Andhra High Court
Maganti Krishna Durga, vs Maganti Anil Kumar, on 2 April, 2015

HONOURABLE SRI JUSTICE R.SUBHASH REDDY AND HONOURABLE Dr. JUSTICE B.SIVA SANKARA RAO

C.M.A.No.3385 OF 2004

02-04-2015

Maganti Krishna Durga,...appellant-Petitioner

Maganti Anil Kumar, .Respondent- Respondent.

Counsel for the Appellant: M/s K. Chidambaram Sri Y.V.Srinivasan

Counsel for respondent: Sri V.S.R.Anjaneyulu

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? Cases referred: :
1. AIR 1999 SC 3381
2. AIR-1974-AP-1=ILR-1972-AP-421=1971(1)APLJ-56(SN)
3. 1993(1)SCC 531
4. AIR-2000-SC -3272
5. AIR-1955-AP-112-(Paras 5 to 7)
6. AIR 2004 SC 4096
7. 2004(6)SCC 325
8. AIR-1956-SC-593=1956-SCR-451
9. AIR-1994-SC-853
10.AIR 1996 SC 2592-para 23
11.AIR 2000 SC 1165
12.2005(7)SCC-605
13.2010 (8)SCC 383
14.1956 All E.R.349
15. AIR 1994 SC 2151
16. (1994) 2 SCC 481
17. AIR-2003-SC-1706
18. 2011(3) SCC 545(JJB)
19. 2002(6) ALD 423
20. AIR-1989-SC-1477
21. AIR-1969-Madras-405
22. HLR 521 Kerela
23. AIR 1990 MP 217
24. 1995(2) HLR 633 PH)
25. AIR 1990 Bombay 84

26 1987(1) HLR page 610

HONOURABLE SRI JUSTICE R.SUBHASH REDDY
AND
HONOURABLE Dr.JUSTICE B.SIVA SANKARA RAO

C.M.A.No.3385 of 2004
JUDGMENT (Per Honble Dr.Justice B.Siva Sankara Rao)

Smt. Maganti Krishna Durga, who is no other than the wife of Maganti Anil Kumar, preferred the appeal under Section 28 of the Hindu Marriage Act (for brevity HM Act) and under Order XLIII Rule 1(d) of the Code of Civil Procedure (for brevity CPC), impugning the order dated 19.07.2004 dismissing her application filed under Order 9 Rule 13 CPC in I.A.No.928 of 2003, to set aside the ex-parte divorce decree dated 24.04.2002 in H.M.O.P.No.86 of 2001 on the file of the Senior Civil Judge, Machilipatnam, obtained by her husband Anilkumar.

2. Heard both sides and perused carefully the material on record including the documents marked for reference, viz., the Exs.C1-9 from record and the Ex.R1-6 additional material filed by the appeal respondent- husband in this appeal in CMAMP No.1647 of 2014, since allowed by order of this Court dated 12.02.2015 in support of his contention of he married again on 20.02.2003 and blessed with child in the second wedlock and in support of their respective rival contentions impugning the lower court`s order by the appellant-wife and supporting the order by the respondent-husband with reference to the provisions and propositions placed reliance by both.

3. Now the points for consideration are:

i). Whether the appellant-wife was not served with summons duly and the substitute service by publication in Janata paper in setting her exparte was not a mere irregularity in the service from improper mention of her name and address of the Mandal area of residence, without foundation for substitute service to obtain the order and also no merits in the exparte decree of divorce dated 24.04.2002 in H.M.O.P.No.86 of 2001 to set aside the same and even from the fact of the respondent-husband married again on 20.02.2003 and blessed with child in the second wedlock and if so, the impugned order of the lower court dated 19.07.2004 in dismissing her application filed under Order 9 Rule 13 CPC in I.A.No.928 of 2003 to set aside the exparte decree is unsustainable and requires interference by this court while sitting in appeal and if so with what observations and conclusions?

ii). To what result?

Pointi :

4.a. For sake of convenience the parties are being referred as arrayed in the divorce petition as petitioner-husband and respondent-wife. In deciding the appeal lis formulated supra, the factual background shows that: the H.M.O.P.No.86 of 2001 was filed against the wife under Section 13(1a) and (1b) of the HM Act on 03.08.2001 to dissolve their marriage took place on 22.05.1993 according

to Hindu rites and caste customs at Musunur village of Krishna district (AP). It is after the O.P. was numbered, the trial Court on 24.08.2001, ordered summons to the respondent-wife returnable by 29.10.2001 through Court Process Server as per Order V Rule 1 CPC and simultaneously through registered post under Order V Rule 19-A CPC(as was in force). It is important to note that the summons were returned unserved viz.,(i). through the Court Process Server unserved for not residing in the given address & (ii). through registered Post unserved for left without instructions. It is therefrom the Court having felt the need ordered on 29.10.2001 to file batta for fresh summons returnable by 03.12.2001. As batta was paid only on 03.12.2001 with delay condonation petition, same was allowed to issue summons returnable by 31.12.2001. It was as not paid batta properly to issue, on 31.12.2001 the notice batta represented with a petition was allowed and ordered for issuing the summons returnable by 01.02.2002, however, it appears not properly complied with and thereby from 01.02.2002 it was posted to 5.03.2002 with observation notice to respondent batta received, issue summons returnable by 05.03.2002. It was on 05.03.2002, there was an endorsement by the Court clerk on the case docket that the petitioner filed substitute service petition instead of filing notice batta, hence for orders: it is pursuant to the above note put up by the Court clerk, instead of ordering fresh notice on payment of batta, the Court allowed the substitute service application for publication in Janata (paper) of Vijayawada (Edition) returnable by 24.04.2002. It was therefrom the case docket of 24.04.2002 reads that: publication in Janata of Vijayawada filed, respondent was called absent, set ex-parte and P.W.1 is examined. Claim proved. Petition is allowed with costs. Marriage of petitioner with the respondent is dissolved by decree of divorce.

