

AFR

**HIGH COURT OF CHHATTISGARH, BILASPUR****FAM No. 122 of 2017**

1. Smt. Renuka Singh W/o Shri Shailesh Singh, Aged About 34 Years R/o C/o B.P. Singh Qr. No. 507, Padmanabpur, Durg, Tahsil And District Durg, Chhattisgarh

**---- Petitioner****Versus**

1. Shailesh Singh S/o Shri Harikrishn Singh, Aged About 40 Years R/o Qr. No.4A, Street No.14, Sector 7, Bhilai Nagar, Tahsil And District Durg, Chhattisgarh

**---- Respondent**

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For Petitioner  
For Respondent

Shri P.R. Patankar, Advocate  
Shri Jaydeep Singh Yadav, Advocate

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

**Judgment On Board****By****Prashant Kumar Mishra, J.****17/07/2017**

1. Present is an appeal under Section 19 (1) of the Family Courts Act, 1984 (for short 'the Act, 1984') to question the legality and validity of order passed by the Family Court rejecting the application of the appellant/wife under Order 9 Rule 13 of the Code of Civil Procedure, 1908 (for short 'the CPC') for setting aside the *ex parte* decree of divorce.

2. The parties were married at Bhilai on 14-2-2009. On account of dispute between them the appellant started residing separately at Bhilai only, on and from 19-10-2009. The respondent/husband moved an application under Section 13 of the Hindu Marriage Act, 1955 (for short 'the Act, 1955') on 16-8-2011 for grant of decree of divorce on the ground of cruelty as well as desertion. The suit was decreed *ex parte* on 7-4-2012.
3. On 18-4-2016 the appellant moved an application before the Mahila Thana, Durg, alleging commission of cruelty by the respondent and his relatives. On being noticed by the Mahila Thana, Durg, one Rajendra Prasad Singh, brother of second wife of the respondent, appeared on behalf of the husband before the police station and shown to the appellant a copy of the *ex parte* decree of divorce. The appellant, thereafter, applied for certified copy of the *ex parte* order on 12-9-2016 and received copy of the same on 21-9-2016 and thereafter, the application under Order 9 Rule 13 of the CPC was moved on 22-9-2016.
4. In the application under Order 9 Rule 13 of the CPC the appellant averred that from the year 2009 till 2014-15 she

was residing at her father's house at Bhilai as shown in the application and that she has never received the notice of the proceedings under Section 13 of the Act, 1955 initiated by the respondent. It was specifically mentioned that the notice was never sent to the address where they were married on 14-2-2009, or to her present address.

5. The respondent/husband contested the application on the ground that notice was issued to the appellant at her address at 40/7 Radhika Nagar, Supela, Bhilai, which remained unserved with an endorsement that the appellant has left the house more than a year back, therefore, the notice was published in the newspapers at Bhiali & Bilaspur (Raigarh) and the appellant remained absent, despite notice by publication, therefore, the *ex parte* decree has rightly been passed by the Court below.
6. We have heard learned counsel for the parties and perused both the records of the trial Court i.e. record of original proceedings as well as the MJC proceedings.
7. The application for grant of divorce was instituted on 16-8-2011. On the said date the Family Court directed issuance of notice and fixed the date for return of notice on

4-11-2011. On the said date the appellant was absent, therefore, it was adjourned for 2-1-2012. When the matter was taken up on 2-1-2012 the Family Court straightaway considered the application under Order 5 Rule 20 of the CPC for substituted service by publication in the newspaper published from Raigarh & Bhilai. The newspapers publication was made in Dainik Bhaskar newspaper Bhilai-Raipur edition on 14-1-2012 and Bilaspur edition on 31-1-2012. In absence of the appellant before the trial Court on the date of hearing i.e. 27-2-2012 she was proceeded *ex parte* and after recording *ex parte* evidence, the *ex parte* decree was passed on 7-4-2012.

8. A reading of the order sheet of the trial Court on 2-1-2012 would reveal that there is no whisper in the said order regarding satisfaction of the trial Court about non-service of the appellant or that she is avoiding service, despite repeated efforts by the Court.
9. Before dealing with the application under Order 5 Rule 20 of the CPC it was the duty of the trial Court to record its satisfaction that the appellant was avoiding the service of notice. The trial Court did not bother to record the statement

of Process Server who had taken the summons for service on the appellant at her address shown in the plaint i.e. 40/7 Radhika Nagar, Supela, Bhilai. There is no examination of the witnesses in whose presence the endorsement was made by the Process Server.

