

HIGH COURT OF CHHATTISGARH, BILASPUR**FAM No. 79 of 2017**

- Smt. Rashmi Jaiswal W/o Shri Alok Kumar Jaiswal (Presently divorced) (Presently Divorced), Aged About 40 Years, R/o C/o V.K.Rai, 18/190, Gayatri Nagar, Katni, District Katni (M.P.)(Non-Applicant/ Defendant)

---- Petitioner**Versus**

- Alok Kumar Jaiswal S/o Shri Lal Baboo Jaiswal, Aged About 42 Years, R/o Ward No.21 Manendragarh, Tahsil Manendragarh, District Korla, Chhattisgarh(Applicant/ Plaintiff)

---- Respondent

For Appellant
For Respondent

Shri Arvind Shrivastava, Advocate
Shri Abhishek Singh, Advocate

Hon'ble Shri Justice Prashant Kumar Mishra
Hon'ble Shri Justice Arvind Singh Chandel

Order On Board By Prashant Kumar Mishra J.**26/07/2017**

1. The appellant has suffered an ex parte decree of divorce. The application seeking divorce was presented by the respondent husband on the grounds under Section 13 (1) (i-a) and (i-b) of the Hindu Marriage Act, 1955.
2. Since after hearing learned counsel for the parties and on perusal of the trial Court's record, we are satisfied that the ex parte decree is legally unsustainable, we are not mentioning

the minute details of the pleadings between the parties, as any observation on that count may affect the case of either of the party when the matter is retried by the trial Court on merits.

3. For the purposes of examining as to whether the ex parte decree was rightly passed by the trial Court, we have perused the record of the trial Court, from which it can be gathered that the suit was filed on 04.05.2016. On the said date, the Family Court directed for issuance of summons. On the next date i.e. 02.07.2016, the Family Court observed that the registered notice has been returned unserved with endorsement that the notice has left the place. The plaintiff sought time to obtain correct address and pay process fee to the defendant and the matter was posted on 18.07.2016 for submission of correct address of the defendant. On 18.07.2016, the plaintiff sought time to pay process fee on correct address. On 09.09.2016, the plaintiff moved an application for substituted service by publication interalia mentioning that the address mentioned in the plaint is the same as mentioned by the parties in different matrimonial proceedings, yet the summons could not be served on such address, therefore, it appears, the defendant is avoiding to accept notice, thus substituted service by publication is necessary. This prayer was allowed by the trial Court and the notice was published in the Jabalpur Edition of Hindi Daily Navbharat Newspaper dated 18.09.2016. When the defendant did not appear before the Court on 10.11.2016, the Family Court proceeded ex parte and the ex parte judgment

and decree was passed on 06.12.2016.

4. It is argued that the appellant/defendant has never left the place i.e. C/o V. K. Rai, 18/190, Gayatri Nagar, Katni, District Katni (M.P.), which is the address mentioned in the present appeal also, therefore, the address was proper but the postman never tendered the notice to the appellant and as such at the first instance, genuine effort was not made to serve the appellant. Since the appellant has not avoided to accept the notice at any point of time, the order of publication was bad in law.
5. Per contra, learned counsel for the respondent/plaintiff would argue that the notice by way of publication is sufficient notice of the proceedings to the appellant and since despite such publication the appellant failed to appear, the trial Court rightly proceeded ex parte and the impugned judgment and decree does not call for any interference.
6. In a recent decision by this Court in the matter of **Smt. Renuka Singh vs. Shailesh Singh** on 17.07.2017 in FAM No.122/2017, we have referred the provisions contained in Order 5 of CPC to observe thus in paragraphs 14 & 15:-

“14. Rule 17 of Order 5 prescribes the procedure when defendant refuses to accept service, or cannot be found. It provides that if the defendant cannot be found, 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 so, and the name and address of the person by whom the house was identified and in whose presence the copy was affixed. Under Rule 19 of Order 5 of the CPC examination of the serving officer is must where a summons is returned under Rule 17, as above.

15. Upon being satisfied after examination of the serving officer that the defendant is keeping out of the way for the purpose of avoiding service, the Court may proceed to invoke Rule 20 to direct service by affixing 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. Thus, before proceeding to direct substitute service the procedure prescribed under Rules 9, 17 & 19 of Order 5 has to be followed.”