4.b. In fact the trial Court from the above, did not properly conduct the proceedings. It casually ordered for the sake of mere asking the substitute service in a news paper by publication, without foundation as per O.V R.20 CPC of respondent avoids service, and even ordered fresh summons through Court and process not even properly filed in compliance of the orders and more particularly in matrimonial proceedings, summons must be as far as possible by personal service through court process server or registered post or other assured service and not by paper publication, that too even not a paper of wide circulation, besides no order to circulate in the area of respondent`s address at Musunur village of Musunur Mandal/Taluk.

4.c. Apart from it, the trial court though supposed to decide on merits, did not even go into merits of the lis and casually dissolved the marital tie for mere asking and for the following reasons:

4.c.(i). The divorce petition averments were that, since marriage respondent used to humiliate him for the reason they are superior in financial status to his family, she insulted him several times despite he was showing love and affection towards her with fond hope that there would be a change in the attitude of her, that she never treated him with affection, that she used to go to her parents house frequently even he was bringing her back many a time through mediators. It is also averred that even he is the only son, she developed disputes with his unhealthy mother with a demand to put up a separate family due to which his mother went away and was staying separately, that she took him to her parents house at Musunur village on the pretext to manage their properties and even there he was ill- treated pointing out his financial status, that he brought her back to his house where she stayed for about 15 days and left to her parents house along with the girl child-Mounika in

the year 1998, that even he sent elders by names Vadlapatla Narayanarao, Maganti Kondaiah Chowdary and Jasti Vishnuprasad to demand her for joining him, she refused stating unwillingness to lead life with him and that she would leave the daughter to his custody if he pays Rs.1,00,000/-, that as a last resort he cause issued legal notices on 08.02.2000 and 07.02.2001 demanding her to join him that was returned unserved and having waited with a fond hope of she may change her attitude and join him, for no other alternative seeking divorce.

4.c.(ii). His exparte evidence of even date 24.04.2004 reads that: I am the petitioner herein. Respondent is this petition is my wife. As my marriage was stipulated on 22.05.1993 according our custom and the same was consummated. The respondent gave birth to a female child. Misunderstandings arose between me and respondent. She left me without any just and reasonable cause and she never treated me with affection. Always go to her parents house and left three years back without any reasonable cause. In spite of my efforts for reconciliation she did not cooperate for amicable settlement. As such I am constrained to file this petition. It is prayed that the petition may be allowed with costs dissolving my marriage with the respondent.

4.c.(iii). From the above pleadings and ex parte evidence of the petitioner-husband supra, the impugned order of the Court on even date reads that: Respondent called absent. Set ex-parte. PW1 examined. Claim proved. Petition allowed with costs. Marriage of petitioner with respondent is dissolved by way of decree of divorce. In the appendix of evidence, the petitioner is shown as P.W.1 with no other evidence oral and documentary.

4.d. The learned Senior Civil Judge, in passing the exparte decree did not assign any reason for grant of decree of divorce, not even discussed the pleadings and evidence as to the case made out for cruelty or for desertion and in particular as to relief granted is on the grounds of cruelty or desertion or on both grounds and as to what material on record that constitute cruelty or desertion or both. The learned Senior Civil Judge did not even draw his attention to the factum of the very divorce petition averments at para-4 clearly speak that he issued notice to the respondent twice on 08.02.2000 and on 07.02.2001 and those were returned unserved. That itself is an indication of she was not residing there at Musunuru village and even he has shown same address in his divorce petition and even the court process server endorsement on oath of non-service for she is not residing in the address and registered post also returned as addressee left the address without instructions, even court ordered fresh notice through court, no process filed duly to cause serve through court and having avoided to file process duly, filed substituted service petition and get paper publication order. Those facts not even drawn attention. The earlier notices he stated issued to her unserved not even filed by him and even in his Chief examination as P.W.1-reproduced above, he could not even make out any ground for desertion with animus-deserandi of two years continuous period nor any acts of cruelty which makes the petitioner/husband unbearable and unable to continue the marital life with the respondent.

5.a. It is not out of context to quote the erudite words of Lord Watley that The judgment is like a pair of scales and evidence like the weights, the Judge holds the balance in its hands in the noble cause of justice delivery, where there shall not even be a slightest jerk to make the lighter side appear heavier.

5.b. The reason is, if the Judge tips the scales of justice, its rippling effect would be disastrous and deleterious. The Judgeship is in fact an office of public trust and a Judge always keep in mind that he discharges a divine function, though he is not divine himself.

5.c. In Balraj Taneja Vs. Sunil Madan - the Apex Court well laid down as per(Or.XX & Sec.2(2&9)CPC)that: a judgement should be a self contained document from which it should appear as to what were the facts of the case and what was the controversy which was tried to be settled by the Court and in what manner. The process of reasoning by which the Court came to the ultimate conclusion and decreed the suit should be reflected clearly in the Judgement. Whether, it is a case which is contested by the defendants by filing a written statement, or a case which proceeds exparte and is ultimately decided as an exparte case, or is a case in which the written statement is not filed and the case is decided under Or.VIII R.10 CPC. The Court has to write a Judgement which must be in conformity with the provisions of the code or at least set out reasoning by which the controversy is resolved. Even if the definition was not contained in Sec.2(9) CPC, of the contents there of were not indicated in Or.XX R.1 CPC, the Judgement would still mean the process of reasoning by which a Judge decides a case in favour of one party and against the other. The whole process of reasoning has to be set out for deciding the case one way or the other. A Judge can not merely say Suit decreed or dismissed. In Judicial proceedings there cannot be any arbitrary orders.

