

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.764 of 2013

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Shila Devi, W/o Shri Milind Kumar Singh, D/o Late Jagarnath Singh, resident of Naya Para, P.S- Dumka, District- Dumka.

... ... Appellant/s

Versus

Milind Kumar Singh, S/o Late Chandra Shekhar Prasad Singh, resident of Mohalla- Shashtri Chowk, Refugee Colony, Munger, P.S- Kotwali, District- Munger.

... ... Respondent/s

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Issue for consideration: whether the decree of Family court annulling the marriage ex-parte of appellant without valid service of notice was justified

appellant (wife) left matrimonial home - filed complaint case u/s 498A - maintenance case u/s 125crpc – respondent(husband) filed matrimonial case u/s 12(1)(a)(b) and 5(ii)(b) of the Hindu Marriage Act –notice was issued to appellant – appellant didn’t appear – due to non-appearance – suit proceeded ex-parte –marriage declared as nullity –appellant submitted that respondent managed the office and as such no notice was ever served – no material to substantiate that there was valid service upon appellant as evident from the order sheet of suit

HELD: the notice was issued through courier and not by any registered post as well as ordinary process . learned family court automatically directed for substituted service through paper publication for appearance of appellant without taking steps for serving by ordinary procedure as laid down in order 5 Rule 9, 12, 15 and 17 of the civil procedure code .Family court is not expected to function in a mechanical way and tread so casually in the matter service of summon to a party in a matrimonial dispute concerning divorce is a serious matter as it concerns the entire life of spouse. ex-parte decree is legally unsustainable on the ground of non service of notice upon appellant

Order 5 rule 20(1) and Order 5 rule 20(1-A) Civil procedure code - Substituted service

HELD :Court should not automatically grant the application for substituted service without taking steps for serving by ordinary procedure as laid down in order 5 rule 9,12 ,15 and 17 of the civil procedure code .It must be kept in view that substituted service has to be resorted as the last resort when notice can't be served in ordinary way and the court is satisfied that there is reason to believe that service of summon is avoided. [Para 7-12]

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... .. Respondent/s

Appearance :
For the Appellant/s : Mr. Gyanendra Kumar Singh, Advocate
For the Respondent/s : Mr. Vinay Kirti Singh, Sr. Advocate
Mr. Pramod Kumar Sinha, Advocate
Mr. Akhileshwar Singh, Advocate
Mr. Chaintany Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI
and
HONOURABLE MR. JUSTICE ARUN KUMAR JHA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE ARUN KUMAR JHA)

Date : 01-03-2024

The instant appeal has been filed by the appellant/wife (for brevity ‘wife’) against the judgment and decree dated 04.02.2013 and 19.02.2013, respectively passed by learned Principal Judge, Family Court, Munger in Title Suit (Matrimonial) No.97 of 2008 whereby and whereunder the petition dated 09.07.2008 filed by the respondent/husband (for brevity ‘husband’) against wife under Section 12 (1) (a) & (b) read with Section 5 (ii) (b) of the Hindu Marriage Act, 1955 (hereinafter referred to as ‘the Act’) has been allowed *ex-parte* and, accordingly, the suit was decreed annulling the marriage



between the parties by decree of nullity.

2. Briefly stated the case of husband, as it appears from the records, is that the parties are Hindus. They were married on 26.06.1991. Thereafter, both the parties started living together as husband and wife. Husband came to realize that wife was suffering from some mental disorder. Thereafter, she was taken to doctor at Naugachiya from where she was referred to Psychiatrist and, as such, she was taken to Ranchi where she was diagnosed as suffering from 'schizophrenia'. Thereafter, she got attack of 'schizophrenia' on 21.09.1999 and was treated by Dr. S.P. Sinha. Thereafter, as per advice of doctor, she was admitted in Central Institute of Psychiatry, Kanke, Ranchi where she was declared as afflicted with 'schizophrenia' and it was also detected that wife was suffering from 'schizophrenia' and it was influenced by genetics and she was lunatic at the time of marriage. On account of persistent repugnance on the part of wife to the act of consummation, the marriage was not consummated and it was claimed by husband that she was impotent at the time of marriage. On 30.01.2003, wife left her matrimonial house and went to Dumka to reside with her mother. Despite efforts of husband, wife did not join him and wife filed a complaint Case No.343/2005 under Section 498(A) of the Indian Penal Code, which was converted into Town P.S. Case