Thereafter, this Court has referred to the Supreme Court's decision in the matter of **Smt. Yallawwa v. Smt. Shantavva** to observe thus in paragraphs 17 & 18:-

17. The Supreme Court in **Smt. Yallawwa v. Smt. Shantavva**, held that the Trial Court could not have almost automatically granted the application for substituted service without taking steps for serving the respondent by ordinary procedure as laid down by Order 5 Rules 12, 15 and 17 of the CPC. It must be kept in view that substituted service has to be resorted as the last resort when the defendant cannot be served in the ordinary way and 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 Supreme Court further observed that it appears that almost automatically the procedure of substituted service was resorted to. In the case at hand also, as mentioned in the preceding paragraphs, the trial Court has almost instantly

allowed the application under Order 5 Rule 20 of the CPC without recording the satisfaction about the prerequisites for exercise of power under Order 5 Rule 20 of the CPC.

18. Under Section 9 of the Act, 1984, which underlines the duty of the Family Court while dealing with matrimonial disputes, it mandates the Family Court to make efforts for settlement meaning thereby that the Family Court is not expected to function in a mechanical manner to dispose of the matter on technical grounds. In the case at hand, the Family Court has passed the *ex parte* decree of divorce in a perfunctory manner without being satisfied about the service of notice.”

7. In the case at hand, the trial Court directed for issuance of summons on 04.05.2016 without specifying that the summon has to be issued by registered post, yet the plaintiff paid the process fee for service by registered post and thus, there was no effort by the trial Court to serve the defendant by ordinary mode. In the absence of any order for sending the notice by registered post, sending of such notice was itself contrary to the Trial Court's order. Moreover, the Supreme Court in **Smt. Yallawwa** (supra) has held that the trial Court could not have almost automatically granted the application for substituted service without taking steps for serving the respondent by ordinary procedure as laid down by Order 5 Rules 12, 15 and 17 of the CPC. Thus, the effort to serve the respondent by ordinary mode is the primary requirement. This is so because, the process server is an employee and agent of the Court, whereas the employee of the postal department i.e. the postman is an outsider. If we examine the endorsement made by the postman in the registered envelop, it appears that the

postman has ticked on a pre-stamped content that the noticee has left the place. This endorsement was made on 10.05.2016, however, there is no signature or name of the witness who informed the postman that the noticee has left the place. Moreover, if the postman was aware on 10.05.2016 that the noticee has left the place, it is surprising why the postman kept on visiting the place from 14.05.2016 to 23.05.2016, as mentioned in the front portion of the envelop. We have our own doubts whether the postman has ever visited the premises where the appellant resides.

8. When the effort to serve the defendant in terms of the procedure prescribed under Rules 12, 15 & 17 of Order 5 CPC has not been followed, the order for service of notice by publication is itself rendered without satisfaction that the defendant is avoiding to receive notice. It appears, the trial Court has allowed the application in a mechanical manner without even examining the postman who has tried to serve the notice nor the trial Court proceeded to verify from the order sheets that the plaintiff has paid the process fee by registered notice without there being any order to pay such process fee.
9. From the record of the trial Court, we are fully satisfied that the order proceeding ex parte against the defendant was not in accordance with law, therefore, the ex parte judgment and decree passed by the trial Court deserves to be and is hereby set aside.

10. At this stage, Shri Abhishek Singh, learned counsel for the respondent would submit that since the appellant has already received the amount of alimony and yet she declined to appear and press the application for grant of divorce by mutual consent and further remained deliberately absent when the notice was tried to be served, the suit may be directed to be disposed of at an early date.
11. In view of the facts and circumstances of the case as mentioned by Shri Abhishek Singh, we direct the parties to appear before the trial Court on 04.09.2017. The trial Court shall not issue any fresh notice to the parties. It is also directed that the appellant shall submit her written statement when she appears before the trial Court on 04.09.2017 and thereafter the trial shall be concluded within a period of 6 months from 04.09.2017.

Sd/-
Judge
Prashant Kumar Mishra

Sd/-
Judge
Arvind Singh Chandel