

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

FAMILY COURT APPEAL NO. 6 OF 2016

Nikita Keswani. ..Appellant.

Versus

Dinesh Keswani. ..Respondent.

Mr. A. M. Sethna and Ms. R. R. Thakker i/b Vijay V. Nene for the Appellant.

Ms. Firdaus Moosa i/b Prakash Mahadik for the Respondent.

Coram : Ranjit More &
Dr. Shalini Phansalkar-Joshi, JJ.

Date : **March 21, 2016.**

P. C. :

1. Heard the learned Counsel appearing for the respective parties.

2. The Respondent herein had filed petition before the Family Court at Bandra seeking dissolution of marriage between himself and the Appellant herein on the ground of cruelty, being Petition No.A-1295 of 2015. By the judgment and order, which is impugned in this appeal, the learned Judge of the Family Court, Bandra has allowed the said petition *ex-parte* and dissolved the marriage between the parties by a decree of divorce on the ground of cruelty as contemplated under section 13(1)(ia) of the

Hindu Marriage Act, 1955.

3. The challenge to the decree is mainly on the ground that the Appellant could not remain present before the family Court for want of knowledge, and therefore, proceedings were conducted ex-parte. The learned Counsel appearing for the Appellant submitted that even the summons of the said divorce petition was not served on the Appellant in accordance with the law. He submitted that on this ground alone the decree deserves to be quashed and set aside and matter deserves to be remanded back with a direction for fresh disposal.

4. The learned Counsel appearing for the Respondent - husband opposed the appeal vehemently. She invited our attention to the copy of roznama of family Court and the endorsement given by the postal authority on the RPAD receipt and submitted that the Appellant was duly served with the summons of the divorce petition. She also submitted that the Appellant had filed mediation proceedings before the Court at Surat. The mediation proceedings were held there before the

Court at Surat on 29th May 2015 and 19th June 2015, which the Respondent had attended and on 29th May 2015 and 19th June 2015 the Appellant was made aware about the petition filed by the Respondent in the family Court at Bandra, Mumbai and therefore Appellant had knowledge about the divorce petition.

5. The learned Counsel appearing for the Appellant states that the Respondent had appeared before the Court at Surat in mediation proceedings, however, he did not disclose the fact that he had filed divorce proceedings before the Family Court at Bandra Mumbai.

6. We have considered the rival submissions. We have also gone through the appeal memo and documents annexed with the appeal memo. The crucial issue which requires consideration is whether the Appellant was duly served with the summons of the proceedings of divorce petition taken out by the Respondent before the Family Court at Bandra Mumbai.

. The acknowledgement receipt of RPAD is annexed at

page 38. It shows that on 18th June 2015, the family Court at Bandra, Mumbai had sent copy of the petition along with the summons to the Appellant by RPAD and it was returned on 1st July 2015 with the endorsement "refused". However, it is not clear from this document whether this endorsement is written by the Appellant or postman. There is also no mention of the date below the said endorsement.

7. The roznama of the petition dated 6th July 2015 reads as follows :

"Adjourned for steps to 21/7/2015".

. The roznama of the date 21st July 2015 shows that the Respondent was directed to proceed ex-parte and the petition was adjourned to 25th August 2015 on which date the Respondent filed his affidavit. Matter was further adjourned to 23rd September 2015 and 6th October 2015. The learned Judge of the Family Court on the basis of the Respondent's affidavit decreed the petition ex-parte.

8. Order-V Rule 20 of the Code of Civil Procedure, 1908 speaks about the substituted service which reads as follows :

“20. Substituted service—

(1) Where the Court is satisfied that there is person 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.]

(2) Effect of substituted service— Service substituted by order of the Court shall be as effectual as if it had been made on the defendant personally.

(3) Where service substituted, time for appearance to be fixed— Where service is substituted by order of the Court, the Court shall fix such time for the appearance of the defendant as the case may require.”

9. Even assuming for the sake of argument that summons was refused by the Appellant (Respondent before the Family Court), in that case also, in our view, the Respondent (Petitioner before the Family Court) was required to take steps as contemplated under Order-V Rule-20 of CPC, 1908. Roznama dated 6th July 2015 itself shows that the Family Court had

adjourned the petition to enable the Petitioner "to take further steps". However without such steps being taken, the petition was decreed ex-parte. The Respondent has filed written arguments before the Family Court. In paragraph 1 of the written arguments, following statement is made by the Respondent :

"The Petitioner states that the summons of the above petition has been served upon the Respondent by Registered post A.D. at the Respondent's place of residence as per the address given in the cause title of this petition however the Respondent and/or her family members refused to accept the summons and the packet was returned back with remark "Refused" and hence the summons could not be served upon the Respondent. The Petitioner therefore prayed for summons to be served upon the Respondent through substituted service by pasting the summons and the copy of the R.D. Upon the main door of the Respondent's residence."

. The above statement in the written arguments of the Respondent makes it clear that the Respondent himself prayed before the Family Court for serving the summons on the Appellant through the substituted service by pasting the summons and copy of the petition upon the main door of the Appellant's (Respondent in the petition) residence. The learned Counsel appearing for the Respondent does not dispute the statement that the Respondent never took the steps under Order-

V Rule-20 of CPC, 1908 though the Respondent prayed before the Family Court to that effect. In our view, the Respondent has not therefore complied with the provisions of Order-V Rule 20 CPC, 1908 and the Appellant was not served properly.

10. The learned Counsel appearing for the Respondent submitted that the Family Court was satisfied that the Appellant was served and therefore directed the Respondent to proceed ex-parte and in these circumstances the Respondent had no alternative but to proceed with the matter, otherwise his petition would have been dismissed. We do not propose to go into this aspect of the matter. Suffice it to state that the Appellant ought to have been served by adopting the method of substituted service as contemplated under Order-V Rule-20 of CPC, 1908, which was not done in the present case.

11. Hence, taking totality of the facts and circumstances of the case into consideration, we find that the impugned judgment and order is passed by the family Court without hearing the Appellant and therefore same deserves to be

quashed and set aside. We accordingly quash and set aside the same. Matter is remanded back to the Family Court. The Family Court is requested to endeavour to dispose of the petition expeditiously.

12. Parties shall remain present before the Family Court at Bandra, Mumbai on 11th April 2016.

13. Appeal stands disposed of. In view of the disposal of this appeal, application, if any, taken out in this appeal does not survive and the same is accordingly disposed of.

[Dr. Shalini Phansalkar-Joshi, J.]

[RANJIT MORE, J.]