5.d. Full Bench of this Court in Aziz Ahmed Vs. I.A. Patel (Kumarayya,C.J., Ekbote & Sambasiva Rao, JJ)-held referring to Or.XX,R.4(2) & Or.IX, R.6 CPC- on the exparte proceedings also that-While pronouncing judgment, Court should apply its mind to the facts of the case and the point at issue and give a reasoned judgment after duly evaluating the evidence adduced. Judgment without reasons and not in conformity with Or.XX, R.4 & 5 is not a binding Judgment.

5.e. The Apex Court in Rameshwar Dayal Vs. Banda(dead) through his L.Rs : held that even the order of a Small Causes Court dismissing or decreeing eviction suit exparte without rendering any findings on point in controversy for decision is no Judgement to bind anyone.

6. Leave about no merits for dissolving the marriage from what is referred supra in the cryptic order, it is important to mention that:

6.a. The divorce petition filed by the husband, mentioned the name of the petitioner as M. Anil Kumar and the respondents name as Maganti Krishna-Durga @ Kanaka-Durga and in the vakalath of him without any alias name, mentioned as M. Kanaka-Durga only - which is marked for reference as Ex.C1. Even in the divorce O.P. filed which enclosed the separate address memo with short and long cause titles of the parties, in the short cause title and long cause title of the respondent, her name is mentioned categorically as Krishna-Durga and not either as Kanaka-Durga much less Krishna-Durga @ Kanaka-Durga which are marked for reference as Exs.C2 and C3. Further in the long cause title description of the respondent, it was mentioned as (c/o) address of Smt. Veerapaneni Pitchamma, (not even her parents address) near police station, Musunur, Musunur Mandal. In the P.W.1`s chief examination supra there is no mention of respondent got alias name. The exparte decree of the trial Court in the cause title speaks Krishna-Durga@ Kanaka-Durga C/o Smt. Veerapaneni Pitchamma. Whereas, in the divorce petition in the short and long cause titles

there was striking out of the words Kanaka among Kanaka-Durga and added Krishna-Durga so as to read it as Krishna-Durga@ Kanaka-Durga with writing of ball pen without even initials. On perusal of the main case docket proceedings, nowhere he filed petition regarding the name for said correction to strike out Kanaka-Durga and to interpolate or incorporate as Krishna-Durga@ Kanaka-Durga. When vakalath speaks Krishna-Durga, main divorce petition enclosed address form shows in long and short cause title only as Krishna- Durga and original petition shows Kanaka-Durga, even for said correction in the divorce petition, there must be a permission of the Court and requirement of petition under Order VI Rule 17 CPC that was not there much less any such endorsement of the correction made with permission of Court, apart from no neat copy filed if the correction was before filing in Court, besides not carried the correction in vakalath and petition enclosed address slip supra. The original petition carrying said correction in the short and long cause title is marked as Exs.C4 and C5 for reference and the original docket proceedings sheet of the Court right from filing of the petition on 03.08.2001 till the exparte decree passed by the Court on 24.04.2002 is marked for reference as Ex.C6 and the deposition of PW1 referred supra as Ex.C7 and the ex parte decree as Ex.C8. In this regard, it is important to note that the paper publication for the original not before the Court not sent by the lower Court with the record called for received by the Court from one of the learned counsel for the parties in open Court to mark for reference is marked as Ex.C9. The Ex.C9 paper publication reads the name of the respondent as Maganti kanaka-Durga C/o. Veerapaneni Pitchamma, near police station, Musunur, Nuziveedu Mandal, though it is in Musunur Mandal and without even mention of husbands name or father`s name or mother`s name and not even shown the care of address of parents at Musunur village. In the paper publication, name of the respondent is not even shown either as Krishna-Durga or even as Krishna-Durga@Kanaka- Durga but as Kanaka-Durga. Had the original petition corrected before representation, the publication must mention generally with @ name. The paper publication cause published by the petitioner-husband shows even ordered on 08.03.2002 cause published only on 23.04.2002 which is a day before the hearing date of 24.04.2002 to state any of the objections by 10.00 A.M. on 24.04.2002 before the Court. From this factual background, there is any amount of doubting the honesty of the petitioner/husband in cause publishing by said substitute service in the Janata paper, Vijayawada Edition with wrong name which is not correlating to name of respondent Krishna-Durga mentioned in Ex.C1 vakalath or Exs.C2 and C3 address memo of parties short and long cause title without any @ name therein or even in relation to the subsequently corrected by striking down Kanaka and adding Krishna Durga@ Kanaka Durga in the divorce petition at page 1 short and long cause titles Exs.C4 and C5. Even to say mistake was crept in the paper publication, for such explanation is not even available to give any credence to the submission that in the course of filing before representation of the return the correction was allegedly carried out in the original petition page 1 short and long cause title Exs.C4 and C5 as Krishna Durga@ Kanaka Durga. If that is true to give credence, the paper publication-Ex.C9 should have reflected Krishna Durga@ Kanaka Durga in the name of respondent, but it shows as if Kanaka Durga and not even the original name of respondent Krishna Durga as shown in Exs.C1-3. It is important to note further that as per the A.P. Civil Rules of Practice, Rule 11 Sub-Rule 2 if the address furnished of the respondent or of the petitioner in the original pleading is required to be changed for proper address of service, the party who desires so to change shall file a verified petition and the Court may direct the amendment of the record accordingly. It was not done in this case.

