

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.82 of 2024

1. Nishi Kant Jha Son of Shiv Nandan Jha, Resident of village- Babutola Amarpur Road, P.S. and District - Banka - 813102. Residing at Banta Nagar, C-Zone near DAV School Adityapur, Saraikala, Kharsawan, Jharkhand.
2. Ridam Kumari D/o Sanjay Kumar Jha, and maternal Grand daughter of Nishi Kant Jha, Resident of Village-Babutola Amarpur Road, P.S. and District-Banka-813102, Residing at Banta Nagar, C-Zone near DAV School Adityapur, Saraikala, Kharsawan, Jharkhand.

... .. Appellant/s

Versus

Sanjay Kumar Jha son of Sri Dinesh Chandra Jha, resident of Village-Chamreli, P.S. Banka, District-Banka.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr.Rajib Ranjan Jha
For the Respondent/s : Mr.Rajendra Kumar Jha

CORAM: HONOURABLE MR. JUSTICE P. B. BAJANTHRI

and

HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ALOK KUMAR PANDEY)

Date : 21-08-2024

The present appeal is directed against the order dated 18.09.2023 passed in Guardian and Wards Case No. 01 of 2020 by the Court of learned Principal Judge, Family Court, Banka whereby and whereunder appellant no. 1/Nishi Kant Jha has been ordered to hand over appellant no. 2/Ridam Kumari to the respondent/Sanjay Kumar Jha.

2. Briefly stated facts of the case is that respondent is said to have married with Nikita Anand/daughter of appellant no. 1 and out of the said wedlock one



daughter/appellant no. 2 took birth. It is stated that respondent visited the house of appellant no. 1 to meet his daughter/appellant no. 2 and the present case has been filed by the respondent being father and natural guardian seeking guardianship of his minor child under the Guardian and Ward Act.

3. With the consent of the learned counsels for the respective parties, the present M.A. No. 82 of 2024 is taken up for final disposal.

4. Learned counsel for the appellants submitted that respondent has filed petition before the Principal Judge, Family Court, Banka for appointment of legal guardian and to take custody of appellant no. 2 as her mother, namely, Nikita Anand (wife of respondent) died at Sikri N.H. 2 near Kaili bypass road, Faridabad, Hariyana on 05.06.2017 in a road accident and after death of mother of appellant no. 2, appellant no. 1 is taking care of appellant no. 2 at Banka as she was only aged about 4-5 years at the time of death of her mother. Learned counsel further submitted that appellant no. 2 is residing with her grand maternal uncle and she is studying in 5th Class in Saraswati Shisha Mandir, Banka. Learned counsel further submitted that respondent has filed an



application before the Principal Judge, Family Court, Banka under Section 7(i) of the Guardians and Wards Act for following relief(s):-

(i) It be held and declared that the respondent is the guardian of the appellant no. 2.

(ii) That upon above adjudication, the court be further pleased to direct the appellant no. 1 to hand over the appellant no. 2 to the respondent.

(iii) The learned Court be further pleased to restrain/direct the appellant no. 1 not to interfere in guardianship of the respondent.

5. Learned counsel for the appellants further submitted that Case No. 02 of 2020 was admitted on 23.12.2020 and notices have been issued vide DB No. 4 dated 08.01.2021. Order sheet dated 06.09.2021 revealed that service reports were attached with the records. From order sheet dated 10.10.2022 it appears that all process for service of summons have been completed and it is also presumed that proper service of summon has been served upon the appellants and the petition was posted for ex parte hearing against them under Order IX Rule 6(i)(a) of the Civil Procedure Code, 1908. He further submitted that in the said case three witnesses have been examined on behalf of the



respondent, they are PW-1/respondent himself, PW-2 Dinesh Jha/father of the respondent and PW-3 Maharani Devi/mother of the respondent. Thereafter, the concerned court on 18.09.2023 passed the order declaring the respondent as natural guardian of appellant no. 2 and ordered that appellant no. 1 shall hand over appellant no. 2 to the respondent in terms of the order. Learned counsel for the appellants submitted that being aggrieved and dissatisfied with the order dated 18.09.2023 passed by the concerned Family Court, the present M.A. has been presented. He further submitted that impugned order is not justified in the light of statutory provision as well as on the facts as ex parte order has been passed behind the back of the appellants and no notice has been served upon the appellants and service report of summon will reveal the real fact as to whether any notices have been received by the appellants or not. He further submits that impugned order has been passed in contravention of Order IX Rule 6(i)(a) of the CPC as summons were never served upon the appellants and illegal order has been passed to hear ex parte and the concerned court has not examined the postal peon who is stated to have served the notice upon the appellants. The concerned court merely relied upon the



service report as to whether notices have been served upon the appellants or not and fixed the case for ex parte hearing under Order IX Rule 6(i)(a) of the CPC.

6. Learned counsel for the respondent submitted that proper notice has been served upon the appellant and the Principal Judge, Family Court, Banka has passed the impugned order on the basis of material available on record and hence, no interference is needed.

