

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No. 203 of 2016

Shikha Priyadarshni W/o Neeraj Kumar, D/o Sri Pankaj Sharma Resident of
Mohalla - South Daulatpur, Raja Bazar, P.S. + District - Jehanabad.

... .. Opposite Party/Appellant

Versus

Neeraj Kumar S/o Ram Pravesh Sharma Resident of Village - Chainpur, P.S. -
Naubatpur, District - Patna.

... .. Plaintiff/Respondent

Appearance :

For the Appellant : Mr. Siyaram Sahi, Adv.
Mr. Devendra Kumar, Adv.
For the Respondent : Mr. Jai Prakash Verma, Adv.

**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

HONOURABLE MR. JUSTICE PRABHAT KUMAR SINGH

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 06-12-2019

Heard learned counsel appearing for the appellant as well as learned counsel appearing for the respondent and perused the record as well as lower court record.

2. The appellant (hereinafter referred to as opposite party) has preferred this appeal against the ex-parte judgment and decree dated 22.04.2015 passed by learned Principal Judge, Family Court, Patna in Matrimonial Case No. 184 of 2012 by



which and where under he decreed aforesaid Matrimonial Case No. 184 of 2012 filed by the respondent (hereinafter referred to as plaintiff) ex parte dissolving the marriage of opposite party with plaintiff passing decree of divorce.

3. The plaintiff filed the above stated Matrimonial Case No. 184 of 2012 for decree of divorce on 13.03.2012 on the ground of cruelty and desertion pleading in his plaint that his marriage was solemnized with opposite party on 01.06.2010 according to Hindu Rites and Rituals and after marriage, opposite party came to his house and started leading her married life with him as husband and wife but after five days of coming to his house, opposite party went to her parents' house on 13.06.2010 and thereafter, she never returned to the house of plaintiff though plaintiff took several efforts to take the opposite party back to his house. He further averred in his plaint that the opposite party falsely lodged criminal case vide Jehanabad P.S. Case No. 108 of 2011 against the plaintiff but even then the plaintiff went to the parental home of opposite party on 02.10.2010 with an object to take her back but he was badly assaulted by the opposite party as well as her family members and they threw the plaintiff from the roof as a result of which he sustained grievous injury and got treated himself.



4. The learned Principal Judge, after presentation and after admission of aforesaid Matrimonial Case No. 184 of 2012, issued summons to opposite party on 08.05.2012 by way of ordinary process as well as speed post but the service of aforesaid summons was never received by the court. However, on 01.04.2013, the plaintiff prayed before the learned Principal Judge for substituted service by publishing the notice in daily hindi newspaper and the aforesaid prayer of the plaintiff was allowed on 01.04.2013. Thereafter, the summons was published in daily newspaper and the court below accepted the aforesaid substituted service. However, the opposite party did not appear before the learned Principal Judge as a result whereof, the learned Principal Judge proceeded ex parte against the opposite party and having recorded the evidence of witnesses examined on behalf of the plaintiff passed the impugned judgment and decree which has been challenged by the opposite party before this court by filing the instant appeal.

5. Learned counsel appearing for the opposite party assailed the impugned judgment and decree arguing that no notice was ever received by the opposite party and as a matter of fact, she got knowledge of impugned judgment and decree when it was disclosed by the plaintiff in a proceeding of 125 of the Cr.P.C.



pending in the court of Jehanabad district and thereafter, she preferred this appeal. He further submits that the plaintiff has sought decree of divorce on the ground of desertion and cruelty and the plaintiff claimed in his plaint that he was thrown from the roof and got treated himself in the hospital but it is surprising enough that neither any injury report was produced nor any doctor was examined on behalf of the plaintiff to support the above stated fact but even then the learned Principal Judge accepted the aforesaid pleading of the plaintiff as gospel truth. He further submits that as a matter of fact, the plaintiff himself deserted the opposite party and moreover, it is demand of natural justice that opposite party should get an opportunity to place her case before the court.

6. On the other hand, learned counsel appearing for the plaintiff refuted the above stated submissions arguing that not only summons was issued to opposite party through ordinary post as well as through postal service but also the notice was published in daily Hindi newspaper and the learned trial court accepted the substituted service and after that proceeded in the case. He submits that evidence produced by the plaintiff before the learned Principal Judge remained uncontroverted and, therefore, even if the injury



report was not produced and doctor was not examined , then also, it does not make any difference.

7. Having heard the contentions of both the parties, we went through the record along with lower court record.

8. It is an admitted position that on 08.05.2012, the learned Principal Judge directed to issue summons to opposite party by both ways i.e. ordinary post as well as registered post and on 13.08.2012, Talbana etc. were filed before the learned Principal Judge but the order sheets of the lower court do not reflect this fact that summons was actually issued to opposite party or not and without receipt of any service report, all of a sudden a petition for substituted service was filed on behalf of the plaintiff and the said petition was allowed by the learned Principal Judge on the date of filing of the aforesaid petition itself without ascertaining this fact as to whether the opposite party was willfully avoiding the service or not.

9. Here, we would like to refer Order V Rule 20 of the Civil Procedure Code which runs as follows:-

20. Substituted service- (1)

Where 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 Court shall order the summons to be served by affixing a copy thereof 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.

[(1A) 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.]

10. The bare perusal of aforesaid provision goes to show that before permitting for substituted service, court is duty bound to come on the conclusion 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 but in the present case, admittedly, there is nothing in the order sheets of the learned Principal Judge that learned Principal Judge was satisfied that opposite party was avoiding the service of notice and without coming to the aforesaid



conclusion, the learned Principal Judge ordered for substituted service by way of publication in newspaper. Apart from this, admittedly, the service report of summons issued to the opposite party was never received and, therefore, there was no occasion before the Principal Judge to come on the conclusion that opposite party was avoiding the service of notice. Therefore, in our view, the learned Principal Judge committed error giving permission to plaintiff to take step for substituted service on the opposite party and, therefore, we are of the view that even if the summons/notice was published in daily newspaper, then also, we are of the opinion that opposite party did not get any notice. Moreover, mere publication of summons/notice in daily newspaper is not a conclusive proof of service of summons/notice. Therefore, in the aforesaid circumstance, we have no option except to set aside the impugned ex parte judgment and decree and remit the matter to the learned Principal Judge, Family Court, Patna for passing a fresh judgment after giving opportunity to the parties to adduce their evidence.

11. Accordingly, this miscellaneous appeal is allowed and the impugned ex parte judgment and decree is, hereby, set aside. The matter is remitted to the learned Principal Judge, Family Court, Patna with direction to him to give opportunity to opposite



party to file her objection against the petition filed on behalf of the plaintiff and also give opportunity to both parties to adduce evidence and thereafter, pass a fresh judgment in accordance with law. Furthermore, it is made clear that both parties shall appear before the learned Principal Judge, Family Court, Patna on 16.01.2020 and furthermore, the learned Principal Judge, Family Court, Patna shall make endeavour to concile the dispute of the parties before recording their evidence.

12. In the aforesaid manner, this miscellaneous appeal stands disposed of.

13. The lower court record be returned to concerned court without any delay.

(Hemant Kumar Srivastava, J)

(Prabhat Kumar Singh, J)

shahzad/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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