

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.448 of 2014

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Saket Kumar, Son of Jai Prakash Singh, R/o village Manjhol Tola Tilak
Nagar, P.S. Cheriabariarpur, District Begusarai.

.... Appellant

Versus

Nitu Kumari, D/o Ram Udgar Singh, R/o Village Rahatpur Tola Itwa
Chhorrapatti, P.S. Balia, District Begusarai.

.... Respondent

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**CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR
DATTA**

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

C.A.V. ORDER

(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

8 16.09.2016

This appeal has been filed against the order dated 12.05.2014, passed in Miscellaneous Case No. 03/2007, arising out of Matrimonial Case No. 05/2004, by the Principal Judge, Family Court, Begusarai, by which the judgment dated 18.05.2006 and decree dated 24.05.2006 (wrongly mentioned as 27.05.2006 in order under challenge) passed in Matrimonial Case No. 05/2004, have been set aside.

2. The case of the appellant, in brief, is that he filed a Matrimonial Case bearing No. 05/2004 for a decree of nullity of the marriage mainly on the ground that he was kidnapped by the family members of the sole respondents on the point of pistol from his



village namely, Majhoul, within the district of Begusarai, thereupon confined at a place and without performing customary rites and ceremonies of valid marriage. The further case of the appellant was that father of the appellant had instituted Cheria Beriarpur P.S. Case No. 23/2003 against the family members of the respondent and the appellant was recovered by the police from the house of the respondent after three months. In the Matrimonial Case No. 05/2004, summons was issued to the respondent through the process of the court as well as by the registered post and thereafter summons was also published in the daily news paper for the purpose of appearance of the respondent in the court below but the respondent did not appear in the said matrimonial case. Thereafter ex-parte proceedings was conducted and lastly vide order dated 18.05.2006, the Principal Judge, Family Court, Begusarai, annulled the marriage of the appellant with respondent, accordingly decree dated 24.05.2006 was prepared.

3. It has been further contended on behalf of the appellant that after lapse of more than eleven months on 07.04.2007, the respondent filed a Miscellaneous Case bearing No. 03/2007 before the Family Court, Begusarai, in terms of Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, for setting aside the order dated 18.05.2006 and decree dated 24.05.2006, on the grounds that she had no knowledge about the Matrimonial Case No. 05/2004 and the process server submitted a

false report regarding service of notice and the news paper in which the notice is said to be published, does not circulate in the village, where she was residing. The appellant contested the said Miscellaneous case, filed by the respondents.

4. The learned counsel of the appellant submits that the learned Principal Judge, Family Court, Begusarai, vide order dated 12.05.2014 passed in Miscellaneous Case No. 03/2007, set aside the order dated 18.05.2006 and the decree dated 24.05.2006 passed in Matrimonial Case No. 05/2004, giving erroneous finding that the respondent had no knowledge about the summons issued in the said matrimonial case, as also the summons being not duly served upon the respondent, therefore interference of this Court is required.

5. In this case, respondent has not entered her appearance before this court. Annexure-4 is the copy of the Miscellaneous Case No. 03/2007 filed by the respondent before the Family Court. From the perusal of the Annexure-4, it appears that the respondent, while filing Miscellaneous Case No. 03/2007 in terms of Order IX, Rule 13 for setting aside the judgment dated 18.05.2006 and decree dated 24.05.2006 contended that she had no knowledge about the institution of Matrimonial Case No. 05/2004 and the process server being in collusion with the appellant, submitted a false report regarding the service of summon. It was also contended that the summons issued by the registered post, neither served upon the respondent nor there is any kind service report of postal peon,



therefore, it could not be deemed to be a valid service and the gazette publication made in the daily news paper, that also was not within the knowledge of the respondent because the said news paper was never circulated in the locality of the respondent. The further contention of the respondent was that her brother learnt about the decree of divorce on 21.03.2007, passed in the said Matrimonial Case No. 05/2004 and thereafter verified the fact and procured certified copy of the judgment and decree of the said case. Having no alternative filed the Miscellaneous Case No. 03/2007 for setting aside the judgment dated 18.05.2006 and decree dated 24.05.2006 passed in Miscellaneous Case No.05/2004.

6. The Principal Judge, Family Court, Begusarai, while passing the order under challenge has given specific finding that the respondent had no knowledge about the issuance of summon in the matrimonial case as also the summons was not duly served upon her, accordingly, set aside the judgment dated 18.05.2006 and decree dated 24.05.2006 passed in Matrimonial Case No. 05/2014.