No.215 of 2005. Wife also filed a maintenance case under Section 125 of the Code of Criminal Procedure in the Family Court, Dumka in the year 2005 in which the learned Principal Judge, Family Court directed husband to pay a sum of Rs.2,000/- per month as ad-interim relief to wife. Thereafter, husband filed a matrimonial case under Section 12 (1) (a) & (b) read with Section 5 (ii) (b) of the Hindu Marriage Act bearing Title Suit (Matrimonial) No.97 of 2008 in which notice was issued to wife, but she did not appear. Due to non-appearance of wife, the Title Suit (Matrimonial) No.97 of 2008 proceeded *ex-parte* in terms of order dated 10.11.2009. On the basis of pleadings and depositions, the learned Principal Judge, Family Court, Munger declared the marriage of wife as nullity vide impugned judgment dated 04.02.2013 and decree dated 19.02.2023, which is under challenge before this Court.

3. The learned counsel for wife submitted that while passing the impugned judgment and decree dated 04.02.2013 and 19.02.2013, respectively, the learned Family Court completely ignored and discarded the fact that though husband appeared, filed show cause and produced the witnesses before the learned Principal Judge, Family Court, Dumka in Cr. Misc. Case No. 133 of 2005 and a proceeding under Section 125 (4) & (5) of Cr.P.C., but husband never informed the learned Family



Court as well as wife or her conducting lawyer at Dumka about the pendency of the Title Suit (Matrimonial) No.97 of 2008. The learned counsel further submitted that the respondent managed the office, resulting thereof, no notice was ever served upon wife. The learned counsel further submitted that the impugned judgment and decree under appeal are based on erroneous consideration as the learned court below completely ignored and discarded the fact that there was no material to substantiate that there was valid service upon wife as is evident from the order sheet of the Title Suit (Matrimonial) No.97 of 2008.

4. On the other hand, learned counsel for husband while justifying the judgment and decree of learned Family Court submitted that the notice by way of publication is sufficient notice of the proceedings to wife and since, despite such publication, wife failed to appear, the trial court rightly proceeded *ex-parte*. The learned counsel further submitted that pendency of the matrimonial suit was well within the knowledge of wife and her family members, but she chose not to appear for about five years during the pendency of the suit. Hence, the impugned judgment and decree does not call for any interference.

5. After due hearing of learned counsels for the parties and on perusal of the trial court's record, we are satisfied



that the *ex-parte* decree is legally unsustainable on the ground of non-service of notice upon wife and the same need to be remanded for retrial, we are not inclined to go into the details of the pleadings of the parties, as any observation on that count might affect the case of either of the parties when the matter is retried by the learned trial court on merits.

6. For the purposes of examining as to whether the *ex-parte* decree was rightly passed by the learned trial court, we have perused the record of the learned trial court, from which it can be gathered that the suit was filed on 09.07.2008. On 06.08.2008, the learned Family Court directed for issuance of notice upon wife through courier and, accordingly, requisites for the same were filed. Thereafter, notice through courier was issued on 14.08.2008. Further, from the order sheet dated 16.10.2008, it appears that service of notice was declared to be validly served on the ground of refusal. Thereafter, the matter was fixed for appearance of wife on several dates. The order sheet dated 02.09.2009 shows the learned Family Court directed for substituted service through paper publication for appearance of wife at the request of learned counsel for husband. Thereafter, on 04.09.2009, format of publication was filed and office was directed to issue the same after its proper verification. On 16.09.2009, from the side of husband, paper cutting of



publication of notice was filed in which wife was directed to appear in the family court on 07.10.2009 and on that date, she did not appear and the next date was fixed for 10.11.2009. Thereafter, on 10.11.2009, when wife did not appear before the learned Family Court, the matter proceeded *ex-parte* against wife and ultimately, an *ex-parte* judgment and decree was passed on 04.02.2013 and 19.02.2013, respectively.

7. Evidently, the matter was heard *ex-parte* against wife before the learned family court. Firstly, the notice was issued to wife through courier in which service report shows 'refused to accept the notice', which was without any registered post as well as ordinary process. Thereafter, at the request of learned counsel for husband, notice was directed to be issued through paper publication. However, from the records, we do not find any application under Order 5 Rule 20 of the Code of Civil Procedure, 1908 (hereinafter referred to as 'the Code') for the said purpose. Even in the order dated 02.09.2009, the name of the newspaper in which the notice is to be published is not mentioned. It appears that notice was published in a newspaper namely, Hindustan local edition, Bhagalpur, Bihar, but the address of wife is at Dumka in the State of Jharkhand.