6.b. Even as per the Order V Rule 20(i) CPC, for ordering substituted service, it must be shown that the respondent is keeping out of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way. It is only from such averment and on subjective satisfaction of the Court in relation thereto for reason to believe such averment, to order substitute service by affixing a copy of the summons on some conspicuous part of the house in which the respondent is known to have last resided or carries on business or personally works for gain and even for service by an advertisement in a newspaper, the notice to the respondent for appearance, further the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resides or carries on business or personally works for gain. In this case, as can be seen from the Ex.C6 docket order of the Court dated 05.03.2002 in allowing the petition for substitute service, that too even earlier ordered for payment of batta to send notice afresh through the Court or by registered post having not even filed and instead of insisting by Court so to file and without assigning any reasons for ordering substitute service, for the mere asking by the petitioner/husband, the Court ordered substitute service that too for publication in Janata of Vijayawada. It did not even mention for circulation in the locality of the address shown in the cause title of the respondent of Musunur village in Musunur Mandal. Even from Ex.C9 paper publication, it is difficult to conceive, whether it is any popular newspaper much less with circulation in the area of the so called residence of the respondent shown in the divorce petition of Musunur village in Musunur Mandal. The Court is entitled to take judicial notice under Section 56 of the Evidence Act of the fact that the said newspaper Janata is not at all in circulation much less within the locality shown in the cause title of the respondent/wife. The trial Court also went wrong in acting upon the said paper publication in ignorance of the mandate of the provisions of order V Rule 20(1) and (1a) not only in ordering said paper publication but also in such paper without any circulation much less to the notice of the respondent where she resides in that area.

6.c. It is also important to note that the Court ought not to have ignored the docket proceedings dated 29.01.2001 of Ex.C6 where, notice ordered through Court Process Server returned unserved with endorsement of the respondent is not residing in the given address. When such is the case, for fresh notice ordered instead of sending to the correct address, the respondent did not even file batta properly much less with correct and change of address and even it shows three more adjournments taken for said purpose including for representing batta with petition to receive by condoning delay for imperfect filing, without even complying managed to get substituted service which is contrary to law as referred supra.

6.d. In the factual matrix, it is nothing but not only fraud on the party-respondent (wife) to the divorce petition but also fraud on the Court as per the following settled expressions:

6.d.i). In Gram Panchayat of village Noulaka Vs. Ujaghar Signh it was held by the Apex Court referring to Sec.11 CPC (Resjudicata) and Sec.44 Evidence Act (collusive or fraudulent decree), that plea of decree passed in earlier proceeding was collusive or fraudulent can be raised even in a later proceedings. Filing a separate suit for declaration that decree was collusive or fraudulent is not a condition precedent for rising such plea. A contrary view would go against the provisions of Sec.44 Evidence Act which provides that any party to a suit or proceeding may show that any judgement, order or decree which is relevant u/s.40, 41 & 42 and which has been delivered by a court not

competent to deliver it or was obtained by fraud or collusion It is also from the expression of this Court way back in Gurajada Vijaya Vs. Padmanabham

6.d.ii). In Ram Chandra Singh Vs. Savitri Devi , the Apex Court held that misrepresentation itself amounts to fraud and further held that fraudulent misrepresentation is called deceit and consists in leading a man into damage by willfully or recklessly causing him to believe and act on falsehood. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues therefrom although the motive from which the representations proceeded may not have been bad. The said judgment was reconsidered and approved in Vice-Chairman, Kendriya Vidyalaya Sangathan vs. Girdharilal Yadav .

6.d.iii). In Nagubai Ammal Vs. B.Shama Rao the Apex Court-three Judge Bench-(AIYYAR, T.L. VENKATARAM; DAS, SUDHIRANJAN(CJ) & IMAM,SYED JAFFER)-laid down the distinction between a collusive and a fraudulent proceeding that, while the former was the result of an understanding between the parties, both the claim and the contest being fictitious, and the purpose is to confound third parties; in the latter the contest was real, though the claim was untrue, and the purpose is to injure defendant by a verdict of court obtained by practicing fraud in it.

6.d.iv). In S.P.Chengalvaraya Naidu(dead) by L.Rs. Vs. Jagannath (dead) by L.Rs - the Apex Court-two Judge Bench-(KULDIP SINGH & P.B.SAWANT, J.J): referring to Sec.2(2) CPC & Sec.44 Evidence Act held that a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another, it is a deception in order to gain by another's loss...it is a cheating intended to got an advantage. Withholding of a vital document or information relevant to litigation by a litigant is also fraud on Court and the guilty party is liable to be thrown out at any stage of litigation for the decree is vitiated by fraud.

6.d.v). The Apex Court in Indian Bank Vs.M/s. Satyam Fibres(India) Pvt.Ltd. held that: Since fraud affects the solemnity, regularity and orderliness of the proceedings of the court and also amounts to an abuse of the process of court, the courts have been held to have inherent power to set aside an order obtained by fraud practiced upon that court. Similarly, where the court is misled by a party or the court itself commits a mistake which prejudices a party, the court has the inherent power to recall its order.

