

IN THE PUNJAB & HARYANA HIGH COURT AT CHANDIGARH

FAO-M-244-2014(O&M)
Date of decision : 14.12.2015

Meenu

... Appellant

Versus

Ajay Singh

... Respondent

**CORAM: HON'BLE MR. JUSTICE RAJIVE BHALLA
HON'BLE MRS. JUSTICE REKHA MITTAL**

Present: Mr. R. S. Chauhan, Advocate
for the appellant.

Mr. Vipin Mahajan, Advocate
for the respondent.

REKHA MITTAL, J.

The present appeal has been directed against the ex-parte judgment and decree dated 21.01.2014 passed by the District Judge, Pathankot, allowing the petition filed by the respondent (husband) for dissolution of marriage of the parties under Section 13 of the Hindu Marriage Act, 1955.

The parties tied marital knot on 01.03.2008 at Sujjanpur, Tehsil and District Pathankot. The respondent prayed for a decree of divorce levelling allegations against the appellant that she is guilty of subjecting her husband to cruelty and withdrawing from his society without any reasonable cause or excuse. It is averred that she refused to

consummate the marriage and declared that he was not a man of her liking. She used to taunt by saying that her husband had an ugly face. She used to pick up quarrels on petty matters and had been leaving the matrimonial home without consent of the respondent. She even threatened to involve the respondent in some false case. She along with her sister and brother-in-law caused injuries to his parents for which FIR under Sections 324, 323/34 of the Indian Penal Code was registered against the accused. She deserted the respondent for a period of more than two years before filing of the petition.

The appellant was proceeded against ex-parte as she failed to appear in the Court after publication of the notice in newspaper Daily Jagbani on 03.12.2013.

To substantiate his allegations, the respondent examined himself, Kirpal Singh PW2 and Kuldeep Singh, his uncle PW3.

The learned trial Court on appreciation of ex-parte evidence adduced by the respondent determined that the appellant (wife) is guilty of causing cruelty to her husband and deserting him for more than two years before filing the petition.

Feeling aggrieved against the judgment and decree passed by the trial Court, the instant appeal has been preferred by the appellant (wife).

Counsel for the appellant contends that apart from the fact that the respondent (husband) has failed to allege much less prove that the

appellant (wife) is guilty of causing cruelty of the magnitude that can constitute a valid ground for divorce, the ex-parte decree passed by the trial Court cannot be allowed to sustain for want of due service of the appellant and thus depriving her of her valuable right to defend the proceedings before the trial Court. To substantiate his contention, he has carried us through the jimni orders dated 01.10.2013 and 05.12.2013 passed by the learned trial Court whereby it was ordered to serve the appellant through substituted service by way of publication in Daily Jagbani. It is argued that the respondent was neither tendered the summons sent by the Court nor she ever refused to accept service, therefore, the order passed by the trial Court ordering service through publication is illegal and cannot form the basis for substitute service and later initiation of ex-parte proceedings on the basis of publication of notice in Daily Jagbani.

Counsel for the respondent would contend that as the appellant refused to accept the summons, a copy of the summon was affixed at the outer door of the house in which she was residing and the report made by the concerned Process Server is duly attested by Sh.Subhash Chand. It is further argued that the appellant could be proceeded against ex-parte on the basis of report of evading service and affixation of copy of the summon on the outer door of her house but the learned trial Court still got the notice published in the newspaper Daily Jagbani. It is further argued that as the appellant intentionally did not

appear in the trial proceedings, it is sufficient to show that she had nothing to say to controvert the allegations set out in the petition.

We have heard counsel for the parties and perused the records.