7. From perusal of the record, we are satisfied that *ex parte* order is legally unsustainable on the ground of non-service of notice upon the appellants and the same needs to be remanded for retrial, we are not inclined to go into the details of merit of the present appeal, as any observation on that count might affect the case of either of the parties when matter is retried by the trial court on merit.

8. For the purposes of examining as to whether the *ex-parte* order was rightly passed by the learned Principal Judge, Family Court, we have perused the record of Family Court. Order sheet dated 19.12.2020 reveals that petition under Section 7(1) of Guardian and Ward Act along with Vakalatnama was filed on behalf of the respondent and same was ordered to be registered and the petition was admitted on



23.12.2020 and order was made to submit requisites. On 04.02.2021, postal receipt was submitted on behalf of the respondent. From order sheet dated 27.03.2021 to 29.10.2021, no effective order has been passed. On 21.12.2021, it was mentioned that receipt was tagged with the record and matter was put up for 04.02.2022. On 04.02.2022, it was prayed that opposite party/appellants were presently residing in Jharkhand and accordingly, prayed to issue summon on the present address and order was made to submit requisite. On 10.10.2022, the court has passed order that all the processes have been completed but opposite party has not made appearance and therefore, case was put up for ex parte hearing.

9. Order 5 of the Civil Procedure Code makes provision for issuance and service of summons. Rule 9 thereof provides 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.

10. Rule 17 of Order 5 of the Civil Procedure 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.

11. From perusal of the order sheets it is evident that there is no finding as to whether court has satisfied that



service of notice was served upon the appellant or not. Order sheet dated 10.10.2022 reveals that the court has jumped to the conclusion by putting the case for ex parte hearing without complying the statutory provision. The order sheet clearly indicates that steps taken by the concerned court is against the provision of Order 5 Rules, 12, 15 and 17 of the C.P.C. The concerned court has never expressed satisfaction as to how he has completed all the processes to secure the presence of appellants. Unless and until the court satisfies itself that notice was properly served, then, on said score, the court can not pass order that notice has been properly served upon the appellants. Order sheet dated 04.02.2022 clearly indicates that opposite party is residing at Jharkhand and order has been made to file requisites for service of notice upon the opposite party/appellants but there was no specific order on any particular date that court has satisfied that service of summon served upon the appellant and the court has directly jumped to the conclusion that notice has properly served without making any whispering that how the notice has been served upon the opposite party/appellants.

12. In the present case, learned Principal Judge, Family Court has passed the order in a casual and mechanical



manner. The order sheet dated 10.10.2022 clearly indicates that case has been fixed for ex parte hearing and the order sheets describe that all the processes have been exhausted but prior to order sheet dated 10.10.2022, there is nothing on record which goes to say that how many processes have been initiated for serving the notice upon the appellant. The order sheets only indicate that paraphernalia and the processes have been done to show that all the processes have been exhausted but in reality the statutory provisions have not been complied and the case has been fixed for ex parte hearing without taking proper recourse which is mandatory requirement under statutory provision. No whisper has been made by the concerned court in any of the order sheet that notice has been properly served upon the opposite party/appellants. Order sheet dated 04.02.2022 clearly indicates that appellants are presently residing in Jharkhand in that situation whether notice has been properly served at new address or not. On said score, no whisper has been made by the court in any of the order sheet. In this way, court has violated the statutory provision of Order 5 Rules 12, 15 and 17 of the CPC. In the said matter, the court should not follow mechanical approach for compliance of issuance of notice rather the court should



take all statutory provision into account which is expected about the prerequisites for exercise of power under Order 5 Rules 12, 15 and 17 of the Civil Procedure Code regarding issuance of summon for appearance of the party.

13. Having regard to the facts and circumstances of the case, we are satisfied that appellants were not duly served with the notice and the procedure adopted by the concerned court being vitiated, therefore, ex-parte order passed against the appellants deserves to be set aside. Accordingly, order dated 18.09.2023 passed in Guardian and Wards Case No. 01 of 2020 by the Court of learned Principal Judge, Family Court, Banka is set aside. Guardian and Wards Case No. 01 of 2020 is restored on the file of Principal Judge, Family Court, Banka. The matter is remitted back to the Family Court for decision afresh in accordance with law on its own merit 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. Parties are directed to co-operate in disposal of Guardian and Wards Case No. 01 of 2020. Family Court, Banka to list Guardian and Wards Case No. 01 of 2020 on 21.09.2024 at 3:00 PM. Parties/counsels are directed to



appear on the aforementioned date without further notice of appearance from Family Court, Banka.

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

15. Pending I.A.'s, if any, stands disposed of.

(P. B. Bajanthri, J)

(Alok Kumar Pandey, J)

shahzad/-

AFR/NAFR	AFR
CAV DATE	N.A.
Uploading Date	30.08.2024
Transmission Date	30.08.2024