6.d.vi). In United India Insurance Company Ltd. v. Rajendra Singh - the Apex Court observed that Fraud and justice never dwell together (fraus et jus nunquam cohabitant) and it is a pristine maxim which has not lost temper over all these centuries.

6.d.vii). In Bhapurao Dagdu Paralkar Vs. State of Maharashtra at para-12 it was held by the Apex Court that Fraud and collusion vitiate even the most solemn proceedings in any civilized system of jurisprudence. Fraud and justice never dwell together. An act of fraud on court is always viewed seriously. A collusion or conspiracy with a view to deprive the rights of others in relation to a property would render the transaction void abinitio. Fraud and deception are synonymous. Although in a given case a deception may not amount to fraud, fraud is anathema to all equitable principles and any affairs with fraud cannot be perpetuated or saved by the application of any

equitable doctrine including resjudicata.

6.d.viii). In Meghmala and others Vs. G.Narasimha Reddy at paras- 28-34 it is held by the Apex Court that when once fraud is proved, all advantages gained by playing fraud can be taken away. Suppression of material fact/document amounts to a fraud on the Court.

6.d.ix). In Lazarus Estate Ltd. Vs. Besalay -it was held without equivocation that no judgment of a Court, no order of a Minister can be allowed to stand if it has been obtained by fraud, for fraud unravels everything.

6.d.ix). In Andhra Pradesh State Financial Corporation v. M/s. GAR Re-Rolling Mills ; and State of Maharashtra v. Prabhu , the Apex Court has observed that even a writ Court, while exercising its equitable jurisdiction, should not act to prevent perpetration of a legal fraud as Courts are obliged to do justice by promotion of good faith. Equity is, also, known to prevent the law from the crafty evasions and subtleties invented to evade law.

6.d.x). The latin Maxims support the conclusion are:

i). Nemo ex dolo suo proprio relevetur, aut auxilium capiat=No one is relieved or gains an advantage by his own fraud.

ii). Lata culpa dolo aequiparatur=Gross fault or negligence is equivalent to fraud.

iii). Dolus et fraus nemini patrocinentur; patrocinari debent= Deceit and fraud shall excuse or benefit no man; they themselves need to be excused.

6.d.xi). In Collector Vs P.Mangamma -it was held that there is no statute of limitation for exercise of power under an Act where fraud is detected to correct it.

7. It is in this background, there was no any possibility of knowledge of the filing of the divorce proceedings and obtaining of the exparte decree against the respondent-wife unless she receives any decree or order of the Court. Though copy of the divorce decree and judgement is required to be sent to the parties as per Rules 16-B & C and it shall also be mentioned in the decree and at the end of judgment that the aggrieved party or the learned counsel has been informed of whether desires to appeal against the decree and any such statement of desire to appeal shall be an intimation to the opposite party of the intention of other party to go in appeal, same is not even complied in this case for nothing to show, free copy of the decree and order of divorce sent to the respondent. Rules also speak provisions of CPC applies to the extent possible to the matrimonial proceedings.

8. In this background, the respondent-wife filed the application in I.A.No.928 of 2003 to set aside the exparte decree of divorce dated 24.04.2002. She also filed another application in I.A.No.745 of 2003 under Section 5 of the Indian Limitation Act to condone the delay in filing said application in I.A.No.928 of 2003 to set aside the exparte divorce decree.

8.a. The averments in I.A.No.928 of 2003 to set aside the exparte decree (like in the application in I.A.No.745 of 2003 to condone delay in its filing) are that after the marriage performed at Musunur, dated 22.05.1993, she joined her husband at Gopavaram and in their wedlock blessed with a female child(Mounika) and after birth of the female child, her husband was demanding for additional dowry and did not stop ill-treatment of her even she brought Rs.50,000/-on four occasions from her parents and given to him as per his demands, that finally in March, 1999 he necked her out and with no alternative she went to her parents house at Musunur and later she joined as a student in charge of Sri Chaitanya Mahila Kalasala of Tadigadapa village of Penamalur Mandal(for short, Chaitanya College), Krishna district in the month of November, 1999 and while she was working there to his knowledge, she made efforts to join him through elders, which he did not heed and also threatened her with dire consequences. She further averred that, she came to know only 10 days prior to the filing of this application that her husband filed the divorce case by showing her with wrong address as well as wrong name even it is within his knowledge that she has been residing at Tadigadapa since November,1999; that he wantonly showed her address wrongly and cause published in a paper with wrong address and he intentionally shown the wrong address of her and managed to obtain an exparte decree against her dated 24.04.2002, that her husband played fraud on her in obtaining the decree and thereby prays to set aside the exparte order and decree dated 24.04.2002 and permit her to partake in the proceedings. She categorically pleaded that he played fraud by giving a wrong address and by giving wrong name and by managing to get a paper publication order and obtained the exparte decree behind her back.

8.b. It is important to note that the application in I.A.No.745 of 2003 to condone the delay was allowed after service of notice on him and from his no-contest, which is not even in dispute.

8.c. The counter filed by the husband as respondent to this application in I.A.No.928 of 2003 is with averments that the allegations of he wantonly shown the address of his wife wrongly with an intention not to serve the summons on her or played mischief in giving wrong address are not true, that he has given correct address of her and she purposefully avoided receiving summons and remained exparte and she was made exparte after satisfaction by the Court regarding service of summons and as such, the exparte decree dated 24.04.2002 is not required any interference and thereby sought for dismissal of the exparte decree set aside petition.

