

Before Rakesh Kumar Jain & Harnaresh Singh Gill, JJ.

HARPREET SHARMA—Appellant

versus

SONIA SHARMA—Respondent

FAO-M No.110 of 2019

April 23, 2019

A) Hindu Marriage Act, 1955—S.13-B— Code of Civil Procedure, 1908— Order IX Rule 8 and S.28—Mutual divorce— Dismissal of petition for non prosecution— Appeal for Condonation of delay of 3555 days—Maintainability—All decrees made by Court in any proceeding under the Act are appealable—Held, no decree passed by trial Court as the only order that has been passed is of dismissing the petition filed u/S 13 of the Act, 1955 in terms of Order IX, Rule 8 of CPC—Hence appeal u/S 28 not maintainable.

Held that according to the provisions of S.28 of the Act, all decrees made by the Court in any proceeding under the Act are applicable.

(Para 7)

Further held that there is no decree passed by the learned trial Court as the only order that has been passed is of dismissing the petition filed under Section 13 of the Act in terms of the Order IX Rule 8 of the CPC. Thus, the present appeal filed by the appellant under Section 28 of the Act is not maintainable.

(Para 8)

B) Hindu Marriage Act, 1955—S.13-B—Code of Civil Procedure, 1908—Order IX, Rules 8, 9 and S.28—Appeal— Maintainability—Appellant has remedy of filing of appeal only against order passed under Order IX, Rule 9 of CPC and not against order passed under Order IX, Rule 8—Hence, appeal not maintainable.

Held that appeal would lie under Order 43 of the CPC in case an application filed under Order IX Rule 9 of the CPC is dismissed for setting aside the order having been passed under Order IX Rule 8 of the CPC. The appellant has, thus, got the remedy of filing an appeal only against the order having been passed under Order IX Rule 9 of the CPC and not against the order having been passed under Order IX Rule 8 of the CPC.

(Para 10)

C) *Hindu Marriage Act, 1955—S.13-B—Code of Civil Procedure, 1908—Order IX, Rules 8, 9 and S.28—Limitation Act, 1963—S.5 and Art. 122—Mutual divorce—Dismissal of petition for non prosecution—Appeal for Condonation of delay of 3555 days—Maintainability—Application for Condonation of delay can be filed by invoking provision of Order IX, Rule 9 and Section 5 of Act, 1963— Thus, appeal under Section 28 of CPC not maintainable.*

Held that in case the appellant could not have filed the said application within time as prescribed before the learned trial Court and has filed the present appeal after the delay of 3555 days before this Court, the application could have been filed by him for setting aside the order dated 18.04.2009 by invoking the provisions of Order IX Rule 9 of the CPC and by invoking the provisions of Section 5 of the Limitation Act, 1963 as the said provisions are applicable to the appeal and applications and in case sufficient cause is shown, the application for condonation of delay, in not moving the application in time, can be entertained by the trial Court.

(Para 13)

Further held that we are of the considered opinion and hold that an appeal filed under Section 28 of the Act is not maintainable against an order having been passed under Order IX Rule 8 of the CPC.

(Para 14)

Lalit Kumar Sharma, Advocate
for Amit Shukla, Advocate
for the *appellant*.

RAJESH KUMAR JAIN, J.

(1) This appeal has arisen from the order dated 18.04.2009 passed by the Additional District Judge, Sangrur by which he has dismissed the petition filed by the appellant-husband under Section 13-B of the Hindu Marriage Act, 1955 (for short “the Act”) for dissolution of his marriage with respondent-wife by invoking Order IX Rule 8 of the Code of Civil Procedure, 1908 (for short “the CPC”). The appeal is filed under Section 28 of the Act alongwith an application for seeking condonation of delay of 3555 days in filing the appeal.

(2) Before we embark upon the application for condonation of delay, the salutary question would arise in this case is as to whether an

appeal under Section 28 of the Act against the order having been passed under Order IX Rule 8 of the CPC would be maintainable?

