

FAO- M-351-2015 (O&M)

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

FAO- M-351-2015 (O&M)

Date of Decision: 25th October, 2017

Sawati Kumari

...Appellant

Versus

Sqn. Ldr. Kunal Kaushal

...Respondent

**CORAM: HON'BLE MR. JUSTICE M.M.S. BEDI
HON'BLE MR. JUSTICE AUGUSTINE GEORGE MASIH**

Present: Mr. Gaurav Kathuria, Advocate
for the appellant.

Mr. Maninder Singh Gill, Advocate
for the respondent.

AUGUSTINE GEORGE MASIH, J.

CM-17274-CII-2017

Prayer in this application is for exemption from filing certified copies as well as typed copies of Annexures A-1 to A-9.

The application is allowed. Exemption is granted from filing certified copies as well as typed copies of Annexures A-1 to A-9, subject to all just exceptions.

CM-17275-CII-2017

Prayer in this application is for placing on record Annexures A-1 to A-9.

The application is allowed. Annexures A-1 to A-9 are taken on record, subject to all just exceptions.

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This appeal has been preferred by appellant-Sawati Kumari (wife) against an *ex parte* decree passed by the Additional District Judge, Kapurthala, dated 13.07.2015, whereby, divorce petition under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as 'H.M. Act') filed by respondent-Squadron Leader Kunal Kaushal (husband) has been decreed. Apart from challenge to the decree on merits, order dated 27.10.2014 proceeding *ex parte* against the appellant-wife and order dated 31.03.2015 when again she was proceeded against *ex parte* in the application for amendment of the petition, have been assailed on the ground that she had never been served either in the divorce petition preferred under Section 13 of the H.M. Act or in the application for amendment of the divorce petition filed thereafter by the respondent-husband.

2. Challenge to these orders is embodied upon the assertion that the address, which has been given in the divorce petition, is not her residential address, rather, it is the official address of her father and on that address also, she has not been served.

3. Upon notice having been issued, respondent-husband has put in appearance. Record of the Court below was summoned and has been perused with the assistance of the counsel for the parties.

4. It is the contention of the learned counsel for the appellant-wife that while passing the order dated 27.10.2014, when appellant-wife was proceeded against *ex parte* in divorce petition under Section 13 of the H.M. Act, the Court had based its order on the fact that the period of 30 days had been elapsed leading to the presumption of due service upon her. Since

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none had put in appearance on behalf of the appellant-wife as she had not been served, she had been proceeded against *ex parte*. Some evidence was led by the petitioner-husband and thereafter, an application for amendment of the divorce petition was filed, which was taken up by the Court for hearing on 07.03.2015 and issued notice to the appellant-wife for 30.03.2015 on filing of registered cover. Since Court was on leave on 30.03.2015, the case was taken up on 31.03.2015, where, the report was that respondent has been duly served through registered/AD. None had put in appearance on her behalf and therefore, she was proceeded against *ex parte*. Amendment to the divorce petition was allowed, *ex parte* evidence was led and decree of divorce dated 13.07.2015 passed in favour of the respondent-husband.

5. Appellant-wife, on having come to know of this fact, filed this appeal and has challenged the findings, which have been recorded, praying for setting aside the orders dated 27.10.2014 and 31.03.2015 proceeding against the appellant-wife *ex parte* and the judgment and decree dated 13.07.2015 passed by the trial Court.

6. On the other hand, learned counsel for the respondent-husband has vehemently argued that the address as has been given in the petition is the correct address as she was residing with her father, who was working in State Bank of India, Turki Branch, District Mujaffarpur, Bihar. He further states that it may be, at the initial stage, when the *ex parte* proceedings were initiated against the appellant-wife on 27.10.2014, registered cover had not been received back but in the application for amendment of divorce petition, she had been duly served as the acknowledgment of the registered notice

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having been received, stands signed by her on 17.03.2015. The said acknowledgment is on the records of the trial Court and he has referred to the same. Apart from this, counsel had also referred to the merits of the case and supported the findings recorded by the trial Court on the basis of the evidence led by the respondent-husband and thus, prays that the appeal being devoid of merit, deserves to be dismissed.

7. At this, counsel for the appellant-wife states that the signatures on the said acknowledgment is not that of the appellant. He refers to the Power of Attorney as also the affidavit filed in this Court where the signatures of appellant-Sawati Kumari exist. He, on this basis, contends that the appellant-wife has not been served.

8. We have heard the learned counsel for the parties but since we have decided to first decide the challenge to the *ex parte* orders passed by the trial Court, we are not referring to the arguments of the counsel for the parties on the merits of the case.

9. Just to give brief background of the case, the parties to the appeal got married on 29.11.2012 according to the Hindu rites and ceremonies. They cohabited together as husband and wife at Kapurthala. They have no child. The husband has been posted at different places where also, at times, the appellant-wife had been joining him. There are allegations by the husband, which according to the husband, would amount to cruelty and on that basis, he filed a petition for divorce under Section 13 of the H.M. Act. In the said petition, the address which has been given for service upon the appellant-wife, who is respondent therein, is as follows:-

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“Swati Kumari w/o Kunal Kaushal d/o Mithilesh Kumar Sharma, r/o S.B.I., Turki Branch, P.O. Turki, District Mujaffarpur, Bihar, Pin 844127.”

10. Notice was ordered to be issued to effect service upon the appellant-wife on 04.08.2014 for 08.09.2014 on filing of process fee/registered cover/copies. On 08.09.2014, since notice was not received back, fresh notice was ordered to be issued for 24.09.2014. As registered cover was not filed for issuance of summons, the same could not be issued for 24.09.2014 and therefore, notice was again ordered to be issued to effect service upon the appellant-wife for 27.10.2014 on filing registered cover. On 27.10.2014, following order was passed:-

“Present: Shri Chandra Shekhar, Advocate for the petitioner.