10. In the application filed by the appellant herein under Order 9 Rule 13 of the CPC, the appellant has clearly stated in para 8 thereof that in the marriage invitation card the address of her native place has been mentioned i.e. District Gazipur (Uttar Pradesh), but the notice was not sent on that address.
11. A perusal of the marriage invitation card provided from the appellant's side, would manifest that the address for place of marriage is mentioned as **25/11 Radhika Nagar, Supela, Bhilai (Chhattisgarh)** whereas the respondent has mentioned the appellant's address in the plaint as **House No.40/7 Radhika Nagar, Supela, Tahsil & District Durg (Chhattisgarh)**. In the marriage invitation card printed from the husband/respondent's side, which is also available on record, the place of reception is mentioned as **Maharana Pratap Bhawan, Sector-7, Bhilai**. Thus, there is no

document indicating that the appellant wife ever resided at **House No.40/7 Radhika Nagar, Supela, Tahsil & District Durg (Chhattisgarh).**

12. Moreover, in the application under Order 5 Rule 20 of the CPC the respondent has not mentioned as to the place of the edition or the name of the newspaper where from the notice is to be published. Even in the order passed by the trial Court on 2-1-2012 the name of the newspaper in which the notice is to be published is not mentioned. Service of summons to a wife in a matrimonial dispute concerning divorce is a serious matter because it concerns the entire life of the spouse against whom a decree of divorce is passed.
13. Order 5 of the CPC makes provision for issue and service of summons. Rule 9 thereof provides that where the defendant resides within the jurisdiction of the Court in which the suit is instituted, or has an agent resident within that jurisdiction who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent either to the proper officer to be served by him or one of his subordinates or to such courier services as are approved by the Court. Under sub-rule (3) of Rule 9 the

services of summons may be made by delivering or transmitting a copy thereof by registered post acknowledgment due, addressed to the defendant or his agent empowered to accept the service or by speed post or by such courier services as are approved by the High Court.

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.

16. When the address shown in the plaint was different than the address shown in the marriage invitation card and there is no proof that the defendant ever resided in the house number shown in the plaint, the observation made by the Delhi High Court in **Union of India v. M/s Associated Procedures Company**<sup>1</sup>, squarely applies wherein the following is held in para 12 :

12. What do we find then ? M.A.A. Wahab was never sent a notice. One Abdul Wahab was. No notice was sent to respondent No.1 as its correct Kuala Lumpur address. Notices were sent at a Madras address to 'Abdul Wahab' without verifying whether he really resided or had an office there. Without any legal justification orders were passed for

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<sup>1</sup> AIR 1992 Delhi 186

substituted service and later for proceeding *ex parte*.

17. The Supreme Court in **Smt. Yallawwa v. Smt. Shantavva**<sup>2</sup>, 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.

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2 AIR 1997 SC 35

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.
19. More surprisingly, neither at the time of allowing the application under Order 5 Rule 20 of the CPC directing substituted service nor at the stage of hearing the appellant's application under Order 9 Rule 13 of the CPC, the Family Court recorded evidence to ensure as to whether or not the notice was sent on the proper address. It was necessary in view of the clear assertion made in the application under Order 9 Rule 13 of the CPC that she has never received any notice or summons of the divorce suit. The present is not a case where the Postman has endorsed refusal of summons by the appellant, therefore, when notice was not sent on correct address there is no presumption of service of notice or avoidance of notice at the initial stage.

20. It is also to be noticed that on 16-8-2011 the Family Court had directed issuance of summons by ordinary process as well as by registered post. The plaintiff paid the process fee by ordinary process as well as by registered AD, however, the record does not contain any endorsement or document about the registered notice, therefore, it was necessary for the Family Court to examine the Process Server and the witness namely; Anurag Singh, who informed the Process Serves that the appellant is not residing on the given address.
21. Apart from merits of the case, the Family Court has dismissed the application also on the ground of delay. However, on perusal of the reply filed by the respondent before the Family Court to the appellant's application under Order 9 Rule 13 of the CPC, it appears no such objection was ever raised by the respondent.
22. For the foregoing, we are satisfied that the appellant wife was not duly served with the summons and the procedure adopted for directing substituted service being vitiated, the appellant had demonstrated sufficient cause for her non-appearance before trial Court on the date when she was

proceeded *ex parte*, therefore, the *ex parte* decree passed against her deserves to be set aside. Accordingly, the order passed by the trial Court is set aside and as a consequence, the *ex parte* decree of divorce dated 7-4-2012 is also set aside. The matter is remitted back to the trial Court for decision afresh in accordance with law and on its own merits.

23. Parties shall appear before the trial Court on 28-8-2017.  
Record be sent back to the trial Court forthwith.
24. As an upshot, the appeal is allowed, leaving the parties to bear their own costs.

Sd/-

Sd/-

Judge

Prashant Kumar Mishra

Judge

Arvind Singh Chandel

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