(3) In order to answer this question, it would be relevant to refer to the provisions of Order IX Rule 8 of the CPC which provides that “where the defendant appears and the plaintiff does not appear when the suit is called on for hearing, the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission”

(4) The next question would be as to whether there is any provision under the CPC for seeking a remedy against the order having been passed under Order IX Rule 8?

(5) Order IX Rule 9 of the CPC which deals with the decree against plaintiff by default bars fresh suit provides that “Where a suit is wholly or partly dismissed under rule 8, the plaintiff shall be precluded from bringing a fresh suit in respect of the same cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit.”

(6) The appellant instead of filing an application under Order IX Rule 9 has filed the present appeal under Section 28 of the Act. Section 28 of the Act is reproduced as under:-

28 Appeals from decrees and orders.-

(1) All decrees made by Court in any proceeding under this Act shall, subject to the provisions of sub-section (3), be appealable as decrees of the Court made in the exercise of its original civil jurisdiction and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in the exercise of its original civil jurisdiction.

(2) Orders made by the Court in any proceedings under this Act, under Section 25 or Section 26 shall, subject to the provisions of sub-section (3), be appealable if they are not interim orders and every such appeal shall lie to the Court to which appeals ordinarily lie from the decisions of the Court given in exercise of its original civil jurisdiction.

(3) There shall be no appeal under this section on subject of costs only.

(4) Every appeal under this section shall be preferred within a period of thirty days from the date of the decree or order.”

(7) According to the aforesaid provisions, all decrees made by the Court in any proceeding under the Act are appealable.

(8) In the present case there is no decree passed by the learned trial Court as the only order that has been passed is of dismissing the petition filed under Section 13 of the Act in terms of the Order IX Rule 8 of the CPC. Thus, the present appeal filed by the appellant under Section 28 of the Act is not maintainable.

(9) Then the question would arise as to whether any appeal is provided in the CPC against such an order having been passed under Order IX Rule 8 of the CPC. In this regard, reference could be had to Order 43 of the CPC which deals with appeals from orders. Order 43 (1) (c) provides that “an order under rule 9 of Order IX rejecting an application (in a case open to appeal) for an order to set aside the dismissal of a suit.”

(10) According to the aforesaid provision, appeal would lie under Order 43 of the CPC in case an application filed under Order IX Rule 9 of the CPC is dismissed for setting aside the order having been passed under Order IX Rule 8 of the CPC. The appellant has, thus, got the remedy of filing of an appeal only against the order having been passed under Order IX Rule 9 of the CPC and not against the order having been passed under Order IX Rule 8 of the CPC.

(11) The next question would arise as to whether the appellant has still got a remedy to approach the trial Court?

(12) Since the petition filed by the appellant under Section 13 of the Act has been dismissed for non-prosecution in terms of Order IX Rule 8 of the CPC, the application can be filed by the aggrieved party before the same Court by invoking the provisions of Order IX Rule 9 of the CPC. Article 122 of the Limitation Act, 1963 provides a period of one month for filing of such an application.

(13) In case the appellant could not have filed the said application within time as prescribed before the learned trial Court and has filed the present appeal after the delay of 3555 days before this Court, the application could have been filed by him for setting aside the order dated 18.04.2009 by invoking the provisions of Order IX Rule 9

of the CPC and by invoking the provisions of Section 5 of the Limitation Act, 1963 as the said provisions are applicable to the appeals and applications and in case sufficient cause is shown, the application for condonation of delay, in not moving the application in time, can be entertained by the trial Court.

(14) Thus, in view of the aforesaid facts circumstances, we are of the considered opinion and hold that an appeal filed under Section 28 of the Act is not maintainable against an order having been passed under Order IX Rule 8 of the CPC.

(15) It is further held that after an order passed under Order IX Rule 8 of the CPC, the only remedy available to the aggrieved party is to file an application for setting aside the said order under Order IX Rule 9 of the CPC. Thus, in our considered opinion present appeal is totally misconceived and the same is hereby dismissed as such. No costs.