

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 6542 OF 2006

Rekha Vijay Gautam

.. Petitioner

vs.

Vijay Sunharilal Gautam

.. Respondent

Ms Aparna Devkar i/b M/s. M.P Vashi and Associates for the
Petitioner.

CORAM : M. S. SONAK, J.

DATE : 4 DECEMBER 2015.

P.C. :-

1] This petition challenges the judgment and order dated 29 March 2006, by which the Family Court has dismissed the Petitioner's application for setting aside the judgment and decree dated 17 June 2004, which according to the Petitioner was made *ex-parte*.

2] Ms Aparna Devkar, learned counsel for the Petitioner, has submitted that there is no material on record to indicate that proper service was effected upon the Petitioner. Though the impugned order records that the process was attempted to be served upon the Petitioner, but could not be served because the Petitioner refused service twice, there is really no record of issue of summons for the

second occasion. On the first occasion, Ms Devkar admitted that there is some record to the effect that the service was refused. However, her contention is that the Petitioner has filed an affidavit stating that the Petitioner at the relevant time was suffering from Cholera and was hospitalized. As such, there was no question of the Petitioner refusing service. Ms Devkar placed reliance upon the decision of this Court in case of *Meghji K. Patel Vs. Kundanmal C. Mehtani - AIR 1968 Bombay 387*.

3] The Respondent, though served, has chosen not to remain present in this Court, either himself or through his advocate.

4] The impugned order dated 29 March 2006 proceeds on the basis that the application for setting aside decree was not maintainable and the Petitioner should have preferred an appeal against the same. The case of the Petitioner is that she was never served with the summons in the matrimonial proceedings and therefore, the decree made is *ex-parte* decree. In these circumstances, the Family Court should not have non suited the Petitioner on the ground that the proper remedy was only to file an appeal against the decree.

5] Further, there is nothing on record to establish that the summons were admitted to be served upon the Petitioner on two occasions. Insofar the first occasion is concerned, on affidavit, the Petitioner had stated that she was never served and therefore, there was no question of refusing her service. That apart, explanation was also offered that the Petitioner was suffering from Cholera during the relevant period and therefore, there was no question of any service. These explanation has been rejected without assigning any cogent reason.

6] This Court, in case of *Meghji Patel (supra)*, has made observations with regard to the manner in which postal endorsement with regard to refusal of service are to be considered. No doubt, such matters depend upon peculiar facts and circumstances of each case. This Court has held that where an *ex-parte* decree has been passed after the writ of summons has been sent to a defendant by registered post and the cover containing the summons has been returned with the postal endorsement '*refused*', it is undoubtedly for the defendant to satisfy the Court that the letter was not actually tendered to such defendant. But the Defendant can only do so by making a statement on oath. This must usually remain uncontroverted, unless the

postman, who tendered the letter to him, is summoned and makes a statement that he tendered the cover containing summons to the defendant and after cross-examination, his evidence is believed. It is possible that this is not the course to be followed in every case. However, in the facts and circumstances of the present case, there is no material to really controvert the statement made by the Petitioner. The Respondent has also not produced any evidence to rebut the statement made by the Petitioner.

7] In view of the aforesaid, this is a case where there is failure on the part of the Family Court to exercise the jurisdiction which was vested in it. For this reason, the impugned judgment and order dated 29 March 2006 is set aside. The application made by the Petitioner for setting aside the *ex-parte* decree is hereby granted and the Matrimonial Petition No. A-657 of 2003 is restored to the file of the Family Court. The Family Court to dispose of the same as expeditiously as possible and in any case within a period of one year from the date of production of authenticated copy of this order.

8] The Family Court to issue notice to the Petitioner in the said petition (Respondent herein) and proceed with the petition after

afford of opportunities to both parties.

9] The parties or in any case the Petitioner herein is directed to appear before the Family Court on 14 January 2016 at 3.0 p.m. and produce an authenticated copy of this order.

10] Rule is made absolute in the aforesaid terms. There shall be no order as to costs.

11 All concerned to act on the basis of authenticated copy of this order.

(M. S. SONAK, J.)

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