on its merits in accordance with law without being influenced  
by any observations made in the impugned order and in this order.

Nidhi Jain

Appeal allowed.