8.d. From above contents of the counter filed by the respondent in this I.A.No.928 of 2003, he did not deny or dispute her pleading specifically of she is residing since November, 1999 at Tadigadapa of Penamalur Mandal, where she is working as a student in-charge in Chaitanya College after she was necked out by him in March,1999 having stayed for some time at her parents house in Musunur and she made efforts through elders for joining him back even while residing at Tadigadapa which is well known to him and even knowing the same he intentionally mentioned a wrong address not even of her parents but as if the C/o. address of one Smt. Veerapaneni Pitchamma. It is no doubt the submission by the learned counsel for the respondent/husband in the appeal in the course of hearing that said Veerapaneni Pitchmma is her grandmother and she is residing with said Pitchamma. However, but for in the attempts now to say that she is maternal grandmother or so to his divorced wife, he did not chose to deny her averments specifically as required by Order VIII Rules 3-5 CPC to this application in I.A.No.928 of 2003 regarding said factum of she has been

working by residing at Tadigadapa in Chaitanya college as a student in- charge by staying there from November,1999 even to his knowledge from the efforts made by her through elders for joining him while so stating which he refused even. Even according to his divorce petition averments at para-4 he stated that twice he sent notice in the years 2000-2001 that were returned unserved for not residing there. Thus he could have mentioned by enquiring her correct address in that divorce application at para-4. Even from the above when notices returned unserved for no such addressee, it was his duty to furnish correct address of her to serve the notice through court process server or regd. Post and even so ordered by Court he avoided compliance with no explanation for the same even now, had it been not his fraudulent intention to get the exparte decree behind her back.

8.e. It is also important to refer Article 123 of the Limitation Act, as per which the limitation period of 30 days to seek for seta side exparte decree is from date of her knowledge, which she claims just 10days before filing the petition she came to know and as such even application under Sec.5 Limitation Act not required. For that runs Article 123 reads that the period of limitation for an application to set aside a decree passed ex parte or to re-hear an appeal decreed or heard ex parte is thirty days, the time of limitation starts to run from the date of the decree or where the summons or notice was not duly served, when the applicant had knowledge of the decree. The explanation to it clearly speaks that- For the purpose of this Article, substitute service under Rule 20 of Order V CPC shall not be deemed to be a due service.

8.f. The Order IX Rule 13 CPC which requires reproduction reads that: 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 that no Court shall set aside a decree 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 plaintiffs claim.

8.g. No doubt, the learned Counsel for the respondent/husband to the appeal submits that there is only an irregularity in service and she got knowledge and thereby the exparte decree not required to set aside, that too after he married for second time and given birth to a child. He placed reliance on the expression of the Apex Court in Parimal Vs. Veena@Bharti . Therein wife filed the application under Order IX Rule 13 of CPC to set aside the exparte decree obtained by the husband by taking substituted service through paper publication under Order V Rule 20 CPC. The Apex Court observed that the second proviso to Order IX Rule 13 CPC makes it obligatory on the appellate Court not to interfere with exparte decree unless it meets the statutory requirements, showing non service of summons or where there is sufficient cause for her not appeared before the Court and the same when not dealt with by the High Court to set aside the finding even recorded by the trial Court; it

was held therefrom that the High Court erred in not appreciating facts in correct perspective and only relied on post exparte divorce decree conduct of husband and even there is nothing to show any fraud or collusion between post man and husband for endorsement of refusal, besides there is presumption of due service by regd. Post at the address of the respondent and the disputed statement of the wife that she was resided at different addresses with her brother was not supported by him and that too, the news paper publication by substitute service affected in the National daily news paper called National herald is of the wide circulation in Delhi and in the area where the respondent wife was stated residing at her brother`s house.

8.h. Here, the facts are entirely different as it is not even a regular Telugu daily newspapers like Eenadu, Sakshi, Vartha, Andhraprabha, Andhrajyothi or Andhrabhoomi etc., of wide publication, as the so called paper Janata is practically with no circulation for the Court to take judicial notice under Section 56 of the Indian Evidence Act and that too in this case, the very pleading of the husband in his divorce petition para-4 is also very clear of his knowledge that the respondent was not residing in that address for even earlier he sent two notices to her that were also returned unserved as not residing and even that is the case he should have chosen to ascertain her correct and present address of her as directed by the court to file process/batta afresh to serve notice to her through court for earlier notices ordered by court returned unserved as no such address at the given address and without such compliance and without even complying to the order of the court by taken more than three adjournments to file batta with correct address properly, managed to get order of court for substitute service by paper publication of such a paper with no circulation and the court even unmindful of these facts and un-gauged the mischief and fraud of the husband ordered wit out even observing the court bench clerk endorsement of without filing batta for notice through court to issue to correct address he file substitute service application, by its ordering for mere asking, nothing more is required, besides other facts of wrong name and wrong address he furnished, to say he not only played fraud on the respondent wife in the divorce case, but also played fraud on the court in obtaining the exparte decree, behind back of wife and by avoiding service of notice to her purposefully.