8. Further, Order 5 of the Code makes provision for issue and service of summons. Rule 9 thereof provides that



where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court. Under sub-rule (3) of Rule 9, the services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the Court.

9. Rule 17 of Order 5 of the Code prescribes the procedure when defendant refuses to accept service, or cannot be found. It provides that if the defendant cannot be found, the serving officer shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally works for gain, and shall then return the original to the court from which it was issued, with a report endorsed thereon or annexed thereto stating that he has so affixed the copy, the circumstances under which he did so, and the name and address of the person by whom the house was identified and in whose



presence the copy was affixed. Under Rule 19 of Order 5 of the Code, examination of the serving officer is must where a summons is returned under Rule 17, as above.

10. Upon being satisfied after examination of the serving officer that the defendant is keeping out of the way for the purpose of avoiding service, the Court may proceed to invoke Rule 20 (1) to direct service by affixing in some conspicuous place in the Court house and also upon some conspicuous part of the house (if any) in which the defendant is known to have last resided or carried on business or personally worked for gain, or in such other manner as the court thinks fit. Thus, before proceeding to direct substituted service the procedure prescribed under Rules 9 and 19 of Order 5 of the Code has to be followed. Further, Rule 20 (1-A) of the Code provides that where the Court acting under sub-rule (1) orders service by an advertisement in a newspaper, the newspaper shall be a daily newspaper circulating in the locality in which the defendant is last known to have actually and voluntarily resided, carried on business or personally worked for gain.

11. In the present case, notice sent through courier has been shown to be refused but it has not come on record who made such endorsement. The endorsement is without any initial, signature or name. Further recourse to substituted service was



though taken through publication, but it was not in local news paper of Dumka, Jharkhand.

12. The Hon'ble Supreme Court in the case of *Yallawwa v. Shantavva*, reported in (1997) 11 SCC 159 has held that the trial court could not have almost automatically granted the application for substituted service without taking steps for serving the respondent by ordinary procedure as laid down by Order 5 Rules 12, 15 and 17 of the Code. It must be kept in view that substituted service has to be resorted as the last resort when the defendant cannot be served in the ordinary way and the Court is satisfied that there is reason to believe that the defendant 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. The Hon'ble Supreme Court further observed that it appears that almost automatically the procedure of substituted service was resorted to. In the instant case also, as mentioned in the preceding paragraphs, the learned trial court has almost instantly allowed the prayer without recording the satisfaction about the prerequisites for exercise of power under Order 5 Rule 20 of the Code.

13. The learned Family Court was not expected to function in a mechanical manner and tread so casually in the matter. Service of summons to a wife in a matrimonial dispute



concerning divorce is a serious matter because it concerns the entire life of the spouse against whom a decree of divorce has been sought and service cannot be presumed.

14. Having regard to the facts and circumstances of the case, we are satisfied that wife was not duly served with the notice and the procedure adopted for directing substituted service being vitiated, wife has demonstrated sufficient cause for her non-appearance before the learned Family Court on the date when she was proceeded *ex-parte*, therefore, the *ex-parte* judgment and decree passed against her deserve to be set aside. Accordingly, the judgment dated 04.02.2013 passed in Title Suit (Matrimonial) No. 97 of 2008 is set aside and as a consequence, the *ex-parte* decree dated 19.02.2013 is also set aside. Title Suit (Matrimonial) No. 97 of 2008 is restored on the file of learned Principal Judge, Family Court, Munger. The matter is remitted back to the learned Family Court for decision afresh in accordance with law and on its own merits within a period of six months from the date of receipt/production of a copy of this judgment, after giving ample opportunity of adducing evidence and hearing to the respective parties.

15. We direct the parties to appear before the learned Family Court on 15.03.2024. The learned Family Court shall not issue any fresh notice to the parties.



16. The trial court record be sent back to the learned trial court forthwith.

17. As an upshot, the appeal is allowed, leaving the parties to bear their own costs.

(P. B. Bajanthri, J)

(Arun Kumar Jha, J)

V.K.Pandey/-

AFR/NAFR	AFR
CAV DATE	16.02.2024
Uploading Date	01.03.2024
Transmission Date	NA