Notice issued to respondent No.2 through registered cover has not received back. A postal receipt dated 26.09.2014 regarding summons sent to respondent through registered cover is also on the record. A time period of thirty days has been elapsed therefore presumption of due service upon respondent is drawn. In spite of repeated calls none has come present on behalf of the respondent. It is already 1.00 p.m. As such, respondent is proceeded against ex parte.

To come up for ex parte evidence of the petitioner for 20.11.2014. PF/DM and list of witnesses if any be filed.

Dated: 27.10.2014

(LK Singla)
Addl. District Judge,
Kapurthala.”

11. A perusal of the above order would show that merely on

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production of a postal receipt dated 26.09.2014, the Court had proceeded *ex parte* against the appellant-wife without verifying the fact, as to whether the address given was actually her residential address? There is nothing mentioned in the petition that it was the residential address of the appellant-wife or that she was residing at the address as reproduced above.

12. Learned counsel for the respondent-husband has not disputed the fact that it is the address of the father of appellant-wife and that too, official, where he is serving. This would be the position with regard to the alleged service upon the appellant-wife of the summons of the divorce petition under Section 13 of the H.M. Act and the subsequent service in the application for amendment of the divorce petition and that too, through registered cover/acknowledgment due. So far as order dated 27.10.2014, whereby, the appellant-wife was proceeded against *ex parte* is concerned, the Court has simply proceeded on the presumption that the period of 30 days had elapsed since the summons were sent through registered cover on production of the postal receipt dated 26.09.2014, thus due service had been effected upon the respondent.

13. As far as order dated 31.03.2015 is concerned, notice in the application seeking amendment of the divorce petition was issued by the trial Court on 07.03.2015 for 30.03.2015. Since on the said date, the Court was on leave, the case was taken up on 31.03.2015 and the order passed, which reads as follows:-

“Present; Shri Sunil Chhabra, Advocate for the
petitioner.

Respondent exparte.

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File taken up today since yesterday i.e. 30.03.2015 I was on leave. Respondent has been served through registered/AD. Case repeatedly called but respondent has not come present. It is already 2.00 p.m. Hence, respondent is proceeded against *ex parte*. To come up for consideration on application under Order 6 Rule 17 CPC for 17.4.2015.

Dated: 31.03.2015

(LK Singla)
Addl. District Judge,
Kapurthala.”

14. Above order would show that the acknowledgment of the registered cover being served had been duly received back. Perusal of this acknowledgment, which is a part of the record of the trial Court, would show that admittedly, the address given of the appellant-wife was again the official address of the father of appellant-wife. On the acknowledgment, the place, which is earmarked for the signatures of the recipients, would show that some signature has been affixed thereon, on 17.03.2015. This has been taken to be the acknowledgment of due service upon the appellant-wife, on the basis of which, the Court concluded that she had been duly served and since, none appeared, she had been proceeded against *ex parte*.

15. The question would be, as to whether the signatures affixed on the acknowledgment are of appellant-Sawati Kumari or not? The said signatures have been disputed by appellant-Sawati Kumari, who is present in Court alongwith her counsel. We had, at this, proceeded to have a look ourselves upon the signatures affixed on the Power of Attorney in the appeal preferred by Sawati Kumari as also her signatures on the affidavit dated 10.03.2017 attached in support of an application filed by the appellant

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for preponing/early hearing of the appeal. Both the signatures on the affidavit as well as on the Power of Attorney are identical, whereas, the signatures on the acknowledgment are totally different as is visible to the naked eyes, the formation of the letters and the flow of hand are total different. Each letter of the signatures and its formation is totally different and therefore, there can be no doubt that these signatures are not of appellant-Sawati Kumari on the acknowledgment, which are alleged to have been affixed by her on 17.03.2015 on receipt of registered letter.

16. There being no doubt on this aspect, it leads to only one conclusion that she has not been duly served in the application for amendment to the divorce petition under Section 13 of the H.M. Act. There may be some doubt as far as the initial service of summons upon her because of the presumption due to elapse of period of 30 days from the date of issuance of the notice, however, there is no doubt that she had not been served at all in the application for amendment of the divorce petition and therefore, the said order dated 31.03.2015 passed by the Additional District Judge, Kapurthala, and the consequent proceedings culminating in the *ex parte* judgment and decree dated 13.07.2015 cannot sustain and are hereby set aside.

17. It may also be added here that the appellant could have approached the trial Court for setting aside the *ex parte* decree under Order 9 Rule 13 of Code of Civil Procedure or could have preferred the present appeal. We would have relegated the appellant to avail of her remedy under Order 9 Rule 13 of Code of Civil Procedure, but keeping in view the fact that the signatures, as referred to above, were patently not of the appellant

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on the acknowledgment, which is record of the trial Court and no evidence was required to be led, we have proceeded with the matter. Further, the appeal as has been preferred by the appellant is within the limitation and therefore, it cannot be said that there has been any delay on her part in availing the remedy as per law.

18. The appeal stands allowed.

19. Parties are directed to appear before the District Judge, Kapurthala, on 28.11.2017, who shall thereafter either proceed himself with the matter or assign the same to the Competent Court. The Court shall make an endeavour to conclude the trial within a period of nine months. Records of the Court below be returned/sent forthwith.

(M.M.S. BEDI)
JUDGE

(AUGUSTINE GEORGE MASIH)
JUDGE

25th October, 2017

Harish

Whether speaking/reasoned:	Yes/No
Whether Reportable:	Yes/No