8.i. Apart from it, he come with the petition for substitute service without even a factual foundation to show, she willfully avoiding service through court and registered post so to order, apart further from the publication order even obtained with sufficient time, only a day before hearing cause printed the news item for appearance on next day by morning hours before the Court. All these cumulatively establish the fraud he played on respondent and court in obtaining the exparte decree. Thus, the proposition laid down in that expression has no application to the present case for the reason and as discussed supra and more particularly for the facts on hand, it is not a mere irregularity in service much less in showing respondent got knowledge of the proceedings and date of hearing and having sufficient time to appear and answer and failed to appear which are the requirements as per the Order IX Rule 13 including from the second proviso, for not to set aside the ex parte decree. It is also for the reason that having shown her name correctly as Krishna Durga in the vakalath filed by him in the divorce application and also in the address form filed by him with the divorce application in short and long cause title Exs.C1 to C3, intentionally shows as if Kanaka Durga in the Ex.C9 paper publication that too a small paper not even a daily news paper and without any circulation and further the original divorce application petition page 1 without even correcting

the address form and vakalath name of the wife as Krishna Durga corrected as Krishna Durga@ Kanaka Durga in the divorce application Exs.C4 and C5. Also it is not even his contention in the counter opposing her Order IX Rule 13 CPC petition that too, even she positively averred in her application that since November, 1999 she has been residing at Tadigadapa, Penamalur Mandal, by working in Chaitanya College for women and therefrom also she sent mediators for reconciliation and he very well knows the same having not even chosen to dispute the facts, though a specific denial is required as per Order VIII Rules 3 to 5 CPC, otherwise, it tantamount to admission if read with Section 58 Evidence Act, with no further proof. Thus, it is suffice to say he not only shown wrong address instead of showing she is residing in Tadigadapa, by working as student in- charge in Chaitanya College, but also shown such a wrong address not even by showing as C/o her parents at Musunur, where they were residing, but showing as C/o. address of an old lady by claiming in the appeal hearing as if that old lady is her maternal grandmother for nothing to show she was ever residing with her so called maternal grandmother at her house.

9.a. Despite all these facts borne by record, the impugned order dated 19.07.2004 passed by the learned Senior Civil Judge in dismissing the I.A.No.928 of 2003 referring to the facts from the pleadings in the petition as well as the counter of the respondent also by mention at para-7, is no way sustainable. The reasons assigned by the Lower Court for dismissal of the application by the impugned order are no way tenable, that too, by referring to the only decision in M.Narasimha Reddy Vs.Bagari samuel holding that summons not be served since defendant was not residing in the village and application of the plaintiff by substituted service when cannot be said to be due service of summons under law, order setting aside the exparte decree is just. The lower Court also not correct in its observation that the paper publication made with the name as Kanaka Durga C/o Veerapaneni Pitchamma and in the petition I.A.No.928 of 2003 she has shown her name as Krishna Durga and nowhere it is mentioned by her that she was not called as Kanaka Durga and notice was published in Janata daily newspaper having as if wide circulation and at para-10 that under the circumstances, the Court cannot agree her contention that publication in the newspaper was not proper one and the reasons assigned by her to set aside the ex parte decree on divorce are not cogent and convincing. The lower Court went wrong in not considering the vakalath of husband in main petition and also address form(Exs.C1-3) mentioned by her of her correct name as Krishna Durga. Thus, ignoring the same and putting again negative burden on the wife in saying as if she did not mention in her affidavit and petition that she was not called as Kanaka Durga, is not tenable, for no need to say when husband himself stated her name as Krishna Durga in (Exs.C1-3) supra, further in the publication shown as if Kanaka Durga and as if in Nuziveedu Mandal and as if care of an old lady and not even to her parents care of address, even he claimed in the divorce petition of she left to her parents house and did not come to him therefrom to join.

9.b. No doubt it is his contention that he married again on 20.02.2003 and blessed with child in the second wedlock, from the additional material filed by him in this appeal in CMAMP No.1647 of 2014, since allowed by order of this Court dated 12.02.2015 and marked Ex.R1-6 for reference; copy of his second marriage invitation Ex.R.1 dated 20.02.2003, with one Vijayalakshmi; Ex.R.2 Photostat copy of the receipt of said marriage performed at the temple of Mantada, Krishna district; Ex.R.3 birth certificate of the female child Yamini Krishna dated 22.12.2003 through the wife of second marriage; Ex.R.4 the maintenance case under Section 125 of the CrPC fled by the wife

Krishna Durga and daughter Mounika in the year, 2013 showing there the then address as residing in Musunur village care of her mother and Ex.R.5 copy of plaint in O.S.17 of 2013 filed for partition by the daughter baby Mounika through guardian-mother Krishna Durga showing in the care of her parents and relatives at Musunur village. However, none of the documents in particular Exs.R.4 and R.5 maintenance case and the suit filed both of the year, 2013 the wife and daughter are residing at Musunur at the mother`s house of the wife, no way improve his contention much less to establish that in the year, 2001-2002 at the time he filed the divorce petition and sent summons, then also the wife was residing at Musunur village. The other document Ex.R.6 is his written statement in the Ex.R.5 suit filed by his daughter through the 1st wife for relief of partition against him. Though it is his contention that the additional evidence covered by Exs.R.1 to R.6 of he undergone the marriage with Vijayalakshmi and blessed with a female child are the additional grounds for non- interference with the dismissal order of the exparte decree set aside petition by the lower Court covered by the impugned order in I.A.No.928 of 2003; that contention cannot be given credence for what are the facts discussed supra and how he played fraud on his 1st wife and also on the Court.