Before advertng to the merits of the case, it would be appropriate to examine if the orders passed by the trial Court on the basis whereof the ex-parte proceedings were initiated against the appellant can stand the test of judicial scrutiny. Perusal of records of the trial Court would make it evident that the petition filed by the respondent was taken up for the first time on 18.03.2013 and a notice was ordered to be issued to the appellant (respondent therein) on filing of process fee and registered cover. Dasti summons were also ordered to be issued under rules and the case was adjourned to 12.06.2013. The file was taken up on 01.06.2013 as 12.06.2013 happened to be a date during vacations but as per the endorsement made by the Ahlmad, the respondent (husband) or his counsel did not file the registered cover and copy of the petition and on the summons sent through dasti process, a report of evading service was made. On 01.10.2013, the Court made an order for substituted service of the appellant and a relevant extract from order dated 01.10.2013 reads as follows:-

“It is reported that respondent has evaded service and one copy of summons was pasted at the outer door of his house. From the report, I am satisfied that respondent cannot be served in ordinary manner. Notice to

respondent be issued by way of publication in Daily Jagbani on PF and publication charges for 05.12.2013.”

It appears that this report with regard to evading service was again received on process issued by way of dasti summons. On 05.12.2013, the appellant was proceeded against ex-parte as the notice has been published in the newspaper in compliance with order dated 01.10.2013. It is evident that no notice was sent to the appellant through process of the Court nor a notice was sent through registered cover as the respondent failed to file copy of the petition and the registered cover. Not only this, the learned trial Court did not bother to examine if copy of summons was affixed in compliance with the provisions of Order V Rule 17 of the Code of Civil Procedure (in short 'CPC').

Order V Rule 17 CPC provides for procedure when defendant refused to accept service or cannot be found. A relevant extract from Rule 17 of Order V reads thus:-

“17. Procedure when defendant refuses to accept service, or cannot be found— Where the defendant or his agent or such other person as aforesaid refuses to sign the acknowledgment, or where the serving officer, after using all due and reasonable diligence, cannot find the defendant, [who is absent from his residence at the time when service is sought to be effected on him at his residence and there is no likelihood of his being found at the residence within a reasonable time] and there is no agent empowered to accept service of the summons on his behalf, nor any other person on whom service can be

made, 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 do, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.”

The serving officer, subject to the conditions prescribed in Rule 17 being satisfied is required to 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 carry on business or personally works for gain. It is incumbent upon the serving officer to make a report with his signatures as to the circumstances under which he affixed the copy of summons, name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed. In the present case, the report made by the serving officer appears to be attested by one Subhash Chander but the address of said Subhash Chander does not appear to be mentioned while giving particulars of said Subhash Chander. Though the report made by the serving officer is not clearly legible but it appears that the said report was made by the concerned officer at the instance of the respondent (petitioner therein) on dasti process issued by the Court with an intent to help the respondent (husband) to get an order

of ex-parte proceedings. In absence of a proper report with regard to the appellant's evading service and / or affixation of a copy of the summons, we are of the considered opinion that satisfaction recorded by the trial Court for ordering substituted service of the appellant by way of publication in a newspaper is not legal and justified. It further appears that the learned trial Court did not appreciate that as the petitioner (respondent herein) had failed to comply with the order of filing registered cover and a copy of the petition, there was no occasion for substituted service which can only be ordered in the circumstances when the Court is satisfied that the other party is intentionally evading service or for any other reason the summons cannot be served in an ordinary way. This apart, there is no reference in the report that either a copy of the petition was appended with the summons much less a copy of the petition was affixed at the given address of the appellant.

To sum up, no proper summons were issued in the present case for service of the appellant and thus the question of any due service on the basis of publication in the newspaper does not arise. As the appellant was not duly served in the case, order passed by the learned trial Court initiating ex-parte proceedings and the ex-parte judgment and decree of divorce cannot be allowed to sustain and are accordingly set aside. As the ex-parte judgment and decree passed by the trial Court has been set aside, we would refrain from expressing any opinion on merits of the controversy lest it may cause prejudice to either of the parties during

proceedings before the trial Court.

In view of what has been discussed hereinabove, the appeal is allowed, ex-parte judgment and decree passed by the trial Court is set aside and the matter is remitted to the trial Court for adjudication fresh, in accordance with law. The parties through their counsel are directed to appear before the trial Court on 21.01.2016.

(RAJIVE BHALLA)
JUDGE

(REKHA MITTAL)
JUDGE

December 14, 2015.

Davinder Kumar