7. We have perused the records of the Matrimonial Case No. 05/2004, which is on record vide Annexure-2 to this appeal. From very perusal of the same, it appears that on 14.02.2004 appellant filed matrimonial case in the court below, thereafter on 28.06.2004 the case was admitted. On 28.06.2004 summons issued against the respondents, thereafter on 06.11.2004 again notice was sent by the registered post, in absence of any service report of



ordinary mode of service. On 06.05.2005 the learned court below passed order for substituted service by an advertisement in a news paper regarding appearance of the respondents in the said case, whereas by that time there was no service report regarding the summons served either by the process of court or by the registered post. On 28.12.2005 by the order of the court below Gazette proforma was sent for publication, thereafter it was published accordingly in the daily news paper and cutting of the news paper was also brought on record.

8. It further appears from the record of the case that on 18.04.2006 the court below summoned the process server for examination regarding the service report of summon issued against the respondents, which was already on record and accordingly the trial court proceeded for examining other witness of the appellant. After conclusion of the trial on 18.05.2006 judgment was pronounced, annulling the marriage of the appellant with the respondent, thereafter on 24.05.2006 the decree of nullity of marriage was sealed and signed.

9. From perusal of the records, we find that in the matrimonial case, the respondent herein never appeared. It also transpires that after issuance of summon by the process of the court as also the registered post, thereafter by the substituted mode of service by publishing advertisement in a daily news paper, the learned court below nowhere gave finding that the summon being



duly served upon the respondent. We also notice from the perusal of the order sheet of the matrimonial case that while proceeding for ex-parte hearing of the matter, the learned trial court was obliged to pass order in terms of order IX Rule 6 (a) of the Code of Civil Procedure (hereinafter referred to as the Code) that the suit be heard ex-parte. Thereafter only the court could have proceeded ex-parte in the matter. From perusal of the order, it is clear that the trial court has not recorded any such finding that summon was duly served upon the respondent, in spite of that, the respondent had not appeared, therefore the suit be heard ex-parte.

10. Ex-parte hearing of the suit, though provided under IX Rule 6 of the Code of Civil Procedure but the Code itself gives two occasions to the contesting party for entering appearance in the matter, subject to assigning good cause for his previous non-appearance. The first occasion to the contesting defendant as to make appearance is envisaged under order IX Rule 7 of the Code, during the trial of the case and the second is under Order IX Rule 13 of the Code after passing of the judgment and decree ex-parte against the defendant. In the present matter, the respondent was defendant in the court below filed a petition in terms of Order IX Rule 13 of the Code for setting aside the judgment dated 18.05.2006 and decree dated 24.05.2006, annulling the marriage.

11. The reason as assigned by the respondent for setting aside the ex-parte decree as referred above was that the process

server submitted a false report and the summons sent by the registered post neither delivered to him nor returned back to the court and further the news-paper in which advertisement was published for her appearance, does not circulate in her village or locality, where she was residing by that time.

12. In course of hearing of the Miscellaneous Case No.03/2005, the respondent led evidence regarding no service of summons through the court peon or registered post, but the appellant did not cross examine her on the point of service of summons through the court peon, thus there has been no rebuttal of her evidence regarding non-service of summons. This is an admitted fact as indicated in the order under challenge that the respondent did not receive any summons personally served through the peon of the court, whereas Rule 9 of the Family Court (Patna High Court) Rules 2000, which reads thus:

“9.Service of process-All processes shall be served in the manner laid down in the Code of Civil Procedure 1908, personally on the respondent except in exceptional cases where judge orders otherwise”.

Therefore, in the matrimonial proceeding service of summons should be made, personally on the respondent. There was no service report on the record in respect of summons issued under registered post. The appellant has also not made rebuttal of the evidence led by the respondent that the news papers, in which

advertisement for her appearance was published, does not circulate in the village/locality, where she was residing by that time.

13. Therefore, we are of the opinion that the appellant has not been able to dislodge the cause shown by the respondent for her non-appearance in the trial court. The appellant has also failed to rebut the evidence that summons were not duly served and further on the point of source of knowledge as also the date of knowledge regarding the ex-parte decree to the respondent. The law is well settled that in case of summons being not duly served, the limitation would run from the date of knowledge to the party who makes application for setting aside the ex-parte decree.

14. We are of the view that as provided in Rule 6 of Order IX, the suit may proceed ex-parte against the defendant, only when it is proved by the plaintiff to the satisfaction of the court that the defendant did not appear even though the summons was duly served. A party should not be deprived of hearing unless there has been something equivalent to misconduct or gross negligence on his part. After all, judgments rendered by the court after offering opportunities to all the parties and in satisfaction of principles of natural justice is much more valuable than judgments in absence of either parties when there is sufficient cause shown for such absence.

15. Thus in view of aforesaid discussions, we are of the opinion that the order dated 12.05.2014, passed in Miscellaneous

Case No.03/2007, does not require any interference by this court.

16. This appeal is, accordingly, dismissed.

(Sudhir Singh, J)

I agree.
(Ramesh Kumar Datta,J)

(Ramesh Kumar Datta, J)

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