9.c. Coming to the appeal maintainability and scope Section 15 of the HM Act and consequence of 2nd marriage, in fact Order IX Rule 13 CPC scope as referred supra equally of Article 123 of the Limitation Act, against the rejection of the application to set aside the ex-parte decree, an appeal lies under Order XLIII Rule 1(d) CPC apart from the appeal lies under Section 28 of Hindu Marriage Act. He claims that after decree of divorce and appeal time, he can marry again. For that, Section 15 of the HM Act reads that 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 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. On its scope as held by the Apex Court in Latha Kamat Vs. Vilas , even after obtaining a decree for annulment or dissolution of marriage by one spouse, the appeal remedy of the other spouse does not take away much less appeal becomes infructuous due to any re-marriage. It was held way back by the Madras High Court in Vathsala Vs. Manoharan that where the application to set aside ex parte decree filed, any contact of second marriage by the opposite party before setting aside the exparte decree, will not render the pending proceedings infructuous and to say otherwise would mean by the act of a party he or she can successfully defeat the lawful remedy given to the aggrieved party. It is to mean despite re-marriage by the act of a party who obtained decree of divorce or annulment of marriage, the other party`s right and remedy to seek for setting aside the exparte decree or to file appeal against the decree as per the statutory provisions no way be taken away.

9.d. In this regard, it was also held by the Kerala High Court in the expression of Susheeladevi Vs. Padmanabhaiah (also held in similar lines by the other High Courts viz., Smt. Rajeshwari vs Jugal Kishore Gupta and Ujwal Sahari Vs. Ravi Sahari that where exparte decree of divorce against wife obtained by husband on 08.03.1984 and later husband married even after waiting more than one year on 20.12.1985 and blessed with a child in the second wedlock on 15.11.1984, when the first wife preferred appeal on 26.05.1986 even two years after the decree of divorce with application to condone the delay and the delay condonation application for entertaining the appeal filed will not become infructuous for the reason of husband`s re-marriage before, as once delay has been condoned it must be held that the period for filing the appeal is not expired. Section 15 of the Hindu

Marriage Act, thus does not override Section 28 of the Act which provides the right of appeal, much less makes it otiose. The expressions of the Bombay High Court in SD Rana Vs. DD Rana is also on same lines. In Mithu Singh Vs. Saroj Kumar , on facts where the husband obtains a decree of divorce exparte by practicing fraud, it was held not open to the husband to take advantage of Section 15 of the Hindu Marriage Act and re- marry.

9.e. Thus, even the application filed by the wife on 01.05.2003, to set aside the exparte decree dated 24.04.2002 passed against her, as per Exs.R1 and R2 the husband as per the exparte decree married again on 20.02.2003, before she filed the application; once it is shown that she has no knowledge of the proceedings and not served with summons in filing application within one month from date of knowledge as per Article 127 of the Limitation Act, which says substitute service is no proper service so to construe and even otherwise filed the application to condone delay as a caution and delay is once condoned in I.A.No.745 of 2003 apart from the exparte decree set aside petition in I.A.No.928 of 2003 is entertained for the same not a bar from remedy of appeal also provided under Section 28 of the HM Act r/w. Order XLI CPC, for Order IX Rule 13 CPC is a parallel and other efficacious remedy to avail without going for appeal, to file application and seek to set aside the exparte decree, apart from such rejection prone to miscellaneous appeal remedy under Order XLIII Rule 1(d) and Rule 2 and Order XLI CPC r/w. Section 28 of the HM Act. It is also for what is the bar provided under Order IX Rule 13 of CPC is maintainability of an application under Order IX Rule 13 CPC where before maintaining such application if invoked already the doors of the appellate Court by appeal remedy also provided.

10. Thus, the order of the lower Court in dismissing the I.A.No.928 of 2003 in HMOP No.86 of 2001 is liable to be set aside and the exparte decree set aside application is to be allowed by setting aside the exparte decree of the divorce dated 24.04.2002 and restoring the HMOP No.86 of 2001 to the file of the Senior Civil Judge, Machilipatnam to receive counter of the respondent wife and decide the case after trial on merits. Point-ii:

11. In the result, the appeal is allowed with no costs and the impugned order of the lower Court dated 19.07.2004 in I.A.No.928 of 2003 is set aside and consequently the said application is allowed by setting aside the exparte decree of divorce dated 24.04.2002 by restoring the HMOP No.86 of 2001 to the file of the Senior Civil Judge, Machilipatnam to decide the same preferably within six months and on merits by receiving counter of the respondent-wife therein and by recording the evidence afresh of both sides.

_____ R.SUBHASH REDDY,J _____ Dr.B.SIVA SANKARA RAO,J Appendix of evidence:

Documents marked for appellant:

-Nil-

Documents marked for respondent (as per orders in CMAMP No.1647 of 2014):

Ex.R.1 Wedding card,dt.20.02.2003 Ex.R.2 Receipt issued by Sri Kalyana Venkateswara Swamy Devasthanam, Mantada, dt.20.02.2003 Ex.R.3 Birth certificate issued by gram panchayat, Vuyyuru,dt.17.02.2004 Ex.R.4 Copy of Petition in Maintenance Case, Ex.R.5 Copy of the plaint in O.S.No.17 of 2013, Ex.R.6 Copy of Written Statement in O.S.No.17 of 2013 Documents marked by the Court for reference:

Ex.C.1 in the part of respondents name in the vakalath, Ex.C2 &3 Short and long cause title of respondent in the address memo filed in Divorce O.P.86 of 2001 Ex.C4 &5 The correction that was carried on in the long and short cause title of respondent in the 1st page of petition in O.P.86 of 2001 Ex.C.6 Original docket proceedings sheet of the Court right from filing of the petition on 03.08.2001 till the exparte decree passed by the Court on 24.04.2002, Ex.C.7 deposition of PW1 in O.P.No.86 of 2001, Ex.C.8 Ex parte decree dated on 24.04.2002, Ex.C.9 Photostat copy of paper publication.

_____ R.SUBHASH REDDY,J _____ Dr.B.SIVA SANKARA RAO,J Date: 02-04-2015.